

A close-up, slightly blurred photograph of the American flag, showing the stars and stripes in warm, golden light. The flag is the background for the entire page.

# Recent Changes to Military Retirement Division in Divorce

BY JENNIFER L. CARTY

*The National Defense Authorization Act of 2017 and recent case law have changed how military retirement benefits are divided in divorce proceedings involving a service member. This article discusses these important changes.*

The year 2017 brought significant changes to the military retirement system, particularly as it pertains to the division of a service member's military defined benefit annuity in a divorce. New federal legislation, a U.S. Supreme Court decision, and the military's move to a blended retirement system in lieu of the old "20 years or nothing" defined benefit annuity require significant changes in the way that family law attorneys advise clients and draft divorce settlement agreements. Under the new federally mandated retirement division formula, former spouses will no longer benefit from a service member's increase in pay after divorce, and the former spouse's portion of the retirement benefit may be significantly less, or entirely eliminated in certain circumstances. Conversely, under the new system, most military members will now have a vested defined contribution asset available for division at the time of divorce.

Domestic relations practitioners should familiarize themselves with these important changes before undertaking representation of a service member in a divorce proceeding, particularly because a service member's retirement is often one of the largest assets in the marital estate in a military divorce.

### **National Defense Authorization Act of 2017**

On December 23, 2016, the President enacted the National Defense Authorization Act of 2017 (NDAA), which substantially amended the Uniformed Services Former Spouses' Protection Act (USFSPA), 10 USC § 1408. This article focuses on the NDAA changes to (1) the formula for calculating the non-military spouse's portion of the military retirement benefit and (2) the structure of military retirement benefits, which have wide-sweeping implications for dissolution of marriage cases involving military retirement assets.

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### **Dividing Military Pensions in Divorce**

The legacy military defined benefit annuity retirement (commonly referred to as the "military pension") is noncontributory.<sup>1</sup> A service member earns credit toward retirement based on his years of creditable service and must have 20 years of creditable service to be entitled to

a benefit. There is no "partial vesting" with a military defined benefit annuity; if the service member does not earn 20 years of creditable service, she is not entitled to the benefit.<sup>2</sup>

The value of a military defined benefit that is unvested and has not yet matured is unknown at the time of divorce. The trial court thus has two options for addressing the asset in the context of a dissolution of marriage property division: (1) enter an order for deferred distribution, or (2) reserve jurisdiction and address the division at the time of retirement.<sup>3</sup> Most courts appear to prefer the deferred distribution method because it eliminates the need for parties to return to court, sometimes decades later, and it defines the non-service member spouse's rights and benefits at the time of the divorce. Deferred distribution orders predetermine a portion of the service member's military retired pay that a former spouse will be entitled to when the defined benefit vests and matures.<sup>4</sup>

### **The Time Rule Formula**

Before enactment of the NDAA, Colorado practitioners were guided by *In re Marriage of Hunt* in Colorado divorce cases involving the division of military retired pay. In *Hunt*, the Colorado Supreme Court approved application of the "time rule formula" in determining the marital portion of the service member's future military retired pay.<sup>5</sup> The time rule formula entailed multiplying the service member's "disposable retired pay," as defined in 10 USC § 1408,<sup>6</sup> by the marital (or coverture) fraction. The marital fraction consisted of a numerator equal to the total number of months the military member earned toward the benefit during the marriage and a denominator equal to the total months of service at the time of retirement.<sup>7</sup> The former spouse was often awarded half of the resulting amount, that is, half of the marital portion of the benefit as determined by the time rule formula:

$$\text{Marital Asset} = \text{Disposable Retired Pay} \times \left( \frac{\text{marital duty months}}{\text{total duty months}} \right)$$

Former Spouse Benefit =  $\frac{1}{2} \times$  (marital asset)  
(assuming equal division)

The time rule formula determined a former spouse's benefit based on the service member's retired pay *at retirement*.<sup>9</sup> Thus, under this formula, the former spouse received the benefits of the military member's rank and time-in-service pay increases that occurred after the divorce.<sup>9</sup>

The Colorado Supreme Court granted certiorari in *Hunt* to determine whether benefit increments based on post-dissolution increases in rank are included in determining what portion of the military defined benefit annuity is subject to division as marital property.<sup>10</sup> The Court explored the nature and effect of the time rule formula and expressly held that "post-dissolution increases in pension benefits are marital property when the trial court, in the sound exercise of its discretion, divides the pension under either the deferred distribution or reserve jurisdiction method."<sup>11</sup> In the Court's view, the "economic partnership" of the previous marriage laid the foundation that allowed the service member to achieve the resulting rank and pay.<sup>12</sup> The commingled career efforts during the marriage resulted in an enhanced future benefit. This is known as the "marital foundation" theory.<sup>13</sup> The Court noted that this theory was fair because the "risks, delay, and uncertainty of the receipt of pension benefits" was in the control of the service member.<sup>14</sup> If the service member left the service before the required 20 years or acted in ways to hurt his career, an ex-spouse could end up with no benefit or a substantially reduced benefit.

#### The New "Freeze Time Rule"

The NDAA significantly changed the calculation of the former spouse's portion of a military defined benefit. The new federal statute preempts existing state law. Thus, *Hunt* no longer controls, and the time rule formula may not be applied in determining the former spouse's benefit. Instead, a new calculation, commonly referred to as the "freeze time rule," applies, under which a former spouse may not benefit from the rank and time-in-service pay increases that occur after the couple gets divorced.<sup>15</sup>

To understand the change brought about by the new rule, it is helpful to examine the re-

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irement benefit calculation. At the time of retirement, a military member's monthly annuity check (disposable retired pay) is based on her "retired base pay." Retired base pay is an average of the highest 36 months of basic pay at the time of retirement. This amount is then multiplied by the "service percent multiplier." The service percent multiplier is determined by multiplying 2.5% by the years of service.<sup>16</sup> For example, the service percent multiplier for a service member with 20 years of service is 50% (2.5% x 20). A retiree with 20 years of service will thus receive 50% of his retired base pay as his disposable retired pay.

To demonstrate the difference between what a former spouse will receive under the new calculation versus what the former spouse would have received under the time rule formula, consider a couple that divorces while the member is a captain in the Army with four years of service. All four years of service were during the marriage. At that time of divorce, the member's highest 36 months of basic pay was \$64,778.00, or \$5,398.16 per month. After the

parties' divorce, this same military member rises to the rank of colonel and retires at 20 years of service with a highest 36 months of basic pay of \$120,654.00, or \$10,054.50 per month. The basic pay used to calculate the ex-spouse's benefit has increased by nearly \$5,000 per month since the parties divorced.

At 20 years of service, the service percent multiplier is 50%. Thus the colonel will receive 50% of his highest 36 months of basic pay at the time of retirement, or a disposable retired pay of \$5,027.25 per month. Under the time rule formula, the calculation of the former spouse's benefit is:

Marital Asset =  $\$5,027.25 \times (48 \text{ marital duty months} / 240 \text{ total duty months})$

Marital Asset = \$1,005.45

Former Spouse Benefit = \$502.72 (assuming equal division)

Under the NDAA, the spousal benefit changes dramatically. The new calculation essentially freezes the military member's base pay at the time of divorce and uses it to calculate the spouse's benefit, rather than calculating an entitlement based on pay at retirement. The freeze time rule computation requires an additional coverture fraction to calculate the spousal benefit:

Marital Asset = disposable retired pay x (marital duty months / total duty months) x (pay at divorce / pay at retirement)

Former Spouse Benefit =  $\frac{1}{2} \times$  (marital asset) (assuming equal division)

Under the freeze time rule, the colonel's former spouse's benefit is:

Marital Asset =  $\$5,027.25 \times (48 \text{ marital duty months} / 240 \text{ total duty months}) \times (\$5,398.16 \text{ captain pay} / \$10,054.50 \text{ colonel pay})$

Marital Asset = \$539.81

Former Spouse Benefit = \$269.90 (assuming equal division)

The freeze time formula results in the former spouse receiving a monthly benefit that is \$232.82 less than the monthly benefit the former spouse would have received under the time rule formula. However, former spouses do continue to benefit from cost-of-living adjustments to the service member's pay that occur between the date of the divorce decree and the date of retirement.

### Calculation Requirements

Attorneys negotiating property divisions on behalf of a non-military spouse should run calculations of the client's projected benefit and discuss them with the client. Defense Finance and Accounting Service (DFAS) offers online calculation tools.<sup>17</sup>

Attorneys for both military and non-military spouses should also be aware that the NDAA changes require a change in the contents of court orders. For DFAS to calculate the new disposable retired pay amount, a court order entered after December 23, 2016 *must* provide:

If the member entered the service *before* September 8, 1980:

1. a fixed amount, a percentage, a formula, or a hypothetical<sup>18</sup> that the former spouse is awarded;
2. the member's pay grade at the time of divorce; and

3. the member's years of creditable service at the time of divorce; or in the case of a reservist, the member's creditable reserve points at the time of divorce.

If the member entered the service *on or after* September 8, 1980:

1. a fixed amount, a percentage, a formula, or a hypothetical that the former spouse is awarded;
2. the member's "high-3" amount at the time of divorce (the actual dollar figure); and
3. the member's years of creditable service at the time of divorce; or in the case of a reservist, the member's creditable reserve points at the time of divorce.<sup>19</sup>

Family law attorneys or judges can find sample language for a Military Retired Pay Division Order through the DFAS website.<sup>20</sup> Language varies depending on when the member entered the service and what duty

status the service member currently holds or previously held.

### U.S. Armed Forces Blended Retirement System

Another significant change brought about by the NDAA is the transformation of the military's traditional "20 years of service or nothing" defined benefit annuity into a new blended retirement system that combines the traditional defined benefit with a new contribution-matching Thrift Savings Plan (TSP). Anyone who entered the military before January 1, 2006 remains enrolled in the traditional 20-year annuity benefit. Anyone joining the military on or after January 1, 2018 will automatically be enrolled in the new blended retirement system.<sup>21</sup> And those military members with less than 12 years of service (or less than 4,320 retirement points for the Reserve component)



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## KNOW THESE MILITARY RETIREMENT FACTS

Attorneys advising clients on the division of military retirement benefits must understand

- the effects of a member's duty status,
- the military retirement system in which the military member is enrolled,
- how to calculate the former spouse's benefit, and
- the potential reduction to that benefit if disability benefits are elected after the divorce.

as of December 31, 2017 may opt in to the new blended retirement system or remain under the legacy defined benefit annuity system.<sup>22</sup> Opt-in enrollment is offered until December 31, 2018 for those members.<sup>23</sup> Members who do not opt in to the new blended retirement system will remain under the legacy defined benefit system.<sup>24</sup>

As discussed above, under the legacy defined benefit annuity, members who do not complete 20 years of service do not receive a benefit. Historically, only about 19% of military members received the traditional retirement benefit because most members do not serve long enough to qualify.<sup>25</sup> The benefit of the new blended retirement system is that even those military members who do not serve for 20 years still receive *some* benefit as a result of the contribution-matching TSP. The TSP is basically a government-run 401(k) plan. Even if a military member elects to not contribute to his TSP, the service will automatically contribute 1% of what the member earns as basic pay to the TSP. The service will match any additional member contributions up to 4%, for a total of 5%.<sup>26</sup> After two complete years of service, the

TSP becomes fully vested. The downside of the new system is that although the member can still receive the defined benefit annuity in addition to the TSP, the disposable retired pay benefit calculation uses a reduced 2% multiplier for the defined benefit annuity calculations.<sup>27</sup> Using our previous colonel example, that's a reduction from 50% of the retired base pay to only 40% of the retired base pay—or from \$5,027.25 to \$4,021.80 per month disposable retired pay upon retirement.

It is thus imperative for family law attorneys to identify the system in which the service member spouse is enrolled and understand the monthly retirement annuity benefit for a service member under both systems. Attorneys must also determine whether the military member has a vested retirement asset (the TSP) of a sum certain that is available for division at the time of divorce.

### How Electing Disability Benefits Affects Retirement Divisions

Title 10 USC § 1408 authorizes states to treat military disposable retired pay as marital property for purposes of divorce.<sup>28</sup> However, the statute provides that any amount that is deducted from military retired pay “as a result of a waiver of retired pay required by law” to collect veteran's disability benefits does not constitute “disposable retired pay.”<sup>29</sup> Thus, a court is not permitted to divide that portion of the veteran's compensation.

A veteran who qualifies for a disability may elect to waive a portion of her retirement to collect nontaxable disability payments instead.<sup>30</sup> This waiver results in a reduction of the monthly retirement payment, which in turn reduces a former spouses' benefit paid pursuant to a divorce or a separation agreement. For example, assume husband is receiving 50% of veteran wife's military pension annuity check of \$1,000 per month, or \$500. Wife applies for disability and qualifies for a 60% disability rating. Wife elects to waive a portion of her retirement benefit to receive a non-taxable disability payment equivalent to 60% of her monthly annuity check (\$600), leaving only \$400 of retired pay. Husband's former spouse benefit is now reduced to \$200 per month.

Previously, a Colorado court could indemnify the former spouse when this occurred. In *In re Marriage of Warkocz*, wife appealed a trial court decision denying her motion to enforce the provisions of a separation agreement that divided husband's military retirement.<sup>31</sup> Wife suffered a reduction in payment as a result of husband's decision to waive a portion of his retirement pay to collect disability.<sup>32</sup> The Colorado Court of Appeals reversed the trial court's decision, concluding that the dissolution decree gave wife a “vested interest” in husband's military retirement benefits, and that vested interest was entitled to enforcement.<sup>33</sup> The Court further iterated that, as a matter of public policy, trial courts were empowered to prevent a veteran from “unilaterally defeat[ing] the other spouse's interest in military retirement pay.”<sup>34</sup>

Recently, the U.S. Supreme Court disagreed, overruling *Warkocz*.<sup>35</sup> The Court in *Howell v. Howell* held that 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 a veteran's waiver of retirement pay to receive service-related disability benefits.<sup>36</sup> The Court clarified that the state court's authority under the USFSPA is a “precise and limited” grant of the power to divide federal military retirement pay.<sup>37</sup> Congress, it said, had specifically exempted disability-related waivers from that grant, and state courts “cannot ‘vest’ that which (under governing federal law) they lack the authority to give.”<sup>38</sup>

The Colorado Court of Appeals subsequently issued *In re Marriage of Tozer*, which aligned Colorado's treatment of veteran's disability benefits with *Howell*. The *Tozer* court noted that “[t]he *Howell* takeaway is clear. Military retirement disability benefits may not be divided as marital property, and orders crafted under a state court's equitable authority to account for the portion of retirement pay lost due to a veteran's post-decree election of disability benefits are preempted.”<sup>39</sup> Any post-decree reduction to the former spouse's share of the benefit is borne by the former spouse, and the state court cannot enter equitable orders requiring the retired spouse to indemnify or compensate the former spouse for the post-dissolution reduction.<sup>40</sup>

## Assessing the Risks of Military Retirement Divisions

Acceptance of a portion of a military defined benefit annuity in an equitable division of property carries an inherent risk. If a service member later qualifies for and elects to accept veteran's disability benefits, the spousal benefit could be dramatically reduced (or perhaps even eliminated entirely). Practitioners must assess this risk under the unique circumstances of each case and advise clients accordingly. Rather than relying on military retirement benefits for an equitable division of assets, some clients might fare better by instead negotiating the division of alternative marital assets. Practitioners might also want to consider whether an award of modifiable maintenance to the non-military spouse is appropriate and desirable when the non-military spouse could anticipate a substantial and continuing change in circumstances after the divorce, such as the loss of significant income from military retired pay.<sup>41</sup>

### Conclusion

The NDAA made substantial changes to the law governing military retirement division in divorce that necessitate substantial changes in how family law attorneys advise clients. Proper advisement requires knowledge of both federal and state law, as well as an understanding of the military terms associated with retirement.

The freeze time rule, combined with the risk of a post-divorce reduction in spousal benefits resulting from the election of disability benefits, warrants serious consideration before relying on a military defined benefit annuity as a primary tool for the equitable division of property. Attorneys representing the non-military spouse should be prepared to explain the freeze time rule and its impact, the risks of further reduction to the former spouse's retirement benefit in the future, and whether seeking an award of modifiable maintenance is advisable. Attorneys representing military members or veterans should be prepared to explain the impact of the NDAA and *Howell* on the issues to be decided in the divorce. <sup>CL</sup>



**Jennifer L. Carty** is an associate family law attorney at Robinson & Henry, P.C. Before attending law school, she was an active duty maritime inspections officer for the U.S. Coast Guard. Carty continues to serve in a reserve capacity as an attorney for the U.S. Coast Guard Legal Services Command East in Norfolk, Virginia—[j.carty@RobinsonAndHenry.com](mailto:j.carty@RobinsonAndHenry.com).

**Coordinating Editors:** Patricia A. Cooper, [trish@harhai.com](mailto:trish@harhai.com); Meredith Patrick Cord, [meredith.patrickcord@judicial.state.co.us](mailto:meredith.patrickcord@judicial.state.co.us)

### NOTES

1. See *In re Marriage of Hunt*, 909 P.2d 525, 530 (Colo. 1995).
2. There are certain very limited exceptions to this, such as Temporary Early Retirement Authority (TERA), which is used to control the numbers of service members required for force readiness. See Defense Finance Accounting Service, Retirement Types, [www.dfas.mil/retiredmilitary/plan/retirement-types.html](http://www.dfas.mil/retiredmilitary/plan/retirement-types.html).
3. See *Hunt*, 909 P.2d at 531.
4. *Id.*
5. *Id.* at 533.
6. 10 USC § 1408(a)(4)(A) and (B) define "disposable retired pay" as 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 as increased by cost of living adjustments.
7. *Hunt*, 909 P.2d at 531.
8. See *id.* at 532-33 (petitioner argued that the post-divorce earnings were separate property and should not be included for purposes of pension division).
9. The nature and effect of the time rule formula was discussed and explored at length in *Hunt*. *Id.* at 525.
10. *Id.* at 528.
11. *Id.* at 532.
12. *Id.*
13. *Id.* at 534.
14. *Id.* at 536.
15. 10 USC § 1408(a)(4)(B)(i). The NDAA, Pub. L. No. 114-328, is codified in scattered sections of 10 USC.
16. Defense Finance and Accounting Service, Estimate Your Retirement Pay, [www.dfas.mil/retiredmilitary/plan/estimate.html](http://www.dfas.mil/retiredmilitary/plan/estimate.html).
17. See *id.* and Department of Defense, Military Compensation Calculator, <http://militarypay.defense.gov/Calculators/RMC-Calculator>.

18. See Defense Finance and Accounting Service, "Sample Order Language," [www.dfas.mil/dam/jcr:e4992868-2fae-4a21-9974-e6e595a6b95d/SAMPLE%20ORDER%20LANGUAGE%20.pdf](http://www.dfas.mil/dam/jcr:e4992868-2fae-4a21-9974-e6e595a6b95d/SAMPLE%20ORDER%20LANGUAGE%20.pdf). The active duty hypothetical calculated as of the time of division for members who entered after September 1, 1980 is: "The former spouse is awarded \_\_\_\_ % of the disposable military retired pay the member would have received had the member retired with a retired pay base (High-3) of \_\_\_\_ and with \_\_\_\_ years of creditable service on \_\_\_\_."

19. Defense Finance and Accounting Service, Notice of Statutory Change, [www.dfas.mil/garnishment/usfspa/NDAA--17-Court-Order-Requirements.html](http://www.dfas.mil/garnishment/usfspa/NDAA--17-Court-Order-Requirements.html).

20. *Id.*

21. Department of Defense, The Uniformed Services Blended Retirement System, <http://militarypay.defense.gov/BlendedRetirement> ("Introduction to Blended Retirement" power point available under Resources).

22. *Id.*

23. *Id.*

24. DOD FAQs (June 2017), <http://militarypay.defense.gov/BlendedRetirement>.

25. Department of Defense, Introduction to the Blended Retirement System, slide 4, <http://militarypay.defense.gov/BlendedRetirement>.

26. Department of Defense, BRS Fact Sheet "Defined Contribution," <http://militarypay.defense.gov/BlendedRetirement>.

27. Department of Defense, The U.S. Uniformed Services Blended Retirement System at a Glance, [www.defense.gov/LinkClick.aspx?fileticket=QQkwCNPEskC%3D&portalid=1](http://www.defense.gov/LinkClick.aspx?fileticket=QQkwCNPEskC%3D&portalid=1).

28. See 10 USC § 1408(c).

29. *Id.* at (a)(4)(A)(ii).

30. Military.com, Waiver of Retired Pay, [www.military.com/benefits/military-pay/waiver-of-retired-pay.html](http://www.military.com/benefits/military-pay/waiver-of-retired-pay.html).

31. *In re Marriage of Warkocz*, 141 P.3d 926, 927 (Colo.App. 2006).

32. *Id.* at 928.

33. *Id.* at 930.

34. *Id.* at 929.

35. *Howell v. Howell*, 137 S.Ct. 1400 (2017).

36. *Id.* at 1401.

37. *Id.* at 1404.

38. *Id.* at 1405.

39. *In re Marriage of Tozer*, 2017 COA 151, ¶ 21.

40. *Id.* at ¶ 8. The former spouse in *Tozer*, whose share of the military retirement benefit was reduced due to the retiree's disability waiver, had remarried before seeking equitable relief in the trial court, and the trial court denied her request to adjust maintenance. The trial court's denial relating to maintenance was not before the Court of Appeals.

41. Neither *Howell* nor *Tozer* addresses the state court's authority to modify spousal maintenance awards when there has been a substantial and continuing change in the circumstances of the non-military former spouse that render the original maintenance award unfair.