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Military Benefits for Former Spouses: Legislation and Policy Issues

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Summary

In 1981, the Supreme Court ruled that the former spouse of a military member or retiree could not be awarded any share of that member's/retiree's retired pay as a part of a divorce property settlement in a community property state. In response, Congress enacted the Uniformed Services Former Spouses' Protection Act (USFSPA) in 1982. Under the USFSPA, as amended, state courts can treat *disposable* military retired pay as divisible property in divorce cases. However, state laws may vary on these concepts. The USFSPA makes no assumption of such a division nor does it presume how much of a division should be made. In addition to possible receipt of retired pay, certain former spouses remain eligible to receive certain military benefits or privileges. Recent changes in other laws that affect the concurrent receipt of military retired pay and veteran disability pay may affect the amount of retired pay a former spouse receives.

In other situations, later career and financial decisions made by military retirees may affect the availability of their retired pay. For example, military retirees who take federal civilian jobs and then retire from those jobs can waive their military retired pay and credit their military time to their civilian careers. In so doing, they eliminate their military retired pay, and thereby any share that might have been awarded to the former spouse.

Since its inception, the USFSPA has remained contentious. Opponents of the law feel that it is unfair to servicemembers and should be modified or repealed. Proponents argue that the law protects the former spouse within nationally accepted standards. Some of the most frequently cited issues include (1) definition of disposable retired pay, (2) effects from new laws concerning concurrent receipt of military retired pay and veteran disability compensation, (3) interactions with other federal retirement systems, (4) effects in cases of early separation of servicemembers, and (5) treatment of benefits upon remarriage of a former spouse. As with the original provisions of the USFSPA, these and other proposed changes have been the source of great debate.

Although legislation making various changes to the USFSPA has been introduced in the past, none of this legislation has allowed for retroactive change to settled cases.

Contents

Purpose 1
The Uniformed Services Former Spouses Protection Act (USFSPA) 1
What Does the USFSPA Authorize? 2
Survivor Benefit Plan: Benefits for Divorced Spouses 4
Other Benefits for Former Spouses of Retired Members 5
Reopening Court Cases 6
Implementation of the Existing Law and Related Measures 7
Concurrent Receipt of Retired Pay and Disability Compensation 7
Dual Compensation: Retired Pay and Civil Service Pay 9
Interactions with Other Federal Retirement Systems 10
Federal Civil Service Retirement and Waiver of Military Retired Pay 11
Persons Affected by "Catch 62" 12
Early Separations 12
Other Issues for Congress 12
Military Retired Pay and Civilian Pensions 13
Recent Changes to the Military Retirement System 13
Pay Grade at Retirement v. Pay Grade at Divorce 14
Remarriage of a Former Spouse 15
Working Spouses and Dual-Service Couples 16

Contacts

Author Information 17

Purpose

This report provides a general discussion of legislative provisions and proposals relating to the military benefits for former spouses. It is not designed to answer detailed questions about specific issues arising in individual cases. Thus, it does not deal with case law nor does it apply legal or judicial interpretations of enacted statutes to specific situations.

Questions that this report seeks to answer include the following:

- What benefits can former spouses of members or retirees of the uniformed services receive under law?
- What role do the services play in facilitating delivery of those benefits? What practical problems arise in the implementation of and service involvement in claims on those benefits?
- How does the current system for a divorce-related division of military retired pay work?

These frequently asked questions reflect confusion and controversy over social policy and economic equity issues. The administrative and legal implementation has proven complex, due to the large number of couples affected and the variety of circumstances surrounding their military service and divorce.

The Uniformed Services Former Spouses Protection Act (USFSPA)

Prior to 1981, state courts disagreed as to whether they were authorized or constrained by federal legislation or federal legal precedent in dividing military retired pay in divorce-related property settlements. Inconsistencies among the states and perceptions of unfairness and arbitrariness were common grounds for criticism of the system.

The Supreme Court ruled (6-3) on June 26, 1981, in the case of *McCarty* v. *McCarty*,[1] that the former spouse of a military member or retiree could not be awarded any share of that member's/retiree's retirement pay as a part of a divorce property settlement in a community property state,[2] because then-current federal law did not authorize the treatment of military retired pay as divisible property in such a settlement.[3] In reaching this ruling, however, the court did not necessarily endorse its social impact. Justice Blackmun (writing for the majority), virtually invited Congress to consider a change in the law to allow such a division to be made:

> We recognize that the plight of an ex-spouse of a retired member is often a serious one. See Hearing on H.R. 2187, H.R. 3677, and H.R. 6270 before the Military Compensation Subcommittee of the House Committee on Armed Services, 96th Cong., 2d Sess. (1980). That plight may be mitigated to some extent by the ex-spouse's right to claim Social Security benefits, cf. Hisquierdo, 439 U.S. at 590, and to garnish retired pay for the purposes of support. Nonetheless, Congress may well decide, as it has in the Civil Service

[1] 453 U.S. 210 (1981).

[2] The *McCarty* case was initiated in California, one of eight community property states at the time. Other community property states included Arizona, Idaho, Louisiana, Nevada, New Mexico, Texas, and Washington.

[3] Generally, a community property state is defined as one in which all property earned by either the husband or the wife during the course of the marriage is treated as jointly held property for the purposes of a settlement.

> and Foreign Service contexts, that more protection should be afforded a former spouse of a retired servicemember. The decision, however, is for Congress alone. We very recently have reemphasized that in no area has the Court accorded Congress greater deference than in the conduct and control of military affairs.[4]

Congress responded by enacting the Uniformed Services Former Spouses' Protection Act in September 1982.

What Does the USFSPA Authorize?

The USFSPA has five main provisions.

1. It enables state courts to treat disposable military retired pay as divisible property in divorce cases.[5]
2. It allows direct payments by the uniformed services (Army, Navy, Marine Corps, Air Force, and Coast Guard) of up to 50% of a member's or former member's disposable retired pay to the former spouse *if the settlement involved is in compliance with the USFSPA*.
3. It allows for the enforcement of alimony and child support (in conjunction with previously enacted provisions of law providing for such enforcement regarding military personnel in 42 U.S.C. 659).
4. It allows a military member or retired member to voluntarily designate a former spouse as a beneficiary under the military Survivor Benefit Plan. This provision was later modified by Congress to allow state courts, under certain conditions, to *order* a member or retiree to provide military Survivor Benefit Plan benefits to a former spouse.[6]
5. It defines which former spouses are eligible to secure access to military-sponsored medical care benefits (e.g., care at uniformed service facilities), as well as commissary and exchange privileges.[7]

The USFSPA currently allows state courts to consider disposable military retired pay (excluding disability retired pay) as divisible property in a divorce settlement, and establishes procedures whereby a former spouse can receive direct payment of a part of that retired pay directly from the Defense Finance and Accounting Service (DFAS).[8] There has been some confusion about the distinction between USFSPA provisions that authorize courts to divide retired pay, and provisions that allow for the *direct payment* of divided retired pay. Under the USFSPA, state courts are free

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[4] 453 U.S. 210 (1981).

[5] Disposable retired pay is retired pay less withholdings, disability pay the member is entitled to on the date the member retires or was placed on the temporary disability retirement list, and Survivor Benefit Plan deductions. For divorces occurring after November 5, 1990, "disposable retired pay" is total monthly retired pay less amounts owed to the United States for previous overpayments and other recoupments required by law, amounts deducted as a result of forfeitures of retired pay ordered by a court-martial, and amounts waived in order to receive compensation under title 5 U.S. Code (civil service) or title 38 U.S. Code (veterans' benefits).

[6] For more information on the military Survivor Benefit Plan, seeCRS Report R45325, *Military Survivor Benefit Plan: Background and Issues for Congress*, by Kristy N. Kamarck and Barbara Salazar Torreon.

[7] For more information on the Military Health Services System, see CRS Report R45399, *Military Medical Care: Frequently Asked Questions*, by Bryce H. P. Mendez.

[8] When enacted, each service (Army, Navy, including the Marine Corps, and Air Force) had their own pay services. Since then, DOD's pay operations have been consolidated under the Defense Finance and Accounting Service (DFAS). DFAS Cleveland handles matters related to retired pay, to include USFSPA.

to order the division of disposable retired pay in any manner congruent with state law. The USFSPA *does not* direct state courts to divide retired pay or to award a former spouse a certain percentage of disposable retired pay. Whether such a division is made, and if made, what percentage is awarded to the former spouse is left to the discretion of the court in each individual settlement.

The secretary of the particular military department (Army, Navy—including the Marine Corps, and Air Force, and the Secretary of Homeland Security for the Coast Guard) can make direct payments of a portion of that pay to a former spouse. These payments are managed by DFAS.[9] In order to be eligible for *direct payment*, a former spouse must have been married to the servicemember or retiree at least 10 years, during which the servicemember or retiree must have served at least 10 years of creditable military service. In addition, the awarded division of military retired pay must be incorporated in a court-ordered, -ratified, or -approved divorce-related settlement. These provisions of the USFSPA pertain only to property settlements and do not affect provisions for alimony or child support. The USFSPA does *not* relieve the servicemember or retiree from the obligation to pay court-ordered alimony and/or child support payments (which are distinct from a divorce *property* settlement) whether or not the retired pay is divided.

The service secretary concerned is required to begin payments to the former spouse within 90 days after the receipt of a valid court order. If the member has not yet retired from the Armed Forces at the time of the court order, the service secretary must begin payments not later than 90 days after the member becomes entitled (i.e., retires). The USFSPA "does not authorize any court to order a member to apply for retirement or retire at a particular time in order to effectuate any payment."[10]

What is the 10/10 rule?

When discussing military divorce settlements some people refer to the 10/10 rule. The 10/10 rule only affects how the former spouse receives the divided retired pay. *Direct payments* are made by the Defense Finance Accounting Service (DFAS) to former spouses who are eligible under the 10/10 rule. In order to be eligible for *direct payment* of retired pay from DFAS, a former spouse must have been married to the servicemember or retiree at least 10 years, during which the servicemember or retiree must have served at least 10 years of creditable military service. Eligibility to receive direct pay under this rule is not automatic; the award of military retired pay still must be incorporated in a court-ordered, -ratified, or -approved divorce-related settlement.

Former spouses who do not meet the 10/10 criteria may still be awarded a portion of the servicemember or retiree's retired pay by the court. However, in this case, the retired servicemember receives his/her entire retired pay from DFAS and he/she arranges for the court-ordered amount to be distributed to his/her former spouse.

Under the USFSPA, the amount of court-ordered retired pay that the services can pay to a former spouse under the *direct payment* provisions is limited to 50% of disposable retired pay or up to 65% if other provisions for garnishment such as alimony or child support (under 42 U.S.C. 659) exist. When the servicemember has more than one former spouse, payment orders are handled by the secretary on a first-come, first-serve basis. The combined amount of retired pay paid out to one or more ex-spouses through the direct payment mechanism cannot exceed 65% of disposable retired pay, but this does not relieve the member or retiree of an obligation to pay any additional sums which are awarded to a former spouse.

When conflicting orders exist (e.g., retired pay subject to more than one court order), the USFSPA instructs the secretary concerned to send the amount specified in the lesser of the two conflicting

[9] For more information on how DFAS handles pay to former spouses under USFSPA, see http://www.dfas.mil/garnishment/usfspa/legal.html.

[10] 10 U.S.C. 1408(c)(3).

orders to the former spouse(s), retain the difference between the two (up to 50%), and send the balance to the retiree. Upon resolution of the conflicting order, the secretary is to allocate the retained amount in accordance with the USFSPA.

Finally, the USFSPA does not allow a court to consider military retired pay in a divorce-related property settlement unless the court has jurisdiction over the servicemember or retiree by reason of his/her

- residence other than military assignment in the territorial jurisdiction,
- domicile in the territorial jurisdiction of the court, or
- consent to the jurisdiction of the court.

Survivor Benefit Plan: Benefits for Divorced Spouses

In addition to providing for the division and direct payment of military retired pay, the USFSPA allows divorced spouses of military members or retirees to draw benefits from the DOD Survivor Benefit Plan (SBP) under certain circumstances. The SBP, established by P.L. 92-425, September 21, 1972, provides financial protection for the surviving dependents of deceased military members and retirees.[11] All personnel of the uniformed services who retire on or after September 21, 1972, are automatically enrolled in the SBP unless they elect not to participate. In 2001, Congress extended SBP coverage to personnel who die while serving on active duty. Such coverage was extended to the survivors of those individuals who die while on active duty, on or after September 10, 2001.[12] Changes concerning the SBP coverage can be made after the initial agreement only if both parties to the divorce agree to it. Any elections other than the maximum protection for a spouse made after March 1, 1986, can take place only if the spouse concurs.[13]

Under the plan, retired pay is reduced to provide for the cost of a survivor benefit. The USFSPA provides that members or retirees may voluntarily elect to name a former spouse as beneficiary for divorces occurring before November 14, 1986. This election may be part of, or incident to, a divorce-related property settlement. If a divorce occurred on or after November 14, 1986, however, a court may order a member or retiree to provide SBP protection as part of or incident to a divorce. According to changes in law implemented by the FY1987 National Defense Authorization Act, "A court order may require a person to elect (or to enter into an agreement to elect) ... to provide an annuity to a former spouse (or to both a former spouse and child)."[14] This language does not require courts to make such an order, but gives them the freedom to do so.

The National Defense Authorization Act for Fiscal Year 2016 amended the Survivor Benefit Plan (SBP) statute to provide a member who had made an election to provide SBP or Reserve Component SBP (RCSBP) coverage for a former spouse the ability to cover a subsequent spouse if the former spouse dies. The legislation included an open season (November 25, 2015, to November 24, 2016) to accommodate members whose covered former spouse beneficiaries were already deceased when the legislation was enacted.[15]

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[11] Upon the death of a military member/retiree, income from the military ceases.

[12] P.L. 107-107.

[13] U.S., Congress, Senate, Conference Committee, FY1986 Department of Defense Authorization Act. S.Rept. 99-118, S. 1160, 99th Cong., 1st Sess., July 29, 1985: 98.

[14] 10 U.S.C. 1450(f)(4).

[15] For more information, see Defense Finance and Accounting Service (DFAS) Former Spouse SBP Coverage Open Season: https://www.dfas.mil/retiredmilitary/provide/sbp/FS-SBP-open-season-16.html.

Other Benefits for Former Spouses of Retired Members

The USFSPA and subsequent amendments also authorized military medical benefits and exchange and commissary privileges for certain un-remarried former spouses of military members or retirees.[16] Eligibility for these benefits depends on both the years of marriage and service by the member or former member and, in certain instances, the date of the final decree of divorce, dissolution, or annulment. Each set of requirements for eligibility is treated separately here.

When originally enacted in 1982, the USFSPA provided that, if a member had been married for at least 20 years to one spouse, during which time the member performed at least 20 years of creditable military service, the un-remarried former spouse was eligible for military commissary and exchange privileges, as well as military medical benefits, if he or she did not have medical coverage under an employer-sponsored health program. This restriction (known popularly as the 20/20/20 restriction) was considered unfair by some because it excluded many former spouses who met most, but not all, of the time requirements. In some cases, for example, the marriage could have lasted 20 years, the servicemember had served 20 years, but the two did not overlap by the required 20 years.

Legislation enacted in 1984 (as subsequently modified) established benefit eligibility provisions for former spouses who do not meet the 20/20/20 restriction (the benefits of those who *do* meet the 20/20/20 restriction were not affected by these provisions).[17]

First, it provided full eligibility for medical care for former spouses whose final decree of divorce, annulment, etc., was dated before April 1, 1985, *and* who meet the eligibility requirements, *except* for the fact that their minimum of 20 years of marriage and 20 years of creditable service overlapped by only 15 years or more, and by less than 20 years (i.e., they meet a 20/20/15 restriction).

Second, it provided a transitional medical care program for former spouses who met the eligibility requirements and the 20/20/15 restriction, but whose final decree of divorce was April 1, 1985, or later. They would be eligible for transitional care in the military medical care system for two years, followed by the right to convert to a private health insurance plan with the identical restriction on remarriage and other medical coverage.[18] Legislation enacted in 1988 limited the period of transitional medical care to one year.[19]

Third, the 1984 legislation provided that former spouses who were otherwise eligible, but who did not meet the minimum 20/20/15 restriction would be eligible for coverage under a specifically formulated private health care plan, with responsibility for premium payments for this plan to be determined by the court in the divorce property settlement.[20]

[16] See 10 U.S.C. §1062 and 10 U.S.C. §1072(2)(F and G).

[17] P.L. 98-525, Section 645(a), September 27, 1984.

[18] See 10 U.S.C. 1086a.

[19] See P.L. 100-456, Section 651; P.L. 101-189, Section 731.

[20] See 10 U.S.C. 1078a.

Reopening Court Cases

The legislative history of the USFSPA indicates that it was the intent of Congress that the direct payment provision of the USFSPA became effective on June 26, 1981, and would not be applied to cases finalized before that date. It was noted in the conference report on the act that

> Although the Conference Report contains no prohibition against courts reopening decisions before [June 26, 1981], the conferees agreed that changes to court orders finalized before the *McCarty* decision should not be recognized if those changes were effected after the *McCarty* decision (and before the effective date of the new title X) to implement the holding in that decision (for example, a modification setting aside a pre-*McCarty* division of military retired pay).[21]

Thus, if a divorce were settled two weeks before the *McCarty* decision and the member retired after *McCarty*, divisibility of retired pay (and other provisions) would, arguably, not apply unless the original decree allowed for a division of retired pay. However, the applicability of the USFSPA, in general, to reopened cases, remained ambiguous.

Congress has no direct control or jurisdiction over state courts, which handle almost all domestic relations law (separation, divorce, adoption, etc.). However, Congress does have control over the administration and disbursal of federal compensation and benefits related to domestic relations law. Congress has indicated its intention that federal law governs the treatment of these benefits in divorce-related settlements.

The U.S. Comptroller General has ruled that certain former spouses, who have their pre-*McCarty* divorces reopened on or after June 26, 1981, may be ineligible to receive direct payment from the military services.[22] Nevertheless, despite congressional language to the contrary, some states continued the practice of reopening pre-*McCarty* divorces in order to allow for a division of retired pay. The National Defense Authorization Act for Fiscal Year 1991 placed explicit limits on the ability of state courts to consider retired pay as property in the reopening of a pre-*McCarty* divorce which did not provide for such a division.[23] In its report on this legislation, the House Armed Service Committee stated the following:

> The committee is concerned because some state courts have been less faithful in their adherence to the spirit of the law. The reopening of divorce cases finalized before the Supreme Court's decision in (*McCarty* v. *McCarty*) that did not divide retired pay continues to be a significant problem. Years after final divorce decrees have been issued, some state courts, particularly those in California, have reopened cases (through partition actions or otherwise) to award a share of retired pay. Although Congress has twice stated in report language that this result was not intended, the practice continues unabated. Such action is inconsistent with the notion that a final decree of divorce represents a final disposition of the marital estate.
>
> Section 555 would provide that a court may not treat retired or retainer pay as property in any proceeding to divide or partition such pay of a member as the property of the member

[21] U.S., Congress, House, Conference Committee, Department of Defense Authorization Act for Fiscal Year 1983, H.Rept. 97-749, August 16, 1982: 167-168.

[22] In a case before the Comptroller General, a pre-June 26, 1981, divorce settlement did not divide military retired pay; the settlement was modified after June 26, 1981, to include a division of military retired pay. The efforts of the former spouse to receive direct payment were rejected by the Army. The Comptroller upheld the Army's decision to reject the request for direct payment because (1) the original decree denied a division of retire pay and (2) the original decree occurred before June 26, 1981. Matter of: Phyllis M. Tharp B-229440 *68 Comp. Gen. 116 (1988)*. "Direct Payment of Retired Pay to Divorcees Limited," *Army Times*, January 16, 1989: 16.

[23] P.L. 101-510, 104 Stat. 1485, November 5, 1990, codified at 10 U.S.C. Section 1408(c)(1).

> and his spouse if a final decree of divorce, dissolution, annulment or legal separation (including court ordered, ratified, or approved property settlement incident to such a decree) was issued before the *McCarty* decision and did not treat retired pay as property of the member and the member's spouse or former spouse. This provision would apply to judgments issued before, on, or after the date of enactment [November 5, 1990] of this Act, but only with respect to any requirement to make payments pursuant to such judgments after the date of enactment. Thus, individuals divorced before the *McCarty* decision who have their cases reopened would not be relieved of the obligation to make payments until after the effective date of this Act.[24]

Implementation of the Existing Law and Related Measures

Implementation of the provisions of the USFSPA has often been confusing and frustrating for those involved. Uneven implementation of the law, especially with respect to the direct pay provisions, and the changing definition of disposable pay as the basis for division of retired pay have been contributing factors. In addition, changes to other laws affecting the treatment of military retired pay with respect to other forms of compensation have also complicated the implementation of USFSPA.

In 1984, the U.S. General Accounting Office (GAO, now called the Government Accountability Office) published a report that examined the implementation of the USFSPA.[25] The GAO also noted that many of the early implementation problems were related to inconsistent language used in court-ordered settlements. Over the years, changes to the law and actions by the courts have overcome many of these problems.

Concurrent Receipt of Retired Pay and Disability Compensation

In recent years, Congress has addressed an issue concerning the payment of military retired pay to retirees who qualify for disability compensation from the Department of Veterans Affairs (VA). Disability payments are excluded from the definition of disposable retired pay. Provisions restricting "dual compensation" have been in effect since 1891, when Congress enacted language prohibiting the concurrent receipt of a disability pension in addition to pay for past or current service.[26] As modified in 1941, the law prevented the concurrent receipt of both military nondisability retired pay and veteran's disability compensation. For those eligible for both, military retired pay was offset or reduced, dollar for dollar, by VA disability benefits. For example, if a retired servicemember was eligible for $1,000 per month in retired pay and $400 in VA disability benefits, the servicemember would receive $1,000 in retired pay plus $400 in disability, minus a $400 reduction in retired pay, for a total of $1,000 before taxes. While retired pay is taxable, VA disability benefits are tax free, so the retiree would only be taxed on the $600 of retired pay.

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[24] U.S. Congress, House, Committee on Armed Services, National Defense Authorization Act for Fiscal Year 1991, H.Rept. 101-665, H.R. 4739, August 3, 1990: 279; P.L. 101-510, 104 Stat. 1569, November 5, 1990.

[25] U.S. General Accounting Office, Implementation of the Uniformed Services Former Spouses' Protection Act, October 24, 1984, GAO, NSIAD-85-4, B-214076.

[26] See CRS Report R40589, *Concurrent Receipt: Background and Issues for Congress*, by Kristy N. Kamarck.

For the purposes of USFSPA, the definition of *disposable retired pay* excludes VA disability benefits.[27] Prior to 2004, a retiree eligible for disability compensation could choose to waive retired pay in the amount of the disability benefit and, thereby, reduce or eliminate the amount of retired pay available for division in a property settlement.

The FY2003 and FY2004 National Defense Authorization Acts (NDAAs) introduced two forms of concurrent receipt that allowed eligible servicemembers to receive both retired pay and certain disability compensation. These programs are known as Combat-Related Special Compensation (CRSC) and Concurrent Retirement and Disability Program (CRDP). CRSC is special disability compensation paid to those with *combat-related* disabilities and a VA disability rating of at least 10%. Servicemembers must apply for this compensation and it is not taxable. CRSC is not longevity retired pay; it is an additional form of compensation for certain members of the Armed Forces.[28] Thus payments are not divisible as property under USFSPA. CRDP is automatically paid to those with any *service-connected* disability that is (1) rated at least 50% or greater by the VA, and (2) have 20 years of qualifying military service or were retired under the Temporary Early Retirement Act (TERA). CRDP was phased in over a period of 10 years and was fully implemented in 2014.[29]

During the CRDP phase-in period, some eligible retirees saw their retired pay increase. For a retiree who is divorced and whose spouse has been awarded a percentage of the retired pay, the former spouses may also have seen an increase in the dollar amount received. Conversely, for those former spouses who were awarded a specific dollar amount of retired pay, changes in the total amount received by the retiree under CRDP may not have affected the amount the former spouse receives.

However, retired servicemembers with less than a 50% disability rating are not eligible for CRDP and are still required to waive retired pay in order to receive VA disability pay. This can result in reductions in the amount of money that a former spouse can claim in a divorce. In cases where the servicemember has waived retirement pay for nondivisible disability pay, some courts have ruled that the member must make up the difference in additional payments to the former spouse. However, a May 2017 Supreme Court ruling said that the lower courts cannot order a veteran to make the extra payments to a former spouse.[30] Advocates for spouses of veterans have noted that this ruling could have a negative financial impact on former spouses who rely on spousal support. Of particular concern for some are former spouses who had put their own careers on hold to be caregivers for a disabled spouse.[31]

If a retired servicemember applies and is eligible for CRSC, it is possible that part or all of disposable retired pay could be offset. This may put the former spouse in a situation where, regardless of the percentage of the court award, there is zero disposable retired pay to be divided. In addition, CRSC payments are retroactive to the date of filing or the enabling legislation on January 1, 2003, whichever is later. This means that if the former spouse had been receiving a

[27] A disabled individual is considered qualitatively in a different category than his/her able-bodied peers (including his/her former spouse). This is based on the assumption that such an individual does not have the same opportunities to reenter the work force. Disability pay may be his/her only source of income. It was reasoned that if this pay were divided, and the retiree had no other source of income, the retiree could be forced onto public assistance.

[28] 10 U.S.C. §1413a (g) states that "[p]ayments under this section are not retired pay."

[29] For more information on concurrent receipt, see CRS Report R40589, *Concurrent Receipt: Background and Issues for Congress*, by Kristy N. Kamarck.

[30] *Howell v. Howell*, (2017), "Held: A state court may not order a veteran to indemnify a divorced spouse for the loss in the divorced spouse's portion of the veteran's retirement pay caused by the veteran's waiver of retirement pay to receive service-related disability benefits."

[31] Bushatz, Amy, "Supreme Court Ruling May Cut Spouses' Divorce Pension Payments," *Military.com*, May 18, 2017.

portion of the retired pay prior to determination of CRSC eligibility, those payments may be recouped from him or her. Perceptions of unfair treatment resulting from the CRDP and CRSC changes may possibly encourage further legal consideration of already settled divorces and have led to calls for remedial legislative action. For example, in Section 642 of the Senate committee version of the FY2014 NDAA (S. 1197) there was a provision that would have protected payments made to former spouses prior to a servicemember's election of Combat Related Special Compensation (CRSC). The final version of the FY2014 National Defense Authorization Act (P.L. 113-66) did not include this provision.

Dual Compensation: Retired Pay and Civil Service Pay

At one time, the amount of military retired pay available for division could be reduced by statutes concerning "dual compensation" of retired military members employed by the federal government as civilians.[32] Dual compensation statutes provided that the retired pay of certain retirees, depending on their status as regular or reserve officers, or when they entered federal civilian service, was to be reduced or capped at certain limits. There were two categories of dual compensation. The first applied only to *retired regular officers* (i.e., reserve officers and enlisted personnel were not affected). Under this restriction, as of December 1, 1993, for example, retired regular officers employed by the federal civil service were entitled to the first $9,310.17 (or $8,700.93 for those who entered the service after August 1, 1986) of their annual retired pay, plus 50% of the remainder (the dollar figure is adjusted each year by the same formula used to calculate cost-of-living adjustments—COLAs—for military retired pay).

A second dual compensation restriction applied to *all* retired military members who were first employed by the federal civil service after January 11, 1979. Such retirees who were employed by the federal civil service had their combined civil service pay and military retired pay "capped" so that it was not equal to or greater than level V of the Executive Schedule. If the combined pay exceeded this level V, military retired pay was reduced.

A former spouse who was awarded a percentage share of a retiree's military retired pay would necessarily receive a reduced amount when total retired pay was reduced because of dual compensation restrictions. Such a reduction may have thwarted a court's intentions and, therefore, required the former spouse to seek a court-ordered adjustment of the property settlement.

In 1999, Congress repealed the above "dual compensation" restrictions allowing affected retirees to receive their full military retired pay.[33] The situation is noteworthy in that in some cases repeal had an effect on benefits available to certain former spouses. Hypothetically, a divorce property settlement that provided a fixed amount of retired pay to the former spouse would not be affected by this repeal. Nevertheless, had the spouse been awarded a portion of retired pay (stated as a percentage), the amount available would have increased following the repeal. Therefore, in this latter scenario, both the retiree and former spouse would have experienced an increase in their benefits.

[32] P.L. 88-448; 78 Stat. 484, August 19, 1964, Dual Compensation Act only applies to warrant officers and commissioned officers and is not affected by the receipt of disability retired pay. Other dual compensation laws affect all retirees in certain situations.

[33] P.L. 106-65; 113 Stat. 512 at 664, October 5, 1999.

Interactions with Other Federal Retirement Systems

The problems and potential inequities in dividing military retired pay in a divorce-related property settlement are particularly complicated when the servicemember is, or becomes, entitled to a pension under the Federal Civil Service Retirement (CSRS), Federal Employees' Retirement System (FERS), or Social Security.[34] Since 1957, military service has been subject to Social Security payroll taxes and has been counted as covered employment for all Social Security benefits. Thus, military retirees draw benefits from two systems completely independent of each other: military retired pay and Social Security. Most federal civilian employees hired before January 1, 1984, by contrast, are not covered by Social Security and do not receive Social Security based on their period of civil service employment.[35] This does not preclude these federal civilian employees from receiving Social Security benefits earned during other periods of employment covered by Social Security.

However, various provisions of law (1) permit the crediting of active duty military service under civilian retirement systems for the purpose of computing civil service retirement benefits, (2) require the reduction of civil service retirement benefits when the retiree first becomes eligible for Social Security retirement payments (generally at age 62) if no corresponding deposit to the Civil Service Retirement and Disability Fund (CSRDF) is made for post-1956 military service, and/or (3) permit retroactive deposit into the (CSRDF) for post-1956 military service in order to eliminate a recomputation that can take place at age 62 for those with military service credited to civilian retirement systems.[36]

A military member who, after retirement, becomes entitled to a civil service annuity can elect one of three options pertaining to military retired pay, Social Security, and a civil service annuity.[37] In each situation, the total income received both by the military retiree and by his/her divorced spouse from all federal retirement systems, civilian and military, could be affected by decisions made by the retiree.

a. *Receipt of both military and civil service retirement benefit, as well as Social Security benefits based on the years of military service*. This will provide the retiree with *three* separate retirement benefits—military retired pay, a civil service annuity, and Social Security retirement benefit. Coverage of military service under Social Security entitles spouse and former spouse (if the marriage lasted at least 10 years) of deceased military retirees to receive Social Security spouse survivor benefits based on the deceased retiree's military service.

b. *Waiver of military retired pay and crediting of all military service to civil service retirement, with the amount of civil service pension to be based on total federal service (including military service), as well as receipt of Social Security benefits based on his/her military service*. Under this option, the military retiree would receive *two* separate benefits—civil service retirement and Social Security. However, when the retiree reaches age 62, the years of military service can no longer be counted toward the civil service annuity (unless a

[34] For an overview of the Civil Service Retirement System (CSRS) and the Federal Employees' Retirement System (FERS), see CRS Report 98-810, *Federal Employees' Retirement System: Benefits and Financing*. For an overview of Social Security retirement benefits, see CRS Report R42035, *Social Security Primer*.

[35] Instead, most civilian federal employees hired before 1984 are covered by CSRS. Most civil servants first hired on or after January 1, 1984, however, are covered by the Federal Employees' Retirement System (FERS). FERS is integrated with Social Security; that is, FERS employees pay Social Security taxes and are fully covered by Social Security.

[36] For more information on these issues from the civilian federal retirement perspective, see CRS Report R40428, *Credit for Military Service Under Civilian Federal Employee Retirement Systems*.

[37] Years of active duty military service may not be double-counted under the military and civilian retirement systems.

deposit to the CSRDF is made) because they are counted toward Social Security. In this situation, the civil service pension is reduced at age 62 when Social Security becomes payable. (This reduction in civil service benefits is known as "Catch 62.")

c. *Selection of the above option (b), and deposit of a lump sum into the CSRDF to avoid a reduction in civil service annuity which would otherwise occur when the retiree reached age 62*. Under this option, the military retiree would also receive *two* separate annuities—civil service retirement and Social Security, but the civil service pension would not be reduced at age 62.[38] Section 306 of the Omnibus Budget Reconciliation Act of 1982 (P.L. 97-253, September 8, 1982) allows federal civilian employees who, because of their prior military service, would face "Catch 62," to avoid the reduction in their civil service annuity at age 62 by allowing them to deposit into the retirement fund an amount equal to what the retiree would have been required to pay into the civil service pension plan had he or she been a civilian federal employee during the time he or she actually performed military service. *The deposit must be made before the civilian employee actually retires from federal civil service*.[39]

"Catch 62" affects military retirees only if they elect to waive receipt of military retired pay in order to credit their military service toward federal civil service retirement. Military retirees who continue receiving separate military and civil service retirement annuities are not affected by "Catch 62" because none of their military service is credited toward civil service retirement.

Federal Civil Service Retirement and Waiver of Military Retired Pay

If a military retiree is divorced, later retires from the federal civil service, and elects to waive his or her military retired pay and credit his or her military service toward a single civil service pension, problems arise in the implementing a court-ordered division of military retired pay under the USFSPA.

Prior to 1996, the waiver of military retired pay reduced the amount of such pay to zero; therefore, no direct payments under the USFSPA could be made to the divorced spouse. Whether or not it was the intent of the retiree to do so, he or she thereby deprived the former spouse of retired pay awarded by a court. The federal civil service pension could then be divided,[40] but neither the retiree nor the ex-spouse would receive any military retired pay after the retiree began to collect his or her civil service benefits. It was/is possible for the former spouse to ask the court to reconsider the property settlement in order to provide for the division of the civil service pension given the new circumstances. Nevertheless, that was an uncertain process.

In 1996, Congress approved language that would allow a former spouse to continue to receive payments based on a division on military retired pay in instances wherein the retiree waived

[38] "Catch 62" does not affect only retired military personnel. When a retiree from the federal civil service with any previous military service which is credited toward a civil service retirement annuity—regardless of whether or not he or she has also retired from a military career—reaches age 62 and becomes eligible for Social Security, the civil service pension is recalculated to exclude the years of military service. In some cases, this means a substantial reduction in civil service retirement benefits, and also in total retirement income received from federal sources (i.e., civil service retirement plus Social Security), even with Social Security added.

[39] This section can only allude to some of the extraordinary complicated situations that arise due to the interaction of military service, civil service retirement, and Social Security. For more information, see CRS Report R40428, *Credit for Military Service Under Civilian Federal Employee Retirement Systems*.

[40] For more information on civilian retirement benefits for former spouses, see CRS Report RS22856, *Retirement and Survivor Annuities for Former Spouses of Federal Employees*.

military retired pay in order to credit military service toward a single civil service pension. This change was prospective beginning January 1, 1997.[41]

Persons Affected by "Catch 62"

The impact of the USFSPA on military retirees in the "Catch 62" situation and on their former spouses is extremely complex. The *decision* to make a lump-sum payment into the CSRDF so as to avoid a reduction in civil service retirement benefits at age 62, and the *liability* for making the payment, belong to the federal civilian employee alone, regardless of his or her marital status. Retirees receive a larger annuity by making this deposit. Thus, the retiree and possibly the former spouse can benefit when the deposit is made. If such a military retiree's ex-spouse's property settlement entitles him/her to a share of the retiree's civil service pension, the ex-spouse can receive this share without incurring part of the cost of making the deposit required to avoid the "Catch 62" reduction in civil service retirement at age 62.

As noted above, prior to 1997, the former spouse whose property settlement entitles him/her *only* to a share of military retirement would be deprived of all such retirement benefits. The relevance and weight given these liabilities and benefits need to be evaluated on a case-by-case basis. Thus, the divorced military retiree employed by the federal government as a civilian employee, and potentially subject to the provisions of the USFSPA, faces numerous retirement-related decisions that include the complex interactions of the different retirement systems.

Early Separations

With the end of the Cold War in 1991, the United States began to reduce the size of the Armed Forces. In order to meet congressionally mandated manpower endstrength (i.e., the number of personnel in uniform at the end of the fiscal year), DOD had been provided with a number of options for downsizing the force, including involuntary separation pay, incentives for early voluntary separation, and early (pre-20-year) retirement.[42]

These options may have affected former spouses and military members, since (1) a court may consider or may have considered future retired pay as divisible property, although the member may not have actually retired to receive those benefits because of the drawdown, (2) the potential amount available under these programs may be substantially less than would have been available under longevity retirement (retirement after a military career of 20 years or more), (3) Congress has neither authorized nor prohibited the courts from considering these separation benefits as divisible property, and (4) national interests (i.e., the size and composition of the military) removed from the domain of domestic relations concerns of state courts, are at issue.

Other Issues for Congress

Since USFSPA's inception, challenges to its implementation have been dealt with by the courts and through amendments to the law. The effects of USFSPA are borne by a large number of military retirees and their spouses across all congressional districts; some continue to feel that inequities in the law remain and advocate for further review, revision, or repeal of USFSPA provisions.

[41] P.L. 104-201; 110 Stat. 2580; September 23, 1996.

[42] The authorities for some of these separation incentive programs were subsequently amended to extend the programs through 2001.

Military Retired Pay and Civilian Pensions

Military retired and retainer pay is often compared to, and contrasted with, public or private civilian pension programs. Those aspects of military retired pay that are comparable to civilian pensions lead advocates of dividing retired pay in divorce cases to reason that military retired pay should be treated similarly, that is, as divisible property. On the other hand, certain unique aspects of military retired pay, and of military service in general, have led opponents to argue that military retired pay is qualitatively different from pensions. They maintain that to treat military retired pay as a pension would thwart much of the program's justification.

According to the Department of Defense, the purpose of providing military nondisability retired and retainer pay is as follows:

> To establish a nondisability retirement system and authorize the payment of retired pay for service in the armed forces of the United States in order to ensure that (1) the choice of career service in the armed forces is competitive with reasonably available alternatives, (2) promotion opportunities are kept open for young and able members, (3) some measure of economic security is made available to members after retirement from career military service, and (4) a pool of experienced personnel subject to recall to active duty during time of war or national emergency exists.[43]

The first and third purposes are directly comparable to reasons given for providing civilian pensions. The second purpose is different, in terms of the age at which military members retire. Most military members become eligible to retire between the ages of 39 and 45, while civilian pensions usually require that the beneficiary be much older before benefits become available. All of these provisions are designed to allow the military to keep the force "young and vigorous," by permitting the involuntarily retirement of its members at a relatively young age.

The fourth purpose provides the principal argument for differentiating military retirement benefits from civilian pensions. In retirement, military retirees continue to be members of the uniformed services and, to an extent, their retired pay serves as compensation for reduced service. Military retirees are generally subject to involuntary recall to active duty as well as to employment and -travel restrictions.[44] They also remain subject to the Uniform Code of Military Justice. Violating any of these restrictions may be sufficient cause to terminate retired pay.

Under most civilian pension plans, retirement benefits are viewed as deferred compensation. In other words, pension annuities are based on benefits earned during the period of employment, rather than during retirement. Since these pensions may also be earned during the period of marriage, pensions are viewed as property that is subject to division in divorce settlements.

Recent Changes to the Military Retirement System

Currently, qualified military members receive a defined pension from the time of retirement until death. Servicemembers may also make contributions to individual retirement accounts through the Thrift Savings Plan (TSP) or through other private retirement accounts.[45] Recent changes to

[43] Department of Defense, Office of the Secretary of Defense. Military Compensation Background Papers, 7th Edition, September 1996, p. 577.

[44] 10 U.S.C. §688 provides the authority to recall retired members to active duty.

[45] The TSP is a defined contribution retirement plan similar to the 401(k) plans provided by many employers in the private sector. The income that a retired worker receives from the TSP will depend on the balance in his or her account. For more information see CRS Report RL30387, *Federal Employees' Retirement System: The Role of the Thrift Savings Plan*, by Katelin P. Isaacs.

the military retirement system that will go into effect on January 1, 2018, authorize government matching contributions to the TSP up to a certain percentage of basic pay.[46] In addition, for those entering the service on or after January 1, 2018, their defined annuity will be calculated at a reduced multiplier.[47] The reduction in the multiplier for the defined annuity does not change the USFSPA provision allowing the court to award up to 50% of retired pay to a former spouse. Servicemembers under this new *blended retirement system* (BRS) will still receive a defined benefit once eligible for retired pay, and will be vested in government contributions to their TSP accounts after two complete years of service. Vesting for the defined benefit remains 20 years of eligible service for a regular retirement.

Funds in a TSP retirement account may be divided in a divorce settlement, and federal statute does not limit the percentage that can be awarded to a former spouse in the division of these assets. TSP funds are typically divided based on the amount in the account at the time of separation or divorce. The TSP will honor a court order that requires payment in the future only if the present value of the payee's entitlement can be calculated to be paid currently.[48] When the BRS went into effect on January 1, 2018, active duty servicemembers with less than 12 years of service and National Guard members and reservists with less than 4,320 points had an opportunity to opt into the new system. This could affect servicemembers and spouses who have finalized divorce settlements prior to January 1, 2018. For example, a servicemember who has 11 years of service and whose former spouse was awarded 50% of his retired pay could opt into the new system. This would reduce the potential monetary value of his/her defined annuity and potentially reduce the amount received by a former spouse.

Those servicemembers who opt into the new blended retirement system or enter service on or after January 1, 2018, will also be eligible to receive a minimum amount of continuation pay between 8 to 12 years of service. This could be paid to the member in a lump sum or in four installments. This payment could be considered to be divisible upon the dissolution of a marriage.[49]

Another consideration is a provision in the new law that would allow servicemembers to opt for a lump sum payment of retired pay at the time of retirement vice a monthly annuity. It is yet unclear whether a court order in a divorce settlement could require the servicemember to select either the lump sum payment or the monthly annuity for the purposes of division with a former spouse.

As this new retirement system is implemented, Congress might consider whether the contributory portion of military retirement (TSP individual and matching contributions) should be treated differently under USFSPA than the noncontributory, defined annuity.

Pay Grade at Retirement v. Pay Grade at Divorce

Because regular military retired pay is currently not vested until 20 years of service, it is calculated based on an individual's pay grade and years of service at the time of retirement. In

[46] For more information see CRS Report RL34751, *Military Retirement: Background and Recent Developments*, by Kristy N. Kamarck.

[47] Currently the multiplier is 2.5% for each year of service; the reduced multiplier is 2.0%. The formula for calculating military retired pay is the number of years of service times the multiplier times the average of the highest three years of salary.

[48] See https://www.tsp.gov/PDF/formspubs/tspbk11.pdf.

[49] Sullivan, Col. (Ret.) Mark E., *SILENT PARTNER: The Blended Retirement System and Divorce*, American Bar Association, Family Law Section, Raleigh, NC, 2016, http://www.americanbar.org/content/dam/aba/administrative/family_law/committees/blendretsystem.authcheckdam.pdf.

some divorce cases prior to 2017, divisible retired pay was calculated based on years of service at the servicemember's retirement, even if the divorce occurred many years prior to the retirement. Some were concerned that the division of the retired pay at the time of retirement and not at the time of divorce created an inequity for the servicemember and subsequent spouses. This issue was raised by DOD and others in the initial consideration of the USFSPA. As stated by Dr. Lawrence J. Korb, then-Assistant Secretary of Defense for Manpower, Reserve Affairs, and Logistics with regard to the proposed bill,

> I believe the provisions in the first section in this bill to divert up to 50 percent of a servicemember's disposable retired pay would be inequitable unless the 50 percent limit is computed as if the member could retire at the time of the final court order. Pay increases for promotions and longevity from the data of divorce to the date of retirement would substantially increase a serviceman's retired pay. If subsequent raises could be included, they would constitute windfall benefit for the former spouse to which he or she had made no contribution.[50]

The National Defense Authorization Act for FY2017, signed by President Obama on December 23, 2016, included a provision (Section 641) that requires divisible retired pay to be calculated based on "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" instead of at the time of retirement.

Some have argued that this revision to USFSPA will add unnecessary complexity to legal processes in many states that already have a rule or rules in place to allow for equitable discounting of a former spouse's military pension benefit.[51] Others argue that the frozen accrued benefit method is the most equitable approach and should continue to be a federal statutory requirement.

Remarriage of a Former Spouse

Some benefits to former spouses, such as commissary privileges and medical care, terminate after the remarriage of a former spouse. However, pension payments to the former spouse continue after remarriage until the retired servicemember's death. Some military retiree advocacy groups argue that the absence of a remarriage clause is inconsistent with the treatment of other federal retiree and benefit programs.[52] In addition, there is the possibility for multiple payments to a single individual. For example, a former spouse could be awarded 50% of a servicemember's retired pay and then remarry and subsequently divorce a second military spouse with an additional award of 50% of the second servicemember's retired pay. Previous Congresses have

[50] S.Rept. 97-502.

[51] At least six states had already been using the "frozen accrued benefit" or "date of divorce" method for pension valuation which fixes the retirement benefit at the time of separation or divorce. In addition, a majority of states used the "time rule" or "date of retirement" method for valuing and dividing a defined benefit plan in divorce cases which took into account the longevity of the marriage during the member's service and gives the servicemember credit for subsequent service time and promotions. For more information on methods for calculating the marital share of a military pension, see Sullivan, Mark, E., Military Divorce Handbook: A Practical Guide to Representing Military Personnel and Their Families, 2nd ed. (American Bar Association, 2011), p. 536. For more information on how the "time rule" is applied, see Moss, Anne E., Your Pension Rights at Divorce: What Women Need to Know, 3rd ed. (Pension Rights Center, 2006), pp. 20-25. http://www.pensionrights.org/pubs/books/divorcebook/YourPensionRightsAtDivorce%20Part%202-%20State%20Divorce%20Law%20and%20Your%20Pension%20Rights.pdf.

[52] For example under the Social Security system, benefits of a former spouse terminate after remarriage of the former spouse.

proposed changes to USFSPA that would terminate payments upon remarriage of a former spouse. These amendments have not been enacted.

Working Spouses and Dual-Service Couples

In deliberations leading up to the enactment of the USFSPA, the Senate Armed Services Committee stated the following:

> Military spouses are still expected to fulfill an important role in the social life and welfare of the military community. Child care and management of the family household are many times solely the spouse's responsibility.[53]

Nevertheless, since 1982 the nature of military families and family life has changed. Female representation in the Armed Forces has increased from 11% to 16%,[54] same-sex spouses are allowed to receive benefits,[55] and the number of dual-service married couples has more than doubled since 1985. Dual-service marriages currently account for 12.3% of all active duty marriages.[56] Over half of married females in the Marine Corps (56.7%) and Air Force (54.0%) are married to other military members.[57] Approximately 8.1% (50,835) of active duty members' spouses are male.[58]

Frequent moves, deployments, and other hardships continue to create challenges for civilian spouses of military members. In general, female military spouses are employed at lower rates and earn less than their female counterparts married to civilians. Approximately 41% of active duty military spouses are employed outside of the home relative to approximately 48% of spouses in married-couple families across all U.S. households.[59]

Nevertheless, some civilian spouses of military members may have equivalent or greater earning potential in their careers. These civilian and dual military spouses may not be contributing to management of the family household in the same way as perceived in 1982. For example, consider a case of a dual military active duty couple who are married while in the service. Assume that one former spouse leaves the service at eight years and goes to school for a graduate degree while being financially supported by his or her military spouse. After 10 years of marriage, the couple divorces. One spouse goes on to have a civilian career while the other spouse continues a military career until 25 years of service, when he or she retires and begins to receive his or her retired pay.

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[53] S.Rept. 97-502.

[54] Defense Manpower Data Center, Active Duty Master Personnel File, Table of Active Duty Females by Rank/Grade and Service, January 2018, available at https://www.dmdc.osd.mil/appj/dwp/dwp_reports.jsp.

[55] On December 22, 2010, gay servicemembers were authorized to serve openly; however same-sex partners were ineligible for certain federal benefits under the Defense of Marriage Act (DOMA). Following the June 26, 2013, Supreme Court decision on *United States v. Windsor* holding sections of DOMA unconstitutional, DOD issued a new policy extending all military benefits for married couples to same-sex couples. For more information see CRS Report R44321, *Diversity, Inclusion, and Equal Opportunity in the Armed Services: Background and Issues for Congress*, by Kristy N. Kamarck.

[56] Department of Defense, 2016 Demographics: Profile of the Military Community, 2014, p. 46.

[57] Ibid., p. 48.

[58] Ibid., p. 130.

[59] [59] Department of Defense, 2016 Demographics: Profile of the Military Community, 2014, p. 133.

Bureau of Labor Statistics, Table 2. Families by presence and relationship of employed members and family type, 2014-2015 annual averages.

Under current law,[60] the spouse who left the military at eight years would not be vested in any military retired pay; however, under USFSPA, a court may award up to 50% of the former spouse's military retired pay. The (now-civilian) former spouse may also keep his or her entire civilian pension, as it was not an available asset to be divided at the time of the divorce. In such a situation, it would be hard to argue (as it was for justification of the USFPA), that one or the other had the primary responsibility for child care and household management during those eight years when both were married and in the service.

The intent of the USFSPA remains equitable treatment by the courts of benefits earned through military service or affiliation. In the past, fundamental definitions and inconsistent application or interpretation of the law have mitigated against this intent. In addition, new laws that affect military benefits but are not directly related to the USFSPA may have unintended effects on equitable division of already settled or future divorce cases.

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[60] For those entering the service before January 1, 2018.