FORT SAM HOUSTON LEGAL ASSISTANCE OFFICE
UNIFORMED SERVICES FORMER SPOUSES' PROTECTION ACT (USFSPA)

Q. WHAT IS USFSPA?

A. USFSPA is a law passed by Congress in 1982 to offer some financial protection to certain former spouses of servicemembers. It allows states to divide military disposable retired pay as marital property upon divorce. It allows some former spouses (through a court order) to be awarded a share of disposable retired pay by direct payment from DFAS (Defense Finance and Accounting Service) and to obtain medical care and certain other benefits.

Q. WHAT IS DISPOSABLE RETIRED PAY?

A. Disposable retired pay is the total monthly pay to which a retired servicemember is entitled, less most VA disability pay, federal debt repayments, fines, forfeitures and Survivor Benefit Plan premiums.

Q. CAN I GET CHILD SUPPORT OR ALIMONY TAKEN OUT OF MY SPOUSE'S RETIRED PAY AND SENT DIRECTLY TO ME?

A. Yes. In order to receive direct payment from DFAS for alimony and child support under the Act, you will first need to get a court order requiring the payment of child support or alimony. The court order does not have to state specifically that the award is made as direct payment of retired pay. The court order and/or other documents served with the court order must identify the soldier concerned and, if possible, state his or her Social Security Number. The USFSPA provides that mot more than 65% of a retired military member's retired pay can be garnished for spousal and child support.

Q. IF PART OF THE RETIRED PAY IS AWARDED AS MARITAL PROPERTY UPON DIVORCE, HOW DO I OBTAIN DIRECT PAYMENT FROM DFAS?

A. You must meet the "10-year test" to receive direct payment under the Act. You, the former spouse, must have been married to the servicemember for at least of 10 years, during which the member performed at least 10 years of creditable service for retirement purposes.

Q. DO ALL STATES ALLOW MILITARY RETIRED PAY TO BE DIVIDED AS MARITAL OR COMMUNITY PROPERTY?

A. Yes. Only Puerto Rico bars the division of pension rights upon divorce. All states have one method or another of granting the division of military pensions as marital property. You should check the laws of the state where you're a legal resident, as well as the "home state" (or domicile) of the servicemember. You should also consult a military legal assistance attorney as to pension division in specific states. An overseas court, however, cannot grant military pension division; DFAS will only honor orders regarding division of retired pay from U.S. courts, not those of foreign countries.

Q. IF STATE LAW ALLOWS THE RETIRED PAY TO BE DIVIDED, HOW WILL THE DIVISION TAKE PLACE?

A. The rules for retired pay division vary from state to state. For example, the court can divide the pension by ordering that a portion be paid to the nonmilitary spouse upon the servicemember's retirement. This would be paid on a monthly basis as long as the retiree receives payments. The payments could come from the retiree or, if the "direct payment" conditions are met, directly from DFAS.

Q. IS THERE ANY WAY THE COURT CAN DIVIDE THE RETIRED PAY SO I DON'T HAVE TO WAIT UNTIL MY HUSBAND RETIRES?

A. Some states, such as California, allow payments to be made under court order while the member is still on active duty. Most states, however, do not. In all states, however, the law allows the present value of the pension to be used as a set-off or trade against other property that the nonmilitary spouse will receive. Thus the retired pay might be traded against the marital residence if the values of each were roughly equal. If the values were not equal and the servicemember received "too much" of the marital property, the judge could order him or her to transfer other property to the nonmilitary spouse, or to make regular payments to the other party (called a "distributive award") until the shares of the parties were adjusted as the judge ordered.

Q. HOW CAN I FIND OUT IF MY HUSBAND'S PENSION IS DIVISIBLE IN A PARTICULAR STATE?

A. The answer to these questions depends on your husband's **legal residence** (or domicile). A state has jurisdiction over the husband's pension if:

- He is a legal resident of this state; **or**
- He is residing in that state for reasons other than because of military assignment; **or**
- He consents to the jurisdiction of that state's courts over the division of his retired pay in a property division lawsuit.

If none of the above conditions apply, then that state's courts cannot divide his retired pay.

Q. HOW MUCH OF HIS RETIRED PAY WILL BE DIVIDED OR AWARDED TO ME?

A. The court can only divide the "marital portion" of the pension, that is, the portion that was earned during the marriage. The rest of the pension (that earned before marriage or after separation or divorce) is his separate property. In addition to this, the Act says that no more than half of the pension can, under most circumstances, be divided. Many states presume an equal division of all marital property, including retirement rights. Other than this, there is no way of telling how much marital property will be awarded or how much of the pension will be granted to you.

Q. IF I DIE, WHAT HAPPENS TO THE PENSION DIVISION AWARD?

A. Under USFSPA, your rights to a portion of military retired pay end upon your death. Payments cannot be made to your estate, survivors or heirs.

Q. IS THERE ANY WAY THAT I CAN STILL CONTINUE TO RECEIVE THE BENEFITS AFTER MY HUSBAND DIES?

A. Yes. Federal law states that, in the event the servicemember dies, the person receiving the award shall receive no further benefits unless the member has elected the Survivor Benefit Plan (SBP). Payments will continue if SBP coverage has been chosen (but not necessarily in the amount of payments under USFSPA). The court can order a spouse to provide SBP coverage for the non-service spouse. If the servicemember fails to do so, the former spouse must apply to DFAS within one year after the divorce; otherwise it will not be honored. When a spouse is forced to go this route, this is called a "Deemed Election". Once again, a U.S. court, not the court of a foreign country, must order this.

Q. IS THERE A MAXIMUM AMOUNT THAT I CAN RECEIVE UNDER USFSPA?

A. Yes. USFSPA limits pension division awards to 50 percent of the disposable retired pay or 65 percent when child support, alimony, or marital property is included and this is to be paid directly from the finance center. There are certain exceptions in the event of multiple court orders involving different spouses. Ask your legal assistance attorney about these exceptions.

Q. WHAT CAN I DO IF MY HUSBAND IS ORDERED TO PAY MORE THAN THE MAXIMUM ALLOWABLE AMOUNT UNDER USFSPA?

A. If this happens, DFAS cannot help you. If there is no exception in USFSPA, then you will need to take action directly against the individual soldier through the courts for amounts in excess of the difference between the maximum allowed under USFSPA and the court ordered judgment.

Q. BESIDES RETIRED PAY, WHAT OTHER BENEFITS CAN I RECEIVE UNDER USFSPA?

A. If you are a former spouse and meet certain requirements, you may be able to receive full or partial medical, dental, commissary and Post Exchange benefits.

Q. HOW CAN I RECEIVE FULL MEDICAL BENEFITS?

A. You can receive full benefits (including medical care on a "space-available" basis and CHAMPUS/TRICARE coverage) if you meet the "20/20/20 test". This three-part test requires that you must have been married to the soldier for at least 20 years. The soldier must have performed at least 20 years of creditable service toward retirement. Finally, at least 20 years of the marriage must overlap at least 20 years of active service. You must meet all three parts of the test.

Q. DOES THE DATE OF THE DIVORCE DECREE MATTER IF I MEET THE "20/20/20 TEST"?

A. No. If you meet the test, you are eligible to receive full benefits regardless of the date of the divorce decree.

Q. IF I DO NOT MEET THE "20/20/20 TEST" FOR FULL BENEFITS, ARE THERE OTHER BENEFITS AVAILABLE?

A. Yes. You may be able to receive permanent medical benefits if the divorce decree was final before 1 April 1985 and you meet the "20/20/15 test".

Q. WHAT ARE THE CRITERIA FOR THE "20/20/15 TEST"?

A. You must have been married to the soldier for at least 20 years and the member must have performed at least 20 years of creditable service towards retirement. Finally, at least 15 years of the marriage must be during military of service. Again, as with the "20/20/20 test", you must meet all parts of the test.

Q. IF I RECEIVE FULL BENEFITS, CAN I BE COVERED BY OTHER MEDICAL INSURANCE?

A. Under either test, if you receive full benefits you cannot be covered by any type of employer-sponsored medical coverage. However, you can refuse your employer-sponsored medical benefits and retain the military medical benefits. You would also disqualified if you have individually-obtained medical insurance.

Q. MAY I RETAIN FULL BENEFITS IF I REMARRY?

A. No. You must remain unmarried under either test. Any subsequent remarriage eliminates the benefits, even if you are widowed or divorced later.

Q. IF I MEET THE "20/20/15 TEST", BUT MY DIVORCE DECREE IS FINAL AFTER 1 APRIL 1985, AM I STILL ELIGIBLE FOR SOME BENEFITS?

A. Yes. You are entitled to one year of transitional benefits, after which you have the right to convert to a private health plan set up by the Defense Department. However, you must remain unmarried and not be covered under employer-sponsored medical coverage.

Q. ARE THERE ANY OTHER ASPECTS OF MILITARY BENEFITS THAT I SHOULD KNOW?

A. Yes. Remember these points:

- If the nonmilitary spouse for some reason loses eligibility to medical care, he or she may purchase a "conversion health policy" under the DOD Continued Health Care Benefit Program (CHCBP), a health insurance plan negotiated between the Secretary of Defense and a private insurer. This must ordinarily be purchased within the 60-day period beginning on the later of the date that the former spouse ceases to meet the requirements for being considered a dependent or such other date as the Secretary of Defense may prescribe. Upon purchase of this policy the former spouse is entitled, upon request, to medical care until the date that is 36 months after (1) the date on which the final decree of divorce, dissolution or annulment occurs or (2) the date the one-year extension of dependency under 10 U.S.C. 1072(2)(H) (for 20/20/15 spouses with divorce decrees on or after April 1, 1985) expires, whichever is later. Premiums must be paid three months in advance; rates are set for two rate groups, individual and group, by the Assistant Secretary of Defense (Health Affairs). CHCBP is not part of TRICARE. For further information on this program, contact a military medical treatment facility health benefits advisor, or contact the CHCBP Administrator, P.O. Box 1608, Rockville, MD 20849-1608 (1-800-809-6119).

- A former spouse who qualifies for any of these benefits may apply for an ID card at any military ID card facility. He or she will be required to complete DD Form 1172, "Application for Uniformed Services Identification and Privilege Card." The former spouse should be sure to take along a current and valid picture ID card (such as a driver's license), a copy of the marriage certificate, the court decree, a statement of the member's service (if available) and a statement that he or she has not remarried and is not participating in an employer-sponsored health care plan.

- The benefits we're discussing are statutory entitlements; they belong to the nonmilitary spouse if she or he meets the requirements as set out above. They are not terms that may be given or withheld by the military member, and thus they should not ordinarily be part of the "give and take" of pension and property negotiations since the military member has no control over these spousal benefits.

Q. ARE THERE ANY CIVILIAN AGENCIES AVAILABLE TO HELP ME?

A. The American Retirees Association (ARA) is an organization that serves divorced military members--active-duty, Guard/Reserve and retired. The ARA can be reached at 2009 N. 14th Street, Suite 300, Arlington, Virginia 22201 (703-527-3065). The ARA has also published a book, "Divorce and the Military II" that covers in depth most of the issues discussed here.

Q. GOD BLESS AMERICA!! THIS STUFF IS SO DARNED COMPLEX THAT I CAN'T FIND A GOOD CIVILIAN ATTORNEY THAT KNOWS ANYTHING ABOUT USFSPA AND MILITARY PENSION DIVISION. HOW CAN I GET A GOOD, COMPETENT LAWYER TO HELP ME?

A. That's a very good question. There are lots of military cases where rights and advantages have been lost because the attorney's lack of knowledge of the subject matter. As a practical matter, there are very few attorneys in any given state (and even fewer overseas) who know much about this little-known corner of the law -- USFSPA and the division of military retirement benefits. And since you only get one chance to do it right, it makes sense to find the right lawyer right off the bat! Here are a couple of tips to help you:

- Ask a legal assistance attorney to help you; they will sometimes know local lawyers near the military base who specialize in "military divorce" cases.

- Ask a friend who's been through this already; if he or she has had a good attorney, this kind of "word-of-mouth" advertising may help you hook up with the right attorney.

- If you already have a lawyer, ask him (or her) how much experience he has in the area of military pension division. A good lawyer should never hesitate to answer a question like this; an honest attorney will not flinch at giving you a straightforward answer. Be careful if your lawyer is "offended" or becomes defensive, however.

- If you're generally satisfied with your current lawyer but she need some help, don't hesitate to suggest that another attorney be hired to act as co-counsel in the area of USFSPA and military pension division. The code of ethics in virtually every state requires attorneys to be competent in the area in which they practice or else to associate competent co-counsel. Maybe if your lawyer has a "silent partner" to help out when the going gets rough, your case will be settled (or tried) more effectively and fairly.

- Try to get a Reservist who practices in the field of family law as your attorney. Members of the Reserves are frequently the ones who are the most "up to speed" on current law and regulations in this area.

- Find out from the state bar or bar association if there are "certified specialists" in family law in your state. A majority of stated have "specialty" designations for

lawyers that concentrate their practices in a particular field, and these lawyers (although charging a premium for their services) will be more likely to be able to handle your case competently than a general practitioner.

- Contact the family law section of your state's bar association or the American Bar Association to see if they can recommend the names of some attorneys who've spoken or written in the area of military divorce law.

Q. IF I HAVE OTHER QUESTIONS, WHAT SHOULD I DO?

A. See a legal assistance attorney or private attorney as soon as possible. Your lawyer can answer many questions and help you to make a fair and intelligent decision about your choices, options and alternatives. Our legal assistance office stands ready, willing and able to help you in these matters. Be sure to bring along with you to the interview a copy of any documents or court papers that might be helpful to your attorney.