

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
 - With repeal of 32 C.F.R. § 63.6, look for current regulations (in flux, but start with Dept. of Defense Financial Management Regulation Volume 7B, Chapter 3 (October, 2000))

- Ensure 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
 - 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
 - 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
 - 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

- 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

- Ensure “Military Retirement Benefits” or “Military Retired Pay” is defined as truly intended:
 - If something other than the current definition of “disposable pay” is intended, the order must say so (and the military will still construe the order as if that was the intended definition)
 - The definition of “disposable pay” is sometimes changed, and may or may not be what a state court typically divides
 - The intent regarding future cost of living adjustment increases should be clearly stated
 - The spousal portion of the retired pay 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)
 - 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

- 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 pay can be paid out for all current orders, combined
 - If support (or some other) arrears are also being garnished, the percentage of total “remuneration for employment” that may be collected rises to 65%

- Follow up **after** the divorce is necessary, by serving the order on the military pay center:
 - The court order **must** be certified within 90 days of service on the military pay center
 - Service must be made by certified mail, return receipt requested

- 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 of 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)
 - 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
 - Provide for the possible "roll over" of military retired pay into a Civil Service retirement or other pension
 - 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.

- Deal with the Survivor's Benefit Plan:
 - Realize that the benefit is *not* divisible between a present and former spouse; there can be only one beneficiary
 - State courts have authority to determine whether the spouse is to remain the post-divorce beneficiary of the survivorship interest
 - The *amount* of the benefit can be varied, by basing it upon the full retired pay amount or some lesser sum
 - 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
 - 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

- Obtain information regarding military-related benefits:
 - 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 a former spouse remarries, the medical benefits are lost permanently even if the later marriage ends
 - 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