

Military Retirement Bench Card

Predicate Requirements/Rules	• Military retirement benefits are available to the following branches of service: Army, Navy, Air Force, Marine Corps (USMC), Coast Guard (USCG), Space Force, Public Health Service (USPHS), and National Oceanic and Atmospheric Administration (NOAA). • The Servicemember's Civil Relief Act (SCRA) applies to military division orders the same way as any other family court order. If the military member has not made a general appearance in the underlying case or the court has not ruled that the SCRA does not apply, there may be a jurisdictional issue.¹ • The military pension vests after 20 years of service; this means that if the Member leaves prior to 20 years of service, they likely do not have a pension benefit payable, but may receive disability. They may also have the Thrift Savings Plan. • For the out-spouse to receive direct payment from DFAS, at least 10 years of marriage (date of marriage to <u>date of divorce</u> (not date of separation!)) must overlap 10 years of creditable military service (active, reserve, or both). This is called the "10/10 rule." <u>If the 10/10 rule has not been met, the out-spouse must receive their community property share directly from the member.</u>²
Vocabulary	• Armed Forces Retirement System = military pension plan. See Plan Types Quick Explanation Chart • TSP = Thrift Savings Plan, the defined contribution plan in which most military members participate. • Military Retired Pay Division Order ("MRPDO") = a DRO for the military pension plan. • Retirement Benefit Court Order ("RBCO") = a DRO for the Thrift Savings Plan. • DIEMS = Date of Initial Entry into Military Service. • DFAS = Defense Finance and Accounting Service. • LES = Leave & Earnings Statement, the military member's paystub. • Military retired pay = gross monthly pension payment. • Disposable retired pay = monthly pension payment reduced by deductions allowed by federal law.³ This is the divisible portion of the pension payment; orders should always divide the disposable retired pay, rather than the gross payment. • Disability waiver = member waives all or a portion of their disposable retirement pay (depending on % disabled) in order to receive disability pay instead. • Active duty = Member not in the Reserves/National Guard. • Actively drilling = Member is actively in the Reserves/National Guard and still accumulating retirement credit. • Grey area reservist = Member is no longer actively drilling/completed 20 good years in the Reserves/National Guard, but is not yet old enough to receive pension payments (generally age 60).⁴
Disability	• A military member's disability payments are their separate property and are not divisible, no matter when earned and regardless of whether they elected disability post-divorce.⁵ • If member receives VA Disability Waiver (most common disability type; there are others): ▪ If less than 50% disabled, the disability payment is a mandatory deduction from member's gross retired pay. ▪ If more than 50% disabled, no deduction from member's gross retired pay.
NDAA 2017	• If the member was not retired (including gray area reservists) and the parties were divorced after 12/23/2016 OR if the member retired after the parties were divorced, different rules apply due to the National Defense Authorization Act (NDAA) of 2017.

¹ See 50 U.S.C. §§3931-3938a.

² The 10/10 rule is a limitation on who can receive direct payments from DFAS. It does NOT mean that if the 10/10 rule isn't met, the out-spouse automatically has no community property interest in the military pension. It only means that the out-spouse's share must be paid to them by the member. See 10 U.S.C. §1408(d)(2); DFAS FAQ No. 4, "Does the USFSPA have any other requirements that apply to retired pay as property awards only?", available at:

<https://www.dfas.mil/Garnishment/usfspa/faqs/>

³ 10 USC §1408; Deductions include SBP premiums, disability waivers from the VA or other special programs; federal debts (e.g., tax debt, recoupment of prior overpayments).

⁴ 10 U.S.C. §12731(f)(1).

⁵ *Howell v. Howell* (2017) 137 S.Ct. 1400.

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NDA 2017 Continued	- For parties in this category, division of the military pension is frozen as of the date of divorce as if the member retired as of the date of divorce.⁶ This is called the “frozen time rule.”⁷ - The Military Retired Pay Division Order must include the high-36 if the NDA 2017 applies. The high-36 is the average of the 36 highest-paying months in the member’s career as of the date of divorce.⁸ <u>If the member retired before date of divorce, the NDA of 2017 does not apply.</u> The traditional time rule (i.e., not frozen) applies, and the high-36 is not necessary.
Documents Needed for DRO	Documents Needed for DRO⁹ - If NDA 2017 applies (see above): LES for 36 highest-paying months of career.¹⁰ - If retired from active duty only: DD-214 Certificate of Release of Discharge from Active Duty. - If ever Reserves/National Guard: Most recent or final Statement of Points. - If grey area reservist: “20 good years letter.” - Certified copy of the Judgment.
Survivor Benefit Plan (SBP)	- The pension payments made during the Member’s life are different (from the perspective of the plan) than what is paid after the Member dies. Those post-death benefits for the military pension are called the Survivor Benefit Plan (SBP). - If the parties and/or the court intend to award the SBP to the out-spouse, it is CRUCIAL that the SBP be specifically awarded in the Judgment or retirement plan division order. The out-spouse has one (1) year from the date of that order to secure their interest in the SBP by sending DFAS a copy of the order and the relevant DD form¹¹ (see DD Forms section below). See the Retirement Benefit Order Drafting Tool for more help. - The SBP allows the Member to designate one eligible beneficiary to receive survivor benefits.¹² - The SBP has a cost, which is generally 6.5% of the Member’s gross retired pay. This cost is deducted by DFAS off the top of the retired pay, before it is divided between the parties. This means that DFAS essentially requires the parties to share the SBP cost. If the parties want or the court orders only the out-spouse to pay for the cost of the SBP, a complex calculation must be done to determine what the out-spouse’s share should be reduced to in order to account for Member’s payment to DFAS of part of the SBP cost.¹³ - If the out-spouse remarries before age 55 and was not married to the Member for 30 years, they will lose their eligibility for the SBP.¹⁴
DD Forms	- Directives Division (DD) forms must be submitted to DFAS for the plan to implement the DRO.¹⁵ - If the SBP was awarded in the Judgment, and the one-year deadline is approaching, the out-spouse can secure their SBP interest by serving DFAS with a certified copy of the Judgment and the relevant DD form(s) even if the DRO is not yet complete. <u>Failure to timely submit the DD Forms for the Survivor Benefit Plan (if awarded) could result in the loss of the SBP.</u> - The DD forms are: (1) Application for Former Spouse Payments from Retired Pay (DD Form 2293); and either (2) Survivor Benefit Plan (SBP) Election Statement for Former Spouse Coverage (DD Form 2656-1); or (3) Survivor Benefit Plan (SBP) Request For Deemed Election Form (DD Form 2656-10).

⁶ The frozen time rule directly contradicts the time rule enumerated in *In re Marriage of Brown* (1976) 15 Cal. 3d 838 and the holding of *In re Marriage of Lehman* (1998) 18 Cal. 4th 169, which provides that the community shares in any post-separation enhancement of pension benefits. However, the division of military retirement benefits is governed by federal law, which preempts state law, so the frozen time rule must be used when required.

⁷ 10 U.S.C. § 1408(a)(4)(B)

⁸ 10 U.S. Code § 1407(d)(4).

⁹ Consider ordering the member to provide these specific documents to the out-spouse by a specific date. The military member can obtain them online and/or through their chain of command. It is extremely difficult, if not impossible, for the out-spouse to obtain these documents from the military, even with a subpoena or a Freedom of Information Act request.

¹⁰ For military members in active duty only, this is likely the most recent 36 months. For members in the Reserves/National Guard, the 36 months could have occurred *at any time* depending on their individual military career. For example, the highest-paid 36 months might have been when the reservist was called up to active duty a decade ago.

¹¹ 10 U.S.C. §1450(d)(3)(C).

¹² 10 U.S.C. § 1448(b)(2).

¹³ In most cases, it is fair for the parties to split the SBP cost. If the Member dies first, the out-spouse will continue to receive a benefit for their life. Conversely, if the out-spouse dies first, their share of the benefits will automatically revert to the Member pursuant to 10 U.S.C. §1408(c)(2) (prohibiting the out-spouse from selling, assigning, transferring, or bequeathing their share of the military retired pay).

¹⁴ 10 U.S.C. §1450(b). See 10 U.S.C. §1450(b)(3) for the effect of termination of the former spouse’s subsequent marriage before age 55.

¹⁵ Department of Defense Instruction 1332.42, § 1.4.