



# Legal Briefs

From the Fort Knox Legal Assistance Office

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## THE UNIFORMED SERVICES FORMER SPOUSES PROTECTION ACT (UFSPA)

### Processing Requests for Allotment Under the UFSPA

The Uniformed Services Former Spouses Protection Act (USFSPA) gives state courts the right to distribute military retired pay to a spouse or former spouse. Kentucky is one of many states that recognize military retired pay as an item of marital property that can be distributed as part of a divorce decree.

The USFSPA also provides a method for enforcing the court's decree on retired pay. If a former spouse has been awarded a portion of the military member's retired pay as marital property, the former spouse can apply to receive direct payment from the Government through the Defense Finance and Accounting Service (DFAS). However, the former spouse must meet certain requirements:

- The former spouse must have been awarded a portion of the member's retired pay as an item of marital property in the final court order. The USFSPA only gives state courts authority to award retired pay to the former spouse if the court chooses to do so; it does not require that the court do so. Unless the court has issued a final order awarding a portion of the member's retired pay to the former spouse, then DFAS cannot give the pay directly to the former spouse.
- The court order must show that the member's rights under the Soldiers and Sailors Civil Relief Act of 1940 (SSCRA) were observed during the court proceeding.
- The court order must show that the court had jurisdiction over the member by reason of (1) the member's residence within the territorial jurisdiction of the court (other than because of his military assignment); (2) the member's domicile in the territorial jurisdiction of the court; or (3) the member's consent to the court's jurisdiction, usually shown by the member taking some affirmative action to appear or defend in the legal proceeding.
- There must be a "10/10 overlap": At least 10 years of marriage between the former spouse and the member, during which the member performed at least 10 years of military service creditable for retirement purposes. The court order should reflect the 10/10 overlap by containing information regarding the date of marriage and the soldier's period of military service.

- The court order must set forth the award of retired pay as either a fixed dollar amount or as a percentage of disposable retired pay. (The percentage method is more often used because it is the fairest to the former spouse; it allows for Cost of Living Adjustments (COLA's) which members routinely receive. If the order sets forth the award as a fixed dollar amount, the former spouse cannot receive any amount above that dollar figure, and the former spouse's percentage of retired pay effectively decreases with each COLA.)

There is no "magic language" required to express a percentage: for example, "(Former spouse) is awarded \_\_\_\_ percent of (Member's name)'s military retired pay" is sufficient for enforcement of the order under the USFSPA. In fact, most of the problems arise in cases where the court order contains a formula or hypothetical for computation of the award of retired pay. In completing a formula, the only number DFAS will supply is the amount of time creditable for retirement. All other information must be provided in the court order. If more information than that is needed to fill in the formula numbers and compute an amount of retired pay, DFAS will reject the application and require that the former spouse obtain an order from the court supplying the other numbers necessary to complete the formula. This type of order is known as a "clarifying order."

DFAS has stated that the following is an acceptable way to express an active duty award of retired pay by means of a formula:

"The former spouse is awarded a percentage of the member's disposable retired pay, to be computed by multiplying \_\_\_\_% times a fraction, the numerator of which is \_\_\_\_ months of marriage during the member's creditable military service, divided by the member's total number of months of creditable military service."

#### **How to Apply for an Allotment of Retired Pay Under the USFSPA**

In order to apply for payments under the USFSPA, the former spouse must complete and sign DD Form 2293, Application for Former Spouse Payments from Retired Pay. The form is fairly self-explanatory, and also has directions on the back. The applicant must also provide a copy of the final court order that has been certified within 90 days of being mailed to DFAS. If the order was entered earlier than that, the former spouse must obtain another certified copy of the order from the court clerk's office.

The maximum that can be paid to the former spouse by DFAS is 50% of a member's disposable retired pay, which is generally defined as retired pay to which the member is entitled less money owed to the Government, money awarded as disability pay and money deducted because of election of Survivors Benefit Plan. However, if there are additional garnishments for alimony or child support, up to 65 percent may be sent to the applicant.

#### **What We Can Do For You**

There are many other issues beyond the scope of this information paper that may arise regarding the USFSPA and the former spouse's entitlement to direct payments of retired pay. If you have any questions, please call the Ft. Knox Legal Assistance Office at 624-2771 to schedule an appointment.