OVERVIEW OF MILITARY SPECIFIC FAMILY LAW ISSUES

Disclaimer: This article is for informational purposes only and is not to be considered legal advice for any particular person or situation. Further, laws can be amended, regulations can be changed, and court decisions can alter the rules. Therefore, information accurate at the time of publication can may become inaccurate thereafter. Further, readers should bear in mind that this manuscript is designed to be an ***overview*** of issues (with references for further research), not a comprehensive guide. Finally, while this manuscript is meant to be helpful, there is no substitute for checking primary sources and personal consulting with competent legal counsel.

1. Every divorce involves many issues. A divorce in which one or both of the spouses is an active duty servicemember (SM), military retiree, or dependent of either, involves additional, military specific issues. This article provides an *overview* of such issues and suggests resources to find additional information. Where services branches differ, the emphasis is on the Marine Corps, the armed force involving my primary practice.

2. While there are service specific regulations concerning financial support to dependents and other matters, there are statutes and regulations of universal application for most of the issues raised herein, such as BAH eligibility, eligibility for military medical care, military life insurance, military pension division, the Survivor Benefit Plan, and criminal law issues under the Uniform Code of Military Justice (UCMJ).

3. Topics addressed in this article include the following:

-Services Provided by Legal Assistance Offices
-Dependent Support Regulations
-Marine Corps Dependent Support Regulation
-Basic Allowance for Housing Relationship to Dependent Support
-Family Separation Allowance and Dependent Support
-Former Spouse Medical Care
-Servicemembers Group Life Insurance (SGLI)
-Survivor Benefit Plan
-Military Pension Division
-VA Disability
-Child Custody
-Servicemember Civil Relief Act (As pertains to divorce cases)

-Domestic Violence: Civil and Military Protection Orders
-Separation for dependent abuse offenses: Transitional Compensation, division of retired pay, child support
-Possession of firearms: conviction of domestic violence misdemeanors, domestic violence protection order

MILITARY LEGAL ASSISTANCE OFFICES

4. I am an active-duty SM and want to get a divorce. Can the legal assistance office at my installation assist me?

Most military installations will have a military legal assistance office. However, the scope of service provided depends on service branch policies, local policies, and local resources. You need to visit or contact the specific installation concerned to determine what services they provide and when they provide them. The installation is also likely to have a web page that provides basic information concerning legal assistance services, hours of operation, and other matters.

Legal assistance offices of the Marine Corps will typically provide quite extensive divorce related services: an overview of relevant divorce / separation statutes, regulations, and processes; preparation of a marital separation agreement, and for those who execute a marital separation agreement, preparation and filing of a non-contested divorce petition incorporating the agreement as the terms of the decree. The office can also assist in understanding and enforcing military dependent support regulations.

5. Are military retirees eligible for legal assistance services? What about dependents of active-duty members and retirees? Anyone else?

Eligibility for legal assistance may vary among the service branches. Further, there is no statutory right to legal assistance services; they are provided as resources permit. Due to limited resources, individual offices within an armed force may restrict the scope of service and the clientele to whom such service is given. Also, service may be temporarily restricted, for example, office resources may be so devoted to readying SMs for deployment that addressing other clients and issues may be delayed. However, servicemembers and their dependents, and retirees and their dependents are typically eligible for services and receive such services routinely.

Within the Navy and Marine Corps, active duty SMs, military retirees, and dependents of either are eligible for legal assistance services. So are Reservists, DoD civilian employees, civilian contractors, and members of allied forces *if* they meet certain additional criteria set forth in the Manual of the Judge Advocate General of the Navy (JAGMAN). Further, a former civilian spouse who was married to a SM for at least 20 years, and whose marriage to that member overlapped military service by at least 20 years, and who has not remarried, is eligible for service. However, eligibility does not equate to a *right* to service. Services are provided as resources permit.

6. What if my spouse is already a client of a military legal assistance office?

Just like any other law firm, the installation's legal assistance office cannot represent both sides of a dispute. Accordingly, if your spouse is already a client of a military legal assistance office, that office will not represent you. If you are eligible for legal assistance service but cannot be seen at a particular office due to a conflict of interest, you may receive services at a different, separate legal assistance office that has no such conflict. Some legal assistance offices may have a family law mediation program, in which case they do not represent either spouse, but rather serve as a mediator for their dispute. Very few legal assistance offices conduct such mediation.

Caveat: There are currently high-level proposals to allow attorneys within a single office to represent clients with conflicting interests. This change would, of course, require that each attorney within the office be segregated, walled off, from any information about any opposing party.

7. Who are these people at the legal assistance office? Are they attorneys?

Military legal assistance personnel include licensed attorneys and support staff. The staff will include one or more judge advocates; that is, uniformed, active-duty attorneys. Judge advocates must be licensed in at least one state, and thereafter undergo additional training conducted by the armed forces. Larger installations will often employ a civilian attorney as well, who is typically a member of the state bar in which the installation is located.

The legal assistance staff also includes enlisted servicemembers who perform administrative tasks. Additionally, the support staff may include of civilian paralegals.

8. Will the legal assistance attorney represent me in court in a contested domestic relations matter?

No. If you have an *uncontested* divorce case, some legal assistances offices will prepare the divorce petition, help you to file it, explain the process of serving the petition on the opposing party, explain court procedure, and discuss what you should say and do at your court hearing. However, in the absence of extraordinary and compelling circumstances, membership in the relevant state bar (or special permission from the court if not), and permission from Headquarters, U.S. Marine Corps, legal assistance counsel will NOT represent you at your divorce court hearing.

If you and your spouse do not have a marital separation agreement and therefore have a contested case, you will need to obtain outside legal counsel to litigate the issues on which you disagree.

9. I am not sure if I want to get a divorce. Maybe my marriage can be salvaged. Is there any marriage counseling available through the armed forces?

Yes. Typically, the installation provides marriage counseling service, particularly at larger installations. The military legal assistance office does not provide such services but can refer you to those who do.

References / Additional Information:

-10 U.S.C. 1044 (Statutory Authorization for Military Legal Assistance)
- JAG Instruction 5800.7G (JAGMAN) section 0705 (eligibility for service in the Department of the Navy
-Marine Corps Order 5800.16 (Legal Support and Administration Manual), Volume 5, Marine Corps Legal Assistance Program.
-Marine Corps Legal Assistance Program Policy & Practice Manual (MCLAPP)

DEPENDENT SUPPORT REGULATIONS

10. My spouse, an active-duty service member, is not providing me with adequate financial support. Can the military force my spouse to provide me with monthly financial support?

Each of the armed forces has enacted a regulation requiring that its members provide adequate and continuous support to their civilian family members. Failure to comply with such order can result in adverse administrative or disciplinary action against the SM. There are differences between the regulations of each service, but they all have the same basic pattern and they are all available online.

First, these service support regulations all require the SM to obey any relevant and valid court order for support and to comply with any marital separation agreement addressing support. If, as is often the case, there is no court order for support and there is also no marital separation agreement, then the regulation will (a) identify a minimum amount of support that must be provided, (b) identify a means for the civilian spouse to complain about inadequate financial support, and (c) provide a mechanism for the SM to petition appropriate authority for a reduction of the presumptive amount.

Service regulations concerning dependent support are listed below:

Air Force Instruction 36-2906
Army Regulation 608-99
Navy Military Personnel Manual (MILPERSMAN) section 1754-030
Marine Corps Order 5800.16 (Legal Support & Administration Manual, Volume 9)
Commandant of the Coast Guard Instruction Manual 1600.2 section 2E

MARINE CORPS DEPENDENT SUPPORT REGULATION

11. I am a civilian spouse with two minor children. There are no court orders addressing support, nor do I have a written agreement with my spouse addressing financial support. How much is my active-duty Marine Corps spouse supposed to provide to me?

LSAM Volume 9 contains a chart identifying minimum monthly support amounts. The required monthly amount is a percentage of the Marine's Basic Allowance for Housing (BAH) based on the number of dependents. The chart is reprinted below:

Total # of dependents entitled to support (not including the Marine)	Share of monthly BAH / OHA per requesting family member
1	1/2

2	1/3
3	1/4
4	1/5
5	1/6
6 or more	1/7 or etc.

In this case, there are three dependents entitled to support, a civilian spouse and two minor children. The Marine is obligated to provide financial support equal to ¼ of his BAH per dependent, for a total of ¾ BAH.

If the Marine is a very junior servicemember, it is possible that the percentage of BAH required under the chart exceeds 1/3 of the Marine's monthly gross pay (pay and allowances before taxes and deductions). In such cases, the support requirement must be adjusted downward to 1/3 gross pay.

12. What if both spouses are active-duty SMs? What support is one military spouse required to provide to the other military spouse?

No support is required to be provided for another active-duty spouse. However, a Marine married to another SM is still required to provide support on behalf of a minor child. For example, suppose that both military spouses reside off base in different locations, and one spouse lives with the two minor children. The noncustodial spouse would be required to provide support to the active-duty spouse in an amount equal to 2/3 of the paying Marine's BAH, 1/3 for each child entitled to support.

13. How can I find out what my spouse's BAH is?

The SM's monthly leave and earnings statement (LES) contains a wealth of information concerning the SM's pay, including BAH. If you do not have access to the LES, you can find the BAH online. Go to https://www.travel.dod.mil/Allowances/Basic-Allowance-for-Housing/ and click on the tab "BAH Calculator" (Or type into your search engine "BAH Calculator Pentagon"). A screen will pop up on which you can input the SM's rank and zip code. When you click on "submit," you will be provided with the BAH for a SM of that rank residing in that zip code. In fact, you will be provided with BAH rates with and without dependents. Use the BAH rate with dependents to determine the required support amount.

14. Who do I complain to if I am not receiving the required amount?

The Marine Corps Order provides that the Special Court Martial Convening Authority (SPCMCA) acts on non-support complaints. The SPCMCA is the first commanding officer in the chain of command that is authorized to convene a special court-martial. In the Marine Corps the SPCMCA is typically the battalion commander or, in the air wing, the squadron commander.

15. When is this financial support supposed to start?

Upon receipt of a complaint of non-support, the Marine's commanding officer can order the SM to provide the required support. However, the support is not retroactive to any period prior to the nonsupport complaint, so it is important that the complaint be submitted in a timely manner.

16. I am an active-duty SM and I think that, considering the circumstances of my case, the support required by the chart in the Marine Corps dependent support order is too high. Can I get that amount reduced?

There are five circumstances under which the support amount otherwise required can be reduced. However, you, as the Marine cannot make the decision that you are exempt from providing the full amount of support. Rather, you can petition your commanding officer for such an exemption. The CO determines whether you qualify for an exemption and if so, whether to grant it or not.

17. So, what are those exemptions provided by the Marine Corps Order under which I my CO has the discretion to reduce the support otherwise required?

If the gross income of the civilian spouse is greater than that of the Marine, the CO has the discretion to reduce the support otherwise required to be provided by the Marine to the spouse. This exemption does not affect the support required to be provided for minor children.

If the parties have been separated at least 12 months and the Marine has been providing the required support during that entire time, and the Marine has not been attempting to evade service of process or otherwise prevent a court from ruling on the issue of support (except to assert rights under the SCRA), the CO has the discretion to relieve the Marine of the requirement to support to the civilian

spouse. This exemption does not affect the support required to be provided for minor children.

If the Marine is the victim of physical abuse perpetrated by the spouse seeking support, the CO has the discretion to relieve the Marine of providing financial support to the civilian spouse. This exemption does not affect the support required to be provided for minor children.

If the Marine is paying regular and recurring obligations (such as rent or consumer debts) of the spouse, and such debts are of sufficient duration and magnitude to justify reduction of support, the CO has the discretion to reduce or eliminate support otherwise required. If credit is granted for paying such debts, the CO should limit the credit to the extent that the payments do not benefit the Marine. For example, the CO may credit the Marine with making rent payments for premises at which the family resides but the Marine does not. Through this exemption the CO can reduce or eliminate the support otherwise required to be provided for the civilian spouse and for the minor children.

18. I am a SM separated from my family, and my family lives in base quarters. Because they live in base quarters, I do not receive any cash BAH. Does the forfeiture of my entire BAH under this circumstance satisfy my obligations under the Marine Corps dependent support order?

Not unless you petition the CO and the CO agrees to grant the exemption. The exemption for paying bills of the dependent "includes a situation where the Marine's family is residing in base housing and as a result the Marine does not receive BAH. In this situation, the Marine's commanding officer **may** reduce or even eliminate the Marine's financial support requirement, depending on the specific circumstances…" (emphasis added). See LSAM Vol 9 section 010504D.

19. Are there any other exemptions authorized under the Marine Corps dependent support order?

Yes, there's one more. The Marine can be granted an exemption if the CO determines that releasing the Marine from the support obligation is a matter of "fundamental fairness," under the totality of the circumstances. The Order does not define the term "fundamental fairness," except procedurally. The decision on this matter needs to be bumped up to the next senior officer in the chain of command (beyond the first SPCMCA). Further, the deciding CO must first consult with the Staff Judge Advocate concerning the matter.

FAMILY SUPPORT AND BASIC ALLOWANCE FOR HOUSING

20. I am an active-duty SM. My civilian spouse and I have a written, signed marital separation agreement in which we have agreed that I don't have to provide any support to any family members. Does such a waiver comply with the Marine Corps dependent support requirement?

Yes, if you comply with the support provisions of a valid marital separation agreement you are also in compliance with the Marine Corps dependent support order, even if the marital separation agreement says you don't have to pay a penny to support your family.

HOWEVER, there is another regulation you need to be concerned with, one that applies to all of the armed forces. The Department of Defense Financial Management Regulation (DoDFMR) Volume 7a, chapter 26, sets forth the requirements for SMs to receive dependent allowances. Failure to comply with the dependent support requirements of the DoDFMR may result in recoupment of portions of military pay.

Each service's financial support regulation provides that compliance with a valid, written agreement for support fulfills the requirements of the regulation, even if the agreement doesn't require any support at all. However, SMs should not expect to retain dependent pay allowances for dependents that they are not supporting. The failure to provide at least a minimal level of support may result in recoupment of all or a portion of the BAH paid to the SM during the period of inadequate support.

Unless the SM provides family support at least equal to the difference between BAH with and without dependents, dependent allowances paid to the SM during such period are subject to recoupment. As a practical matter, the SM will be required to provide the command with a copy of the divorce decree, which in many cases will specify the date of separation and amount of support (or waiver thereof) that the SM was required to pay prior to the divorce. This information alerts the military administrative unit that recoupment may be required.

The Department of Defense Financial Management Regulation (DoDFMR), Volume 7a, chapter 26, contains detailed rules concerning dependent support requirements to receive BAH on behalf of a dependent.

The SM is authorized a housing allowance on behalf of a primary dependent if the SM contributes to the dependent's support in an amount at least equal to the applicable BAH diff rate. [DoDFMR 7a, ch 26, section 3.3.2.]. Primary dependent includes the civilian spouse and dependent child. [DODFMR ch 26, section 26 3.1.1.1]

If the SM is separated from the spouse, but not yet divorced, and neither a court order nor a separation agreement calls for the required level of support, the SM must prove support in the required amount to receive a housing on behalf of the spouse. [DoDFMR Vol 7a, ch 26, section 3.3.2.3]

21. If the SM is found to have provided support to dependents that is less than the BAH diff rate, what exactly is subject to recoupment?

Failure to provide support in an amount at least equal to BAH diff may result in the recoupment of the difference between the amount of BAH with and without dependents for each month of inadequate support.

However, in the case of junior SMs, who would need to petition for BAH own right, their administrative unit is likely to recoup not just the BAH diff, but the entire amount of BAH provided to the SM during the period of inadequate support. More senior SMs, who rate BAH own right without the necessity of petitioning the command, likely would be required to pay back only the BAH diff for each month of inadequate support.

22. My marital separation agreement requires me, the SM, to pay certain marital bills, including some joint marital bills as well as some bills solely in the name of my spouse. These bills far exceed the BAH diff. Does the payment of such bills pursuant to the marital separation agreement protect me from recoupment?

It depends on what bills the SM is paying and how the marital separation agreement is drafted. If the marital separation agreement calls for the SM to pay the right bills of the spouse, and is drafted properly so as to count such payment as dependent support, then the SM *may* be protected against recoupment. Frankly, it is not easy to predict the reaction of administrative units to such provisions. The administrative unit (for example in the Marine Corps, the Regional Personnel Administration Center / RPAC) runs these programs, not the legal assistance office. Accordingly, in doubtful cases, SM and / or their advocates may wish to consult the cognizant administrative unit.

A cleaner, more sure method of avoiding recoupment is to draft the marital separation agreement with a simple provision that identifies a dollar amount of support that is greater than the BAH diff. If there are bills to be paid with such funds, assign the payment thereof to the civilian spouse.

23. Do I rate BAH if I am not providing financial support to a dependent, but I have custody of a minor dependent?

The senior regulation concerning this issue is the DoDFMR, see especially chapter 26, section 4, entitled "Impact of Certain Child Custody and Family Arrangements on Housing Allowance." This section provides that a service member rates BAH with dependent allowances in the following circumstances:

The Service member is awarded primary physical custody of a dependent child, or whose dependent child resides with the Service member for at least half of a calendar year, is considered a "custodial parent" for housing allowance purposes (4.1).

A service member who resides in private quarters and who has temporary custody of 91 consecutive days or more, qualifies for BAH at the with-dependent rate for the period of the visit (4.2.2).

24. What if I have shared / equal custody? Do I rate BAH dependent allowances?

Here's what the DoDFMR says about that issue:

> When the non-Service member parent is awarded primary physical custody of a child of a Service member, or the Service member's dependent child resides with the non-Service member parent for more than half of the calendar year, then the Service member is a non-custodial parent for housing allowance purposes (4.3.1).

The regulation does not explicitly address the situation where the Service member and former spouse *share* equal physical custody, that is, where neither parent has primary physical custody. However, the natural reading of the above-mentioned provision of the DoDFMR is that the Service member is the custodial parent for housing allowance purposes unless (a) the former spouse is awarded primary

physical custody or (b) the child resides with the civilian parent more than half the time.

In North Carolina, parents are regarded as having shared custody if each has at least 123 overnights with the children. Your installation personnel office may nonetheless require that the applicant for BAH have custody for more overnights than the other party. The individual who is the certifying officer or the administrative unit needs to be satisfied that the DoDFMR requirements for payment have been met.

The Marine Corps Dependency Order (MCO 1751.3) refers to the DoDFMR and does not contradict it. It does, however, add an administrative requirement. The applicant must complete a specified application and provide "supporting documents."

FAMILY SEPARATION ALLOWANCE

25. What is Family Separation Allowance? What does divorce and separation have to do with it?

A SM with dependent(s) who is separated from family by reason of military duties, for example when deployed, rates additional pay of about $250 - $400 per month. This additional pay is called Family Separation Allowance (FSA).

However, the SM does not rate FSA if the sole dependent is a legally separated spouse or the sole dependent is a child is the legal custody of another person. An exception occurs when the member has joint physical and legal custody of the child and the child otherwise would reside with the member at least 14 days each month (DoDFMR ch 27 section 3.1.2).

Upon divorce, the former spouse is no longer considered a dependent for FSA purposes.

In determining FSA entitlement, the administrative unit will almost certainly construe the parties as "legally separated," if they live in different places with the intent not to continue the marital relationship. No court order or agreement is needed.

26. What if I have already been paid FSA during a period of legal separation?

Take a look at this real-life scenario. SM deploys on February 1st for eight months, returning September 30th. During the deployment, the command, and more particularly the SM's administrative unit, had no idea that the SM was separated. The command therefor pays monthly FSA during the deployment.

The court issues a divorce decree December 1st which the SM submits to the admin unit. The decree states that the parties have been separated since February 1st. The FSA erroneously paid to the SM from February through September will then be recouped.

References
-37 U.S.C. 427
-DoDFMR Vol 7a, chapter 27

MEDICAL CARE.

27. Who is eligible for medical care through the armed forces?

Active duty SMs, retirees, and dependents of either are eligible for military medical care through the on base medical facility or through TriCare, the military medical insurance plan.

28. What if I am separated (but not divorced) from my active-duty SM spouse?

As long as you remain married to the SM, you continue to be eligible for military medical benefits. You remain eligible as a dependent even you have executed a marital separation agreement. However, once a court order dissolves the marriage, then the civilian former spouse loses eligibility for military medical benefits unless the former spouse fits into one of the narrowly defined statutory exceptions discussed below.

29. OK, what are the exceptions? When is the civilian former spouse eligible for military medical care?

Most of the time, the civilian former spouse loses eligibility for TriCare upon divorce. However, the former spouse continues eligibility for military medical

benefits if either the 20/20/20 test or the 20/20/15 test is met. In either case, the former spouse (a) must not have remarried, and (b) must not be covered under an employer sponsored health insurance plan. To apply, the former spouse will need a marriage certificate, divorce decree, and SM's discharge papers (DD 214 or Statement of Service.)

Additional requirements to meet the 20/20/20 test:

-The former spouse must have been married to the SM for at least 20 years

-The SM spouse has or had at least 20 years creditable military service, and

-The marriage overlapped military service for at least 20 years.

A former spouse meeting this test is eligible for military medical care for life.

Additional requirements to meet the 20/20/15 test:

-The SM spouse had at least 20 years creditable service towards retirement

-The parties were married for at least 20 years, and

-The marriage overlapped military service by at least 15 years.

A former spouse who qualifies under the 20/20/15 test is eligible for one year of military medical care beginning on the date of divorce.

30. I am a former spouse who doesn't meet the eligibility criteria for military health care as a 20/20/20 former spouse or as a 20/20/15 former spouse. Are there any other military health care options?

You are not eligible for TriCare unless (a) your SM spouse was discharged due to a dependent abuse offense and then only for a limited duration, or (b) your retirement eligible spouse lost retirement eligibility due to the commission of a dependent abuse offense and you are receiving court ordered pension division payments from the United States. These matters are addressed in somewhat greater detail later in this manuscript.

However, loss of military health care coverage due to divorce authorizes the civilian former spouse to purchase a health care policy under the DoD Continued Health Care Benefit Program (CHCBP). The former spouse must apply within 60 days of losing TriCare and pay the premiums promptly. Generally, CHCBP provides benefits for 36 months after the date of divorce, or 32 months after the 20/20/15 one-year TriCare benefit ends.

However, in some cases, the former spouse may be indefinitely eligible for CHCBP. Such eligibility also requires that the former spouse

-Must not have remarried before age 55,
-Must not be covered under TriCare,
-Must receive a portion of the former active-duty spouse's military retired pay or survivor annuity (SBP) or
-Have a court order for military pension division or a written agreement requiring the member to elect former spouse SBP coverage

31. My SM spouse (now former spouse) was separated from the armed forces as a result of committing a dependent abuse offense. Are there any medical benefits available to me under these circumstances?

Yes, but the duration is limited. When a SM is separated from the armed forces due to the commission of a dependent abuse offense, the victim may be eligible for monthly compensation for up to 36 months. While these payments are made, the recipient is also eligible for medical and dental care to the same extent as if the victim were still a military dependent. During this period in which the victim is receiving such transitional compensation (TCOMP) the victim is also eligible for military medical care. Victim advocates and Victim's Legal Counsel can assist with TCOMP application. See also the section herein concerning criminal matters.

References:
-10 U.S.C. 1059 (Transitional Compensation)
-Department of Defense Instruction 1342.24 (TComp Implementing Instruction)
-10 U.S.C. 1072 (2)(F) & (G) (Authorization to provide medical care to 20/02/20 former spouse and 20/20/15 former spouse)
-10 U.S.C. 1086 (Continued Health Care Benefit Program)
-10 U.S.C. 1078 / 32 C.F.R. 161.19 (Indefinite CHCBP eligibility in certain cases)
-32 C.F.R. 161.19 (Benefits of FS)
-Silent Partner: Primer on Former Spouse Medical Benefits, Sullivan, M.

31a. I am a former spouse with a court order directing that I receive a portion of military retired pay. However, though my former spouse served enough years to be retirement eligible, he never got any retired pay because he was separated for a dependent abuse offense. Am I eligible for military medical care?

You are eligible to receive the retired pay from the United States if you meet certain requirements:

-Servicemember / former member was eligible to retire based on years of service.
-Servicemember / former member, while a member of the armed forces, lost retirement eligibility as a result of misconduct involving abuse of a spouse or dependent child.
-Court order directs the payment of an amount from the disposable retired pay of the member or former member to an eligible spouse or former spouse
-The applicant former spouse was married to the abusive SM at the time of the abuse, and
-The applicant former spouse was the victim of the abuse (or is the parent of the dependent child who was the victim of the abuse.

Eligibility for such payment ends upon remarriage. Eligibility resumes if the marriage ends due to the death of the person's spouse, or by annulment or divorce.

Further, while receiving such retired pay you are eligible for military medical benefits.

References:
- 10 U.S.C. 1408 (h) (Payment to former spouse of retired pay share in cases of dependent abuse offenses)
-10 U.S.C. 1408(h)(9) Eligibility for military medical benefits

LIFE INSURANCE / SGLI

32. What role, if any, does life insurance play in negotiating the terms of a marital separation agreement or litigating the terms of a divorce?

Generally, the parties should view life insurance as a substitute for some long-term payment that may get cut off prematurely due to the untimely death of the insured. The most obvious long-term payment is child support. If the payor spouse dies,

child support payments terminate. The parties therefor sometimes agree to impose a life insurance requirement on the payor spouse to plan for the contingency of that person's premature death. Thus, some agreements require the payor spouse to maintain a life insurance policy of a designated amount naming the other spouse (or in some cases a trust for the children) as the beneficiary. The duration of the requirement is typically until the child support requirement ends.

Another potential long-term payment is military pension division, particularly in cases where there is a lengthy overlap between marriage and military service, making it likely that the former spouse will be awarded a significant share of the pension. When the retiree dies, the pension dies too, as well as the FS share of the pension. The parties may address this contingency by imposing a life insurance requirement on the retiree, or the through the Survivor Benefit Plan (SBP) or a combination thereof.

33. Can a contractual life insurance requirement in a marital separation agreement be satisfied through the Servicemembers' Group Life Insurance (SGLI)?

SMs are eligible to obtain up to $500,000 in term life insurance through SGLI, and the vast majority of SMs choose to do so. It is underwritten by Prudential Life and the cost is partially subsidized by the United States, so the SM pays about $27 per month. Copious information about the program is available through the SGLI website.

Military parties often choose SGLI to fulfill the life insurance requirement of a marital separation agreement, because it is relatively inexpensive and for active duty SMs, readily available. Unless the marital separation agreement or court order specifically prohibits it, the life insurance requirement can be satisfied through SGLI. Of course, 120 days after separation from the armed forces, SGLI is no longer an option, since former servicemembers lose eligibility at that time.

33a. What if the marital separation agreement or court order requires the SM to name the spouse as the beneficiary but the SM fails to do so and then dies?

The beneficiary named by the SM in the insurance election will receive the life insurance proceeds. Thus, if the SM names his father, or his new spouse, in the SGLI election form as beneficiary, then that person will receive the life insurance proceeds upon the SM's death. The named beneficiary on the election form will receive the proceeds *even if the SM was required by marital separation agreement*

or court order to provide the proceeds to the former spouse and the SM failed to do so.

Unlike with commercially available insurance policies, courts, in dealing with SGLI, have no authority to order the insurance company to impose a "constructive trust," that is, to divert the insurance proceeds from the named beneficiary and award it instead to the beneficiary it was supposed to go to per the court order or marital separation agreement. This issue is sometimes called "The Ridgeway Problem," named for the U.S. Supreme Court case that addressed this matter.

In that case, the U.S. Supreme Court considered the conduct of U.S. Army Sergeant Richard Ridgway, who violated a court order that required him to maintain his three minor children as SGLI beneficiaries. Instead, he remarried and, contrary to the court order, filled out an SGLI election form giving the life insurance proceeds to his new spouse. When Sergeant Ridgway died a year later, his former spouse, April Ridgeway, petitioned the court to bar payment of the proceeds to the second spouse and to pay them instead to April's children, because that's what would have happened had Sergeant Ridgway complied with the divorce decree. The case ultimately reached the U.S. Supreme Court, which held that Federal law gave the beneficiary designation authority solely to the service member. The court therefore had no authority to direct someone else as the SGLI beneficiary. April Ridgeway could make a claim against assets in the deceased's estate, but she was not going to receive the life insurance proceeds.

34. OK, so what are some options for dealing with the Ridgeway Problem?

One response is to use SGLI to fulfill life insurance requirements, notwithstanding the Ridgeway issue. SMs particularly like this option because they already have SGLI and it is inexpensive. The obvious downside is that the SM may fail to comply with requirements of a marital separation agreement or court order.

The parties may attempt to cope with the Ridgeway problem by requiring the payor spouse to provide evidence of the beneficiary designation, or to authorize the beneficiary spouse access to records concerning SGLI. However, these methods of protection require constant vigilance by the beneficiary spouse.

A more secure (and often more expensive) method of enforcing the life insurance obligation is to require the obligor to purchase private, commercial insurance. When such private insurance policies are directed by court order, courts can later

direct that the FS to receive the insurance proceeds even if the obligor spouse named some other beneficiary.

The most secure means of enforcing the life insurance obligation is to require private, commercial insurance and to make the former spouse not only the beneficiary, but also the owner of the policy. Only the owner of the policy has authority to change the beneficiary.

References:
Ridgway v Ridgway, 454 U.S. 46, 102 S. Ct 49, 70 L.Ed 2d 39 (1981)

THE SURVIVOR BENEFIT PLAN

35. What is the Survivor Benefit Plan (SBP)?

When a SM retires, s/he will be entitled to retired pay; that is, a monthly amount of money, from the United States. When the retiree dies, this retired pay stops. If the former spouse was entitled to a portion of the retired pay, those payments stop, too.

Upon retirement, the SM will be given the opportunity to address this contingency through SBP. The SM elects a beneficiary and a base amount of support. Upon the death of the SM, the beneficiary receives 55% of the base amount. The cost is 6.5% of the base amount. That's pretty confusing, so here's a concrete example:

> Let us suppose that SM X is entitled to a gross monthly retired pay of $5,000. SM chooses the entire retired paycheck as the base amount. SM chooses the spouse as the beneficiary. Upon the death of the SM, the surviving spouse will receive a monthly sum of $2,750 (55% of $5,000). These payments continue until the recipient spouse's death.
>
> The monthly cost of SBP in this example is $325 (.065 x $5,000, the base amount chosen). In other words, during the SM's lifetime, the monthly retired paycheck will be diminished by $325, the monthly SBP premium. The requirement to make these monthly SBP payments terminates upon death of the retiree, the death of the beneficiary, or the retiree attaining the age of 70.

The SM can choose a base amount as little as $300 up to the entire retired pay.

36. Doesn't the SM's spouse get a say in the SBP election decision?

Yes. If the SM is married at the time of retirement, the SM must choose the spouse as the SBP beneficiary at the maximum amount unless the spouse waives SBP in writing.

37. What is the monetary amount of the SBP benefit over the lifetime of the beneficiary?

It depends. Let's take a look at three different scenarios. In each of these scenarios, let's assume that the retiree's gross monthly retired pay is $5,000 and the retiree chose the entire paycheck as the base amount.

Scenario 1. Early death of retiree and extended lifetime of beneficiary.
SM retires at age 45 and dies at age 55. SBP beneficiary lives another 30 years.
Thus, SM pays $39,000 (120 monthly payments of $325) and the beneficiary receives $990,000 ($2,750 x 360)

Scenario 2. Retiree outlives beneficiary
No SBP benefit payments.

Scenario 3. Retiree dies 3 years before beneficiary.
SM retires at age 45 and dies at age 65. Beneficiary dies 3 years later.
Thus, retiree has paid $78,000 (240 monthly payments of $325) to provide SBP benefit of $99,000 (36 benefit payments of $2,75).

38. Can the SM choose the former spouse as the SBP beneficiary?

Yes. If the SM has a former spouse at the time of retirement, the SM can elect former spouse coverage. If, at retirement, the SM elects coverage for a spouse and / or child, and obtains a former spouse after retirement; i.e., is divorced after retirement, the SM can choose FS coverage within 1 year of the divorce if the SM was married to the former spouse at least one year or the former spouse is the parent of a child of the marriage. [See DoDFMR Vol 7b, ch 43, section 4.4]

39. Why would the SM choose SBP coverage for a FS?

Given a choice, very few, if any SMs or retirees would voluntarily choose to purchase SBP for the FS. Typically, FS coverage is "elected" as a result of a negotiated settlement or because a court ordered the SM to choose FS coverage.

40. What if there's a court order directing the military retiree to elect former spouse coverage but the retiree fails to do so?

If there is a court order (including a marital separation agreement incorporated into the court order) that requires former spouse election, the former spouse can initiate a "deemed election," by submitting a copy of the court order and DD form 2656-10 to the Director, Defense Finance and Accounting Service. These must be submitted within one year of the date of the first court order that (a) requires the retiree to make FS election, or (b) shows that the member entered a written agreement to elect FS coverage. [Details at DoDFMR Vol 7b, ch 43, 4.4.3 et seq. and DoDI 1332.42 section 5.3b]

41. Can the SBP benefit payments between two people; for example, between my former spouse and my current spouse?

No. SBP is a unitary benefit. It can only go to one person at a time. No splitting.

42. I elected former spouse coverage but my former spouse died. Can I switch coverage to my current spouse?

Yes. If you have previously elected former spouse coverage, and then the former spouse dies, you can change the SBP beneficiary to your current spouse. You can make such change if you were married at the time of the former spouse death or if you married after the former spouse death. [Details at DoDFMR Vol 7b ch 43, section 4.4.4 and DoDI 1332.42, section 4.5.]

42a. Can I designate my dependent children as SBP beneficiaries?

You can choose to name your dependent children as SBP beneficiary. However, if you are married at the time of election, you must first obtain your spouse's written concurrence. Furthermore, the children must be "dependents," meaning (a) unmarried, and (b) under age 18, (or at least 18 and under 22 and pursuing a full time course of study in a recognized educational institution OR Incapable of self-support because of a physical or mental incapacity, which existed before the child's 18th birthday or was incurred before age 22 while pursuing a full-time course of study.

42b. I want to name a special needs child as SBP beneficiary, but the child is incapable of handling funds. Further, I am concerned that if my special needs

child has too much income or assets, then s/he will have to forfeit other needs-based benefits provided by Medicaid. How can I address this situation?

You can name a special needs trust for the benefit of your child as SBP beneficiary. If the trust meets all the requirements, your child may receive the benefit of SBP payments, which will be under the control of your named trustee, and further this asset will not count against the Medicaid income cap. The detailed requirements are beyond the scope of this article. See DoDFMR chapter 44, especially section 2.7.

43. Can I make the former spouse pay for the SBP benefit?

DFAS will extract payment for SBP from the military retiree's paycheck at a rate equal to 6.5% (a different, higher rate may be extracted for those who retired from the reserve component) of the monthly base amount chosen. This is the only payment method allowed by DFAS.

However, the parties can negotiate a marital separation agreement that effectively shifts SBP payment to the former spouse. Calculate the amount of the SBP premium and then adjust the required base amount downward to reduce the premiums by that amount. Other options include: providing in the marital separation agreement that the former spouse will reimburse the retiree for the SBP premiums or structure the agreement such that the retiree will receive some other concession in consideration of making the SBP payments.

44. I am an active-duty SM. What happens to SBP if I die before my military retirement?

SBP benefit payments may be made on behalf of (a) an active-duty member who dies after becoming eligible for retired pay, or (b) an active-duty member who dies in the line of duty on or after September 10, 2001 (See DoDFMR vol 7b, ch 46, section 3.1, ch 54 concerning reserve component death)

Reference
-10 U.S.C. 1447 thru 1455 (Statutory authorization for SBP)
-Department of Defense Instruction 1332.42, (Survivor Annuity Program Administration)
-DoDFMR Vol 7B
Ch 42 Application of SBP
Ch 43 Elections and Election Changes

Ch 44 Beneficiaries
Ch 45 Premiums
Ch 46 Annuities and DIC offset
Ch 54 Reserve Component SBP

-DFAS guide to SBP, https://www.dfas.mil, then navigating to: "Retired Military & Annuitants" > "Provide for Loved Ones" > "Survivor Benefit Plan"
-"Silent Partner" article "SBP Update: Special Needs, New Spouses" and "Defending Against SBP in Divorce," and "Legal Eagle" article "The Survivor Benefit Plan," Col Mark Sullivan, USA (retired), on the web site of the NC State Bar Committee on Legal Assistance for Military
-Silent Partner, Guidance for Lawyers, The Survivor Benefit Plan, Sullivan, M. NC State Bar LAMP program, online

MILITARY PENSION DIVISION

45. What is military retired pay? Is it a divisible marital asset?

When a SM retires, that SM will be entitled to monthly military retired pay, the amount of which is based on the SMs rank, length of service, and the type of retirement plan the SM is enrolled in.

In 1981 the U.S. Supreme Court held that federal law gave military retired pay solely to the military retiree and that state court judges had no authority to award any portion to the divorcing spouse (McCarty v McCarty, 453 U.S. 210 (1981). In reaction to this decision, Congress enacted the Uniformed Services Former Spouse Protection Act (10 U.S.C. 1408), which allowed state court judges to divide Disposable Retired Pay (DRP), thereby legislatively overturning McCarty. As defined by the original USFSPA, DRP included all *final* retired pay minus (a)amounts owed to the United States due to overpayment to the retiree, (b) amounts deducted from pay due to a court-martial sentence, (c) deducted as the monthly payment for the Survivor Benefit Plan, or (d) are deducted for certain Veteran's Administration disability pay. The USFSPA did not require courts to divide military pensions and did not provide detailed instructions on how to do it. The manner of pension division was largely left up to the states / territories. Some states, including North Carolina, had "vesting" requirements; that is, they refused to divide military pensions until SM had a right to it. Before then, it was considered too speculative to divide. North Carolina and other jurisdictions have largely abandoned such requirements. However, at least one jurisdiction, Puerto Rico, chose not to divide military retired pay at all.

Later federal legislation further narrowed DRP to retired pay that the SM would have been entitled to if the SM retired at the time of the court order dividing the pension (usually the time of divorce). The intent was to deprive the FS of the benefit of SM increases in retired pay based on post-divorce increases in rank and longevity.

46. By what method will state court judges divide DRP?

Courts will generally honor the agreements of the parties concerning property division, including pension division or waiver thereof. However, knowing how the court will divide the pension in a contested case greatly informs the parties in drafting an agreement.

Most states consider the portion of military retired pay earned during the marriage and prior to separation as a marital asset, and therefore equally owned by the parties.

Here's an example: GySgt Smith was married to his spouse for 16 years, including five years before he entered the armed forces and one year of marriage after separation. GySgt Smith retired at exactly 20 years. The FS pension share would generally be calculated as follows

$$\frac{\text{120 (\# months of marriage/ service overlap)}}{\text{240 (total months creditable service)}} \times \frac{1}{2} = 25\%$$

In other words, the former spouse would receive a 25% share of the retiree's pension.

47. What if the SM has not yet retired at the time of divorce?

Prior to 23 December 2016, the former spouse would take a share of the *final* retired pay, calculated using the formula above. In fact, marital separation agreements and court orders often contained such formula awards. Since the total length of creditable service would not be known at the time the order / marital separation agreement was drafted, such agreements would indicate that the denominator in the first fraction was X, and that X represented the total months of credible serve at retirement. But those days are now gone.

The National Defense Authorization Act (NDAA) for 2017 (enacted 23 December 2016 and effective for all divorces on / after that date) continued to allow states to divide the military pension, but only that portion of the military pension earned at the time of the court order dividing the pension (usually the time of divorce). The intent was to deprive the former spouse of the benefit of service member increases in retired pay based on post-divorce increases in rank and longevity. The mechanism for accomplishing this goal was to statutorily redefine disposable retired pay (DRP) as retired pay that would have resulted if the service member retired at the time of divorce. The USFSPA only authorizes state judges to divide DRP, not all retired pay. In other words, if the SM has not yet retired, courts must determine the retired pay that the SM would have received had the SM retired at the time of divorce, and award the former spouse a portion thereof based on the overlap between the marriage and the years of service. This new rule applies to all divorces after December 23, 2016. If these rules sound confusing, that's because they are, and their application even more so. Additional information can be found below and in a series of "Silent Partner" articles concerning "The Frozen Benefit Rule," posted on line by the NC State Bar.

47a. Calculating the former spouse portion of Disposable retired Pay (DRP) on or after 23 December 2026. Conceptually the former spouse is entitled to half of the pension earned during the marriage and prior to separation. Example:

SM was married to spouse for 11 years at time of separation, 10 years of which (120 months) overlapped military service. At the time of divorce, SM had 12 years (144 months) total active duty service. SM retires many years after the divorce, with 22 years military service.

$$\frac{\text{120 (months service/marriage overlap at separation)}}{\text{144 (total months service at divorce)}} \times \frac{1}{2} = \frac{120}{288} = .4166$$

Thus, in this scenario, FS will typically receive about 42% percent of the pension that SM would have received had he retired at the time of divorce.

48. Is military pension division that big a deal? How much is this retired pay anyway?

The retired pay amount is a percentage of the retiree's "high three." The high three is the average base pay of the retiree's highest 36 months of earnings, usually the last 36 months of service.

For those enrolled in the so-called legacy retirement system, the amount of retired pay is calculated by using the multiplier (2.5 in these cases) times the number of years in service.

For those enrolled in the so-called Blended Retirement System (BRS) the amount of retired pay is calculated by using a different multiplier (2.0) times the number of years in service.

Let's illustrate this concept with a concrete example. Lieutenant Colonel Alex Hamilton, who is in the legacy retirement system, retires at age 42 with 20 years' service and a high 3 base pay of $10K month. Alex dies at age 82.

The monthly retired pay is 50% (2.5 x 20) of $10K, or $5K per month.
In this case, there will be 480 such monthly payments (12 payments per year for 40 years until the retiree dies) for a total of $2.4 million! And that doesn't even count any annual cost of living increases in pay likely to be enacted.

If Alex had been enrolled in the BRS, the monthly retired pay is 40% (2.0 x 20) of $10K, or $4,000 per month. In this case, there will be 480 such monthly payments for a total of $1,920,000. Again, this calculation does not include any annual cost of living increases likely to be enacted.

Note that the retiree in the BRS receives a smaller monthly retired pay then retiree in the legacy system. On the other hand, the BRS recipient has other benefits, (mid-career bonus option, TSP match, and lump sum option) explained later in this manuscript.

Those entering the armed forces on or after 1 January 2018 are enrolled in the BRS. SMs entering the armed forces after 1 January 2006 and before 1 January 2018 with less than 12 years' service as of 31 December 2017 (and certain reserve members) were given an option of enrolling in the BRS or remaining in the "legacy" system described previously.

For divorce purposes, calculate the retired pay of an active duty SM as if the SM retired on the date of divorce.

49. Can military pension division be waived?

Yes. The parties can execute an agreement whereby the civilian spouse waives any right to the military pension. Such waivers are common, particularly in short marriages of young SMs where pension share would only be slight, retirement doubtful, and in any event not for many years. Mutual pension share waiver is also quite common where both spouses are SMs.

Civilian spouses who have been married to the SM for a significant time should be wary of pension waiver, and carefully consider the value over time of what is being waived. In contemplating pension division waiver, the civilian spouse should also consider demanding some other asset of comparable value (if any) in exchange for pension waiver.

Further, pension share can be involuntarily waived by failing to address it in the appropriate court order.

50. Are all military retirements calculated the same way?

No. The amount of retired pay that the retiree will receive depends on the retirement program the SM is enrolled in.

For SMs who entered the armed forces prior to 8 September 1980 the retiree receives a percentage of the final base pay, not the high three.

Further, there are REDUX, Reserve Retirement, and the current, Blended Retirement System. Each has its own, somewhat complicated rules. Here are the basics.

REDUX Formula.
SMs who entered the armed forces between 1 August 1986 and 1 January 2018 were given an option to receive a mid-career bonus of up to $30K between 14.5 and 15 years of service. If the SM chose the bonus, the SM receives only 40% of the high three if retiring at 20 years. Multiplier of 2.5 minus 1% for each year served less than 30 years. Expressed mathematically: 2.5 (multiplier) x 20 (years of service)-10 (number of years short of 30 at retirement)= 50-10=40%.

The SM receives a 3.5% increase for each year served over 20 years, up to 30 years. So, for example, if the SM chose the mid-career bonus and then retired at 24 years, the SM will receive 54% of the high three (Forty percent earned as a result of the first 20 years served plus 3.5% x 4 or 14%, for the four years served beyond 20.)

Reserve Component Retired Pay

The rules concerning eligibility for retired pay for the reserve component are more complicated than for the regular armed forces and the precise details of these rules are not within the scope of this article. Generally, to be eligible for reserve retired pay, the SM must be at least 60 years old, and have had 20 years of qualifying service. To be credited with a "good year" of service (20 good years are required) the reserve SM must earn 50 points during that year, generally through participating in two-week annual training, weekend drill, or by being mobilized to extended active-duty service.

The amount of retired pay for those reserve members who entered the armed forces before 8 September 1980 is 2.5 x creditable years of service x final retired pay. The amount of retired pay for those reservists who entered the armed forces on or after 8 September 1980 is 2.5 x creditable years of service x high three.

Blended Retirement System (BRS)

SMs entering the armed forces on or after 1 January 2018 are enrolled in the BRS. SMs entering the armed forces after 1 January 2006 and before 1 January 2018 with less than 12 years' service as of 31 December 2017 (and certain reserve members) were given an option of enrolling in the BRS or remaining in the "legacy" system described previously.

The BRS consists of four elements: (a) a defined monthly annuity benefit, (b) the opportunity to participate in the Thrift Savings Plan (TSP), (c) a continuation pay bonus, and (d) the opportunity to take a portion of retired pay as lump sum rather than monthly payments.

BRS Annuity

A SM may retire after at least 20 years creditable service. The amount of the monthly annuity under the BRS is 2.0 x the number of years of creditable service x high three. Thus, a SM in the BRS with 20 years' service will receive a monthly annuity equal to 2.0 x 20 (40%) of the high three. Note that this amount is 10% less than retirees under the legacy system. However, those enrolled in the BRS have additional benefits.

Thrift Savings Plan (TSP)
TSP is a group of investments that the SM may contribute to through payroll deduction. The SM will be enrolled automatically at a contribution rate of 3% of base pay but can increase or decrease this amount. The United States makes a contribution equal to 1% of the SM's base pay as well as matching contributions after two years' service as follows:

SM Contribution	U.S. Contribution	U.S. Match	Total
0	1%	0	1%
1%	1%	1%	3%
2%	1%	2%	5%
3%	1%	3%	7%
4%	1%	3.5%	8.5%
5%	1%	4%	10.0%

Continuation Pay
SMs enrolled in BRS have the opportunity to receive a bonus between their eighth and twelfth year of service. The bonus amount is 2.5 to 13 times the monthly base pay (for reservists .5 to 6 times monthly base pay). Each service branch determines the amount of the continuation pay bonus (within the specified guidelines) based on such matters as retention needs and specialty skills.

Lump Sum Option
SMs enrolled in the BRS have the opportunity to take a lump sum at retirement instead of a monthly payment. The SM may elect to take a lump sum payment of 25% to 50% of pension payments between retirement eligibility and full social security age. The retiree annuity will therefore be 75% of what it would otherwise be (if the retiree chose 25% lump sum payment) or 50% of what it would otherwise be (if the SM chose 50% lump sum). The annuity amount is no longer diminished after the SM reaches social security eligibility. Further, the amount of the lump sum payment is downwardly adjusted to its present value by a "discount rate" published annually in June by the Department of Defense. A lifetime of full monthly payments is usually more than the amount received by taking the lump sum.

References/ Additional Information:
-Silent Partner Article, "A Teaspoon of TSP" Col Mark Sullivan

-Silent Partner Article: “The Blended Retirement System and Divorce,” Col Mark Sullivan.
These and other Silent Partner articles are on the website of the NC State Bar.

51. I am a SM or military retiree and I heard that if I haven’t been married for at least ten years, then my spouse can’t get any of my retired pay.

Contrary to popular belief, Federal law does not (and never did) impose a ten-year marriage requirement before a military pension can be divided. Nor is there any entitlement to 50% of the military pension once the ten-year threshold has been met. These myths likely are the result of a misunderstanding of the direct pay authorization of the USFSPA.

Under federal a law, a court, if also authorized by the relevant state / territory, may award a former spouse a portion of military retired pay even if the parties were not married for ten years. However, if the parties have been married for at least ten years, DFAS can help enforce the pension division through direct payments to the former spouse if the following requirements are met: (i) the parties were married for at least ten years, and (ii) the marriage overlapped military service by at least ten years, (iii) a state court issued a qualifying pension division order or divorce decree, and (iv) that order is provided to DFAS, along with completed form 2293. When these prerequisites are met, the military paymaster, DFAS, will take the required amount out of the retiree’s pay and send it directly to the former spouse.

State Requirements for Pension Division. As stated above, the USFSPA does not require a ten- year marriage as a condition of military pension division. However, states (and U.S. territories) may impose on themselves additional requirements. Legal practitioners should check state law requirements as well as the USFSPA. Concerning Indiana vesting requirements, see Kirkman v Kirkman 555 N.E. 2d 1293 (Ind. 1990), Harris v Harris 31 N.E.3d 991 (Ind. Ct. App. 2015), and Robinson v Porter, 2020 Ind App Unpub Lexis 603

Concerning Arkansas vesting requirements, see Christopher v Christopher 316 Ark 215, 871 SW 2d 398 (1994), Holaway v Holaway 70 Ark App 240, 16 SW 3d 302 (2000). Puerto Rico law provides that the pension belongs to the person who earned it and its courts have no authority to direct that any portion to the former spouse. See Deluca Roman v Colon Nieves, 119 PR Dec 720 (1987).

52. Which court has jurisdiction to decide issues concerning military pension?

Jurisdiction is the power of the court to hear and decide the case. State statues differ, but typically, state statutes provide that its courts have jurisdiction to hear divorce cases as long as either the husband or wife was a bona fide resident of the state for at least six months preceding the filing of the divorce petition. Some states have statutes specifically addressing divorce jurisdiction in military cases. However, jurisdiction to decide the divorce case does not necessarily mean that the court has the power to make decisions concerning military pension; that is governed by federal law.

Courts cannot issue orders concerning the military pension unless the court has jurisdiction over the member by reason of (A) the member's residence, other than because of military assignment, in the territorial jurisdiction of the court, (B) the member's domicile in the territorial jurisdiction of the court, or (C) the member's consent to the jurisdiction of the court. 10 U.S.C. 1408 c (4)

References
-10 U.S.C. 1409 (B)(4) Calculation of BRS retirement
-DoDFMR Vol 7b, ch 3 Computation of Retired Pay
-10 U.S.C. 1408 Uniformed Services Former Spouse Protection Act. Miliary Pension Division
-For a detailed resource concerning all aspects of military retired pay, see *The Military Divorce Handbook, A Practical Guide to Representing Military Personnel and their Families*, (3d Edition), Mark Sullivan, Published by the American Bar Association, 2019.
-See also the series of "Silent Partner" articles on this topic at the website of the NC State Bar Committee on Legal Assistance for Military Personnel (www.nclamp.gov)

53. I think my spouse is receiving, or will receive in the future, disability pay from the Veteran's Administration due to a service- connected illness or injury. Is such pay a divisible asset?

The USFSPA authorizes state judges to divide "disposable retired pay" (DRP). The statute specifically excludes retired pay to which the member is entitled under 10 U.S.C. 1201 (disability retired pay.) Thus, judges have no authority to divide such pay. 10 U.S.C. 1408 (A) (4).

54. What effect does the award of VA disability pay have on the military pension?

Veterans with a service-connected disability may be eligible to receive tax free disability pay. If the member's disability rating is under 50%, such an election causes a dollar-for-dollar reduction of the regular retirement annuity and consequently, the number of pension dollars going to the former spouse.

Example: Court awards Martha a twenty percent share of George's DRP. At the time of the divorce, the DRP is $4,000, so Martha gets $800 per month. However, if George thereafter elects to receive disability pay of $3,000, and his disability rating is under 50%, George's DRP goes down to $1,000 and Martha's 20% is now worth only $200 per month.

55. If the military retiree elects disability retired pay and such election causes the former spouse' pension dollars to shrink, can a court order the member to reimburse the former spouse for such loss?

It depends. Those were the essential facts in the 2017 U.S. Supreme Court case of Howell v Howell 137 S.Ct. 1400, 197 L.Ed. 2d 781, 581 U.S. 214 (May 15, 2017). When Sandra and John Howell were divorced in Arizona in 1991, the court awarded Sandra 50% of John's military retired pay, which she began to receive the following year, when John retired from the Air Force. Thirteen years later, the VA determined that John had a service-connected disability, that he was 20% disabled, and that he was entitled to about $250 per month as a result. Not surprisingly, John elected to take the tax-free VA disability dollars. This election diminished John's disposable retired pay and, consequently, the value of Sandra's 50% share thereof. Sandra petitioned the court to force John to repay her for all of the dollars lost due to his election to take VA disability pay. The trial court and the Arizona Supreme Court agreed with Sandra, but a unanimous U.S. Supreme Court reversed, holding that John was not required to pay back the dollars Sandra lost due to John's VA disability because VA disability dollars are, by statute, specifically excluded from the definition of "disposable retired pay."

However, it is important to note that the vast majority of divorces, unlike that of the Howells, involve a written property settlement agreement. It is likely that, notwithstanding the Howell decision, the parties may, in a marital settlement agreement, provide for some indemnification in the event that the military retiree makes a VA election that diminishes disposable retired pay. In other words, courts

will likely enforce a contract between the parties even though the court cannot order indemnification without such a contract.

56. Weren't there some fairly recent changes about dividing medical disability pay?

OK, first some background concerning this exceedingly complex issue. When an active duty servicemember is determined to be medically unfit for continued service, that person may be discharged from the armed forces and, if the disability rating is 30% or greater, the member will receive Military Disability Retired Pay (MDRP) notwithstanding failure to attain 20 years' service. MDRP is not a divisible asset. If the SM receives VA disability pay, that too is not a divisible asset, as mentioned above.

SMs who serve at least 20 years are entitled to military retired pay based on longevity. If such a retiree also receives in VA disability pay, the retiree waives a dollar in military retired pay for every dollar gained in VA disability pay. The VA disability pay is neither divisible or taxable.

However, if the retiree's VA disability rating is 50% or more, Concurrent Disability and Retired Pay (CDRP) law kicks in and allows the retiree to receive not only the VA disability pay, but also the entire military retired pay, including the portion that would otherwise have been waived. In such cases, the amount of pay that is restored under CRDP should be listed in the monthly retiree account statement (RAS).

56a. OK, so what's changed?

DFAS has long operated under the assumption that the military retired pay that is waived, but is restored through CRDP is not a divisible marital asset.

However, on 1 March 2022, the Claims Appeal Board, an administrative body within the Department of Defense, determined that the pay restored by CDRP is, essentially, a restoration of military retired pay (which is divisible) and not medical / VA retired pay (which is not divisible). In February 2026, the Department of Defense promulgated new regulations within the DoDFMR implementing this decision.

56b. What about Combat Related Special Compensation?

CRSC is payment made by the United States to a military retiree who has a disability rating of 10% or more, for a disability that is "combat related," as statutorily defined. (10 U.S.C. 1413a). A disability is combat related if it was incurred (a) as a direct result of armed conflict, or (b) while engaged in hazardous service, or (c) in the performance of duty under conditions simulating war, or (d) through an instrumentality of war. CRSC is not divisible as retired pay but is subject to garnishment for family support.

A retiree cannot receive both CRDP and CRSC. DFAS will automatically chose one or the other, whichever yields a higher gross dollar amount. However, the automatic DFAS choice does not take into account taxes that may be imposed on CRDP or any garnishment order that may be in place.

References / Additional Information

-10 U.S.C. 1408(A)(4) Statutory definition of disposable retired pay
-10 U.S.C. 1414 Concurrent Retirement and Disability Pay (CRDP)
-10 U.S.C. 1413 Combat Related Special Compensation (CRSC)
-U.S. Code title 10, chapter 61 (Disability Retirement from Active Duty)
-Howell v Howell 137 S.Ct. 1400, 197 L.Ed. 2d 781, 581 U.S. 214 (May 15, 2017).
-*Military Pension Division: A Review of Cases Following Howell v Howell*, Kristopher J. Hilscher, Vol 36, 2023, American Academy of Matrimonial Lawyers
-"Silent Partner" articles of Col Mark Sullivan, USA (Ret) on NC State Bar website:
The Death of Indemnification?" (Impact of Howell)
Military Pension Division: The Evil Twins-CRDP and CRSC"
Medical Retirements: Dividing the Pension ((Rev 23 June 2026) divisibility of CRDP)
-DoDFMR Vol 7B, chapters 29 & 64 , (2026 rules implementing CRDP)
-Claims Appeal Board, Case 2016-CL-091608.3 (1 Mar 2022)

THE SERVICEMEMBER CIVIL RELIEF ACT

56c. What is the Servicemember Civil Relief Act?

The Servicemember Civil Relief Act (SCRA) is the single most important piece of legislation protecting SMs and, in some circumstances, their dependents. It

contains provisions that address such matters as interest on pre-service financial obligations, mortgage foreclosure, residential and vehicle lease termination, repossession, enforcement of storage liens, professional licenses, termination of certain communications, gym membership, and home security contracts; and other matters that are beyond the scope of this manuscript. As related to divorce, the SCRA's most important provisions relate to the delay of civil cases and protection against default judgements.

57. What is a default judgement and what does the SCRA have to do with it?

If one of the parties to litigation fails to show up for a civil court hearing, a default judgement may be entered; that is, the party that *did* show up wins. However, the SCRA is designed to help ensure that SMs do not lose their civil case by default because military duties prevented them from appearing.

If the SM has notice of the hearing, the SM can request that the hearing be stayed, i.e. delayed, because military duties materially affected the SM's ability to appear. The request must (a) specify how military duties materially affect ability to appear, and (b) state a date when the SM will be available to appear. The stay request must also include a separate letter or "other communication" from the SMs commanding officer (a) stating that the SMs military duty prevents appearance and (b) that military leave is not authorized for the servicemember at the time of the letter. The better practice is for the CO letter also to include a date after which the SM will be available. Upon receipt of a proper SCRA stay request, the court "shall" stay the case for not less than 90 days. The court has the discretion to grant additional delay.

Also, do not forget that the stay request has to get into the court file so the judge can review it. A beautifully drafted SCRA stay request sitting on your desk isn't going to have any effect on the case. You may need to contact the clerk of court's office, personally file the stay with the court, or otherwise accomplish this critical step.

58. What if the SM doesn't know about the hearing?

In every civil action, the plaintiff is required to submit an affidavit, a sworn statement, to the court advising that (a) the defendant is a member of the armed forces, or (b) the defendant is not a member of the armed forces, or (c) the plaintiff is unable to determine whether the defendant is a member of the armed forces. The plaintiff must make reasonable investigation to determine if the defendant is in the

armed forces before selecting the final option. The SCRA does not require any particular form be used for this purpose, but some states have adopted a preferred format (for example, North Carolina AOC Form G-250).

If it appears to the court that the defendant is in the armed forces, the court must appoint an attorney to represent the defendant. The SCRA prohibits the court from entering a default until such counsel is appointed. The SCRA does not say where the attorneys will be sourced, how they will be paid, or what they will do. However, at a minimum, the appointed counsel must take efforts to find the military defendant and ascertain whether the SM wishes to delay the case.

59. What if the court issues a default judgement in violation of the SCRA?

Upon request of the SM, the court shall re-open the default if it appears to the court that (a) the SM's military service materially affected the SM's ability to defend the action, and (b) the SM has a meritorious defense to all or a portion of the action.

References / Additional Information
-50 U.S.C. 3931 (Affidavit requirement, appointment of counsel, stay of proceedings when defendant does not have notice, protection against default)
-50 U.S.C. 3932 Stay of proceedings when defendant has notice of hearing.
-NC State Bar Committee on Legal Assistance for Military Personnel, For lawyers / Additional Resources:
"Judges Guide to the SCRA," Col Mark Sulliven, USA (Ret)

59a. What, if anything, does the SCRA say about child custody?

The SCRA provides that if a judge issues a temporary custody order based solely on deployment or anticipated deployment, the order shall expire no later than justified by the deployment. Further, the SCRA provides that States may provide a higher standard of protection concerning temporary custody orders.

Further, in determining an appropriate permanent custody order, the judge cannot consider the SM's absence due to the deployment as the sole factor in determining the child's best interest.

Reference: 50 U.S.C. 3938

59b. What, if anything, does North Carolina law say about deployment and child custody?

The North Carolina Uniform Deployed Parents Custody and Visitation Act (NCGS 50A-361 thru 396) provides that the deploying parent must notify the other parent of the deployment withing seven days of receiving such orders, unless prevented by circumstances of the service. If the SM can't provide notice because of the issuance of a court order preventing disclosure of party's address, then SM must make disclosure to the issuing court.

The parties may enter into an agreement regarding child support, custody and visitation that ends at conclusion of deployment. The agreement may provide caretaking authority to a non-parent (e.g. grandparent).

In a proceeding for temporary custody, the court may grant caretaking authority to non-parent on motion of the deploying parent if it is in best interest of child. A permanent custody order cannot be issued if the deploying parent is absent, unless that parent consents.

The Act also provides procedures for an expedited hearing and electronic testimony.

CRIMINAL LAW ISSUES

60. Why is there a criminal law section in a manuscript about divorce?

There are many criminal law issues related to divorce and separation. This manuscript will address the following: Military and Civil Protection Orders, Transitional Compensation, Pension Division in certain cases where the SM is separated for the commission of a dependent abuse offense, Extra-marital Sexual Conduct under the Uniform Code of Military Justice, and federal prohibitions on the possession of firearms.

60a. My spouse has assaulted me or threatened to do so and I am therefor concerned for my safety. Can the legal assistance office help?

The legal assistance office can assist you to request a Military Protective Order (MPO); that is, an order from your spouse's Commanding Officer directing your spouse to stay away from you and not to contact you. The installation will also

have victim advocates who can assist you to form a safety plan and to obtain a MPO from a commander and a domestic violence protective order (DVPO) from a civilian judge. Further, the installation will have attorneys whose job it is to assist victims and even to represent abused spouses if a court martial is convened to address the abusive conduct of the SM. In the Marine Corps such attorneys are referred to as Victim's Legal Counsel, or VLC. Other services may refer to such counsel as the Special Victim's Counsel, or SVC.

The legal assistance office can refer you to victim advocates and to VLC / SVC.

60b. Is the MPO effective off base as well as on base? Yes, SMs who violate the MPO off base can be punished by the armed forces for doing so. However, civilian police do not enforce MPOs. Civilian police cannot arrest a SM for the violation of the MPO. At best, they can prepare a report and ensure that it gets to the military police and / or to the SM's commanding officer.

60c. Is the civilian DVPO effective on the installation?

Yes, In accordance with federal law (10 U.S.C. 1561a) a civilian order of protection shall have the same force and effect on a military installation as it has within the jurisdiction of the court that issued it.

61. What is Transitional Compensation?

When a SM is separated from the armed forces as a result of committing a dependent abuse offense, and the proper application is made, the United States makes monthly compensation payments to the spouse / former spouse. Such separation from the armed forces occurs (a) when a court martial sentence for the commission of a dependent abuse offense includes a punitive discharge; for example, bad conduct or dishonorable discharge, or (b) when SM's commanding officer initiates separation proceedings based on a dependent abuse offense.

Applicants who also participated of the dependent abuse offense are ineligible to receive Transitional Compensation. For example, a civilian spouse who assisted the SM in the sexual abuse of their child is not entitled to Transitional Compensation.

62. How do I apply?

The service appointed representative submits DD Form 2698 of behalf of the dependent. Ask the VLC / SVC and/ or the installation victim advocates concerning Transitional Compensation applications.

63. How long do these monthly Transitional Compensation payments last?

Payments last 12 to 36 months depending on the circumstances. If the separated member had 12 or less months remaining on the enlistment contract, then the duration shall be for 12 months. If the SM had more than 12 months remaining on the enlistment contract, then payments continue for the duration of the unserved term of the SM's enlistment, up to a maximum of 36 months.

However, payment stops if:

- the conviction of the separated SM is set aside,
- the sentence of the court is diminished so that it no longer includes a punitive discharge or forfeiture of all pay and allowances,
-appropriate authority disapproves the administrative separation, or
-the spouse remarries or cohabitates.

64. How much are these monthly payments?

Compensation is commensurate with the amounts authorized for Dependency Indemnity Compensation (DIC) pursuant to 38 U.S.C. 1313. As of this writing, monthly surviving spouse DIC is about 1,699.36.

65. What about medical benefits for Transitional Compensation beneficiaries?

A spouse or former spouse receiving Transitional Compensation from the United States is entitled to medical, dental, commissary and exchange privileges.

Likewise, a dependent child who was a member of the household of the member or former member at the time of the misconduct is entitled to medical, dental, commissary and exchange privileges during the period of Transitional Compensation.

References:
-10 U.S.C. 1059 (Transitional Compensation)
-Department of Defense Instruction 1342.24 (TComp Implementing Instruction)
-32 C.F.R. 111 Eligibility of TComp beneficiaries to military medical care

66. I am a civilian former spouse with a court order awarding me a portion of my former spouse's military retired pay. However, before my former spouse could retire, he was convicted of a dependent abuse offense and the sentence of the court martial included a punitive discharge. Does my former spouse get any retired pay? Do I?

The conviction and sentence deprive your former spouse of the ability to retire from the armed forces. Your spouse therefore receives no retired pay. However, you can still receive payment from the United States of the portion of pension that you would have received if not for your spouse's misconduct.

Here are the requirements:

-Servicemember / former member was eligible to retire based on years of service.
-Servicemember / former member, while a member of the armed forces, lost retirement eligibility as a result of misconduct involving abuse of a spouse or dependent child.
-Court order directs the payment of an amount from the disposable retired pay of the member or former member to an eligible spouse or former spouse
-The former spouse was married to the abusive SM at the time of the abuse, and
-The applicant former spouse was the victim of the abuse (or is the parent of the dependent child who was the victim of the abuse.

Eligibility for such payment ends upon remarriage. Eligibility resumes if the marriage ends due to the death of the person's spouse, or by annulment or divorce.

Reference:
- 10 U.S.C. 1408 (h) (Payment to former spouse of retired pay share in cases of dependent abuse offenses)

66a. I am a spouse/ former spouse of a SM who was separated due to a dependent abuse offense. I am currently receiving a portion of military retired pay under 10 U.S.C. 1408(h). Am I eligible for military medical care?

Yes. You are eligible for military medical care while receiving such payments.

Reference:
-10 U.S.C. 1408(h)(9)(A) Eligibility of spouse / former spouse for military medical care, case of retirement eligible SM separated for dependent abuse offense.
-10 US.C. 1408(h) (9) (B) Eligibility of dependent child for military medical when retirement eligible SM is separated for dependent abuse offense.

67. I am a civilian former spouse. Can I receive payments under both 10 U.S.C. 1408(h) [payments from the United States when SM loses retirement eligibility due to dependent abuse offense] and 10 U.S.C. 1059 [transitional compensation payment when SM is separated for dependent abuse offense]?

No. Even if you are eligible for both, you have to pick just one. (DoDI 1342.24 para 3.4).

68. I am a civilian former spouse with a court order directing that child support be paid out of my former spouse's retired pay. However, before retirement, my former spouse was convicted of a dependent abuse offense and the sentence of the court martial included a punitive discharge. Do I lose the child support?

Not necessarily. The conviction and sentence deprive your former spouse of any right to retired pay. However, in some cases, the United States will pay the child support.

Here are the requirements:

-Servicemember / former member was eligible to retire based on years of service.
-Servicemember / former member, while a member of the armed forces, lost retirement eligibility as a result of misconduct involving abuse of a spouse or dependent child.
-Court order directs the payment of child support from the member's disposable retired pay

References:
- 10 U.S.C. 1408 (h) (Payment of child support from retired pay in cases of dependent abuse offenses)

69. I am an active-duty SM separated from my spouse. We reside in different places and we have even executed a marital separation agreement. Can I date other people now?

I assume that by "dating," you are not referring to going to movies and restaurants, etc., but rather having sexual relations with a person that is not your current spouse.

The Manual for Courts Martial (MCM) at Part IV lists various offenses under the Uniform Code of Military Justice (UCMJ). These include offenses under UCMJ Article 134. One of those offenses, defined at MCM Part IV, paragraph 99, is Extramarital Sexual Conduct. The elements of this offense are:

-That the accused wrongfully engaged in extramarital sexual conduct with another person, and

-That at the time the accused knew that the accused or that the other person was married to someone else, and

-That under the circumstances, the conduct of the accused was (a) prejudicial to good order and discipline in the armed forces and / or (b) was of a nature to bring discredit upon the armed forces.

Extramarital conduct includes genital sexual intercourse, oral to genital intercourse, anal to genital intercourse, and oral to anal intercourse.

70. What does "prejudicial to good order and discipline" mean? What does "of a nature to bring discredit upon the armed forces mean?"

There's a long definition of these terms in the MCM, which also lists important factors to consider in making this determination. However, in general, "prejudicial to good order and discipline" means that the conduct has an obvious, divisive effect on unit discipline or morale, or is detrimental to the authority or stature of a servicemember. Discrediting conduct is that which injures the reputation of the armed forces.

As a practical matter, these terms mean whatever the commanding officer holding your nonjudicial punishment, or the judge or jury factfinder at your court-martial thinks it means.

71. Is being legally separated a defense to the charge of Extramarital Sexual Conduct?

It is a defense to the charge of Extramarital Sexual Conduct that that the accused, the co-actor, or both were legally separated *"by the order of a court of competent jurisdiction."* Thus, merely living in different places, even pursuant to a separation agreement, does not constitute a defense. The defense applies only if both parties to the conduct were either legally separated (as defined in the MCM) or unmarried at the time of the conduct.

72. I am a SM who engaged in sexual contact with a person not my spouse but I thought that this person was unmarried when I engaged in such conduct. Is that a defense?

It is a defense to Extramarital Sexual Conduct that the accused had an honest and reasonable belief that the accused and the co-actor were both either unmarried or legally separated by order of a court, or that they were lawfully married to each other. If this defense is raised, the prosecution has the burden to prove that the accused's belief was either unreasonable or not honest.

Reference
Manual for Courts Martial, Part IV, paragraph 99, (Extramarital Sexual Conduct, elements and defenses)

73. What is the effect of a conviction of a misdemeanor offense of domestic violence on a SM's ability to lawfully possess a firearm?

The federal gun control act [at 18 U.S.C. 922(g)] prohibits certain categories of people from possessing firearms. It is unlawful for any person to possess a firearm who is:

-a convicted felon
-a fugitive from justice
-an unlawful user of or addicted to controlled substance
-adjudicated to be a mental defective or committed to mental institution
-an illegal alien
-discharged from the armed forces with a dishonorable discharge
-a person who has renounced U.S. citizenship
-*subject to a court order issued at a hearing at which he had notice and an opportunity to participate and which restrains such person from harassing,*

stalking or threatening an intimate partner or child of an intimate partner or engaging in other conduct which would place the intimate partner in fear of bodily injury, or
-has been convicted of misdemeanor crime of domestic violence

74. What is the effect of a domestic violence restraining order on the SM's ability to possess a firearm? What about the conviction of a misdemeanor crime of domestic violence?

A person subject to a qualifying domestic violence restraining order is prohibited by the federal gun control act from possessing a firearm. However, an exception to this prohibition allows the possession of a firearm, notwithstanding the domestic violence restraining order, for "official use" during employment by the federal, state or local government" [18 U.S.C. 925(a)(1)]. For example, a SM subject to such a restraining order may, consistent with the federal gun control act, possess a firearm for required annual requalification at the rifle range.

Note that the official use exception does not apply to conviction of a misdemeanor crime of domestic violence. Accordingly, a person so convicted can not possess a firearm even for official use. Such a severe limitation on military service may greatly affect the usefulness of a SM and may result in administrative sanction, including proceedings for separation.

Note too that the SM must also comply with any state court orders. For example, notwithstanding the federal official use exception, a SM cannot lawfully possess a weapon (even for official use) if a state court order prohibits the SM from doing so.

References:
18 U.S.C. 922(g) Persons prohibited from possessing a firearm
18 U.S.C. 925(a)(1) Official Use Exception