

# Major Changes to Military Retirement

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# Major Changes to Military Retirement

by Marshal S. Willick | May 10, 2017

A legal note from Marshal Willick about the federal government injecting itself into state divorce law by enacting changes to the Uniformed Service Former Spouses Protection Act ("USFSPA") that impede the property rights of former spouses of military members, make the process much more difficult and expensive for everyone, and increase malpractice risks for divorce lawyers.

Military retirement benefits is a topic I have studied and taught to family law lawyers across the United States for many years. My "standard clause set" for military retirement division was published by the American Bar Association in 1995, and the ABA published my first textbook on the subject, *A Lawyer's Guide to Military Retirement and Benefits in Divorce*, in 1998. Both have been continually updated. Our retirement-order drafting division, QDRO Masters, is of course fully informed on all the changes discussed below, and drafts military orders as well as private pension QDROs, Civil Service COAPs, and Nevada PERS QDROs. See [qdro@qdromasters.com](mailto:qdro@qdromasters.com).

Effective at the end of 2016, Congress greatly altered what the military pay center (the Defense Finance and Accounting Service, or "DFAS") will consider "disposable retired pay" for division of military retired pay between spouses. The change in law, based on the false assertion made by a junior member of the House and pushed through without a hearing, presents challenges for litigants, family law lawyers, and judges.

## I. A BRIEF HISTORY OF THE INTERSECTION BETWEEN THE USFSPA AND NEVADA LAW

The USFSPA was enacted in 1982 to reverse the U.S. Supreme Court decision in *McCarty v. McCarty*, 453 U.S. 210 (1981) by “returning the retired pay issue to the states.” It did not guarantee that a spouse received a certain share of the benefits, but left to the States to determine – under **their** laws – how military pensions were divided.

Presumptions and requirements for marital or community property division vary from state to state, but all recognize pensions as “property” and provide for the division of that property. Almost all states use some version of the “time rule” essentially giving to both spouses a portion of the pension benefits ultimately received in accordance with a fraction in which the service during marriage is the numerator, and the total service is the denominator, divided by two.

In *Forrest v. Forrest*, 99 Nev. 602, 668 P.2d 275 (1983), the Nevada Supreme Court stated that “[a]ll property acquired after marriage is presumed to be community property” – whether “vested” or not, and whether “matured” or not. In dividing community property, NRS 125.150 is vague and expansive, providing only that any division **other** than equal must be “deemed just,” based upon a “compelling reason,” and supported by written findings.

The “time rule” is used for **all** defined benefit pension divisions. Additionally, the “wait and see” approach is mandated; the community has an interest in pension ultimately received, **not just** the pension that would be payable as of the date of divorce. Until the passage of the 2017 National Defense Authorization Act (NDAA), **ALL** pensions divided in Nevada were subject to the same uniformly applicable rule.

## II. CHANGES TO THE USFSPA

In late 2016, the USFSPA was amended through section 641 of the National Defense Authorization Act for 2017. The military retired pay that DFAS can divide was limited to:

- (i) the amount of basic pay payable to the member for the member's pay grade and years of service ***at the time of the court order***, as increased by
- (ii) each cost-of-living adjustment that occurs under section 1401a(b) of this title between the time of the court order and the time of the member's retirement using the adjustment provisions under that section applicable to the member upon retirement.

The remainder of the USFSPA remained unchanged.

The language used in the amendment was inaccurate, referring to the "basic pay payable" and not to the pay payable had the member retired at the time of the effective order. If the language was actually enforced as written, the former spouse could be awarded more than 100% of the member's final pay – which is obviously not what the proponent intended. So it is quite likely that DFAS will interpret the language as meaning something other than what it actually says, although the regulations have not yet been issued, and it is unclear how courts will react to regulations that contradict the statutory text.

No matter how DFAS (or the courts) read it, the change altered the pension division law of 45 States. The Representatives and Senators from those States approved the change without apparently knowing, ***or caring***, that they were altering their States' divorce statutes to the detriment of a huge number of people.



### III. WHAT THIS MEANS FOR PARTIES TO MILITARY CASES – AND THEIR LAWYERS

The law change does **not** affect cases where the member has already retired – those cases will be treated the same as they are currently, since the member's rank and time in service will have already been fixed by retirement.

For any military retirement division **after** December 23, 2016, involving a **still-in-service** military member, however, that member's rank and time in service are frozen for the calculation of the share of benefits that can be awarded to the former spouse and paid by DFAS.

Nothing in the new law specifically affects the ability of a court to award any percentage of the final retirement benefit to the former spouse. The amended law only affects what **DFAS** will pay concerning that award. The change in law requires some additional work by litigants, lawyers, and courts to comply with **both** federal and State law in a military divorce involving a member still in service.

The situation is akin to that relating to the much-misunderstood "ten year rule." It is a **payment** limitation, not a restriction on State court jurisdiction. The USFSPA's "savings clause" – providing that any benefits awarded but not payable by DFAS "may be enforced by any means available under law other than the means provided under this section" – remains unaltered.

As another slap in the face to the former spouses and directly interfering with NRS 125.150 (which requires an equal division of assets), the former spouse's share will grow by the "retired" COLA increases that may be granted each year from the date of the order awarding the benefits to the date of actual retirement, while the **member's** share will grow using (larger) active duty pay increases

(COLAs) during the same period. This alone will result in an unequal division of pension benefits. As an example:

Consider a spouse being awarded 50% of the benefit at the 10 year point in the member's career. Her benefit, say \$500, would equal his benefit of \$500. She does not receive this benefit until he retires after 20 years. With an average retired COLA rate of 1.99% (this is the average of the last 10 years of retired COLAs), her \$500 will be worth \$608.90 at retirement. The member's \$500 would grow at the active duty COLA rate, which averaged 2.46% over the same period. His \$500 will be worth \$637.55 at the time of retirement.

The result is an unequal division of the community property in **all** active duty military divorce cases. The new law reduces the portion of a retirement to be received by any spouse of an active-duty military member, and makes calculations much more difficult. Whenever a court divides military retirement benefits, what the spouse will receive from DFAS is less than what Nevada law requires a spouse to receive.

It gets even worse if **both** parties have retirement benefits in their respective names – the military spouse will get a larger (time rule) interest in the non-military spouse's pension than the non-military spouse will get in the member's retirement, which is on its face a violation of NRS 125.150, *Blanco v. Blanco*, 129 Nev. \_\_\_, 311 P.3d 1170 (Adv. Opn. No. 77, Oct. 31, 2013), and perhaps the Equal Protection clause of the 14th Amendment.

Since the benefit to a former spouse in such a case only increases by what she would get anyway (retired COLAs) there will **never** be a reason in "still-in-service" military divorce cases that the benefit

should **not** be made payable at the member's first eligibility to retire, pursuant to *Sertic v. Sertic*, 111 Nev. 1192, 901 P.2d 148 (1995).

As to what attorneys and courts should **do** about the resulting inequalities, nothing in the federal law affects the Court's ability to offset other property (or make an alimony award) to equalize the community being divided, and the **State** law in an "equal division" State appears to **require** parties and courts to take additional steps to achieve an equal division of community property. Failure to do so risks unjust enrichment/wrongful deprivation for parties, malpractice liability for counsel, and reversal for courts.

In Nevada, for example, it is still possible to satisfy the duty under NRS 125.150 and *Blanco* to divide community property equally. Other States can use similar provisions, with analogous case citations.

Any attorney representing a non-member spouse in a military divorce should fashion the order to provide a supplemental property or alimony award to compensate the spouse for the difference between what the spouse should receive under the time rule and what is directly payable under the revised federal law.

It is important to note that ***the former spouse must complete and send in DD Form 2656-10 within one year of the first order addressing the Survivor Benefit Plan ("SBP") or SBP is (usually) waived***. Additionally, the Thrift Savings Plan ("TSP") balance should be divided at the time of divorce. Furthermore, including a provision that the regular pension benefits be paid at the member's first eligibility to retire presumably eliminates the need for a further motion to be filed before payments are to begin. See *Henson v. Henson*, 130 Nev. \_\_\_, \_\_\_ P.3d \_\_\_ (Adv. Opn. No. 79, Oct. 2, 2014).



Such a paragraph might look like this (if the SBP premiums are to be paid using the DFAS default method):

**IT IS HEREBY ORDERED, ADJUDGED, AND DECREED** that [wife] is awarded her time rule share of [husband's] military retirement in accordance with the holdings in *Gemma*, *Fondi*, and *Sertic*. [Wife] is deemed the irrevocable beneficiary of the Survivor Benefit Plan with the base amount set at the full retirement benefit. The benefits payable directly from DFAS calculated in accordance with 10 U.S.C. § 1408(a) are payable upon [husband's] first eligibility to retire. This Court retains jurisdiction to make a further property distribution or order permanent alimony in a sum sufficient, inclusive of the sums payable from DFAS, to equal a time rule distribution in accordance with Nevada law requiring equal division of community property. [Husband] is required to cooperate by providing any pay information necessary to achieve that result.

Should the final settlement/decreed **alter** the DFAS default as to how SBP premiums are to be paid, the language might look like this:

**IT IS HEREBY ORDERED, ADJUDGED, AND DECREED** that [wife] is awarded her time rule share of [husband's] military retirement in accordance with the holdings in *Gemma*, *Fondi*, and *Sertic*. [Wife] is deemed the irrevocable beneficiary of the Survivor Benefit Plan with the base amount set at the full retirement benefit. The benefits payable directly from DFAS calculated in accordance with 10 U.S.C. § 1408(a) are payable upon [husband's] first eligibility to retire. This Court retains jurisdiction to make a further property distribution or order permanent alimony in a sum sufficient, inclusive of the sums payable from DFAS, to equal a time rule distribution in accordance with Nevada law requiring equal division of community property. The actual percentage of the military retirement awarded to [wife] must be

known before SBP premium costs may be shifted as called for in this *Decree*. Accordingly, this Court further retains jurisdiction to make a clarifying order adjusting the division of military retirement benefits until [husband's] actual retirement. [Husband] is required to cooperate by providing any pay information necessary to achieve that result.

#### IV. MORE BIG CHANGES COMING IN 2018

There are additional changes coming **next** year to what benefits are actually available for division, because a change in the actual total pension benefits payable – called the Blended Retirement System (“BRS”) – becomes effective in 2018. It reduces the value of the traditional legacy defined benefit retirement pension, increases the contributions and value of the TSP defined contribution, and adds a cash payment called “Continuation Pay” to be paid between years 8 and 12 of active duty. All of these components should be addressed in **every** military divorce.

We are currently working on form clauses that should be included immediately in every active-duty military case, as the new retirement system is effective as of January 1, 2018; they will be available on the Military Retirement Benefits page of our website.

All members serving as of December 31, 2017, are grandfathered under the legacy retirement system; no one currently serving will be automatically switched to the BRS. However, active duty members with fewer than 12 years since their pay entry base date, and Reservist members who have accrued fewer than 4,320 retirement points as of December 31, 2017, will have the option to opt into the BRS. The opt-in/election period for the BRS begins January 1, 2018, and concludes on December 31, 2018. All Service members who enter

the military on or after January 1, 2018, will automatically be enrolled in BRS.

Another change as a result of the BRS is that the voluntary election of ***lump sum payments*** of retired pay – by giving up a fourth or half of the regular monthly payments of regular retired pay until eligibility for full Social Security – for those under the BRS who serve 20 or more years. If the unilateral decision is allowed to be made by the member, the former spouses share could be further eroded by reducing the benefit payable for the life of the member. An indemnification clause is critical. This could be a ***huge*** malpractice trap for attorneys.

## V. CONCLUSION

The pension universe is constantly changing. Given the changes that have just gone into effect – and those that are about to – every party to a military divorce, and every attorney for one of those parties, should have an understanding of the current and future rules concerning the division of military pensions. Those changes could greatly alter who gets what in a given case – and the opportunities for malpractice have increased geometrically.

A final note: some attorneys believe that they avoid malpractice in the drafting of retirement division orders by passing the duty to a “third party neutral.” I have written on this subject before and continue to caution attorneys not to believe that they can shield themselves from liability in this manner. See *Lawyer Liability in QDRO Cases*, Nevada Family Law Report Volume 29, Issue 4 (Fall 2016), also posted in MLAW Case Summaries, and at <https://www.willicklawgroup.com/published-works/>. Lawyers must realize they have a duty to their clients to protect their interest and



that duty cannot be avoided by covering their eyes **or** by hiring some snake-oil salesman who (falsely) promises to “assume all liability.”

If you have any questions when representing a party in a military divorce, or need any assistance with orders addressing any of these matters, please contact the Willick Law Group/QDRO Masters at 702-438-4100 or [qdro@qdromasters.com](mailto:qdro@qdromasters.com).

## VI. QUOTES OF THE ISSUE

“Retirement is like a long vacation in Las Vegas. The goal is to enjoy it the fullest, but not so fully that you run out of money.”

– Jonathan Clements

“You can be young without money, but you can’t be old without it.”

– Tennessee Williams

“Roberts had grown so rich, he wanted to retire. He took me to his cabin and he told me his secret. ‘I am not the Dread Pirate Roberts’ he said. ‘My name is Ryan; I inherited the ship from the previous Dread Pirate Roberts, just as you will inherit it from me. The man I inherited it from is not the real Dread Pirate Roberts either. His name was Cumberbund. The real Roberts has been retired 15 years and living like a king in Patagonia.’”

– *The Princess Bride* (1987)

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