



CHECKLIST FOR MILITARY RETIREMENT BENEFITS CASES

- Be familiar with the federal rules that work with, and partly supersede, state law:
 - 10 U.S.C. § 1408 (“Payment of retired or retainer pay in compliance with court orders”).
 - Dept. of Defense Financial Management Regulation 7000.14-R) Volume 7B, Chapter 29 (Feb. 2009) (“Former Spouse Payments from Retired Pay”).
 - Dept. of Defense Financial Management Regulation 7000.14-R) Volume 7B, Chapters 42 thru 58 (Concerning Survivor Benefit Plan).
 - Be familiar with, and use, terms of art as defined in federal law and/or regulations.

- Verify and document jurisdiction to enter a valid retired pay order under **both** state law **and** federal law:
 - The state court must have jurisdiction over the service member by reason of residence (**other** than because of military assignment), domicile, or consent to the jurisdiction of the court. Order sent to DFAS must state the specific reason court finds jurisdiction (*See* § 290605, DoDFMR and 10 U.S.C. § 1408(c)(4)).
 - Courts sometimes differ as to what constitutes “consent”; for most it is any general appearance, but some have required consent to litigation of that particular asset. DFAS regulation now defines “consent” as “participating in some way in the legal proceedings.” *See* Section 290604 A(3), DoDFMR. In addition, Servicemember’s signature on a separation agreement will be presumed to be consent when the agreement is incorporated into a court order. *See* Section 290606, DoDFMR.
 - A spouse seeking to divide retired pay should **NEVER** take default against an out-of-state military member; the order will probably be unenforceable and may not be “fixable” in any court anywhere.
 - The marriage must **overlap** the member’s military service by at least ten years during creditable military service to obtain direct payment of retired pay to the spouse as property. Best to include a finding (including dates) to that effect in the order or agreement. If there is no ten-year overlap:
 - consider substituting an alimony award, which is directly payable irrespective of the length of the marriage/service overlap.
 - consider specifying detailed procedures and enforcement methods to ensure direct payment from the retiree (e.g. voluntary allotment; automatic bank debits) that minimize dependence upon retiree’s ongoing diligence.

- Ensure the order recites all necessary “magic language”:
 - Compliance with the Servicemembers Civil Relief Act of 2003.
 - The name and Social Security Number of both the member and the former spouse are essential to DFAS, but consider omitting full SSN from orders that might be considered public documents in a court file and submit by cover letter.
 - Use standard and accepted terms of art in describing intent.

- Ensure “Military Retirement Benefits” or “Military Retired Pay” is defined as truly intended: Use new DFAS defined term “retired pay award” to distinguish a property division from a support obligation.
 - If something other than the current definition of “disposable retired pay” is intended, the order must say so (but the military will still construe the order using the statutory definition) See § 290601, DoDFMR.
 - The definition of “disposable retired pay” is sometimes changed, and may or may not be what a state court typically divides. See 10 U.S.C. § 1408(a)(4). If something else is intended for purpose of the award, establish the definition of the term as used.
 - Determine from local State law whether “disposable retired pay” definition in federal law limits “subject matter jurisdiction” or parties’ intent in the settlement agreement.

- The intent regarding future cost of living adjustment increases should be clearly stated.
 - Cost of living adjustments (COLAs) do not accrue on fixed dollar awards; to obtain COLAs for the spouse, the award must be phrased as a percentage. See § 290902, DoDFMR.

- The spousal portion of the retired pay award should be expressed as a percentage of the retired pay or as a fixed dollar sum.
 - Do not mix fixed dollar awards and percentages (it confuses the pay center).

- If the member is still on active duty, determine whether to use a formula award method (where DFAS will compute the denominator/total creditable service) or to defer final determination of spousal portion until actual retirement.) See Section 290607, DoDFMR.

- When appropriate, consider whether to use a hypothetical award formula (e.g., based on pay grade or pay tables at a particular point in time). See § 290608, DoDFMR.

- Determine State law requirements for determining the marital or community portion of the total retired pay entitlement (e.g. time rule or coverture fraction) and ensure that any percentage based retired pay award complies with applicable limitations (e.g., is the award for 50% of the marital portion or 50% of the total?)

- Military retired pay can be used for payment of child support and alimony as well as divided as property, but there are collection limitations:
 - Only 50% of monthly disposable retired pay can be paid out for all current orders, combined, under the direct pay procedures.
 - But if support (or some other) arrears are also being garnished, the percentage of total “remuneration for employment” that may be collected rises to 65%. See § 290901, DoDFMR.
 - Child support and alimony arrearages can be obtained from disposable retired pay; but arrearages in property awards cannot. See §§ 290302, 290303, and 2980304, DoDFMR.

- Follow up *after* the divorce is essential, by serving the order on the military pay center:
 - Use DD Form 2293 to submit Application for Direct Payment.

- The court order **must** be certified within 90 days of service on the military pay center. Review minimum requirements for order in § 290601, DoDFMR.
- Service of the Application may be made by certified mail, regular mail, or by Fax to 877-622-5930.
- Even if member is still on active duty, do not delay submitting a suitable order and direct pay application to DFAS unless there is some unavoidable reason to wait until actual retirement. DFAS will process the application and hold it until retirement. *See* Section 290404, DoDFMR.
- Use DD Form 2656-1 and/or 2656-10 to ensure appropriate SBP elections.

- Provide for possible future contingencies:
 - If the member is still on active duty upon divorce:
 - Provide for what division will be made, and when, if the member takes any form of early retirement or elects an alternate benefit.
 - In states (such as California) that permit division or retired pay upon eligibility for retirement, provide for the member's possible service **after** eligibility for retirement (such as by requiring personal payments by the member to the spouse until actual retirement).
 - If member is an activated member of Reserve component, consider the dual possibilities of either a Reserve Retirement or a normal active duty retirement and provide for each possibility.
 - Provide for some obligation of member to notify former spouse when termination of active duty is planned or occurs.
 - Provide for the possible "roll over" credit of military service into a Civil Service retirement or other pension. Provide guidance for addressing payment of the cost required for such rollover.

 - In all cases:
 - Provide for whether alimony should be possible if the member takes a disability retirement or otherwise reduces or eliminates the regular retired pay being divided (e.g., VA disability compensation).
 - Include a reservation of jurisdiction to correct the form of order to comply with the court's intentions in case statutes change, the member's service takes an unexpected turn, etc.
 - If member is already retired, or retirement is imminent, become familiar with and address the options for possible waiver of military retired pay for the receipt of a federal civil service retirement annuity.
 - Obtain a Privacy Act Waiver from member to permit former spouse or attorney to obtain relevant information concerning retirement, retired pay, and related matters.

- Deal with the Survivor's Benefit Plan:
 - Realize that if member is already retired, the election made at time of retirement cannot be changed except to change beneficiary "spouse" to "former spouse" or to terminate or suspend (under limited circumstances). If not elected on retirement, can't be done now.

- State courts have authority to determine whether the spouse is to remain the post-divorce beneficiary of the survivorship interest or parties can agree to do so. Can also compel an election in the future.
- Realize that the benefit is **not** divisible between a present and former spouse; there can be only one beneficiary.
- If member still on active duty, acknowledge pre-retirement & post-retirement options:
 - Decide whether to compel a future election for former spouse when retirement occurs or to use commercial life insurance as an alternative.
 - Decide whether to compel an election for former spouse for the active duty SBP benefit.
- The **amount** of the benefit can be varied, by basing it upon the full retired pay amount or some lesser sum. Decision must be made at time of retirement and cannot be changed.
- Who pays for the benefit can also be adjusted between the member and the spouse, but only indirectly, by varying the percentages of the lifetime benefit paid to each party or by requiring direct reimbursement to the member.
- Use DD Form 2656-1 and/or 2656-10 to ensure appropriate SBP elections.
- Recognize that any SBP election required by the divorce decree or agreement must be implemented within one year. The proper office at the military pay center must be served with a deemed election of the former spouse as beneficiary (and an extra copy of the order) within one year of the date of divorce, or the spouse gets no survivorship benefits no matter what the decree says.
 - For Reservists, anticipate receipt of the 20-year letter and provide procedures to ensure submission of DD Form 2656-5 and determinations as to RCSBP.
- Obtain information regarding military-related benefits:
 - Determine if former spouse is 20/20/20 eligible. (I.D. cards, lifetime medical benefits, and base and commissary privileges are determined according to whether the member served for twenty years, was married for 20 years, and those two periods overlapped by 20 years.)
 - If an eligible former spouse remarries, the medical benefits are lost permanently even if the later marriage ends.
 - If not 20/20/20 eligible, evaluate the potential benefit of former spouse using CHCBP eligibility.
 - These benefits are an entitlement if the spouse fulfills the requirements.
 - They should therefore never be “bargained for,” since they cost the member nothing, and are not something the member can choose whether or not to provide.

Courtesy of: WILLYCK LAW GROUP
 3591 E. Bonanza Rd., Suite 200
 Las Vegas, Nevada 89110-2101
 Tel: (702) 438-4100
 Fax: (702) 438-5311
 Web: www.willicklawgroup.com
 Email: marshal@willicklawgroup.com