

THE LEGAL ASSISTANCE OFFICES OF
III CORPS, 1ST CAVALRY DIVISION, 4TH INFANTRY DIVISION (MECHANIZED)
FORT HOOD, TEXAS 76544

THE UNIFORMED SERVICES FORMER SPOUSES' PROTECTION ACT (USFSPA)

I. INTRODUCTION - The Uniformed Services Former Spouses' Protection Act (the Act) recognizes the right of state courts to treat disposable military retired pay as marital property or community property. Thus, Act allows state courts to order a share of the disposable military retirement be paid to a spouse or former spouse (hereafter, the former spouse). In some cases, the Act allows former spouses to receive their share of military retired pay directly from military finance centers. Furthermore, the Act provides qualifying former spouses with continued medical care and privileges and allows former spouses to be designated as SBP beneficiaries. This information paper is designed to provide a brief summary of the Act. It is NOT designed to be a substitute for individual legal advice from a Legal Assistance attorney. Should you need additional assistance, contact the appropriate Legal Assistance Office designated on the last page of this form.

II. DIVISION OF DISPOSABLE MILITARY RETIREMENT PAY UNDER USFSPA

A. Generally - The Act itself does not provide for an automatic division of a member's military disposable retired pay to a former spouse. State law controls whether and how much to divide military retired pay. There is no formula provided in Federal Law. In doing so, each state must decide whether the military disposable retired pay is marital or community property before ordering any entitlement or division. Currently, most states, including Texas, consider military disposable retired pay community or marital property and thus divisible. In order for a former spouse to receive a share of their ex-spouse's military disposable retired pay, he/she must be awarded a portion of the military disposable retired pay as property in their final decree of divorce, dissolution, annulment, or legal separation (the court order). The Act also provides a method of enforcing current child support and/or arrears and current alimony awarded in a court order.

B. How Rank Plays a Big Role - The division of any disposable military retired pay is calculated at the rank at which the divorce became final, not what rank the soldier actually retires in. For example, after 12 years of marriage and 10 years of service SGT and Mrs. Smith obtain a divorce. SGT Smith continues in the Army and retires as a SGM after 20 years on active duty. Any share of SGM Smith's disposable military retired pay that Mrs. Smith would receive would be calculated as if SGM Smith retired as a SGT. As a result, SGM Smith would be able to retain a larger portion of his disposable retired pay.

C. Direct Payments From DFAS After Property Division - If a state court has awarded a share of retired pay to a former spouse of a member, direct payment from DFAS can be requested by the spouse under certain conditions.

1. 10/10 Rule - In order to qualify for direct payment from DFAS under the Act, the member and former spouse must have been married to each other for at least 10 years during which the member performed at least 10 years of creditable military service (the 10/10 Rule). The 10/10 Rule and the jurisdictional requirement generally do not apply to the enforcement of child support or alimony awards under the Act.

2. Limitations on the Amount of Payment - The amount of direct payment under Act is limited to 50 percent of the disposable retired pay. Disposable retired pay is calculated as gross retired pay less allowable deductions. In cases where there are payments both under the Act and pursuant to a garnishment for child support or alimony under 42 U.S.C. 659, the total amount payable cannot exceed 65% of the member's disposable retired pay. The right to payments under the Act terminates upon death of either the member or former spouse, unless the applicable court order provides that payments terminate earlier.

3. Jurisdiction Over the Soldier - In order for former spouse to receive direct payment from DFAS, the state court order must show that the issuing state court had jurisdiction over that member. Jurisdiction can be established over a member by reason of: (1) the member's residence in the territorial jurisdiction of the court (other than because of his/her military assignment); (2) the member's domicile in the territorial jurisdiction of the court; or, (3) the member's consent to the jurisdiction of the state court.

4. Compliance with the Sailor's and Soldier's Civil Relief Act - If a member is on active duty at the time of divorce, the state court order must show that member's rights under the Soldier's and Sailor's Civil Relief Act (SSCRA) were observed during the state court proceeding.

D. Tax Treatment of Divisions - Under recent amendments to the USFSPA, amounts paid directly to a former spouse by a military finance center will not be treated as retired pay earned by the retiree from the military services. Direct payments of retired pay received from finance by the former spouse are now subject to withholding. Separate W-2 forms are issued to the retiree and the former spouse.

III. MILITARY BENEFITS TO FORMER SPOUSES UNDER THE USFSPA and UNITED STATES CODE (U.S.C.)

A. Commissary and PX/BX (10 U.S.C. sec. 1062) - An unremarried former spouse of a member is entitled to commissary and post exchange privileges to the same extent and on the same basis as the surviving spouse of a retired member of the uniformed services, if the former spouse meets certain requirements.

1. 20/20/20 Test - In order to qualify there must have been: (1) 20 years of creditable service by the member; (2) 20 years of marriage; and (3) 20 years of overlap between marriage and the creditable service. The date of the divorce is irrelevant.

2. "Unremarried" - Unremarried means "unmarried" for purposes of these benefits. Termination of a subsequent marriage will revive the former spouse's Commissary and PX/BX privileges. For example, MSG Smith and Mrs. Smith married for 20 years, all of which time SGT Smith was in the Army. They divorced, Mrs. Smith then remarried and became Mrs. Johnson. Mrs. Johnson then divorced from Mr. Johnson, her second husband. Mrs. Johnson is entitled to use the PX/BX and Commissary.

B. Medical Benefits (10 U.S.C. sec. 1072, 1078 & 1086) - There are three categories of health care. To qualify for the health care category, a former spouse must meet certain requirements.

1. Full Military Health Care Program - This category includes CHAMPUS coverage (up to age 62) and in-patient and out-patient care at military treatment facilities. To qualify, a former spouse must:

a. Remain Unmarried - Termination of a subsequent marriage by divorce or death of the second spouse does not revive health care benefits, but annulment of the second marriage does;

b. Meet the 20/20/20 Test or the 20/20/15 Test - In order to qualify there must have been: (1) 20 years of creditable service by the member; (2) 20 years of marriage; and (3) 20 years of overlap between marriage and the creditable service. However, if the divorce was dated prior to 1 April 1985, then only 15 years of overlap is necessary to qualify;

c. Not Enroll in an Employer-Sponsored Health Insurance Plan - an unremarried former spouse must not enroll in an employer-sponsored health insurance plan or they become ineligible for military medical benefits.

2. Transitional Health Care - This category provides full coverage for one year after the divorce, with the possibility of limited coverage for an additional year. To qualify, a former spouse must:

a. Remain Unmarried - Termination of a subsequent marriage by divorce or death of the second spouse does not revive health care benefits, but annulment of the second marriage does;

b. Meet the 20/20//15 Test - In order to qualify there must have been: (1) 20 years of creditable service by the member; (2) 20 years of marriage; and (3) 15 years of overlap between marriage and the creditable service;

c. Not Enroll in an Employer-Sponsored Health Insurance Plan - an unremarried former spouse must not enroll in an employer-sponsored health insurance plan or they become ineligible for military medical benefits.

d. Second Year of Limited Coverage - To qualify for the second year of limited coverage, the former spouse must have enrolled in the DOD Continued Health Care Benefit Program (CHCBP).

3. DOD Continued Health Care Benefit Program (CHCBP) - The CHCBP is a premium based temporary health care coverage program designed to mirror the benefits offered under the basic CHAMPUS program, however it is not part of CHAMPUS. Anyone who loses entitlement to military health care becomes eligible. CHCBP facilitates retention of medical insurance coverage until alternative coverage can be obtained. Most people, if they enroll within 60 days of losing CHAMPUS benefits, have guaranteed eligibility. CHCBP premiums must be paid three months in advance. Rates are set for two age groups: individual and group, by the Assistant Secretary of Defense for Health Affairs. Former spouses and others who no longer qualify as dependents, qualify for 36 months of coverage.

IV. USFSPA AND THE SURVIVORS' BENEFIT PLAN (SBP)

A. Generally - A former spouse of a soldier or former soldier who elects to designate that former spouse as a beneficiary under the SBP, or agrees to designate that former spouse as a beneficiary, which agreement is recognized, adopted, or ratified in a court order, may be paid a monthly portion of retired pay in accordance with the provisions of the Uniformed Services Survivor Benefit Plan. Furthermore, under recent Amendments to the USFSPA, a

former spouse can now be designated an SBP beneficiary in the same category that applies to current spouses, so the “natural person with an insurable interest” offset does not apply.

B. Court Ordered SBP Designation (10 U.S.C. sec. 1450(f)(3)(A)) - A civil court can now order a retiring soldier to designate the former spouse as an SBP beneficiary—the election need not be voluntary. This “deemed” or court-ordered election is not automatic. It must be triggered by a request from the former spouse, and the request must be sent to the appropriate military finance center no later than one (1) year after the date of the court order. Once a timely request is made, the military finance center will flag the member’s records. Upon the member’s retirement, the former spouse will be designated as an SBP beneficiary.

C. SBP Contact Information - All correspondence regarding SBP coverage should be sent directly to the DFAS Retired Pay Office:

Defense Finance and Accounting Service
Cleveland Center [Attn: Code FRB (for retired members) or Attn: Code FRABA
(for active duty members and reservists)]
PO Box 99191
Cleveland, Ohio 44199-1126
Toll free 1-800-321-1080

V. USFSPA AND SEPERATION INCENTIVES (VSI, SSB)

Generally - In addition to involuntary separation benefits and voluntary 15 year retirement, some soldiers are offered annual payments (voluntary separation incentive or VSI) or lump sum (special separation benefit or SSB) if they elect to leave active duty voluntarily before retirement. These payments are clearly not “disposable retired pay” and therefore do not fall under the USFSPA. The statutes authorizing VSI/SSB do not preclude states from treating the payments as marital property. State law will determine whether VSI/SSB payments are marital property and therefore divisible. Case law in Texas suggests that Texas courts will treat VSI/SSB payments the same as retirement pay, making it divisible and payable to a former spouse.

VI. USFSPA AND DOMESTIC ABUSE CASES (10 U.S.C. sec. 1408(h))

A. Generally - Current law allows former spouses to collect a portion of a member’s disposable retired pay (and other benefits) even though the service member does not retire due to domestic abuse.

B. Requirements for Eligibility - In order for the former spouse to qualify, certain requirements must be met: (1) the former spouse must obtain a court order awarding as a property settlement a portion of disposable retired pay; (2) the member must be eligible by years for retirement but loses his or her right to retire due to misconduct involving dependent abuse; and, (3) the person with the court order was either a victim of the abuse or the parent of the child who was the victim of the abuse.

C. Benefits - Benefits include: (1) retired pay as certified by the Secretary of the Army determined by the amount the member would have received if the member retired upon the date eligible; (2) access to the PX/BX; (3) access to the Commissary; (4) medical and dental; and, (5) legal assistance. These benefits terminate upon remarriage but can be revived by a divorce, annulment or death of the subsequent spouse.

D. Procedures for Obtaining Payment - DFAS treats these situations similar to any other direct payment request. Therefore, the request for payment must meet the requirements for direct payment of a property settlement (i.e. the 10 Year Test).

VII. APPLYING FOR PAYMENTS FROM DFAS UNDER THE USFSPA

In order to apply for payments under the Act, a completed application form (DD Form 2293) signed by the former spouse together with a certified copy of the applicable court order certified by the clerk of court, within 90 days immediately preceding its service, should be served either personally, by facsimile, or by mail upon the:

Defense Finance and Accounting Service
Cleveland Center, Code L
PO Box 998002
Cleveland, Ohio 44199-8002
216-522-5301 (Customer Service)
216-522-5394 (Fax Number)

The application form should state which awards the former spouse is seeking to enforce under the Act (i.e., alimony, child support, and/or division of retired pay as property). If the application does not contain this information, then only rewards of retired pay as property will be enforced by DFAS under the Act. A former spouse should also indicate the priority of the awards to be enforced, in case there is not sufficient disposable retired pay to cover multiple awards. The court order should contain sufficient information for DFAS to determine whether the SSCRA, and the Act's jurisdictional and 10/10 requirements (if applicable), have been met. If DFAS cannot determine the parties' marriage date from the court order, then the former spouse must submit a photocopy of their marriage certificate. If the former spouse is requesting child support, and the court order does not contain the birth dates of the children, the former spouse must provide photocopies of the children's birth certificates. If the requirements of the Act have been met, payments to the former spouse will begin no later than 90 days after the date of effective service of a complete application. If the member has not yet retired at the time the former spouse submits his or her application, payments must begin no later than 90 days after the date on which the member first becomes entitled to receive retired pay.

IV. CONCLUSION - The USFSPA is a complicated instrument which may require an interpretation by a Legal Assistance Attorney in applying it your specific circumstances. If you feel the assistance of a Legal Assistance Attorney is necessary, contact your unit's Legal Assistance Office to schedule an appointment or to inquire about walk-in times. Bring all relevant legal and court documents with you. If you do not have them, request a copy from the court house where you received the court order.

FOR ADDITIONAL INFORMATION CONTACT THE LEGAL ASSISTANCE OFFICES ON FORT HOOD: III Corps, Building 1001, Room C224, 287-7901/3199; 1st Cavalry Division, Building 28000, Room 1155, 287-6060; 4th Infantry Division (Mech), Building 410, Room 175, 287-1850