Partition of Military Retired Pay in Texas Divorce

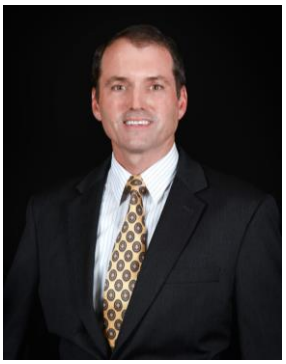
Author:

James G. Cramp
Colonel, USAF (Ret.)

August 2012
(Republished November 2013)

CRAMP LAW FIRM, PLLC
901 N.E. Loop 410 – Suite 800
San Antonio, Texas 78209

About the Author



James ("Jim") Cramp is the founder and principal at the Cramp Law Firm, which provides a spectrum of family-related legal services in the San Antonio region. Jim is a strong and committed advocate for all families. His military background has made him particularly passionate about serving military and Federal civil service families in all stages of life.

Jim retired from military service in the grade of colonel after having served 29 ½ years on active duty. His military career included flying, operations, support, recruiting, training and headquarters assignments. Jim is a three-time commander at the detachment, squadron and group levels.

Jim has two passions as an attorney. The first is ***caring about*** and ***caring for*** families in the broader community because they are the foundation of our nation. The second is to continue doing what he did for decades while on active duty—***caring about*** and ***caring for*** military and Federal civil service families whether they are still serving or enjoying second careers and hobbies in retirement.

Civilian and Military Education

- Juris Doctor (JD) (Magna Cum Laude),
  St. Mary's University School of Law, San Antonio, Texas
- Executive Excellence Seminar,
  H. John Heinz III School of Public Policy and Management, Carnegie Mellon University, Pittsburgh, PA
- Master of Strategic Studies (MSS),
  Air War College (in residence), Montgomery, Alabama
- Master of Business Administration (MBA),
  California State University (Stanislaus), Turlock, California
- Master of Aeronautical Science (MAS),
  Embry Riddle Aeronautical University, Daytona Beach, Florida
- Joint Forces Staff College (in residence),
  Norfolk, Virginia
- Marine Corps Command & Staff College (in residence),
  Quantico, Virginia
- Bachelor of Arts (BA),
  East Stroudsburg State University, East Stroudsburg, Pennsylvania

Organizations and Memberships

- American Bar Association
- State Bar of Texas
- San Antonio Bar Association
- Military Officers Association of America
- Harlan Society (law honors)

Table of Contents

Table of Authorities

Cases **Page(s)**

FEDERAL STATUTES

TEXAS STATUTES AND RULES OF CIVIL PROCEDURE

DEPARTMENT OF DEFENSE REGULATIONS

FEDERAL GOVERNMENT REPORTS

OTHER AUTHORITIES

Preface

While this paper is substantial in its coverage and should be of value to both the novice and experienced military family law practitioner, it is not an exhaustive review of the subject matter. Some sections and subsections of the United States Code were left unaddressed because, in the author's opinion, they apply to fact situations beyond the norm. Therefore, the military family law practitioner must conduct his own research to ensure he is aware of all the law that applies to the unique set of facts with which he is confronted. The same can be said for Texas case law.

Next, regarding treatment of gender within the paper's construct, the servicemember often is referred to by a male personal pronoun and the former spouse by a female personal pronoun. This approach is meant to convey realism, not sexism. As the reader will note within the paper's very first section, women comprise roughly 15 percent of the current military force yet only seven percent of the military retiree population.

Finally, in the interest of space, all citations to statutes and civil procedure are presented in short form. All Federal statutes to include sections cited from Titles 5, 10, 14, 37, 38, 42, and 50 Appendix are from the United States Code Service (U.S.C.S.) online edition published by LEXIS and current through Public Law 112-155, approved August 7, 2012. All citations to the Texas Family Code are from the online edition published by LEXIS and current through the 2011 First Called Session with Federal case annotations through May 25, 2012 postings and State case annotations through July 17, 2012 postings. All citations to the Texas Rules of Civil Procedure are from the online edition published by LEXIS and current through July 5, 2012 with Federal case annotations through May 1, 2012 and State case annotations through June 28, 2012.

PART I: STRATEGIC CONTEXT.

Framing the Issues with Demographics.

A servicemember's (SM's) retired pay is likely to be the highest valued item of community property in a military divorce. *See* DEP'T OF DEF. OFFICE OF THE ACTUARY, STATISTICAL REPORT OF THE MILITARY RETIREMENT SYSTEM—FISCAL YEAR 2011 270, 275-76 (2012), *available at* http://actuary.defense.gov/reports-mr-stats.html. The sum of payments to an active duty O-5 (i.e. Army lieutenant colonel or Navy commander) who retired in fiscal year 2012 with 20 years of service—assuming modest 1.5 percent annual cost of living increases—will total $2.56 million during the remaining 40.6 years of his actuarial life (calculations at Appendix A). *See id*. The same calculation for an E-7 (i.e. Air Force master sergeant or Marine Corps gunnery sergeant) who retired in 2012 with 20 years active duty will total $1.275 million over the remaining 38.9 years of his actuarial life (Appendix B). *See id*. Writ large, the Department of Defense (DOD) totaled $50.65 billion in retired pay disbursements during fiscal year 2011 for its 1.933 million military retirees. *Id*. at 25, 144.

The 1.933 military retiree population can be better understood by subdividing it into some 1.566 million active duty retirees (24 percent officers and 76 percent enlisted) and nearly 367 thousand Reserve Component retirees (40.3 percent officers and 59.7 percent enlisted). *Id*. While women comprise roughly 15 percent of the total active duty and Reserve Component force, they constitute only seven percent of the retiree population. *Compare* STATISTICS ON WOMEN IN THE MILITARY, *available at* http://www.womensmemorial.org/PDFs/StatsonWIM.pdf, *with* STATISTICAL REPORT OF THE MILITARY RETIREMENT SYSTEM—FISCAL YEAR 2011, *supra* 188. Then, nearly 57 thousand SMs—or 2.9 percent of the total population—retired with more than 15 but less than 20 years service under a Temporary Early Retirement Authority (TERA) program that ran from 1993 until 2002. *Id*. at 11.

Texas figures prominently in the national equation with nearly one in ten of the nation's military retirees residing in the state. *See* STATISTICAL REPORT OF THE MILITARY RETIREMENT SYSTEM—FISCAL YEAR 2011, *supra* 26. In fiscal year 2011, DOD provided $388.5 million each month to the state's 192.2 thousand military retirees. *Id*. (excluding Department of Veterans Affairs disability compensation offsets, if any). Among Texas' military retiree population, nearly one in six lives in San Antonio, a metropolis that styles itself as "Military City USA." *See id*. at 46 (counting military retirees in the 782NN zip code); Defense Transformation Institute website, *available at* http://militarycityusa.com/.

There is much a military family law practitioner must know to include: (1) how DOD calculates non-disability and disability retired pay; (2) how the DOD retired pay interacts with the Department of Veterans Affairs (VA) disability compensation system; (3) how VA disability compensation can cause partial defeasance of the share of retired pay awarded to a former spouse (FS) years or even decades after the divorce; and (4) how the Survivor Benefit Plan (SBP), if available, can secure a FS's financial future—even yielding a "death windfall"—after the SM's demise. Each of these issues and more will be explored in the coming pages.

For now, introducing these issues by examining the demographics can aid the military family law practitioner in anticipating how best to safeguard and serve military clientele. The practitioner should appreciate that the military retiree population both nationally and in Texas is comprised overwhelmingly of non-disability (i.e. longevity) retirees—at 95 percent and 91 percent respectively. *Id*. at 144. Dissecting the population further, some 45 percent of non-

disability retirees nationally have a portion of their monthly retired pay offset by VA disability compensation—which in most cases invokes the partial defeasance of the FS's share mentioned above. *See id*. at 154. In contrast, some 16.5 percent of military retirees nationally and 21 percent in Texas qualify to receive their full DOD retired pay and VA disability compensation concurrently, courtesy of a statutory provision known as Concurrent Retirement and Disability Pay (CRDP). *Id*. at 30. Yet only 4 percent of military retirees nationally and 4.5 percent in Texas have taken advantage of CRDP's alter ego, Combat-Related Special Compensation (CRSC), which can cause a FS financial devastation when both CRSC and VA disability ratings near 100 percent. *See id*. Shifting to SBP, while the historical "take rate" nationally is only 65 percent, recent retirees are enrolling at a much higher clip of 81 percent. *Id*. at 224-25.

The importance of accurately partitioning military retired pay in divorce is not limited to the current and future military retiree populations—despite the fact that only 19 percent of those who ever don the uniform serve long enough to qualify for retired pay (49 percent of officers and 17 percent of enlistees). *See* DEP'T OF DEF. OFFICE OF THE ACTUARY, VALUATION OF THE MILITARY RETIREMENT SYSTEM—SEPTEMBER 30, 2010 24 (2012), *available at* http://actuary.defense.gov/Portals/15/Documents/valbook2010.pdf. Not everyone who leaves short of retirement forfeits all chance of having their years of military service count toward a Federal annuity. *See* 5 U.S.C.S. §§ 8334(j), 8411(c) (defining credit for military service in the Federal civil service retirement systems). The fact that military service can be rolled into a Federal civil service retirement annuity is not a peripheral issue for the military family law practitioner given that nearly one-half million veterans make up 28.3 percent of the Federal workforce. UNITED STATES OFFICE OF PERSONNEL MANAGEMENT, COMMON CHARACTERISTICS OF THE GOVERNMENT, 50 (2010), *available at* www.opm.gov_feddata_demograp_table8mw.pdf.

Accurate partition of military retirement pay—whether unvested, vested-but-not-matured, or fully-matured at time of divorce—is critically important to both parties well-being. When representing the SM, accurate partition ensures the client is not divested of separate property through an erroneous application of Federal and Texas law. When representing the FS, it facilitates a just and right division of the community estate that—if the retirement pay matures—can lay a foundation for the FS's long-term financial security.

Nature of the Military Retired Pay System.

The military retired pay system is a non-contributory, defined benefit plan. *See* 10 U.S.C.S. §§ 1461-67. It is not a pension plan in the sense that military retired pay cannot be partitioned in divorce based on an accrual value over time. DEP'T OF DEF. FIN. MGMT. REGULATION (DODFMR) 7000.14-R, Vol. 7B, Ch. 29, Para. 290614 (2012). To the contrary, it is a statutory entitlement calculated only at the time the member retires, using the SM's rank and total years of creditable service to determine the benefit. *Id*. Thus, the system has been described as "all or nothing," since entitlement to retired pay vests when the SM first attains eligibility for retirement at 20 years creditable service. *See* 10 U.S.C.S. §§ 3911-3929 (providing Department of the Army authority); 10 U.S.C.S. §§ 6321-6336 (providing Department of the Navy authority); 10 U.S.C.S. §§ 8911-8929 (providing Department of the Air Force authority); 14 U.S.C.S. §§ 291, 355 (providing U.S. Coast Guard authority); CHARLES A. HENNING, CONGRESSIONAL RESEARCH SERV., MILITARY RETIREMENT REFORM: A REVIEW OF OPTIONS AND PROPOSALS FOR CONGRESS 1-2 (2011).

The military retired pay system is scrutinized at regular intervals. *See* LIBRARY OF CONGRESS FEDERAL RESEARCH DIVISION, A SUMMARY OF MAJOR MILITARY RETIREMENT REFORM PROPOSALS, 1976-2006 1-13 (2007). The President is required at no more than four year intervals to study the military compensation system, which includes the military retired pay system, and propose changes via a report to Congress. 37 U.S.C.S. 1008(b). The resulting report is entitled *The Quadrennial Review of Military Compensation* (QRMC), with the recently published 11th edition available at http://militarypay.defense.gov/reports/qrmc/11th_QRMC_Main_Report_(290pp)_Linked.pdf. *See* DEP'T OF DEF., PRESS RELEASE NO. 520-12 (JUNE 21, 2012), available at http://www.defense.gov/releases/release.aspx?releaseid=15392.

The military retired pay system remains stable but not static despite the regular stream of proposals for change both large and small. *See* A SUMMARY OF MAJOR MILITARY RETIREMENT REFORM PROPOSALS, *supra* 1-13. The system's stability over the last 60 years is linked to its defining feature—"all or nothing" vesting at 20 years—which has remained in force since its inception in the 1940s. *See id*. at 1.

The economic downturn that began in 2008 spawned a renewed focus on wholesale reform of the military retired pay system. *See* HENNING, *supra* 19-25. The last major reform—introduction of the "High Three" system—occurred more than 30 years ago and continues to stand as the single most significant change to the military retired pay system since World War II.. *Id*. at 6, 13. While history suggests tweaks to the system will continue to occur, whether Congress ultimately has the political will to enact wholesale reform remains uncertain. *See* LIBRARY OF CONGRESS FEDERAL RESEARCH DIVISION, supra 70-74; HENNING, *supra* 19-25.

If wholesale reform does occur in the future, then past precedent and current policy statements suggest that change will only apply to new entrants and those serving at the time of change will be grandfathered under the current (High Three) retired pay system. HENNING, *supra* 6, 12-13. In that light, it will take decades before the full effect of any prospective reform is woven into the fabric of Texas case law. *See* VALUATION OF THE MILITARY RETIREMENT SYSTEM—SEPTEMBER 30, 2010 at 23 (citing that for fiscal year 2011, 97.2 percent of SMs now serving entered after the last minor reform, CSB/REDUX, in 1986, which is now more than 25 years ago).

PART II: FEDERAL LAW IMPACTING PARTITION OF MILITARY RETIRED PAY.

State Authority to Divide Military Retired Pay in Divorce.

The issue of partition of the military retired pay in divorce reached a critical juncture in June 1981, with the U.S. Supreme Court's decision in *McCarty*, which preempted all then-existing state authority over military retired pay. *See McCarty v. McCarty*, 453 U.S. 210 (1981). The Supreme Court interpreted Congressional intent in then-existing legislation as having established military retired pay as a SM's separate property. *See id*. at 224-26. Simultaneously, the Court noted the plight of a FS and acknowledged Congressional authority to provide specific protection if it chose to do so. *Id*. at 235-36.

Congressional reaction was swift. In September 1982, Congress provided the states authority to divide the military retired pay in divorce according to state law—subject to certain Federal preemptions—by enacting the Uniformed Services Former Spouses' Protection Act (USFSPA). *See* USFSPA § 1408 (codified in 10 U.S.C.S. § 1408). The USFSPA has been

amended ten times since its inception with the last amendment having occurred in 2009. *See id.*

USFSPA.

Overview.

A 2004 Congressional Research Service report characterized the USFSPA as containing five important provisions:

(1) It enabled state courts to treat disposable military retired pay as divisible property in divorce cases.

(2) It allowed 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 FS *if the settlement involved was in compliance with the USFSPA*.

(3) It allowed 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 allowed a military member or retired member to voluntarily designate a FS as a beneficiary under the military Survivor Benefit Plan—or for a state court to order designation under certain conditions.

(5) It defined which FSs were eligible to secure access to military sponsored medical care benefits as well as commissary and exchange privileges.

DAVID BURELLI, CONGRESSIONAL RESEARCH SERVICE, MILITARY BENEFITS FOR FORMER SPOUSES: LEGISLATION AND POLICY ISSUES 1-2 (2004) (emphasis original). Study of the partition of the military retired pay in divorce involves the first four provisions which will be developed in this paper. The fifth provision—medical care, commissary and exchange privileges—is related indirectly to qualification for a military retired pay. *See* 10 U.S.C.S. §§ 1062 (defining commissary and exchange privileges for FS's who meet the definition of a "dependent" within § 1072(2)), 1072(2)(F), (G) (defining "dependent" FS qualifications for medical care), 1076 (defining authorized medical care for dependents). Military medical care, commissary and exchange privileges are not property rights derived from the retired pay and any court that attempts to award them in divorce exceeds its authority. *See In the Interest of A.E.R.*, No. 2-05-057-CV, 2006 Tex. App. LEXIS 1342, at *8-9 (Tex. App.—Ft. Worth 2006, no pet.). Thus, the fifth provision will not be developed further as it is beyond the scope of this paper.

Authority to Partition Military Retired Pay.

General.

With respect to the first important provision—authority to partition the retired pay—the USFSPA permits, but does not require, state courts to partition military retired pay in divorce. 10 U.S.C.S. § 1408(c)(1). This authority only exists for pay periods beginning June 25, 1981 and later—which is the date of the *McCarty* decision. *See id.* For court orders issued prior to June 25, 1981—i.e. before *McCarty*—a 1990 amendment to the USFSPA clarified that courts may not partition retired pay as divisible property if the order "did not treat (or reserve jurisdiction to treat) any amount of retired pay as the property of the member and the member's spouse or former spouse." *Id.*; *Buys v. Buys*, 924 S.W.2d 369 (Tex. 1996) (citing the USFSPA's 1990 amendment).

Partition of retired pay, however, is limited to the SM's "disposable retired pay" (DRP). 10 U.S.C.S. § 1408(a)(2)(C). The USFSPA defines DRP as the total monthly retired pay less amounts waived to receive disability compensation and Survivor Benefit Plan (SBP) premiums. *Id.* at § 1408(a)(4) (emphasis added). DRP can also

include deductions for recoupment of overpayments and forfeitures of retired pay ordered by a court-martial—both of which occur with less frequency. *See id.* From a practical perspective, therefore, SBP and disability compensation are the main factors in calculating DRP. *See id.* Both will be explored in later sections of this paper.

Federal Preemptions.

The USFSPA contains several provisions that preempt state law as it may affect partition of retired pay. *See* 10 U.S.C. S. § 1408(c). First, it proscribes any right, title or interest that would enable a spouse or FS to sell, assign, transfer or devise his or her entitlement to a share of the military retired pay. *Id.* at § 1408(c)(2). Second, since a FS receives nothing until the SM actually begins receiving monthly retired pay payments—which means years can elapse between a court's partition order and the SM's retirement—the USFSPA prohibits state courts from ordering a SM to retire in order to start earlier payments to the FS. *Id.* at § 1408(c)(3). Third—and of greatest significance—it preempts state jurisdictional statutes by prescribing the manner by which states obtain jurisdiction over the SM's retired pay. *Id.* at § 1408(c)(4). In order to partition military retired pay, jurisdiction can only be based on the following: (1) the SM's residence in the territorial jurisdiction of the court other than because of military assignment; (2) domicile in the territorial jurisdiction of the court; or (3) consent to the jurisdiction of the court. *Id.* In concert, the Servicemembers Civil Relief Act (SCRA) established that SMs neither lose nor acquire domicile merely by virtue of residency that derives from compliance with military orders. *See* 50 U.S.C.S. App. § 571(a).

Direct Payments to a Former Spouse.

With respect to the USFSPA's second important provision—direct payments to a FS—the USFSPA levies two prerequisites. First, the marriage must have overlapped at least 10 years of creditable military service. 10 U.S.C.S. § 1408(d)(2). It must be emphasized that the "10 year rule" only constrains enforcement of an order that partitions military retired pay. *See id.* It does not constrain a court's authority to partition military retired pay in cases where the marriage overlaps less than 10 years military service. *See id.* Thus, a FS with a valid court order based on less than 10 years marriage-military overlap must seek her share of retired pay payments directly from the retired SM. *See id.* Second, the DOD agent designated for receipt of court orders affecting pay—meaning the agency from which a direct payment to a FS will come—must receive "effective service of process." 10 U.S.C.S. § 1408(b)(1)(A). The designated agents are specified by DoD regulation as set out in the text box 1. DODFMR 7000.14-R, Vol. 7B, Ch. 29, Para. 290403.

Text Box 1: DoD Designated Agents for Receipt of Court Orders for FS Payment.

1) ARMY, NAVY, AIR FORCE, AND MARINE CORPS: Attn: DFAS-HGA/CL, Assistant General Counsel for Garnishment Operations, P.O. Box 998002, Cleveland, OH 44199-8002.

(2) COAST GUARD: Commanding Officer (1GL), United States Coast Guard, Personnel Service Center, 444 S.E. Quincy Street, Topeka, KS 66683-3591. Application may also be served by fax to 785-339-3788.

(3) PUBLIC HEALTH SERVICE: Attn: Retired Pay Section, CB, Division of Commissioned Personnel, PUBLIC HEALTH SERVICE, Room 4-50, 5600 Fishers Lane, Rockville, MD 20857-0001.

(4) NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION: Same as U.S. Coast Guard.

The Defense Finance and Accounting Service (DFAS) is the designated agent for the four main

military services—i.e. the agency that will make retired pay payments to retired SMs and qualified FSs. *Id*.

Effective service of process further requires that a court order be "regular on its face." *Id.* at § 1408(b)(1)(B). An order is regular on its face if it is issued by a court of competent jurisdiction, legal in form, and includes nothing on its face that provides reasonable notice that it is issued without authority of law. *Id.* at § 1408(b)(2). The order must identify the SM concerned and, when possible, include the SM's social security number. *Id*. at § 1408(b)(1)(C). It must certify that the SM's rights under the SCRA (i.e., 50 U.S.C. App. §§ 501-97b.) were observed. *Id*. at § 1408(b)(1)(D). Other requirements levied by the designated agent are discussed in the KEY ADMINISTRATIVE PROVISIONS section of this paper. Once all prerequisite for a valid order are met, then direct payment to a FS is limited to no more than 50 percent of DRP. *Id*. at § 1408(e)(1).

Alimony and Child Support in Relation to Direct Payments to a Former Spouse.

In homage to the USFSPA's third important provision—enforcement of alimony and child support—direct payment cannot exceed 65 percent of DRP in cases where a FS's share of the retired pay competes with either of these two domestic support obligations. *Id*. at § 1408(e)(4)(B). It is critical to emphasize that the limitations above only constrain DOD's ability to participate in enforcement of multiple, competing court orders. *Id*. at § 1408(e)(6). The limitations in no way cap the SM's pecuniary liability for satisfying the sum total of valid court orders that partition retired pay and levy domestic support obligations. *Id*. (emphasis added).

*** Remainder of column intentionally blank ***

Qualifying For and Computing Active Duty Military Retired Pay.

Retirement Authority.

As referenced earlier, the Secretaries of the Military Departments and the U.S. Coast Guard are authorized to retire active duty SMs upon attaining the minimum 20 years service. 10 U.S.C.S. §§ 3911-3929 (providing Department of the Army authority); 10 U.S.C.S. §§ 6321-6336 (providing Department of the Navy authority); 10 U.S.C.S. §§ 8911-8929 (providing Department of the Air Force authority); 14 U.S.C.S. §§ 291, 355 (providing U.S. Coast Guard authority). The U.S. Coast Guard procedures for retired pay computation originate in Title 14 and contain internal references to Title 10 since the procedures are identical to the other military services. *See* 14 U.S.C.S. at §§ 421-24, 467. Hence, all references that follow will point to applicable provisions in Title 10. *See id*.

Retirement Systems.

The manner in which a retiree's retired pay is computed differs dependent upon his "date of initial entry into military service" or DIEMS date. 10 U.S.C.S. §§ 1401-14. It is commonly said that there are three military retired pay systems (i.e. three statutory methods for computing a SM's retired pay depending upon the DIEMS date). *See id*. In reality, there are only two military retired pay systems—the "Final Basic Pay" and "High Three Basic Pay" systems—and a single permutation of the second system known as the "Career Status Bonus" program. *See id*. The Career Status Bonus program is known colloquially as the REDUX retirement system given that it produces a reduced benefit that will be described later in this section. *See id*.; Office of the Secretary of Defense for Personnel and Readiness, CSB/Redux Retirement System, *available at* http://militarypay.defense.gov/retirement/ad/04_redux.html.

Final Basic Pay (FPB) System.

The FBP system applies to SMs whose DIEMS date is September 7, 1980 or earlier. 10 U.S.C.S. § 1406. These SMs' retired pay is based on the final basic pay to which the SM was entitled on the day prior to retirement. *Id*. The actual retired pay entitlement is the product of the final basic pay times the applicable retired pay multiplier (i.e. final basic pay x retired pay multiplier). *See id*. at § 1409. The retired pay multiplier—also known as the longevity multiplier—is the product of the number of years of creditable service times 2.5 percent (i.e. number of years creditable service x 2.5%). *See id*. The product is rounded to the nearest 1/100th of a percent. DODFMR Vol. 7B, Ch. 3, para. 030108D.

The number of years creditable service includes each full year of service plus 1/12 for each full month of service. 10 U.S.C.S. § 1405(a), (b)(1). Fractions of months are discarded for computational purposes. *Id*. at § 1405(b)(2). The product of the computation is rounded down to the next whole dollar. *Id*. at § 1412(a).

To illustrate the computation of the retired pay multiplier, an example for a SM who served 24 years, 7 months and 10 days is in text box 2. Continuing the example, a retired pay computation under the FBP system is in text box 3.

*** Remainder of column intentionally blank ***

Text Box 2: Retired Pay Multiplier ("Longevity Multiplier") Example.

- Assumed facts: 24 years, 7 months and 10 days total military service.
- Years creditable service is 24 + 7/12 years.
  - The 10 days of service (i.e. partial month) are discarded.
- 24 + 7/12 in decimal form is 24.58 years creditable service.
- 24.58 years creditable service x 2.5% per year = 61.45% retired pay multiplier

Text Box 3: Retired Pay Computation Example—Final Basic Pay (FBP).

Assumed facts:

- Air Force Master Sergeant Smith (E-7) retired under the FBP system given a DIEMS date of September 7, 1980 or earlier.
- Her final basic pay = $3,645
- She retired with 24 years and 7 months creditable service; her retired pay multiplier is 24 + 7/12 x 2.5%, or 24.58 x 2.5% = 61.45%.
- Gross retired pay = $2,239 per month (i.e. $3,645 x 61.45%)

High Three (High-3) System.

The High-3 system applies to SMs whose DIEMS date is September 8, 1980 or later. 10 U.S.C.S. § 1407. In comparison to the FBP system, a SM retiring under the High-3 system experiences a modest decrement in retired pay because the average of his highest 36 months basic pay is used for computational purposes instead of the basic pay on the day prior to retirement. *Compare* 10 U.S.C.S. § 1407, *with* 10 U.S.C.S. § 1406.

Otherwise, computation of retired pay is identical insofar as it requires multiplying the High-3 pay by the retired pay multiplier. *See* 10 U.S.C.S. § 1407. The computation is illustrated in text box 4.

Text Box 4: Retired Pay Computation Example—High-3 Basic Pay.

Assumed facts:

- Air Force Master Sergeant Smith (E-7) retired under the High-3 system given a DIEMS date of September 8, 1980 or later.
- The average of her highest 36 months of basic pay = $3,450
- She retired with 24 years and 7 months, 10 days creditable service; her retired pay multiplier = 61.45%.
- Gross retired pay = $2,120 per month (i.e. $3,450 x 61.45%) (compare with text box 3).

Cost of Living Adjustment (COLA) for FBP and High-3 Retirees.

Whether retired under the FBP or High-3 system, retired pay is entitled to annual COLAs. 10 U.S.C.S. § 1401a. COLAs are linked to the Consumer Price Index and effective on December 1st. *Id*.

Career Status Bonus (CSB) System.

SMs with DIEMS dates of August 1, 1986 or later are automatically entitled to the High-3 system upon qualification for retirement. *See* 10 U.S.C.S. § 1407. However, these SMs have the option of accepting a mid-career bonus with temporarily reduced retired pay upon retirement. 37 U.S.C.S. § 354.

To receive the CSB, SMs must complete 15 years service and sign an irrevocable agreement to remain on active duty through at least 20 years of service. *Id*. at § 354(a)-(c). The CSB is $30,000 payable in a lump sum or two, three, four, or five equal annual installments. *Id*. at § 354(d). The CSB is subject to repayment if the SM fails to complete 20 years service. *Id*. at § 354(f).

As mentioned earlier, SMs retiring under CSB have their retired pay multiplier decremented by one percent for each year less than 30 years of service and—after counting full years—1/12 of a percent for each month less than a full year. 10 U.S.C.S. § 1409(b)(2). Thus, if two SMs with DIEMS dates on or after August 1, 1986 each retire with exactly 20 years creditable service—and one opted for CSB and one did not—the SM under CSB would receive 40 percent of his High-3 pay as his initial retired pay while the other would receive 50 percent. *Compare* 10 U.S.C.S. § 1409, *with* 10 U.S.C.S. § 1407. This comparison is illustrated in text box 5 on the next page.

*** Remainder of column intentionally blank ***

Text Box 5: High Three and CSB Comparison.	
"Commander Smith"	**"Commander Jones"**
• High-3 system. • 22 years, 4 months, and 7 days creditable service at retirement (22 + 4/12, or 22.33 in decimal form). • Retired pay multiplier = 22.33 x 2.5% , or 55.83%. • High-3 basic pay = $ 8,200. • Gross retired pay formula = $8,200 x 55.83%, or $4,578 per month.	• CSB system. • 22 years, 4 months, and 7 days creditable service at retirement (22 + 4/12, or 22.33 in decimal form). • Retired pay multiplier had the SM ***not*** opted for CSB = 22.33 x 2.5%, or 55.83% (i.e. same as Commander Smith). • $30,000 career status bonus lump sum received at 15 years of service. • Retired pay multiplier ***with*** CSB = 55.83% minus [(7 x 1%) + (8/12 x 1%)], which is the decrement factor for less than 30 years service = 48.16% • High-3 basic pay = $8,200 (i.e. same as Commander Smith). • Gross retired pay formula = $8,200 x 48.16%, or $3,949 per month.

COLA for CSB Retirees.

The retired pay is further reduced over time as COLAs for CSB retirees are the standard COLA for military retirees less one percent. 10 U.S.C.S. § 1401a(b)(3). There is, however, a one-time "catch up" that occurs at age 62, when the CSB retired pay is recomputed to achieve parity with non-CSB High-3 retirees who have the same number of years and full months creditable service. *See* 10 U.S.C.S. § 1410. Restoration of parity is only brief since CSB retirees post-62 years of age will continue to receive the standard retiree COLA less one percent. *See* 10 U.S.C.S. § 1401a(b)(3).

CSB and its Waning Popularity.

While DOD does not maintain records on how many SMs with DIEMS dates on or after August 1, 1986 opted for CSB, statistics compiled by the Navy and Marine Corps for the years 2003-2010 suggest interest in the program has dropped precipitously. *See* HENNING, *supra* 9. Roughly 41 percent of those eligible opted for CSB in 2003, but the "take rate" decreased each year with one exception before hitting the low of 16 percent in 2010. *Id*. at 10.

Temporary Early Retirement Authority (TERA).

General.

The fiscal year 2012 National Defense Authorization Act permitted the Secretaries of the military departments to administer a TERA program through December 31, 2018, as a force management tool to meet drawdown targets. NDAA, Pub. L. No. 112-81, 124 Stat. 1298, (2012) (codified as amended at 10 U.S.C.S. § 1293 note). Succinctly, the retired pay multiplier under TERA is reduced by 1/12th of one percent for each month the SM retires short of 20 years service. 10 U.S.C.S. § 1293 note. For example, while a hypothetical "16 year retiree" would normally expect to receive 40 percent of his High-3 base pay (i.e. 16 x 2.5% = 40%), a 16 year TERA retiree would only receive 36 percent of his High-3. *See id.*

Further Information.

TERA will not be explored further within this paper given that the prior authorization only impacted less than 3 percent of current military retirees. *See* STATISTICAL REPORT OF THE MILITARY RETIREMENT SYSTEM—FISCAL YEAR 2011, *supra* at 11. Pay entitlements for TERA retirees are fully described in DODFMR 7000.14-R, Vol. 7B, Ch. 3, para. 030110, *available at* http://comptroller.defense.gov/fmr/07b/07b_03.pdf.

Qualifying For and Computing the Reserve Component Military Retired Pay.

The term "Reserve Component (RC)" includes the following:

(1) Army National Guard.

(2) Army Reserve.

(3) Navy Reserve.

(4) Marine Corps Reserve.

(5) Air National Guard.

(6) Air Force Reserve.

(7) Coast Guard Reserve.

10 U.S.C.S. § 10101. Generally, a Reserve Component servicemember (RCSM) becomes eligible to apply for a retired pay when he completes what is known colloquially as 20 "good years" of service as calculated via a points-based system. *See* 10 U.S.C.S. § 12731(a). However, unlike an active duty retiree, a RC retiree generally does not begin receiving monthly retired pay payments until attaining 60 years of age. *See id*. The age 60 threshold can be reduced for RCSMs who are called to active duty after January 28, 2008. *Id*. at § 12731(f)(2). In such cases, the threshold to begin receiving monthly retired pay payments is reduced by three months for each aggregate of 90 days of active duty service—with a maximum reduction to 50 years of age. *Id*.

A "good year" for RC retirement purposes includes any year in which the RCSM accumulates at least 50 points. 10 U.S.C.S. §§ 12732(a)(2). RCSMs earn points at the rate of one point per day for periods where they are called to active duty. *Id*. RCSMs earn a prescribed amount of points for drill periods (e.g. weekend or annual training), attending or completing military educational courses, providing military funeral honors, and a range of other duties. *Id*. RCSMs also earn 15 points per year by virtue of membership in the RC. *Id*.

Years of creditable service for RC members is computed by adding all points—to include one point per day for any time while formerly a member of the active duty forces—and dividing the total by 360. 10 U.S.C.S. § 12733. While a year in which a RCSM accumulates less than 50 points does not qualify as a "good year" for purposes of retirement eligibility, all points are included when computing years of creditable service. *Id*. at § 12731-33.

An example is set out in text box 6 for illustration. The example is based on a notional RCSM—"Sergeant Major Walker"—who served his first six years in the Army on active duty before transferring to the Army Reserve. In year 12, he was not able to accumulate the necessary 50 points for a "good year." In years 18-19, he was called to active duty when his unit deployed to Iraq in 2002-2003. He qualified for RC retired pay because he accumulated 26 "good years" during 27 years total service. He is not yet 60 years old so he is not yet receiving a monthly retired pay based on the equivalency of 12.13 years of creditable service.

*** Remainder of column intentionally blank ***

Text Box 6: Computation of RCSM Years of Creditable Service Example			
Year	Component	Points	Note
1	Active	365	
2	Active	365	
3	Active	365	
4	Active	366	Leap year
5	Active	365	
6	Active	365	
7	Reserve	74	
8	Reserve	74	
9	Reserve	65	
10	Reserve	68	
11	Reserve	63	
12	Reserve	40	≠ "Good year"
13	Reserve	74	
14	Reserve	68	
15	Reserve	74	
16	Reserve	80	
17	Reserve	74	
18	Reserve	365	Deployed
19	Reserve	365	Deployed
20	Reserve	74	
21	Reserve	65	
22	Reserve	75	
23	Reserve	82	
24	Reserve	74	
25	Reserve	110	
26	Reserve	92	
27	Reserve	120	
Total Points		4,367	
Years of Service: 4,367 ÷ 360 = 12.13 years			

Once years of service is computed, the retired pay entitlement is calculated per 10 U.S.C.S. § 12739. Like active duty SMs, RCSMs qualify under either the FBP or High-3 systems based on their DIEMS date. *Compare* 10 U.S.C.S. § 12739(a)(1), *with* 10 U.S.C.S. §§ 1406-1407. The retired pay multiplier remains 2.5 percent for each year or fraction of creditable service. 10 U.S.C.S. § 12739(a)(2). The result is rounded down to the next whole dollar. 10 U.S.C.S. § 12739(d). An example calculation for our notional "Sergeant Major Walker" is illustrated in text box 7.

Text Box 7: Retired pay Computation Example under High-3 System.

Assumed facts:

- Sergeant Major Walker (E-9) entered military service in 1984; therefore, he retired under the High-3 system given that his DIEMS date after September 7, 1980.
- The average of his highest 36 months of basic pay was $6,129 per month.
- Retired pay (longevity) multiplier = 12.13 years of service x 2.5% = 30.33%.
- Gross retired pay = $6,129 x 30.33% = $1,858 per month starting at age 60.

Finally, RC retirees receive annual COLAs per the same calculation used for active duty retires. 10 U.S.C.S. § 1401a.

*** Remainder of column intentionally blank ***

Fleet Reserve/ Fleet Marine Corps Reserve.

General.

The Fleet Reserve and Fleet Marine Corps Reserve (FR/FMCR) provide a cadre of trained personnel subject to involuntary recall in the event of war, national emergency or as otherwise authorized by law. *See* 10 U.S.C.S. § 6485(a). Enlisted SMs in the Navy or Navy Reserve and Marine Corps or Marine Corps Reserve may request transfer to the FR/FMCR upon completion of 20 years or more service. *Id*. at § 6330. Without being recalled, FR/FMCR members can be ordered to perform not more than two months training in each four year period. *Id*. at § 6485(b). FR/FMCR members are transferred to the retired list when they reach 30 years service. *Id*. at § 6331(a). While the FR/FMCR constitute a special category of personnel insofar as their entitlement to retainer pay is concerned, it should be noted that all retired military personnel are subject to recall to active duty in the event of war or national emergency under guidelines set by the Secretary of Defense. *Id*. at § 688 (emphasis added).

Pay.

FR/FMCR members receive retainer pay instead of retired pay to reflect the fact their services have been retained for possible use in the event of war or national emergency. *See id*. at § 6330(c); DODFMR 7000.14-R, Vol. 7B, Ch. 2, para. 020404. Of significance to the military family law practitioner, all USFSPA provisions apply equally to both retainer and retired pay. *See id*. at § 1408(a)(7). Despite the "retainer pay" label, retainer pay is computed based on rank and longevity in the same manner as retired pay. *See* 10 U.S.C.S. § 6330; DODFMR 7000.14-R, Vol. 7B, Ch. 2; para. 020601. Entitlement to retainer pay begins the day after transfer to the FR/FMCR. DODFMR 7000.14-R, Vol. 7B, Ch. 2, para. 020404. Retainer pay stops during periods of active duty. *Id*. at Ch. 3, para. 030106. Time spent on active duty while a member of the FR/FMCR is factored into and boosts computation of retired pay. *See id*. at § 6331(b).

Further Information.

DODFMR 7000.14-R, Vol. 7B, Chapter 2 fully describes pay entitlements for FR/FMCR members. The chapter is available at http://comptroller.defense.gov/fmr/07b/07b_02.pdf.

Survivor Benefit Plan (SBP)

General.

Direct retired pay payments to a FS terminate on the earlier of the date specified in the court order or death of the SM. 10 U.S.C.S. § 1408(d)(4). Consequently, the USFSPA's fourth important provision—SBP—can be a critical component in securing a FS's long-term financial well-being.

SBP is a purchased annuity program that—upon the SM's death—provides a specified level of monthly payments for the remainder of the FS's life. *See* 10 U.S.C.S. § 1450. Eligibility for SBP payments is lost if the FS remarries before age 55. *Id*. at § 1450(b)(2). Eligibility can be regained, however, if any subsequent marriage terminates by death, annulment or divorce. *Id*. at § 1450(b)(3). Recall that under the USFSPA, deduction of SBP premiums from gross retirement pay is a statutory component of the DRP computation. *Id*. at § 1408(a)(4)(D).

Determining the Annuity and Premium.

In straightforward terms, the SBP annuity is 55 percent of the base amount (i.e. the amount of retired pay that the SM elects to insure). 10 U.S.C.S. § 1451(a)(1)(B)(i)(V). The base amount is the amount designated by the SM up to his gross retired pay entitlement (i.e. "standard annuity") but not less than $300 (i.e. "reduced annuity"). *See id*. at § 1447(6). The monthly SBP insurance premium in most instances is six and one-half (6.5) percent of the base amount. *Id*. at

§ 1452(a)(1)(A). Both the base amount insured and premiums paid increase commensurate with retired pay COLAs. *Id*. at § 1451(g) (addressing increases in the annuity paid after the SM's death that remain tied to retired pay COLAs), 1451(h) (addressing increases in the premiums paid tied to retired pay COLAS the SM receives while still alive). Two notional examples are set out in the text box 8 to illustrate calculations for a standard and reduced annuity.

Text Box 8:

Example 1—"standard annuity."

- Full (gross) retired pay entitlement = $3,000 per month.
- SBP base amount = $3,000 per month.
- SBP premium during the SM's lifetime = $195 per month (i.e. $3K x 6.5%).
- SBP annuity paid to FS upon SM's death = $1,650 per month (i.e. $3K x 55%).
- Special note: Here, DRP available for partition equals $2,805 per month (i.e. $3K less SBP premium of $195).

Example 2—"reduced annuity."

- Retired pay entitlement = $3,000 per month.
- SBP base amount = $1,500.*

  * Spousal consent required to insure a base amount less than the full retired pay.

- SBP premium during the SM's lifetime = $97.50 per month (i.e. $1.5K x 6.5%).
- SBP annuity paid to FS upon SM's death = $825 per month (i.e. $1.5K x 55%).

DFAS requires that SBP premiums be deducted from the SM's retired pay. DODFMR 7000.14.-R, Vol. 7B, Ch. 29, para. 290610. Premiums cannot be deducted from a FS's share of retired pay and a court order that directs DFAS to do so is unenforceable. *Id*. Premiums are "paid up" and deductions from retired pay cease at the later of 30 years payment or the SM attaining age 70. *Id*. at § 1452(j).

Former Spouse (FS) SBP Coverage.

General.

When a marriage remains intact, the SM normally elects SBP standard annuity "spouse coverage." *See* 10 U.S.C.S. § 1448(a)(1). As indicated by the asterisk in text box 8, SMs may neither decline SBP coverage altogether nor elect a base amount less than the full retired pay entitlement without the spouse's consent. *Id*. at § 1448(a)(3).

When the marriage does not remain intact, whether prior or subsequent to the SM's retirement, courts have authority to order FS SBP coverage for the soon-to-be FS. *Id*. at § 1450(f)(4). In cases where the SM has already retired and previously elected "spouse coverage," an order for "FS SBP coverage" is still important; eligibility for "spouse coverage" terminates upon divorce and does not automatically convert to "FS SBP coverage." *See id*. at § 1450(a).

Deemed Election.

It is vital that the military family law practitioner understand how to effect a "deemed election" of FS SBP coverage by the SM because court-awarded coverage can be forfeited if certain timelines are not met. *See id*. at § 1450(f)(3). To effect a deemed election, the court order (and application, which is discussed later in the KEY ADMINISTRATIVE PROVISIONS section of this paper) must be received by the designated agent within one year of the divorce, otherwise the protection afforded by the order may be forfeited for failure to timely file. *See id. at* § 1450(f)(3)(C). The designated agents for SBP orders are set out on the next page in text box 9. *See* DD Form 2656-10 *available at* http://www.dtic.mil/whs/directives/infomgt/forms/eforms/dd2656-10.pdf.

Text Box 9: DOD Designated Agents for Receipt of Court Orders for FS SBP Coverage.

(1) ARMY, NAVY, AIR FORCE and MARINE CORPS: Defense Finance and Accounting Service, U.S. Military Retirement Pay, P.O. Box 7130, London, KY 40742-7130.

(2) COAST GUARD: Commanding Officer (LGL), USCG Personnel Service Center, 444 S.E. Quincy Street, Topeka, KS 66683-3591;

(3) PUBLIC HEALTH SERVICE: Office of Commissioned Corps Support Services, Compensation Branch, 5600 Fishers Lane, Room 4-50, Rockville, MD 20857;

(4) NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION: Same as U.S. Coast Guard.

Allocation of Coverage Prohibited.

A SM cannot elect to allocate SBP coverage between a spouse and FS, or multiple FSs. *See* 10 U.S.C.S. § 1448(b)(2). Thus, if SBP coverage was previously ordered to insure a "first FS's" share of the SM's retirement pay, then SBP is unavailable to insure any subsequent FS's share. *See id*. Once in effect, FS SBP coverage cannot be terminated by the SM in favor of a new spouse without the covered FS's consent. *Id*. at 1450(f)(2).

FS SBP Coverage When SM Dies While Still On Active Duty.

If a deemed election is in effect, then the FS will still receive an SBP annuity should the SM be vested in retired pay but die on active duty prior to actual retirement. *Id*. at § 1448(d)(3). This provision underscores the importance of the deemed election because income protection is afforded even though a single premium has never been paid. *See id*.

Reserve Component SBP (RCSBP).

General.

RCSBP provides protection to RCSMs who are eligible for retired pay except for the fact that they have yet to reach age 60. 10 U.S.C.S. § 1148(a)(1)(B). Many of RCSBP's features are identical to SBP, so only key differences will be highlighted. *Id*. at §§ 1447-55; c*ompare* DODFMR 7000.14R, Vol. 7B, Ch. 42-49 (describing SBP), *with* DODFMR 7000.14-R, Vol. 7B, Ch. 54 (describing RCSBP).

RCSMs have a 90-day window to apply for SBP after receiving notification of eligibility for retired pay. 10 U.S.C.S. § 1448(a)(2)(B). RCSMs must select one of three options known as Option A, B, or C. *See id*.; DODFMR 7000.14-R., Vol. 7B, Ch. 54, para. 540402 (describing in detail the three options). Otherwise, the same one year limitation for the FS to file for a deemed election subsequent to court order remains in effect. *See* 10 U.S.C.S. § 1450(f)(3); DODFMR 7000.14-R., Vol. 7B, Ch. 54, para. 540502H.

Option A.

Under Option A, the RCSM may defer his decision to enroll in RCSBP or decline coverage altogether. DODFMR 7000.14-R., Vol. 7B, Ch. 54, para. 540402A. In such cases, there is no annuity should the RCSM die before he begins to receive retired pay at age 60 (or earlier if qualified). *Id*. Spousal consent is required before the RCSM can defer the decision or decline RCSBP coverage. 10 U.S.C.S. § 1448(a)(3)(B), DODFMR 7000.14-R., Vol. 7B, Ch. 54, para. 540402A. The RCSM then has another opportunity to elect RCSBP when achieves the age to begin receipt of retired pay (i.e. normally age 60, or earlier if qualified). 10 U.S.C.S. § 1408(a)(2)(B).

Option B.

Under Option B, the RCSM may elect to provide a deferred annuity that, after the RCSM's death, would begin on the date at which he would have started to receive retired pay (i.e. age 60, or even earlier if qualified). DODFMR 7000.14-R., Vol. 7B, Ch. 54, para. 540402B. Spousal consent is again required to choose this option. 10 U.S.C.S. § 1448(a)(3); *see* DODFMR 7000.14-R., Vol. 7B, Ch. 54, para. 540502G.

Option C.

Under Option C, the RCSM may elect to provide an annuity immediately upon his death. DODFMR 7000.14-R., Vol. 7B, Ch. 54, para. 540402C. The annuity pays whether or not the RCSM had reached the age at which payment of retired pay would commence (i.e. death prior to age 60, or earlier if qualified). *Id*. The military family law practitioner who represents a FS would be well advised to ensure the decree specifies this option as the deemed election. *See id*.

RCSBP Premiums.

RCSBP premiums for either the deferred or immediate annuity options are the same as for SBP with the addition of an "add on" premium. 10 U.S.C.S. § 1452(a)(1)(B); DODFMR 7000.14-R., Vol. 7B, Ch. 54, para. 5410. The add-on premium depends on factors to include the type of annuity elected and difference in age between the RCSM and spouse or FS. DODFMR 7000.14-R., Vol. 7B, Ch. 54, para. 541001. Given that premiums normally are deducted from gross retired pay, RCSMs not yet receiving retired pay must pay all applicable premiums on their own. 10 U.S.C.S. § 1452(d).

RCSBP Annuity.

The annuity to a FS (or other eligible beneficiary) generally is computed in the same manner as for SBP except it is 55 percent of the base amount insured less the cost of the add-on premium. DODFMR 7000.14-R., Vol. 7B, Ch. 54, para. 541301 A. (emphasis added). The annuity amount paid is the amount calculated, rounded to the next lower whole dollar. *Id*.

FS RCSBP Coverage When SM Dies While Still On Active Duty.

If a deemed election is in effect, then the FS will still receive a RCSBP annuity should the SM be vested in retired pay but die within the 90 day window prior to making an election. 10 U.S.C.S. § 1448(f)(3).

Further Information.

DODFMR 7000.14-R, Vol. 7B, Chapters 42-49 fully describe SBP and Chapter 54 fully describes RCSBP. The chapters are available at http://comptroller.defense.gov/fmr/07b/index.html.

Disability Compensation

General.

Disability compensation is not subject to partition in divorce as it is excluded from the definition of DRP within the USFSPA. *See* 10 U.S.C.S. § 1408(a)(4)(B), (C). Nevertheless, the system of disability compensation must be understood by the military family law practitioner because its effect can significantly reduce DRP—and divest a FS of some or all of her share of the retired pay. *See id.*

There are two systems of post-service disability compensation. *See* 10 U.S.C.S. § 1216. One system is administered by the SM's respective military department (i.e. Department of the Army, Department of the Air Force, etc.). *Id*. It compensates SMs who were determined by the department to be physically unfit for continued duty. *Id*. The other system is administered by the VA. *Id*. It compensates SMs for service-connected disabilities that merit compensation post-service but did not render the SM unfit for continued duty (e.g. partial loss of hearing due to

prolonged noise exposure or partial loss of mobility within a joint or limb linked to some aspect of the SM's service). *See id*.

Military Department System: Those Physically Unfit for Continued Service.

The first disability compensation system—the one run by the respective military department—retires SMs physically unfit for continued duty under the authority of 10 U.S.C. Chapter 61—*Retirement or Separation for Physical Disability*. 10 U.S.C.S., §§ 1201-1222. These SMs are known colloquially as "Chapter 61 retirees" or "medical retirees." *See id*. Chapter 61 applies to those with less than 20 years creditable service (i.e. SMs not eligible for regular "longevity-based" retirement) or 20 years or more creditable service (i.e., SMs eligible for regular retirement). *Id*. For purposes of this paper, only Chapter 61 retirees with 20 years or more creditable service will be addressed hereafter in order to isolate the effect of their disability compensation on DRP subject to partition in divorce (i.e. SMs who attained eligibility for regular retirement and theoretically could have continued to serve except for the fact they were determined to be physically unfit for continued duty). *See* 10 U.S.C.S. § 1408(a)(4)(C).

A Chapter 61 retiree's respective military service determines the disability rating percentage using the VA's ratings schedule. 10 U.S.C.S. § 1216(a). The SM's retirement pay is computed first in the standard manner (i.e. based on the applicable retirement plan, rank and years of creditable service) and a second time based on the percentage disability for the condition(s) that precipitated retirement. *See* 10 U.S.C.S. § 1401(a). The SM is entitled to receive the higher of the two amounts. *Id*. at § 1401(b). When use of the disability rating produces the higher amount of retired pay, then those SMs are not also eligible to receive VA disability compensation. 38 U.S.C.S. § 5304(a). In other words, being compensated twice for the same disability, generally, is prohibited. *Id*.

With respect to USFSPA computations, DRP for a Chapter 61 retiree is regular, gross retired pay less an amount computed using the SM's the disability percentage. 10 U.S.C.S. § 1408(a)(4)(C). A notional example is set out in the text box 10 to illustrate the calculations.

Text Box 10: Example—Disposable Retired Pay of SM Retired for Physical Disability per 10 U.S.C.S., Chapter 61, §§ 1201-1222.

- Assumed figures for a Lieutenant Colonel with 22 years of service who is retired for physical disability with a 40% disability rating.
- SM's assumed base pay for retirement calculation = $8,000 per month.
- Gross retired pay based on standard calculations = $4,400 per month (i.e. $8,000 x 55% longevity multiplier (see text box 2, *supra*).
- Gross retired pay based on disability rating = $3,200 per month (i.e., $8,000 x 40% disability percentage).
- Amount of gross retirement pay SM will receive = $4,400 per month (i.e. the higher of the two figures).
- DRP subject to partition in divorce per USFSPA = $1,200 per month (i.e. $4,400 less $3,200)

VA System: Those with Service-Connected Disabilities.

The second disability compensation system is administered by the VA for SMs who are either regularly discharged before 20 years creditable service (i.e. discharged at expiration of a service commitment under conditions other than Chapter

61) or regularly retired but possess a service-connected disability. *See* 10 U.S.C.S., § 1216.

Title 38 prescribes the VA system for service-connected disability compensation. 38 U.S.C.S. §§ 1101-63. The scheme is quite elaborate and a comprehensive explanation is beyond the scope of this paper. *See id.* A concise explanation is contained on the VA's website at http://www.vba.va.gov/bln/21/compensation/. A more in-depth discussion is contained in a 2006 Congressional Research Service report worth perusing. DOUGLAS A. WEIMER, CONGRESSIONAL RESEARCH SERV., VETERANS AFFAIRS: BENEFITS FOR SERVICE-CONNECTED DISABILITIES (2011), *available at* http://www.lieberman.senate.gov/assets/pdf/crs/veteransaffairs.pdf.

For example, a SM (i.e. "veteran") with "spouse only" who is determined by the VA to be 40% disabled is entitled to $622 per month per the table effective 12/01/11. *See* TABLE, available at http://www.vba.va.gov/bln/21/Rates/comp01.htm. The same SM with a 60 percent disability rating is entitled to $1,102 per month. *Id*.

It is worth emphasizing again that the impact of VA disability compensation upon DRP can be dramatic given that disability compensation cannot be partitioned in divorce. *See* 10 U.S.C.S. § 1408(a)(4)(B), (C). In describing the impact, it is important to recall that the vast majority of retirees with service-connected disabilities have been rated by the VA as less than 50 percent disabled. STATISTICAL REPORT OF THE MILITARY RETIREMENT SYSTEM—FISCAL YEAR 2011, *supra* at 154. Retirees with disability ratings less than 50 percent must waive an equivalent amount of retired pay in order to receive VA disability compensation. *See* 38 U.S.C.S. § 5305. The amount waived is known colloquially as the "VA offset." *See id.* The example in text box 11 illustrates the impact of the VA offset on DRP.

Text Box 11: Example—Effect of VA Disability Compensation upon DRP when the SM's Disability Rating is < 50%.

- Assumed figures for a Lieutenant Colonel regularly retired (i.e. for longevity) with 22 years of service and a 40% VA disability rating.
- Assumed base pay = $8,000 per month.
- Gross retirement pay based on standard calculations = $4,400 per month (i.e. base pay of $8,000 x 55% longevity multiplier).
- VA disability compensation (assuming SM and spouse only at 40% rating) = $622 per month.
- Amount of regular retirement pay required to be waived to receive VA disability compensation = $622.
- Net effect:
  - Gross Retired pay = $4,400.
  - VA disability compensation = $622.
  - Total compensation to SM = $4,400 (i.e. $4,400 gross retired pay less $622 VA offset, plus $622 VA disability compensation).
  - DRP available for partition per USFSPA = $3,778 (i.e. $4,400 gross retired pay less $622 VA offset; the VA disability compensation is not part of DRP).*

* Subject to further reduction if SBP premiums are paid.

Concurrent Retirement and Disability Pay (CRDP).

SMs with service-connected VA disability ratings of 50 percent or greater are the beneficiaries of a statutory provision known as Concurrent Retirement and Disability Pay. *See* 10 U.S.C.S. 1414(a). For these SMs, waiver of an equivalent amount of retired pay in order to receive VA disability compensation is mitigated because the

amount normally waived is restored by CRDP. *See id*; DODFMR 7000.14-R, Vol. 7B, Ch. 64, para. 6401.

A SM's qualification for CRDP is of significant benefit to the FS. *See* DODFMR 7000.14-R, Vol. 7B, Ch. 64, para. 640502. CRDP is subject to partition under the USFSPA given that it is a restoration of retired pay and not disability compensation. *Id*. Thus, the SM receives the equivalent of his retired pay—all of which can be partitioned in divorce—plus VA disability compensation as illustrated in text box 12. *Id*. Application by the SM for CRDP is not required as DFAS has established procedures to automatically implement the entitlement once notified by the VA of a SM's qualifying rating. *See* DODFMR 7000.14R, Vol. 7B, Ch. 64, para. 6403.

Strictly speaking, enactment of CRDP included a ten year phase-in that extends through 2013. 10 U.S.C.S. § 1414(c). For purposes of this paper, the effect of the phase-in will not be detailed since it is rapidly becoming moot. *See id*.

Chapter 61 retirees with 20 or more years service who qualify for CRDP remain subject to VA offset. 10 U.S.C.S. § 1414(b). The offset, however, is limited to the amount of retired pay to which the SM would have been entitled had the SM not retired under Chapter 61. *Id*. Then, CRDP is not authorized if any restoration would cause retired pay to exceed the longevity-based amount to which the SM would have been entitled but for his disability retirement. DODFMR 7000.14-R, Vol. 7B, Ch. 64., para. 640401. The example in text box 13 on the next page illustrates the concept. Recall that with respect to USFSPA computations, DRP for a Chapter 61 retiree is regular retired pay less an amount computed using the SM's disability percentage. 10 U.S.C.S. § 1408(a)(4)(C).

Text Box 12: Example—Effect of VA Disability Compensation upon DRP when the SM's Disability Rating is ≥ 50%.

- Same assumptions as in text box 11.
- VA disability compensation (assuming SM and spouse only at 60% rating) = $1,102 per month.
- Waiver of an equivalent amount of retired pay not required to receive VA disability compensation because the normal VA offset is restored by CRDP.
- Net effect:
  - Gross Retired pay = $4,400.
  - VA disability compensation = $1,102.
  - Total compensation to SM = $5,502 (i.e. $4,400 gross retired pay less $1,102 VA offset, plus $1,102 CRDP restoration, plus $1,102 VA disability compensation).
  - DRP available for partition per USFSPA = $4,400 (i.e. $4,400 gross retired pay less $1,102 VA offset, plus $1,102 CRDP; the $1,102 VA disability compensation is not part of DRP).

Finally—other than the fact it reduces a FS's share of retired pay awarded in divorce—one might ask why a SM who does not qualify for CRDP would opt to waive an equivalent amount of retired pay in order to receive disability compensation. The main reason is straightforward—disability compensation is non-taxable. 38 U.S.C.S. § 5301(a)(1). It also is not subject attachment, levy or seizure under state legal process. *Id*. There are, however, limitations. Disability compensation remains subject to Federal process to satisfy debts to the Federal government. *Id.* It also is subject to garnishment for child support and alimony to the extent retired pay was waived to receive disability compensation. 42 U.S.C.S. § 659(h)(1)(A)(ii)(V).

Text Box 13: Example—Chapter 61 retiree subject to VA offset per § 1414(b).

- Assumed figures for a Lieutenant Colonel with 22 years of service who is retired for physical disability with a 70% disability rating.
- SM's assumed base pay for retired pay calculation = $8,000 per month.
- Gross retired pay based on longevity calculations = $4,400 per month (i.e. $8,000 x 55% longevity multiplier) (Recall that the retired pay multiplier—also known as the longevity multiplier—is 2.5% times the number of years creditable service (i.e. 2.5% x 22 = 55%).
    - Premium for FS SBP standard annuity for gross retired pay of $4,400 = $286 per month (i.e. $4,400 x 6.5%)
- Gross retired pay based on disability rating = $5,600 per month (i.e., $8,000 x 70% disability percentage).
    - Premium for FS SBP standard annuity for gross retired pay of $5,600 = $364 per month.
- Amount of retired pay SM will receive = $5,600 per month (i.e. the higher of the two amounts, as described earlier, per 10 U.S.C.S. § 1414(b)).
- VA disability compensation for 70% rating (for SM with spouse and child) = $1,902.
- Effect of CRDP upon compensation received by the SM had he **not** retired under Chapter 61 (i.e. had he retired solely based on longevity) = $6,016 (i.e. $4,400 retired pay based on longevity less $286 FS SBP premium, less $1,902 VA offset, plus $1,902 CRDP restoration, plus $1,902 VA disability compensation).
- **Theoretical effect** if full CRDP permitted when SM retires under Chapter 61 = $7,138 (i.e. $5,600 retired pay based on disability less $364 FS SBP premium, less $1,902 VA offset, plus $1,902 CRDP, plus $1,902 VA disability compensation) (Deemed "theoretical effect" because this outcome is proscribed by § 1414(b)).
- Required VA offset to retired pay = $1,200 (i.e. $5,600 less $4,400) (Mandated by § 1414(b), which precludes the "theoretical effect" from ever being realized).
- Compensation actually received by SM = $5,938 (i.e. $5,600 retired pay based on disability less $364 FS SBP premium, less $1,200 VA offset, plus $0 CRDP, plus $1,902 VA disability compensation).
- DRP available for partition per USFSPA = $0 (i.e. $4,400 retired pay based on longevity reduced to zero by combined effect of deducting $5,600 retired pay based on disability, the $286 FS SBP premium, and the $1,200 VA offset, plus adding $0 CRDP restoration. The $1,902 VA disability compensation is not part of the DRP calculus).

Combat-Related Special Compensation (CRSC).

There is a specialized variation of CRDP called Combat-Related Special Compensation (CRSC). 10 U.S.C.S. § 1413a. CRSC complements CRDP because its purpose is to mitigate the effect of the VA offset for SM's with combat-related disabilities who do not otherwise qualify for CRDP. *See* DODFMR 7000.14R, Vol. 7B, Ch. 63, para. 630101. CRSC is available to SMs with disabilities related to: (1) award of the Purple Heart; (2) direct armed conflict; (3) engagement in hazardous duty; (4) performance of duty simulating war conditions; and, (5) impact caused by an instrumentality of war. 10 U.S.C.S. § 1413a(e). CRSC is not retired pay and therefore not subject to partition under the USFSPA. *See* 10 U.S.C.S. § 1413a(g).

CRSC is a program layered with complexities and a detailed explanation is beyond the scope of this paper. The best source for an in-depth explanation with an abundance of scenario-based examples is DODFMR 7000.14R, Vol. 7B, Ch. 63, *available at* http://comptroller.defense.gov/fmr/07b/index.html. For purposes of this paper, a simplified example is presented in text box 14 to illustrate the interaction among the retired pay, CRSC and VA disability compensation, and DRP.

*** Remainder of column intentionally blank***

Text Box 14: Example—Effect of CRSC when VA Disability Rating < 50%.

- Assumed figures for a Lieutenant Colonel with 22 years of service who is retired for longevity and subsequently obtains a 40% VA disability rating, not all of which qualifies as combat-related under CRSC.
- SM's assumed base pay for retirement calculation = $8,000 per month.
- Gross retirement pay based on longevity = $4,400 per month (i.e. $8,000 x 55% longevity multiplier).
- FS SBP standard annuity = $286 per month premium (i.e. $4,400 x 6.5%)
- Notional VA disability compensation = $622.
- Notional CRSC based only on combat-related disabilities as calculated by the military department = $220.
- Net effect:
  - Compensation received by SM = $4,334 (i.e. $4,400 gross retired pay less $286 FS SBP premium, less $622 VA offset, plus $622 VA disability compensation, plus $220 CRSC).
  - DRP available for partition = $3,492 (i.e. $4,400 retired pay less $286 FS SBP premium, less $622 VA offset. Neither CRSC nor VA disability compensation are retired pay and therefore both are excluded from the DRP calculus).

Unlike CRDP, SMs must file an application with their respective military department to receive CRSC. 10 U.S.C.S. § 1413a(d). The amount for which a SM is eligible is determined by the respective military department using the VA's disability ratings schedule but without regard for any disability that is not combat-related. 10 U.S.C.S. § 1413a(b)(1).

A SM eligible for both CRDP and CRSC (i.e. SM with VA disability rating of 50% or greater, some amount of which is determined by the respective military department to be combat-related) cannot receive simultaneous compensation under both programs. 10 U.S.C.S. § 1414(d). Dual-eligible SMs, however, can switch between programs annually during an "open season." 10 U.S.C.S. § 1414(d)(2). Once enrolled in CRSC, DFAS will notify the SM if switching programs would result in greater compensation. DODFMR 7000.14-R, Vol. 7B, Ch. 63, para. 630402.

CRSC cannot exceed the reduction in a SM's retired pay due to VA offset. 10 U.S.C.S. § 1413a(b)(2). A notional example for a longevity retiree eligible for both CRDP and CRSC is presented in text box 15. Otherwise, Chapter 61 retirees are eligible for CRSC but—in the same manner as described earlier for CRDP—subject to an offset limited to the amount of retired pay to which the SM would have been entitled had the SM not retired under Chapter 61. *Id*. at § 1413(b)(3)(A).

*** Remainder of column intentionally blank ***

Text Box 15: Example—Effect of CRSC when VA Disability Rating 50% or greater and SM opts for CRSC in lieu of CRDP.

- Assumed figures for a Lieutenant Colonel with 22 years of service who is retired for longevity and subsequently obtains a 60% VA disability rating, all of which qualifies as combat-related under CRSC.
- SM's assumed base pay for retirement calculation = $8,000 per month.
- Gross retirement pay based on longevity = $4,400 per month (i.e. $8,000 x 55% longevity multiplier).
- FS SBP standard annuity = $286 per month premium (i.e. $4,400 x 6.5%)
- VA disability compensation (assuming SM and spouse only at 60% rating) = $1,102 per month.
- Notional CRSC based on combat-related disabilities as calculated by the military department = $1,200 per month.
- SM elects to receive CRSC which precludes receipt of CRDP.
- Net effect of opting for CRSC in lieu of CRDP:
  - Compensation received by SM = $5,314 (i.e. $4,400 gross retired pay less $286 FS SBP premium, less $1,102 VA offset, plus $1,102 VA disability compensation, plus $1,200 CRSC).
  - DRP available for partition = $3,012 (i.e. $4,400 retired pay less $286 FS SBP premium, less $1,102 VA offset. Neither CRSC nor VA disability compensation are retired pay and therefore both are excluded from the DRP calculus).
- Illustration of DRP had the SM opted for CRDP in lieu of CRSC:
  - Compensation received by SM = $5,216 (i.e. $4,400 gross retired pay less $286 FS SBP premium, less $1,102 VA offset, plus $1,102 CRDP, plus $1,102 VA disability compensation).
  - DRP available for partition = $4,114 (i.e. $4,400 retired pay less $286 FS SBP premium, less $1,102 VA offset, plus $1,102 CRDP. Recall that CRDP is partionable in divorce since it is a restoration of retired pay. Recall that VA disability compensation is not retired pay and therefore excluded from the DRP calculus).
  - Net loss by FS due to SM's decision to opt for CRSC in lieu of CRDP: $1,002 (i.e. $4,114 less $3,012).

Limited Protection Against Default Judgment—Servicemembers Civil Relief Act (SCRA).

General.

The SCRA, in part, provides SMs engaged in distant military operations limited protection against entry of a default judgment and a means of requesting a stay of proceedings so that the SM can concentrate on the military mission. *See* 50 U.S.C.S. App. § 502, 521, 522. For court orders to be effective, the USFSPA requires that orders certify that the SM's rights under the SCRA were observed. 10 U.S.C.S. § 1408(b)(1)(D).

Section 521—SM Does Not Appear.

General.

Section 521 applies when the SM does not make an appearance in the proceeding. *Id*. at § 521(a). Before a default judgment can be entertained, the plaintiff is required to file an affidavit with the court stating whether the defendant is in military service or whether the defendant's military status cannot be determined. *Id*. at § 521(b)(1). The court must appoint an attorney to represent the defendant prior to default judgment if either it is established or appears that the defendant is in military service. *Id*. at § 521(b)(2). Any defenses the SM may have in the cause are not waived by the mere fact the attorney may not be able to locate the SM prior to default. *Id*. In cases where the defendant's military status cannot be determined, the court may require the plaintiff post a bond prior to default judgment to indemnify the defendant against potential unjust harm. *Id*. at § 521(b)(3).

Stay of Proceedings.

The proceedings can be stayed upon motion of the SM's court-appointed attorney or the court's own motion in cases where it is established or appears the defendant is in military service. *Id*. at § 521(d). In order to grant a stay, the court must determine that one of three conditions exist: (1) the SM may have a defense that cannot be presented without his presence; (2) counsel, after due diligence, is unable to locate the SM; or (3) counsel cannot otherwise determine whether a meritorious defense may exist. *Id*. When granted, the stay shall be for a minimum of 90 days. *Id*. Finally, SMs with actual notice of a proceeding are directed to follow procedures under Section 522 in order to request a stay. *Id*. at § 521(f).

Section 522—SM with Actual Notice Requests Stay.

Stay of Proceedings.

Section 522 permits the court on its own motion or requires the court upon motion of the SM to stay the proceedings for not less than 90 days if two conditions are met. *Id*. at § 522(b)(1). The first condition is receipt by the court of a letter or other communication from the SM that: (1) sets forth facts demonstrating that the SM's military duty materially affects his ability to appear; and, (2) specifies a date when the SM will be available to appear. *Id*. at § 522(b)(2)(A). The second condition is receipt by the court of a letter from the SM's commander that: (1) states the SM's current military duty prevents his appearance; and, (2) leave is not authorized at time of the letter. *Id*. at § 522(b)(2)(B). It is critical for the military family law practitioner to note that application for a stay: (1) does not constitute an appearance and therefore does not waive any defenses to lack of personal jurisdiction; and, (2) does not constitute waiver of any other substantial or procedural defenses. *Id*. at § 522(c).

Additional stays are possible if the SM's military duty continues to materially affect his ability to appear. *Id*. at § 522(d)(1). The SM is required to submit the same two letters described above—one from himself and one from his commander—

when requesting additional stays. *Id*. The court is required to appoint counsel to represent the SM any time it denies a request for an additional stay. *Id*. at § 522(d)(2).

Common Errors and Repercussions.

As the author has observed, it is not uncommon for a SM's request for stay under Section 522 to prove deficient with the most common errors, either individually or in combination, being: (1) request for stay based on a mere assertion that the SM is in the military (i.e. failure to state how military service materially affects the SM's ability to appear); (2) submission of a letter or communication from the SM that fails to state a date when the SM is available to appear; or (3) failure to submit any letter or communication from the SM's commanding officer at all, let alone one that contains the required elements. *See id*. at § 522(b)(2)(A), (B). In such cases, strictly speaking, the SM has failed to satisfy the requirements necessary to invoke the SCRA's protection. *See id*. Thus—and for whatever reason denial may result—it is critical that the military family law practitioner grasp that SMs denied a stay under Section 522 cannot claim the protections Section 521 affords SMs who do not make an appearance. *See id*. at § 522(e). Recalling that a request for stay under Section 522 does not itself constitute an appearance, then it appears advisable that any substantive or procedural defenses the SM may have should be made subject to any request for stay. *See id*. at § 522(c), (e).

Section 521 Revisited—Vacating a Default Judgment.

A default judgment under Section 521 may be set aside or vacated if the order was entered during the SM's period of military service or within 60 days after termination of military service. *Id*. at § 521(g)(1). The court may on its own motion or must upon application of the SM reopen the judgment if it appears that two conditions were met. *Id*. The first condition is that the SM was materially affected by reason of his military service from presenting a defense to the action. *Id*. at § 521(g)(1)(A). The second condition is that the SM has a meritorious defense to all or some part of the action. *Id*. at § 521(g)(1)(B). A SM's application to the court must be made not later than 90 days after the SM's military service is terminated (i.e. an active duty SM retires or is otherwise discharged, or a RCSM retires, completes a period of active duty obligation or is otherwise discharged). *Id*. at § 521(g)(2). The requirement to apply for SCRA protection within 90 days after termination of service accounts for entry of a default judgment on the 60th day after service, plus expiration of the court's plenary power 30 days later. *See id*.

PART III: TEXAS LAW IMPACTING PARTITION OF MILITARY RETIRED PAY.

Evolution of Military Retired Pay's Position Within The Texas Community Property System.

Prior to 1923, Texas courts viewed all retirement and pension plans as separate property because they were considered to be gifts to the employee from a benevolent employer. *Cearley v. Cearley*, 544 S.W.2d 661, 661-62 (Tex. 1976). That view shifted in 1923 with the Texas Supreme Court's decision in *Lee* in which the Court reasoned:

> [Bestowal of retirement pay] was in no sense a donation to the employee for individual merit, but was manifestly additional compensation for faithful and continuous service. It was as much a fruit of his labors as his regular wages or salary. It was in the strictest sense a "gain" added to the common acquests [sic] of the marital

> partnership, as the direct result and fruit of his labor and services.

Id. at 662 (quoting *Lee v. Lee*, 247 S.W 828, 833 (Tex. 1923)) (emphasis original).

In the years following *Lee*, it became well settled that matured, private retirement pay and annuity benefits earned during the marriage were part of the marital estate and subject to partition in divorce. *Id*. (citing *Herring v. Blakeley*, 385 S.W.2d 843 (Tex. 1965)). The Texas Supreme court extended this characterization to military retired pay in 1970 with its decision in *Busby*. *Id*. (citing *Busby v. Busby*, 457 S.W.2d 551 (Tex. 1970)). Yet, the issue lingered as to whether unmatured or unvested retirement pay earned during the marriage was divisible in divorce. *Id*. at 663. Differing views existed among community property states and even among Texas courts whether an unvested retirement pay entitlement was community property or merely an expectancy. *Id*. The issue was settled in 1976 with the Texas Supreme Court's decision in *Cearley* in which the Court held:

> [Military retired pay], prior to accrual and maturity, constitute[s] a contingent interest in property and a community asset subject to consideration along with other property in the division of the estate of the parties under Section 3.63 [now Section 7.003] of the Family Code.

Id. at 666.

*** Remainder of column intentionally blank ***

Establishing and Challenging Jurisdiction to Partition Military Retired Pay.

Establishing Jurisdiction.

Recall that the USFSPA requires that jurisdiction over the SM's retired pay be based one of three factors—either the SM's domicile in the forum state, residence in state other than because of military assignment, or consent. 10 U.S.C.S. § 1408(c)(4). Thus, the mere presence or residence of non-domiciliary SMs within Texas is insufficient to confer jurisdiction. *See, e.g.*, *Southern v. Glenn*, 677 S.W.2d 576, 583 (Tex. App.—San Antonio 1984, writ ref'd n.r.e.).

With respect to domicile, it is presumed that domicile remains the state from which the SM entered military unless there is an affirmative showing that the SM took action to change his domicile at the time of or subsequent to entering military service. *Id*. at 583-84 (citing *Hagle v. Leeder*, 442 S.W.2d 908, 909 (Tex. Civ. App. -- Austin 1969, no writ)). The presumption of original domicile is rebuttable. *Id*.

With respect to the SM's residence by reason other than military assignment, this criterion appears to apply in very limited circumstances. *See* 10 U.S.C.S. § 1408(c)(4). Possible circumstances might include when a SM has a second home or vacation home in the forum state in which he regularly resides. *See id*.

Consequently, the issue of personal jurisdiction over the SM's retired pay frequently depends on consent when the SM either initiates suit, answers or otherwise enters an appearance. *See, e.g.*, *Southern v. Glenn*, 677 S.W.2d at 583. It must be emphasized that for SMs without Texas, the fact a SM may possess minimum contacts with the state that would otherwise satisfy long-arm provisions will not suffice to confer personal jurisdiction. *See* Tex. R. Civ. P. 108; *e.g.*, *Southern*, 677 S.W.2d at 582 (concluding that the minimum

contacts test is the wrong test to apply when the defendant is a non-resident SM).

Challenging Jurisdiction.

Absent consent—and whether within or without the state—the proper method in Texas for SMs to challenge jurisdiction to partition military retired pay is by special appearance. Tex. R. Civ. P. 120a; *e.g.*, *Barrett v. Barrett*, 715 S.W. 2d 110, 111-12 (Tex. App.—Texarkana 1986, writ ref'd n.r.e.); *Morris v. Morris*, 894 S.W.2d 859, 862 (Tex. App.—Ft. Worth 1995, no writ). The requirements of a special appearance are strictly applied and a general appearance can be entered inadvertently if the SM raises any other issue at a hearing—such as defective service, venue, special exception to pleading defects, discovery issues, or other matters—before the court has ruled on the special appearance motion. *Barrett*, 715 S.W. 2d at 113.

In *Seeley*, the SM entered a special appearance based on the fact he was a domiciliary of Massachusetts and neither his person nor property in Massachusetts were subject to Texas jurisdiction. *Seeley v. Seeley*, 690 S.W.2d 626, 626-27 (Tex. App.—Austin 1985, no writ). Unfortunately for the SM, his attorney failed to get a ruling on the special appearance before proceeding to trial on the merits. *Id*. at 627. To add insult to injury, the judge had inquired at the outset whether the parties were present to hear the special appearance. *Id.* The SM's attorney simply noted that a separate hearing was scheduled for that matter and he permitted the wife's attorney to proceed with the trial on the merits. *Id*. On appeal, the Third Court ruled that the SM had made a general appearance when his attorney failed to obtain a ruling on the special appearance before proceeding, which thereby conferred jurisdiction. *Id.* The Third Court affirmed the trial court's judgment that, along with granting the divorce, awarded the ex-wife all community property in Texas—and partitioned the SM's military retired pay. *Id*. at 626-28.

Kovacich illustrates the principle that consent in one suit does not create "continuing jurisdiction" for all subsequent suits. *See Kovacich v. Kovacich*, 705 S.W.2d 281, 282-83 (Tex. App.—San Antonio 1986, writ dism'd w.o.j.). Gerald Kovacich, who was a non-domiciliary spouse, filed for and received a divorce while stationed in Texas on military assignment. *Id*. at 282. For some reason, his military retired pay was not partitioned in the decree. *Id*. The FSs at that point became tenants in common in the military retired pay. *Id*. Gerald's FS then filed suit in Texas seven years later to partition the retired pay. *Id*. Gerald—who was by now retired from the military and a domiciliary-resident of California—challenged jurisdiction via special appearance. *Id*. The Texas trial court sustained the special appearance and dismissed the suit. *Id*. at 283. Gerald's FS argued on appeal that the trial court erred because Texas had "continuing jurisdiction" based on the fact that Gerald had submitted to jurisdiction when he filed the prior divorce suit. *Id*. The Fourth Court maintained that a plain reading of the USFSPA requires that jurisdiction be established "at the time of the suit"—which meant the present suit for partition and not the prior divorce. *Id*. Thus, the Fourth Court affirmed the trial court's dismissal of the suit for want of jurisdiction. *Id*. Thus, a key take-away for the practitioner is to <u>never squander an opportunity to partition retired pay when jurisdiction is present</u>. *See id*. (emphasis added).

That said, a FS who brings suit to partition a tenancy in common in military retired pay is not without remedy when the SM makes a successful jurisdictional challenge under the USFSPA via special appearance. *See Southern*, 677 S.W.2d at 584 n.2. Despite stringent deference to the USFSPA's jurisdictional elements, the judicial view in Texas is that Congress did not intend the statute to preclude all opportunity for a FS to seek partition of the military retired pay when the issue has never been adjudicated. Rather, the Texas view is that the purpose of the USFSPA's

jurisdictional elements are to limit adjudication of retired pay to one and only one fair hearing in a court of proper jurisdiction. *Id*. The FS still has the option of filing suit to partition the retired pay in the SM's state of domicile. *Id*. *See Redus v. Redus*, 852 S.W.2d 94, 96 (Tex. App.—Austin 1993, writ denied). Hence, dismissal for want of jurisdiction does not operate as a bar to further suit in a forum state that meets USFSPA requirements. *See id*. However, a follow-on suit in another forum state will cost the FS more time and money; therefore, the previous point about never squandering jurisdiction over retired pay remains good advice. *See id*.

Pre-McCarty Cases.

A flurry of appeals of Pre-McCarty cases were triggered by the 1990 amendment to the USFSPA that limited state courts' ability to re-open pre-McCarty divorces in order to partition retired pay. *See*, *e.g.*, *Buys*, 924 S.W.2d 369 (Tex. 1996); *Havlen v. McDougall*, 22 S.W.3d 343 (Tex. 2000). The amendment read:

> A court may not treat retired pay as property in any proceeding to divide or partition any amount of retired pay of a member as the property of the member and the member's spouse or former spouse if a final decree of divorce, dissolution, annulment, or legal separation (*including a court ordered, ratified, or approved property settlement incident to such decree*) affecting the member and the member's spouse or former spouse (A) was issued before June 25, 1981, and (B) did not treat (or reserve jurisdiction to treat) any amount of retired pay of the member as property of the member and the member's spouse or former spouse.

10 U.S.C.S. § 1408(c)(1) (emphasis added); *Buys*, 924 S.W.2d at 371.

It is likely that these cases have worked their way through the Texas court system given that the amendment is now more than 20 years old. *See*, *e.g.*, *Buys*, 924 S.W.2d 369; *Havlen*, 22 S.W.3d 343. Nonetheless, the Texas view of pre-McCarty cases can be summed up in three principles. *See*, *e.g.*, *Buys*, 924 S.W.2d 369; *Havlen*, 22 S.W.3d 343. First, the ideal is that a pre-McCarty divorce decree specifically treated military retired pay (i.e. partitioned it or reserved jurisdiction of the issue for later consideration). *See*, *e.g.*, *Havlen*, 22 S.W.3d at 347. Second, if not explicitly treated, then a decree that contains a residuary clause that can be interpreted as disposing of the SM's retired pay is legally sufficient to constitute having "treated" the retired pay. *See*, *e.g.*, *Buys*, 924 S.W.2d at 370-73. Finally, absent explicit treatment or a legally sufficient residuary clause, the fact that parties become tenants in common by operation of Texas law in community property unaddressed in a decree does not equate to having "treated" the retired pay and, thus, fails to reserve jurisdiction. *See*, *e.g.*, *Havlen*, 22 S.W.3d at 346-47.

Partitioning Retired Pay.

General.

With jurisdiction established, Texas courts use one of two formulas to partition military retired pay—the *Taggart* formula when the SM is retired at time of partition and the *Berry* formula when the SM is still serving and therefore not yet retired. *Limbaugh v. Limbaugh*, 71 S.W.3d 1, 16-n.12. (Tex. App.—Waco 2002, no pet.); *compare Taggart v. Taggart*, 552 S.W.2d 422 (Tex. 1977), *with Berry v. Berry*, 647 S.W.2d 945 (Tex. 1983). When the SM whose retired pay is being partitioned is a RCSM, then the *Bloomer* formula is melded into either *Taggart* or *Berry* to account for the fact that the RCSM's years of creditable service is a function of points accrued. *Compare Bloomer v. Bloomer*, 927 S.W.2d 118 (Tex. App.—Houston [1st Dist.] 1996, writ denied), *with Taggart*, 552 S.W.2d 422 (Tex. 1977) *and*

Berry, 647, S.W.2d 945 (Tex. 1983). Each of the three formulas will be examined in detail.

Taggart.

The *Taggart* opinion—in comparison to what it stands for—is a bit of an anomaly since it was a suit for post-divorce partition of military retainer pay, given that the SM transferred to the Fleet Reserve after completion of 20 years active duty but prior to being officially retired. *See Taggart*, 552 S.W.2d at 423 (emphasis added). As a member of the Fleet Reserve, the prospect existed that the SM might be recalled to active duty which would increase his retired pay at the conclusion of 30 years service and transfer to the retired list. *See* 10 U.S.C.S. § 6330(c)(2).

While the facts in *Taggart* parallel those in *Berry*, the rules affecting partition of a military retired pay differ. *Compare Taggart*, 552 S.W.2d at 423 (stating that George Taggart was still serving in the Navy Fleet Reserve and not yet entitled to a retired pay at time of divorce), *with Berry*, 647 S.W.2d at 945-46 (Tex. 1983) (stating that Giles Berry was still employed by Southwestern Bell and not yet entitled to a retired pay at time of divorce). Nevertheless, the *Taggart* formula stands as the judicially approved method for partition of fully matured military retired pay (e.g. the SM is retired and receiving monthly retired pay payments at time of divorce) while the *Berry* formula stands as the approved formula when the SM will continue service after the divorce. *See, e.g.*, *Limbaugh*, 71 S.W.3d 1, 16−n.12. (emphasis added). Cast in that light, the *Taggart* opinion—which acknowledges the *Cearley* opinion as its foundation—is best understood as the manifestation of the following principle set forth in *Cearley*:

> Matured private retirement, annuity, and retired pay benefits earned by either spouse during the marital relationship are part of the community estate and thus subject to division upon dissolution of the marriage.

See Cearley, 544 S.W.2d at 661 (emphasis added); *Taggart*, 552 S.W.2d at 423-24.

The *Taggart* formula expresses that the FS's share is one-half of the community interest in the military retired pay—with the community interest expressed as a fraction comprised of the number of months the marriage overlapped military service as the numerator and the number of months of military service as the denominator. *See Taggart*, 552 S.W.2d at 424. The *Taggart* formula is set out for illustration in text box 16 below. The addition of DRP to the formula merely acknowledges how application of the formula is restricted by the USFSPA. *See* 10 U.S.C.S. § 1408(a)(2)(C).

Text Box 16: Taggart Formula.

$$\text{FS share} = 1/2 \times \frac{\text{\# months marriage overlapped with military service}}{\text{\# months military service}} \times \text{DRP}$$

A notional example follows in text box 17 on the next page. Recall that DRP includes deductions for SBP premiums and waiver of retired pay in order to receive disability pay. 10 U.S.C.S § 1408(a)(4).

*** Remainder of column intentionally blank ***

Text Box 17: Notional Scenario—Taggart Formula.

16.5 years of marriage

20 years of military service

Assumed Facts

- H & W's 16.5 year marriage overlapped 15 years (180 months) of H's military service; they divorced 1.5 years after H's retirement.
- H's military service totaled 20 years (240 months).
- H's retired pay at time of divorce was $4,000 per month gross (e.g. O-5 grade under the High-3 system).
- After retirement, H received a 20% VA disability rating and waived $200 of retired pay (i.e. the VA offset) to receive $200 per month tax free disability pay.
- The divorce decree ordered H to provide FS SBP coverage for W with H's full pay as the insured base (i.e. standard annuity); premiums are $260 per month.

Calculations

- Community interest in retired pay: 180 months ÷ 240 months = 75%
- W's share of community interest: 1/2 x 75% = 37.5%
- DRP: $3,540 per month (i.e. $4,000 less $200 VA offset, less $260 SBP premium)
- W's share of retired pay (per full expression of the Taggart formula): 1/2 x (180 ÷ 240) x $3,540 = $1,327 per month*

* Plus a proportionate share of all future COLAs (discussed next in *Berry*).

Berry.

The Texas Supreme Court rendered its decision in *Berry* six years after deciding *Taggart*. Without overruling *Taggart*—recalling that the facts in the two cases run parallel—the Court fashioned a refined principle as follows:

> When the value of retirement benefits are in issue, the benefits are to be apportioned to the spouses based upon the value of the community's interest at the time of divorce.

Berry, 647 S.W.2d at 947. (emphasis added). Again, the Court recognized that doing otherwise could invade a SM's separate property and unjustly reward the FS for post-divorce pay increases tied to longevity and promotion. *See, e.g., id.* at 945-47; *Limbaugh*, 71 S.W.3d at 16 n.12. On the other hand, it must be emphasized that judicial partition of the SM's post-divorce COLAs has been deemed to not invade the SM's separate property—a critical point that applies whether partition occurs under *Taggart* or *Berry*. *See, e.g., Limbaugh*, 71 S.W.3d at 16 n.12 (citing *Burchfield v. Finch*, 968 S.W.2d 422, 424-25 (Tex. App.--Texarkana 1998, pet. denied) and *Phillips v. Parrish*, 814 S.W.2d 501, 505 (Tex. App.--Houston [1st Dist.] 1991, writ denied)) (emphasis added).

Thus, the Berry formula expresses the FS's share as one-half of the community interest in the military retired pay at time of divorce—expressed as a fraction comprised of the number of months the marriage overlapped military service as the numerator and the number of months of military service at time of divorce as the denominator. *See Berry*, 647 S.W.2d at 945-47 (emphasis added). It is worth noting that the Texas approach of fixing the demoninator's number of months military service at the "date of divorce" contrasts with the majority of states that permit the number of months to extend post-divorce until the SM's "date of retirement." MARK E. SULLIVAN, THE MILITARY DIVORCE HANDBOOK, 536, 2nd ed.

2011. The majority's rationale for extending the denominator until retirement, generally, is that post-divorce career achievements are built upon a foundation established by pre-divorce achievements to which a FS contributed. *Id*. (citing *In re Marriage of Wisniewski*, 675 N.E.2d 1362, 1369 (Ill. Ct. App. 1997).

Another potential contention in a *Berry* scenario is the rank or equivalent pay grade that should apply to the partition (i.e. Major and O-4 are equivalent designators. Major is the rank. O-4 is the pay grade.). In *Grier*, the SM was an O-4 who had been selected for but not yet promoted to O-5 (i.e. Lieutenant Colonel) at time of divorce. *Grier v. Grier*, 731 S.W.2d 931, 931-32 (Tex. 1987). The FS requested that the court base partition on the SM's projected grade since he had earned the promotion during the marriage. *Id*. (emphasis added). The Texas Supreme Court rejected the FS's argument. *Id*. at 932. The Court, recounting its decision in *Berry*, added the following principle:

> We hold that in apportioning military retirement benefits upon the dissolution of a marriage, the valuation of the community's interest in such benefits is to be based on the retirement pay which corresponds to the rank actually held by the service spouse on the date of the divorce.

Id. (emphasis added). The Court reasoned that factoring an unrealized pay increase would invade the SM's separate property. *Id*. After all, being "selected" for promotion is not an absolute guarantee that promotion will occur since a selectee can be stricken from a promotion list for cause. *Id*. at 935 (Mauzy, J., concurring and dissenting) (acknowledging that selection does not guarantee promotion, but arguing for a rebuttable presumption that community interests become vested in the next higher grade at time of selection for promotion).

The *Berry* formula is set out in text box 18. *Berry*, 647 S.W.2d at 947. As before, the reference to DRP acknowledges the restriction imposed on the formula's application by the USFSPA. *See* 10 U.S.C.S. § 1408(a)(2)(C). The phrasing "DRP of [insert SM's rank/grade at time of divorce]…" expresses the influence of *Grier*. *Grier*, 731 S.W.2d at 932. The addition of "if, as, and when" expresses an influence from *Cearley* that will be developed later in this section (i.e. bottom of page 31 and top of page 32)—meaning that that the FS's court award represents only a contingent interest in the retired pay that can be extinguished by the SM. *Cearley*, 544 S.W.2d at 666. A notional example follows in text box 19 on the next page.

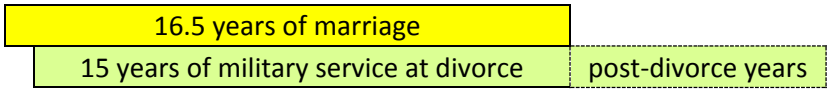
Text Box 18: Berry Formula.

$$\text{FS share} = 1/2 \times \frac{\text{\# months marriage overlapped with military service}}{\text{\# months military service at time of divorce}} \times$$ DRP of [insert SM's rank/grade at time of divorce] with [insert SM's years/months of creditable service at time of divorce] if, as and when received.

Roadmap of influences within the above formula expression:

- *Berry* (i.e. fixes the # months military service used in the denominator at time of divorce).
- USFSPA (i.e. limits partition to DRP).
- *Grier* (i.e. limits partition to actual rank at time of divorce).
- *Cearley* (i.e. acknowledges that partition creates only a contingent interest).

Text Box 19: Notional Scenario—Berry Formula.



Assumed Facts

- H entered military service 1.5 years after marriage to W
- H & W's 16.5 year marriage overlapped 15 years (180 months) of military service; thus, H's retired pay was neither accrued (i.e. "vested") nor matured at divorce.*
- Had H theoretically been able to retire at 15 years, his monthly retired pay at time of divorce would have been $2,500 (e.g. O-4 rank under the High-3 system with exactly 15 years service).
- After divorce, H served 7 more years and retired in the grade of O-5 with 22 years creditable military service; his monthly retired pay at retirement was $4,200
- The divorce decree failed to address FS SBP coverage.
- There is no VA disability rating to factor at this time since it will not determined until after discharge (i.e. until after H's retirement in this example).

Calculations

- Community interest in retired pay: 180 months ÷ 180 months = 100%
- W's share of community interest: 1/2 x 100% = 50%
- DRP: Cannot be fully determined at time of divorce. Any VA disability rating is yet to be determined. SBP is known to be a non-factor since FS coverage was not ordered in the decree.
- W's share of the retired pay per full expression of the formula: 1/2 x (180 ÷ 180) x DRP of an 0-4 with 15 years and zero months of creditable military service if, as, and when received.
- W's "expectancy" at time of divorce based on the formula above = $1,250 (i.e. 1/2 x (180 ÷ 180) x "guest-imated" DRP of $2,500).

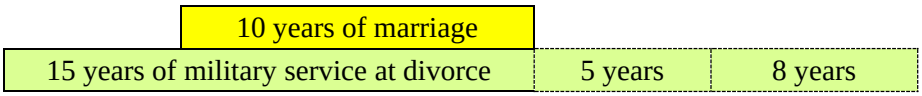
* Distinction between vested and matured, as defined in *Cearley*, discussed next on page 31.

*** Remainder of page intentionally blank ***

As alluded to in text box 19's example, H's notional retired pay was neither accrued nor matured given his 15 years of creditable military service at time of divorce. *Cearley* defined "accrued" to mean only that the minimum number of years has been served to qualify for retired pay. *Cearley*, 544 S.W.2d at 664 n.4. *Cearley* equates the term "vested" with "accrued," but the term "vested" is more commonly used in military circles. *See id.*; HENNING, *supra* 1-2. In contrast, *Cearley* defines "matured" to mean that all requirements have been met for immediate collection and enjoyment of military retired pay (i.e. 20 or more years of creditable service for an active duty SM—plus retirement; 20 or more "good years" of service for a RCSM—plus retirement and, in most cases, attainment of age 60). *See Cearley*, 544 S.W.2d at 664 n.4.

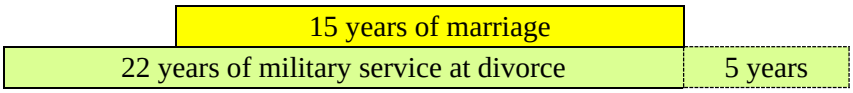
Text Box 20: Two Situations in which Berry Applies.

Scenario #1 (retired pay not vested and not matured at divorce)



- H served 5 years in the military before marrying W.
- H & W later divorce after 10 years of marriage.
- With only 15 years creditable service, H's retired pay entitlement is neither vested nor matured at time divorce.
- H must serve 5 more years after divorce before his retired pay entitlement is vested (i.e. H must attain 20 years creditable service).
- However, H does not retire at the 20 year mark; rather, he continues to serve 8 more years.
- H retires 13 years after the divorce with a total of 28 years creditable military service; thus, H's entitlement to retired pay matures upon his retirement after 28 years creditable service.

Scenario #2 (retired pay vested but not matured at divorce)



- H served 7 years in the military before marrying W.
- H & W later divorce after 15 years of marriage.
- H's retired pay entitlement is vested but not matured at time divorce because H has served more than the minimum 20 years to qualify for retired pay (but has not yet retired).
- Five years after the divorce, H's entitlement to retired pay matures upon his retirement after 27 years creditable military service.

Consequently, the *Berry* formula applies in two instances—one in which a SM's entitlement to a retired pay is neither vested nor matured, and the other where a SM's entitlement is vested but not yet matured. *See Berry*, 647 S.W.2d at 947; *Cearley*, 544 S.W.2d at 664 n.4. This important distinction is illustrated above in text box 20.

With respect to scenario #1 in text box 20 above, *Cearley*—a progenitor of both *Taggart* and *Berry*—remains instructive because it emphasized that eventual possession and enjoyment of an unvested retired pay is not guaranteed to the FS. *Cearley*, 544 S.W.2d at 664-66. The contingent

property right awarded to the FS in divorce can be extinguished by the SM if he fails to serve the minimum 20 years to qualify for vesting. *Id*. The contingent interest was expressed in *Cearley* as follows:

> [C]ontingent interests in retirement benefits are [best] settled at the time of the divorce, even though it may be necessary in many instances for the judgment to make the apportionment to the nonretiring spouse effective if, as, and when the benefits are received by the retiring spouse.

Id. at 666 (emphasis added).

Extinguishment of the FS's property right by the SM's separation short of 20 years creditable service can be mitigated in a few instances through addition of certain language in a divorce decree. *See* 10 U.S.C.S. §§ 1174a-75a. Three such instances where potential extinguishment can be mitigated—Special Separation Benefit (SSB), Voluntary Separation Incentive (VSI) and Voluntary Separation Play (VSP)—will be discussed later in this paper. *See id*.

Bloomer.

Bloomer complements the basic concepts within either *Taggart* (i.e. when the retired pay entitlement is both vested and matured) or *Berry* (i.e. when the retired pay entitlement either is not vested, or vested but not yet matured) to effect a just and right partition of a RCSM's retired pay. *See Bloomer*, 927 S.W.2d at 119-21. A close examination of the facts in *Bloomer* proves instructive.

David and Patricia Bloomer were married 160 months out of David's 236 months in the Air Force Reserve. *Id*. at 119-20. The trial court awarded Patricia the following share of David's military retired pay:

> All right, title, and interest in and to **34%** (1/2 x 160/236) of the United States Air Force disposal [sic] retired or retainer pay to be paid as a result of **DAVID A. BLOOMER's** service in the United States Air Force, and **34%** of all increases in the United States Air Force disposable retirement or retainer pay due to cost of living or other reasons, if, as, and when received.

Id. at 120 (emphasis original). David's appeal proved successful because, according to the First Court's opinion, the trial court improperly determined the community interest under the *Taggart* formula by using the number of months the marriage overlapped his military service at time of divorce (i.e., 160 ÷ 236 = 68%). *Id*. Regrettably, the First Court's characterization of the trial court's error is itself a misstatement. *See id*. at 119-20. The trial court did err—not because it used *Taggart* but—because the facts warranted application of the *Berry* formula given that David needed to serve four more months post-divorce before his retired pay entitlement became vested. *Id*. at 120.

The First Court correctly explained, however, that "months" is the appropriate measure of community interest only for an active duty marriage given that active duty SMs accumulate points at an even rate—one per day. *Id*. at 120 n.3. (citing 10 U.S.C.S. § 12732(a)(2)(A)(i)) (emphasis added). The same cannot be said for RCSMs. *See id*. at 120. RCSM's accumulate points based on various duties performed and not at a constant daily rate during the period of concern (i.e. during the marriage-military overlap). *Id*. at 120 (citing 10 U.S.C.S. § 12732(a)(2); *In re Marriage of Poppe*, 158 Cal. Rptr. 500, 501 (Ct. App. 1979).

The salient point remains that in David Bloomer's case, he accumulated only 906 points during the marriage-military overlap in comparison to 3,385

total points over the course of his service at time of divorce. *Bloomer*, 927 S.W.2d at 121. And so, while David was married for 68 percent of his military service at time of divorce, the community interest was only 26.77 percent of his unvested retired pay (i.e. 906 points ÷ 3,385 points = 26.77%). *Id*. The First Court appropriately noted that 73.23 percent of David's points were his separate property and not subject to partition. *Id*. Accordingly, the FS's share of the community interest was only a 13.39 percent contingent interest in David's prospective retired pay (i.e. 1/2 x 26.77%)—not the 34 percent awarded by the trial court. *See id*. at 121.

When applied to a RCSM, the *Taggart* and *Berry* formulas are recast as set out in text boxes 21 and 22, respectively, with the expressions comporting with the USFSPA, *Bloomer*, *Grier* and *Cearley*. *See* 10 U.S.C.S. § 1408(a)(2)(C) (limiting partition to DRP); *Bloomer*, 927 S.W.2d at 119-21 (basing partition of RC retired pay on points); *Taggart*, 552 S.W.2d at 423-25 (defining the denominator for matured retired pay as total months military service); *Berry*, 647 S.W.2d at 945-47 (defining the denominator for unvested or vested but not yet matured retired pay as the number of months the marriage overlapped military service at time of divorce); *Grier*, 731 S.W.2d at 932 (limiting partition to the rank actually held at time of divorce); *Cearley*, 544 S.W.2d at 666 (acknowledging that award of unvested or vested but not yet matured retired pay represents only a contingent property right for the FS).

Text Box 21: Taggart–Bloomer Formula.

$$\text{FS share} = 1/2 \times \frac{\text{\# points accumulated during marital overlap with military service}}{\text{\# points accumulated during military service}} \times \text{DRP}$$

Partition and Enforcement Issues: The Formulas.

The *Taggart*, *Berry* and *Bloomer* formulas have been misapplied by courts or ignored by parties in various instances. *E.g.*, *May v. May*, 716 S.W.2d 705 (Tex. App.—Corpus Christi 1986, no writ); *Baxter v. Ruddle*, 794 S.W.2d 761 (Tex. 1990); *Barnard v. Barnard*, 863 S.W.2d 770 (Tex. App.—Ft. Worth 1993, no writ); *Knickerbocker v. Knickerbocker*, NO. 01-03-00677-CV, 2005 Tex. App. LEXIS 89 (Tex. App.—Houston [1st Dist.] Jan. 6, 2005, no pet.) (mem. op.); *In the Interest of K.B., a Child*, 298 S.W.3d 691 (Tex. App.—San Antonio 2009, no pet.); *Carroll v. Carroll*, 2009 Tex. App. LEXIS 167 (Tex. App.—San Antonio 2009, no pet.) (memo op.); *Hicks v. Hicks*, 348 S.W.3d 281, 288 (Tex. App.—Houston [14th Dist.] 2011, no pet.). Whether any resulting error can be corrected hinges on the well settled principle of res judicata. *E.g.*, *Baxter*, 794 S.W.2d at 762-63. Whether any resulting error invokes an enforcement issue when direct payment of the FS's share is sought from DFAS hinges on Federal law. 10 U.S.C.S. §§ 1408(c)(1), (d)(2), (e)(1).

It is well settled that misapplication of a partition

Text Box 22: Berry–Bloomer Formula.

$$\text{FS share} = 1/2 \times \frac{\text{\# points accumulated during marital overlap with military service}}{\text{\# points accumulated during military service at time of divorce}} \times$$

DRP of [insert SM's rank/grade at time of divorce] with [insert SM's years/months of creditable service at time of divorce] if, as, and when received.

formula that is not timely challenged will stand based on res judicata. *See, e.g.*, *Baxter*, 794 S.W.2d 761, 762-63; *Lopez v. Lopez*, No. 04-04-00277-CV, 2004 Tex. App. LEXIS 11473, at *4 (Tex. App.—San Antonio Dec. 22, 2004) (mem.op.). For example, Sam and Gloria Lopez were divorced on March 28, 1983—a mere 19 days after *Berry* was rendered. *See Lopez*, 2004 Tex. App. LEXIS 11473, at *1. Despite the fact Sam was not yet retired, the trial court partitioned the retired pay consistent with the *Taggart* formula as follows:

> [Gloria] shall be entitled to the maximum allowable portion of the [Sam's] military retirement when he retires. The amount is to be determined at the date of [Sam's retirement based on the following formula: 1/2 x months married and in plan over months in plan at time of retirement x benefits received.

Id. at *3 (emphasis original).

In 2003, Gloria sought and received a post-decree Clarification Order via summary judgment that confirmed her entitlement to one-half the marital share of Sam's full military retired pay. *See id*. at *1 (emphasis added). Sam appealed the Clarification Order, arguing that the partition was erroneous since it should have been rendered based on *Berry*—meaning his pay grade and longevity at time of divorce, not at time of retirement. *Id*. at *2-3. The Fourth Court quickly dispensed with Sam's challenge. *See id*. at *3-4. The court explained that Sam could not attempt retroactive application of *Berry* because an appeal was not timely perfected in direct challenge of his 1983 divorce decree. *Id*. Res judicata barred subsequent collateral attack even though the 1983 decree improperly divided his military retired pay. *Id*. at *4.

In *Wolcott*, Ronald, the SM, and his soon-to-be FS Maria consented to an agreed divorce decree enforceable as a contract that—to Ronald's great detriment—completely ignored the established formulas. *See Wolcott v. Wolcott*, No. 05-00-00488-CV, 2001 Tex. App. LEXIS 1644 (Tex. App.—Dallas 2001, no pet.) (memo op., not designated for publication). The decree awarded Maria the following:

> [A]ll right, title, and interest in and to 100% of the disposable retired pay to be paid by Defense Finance and Accounting Service, Cleveland Center, as a result of RONALD DEAN WOLCOTT'S service in the United States Army, and 100% of all increases in said retired pay pension due to cost of living or other reasons, if, as, and when received.

Wolcott, 2001 Tex. App. LEXIS 1644, at *2-3 (emphasis added). After retirement, Ronald complied with the order for a few months by handing over the entirety of his DRP before opting to retain 50 percent for himself. *Id*. at *1. Maria subsequently obtained an enforcement order from which Ronald appealed, arguing that the military retired pay was his separate property. *Id*. at *1-2. Notwithstanding the shortcomings of the argument, the Fifth Court denied Ronald's collateral attack because no appeal of the original agreed decree was ever attempted. *See id*.

While the amount of the Wolcott's marriage-military overlap is not indicated in the memorandum opinion, what should be evident is that Maria binded herself to an enforcement issue in either of two instances. *See* 10 U.S.C.S. §§ 1408(c)(1), (d)(2), (e)(1); *Wolcott*, 2001 Tex. App. LEXIS 1644, at *1-3. First, if the marriage-military overlap was less than 10 years, then Maria's only recourse was to seek full payment directly from Ronald. *See* 10 U.S.C.S. § 1408(d)(2). Second, if the overlap was 10 years or more, then she still would have to seek at least partial payment from Ronald because DFAS will not pay to a FS more than 50 percent of the SM's DRP. *See* 10 U.S.C.S. § 1408(e)(1).

In *Baxter*, the parties agreed the FS would receive 37 and one-half percent (37.5%) of the SM's gross retired pay plus an equivalent percentage of all increases if, as and when received. *Baxter*, 794 S.W.2d at 762. Neither party timely appealed. *Id*. The SM remained in the military and was promoted after the divorce. *Id*. Consequently, the FS filed a Motion for Contempt and Arrearage Judgment to obtain her share of the retired pay increases. *Id*. The FS relied on the unambiguous language of the decree. *Id*. The trial court denied her motion and the court of appeals affirmed. *Id*. The Texas Supreme Court reversed the lower courts based on the consent of the parties to the unambiguous partition. *Id*. The Supreme Court noted that res judicata barred collateral attack—despite the fact that the parties agreed to a partition formula that could have been overturned had it been imposed by a lower court and timely appealed. *Id*. at 762-63.

Despite her legal victory, the FS in *Baxter* still bears the burden of an enforcement issue. *See id*. (awarding the FS a percentage of gross retired pay). DFAS construes all percentages awarded to a FS in the decree to be a percentage of DRP—even if the decree states the award as a percentage of gross retired pay. DODFMR 7000.14-R, Vol. 7B, Ch. 29, para. 290601. Therefore, the difference between gross retired pay and DRP will have to be collected by the FS directly from the SM. *See id*.

Partition and Enforcement Issues: VA Disability Compensation and CRSC.

General.

Numerous cases exist in which a FS attempted to regain what she perceives to be the "just and right" partition rendered in the decree that was later diminished by the SM's choice to waive an equivalent amount of retired pay in favor of VA disability compensation. *E.g.*, *Ex parte Burson*, 615 S.W.2d 192 (Tex. 1981); *Loria v. Loria*, 189 S.W.3d 797 (Tex. App.—Houston [1st Dist.] 2006, no pet.). Texas courts nonetheless recognize that VA disability compensation is not subject to partition in divorce because it is not an earned property right. *See, e.g.*, *Hagen v. Hagen*, 282 S.W.3d 899, 903 (Tex. 2009).

It is well settled that Federal law vis-à-vis the USFSPA preempts state courts' ability to prohibit a SM from imposing such unilateral modification, whether disability compensation results from computation under Title 10 (i.e. military department computation when retiring SMs are physically unfit for continued service) or Title 38 (i.e. VA computation for SMs with service-connected disabilities). 10 U.S.C.S. § 1408(a)(4)(B)-(C); *e.g.*, *Loria*, 189 S.W.2d at 798. Recall that the effect of both Title 10 and Title 38 disability pay upon DRP was illustrated in text boxes 10 through 13, *supra*. The First Court in *Loria* commented on the potential for injustice as follows:

> The Texas Supreme Court has recognized that a servicemember has the right, by [F]ederal law, to waive military retirement pay for disability pay, even though this means that the servicemember can effectively unilaterally modify a divorce decree insofar as it allocates income attributable to prior military service.

Id. at 799 (citing *Ex Parte Burson*, 615 S.W.2d 195-96) (emphasis added).

CRDP is the FS's Friend while CRSC is her Enemy.

While CRDP mitigates the VA offset by restoring monies available for partition, the interaction between CRDP and CRSC can reduce DRP to zero or near-zero in cases where the SM's respective VA and CRSC disability ratings both stand at or near 100 percent. *See Sharp v. Sharp*, 314 S.W.3d 22 (Tex. App.—San Antonio 2009, no pet.) (reducing DRP to near zero by the SM's election to receive CRSC instead of CRDP); *Jackson v. Jackson*, 319 S.W.3d 76 (Tex. App.—San Antonio 2010, no pet.) (reducing DRP to zero

by the SM's election to receive CRSC instead of CRDP). In short, while CRDP is the FS's friend, CRSC can be her enemy. *See id*. Recall that CRDP and CRSC are mutually exclusive benefits—simultaneous acceptance of both is prohibited. 10 U.S.C.S. § 1414(d).

Jackson represents the most egregious example of the potential for injustice from a FS's perspective. *See Jackson*, 319 S.W.3d at 82. The divorce awarded the FS a one-half community interest equaling 39.58 percent of the SM's DRP plus a proportionate share of COLAs. *Id*. at 77-78. The decree also named the SM constructive trustee for the FS's share in the event DFAS ever failed to pay her directly. *Id*. at 77. The SM's VA disability rating was 100 percent, which caused his disability compensation to exceed his retired pay. *Id*. In the days before CRDP—circa 1999 through 2003 in this case—the VA offset reduced the FS's share of DRP to zero. *Id*. After enactment of CRDP, the FS again received a share since CRDP can be partitioned as it constitutes a restoration of retired pay. *See* DODFMR 7000.14-R, Vol. 7B, Ch. 64, para. 640502; *id*. However, DRP was again reduced to zero when the SM in 2004 elected to receive CRSC. *Jackson*, 319 S.W.3d at 77.

The FS subsequently filed a motion for enforcement alleging the SM breached his fiduciary duty as constructive trustee by failing to pay her share of DRP given that DFAS would no longer pay her directly. *Id*. at 77-78. The trial court denied the motion for enforcement. *Id*. at 78. The Fourth Court affirmed, acknowledging the SM's statutory right to elect CRSC over CRDP and reasoning that the SM's duty as constructive trustee only arose in the event the SM received DRP—which he did not. *Id*. at 79, 81-82 (drawing, in part, upon the Court's opinion in *Sharp*). In the end, the FS was entitled to nothing because there was no longer any DRP to divide. *Id*. at 82. The devastating effect CRSC can have upon a FS's share of DRP is illustrated by notional example in text box 23. *See Sharp*, 314 S.W.3d 22 (reducing DRP to near zero by the SM's election to receive CRSC instead of CRDP).

Text Box 23: CRSC and its Potential for Devastation.

Notional Facts:

- Assumed figures for a Lieutenant Colonel with 22 years of service who is retired for longevity and subsequently obtains a 100% VA disability rating, all of which qualifies as combat-related under CRSC.
- SM's assumed base pay for retirement calculation = $8,000 per month.
- Gross retirement pay based on longevity = $4,400 per month (i.e. $8,000 x 55% longevity multiplier).
- FS SBP standard annuity = $286 per month premium (i.e. $4,400 x 6.5%)
- VA disability compensation (assuming SM and spouse only at 100% rating) = $2,924 per month.
- Notional CRSC based on combat-related disabilities as calculated by the military department = $2,924 per month.
- SM elects to receive CRSC which precludes receipt of CRDP.
- Net effect of opting for CRSC in lieu of CRDP:
    - Compensation received by SM = $7,038 (i.e. $4,400 gross retired pay less $286 FS SBP premium, less $2,924 VA offset, plus $2,924 CRSC, plus $2,924 VA disability compensation).
    - DRP available for partition = $1,190 (i.e. $4,400 retired pay less $286 FS SBP premium, less $2,924 VA offset. Neither CRSC nor VA disability compensation is considered to be retired pay and therefore both are excluded from the DRP calculus).

The *Rothwell* Principle.

All hope of a remedy for the FS is not lost. *See Rothwell v. Rothwell*, 775 S.W.2d 888 (Tex. App.—El Paso 1989, no writ). In *Rothwell*, the Eighth Court, in denying a motion for rehearing, established a principle rephrased by the author for added clarity as follows:

> A court can consider disability benefits payable to the retired SM when making a just and right division of the parties' community property—even though Federal law preempts outright partition of these same disability benefits belonging solely to the SM.

See id. at 890, 892 (extending the reasoning from *Rose v. Rose*, 481 U.S. 619 (1987) as cited in the Eighth Court's original opinion).

The *Rothwell* principle, however, is not a panacea for mitigating a FS's vulnerability to unilateral modification. *See Hagen*, 282 S.W.3d at 911 (Brister, J., dissenting) (reasoning that a judgment dividing VA disability pay when no disability has yet occurred is void under the rules of both ripeness and standing). The principle appears to offer relief only in *Taggart* or *Taggart-Bloomer* scenarios where the SM is retired at time of divorce, as was the case in *Rothwell*, receiving retired pay while also waiving a portion of retired pay in order to receive disability benefits. *See id*. at 911; *Rothwell*, 775 S.W.2d at 890. In other words, a trial court can quantify application of its discretion in rendering a just and right division other than a straight 50-50 split when the following factors are known: (1) gross retired pay; (2) the community interest in the retired pay; (3) the SM's disability rating; (4) the resulting amount of disability compensation based on the rating; (4) whether CRDP will mitigate the effect of any VA offset or whether any VA offset will inflict partial defeasance on the FS's expectancy by unilaterally modifying DRP; and (5) whether any potential benefit to the FS from CRDP is forfeited in lieu of a less favorable outcome driven by the SM's election of CRSC. *See* 10 U.S.C.S. § 1408(a)(4)(B)-(C); Tex. Fam. Code § 7.001, 7.003; *Murff v. Murff*, 615 S.W.2d 696 (Tex. 1981) (stating that a just and right division of community property does not have to be equal); *Rothwell*, 775 S.W.2d at 890-92.

In *Berry* or *Berry-Bloomer* scenarios—where the SM either is not yet vested or vested but will continue serving post-divorce—the dissent in *Hagen* suggests that the *Rothwell* principle has no application. *See Hagen*, 282 S.W.3d at 911 (Brister, J., dissenting). With respect to military retirees, recall that any VA disability rating and corresponding compensation is not determined until after the SM's retirement. *See* 38 U.S.C.S. § 5110. Were a FS were to plead in an original suit for an unequal division of community property based only on an unrealized possibility of unilateral modification inflicted by a yet-to-be-determined VA offset, then any judgment in her favor may be void because the inequity being resolved is not yet ripe. *See id*. at 910-11 (Brister, J., dissenting) (citing *DaimlerChrysler Corp. v. Inman*, 252 S.W.3d 299, 304 (Tex. 2008)). Unilateral modification is not assured because a VA offset to DRP may or may not ever occur. *See id*. In such cases, an unequal division of community property based only on the prospect of partial defeasance could prove to be a remedy without a wrong. *See id*. (emphasis added).

The "Floor" Principle.

Another approach to protecting the FS from unilateral modification is to insert language in the decree that establishes a floor below which the FS's share of disposable retired pay cannot go—without attempting to restrict a SM's right to waive an equivalent amount of retired pay to receive disability pay. *See Gillen v. Gillen*, 307 S.W.3d 395 (Tex. App.—San Antonio 2009, no pet.). In *Gillen*, the SM contended that two provisions in a domestic relations order impermissibly restricted his right to waive retired

pay in favor of VA disability pay. *Id*. at 396. The first provision provided that:

> IT IS FURTHER ORDERED AND DECREED that any election of benefits that may hereafter be made by SERVICE MEMBER shall not reduce the amount of the retired pay that the Court has herein awarded to FORMER SPOUSE. In this regard, IT IS FURTHER ORDERED AND DECREED that SERVICE MEMBER…shall not waive any portion of his military retired pay in order to receive disability pay and/or shall not pursue any course of action which would defeat, reduce or limit FORMER SPOUSE's right to receive FORMER SPOUSE's full separate property share of SERVICE MEMBER's retired pay as awarded herein, unless otherwise ordered herein.

Id. at 397. The Fourth Court determined this to be error since the provision impermissibly restricted the SM's right established in Federal law. 10 U.S.C.S. § 1408(c)(4)(B), (C); *Gillen*, 307 S.W.3d at 398 (citing, in part, *Ex parte Burson*, 615 S.W.2d at 196). The court ordered modification of the decree by deletion of the first provision in its entirety. *Gillen*, 307 S.W.3d at 398.

The story does not end there. The second provision provided that:

> IT IS THEREFORE ORDERED AND DECREED that FORMER SPOUSE have judgment against and recover from SERVICE MEMBER the sum equal to 8.1395% of SERVICE MEMBER's disposable retired pay as hereinabove defined, that is, to exclude deduction/reduction for the monthly SBP premium, payable IF, AS and WHEN received by SERVICE MEMBER. IT IS FURTHER ORDERED AND DECREED that the award herein shall in no event be less than $ 227.99 per month of the disposable retired pay of SERVICE MEMBER. The Court recognizes, in making this award that the DFAS, pursuant to the USFSPA, is only authorized to pay FORMER SPOUSE the herein awarded percentage of SERVICE MEMBER'S "disposable retired pay," and this Order, as to the DFAS, should be thusly construed.

Id. at 397. The Fourth Court affirmed the validity of the second provision because it did not prohibit the SM from waiving retired pay to receive disability pay. *Id*. at 398. Rather, it provided the FS a modicum of insurance via a bifurcated partition. *See id*. The FS would receive the greater of either 8.1395% <u>of</u> DRP or $227.99 <u>from</u> DRP. *See id*. at 398-99 (emphasis added).

If, in the Gillen's case, DRP was ever reduced to $455.98, then the FS's guaranteed $227.99 share would represent exactly 50 percent of DRP—the maximum payable to a FS by DFAS. *See* 10 U.S.C.S. § 1408(e)(1); *Gillen*, 307 S.W.3d at 398-99. If DRP was ever further reduced subsequent to a revised, higher VA disability rating—for example, to $303.98—then the FS's $227.99 share would represent 75% of DRP. *See* 10 U.S.C.S. § 1408(e)(1); *Gillen*, 307 S.W.3d at 398-99. Consequently, the last sentence of the provision (i.e. "The Court recognizes, in making this award, that the DFAS…") is important to ensure DFAS does not reject the order as being non-compliant with USFSPA. SULLIVAN, THE MILITARY DIVORCE HANDBOOK, *supra* 541-42 (quoting San Antonio attorney Jim Higdon).

Continuing the example, if DRP in Gillen's case was $303.98, then DFAS would only pay the FS $151.99, which would be 50 percent. *See* 10 U.S.C.S. § 1408(e)(1); *Gillen*, 307 S.W.3d at 398-99. The FS would have to get the remaining $76 directly from the SM. *See* 10 U.S.C.S. § 1408(e)(1); *Gillen*, 307 S.W.3d at 398-99. Despite this added protection, the Court stressed that the FS's award was still subject to defeasance if DRP ever dropped below $227.99 given that

payment could only result from actual DRP. *Gillen*, 307 S.W.3d at 399 (emphasis added).

Partition and Enforcement Issues: Survivor Benefit Plan (SBP).

Not "Permanent Alimony."

Recall that the USFSPA permits a state court to order FS SBP coverage in divorce. 10 U.S.C.S. § 1450(f)(4). A SM will not be successful arguing against such award in a Texas divorce by attempting to characterize SBP as permanent alimony. *See Limbaugh*, 71 S.W.3d at 15-16. Rather, the inception of title rule permits a Texas court to treat SBP as a community asset given that it is "directly referable" to the contingent or vested retired pay benefit partitioned at divorce. *See id*. at 15-16 (citing *Siefkas v. Siefkas*, 902 S.W.2d 72, 75 (Tex. App.—El Paso 1995, no writ)).

Proper Order.

While no Texas case has dealt squarely with this next issue, it is vital that the SM not be ordered to maintain the FS as the irrevocable beneficiary of his Servicemembers' Group Life Insurance (SGLI) policy or Veterans' Group Life Insurance (VGLI) policy in lieu of FS SBP coverage. *See Ridgway v. Ridgway*, 454 U.S. 46 (1981) (emphasis added). *Ridgway* is a case from Maine in which the U.S. Supreme Court established that Federal preemption barred state court interference with the SM's statutory right to change without notice the beneficiary of his SGLI policy. *See id*. at 52-57. *Ridgway* also established that—subsequent to an alleged breach—any attempt to impose a constructive trust upon SGLI or VGLI proceeds is preempted by Federal law because permitting such would be inconsistent with prescribed anti-attachment provisions. *See id*. at 60-61 (citing 38 U.S.C.S. § 770(g) [now § 1970(g)]); 38 U.S.C.S. § 1970(g) (exempting SGLI/VGLI payments to beneficiaries from taxation, creditor claims, attachment, levy, seizure, or any and all equitable process); 38 U.S.C.S. § 1975 (conferring original jurisdiction upon U.S. District Courts for any suit affecting SGLI/VGLI).

Next, it is important for a decree specifically to order "Former Spouse SBP coverage" rather than another type of insurance, otherwise the FS is at risk of not receiving the benefit of the bargain if FS SBP was intended. *See Hicks v. Hicks*, 348 S.W.3d 281, 288 (Tex. App.—Houston [14th Dist.] 2011, no pet.). In *Hicks*, the couple's divorce decree was devoid of reference to FS SBP coverage. *Id*. at 287. The decree did, however, order the SM to purchase "life insurance" to secure a child support obligation with the soon-to-be FS as the beneficiary. *Id*. In contrast, a Domestic Relations Order (DRO) signed the same day as the decree specifically ordered the SM to provide FS SBP coverage. *Id*. at 283-84. While normally a DRO signed contemporaneously with a decree will be construed as one document, the Fourteenth Court cast them as separate documents since the trial court approved the terms of divorce "as contained in this Final Decree of divorce." *Id*. at 284. The DRO, therefore, impermissibly modified the decree. *Id*. at 288. The case was remanded to the trial court with direction to remove reference to FS SBP coverage from the DRO. *Id*.

Timely Deemed Election.

Recall that a court order awarding FS SBP coverage does not by itself create the coverage. *See* 10 U.S.C.S. § 1450(f)(3)(C). Rather, the order must be received by DFAS within one year of the divorce to effect a deemed election—whether the SM is retired at time of divorce or will continue serving post-divorce. *See id*. Failure to heed this strict requirement can produce harsh consequences for the FS. *See, e.g., Carroll v. Carroll*, 2009 Tex. App. LEXIS 167, *2-4 (Tex. App.—San Antonio 2009, no pet.) (memo op.).

In *Carroll*, the divorce decree ordered James to provide Joan with FS SBP coverage. *Id*. at *2. James attempted to comply by naming Joan as his FS beneficiary when he retired some five years after the divorce. *Id*. at *4. His application was rejected by DFAS for failure to comply with the one year post-divorce filing requirement. *Id*.

Allocating the Burden for Payment of Premiums.

The issue of which party should pay the premiums for FS SBP coverage can be contentious. *See Griffith, v. Griffith*, 698 S.W.2d 729 (Tex. App.—El Paso 1985, no writ); *Flowers v. Flowers*, No. 04-98-00914-CV, 1999 LEXIS 6946 (Tex. App.—San Antonio 1999, pet. denied) (memo op., not designated for publication). Recall that DFAS requires SBP premiums be deducted from the SM's retired pay. DODFMR 7000.14-R, Vol. 7B, Ch. 29, para. 290610. Since the SM will pay the premiums, the real questions are whether, to what degree and how the FS should reimburse the SM for the cost. *See id*. (emphasis added).

First, it must be emphasized that it is not an abuse of discretion for a Texas court to order the SM to pay the full amount of all premiums since they are "directly referable" to SBP as a community asset. *Limbaugh*, 71 S.W.3d at 16. Decrees ordering the SM to "maintain and continue" FS SBP coverage are reasonably interpreted as directing that the SM bear the full cost of the premiums. *Griffith*, 698 S.W.2d at 732. To construe otherwise would be inconsistent with such an order because a SM who failed to pay premiums would cause the policy to lapse and thereby render court-ordered coverage a nullity. *Id*.

Next, a FS who either agrees or is ordered to pay some or all of the premiums must ensure she does not inadvertently bear more than her allocated share. *See Schneider*, 5 S.W.3d at 928. In *Schneider*, Kay agreed to reimburse Karl, the SM, for the full cost of the premiums until she realized that the manner in which DFAS calculated DRP caused her to overpay. *Id*. Since DFAS deducted FS SBP premiums from gross pay when calculating DRP, then Kay's 31.9 percent share of the retired pay automatically resulted in her paying a roughly equivalent percent of the premium. *Id*. A sample calculation in text box 24 illustrates the point.

Text Box 24: FS "share" of SBP Premium.

Notional Facts:

- Gross retired pay/insured base = $1,000 per month.
- Kay's decreed one-half community interest in Karl's retired pay = 31.9%.
- Kay's "maximum expected" share of the retired pay (should gross retired pay equal DRP) = $319 per month.
- For simplicity, no compensable disabilities; therefore, no VA offset to factor.

- FS SBP premium = $65 (Insured base of $1,000 x 6.5%).
- DRP = $945 per month ($1,000 - $65).
- Kay's realized share of the retired pay = $301 per month (DRP x 31.9%).
- Decrease in Kay's share of retired pay due to DRP calculus = $18 per month ($319 less $301).
- Kay's monthly contribution to SBP premium by virtue of the DRP calculus: $18 ÷ $65 = 27.7% (roughly equivalent to 31.9%).

Continuing with the discussion of *Schneider*, Kay eventually reduced her reimbursements to Karl by 31.9 percent to compensate for this effect. *Id*. Karl filed a Motion for Clarification which the trial court resolved in Kay's favor and the Third Court affirmed based on the premium

reimbursement proportionately embedded within the DRP calculus. *See id*. at 930-32.

Death Windfall.

Another issue presented in *Schneider* was that FS SBP coverage with the SM's full retired pay as the base amount will always result in a "death windfall." *See id*. at 929 (reasoning that the FS's share of retired pay is limited to 50 percent of the community interest while the SBP standard annuity is set at 55 percent of the SM's gross retired pay). This maxim holds true unless a court orders reduces the insured base to an amount that yields a SBP annuity on par with the FS's retired pay share. *See id*. This point is illustrated in text box 25.

Text Box 25: "Death Windfall."

Notional Facts:

- Gross retired pay/insured base = $1,000 per month (i.e. standard annuity).
- Kay's decreed one-half community interest in Karl's retired pay = 31.9%.
- FS SBP Premium = $65 (i.e. $1,000 x 6.5%)
- For simplicity of the example, no compensable disabilities; therefore, no VA offset to factor.
- DRP = $945 (i.e. Gross retired pay less FS SBP premium).
- Kay's realized share of DRP = $301 (i.e. DRP x 31.9%).

"Death Windfall":

- Insured base per court ordered "standard annuity" = $1,000 per month (i.e. gross retired pay).
- FS SBP annuity = 55% of insured base.
- Standard annuity amount upon Karl's death = $550 (i.e. $1,000 insured base x 55%)
- Amount of "death windfall" = $249 per month (i.e. $550 less $301—an 82.7% increase in monthly payments to the FS).

The way to preclude a death windfall is for the SM to adjust the insured base so that 55 percent of that amount equals the share of retired pay the FS is due to receive while the SM is alive. *See* 10 U.S.C.S. § 1451(a)(1)(B)(i)(V); *Schneider*, 5 S.W.3d at 928. A sample calculation in text box 26 illustrates the point.

Text Box 26: Adjustment to Insured Base to Mirror Retired Pay Partition in Divorce.

Notional Facts:

- Same as text box 25.

Adjustment to Insured Base to Preclude "Death Windfall":

- Insured base necessary to yield a $301 month annuity after the SM's death = $547 (i.e. $301 ÷ 55%)
- SBP premium = $36 (i.e. $547 x 6.5%)
- DRP = $964 (i.e. $1,000 less $36)
- Kay's realized share retired pay = $307 per month (DRP x 31.9%)

Notes:

- The lesser insured base decreases the SBP premium, which increases DRP available for partition.
- Thus, in this example, the $301 and $307 per month figures can be deemed to be equivalent or the formula can be further refined to narrow the gap more.

For reasons not specified, Karl's attempt to limit Kay's annuity to preclude a "death windfall" was rejected by his military service. *Schneider*, 5 S.W.3d at 928. Karl responded by asking the court to impose a constructive trust upon Kay's prospective "death windfall." *Id*. The trial court refused to do so, reasoning that a constructive trust was barred by Federal preemption given the statutory constraint against apportioning SBP

coverage among a spouse and FS(s). 10 U.S.C.S. § 1448(b)(2)(B); *Schneider*, 5 S.W.3d at 929-30.

The Third Court—without expressing its opinion on the legality of a constructive trust in such circumstances—held that the trial court did not abuse its discretion in refusing to impose a constructive trust given its concern about Federal preemption. *Id*. Thus, the issue of whether a constructive trust could be employed in a future, similar scenario remains unsettled in the Texas courts. *See id*. Notwithstanding that fact, the U.S. Supreme Court's stance in *Ridgway* suggests that any inclination a state court may have toward imposing a constructive trust upon any form of SBP annuity payments would, likewise, be preempted by SBP's anti-attachment provisions. *Compare* 38 U.S.C.S. § 1970(g) (exempting SGLI/VGLI payments to beneficiaries from taxation, creditor claims, attachment, levy, seizure, or any and all equitable process) *and Ridgway*, 454 U.S. at 60-61 (concluding that the anti-attachment provision now codified in 38 U.S.C.S. § 1970(g) precludes imposition of a constructive trust on SGLI payments), *with* 10 U.S.C.S. § 1450(i) (exempting all SBP payments to beneficiaries from levy, execution, attachment, garnishment or other legal process).

Former Spouse (FS) SBP Not Available.

When FS SBP coverage is no longer available then an order that directs the SM to purchase a commercially-available life insurance policy or annuity with the FS as the irrevocable beneficiary should be considered for income protection after the SM's death. *See Carroll*, 2009 Tex. App. LEXIS 167 at *3-4. The issue is straightforward when FS SBP coverage was previously elected by the SM in favor of a prior FS—neither a second SBP policy nor split coverage between FSs is an option. *See* 10 U.S.C.S. § 1448(a)(3). The issue becomes more complex when FS SBP coverage was ordered by the court but the deemed election was not timely filed with DFAS. *See* 10 U.S.C.S. § 1450(f)(3)(C); *Carroll*, 2009 Tex. App. LEXIS 167, at *3-4. A court cannot "clarify" a decree by ordering the SM to purchase life insurance as a substitute for FS SBP coverage in the aftermath of a botched deemed election. *Carroll*, 2009 Tex. App. LEXIS 167, at *3-4. Any attempt to do so is, of course, not "clarification" but an impermissible modification of decree's terms. *See Hicks*, 348 S.W.3d 281, 288; *Carroll*, 2009 Tex. App. LEXIS 167, at *9-10 (emphasis added). A SM may, however, voluntarily pledge to substitute purchase of commercial life insurance for court-ordered FS SBP coverage to compensate for a botched deemed election—and this type of promise is enforceable. *Carroll*, 2009 Tex. App. LEXIS 167, at *9-10.

Servicemembers Civil Relief Act (SCRA).

General.

There is no lack of Texas cases over the last several decades that address application of the SCRA to a stay of proceedings or set aside of a default judgment. *See, e.g.*, *Mims Bros. v. James*, 174 S.W.2d 276 (Tex. Civ. App.—Austin 1943, writ denied); *Womack v. Berry*, 291 S.W.2d 677 (Tex. 1956); *Power v. Power*, 720 S.W.2d 683 (Tex. App.—Houston [1st Dist.] 1986, writ dism'd w.o.j.); *Winship v. Gargiulo*, 761 S.W.2d 301 (Tex. 1988); *Hawkins v. Hawkins*, 999 S.W.2d 171 (Tex. App.—Austin 1999, no pet.); *In re Walter*, 234 S.W.3d 836 (Tex. App.—Waco 2007, no pet.); *In the Interest of K.B., a Child*, 298 S.W.3d 691 (Tex. App.—San Antonio 2009, no pet.); *Vandemark v. Jiminez*, No 01-09-00168-CV, 2010 Tex. App. LEXIS 2351 (Tex. App.—Houston [1st Dist.] Apr. 1, 2010, no pet.) (memo op.); *Calderoni v. Vasquez*, No. 03-11-00537-CV, 2012 Tex. App. LEXIS 5245 (Tex. App.—Austin June 26, 2012, no pet.) (memo op.) Based on the author's search, however, there appears to be only one case—*Hawkins*—that deals squarely with the SCRA and an erroneous partition of military retired pay. *See Hawkins*, 999 S.W.2d at 174-79.

Nevertheless, the spectrum of cases illuminate four concepts that might impact orders for partition of military retired pay. Each concept is developed in the paragraphs that follow.

Force-Fitting the SCRA into State Procedures.

First, the Texas Supreme Court underscored that SCRA provisions for setting aside default judgments constitute a distinct, Federally-created right of relief. *Winship*, 761 S.W.2d at 301. Thus, the Court reasoned that it is inappropriate when lower courts try to force a proper appeal under the SCRA to conform with established state procedures such as a Motion for New Trial, Restricted Appeal, or Bill of Review. *See id*.

Negating SCRA Applicability.

Second, a SM who enters an appearance but later fails to participate in the proceedings cannot then use the SCRA to vacate a default judgment rendered against him. *Vandemark*, 2010 Tex. App. LEXIS 2351, at *17-18. In *Vandemark*, the SM requested the trial court set aside its default judgment because he had not received service of process and the plaintiff had failed to comply with SCRA Section 521 by failing to submit an affidavit of military service. *Id*. at *1-4. The trial court denied his request. *Id*. at *5. On appeal, the First Court held that Vandemark had earlier waived service by entering a general appearance when he appeared at a scheduled hearing; requested time to hire an attorney; and, signed the reset order. *Id*. at *8-10, *17-18. The First Court further held that the trial court did not err in refusing to set aside the default judgment because—per Section 521(a)—the SCRA's protections are only available when the SM does not make an appearance. *Id*. at *12, *17-18.

Burden of Proof for Granting a Stay.

Third, a request for stay based on the mere fact the SM is in the military should prove insufficient to persuade the court to act. *See, e.g.*, *Power*, 720 S.W.2d at 684-85. Use of the conditional term "should" reflects the fact that the U.S. Supreme Court established in 1943 that courts have wide discretion in determining whether a stay under the SCRA [and its predecessor, the Soldiers and Sailors Civil Relief Act or SSCRA] is warranted. *See id*. at 684 (citing *Boone v. Lightner*, 319 U.S. 561, 575 (1943)). The Texas Supreme Court in *Womack* indorsed use of such wide discretion among lower courts. *Id*. at 49 (citing *Boone*, 319 U.S. at 575). Wide discretion comports with the SCRA's Section 521(d) in that a court may stay proceedings in cases where the SM fails to appear if the court determines that there might be a defense that cannot be presented without the SM's presence. *See* 50 U.S.C.S. App. § 521(a), (d)(1) (emphasis added).

Employment of a court's wide discretion, however, does not carry over into cases where a SM with actual notice requests a stay under the SCRA's Section 522. *See* 50 U.S.C.S. App. § 522(b). Recall that a court only has authority to grant a stay under Section 522 when two conditions are met: (1) the SM presents the court with a letter or other communication that states the manner in which military service materially impacts his ability to appear and states a date when the SM will be available to appear; and (2) the SM presents the court with a letter or other communication from his commander that states the SM's military duty prevents his appearance and that leave is not authorized at time of the letter. *See id*. at §§ 522(b)(1), (b)(2)(A), (b)(2)(B) (emphasis added). A stay under Section 522 is not required unless all conditions are met. *See Power*, 720 S.W.2d at 684-85; *Walter*, 234 S.W.3d at 837 (emphasis added).

In *Power*, the SM communicated to the trial court that he was in the military, stationed in Germany, and would remain overseas for another three years—and was requesting relief under the SCRA's predecessor on that basis alone. *See Power*, 720 S.W.2d at 684. The trial court denied

the request and the First Court affirmed. *Id*. at 683, 685. The First Court noted in its opinion that the SM never presented evidence that he was unable to obtain leave or that his military service materially affected his ability to defend. *Id*. at 685.

Similarly in *Walter*, the trial court denied the SM's request for stay and entered temporary orders. The SM petitioned for mandamus which the Tenth Court denied with alacrity in a terse four-paragraph opinion. *Walter*, 234 S.W.3d at 837. The court's opinion noted that the SM was currently deployed to "Kuwait and/or Iraq." *Id*. (citing the SM's letter to the court). Yet, the court emphasized that both of Section 522(d)'s conditions were not met because—at a minimum—the SM failed to provide a letter or other communication from his commander with the required, supporting statements. *Id*.

Burden of Proof for Setting Aside a Voidable Order.

Fourth, a request by a SM to set aside a default judgment based on the mere fact of non-compliance with some provision of the SCRA (i.e. a plaintiff's failure to file and affidavit of military service or a court's failure to appoint an attorney to represent a SM who does not make an appearance) should prove insufficient to persuade the court to act. *See, e.g.*, *Mims*, 174 S.W.2d at 278; *Hawkins*, 999 S.W.2d at 174 (citing Mims); *K.B.*, 298 S.W.3d at 693 (citing *Hawkins*); *Calderoni*, 2012 Tex. App. LEXIS 5245, at *20-21 (citing *Mims*). A default judgment the fails to comply with the SCRA is not void but merely voidable. *See, e.g.*, *Mims*, 174 S.W.2d at 278. The key to attacking the voidable judgment lies not in proof of mere non-compliance with the SCRA, but with proof that the SM's "interest has been deleteriously-affected." *Id*.

Recall that in contemporary terms, proving a deleterious affect means the SM must prove two elements: (1) that his ability to defend was materially affected by his military service and (2) that he has a meritorious defense. *See* 50 U.S.C.S. App. § 521(g)(1)(A), (B); *Hawkins*, 999 S.W.2d at 174-75; *K.B.*, 298 S.W.3d at 693; *Calderoni*, 2012 Tex. App. LEXIS 5245, at *20 (emphasis added). Failure to prove both elements is fatal to the SM's request to reopen the default judgment. *See K.B.*, 298 S.W.3d at 693-94 (emphasis added).

In *K.B.*, the SM argued that the mere fact he was in the military and preparing for deployment to Iraq at time of trial was cause to reopen the default judgment rendered against him. *Id*. at 693. The Fourth Court—while finding it noteworthy that the SM's affidavit acknowledged he was stateside during the time of the trial—held that the SM failed to meet his burden of proving material impact by reason of military service. *Id*. at 694.

In contrast, the Third Court in *Hawkins* concluded that the trial court—which failed to ensure compliance with the SCRA and thus rendered a voidable default judgment—abused its discretion in refusing to reopen the judgment. *Hawkins*, 999 S.W. 2d at 173-79. Here, a SM who had notice of the proceeding yet failed to appear demonstrated both material impact and a meritorious defense. *See id*. at 173-77. The SM's documented inability to obtain leave proved material impact and an erroneous partition of his military retired pay proved a meritorious defense. *Id*. at 175-76. The trial court had partitioned the retired pay as if the SM had already retired—i.e., using the *Taggart* formula—when in fact he was still serving. *See id*. at 176. The trial court's failure to apply the *Berry* formula meant the FS received a greater share of the retired pay than she should have had the correct law been applied. *See id*. While other aspects of the trial court's judgment were affirmed, the issue of partition of the retired pay was reversed and remanded based on "overwhelming evidence that [the SM] was prejudiced in presenting his defense…by reason of his military status." *Id*. at 176, 179.

PART IV: SPECIAL ISSUES RELATED TO MILITARY RETIRED PAY.

Pay Upon Involuntary Separation.

General.

SMs who are involuntarily separated—and thus denied the opportunity to vest in retired pay—generally are not left without some compensation. *See* 10 U.S.C.S. § 1174. Regular (i.e. active duty) officers with at least six but less than 20 years service who are involuntarily separated qualify for separation pay—unless the Secretary of their respective military department determines otherwise (e.g. dishonorable discharge subsequent to court martial). *Id*. at § 1174(a). Regular enlisted members with at least six but less than 20 years service who are involuntarily separated or denied reenlistment qualify for separation pay subject to the same caveat. *Id*. at § 1174(b). RCSMs who are involuntarily separated from active duty qualify for separation pay with similar conditions and restrictions. *Id*. at § 1174(c). A special exception is contained in Section 1176 for active duty and Reserve enlisted members with at least 18 but less than 20 years of service. *Id*. at § 1176. These SMs generally are permitted to continue serving until they become vested at 20 years. *Id*.

The two formulas for involuntary separation pay are prescribed in Section 1174(d) and depicted in text box 27. *Id*. at § 1174(d). Whether the separation pay is computed under Section 1174(d)(1) or the less generous formula in Section 1174(d)(2) is determined by the Secretary of the SM's respective military department or the Secretary of Defense. *Id*. at §1174(a)(1)-(b)(2). Any VA disability compensation to which the SM is entitled will be reduced by the amount of separation pay received, less the amount of Federal income tax withholding attributable to the separation pay. *Id*. at § 1174(h)(2).

Text Box 27: Computation of Involuntary Separation Pay—10 U.S.C.

§ 1174(d)(1): 10% x (years of service x 12 x monthly basic pay at time of discharge); or

§ 1174(d)(2): One-half the amount computed under (d)(1).

A notional example of separation pay computed under Section 1174(d)(1) is below in text box 28. Computation of years of service includes full months but discards fractional months. *Id*. at § 1174(f).

Text Box 28: Example—Computation of Involuntary Separation Pay Under § 1174(d)(1).

Notional Facts:

- O-3 (e.g. Army Captain)
- 7 years, 5 months and 12 days at discharge (7 + 5/12, or 7.417 in decimal form)
- Basic pay at discharge = $5,188

Computation:

- 10% x (7.417 x 12 x $5,188), or
- 10% x (7.417 x $62,256), or
- 10% x $461,752.75 = $46,175.28

Generally, the SM must contract to serve in the RC (i.e. Reserves or National Guard) for a minimum of three years as a condition of payment. *Id*. at § 1174(e). Then, SMs who later qualify for RC retired pay will experience a reduction in retired pay payments to effect full recoupment at a rate determined by the Secretary of Defense. *Id*. at § 1174(h)(1).

Involuntary Separation Pay Case Law.

The Texas Supreme Court held in *Perez* that involuntary separation pay is not community property and consequently not subject to partition in divorce. *Perez v. Perez*, 587 S.W.2d 671, 672 (Tex. 1979). The Court rejected the FS's argument that the involuntary separation benefit was a community property right earned during service—akin to a marital share of the retired pay. *Id*. at 672. The Court's review of Congressional legislative history supported its conclusion that the benefit was "bestowed by Congress upon an involuntarily separated [SM]…as an unearned gratuity..." *Id*. at 673. Hence, the Court characterized involuntary separation pay received under Section 1174 as a gift, which made it the SM's separate property. 10 U.S.C.S. § 1174; Tex. Fam. Code § 3.001(2); *Perez*, 587 S.W.2d at 673; *Marsh v. Wallace*, 924 S.W.2d 423, 425 (Tex. App.—Austin 1996, no writ) (citing *Perez* while stating that benefits payable under § 1174 are not divisible retired pay).

Pay Upon Voluntary Separation.

General.

SMs who are voluntarily separated—and thus freely relinquish the opportunity to vest in retired pay—can receive compensation under one of three programs: (1) the Special Separation Benefit program; (2) the Voluntary Separation Incentive program, and the Voluntary Separation Pay program. 10 U.S.C.S. §§1174a-75a.

Special Separation Benefit (SSB).

SSB is defined in Section 1174a and specifies that regular and RCSMs on active duty with at least six but not more than 20 years service are eligible to apply for a lump sum payment in consideration of separation prior to vesting for retired pay. *See Id*. § 1174a(c). RCSMs must have five years continuous active duty or full-time National Guard duty, or combination thereof, to be eligible. *Id*. at § 1174a(c)(4). Secretaries of the military departments have authority to conduct "force shaping" by restricting SSB eligibility according to rank, years of service, job skill, or remaining service obligation. *See id*. at §§ 1174a(c)(5), 1174a(e).

The formula for voluntary separation pay under SSB is prescribed in Section 1174a(b)(2) and portrayed in text box 29. *Id*. at § 1174a(b)(2). The formula for voluntary separation pay is more generous than for involuntary separation pay. *Compare* 10 U.S.C.S. § 1174a(b)(2), *with* 10 U.S.C.S. § 1174(d). A notional computation follows in text box 30. *See id*.

Text Box 29: Computation of SSB.

§ 1174a(b)(2): 15% x (years of service x 12 x monthly basic pay at time of discharge).

Text Box 30: Example—Computation of SSB.

Notional Facts:

- O-3 (e.g. Army Captain)
- 7 years, 5 months and 12 days at discharge (7 + 5/12, or 7.417 in decimal form)
- Basic pay at discharge = $5,188

Computation:

- 15% x (7.417 x 12 x $5,188), or
- 15% x (7.417 x $62,256), or
- 15% x $461,752.75 = $69,262.91

SSB incorporates the provisions in § 1174 pertaining to computation of fractional years of service; the requirement to contract with the RC for a minimum of 3 years as a condition of payment; and, full recoupment if the SM later qualifies for a RC retired pay at a rate determined by the Secretary of Defense. *Id*. at § 1174a(g) (incorporating by reference § 1174(e) through (h)

with the exception of (e)(2)(A)). Finally, SMs forfeit all entitlement to SSB if they become employed by the Department of Defense in a civilian position (i.e. Federal civil service) within 180 days of separation. DODFMR 7000.14-R, Vol. 7A, Ch. 35, para. 350703 E. (2012).

Voluntary Separation Incentive (VSI).

VSI is defined in Section 1175 and differs from SSB in that VSI's purpose is to entice SMs to request voluntary transfer to the RC (i.e. Reserve or National Guard) in exchange for a limited annuity. *Compare* 10 U.S.C.S. § 1175 (describing VSI), *with* 10 U.S.C.S. § 1174a (describing SSB). VSI specifies that regular and RCSMs on active duty with at least six but not more than 20 years service are eligible to apply for transfer to the RC. *Id*. at § 1175(b)(1). RCSMs must also have five years continuous active duty or full-time National Guard duty, or combination thereof, to be eligible. *Id*. at § 1175(b)(2). Again, Secretaries of the military departments have authority to conduct "force shaping" by restricting VSI eligibility according to rank, years of service, job skill, or remaining service obligation. *See id*. at § 1175(b)(3).

The length of the annuity, generally, is two times the SM's length of service. *Id*. at § 1175(a)(2) (emphasis added). The amount of the annuity is prescribed in Section 1175(e)(1) and depicted in text box 31. *Id*. at § 1175(e)(1) (emphasis added).

Text Box 31: Computation of VSI Amount.

(2.5% x basic pay on appointment/enlistment into the RC) x (12 x years of service).

A notional computation is in text box 32. *See id*. at § 1175(a)(2), (e)(1). Fractional years of service are computed in the manner previously described. *Id*. at § 1175(e)(5) (incorporating by reference 10 U.S.C.S § 1405). VSI payments will be reduced by the amount of VA disability compensation concurrently received, if any. *Id*. at § 1175(e)(4).

Text Box 32: Example—Computation of VSI Annuity.

Notional Facts:

- O-3 (e.g. Army Captain).
- 7 years, 5 months and 12 days at discharge (7 + 5/12, or 7.417 in decimal form).
- Basic pay upon appointment into RC = $5,188.

Computation—VSI Annuity Amount:

- (2.5% x $5,188) x (12 x 7.417), or
- $129.70 x (12 x 7.417) = $11,543.82.

Computation—VSI Annuity Length:

- 2 x 7.417 = 14.83 years.

Further limitations apply. SMs who later qualify for RC retired pay will experience a reduction in retired pay payments to effect full recoupment of VSI at a rate determined by the Secretary of Defense. *Id*. at § 1174(h)(1). RCSMs who wish to minimize or preempt a prospective RC retired pay reduction may effect early recoupment by reducing their VSI payment by any amount of basic pay received in any given year in which VSI is due to be paid. *See id*. at § 1175(e)(2). Otherwise, the SM's right to VSI payments shall not be transferable, except that the SM may designate beneficiaries to receive the payments in the event of the member's death. *Id*. at § 1175(f). Finally, as with SSB, SMs forfeit all entitlement to VSI if they become employed with the Department of Defense in a civilian position within 180 days of separation. DODFMR 7000.14-R, Vol 7A, Ch. 35, para. 350803 F.

Noteworthy administrative provisions apply. First, DFAS issues annual VSI payments on the

anniversary date of the SM's separation. *Id*. at Vol. 7B, Ch. 23, para. 230201 C. Second, garnishment orders, if any, remain in effect. *Id*. at para. 230303 (active duty), para. 230503 (RC).

Voluntary Separation Pay (VSP).

The VSP program superseded both the VSI and SSB programs. *Id*. at Vol. 7B, Ch. 4, para. 040102 E (referencing VSP superseding VSI), F (referencing VSP superseding SSB). The key provisions of VSP align with those of VSI. *Compare* 10 U.S.C.S. § 1175a (describing VSP), *with* 10 U.S.C.S. § 1175 (describing VSI).

Some differences exist though. *See id*. First, the VSP entitlement, as prescribed by the Secretary of Defense, cannot exceed four times the amount for a SM of the same grade and years of service as computed under Section 1174 for involuntary separation. 10 U.S.C.S. § 1175a(f) (emphasis added). Next, Congress authorized payments to be made in lump sum or annually not to exceed ten years, or a combination of lump sum and annual payments. *See id*. at § 1175a(g). Presently, however, the Secretary of Defense has specified that VSP be paid in lump sum. DODFMR 7000.14-R, Vol. 7A, Ch. 35, para. 350908. Finally, it must be emphasized that, at time of this writing, statutory authority to separate SMs under VSP terminates December 31, 2018. *Id*. at § 1175a(k).

Voluntary Separation Pay Case Law.

The Third Court in *Marsh*—a 1996 case of first impression and the only Texas case to deal with the subject—considered whether SSB's lump sum payment under Section 1174a was "retirement pay" and therefore subject to partition in divorce. *Marsh v. Wallace*, 924 S.W.2d 423 (Tex. App.—Austin 1996, no writ). The Court concluded that SSB was "in the nature of retirement pay" and therefore partitionable. *Id*. at 425. The Court expounded on its reasoning in stating:

> By its nature, an SSB payment resembles a buy-out of the service member's investment in military retirement, a sort of lump sum settlement, even though the retirement is not yet vested, in order to encourage the member's voluntary early separation from service. The recipient who reenlists and later becomes eligible for retirement has in effect received a prepayment on retirement pay because the retirement benefits are reduced by the amount of the SSB payment.

Id. at 426.

While no Texas case has considered whether a VSI annuity paid under Section 1175 is community property divisible in divorce, VSI and SSB were deemed by the Colorado Supreme Court to be equivalent in a 1997 decision. *In re Marriage of Heupel*, 936 P.2d 561, 566-67 (Colo. 1997) (drawing, in part, upon the Third Court's decision in *Marsh* in reaching its conclusion). The Colorado Supreme Court reasoned that the two programs served the same purpose and the only difference was the method of allocation—VSI being an annuity and SSB being a lump sum. *Id*. at 566.

The California Court of Appeals, Fourth District, while citing both *Marsh* and *Heupel*, likewise concluded in a 1998 decision that VSI was divisible community property. *In re Marriage of Babauta*, 66 Cal. App. 4th 784 (Cal. App. 4th Dist. 1998). The California Court of Appeals noted in its decision that opinions from six other states aligned with *Marsh* and *Heupel* while only one—*McClure*, an Ohio Court of Appeals decision—differed. *Id*. at 787.

In *McClure*—also a case of first impression—an Ohio Court of Appeals reasoned that:

> Given the Congressional intent behind the VSI program, VSI payments are more closely analogous to severance benefits than retirement benefits. Like severance payments, VSI benefits attempt to compensate a separated service member for

> future lost wages. The mere fact that the amount of the payments is determined according to the number of years of service does not necessarily render these payments compensation for past services. Rather, severance pay is frequently calculated according to the number of years of employment. Although severance pay received during the marriage is marital property to the same extent that wages paid during the marriage are marital property, severance payments intended to compensate for wages lost after the divorce cannot be characterized as marital property. [internal citations omitted].

McClure v. McClure, 647 N.E.2d 832, 841 (Ohio Ct. App., Greene County 1994). The Ohio court's decision was influenced by the fact that the SM provided uncontroverted testimony that he received an ultimatum to either apply for VSI or face involuntary separation. *Id*. at 842. He opted for VSI because it would provide the larger benefit. *Id*. On that basis—ultimatum, not free choice—the Court of Appeals supported the trial court's characterization of VSI as the SM's separate property. *Id*. In other words, the ultimatum gave cause to analogize the SM's acquiescence in accepting VSI with severance pay due to involuntary separation. *See id*.

Protecting Against Extinguishment of the FS's Contingent Property Interest in Voluntary Separation Pay.

A provision permitting the FS to receive a portion of any VSP payments modeled on the *Berry* (for active duty SMs) or *Berry-Bloomer* (for RCSMs) formulas should be included in any divorce decree that partitions unvested retired pay otherwise a FS may lose twice. *See* 10 U.S.C.S, § 1408(a)(4)(A); *id*. at § 1175a; *Cearley*, 544 S.W.2d at 664-66; (emphasizing that future enjoyment of the FS's contingent property right is not guaranteed); *Berry*, 647 S.W.2d at 947 (stating the FS's share of retired pay should be calculated at time of divorce); *Bloomer*, 927 S.W.2d at 119-21 (stating that calculation for RCSMs is the marital share of points accrued at time of divorce). The FS would lose a first time when her contingent interest in half the marital share of retired pay gets extinguished by the SM's unilateral decision to apply for VSP and separate short of vesting for retirement. *See* 10 U.S.C.S. § 1175a (outlining VSP); *Cearley*, 544 S.W.2d at 664-66. Then, the FS would lose a second time should she not have received a portion of VSP yet the SM later qualified for a RC retirement—in which she will share—that requires statutory recoupment of VSP payments from retired pay. *See* 10 U.S.C.S, § 1408(a)(4)(A) (stating DRP includes deductions for recoupments provided for by law resulting from entitlement to retired pay); 10 U.S.C.S. at § 1175a(h) (outlining recoupment policy); *Cearley*, 544 S.W.2d at 664-66. On the other hand, and given the complexities of voluntary separation pay programs combined with the prospect of a subsequent RC retirement, it may be prudent simply to reserve jurisdiction on the issues of partition and recoupment of any voluntary separation pay and seek clarification and enforcement if, as and when the specific facts and conditions become known. *See* 10 U.S.C.S, §§ 1175a(h), 1408(a)(4)(A); Tex. Fam. Code §§ 9.008 (specifying authority to clarify a decree), 9.011 (specifying authority to divide future property whether vested or unvested at time of divorce) (emphasis added).

Civil Service Roll-Over.

Former Servicemembers Not Entitled to Military Retired Pay.

SMs who separate short of vesting for military retired pay and join the Federal workforce can roll their years of military service into a civil service retirement. 5 U.S.C.S. §§ 8334(j) (specifying credit under the Civil Service Retirement System), 8411(c) (specifying credit under the Federal Employee Retirement System). Understanding how this may affect a FS is an important issue for

a military family law practitioner given that more than one-half million veterans comprise 28.3 percent of the Federal workforce. UNITED STATES OFFICE OF PERSONNEL MANAGEMENT, COMMON CHARACTERISTICS OF THE GOVERNMENT, 50 (2010) (available at www.opm.gov_feddata_demograp_table8mw.pdf).

Persons joining the Federal workforce in 1983 or earlier can qualify for retired pay under the Civil Service Retirement System (CSRS). 5 U.S.C.S. at §§ 8331-51. Those joining in 1984 or after can qualify under the Federal Employee Retirement System (FERS). *Id*. at §§ 8401-80. There were two "open seasons" in 1987 and 1998 during which CSRS employees could convert to FERS. PATRICK PURCELL, CONGRESSIONAL RESEARCH SERV., CREDIT FOR MILITARY SERVICE UNDER CIVILIAN FEDERAL EMPLOYEE RETIREMENT SYSTEMS 1 (2009). A comprehensive discussion of civil service retirement is beyond the scope of this paper. The remainder of this section will focus on FERS—as it may relate to partition of the military retired pay in divorce—given that SMs separating now and in the future who become Federal employees will be covered by FERS. *See* 5 U.S.C.S. §§ 8401-80.

Two aspects of FERS that interrelate are worth emphasizing. First, FERS is a contributory retired pay system. *Id*. at § 8422. Next, to effect roll-over of military service, former SMs must deposit into the Civil Service Retirement and Disability Fund (CSRDF) an amount equal to 3 percent of military basic pay received during the years to be credited in FERS. *Id*. at § 8422(e). A comprehensive discussion of the military roll-over option is contained in the *CSRS AND FERS HANDBOOK FOR PERSONNEL AND PAYROLL OFFICES, CHAPTER 22—CREDITABLE MILITARY SERVICE*, published by the Office of Personnel Management (April 1998), *available at* http://www.opm.gov/retire/pubs/handbook/C022.pdf .

Former Servicemembers Entitled to Military Retired Pay.

Some SMs who receive military retired pursue a second career in Federal employment. *See* 5 U.S.C.S. § 8411(c)(2); COMMON CHARACTERISTICS OF THE GOVERNMENT, *supra* 50. These former SMs must waive military retired pay in order to have their years of service credited to FERS retired pay. 5 U.S.C.S. § 8411(c)(2). SMs with court orders that partitioned retired pay during divorce are prohibited from waiving their military retired pay unless they authorize the Director, Office of Personnel Management (OPM) to withhold an amount of any FERS annuity that produces an equivalent result in favor of the FS. *Id*. at § 8411(c)(5). This restriction applies only if the state court order was properly served on the military department Secretary via prior effective service on DFAS. *Id*. Payment directly to the FS is then authorized by OPM. *Id*.

Further Guidance.

Requirements for court orders to partition FERS retired pay are contained in 5 U.S.C. § 8467 and an OPM publication entitled *A HANDBOOK FOR ATTORNEYS ON COURT-ORDERED RETIREMENT, HEALTH BENEFITS AND LIFE INSURANCE UNDER CIVIL SERVICE RETIREMENT BENEFITS, FEDERAL EMPLOYEE RETIREMENT BENEFITS, FEDERAL EMPLOYEE HEALTH BENEFITS AND FEDERAL EMPLOYEE GROUP LIFE INSURANCE PROGRAM (JULY 1997)* (hereafter, *OPM HANDBOOK FOR ATTORNEYS*) available at http://www.opm.gov/retire/pubs/pamphlets/ri38-116.pdf

*** Remainder of column intentionally blank ***

PART V: KEY ADMINISTRATIVE PROVISIONS.

General.

The thrust of this paper has been to provide an overview of the law affecting partition of military retired pay in divorce. This paper has not attempted to provide exhaustive "how to" instructions for either decretal language or follow-on administrative requirements for proper filing of a FS's claim. That said, ample tools are available to fill those gaps. For example, suggested decretal language and key administrative provisions affecting a FS's right to receive her share of retired pay are defined in DODFMR 7000.14-R, Vol. 7B, Ch. 29—*Former Spouse Payment From Retired Pay*, *available at* http://comptroller.defense.gov/fmr/07b/07b_29.pdf. These provisions are restated in a DFAS handbook entitled *USFSPA, ATTORNEY INSTRUCTION, DIVIDING MILITARY RETIRED PAY, available at* http://www.dfas.mil/garnishment/usfspa/attorneyinstructions.html (hereafter referred to as *ATTORNEY INSTRUCTION*) (The preceding link will take the reader to the DFAS webpage, "Attorney Instructions" sub-page. Click on the hyperlink labeled *Guidance for dividing retired pay and sample language for court orders*.).

Discussion of some of the more important provisions follows while acknowledging that a comprehensive discussion is beyond the scope of this paper. The military family law practitioner would be well advised to read DODFMR Vol. 7B, Chapter 29 and the *ATTORNEY INSTRUCTION* in their entirety to ensure decretal language or administrative requirements do not delay or derail DFAS processing of a court ordered partition. *See* DODFMR 7000.14-R, Vol. 7B, Ch. 29; *ATTORNEY INSTRUCTION*, *supra*.

Qualified Domestic Relations Order (QDRO) Not Required But Acceptable.

A QDRO is not needed because military retired pay is a Federal entitlement and not an ERISA-qualified pension plan. *See id*.; *ATTORNEY INSTRUCTION*, *supra* 3. A QDRO will be accepted, however, as long as it otherwise complies with DOD requirements administered by the designated agent (see Text Box 1, *supra*). *See* DODFMR, Vol. 7B, Ch. 29, para. 290204, 290403, 290603. Then, DFAS requires receipt of the final court order. DODFMR, Vol. 7B, Ch. 29, para. 290204. A final order that incorporates a property settlement agreement is acceptable. *Id*. Likewise, a court order that incorporates a separation agreement is acceptable. *Id*. at para. 290603.

Types of Awards.

Court orders must specify retired pay awards to the FS as either a fixed dollar amount or a percentage. *Id*. at para. 290601C. AWARDS EXPRESSED AS A FIXED DOLLAR AMOUNT WILL NOT RECEIVE A PERCENTAGE OF FUTURE COLAS UNLESS A PERCENTAGE SHARE OF COLAS IS SPECIFIED IN THE ORDER. *Id*. (emphasis added). If a percentage of COLAs is not specified, then award of a fixed amount remains just that—forever fixed or frozen in time. *See id*. Thus, award of a fixed amount with no COLA provision puts the FS at a significant disadvantage since the purchasing power of her share of the retired pay will erode over time. *See id*. Conversely, awards expressed as a percentage of retired pay will have an equivalent share of COLAs automatically applied. *Id*. Finally, it is worth repeating that all percentage awards will be construed by the designated agent to be a percentage of DRP—even if the court order awards a percentage of gross retired pay. *Id*. at para. 290601D.

Formula Awards.

Active Duty.

Per DOD, the formula to partition retired pay of an active duty member is expressed as a marital fraction, where the numerator is the number of months married during military service and the denominator is the number of months of the SM's total creditable military service. *Id*. at 290211A., 290607B. (emphasis added). WHAT THIS MEANS TO A MILITARY FAMILY LAW PRACTITIONER IS THAT A COURT ORDER THAT CONFORMS WITH THE MAJORITY VIEW (I.E. PERMITS THE DENOMINATOR FOR A SM STILL SERVING POST-DIVORCE TO FLOAT UNTIL THE "DATE OF RETIREMENT") BUT IS ERRONEOUS PER TEXAS LAW (I.E. CONFLICTS WITH THE *BERRY* FORMULA) IS PERFECTLY ACCEPTABLE TO THE DESIGNATED AGENT AND WILL BECOME RES JUDICATA IN TEXAS IF NOT TIMELY APPEALED. *See id*. at para. 290607C. (stating the designated agent will supply the denominator, that will be total months active duty at retirement or total points accrued at retirement); *Berry*, 647 S.W.2d at 947; *e.g.*, *Barnard*, 863 S.W.2d at 771-74 (successfully appealing an impermissible collateral attack of an unambiguous decree that erroneously awarded the FS a percentage of total retired pay); *Lopez*, 2004 Tex. App. LEXIS 11473, at *1-4 (unsuccessfully collaterally attacking the fact the trial court erred by not restricting the denominator to the number of months creditable service at time of divorce); SULLIVAN, THE MILITARY DIVORCE HANDBOOK, *supra* 536 (declaring the view held by the majority of states).

Reserve Component.

Formula for RCSMs must be expressed in points. DODFMR 7000.14-R, Vol. 7B, Ch. 29, para. 290211 B., 290607B. Failure to do so will cause the order to be rejected and require clarification. *See Attorney Instruction*, *supra* 7.

Hypothetical Retired Pay.

Hypothetical retired pay formulas use variables different from those applicable to the SM's actual retirement. DODFMR 7000.14-R, Vol. 7B, Ch. 29, para. 290213, 290608. Recall that a key feature of a hypothetical award is that it precludes a FS from benefiting from the SM's post-divorce pay increases, whether due to longevity or promotion. *See id*. at para. 290213. To effect a hypothetical award, the court order must supply the following variables:

1) The percentage awarded to the FS;

2) The hypothetical years of creditable service, or, in the case of a RCSM, the Reserve retirement points on which the hypothetical retired pay is to be based;

3) The hypothetical retired pay base (i.e. Final Basic Pay or High-3, as appropriate); and

4) The hypothetical retirement date.

Id. at para. 290608D., E. COLAs will be applied to the resulting hypothetical award from the date of divorce through the date of retirement and thereafter. *Id*. at para. 290902.

If pay tables in effect on the date of the SM's retirement are to be used, then the court order requires the following variables:

1) The percentage awarded to the FS;

2) The hypothetical years of creditable service, or, in the case of a RCSM, the Reserve retirement points on which the hypothetical retired pay is to be based;

3) The SM's hypothetical rank (i.e. pay grade and years of service on date of divorce, such as O-4 over 16 years or E-5 over 8 years); and

4) A statement that the calculation is to be made as of the SM's actual retirement date.

Id. at para. 290608F. The designated agent will then convert all hypothetical awards into a percentage of actual DRP. *Id*. at para. 290608H. COLAs will apply thereafter. *Id*. at para. 290902.

Notarized Statement In Lieu of Clarification Order.

When the formula in a court order proves defective, the designated agent will accept a notarized statement that supplies the necessary information in lieu of a clarification order only if the statement is signed by both parties. DODFMR 7000.14-R, Vol. 7B, Ch. 29, para. 290215. Notarized statements cannot be used to modify a court-ordered award if the order contains sufficient information for calculation. *See id*. This fact suggests that clarification by notarized statement is not a no-cost alternative to timely appeal or "silver bullet" to overcome an erroneous order that has become res judicata. *See id*. (emphasis added).

Conditional Awards.

The designated agent will not honor a conditional award based on some future event (i.e. FS entitled to her half of the marital share of retired pay so long as she does not remarry or cohabitate; FS does not move from Texas prior to the last child graduating high school,; or, any other creative condition) as DFAS has no means or authority to determine compliance. *See id*. at para. 290613 (emphasis added). If an order with a condition is received, then the FS will have to replace it with a modified order without the condition. *Id*.

Subsequent Court Orders.

When receiving clarification or modification orders, the designated agent will implement the most recent order received that appears regular on its face. *Id*. at para. 290612. If the court order is from a different state than the order currently in effect, the designated agent will not honor it unless the order specifies that the court has jurisdiction over the FS and, per USFSPA Section 1408(c)(4), the SM. *Id*. at para. 290612B.

Former Spouse Application for Retired Pay.

A proper application includes both an acceptable court order and DD Form 2293 (Request for Former Spouse Payments from Retired Pay). *Id*. at para. 290401A. DD Form 2293 is available from the DOD Forms Management Program website at http://www.dtic.mil/whs/directives/infomgt/forms/forminfo/forminfopage2217.html.

The FS (or her attorney) does not have to wait until the SM retires to file the application for payments from retired pay. See DODFMR 7000.14-R, Vol. 7B, Ch. 29, para. 290404. Application can be made any time after the final order is rendered. *Id*. A KEY ADVANTAGE OF SUBMITTING THE APPLICATION EARLY IS THAT THE DESIGNATED AGENT WILL PROVIDE CONDITIONAL PRE-APPROVAL OR DISAPPROVAL AFTER RECEIPT. *Id*. at para. 290405, 290501A. (emphasis added). Applications from multiple FSs will be honored on a first-come, first-served basis. *Id*. at para. 291002.

An approved application will be retained and a second review will occur at the time the SM begins to receive retired pay. *Id*. at para. 290405B. If conditionally pre-approved but defective upon second review, the designated agent will require a clarification order or notarized statement before FS payments can begin. *Id*.

THE FS WILL BE NOTIFIED OF APPROVAL OR DISAPPROVAL WITHIN 30 DAYS AFTER RECEIPT OF THE COURT ORDER AND APPLICATION. *Id*. at para. 290501 (emphasis added). An appeal process is available. *Id*. at para. 290201-03. Appeals must be submitted within 30 days of the initial determination. *Id*.

Notice of approved applications will include the projected date when payments to the FS will begin, that will be no later than 90 days after approval. *Id*. at 290501, 290801. The SM will receive notification of approval, disapproval and commencement of payment as well. *Id*. at para. 290502-05. The SM can stop payment if he provides the designated agent with documentary evidence that the court order bears a legal defect. *Id*. at para. 290505.

Former Spouse Application for Deemed Election of SBP.

The FS (or her attorney) need only complete and timely file a DD Form 2656-10 and copy of the court order directing the SM or RCSM to provide FS SBP coverage. DODFMR 7000.14-R, Vol. 7B, Ch. 43, para. 430503 C. (active duty SMs); *id*. at Ch. 54, para. 540502 H.2. (RCSMs). DD Form 2656-10 is available at http://www.dtic.mil/whs/directives/infomgt/forms/forminfo/forminfopage3346.html. Send the form and court order to the designated agent listed on the form (see text box 3, *supra*, for the list of designated agents for FS SBP deemed elections). *Id*. RECALL THAT A DEEMED ELECTION MUST BE RECEIVED WITHIN ONE YEAR OF THE DATE OF THE COURT ORDER. *See id*. at 430503C.2. (emphasis added).

Garnishment and Bankruptcy.

Payment to the FS of her court-ordered share of retired pay cannot be offset or garnished to satisfy other legal obligations. *Id*. at para. 290903. This prohibition includes child support that the FS may owe the SM. *Id*.

The designated agent, DFAS, will honor bankruptcy orders when retired SMs file for either Chapter 7 or 13 relief. *Id*. at para. 170102. While most deductions from a retired SM's pay will cease pursuant to the automatic stay, THE AUTOMATIC STAY DOES NOT PRECLUDE CONTINUED PAYMENTS OF THE FS'S COURT-ORDERED SHARE OF RETIRED PAY. *Id*. at para. 170103 (emphasis added).

The situation becomes problematic if divorce and partition of retired pay were to occur during an active bankruptcy case since the debt is then post-petition. *Id*. at para. 170105. In such cases, coordination with the DFAS Office of General Counsel, Garnishment Operations, is required. *Id*. Otherwise, retired pay is subject to payment to a court-appointed bankruptcy trustee. *Id*. at para. 170204.

Sample Military Retired Pay Division Order (MRPDO).

The DODFMR Vol. 7B provides a sample MRPDO that meets the designated agent's legal and administrative requirements. DODFMR 7000.14-R, Vol. 7B, Ch. 29, Appendix A., Figure 1. The Sample MRPDO, with notations by the author in **bold red text**, is reproduced at Appendix C. If nothing else, the Sample MRPDO should be used as a checklist for evaluating the completeness of any commercial or state bar form used by the military family law practitioner to partition the military retired pay. *See id*. (Appendix C, infra). IT IS CRITICAL TO NOTE THAT THE SAMPLE MRPDO, AS PUBLISHED BY DOD, CONTAINS NO PROVISIONS WITH RESPECT TO SBP, VSP, OR CIVIL SERVICE ROLL-OVER THAT WOULD PROTECT A FS'S CONTINGENT PROPERTY INTEREST SHOULD THE SM SEPARATE PRIOR TO VESTING FOR RETIREMENT OR HER INCOME STREAM AFTER A RETIRED SM'S DEATH. *See id*. (emphasis added).

PART VI: CLOSING THOUGHTS.

The number of instances in which a family law practitioner has occasion to partition a defined benefit plan in divorce is becoming less frequent given the rise in defined contribution retirement

plans. Nevertheless, the substantial military population in Texas—active duty, Reserve, National Guard and retiree—suggests that the Texas family law practitioner would be well advised to remain proficient. The reader should have gleaned that a "one size fits all" approach to partition of military retired pay is not feasible.

The law affecting military retired pay can be likened to an amalgam of layers. The first layer is determined by whether the SM is active duty or RC. The second layer by whether the SM is already retired at time of divorce or still serving. The third layer by whether a disability rating(s) is known or yet to be determined. Yet another layer is determined by whether SBP is still available or was awarded to a prior FS. The list goes on.

Some "number crunching" by the practitioner that results from application of the various formulas discussed in this paper should prove inescapable but, generally, not determinative. Generally, the only numbers that count are those produced by the appropriate entity in charge—whether DFAS in the case of retired pay or SBP, the VA in terms of its disability rating and resulting compensation, or the respective military department in terms of any disability rating or CRSC award. Nevertheless, reasonably accurate calculations by the practitioner are necessary to inform the practitioner's negotiation and trial strategy and the client's decision-making. The exception is when the practitioner's calculation of the marital share of retired pay is presented to the court. Here, the calculation must prove accurate because it is intended to be determinative. Elsewhere, all calculations performed by the practitioner must be presented to the client, opposing counsel and the court as good faith estimates—no more, no less.

Finally, it may have dawned on the reader, rightfully, that many of the perspectives presented in this paper emphasize—if not advocate—how to ensure maximum protection of the FS's interests. That dynamic stems from the fact that, arguably, a FS has the most to lose during partition. The SM starts the negotiation or trial with everything and—barring exceptional circumstances—should end up with no less than half. The FS starts with nothing and every lost opportunity or misstep by her counsel leaves her at risk of falling short of attaining a just and right division. That said, the reader is urged to grasp the double-meaning within each section or illustration of this paper. After all, illuminating how best to advance a FS's interests should also suggest how best to defend the SM's interests. The author favors neither the FS nor the SM. Either, of course, could be the client—relying upon and paying for the practitioner's expert advice and zealous advocacy.

Appendix A

Assumptions:

1. Male O-5 retired at 43 years of age after 20 years of service.

2. Post-retirement life expectancy = 40.6 years.

Year	Monthly	Annual	Note
1	$3,855	$46,260	
2	$3,913	$46,954	1
3	$3,972	$47,658	1
4	$4,031	$48,373	1
5	$4,092	$49,099	1
6	$4,153	$49,835	1
7	$4,215	$50,583	1
8	$4,278	$51,341	1
9	$4,343	$52,112	1
10	$4,408	$52,893	1
11	$4,474	$53,687	1
12	$4,541	$54,492	1
13	$4,609	$55,309	1
14	$4,678	$56,139	1
15	$4,748	$56,981	1
16	$4,820	$57,836	1
17	$4,892	$58,703	1
18	$4,965	$59,584	1
19	$5,040	$60,478	1
20	$5,115	$61,385	1
21	$5,192	$62,306	1

Year	Monthly	Annual	Note
22	$5,270	$63,240	1
23	$5,349	$64,189	1
24	$5,429	$65,152	1
25	$5,511	$66,129	1
26	$5,593	$67,121	1
27	$5,677	$68,128	1
28	$5,762	$69,149	1
29	$5,849	$70,187	1
30	$5,937	$71,239	1
31	$6,026	$72,308	1
32	$6,116	$73,393	1
33	$6,208	$74,494	1
34	$6,301	$75,611	1
35	$6,395	$76,745	1
36	$6,491	$77,896	1
37	$6,589	$79,065	1
38	$6,688	$80,251	1
39	$6,788	$81,455	1
40	$6,890	$82,676	1
41	$6,993	$50,350	1, 2
Total		$2,560,783	

Note 1: Assumes 1.5% annual COLA.

Note 2: Decremented to 60% of annual amount to reflect actuarial death of SM prior to year's end.

Appendix B

Assumptions:

1. Male E-7 retired at 40 years of age after 20 years of service.

2. Post-retirement life expectancy = 38.9 years.

Year	Monthly	Annual	Note
1	$2,032	$24,384	
2	$2,062	$24,750	1
3	$2,093	$25,121	1
4	$2,125	$25,498	1
5	$2,157	$25,880	1
6	$2,189	$26,268	1
7	$2,222	$26,663	1
8	$2,255	$27,062	1
9	$2,289	$27,468	1
10	$2,323	$27,880	1
11	$2,358	$28,299	1
12	$2,394	$28,723	1
13	$2,429	$29,154	1
14	$2,466	$29,591	1
15	$2,503	$30,035	1
16	$2,540	$30,486	1
17	$2,579	$30,943	1
18	$2,617	$31,407	1
19	$2,657	$31,878	1
20	$2,696	$32,356	1

Year	Monthly	Annual	Note
21	$2,737	$32,842	1
22	$2,778	$33,334	1
23	$2,820	$33,834	1
24	$2,862	$34,342	1
25	$2,905	$34,857	1
26	$2,948	$35,380	1
27	$2,993	$35,911	1
28	$3,037	$36,449	1
29	$3,083	$36,996	1
30	$3,129	$37,551	1
31	$3,176	$38,114	1
32	$3,224	$38,686	1
33	$3,272	$39,266	1
34	$3,321	$39,855	1
35	$3,371	$40,453	1
36	$3,422	$41,060	1
37	$3,473	$41,676	1
38	$3,525	$42,301	1
39	$3,578	$38,642	1, 2
Total		$1,275,395	

Note 1: Assumes 1.5% annual COLA.

Note 2: Decremented to 90% of annual amount to reflect actuarial death of SM prior to year's end.

Appendix C

STATE OF _____ COURT OF _____

COUNTY OF _____ Case No. _____

_____

Petitioner

MILITARY RETIRED PAY DIVISION ORDER

_____

Respondent

This cause came before the undersigned judge upon the petitioner/respondent's claim for a distribution of the respondent/petitioner's military retired pay benefits. The court makes the following:

FINDINGS OF FACT:

1. The Petitioner's Social Security Number is _____ and current address is _____.

2. The Respondent's Social Security Number is _____ and current address is _____.

3. The Parties were married on _____. Their marital status was terminated on _____ pursuant to a(n) _____entered in _____ County, State of _____. This current order is entered incident to the aforementioned order.

4. The parties were married for a period of ten or more years during which time the Petitioner/Respondent performed at least ten years of service creditable for retirement eligibility purposes.

5. If the military member was on active duty at the time of this order, Respondent/Petitioner's rights under the Servicemembers' Civil Relief Act, 50 U.S.C App. 501-548 and 560-591, have been observed and honored.

6. This court has jurisdiction over the Respondent/Petitioner by reason of [choose those that apply] (A) his or her residence, other than because of military assignment, in the territorial jurisdiction of the court, during the [divorce, dissolution, annulment, or legal separation] proceeding, (B) his or her domicile in the territorial jurisdiction of the court during the [divorce, dissolution, annulment, or legal separation] proceeding, or (C) his or her consent to the jurisdiction of the court.

CONCLUSIONS OF LAW:

1. This court has jurisdiction over the subject matter of this action and the parties hereto.

2. Petitioner/Respondent is entitled to a portion of Respondent/Petitioner's United States military retired pay as set forth herein.

IT IS THEREFORE ORDERED THAT:

[Choose and complete one of the following. Please note that all awards expressed as a percentage of disposable retired pay, including hypothetical awards, will automatically include a proportionate share of the member's cost-of-living adjustments (COLAs) unless this order states otherwise. Also, hypothetical retired pay amounts will be adjusted for all retired pay COLAS from the hypothetical retirement date to the member's actual retirement date, unless this order states otherwise.]

Source: DODFMR 7000.14-R, Vol. 7B, Ch. 29, Appendix A, Figure 1.

Appendix C

[Retired member] **"The former spouse is awarded ___ percent [or dollar amount] of the member's disposable military retired pay." [Recall that dollar amounts receive no COLA unless a proportionate share is expressly awarded. This expression is consistent with *Taggart*.]**

[Active duty formula] **"The former spouse is awarded a percentage of the member's disposable military retired pay, to be computed by multiplying 50% times a fraction, the numerator of which is _____ months of marriage during the member's creditable military service, divided by the member's total number of months of creditable military service**." **[This expression is consistent with *Taggart*.]**

[Reservist formula] **"The former spouse is awarded a percentage of the member's disposable military retired pay, to be computed by multiplying 50% times a fraction, the numerator of which is _____ Reserve retirement points earned during the period of the marriage, divided by the member's total number of Reserve retirement points earned." [This expression is consistent with *Taggart-Bloomer*.]**

[Active duty hypothetical calculated as of time of division, for all members regardless of service entry date] **"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 of _____ and with _____ years of creditable service on _____." [This expression is consistent with *Berry* and *Grier*.]**

[Active duty hypothetical calculated as of time of division; may only be used for members entering service before 9/1/80] **"The former spouse is awarded _____% of the disposable military retired pay the member would have received had the member retired with the rank of _____ and with _____ years of creditable service on _____." [This expression is consistent with *Berry* and *Grier*.]**

[Active duty hypothetical calculated as of member's actual retirement date **"The former spouse is awarded _____% of the disposable military retired pay the member would have received had the member retired on his actual retirement date with the rank of _____ and with _____ years of creditable service." [This expression mixes elements of *Berry* and *Taggart* to produce a result that is erroneous under Texas law. It is, however, consistent with the view held by the majority of states.]**

[Reservist hypothetical calculated as of time of division, for all members regardless of service entry date] **"The former spouse is awarded _____% of the disposable military retired pay the member would have received had the member become eligible to receive military retired pay with a retired pay base of _____ and with _____ Reserve retirement points on _____." [This expression is consistent with *Berry-Bloomer*.]**

[Reservist hypothetical calculated as of time of division; may be used for members entering service before 9/1/80] **"The former spouse is awarded _____% of the disposable military retired pay the member would have received had the member become eligible to receive retired pay on _____, with the rank of _____, with _____ Reserve retirement points, and with _____ years of service for basic pay purposes." [This expression is consistent with *Berry-Bloomer* and *Grier*.]**

[Reservist hypothetical calculated as of the date the member becomes eligible to receive retired pay] **"The former spouse is awarded _____% of the disposable military retired pay the member would have received had the member become eligible to receive retired pay on the date he [or she] attained age 60, with the rank of _____ , with _____ Reserve retirement points, and with _____ years of service for basic pay purposes." [This expression mixes elements of *Berry* and *Taggart* to produce a result that is erroneous under Texas law. It is, however, consistent with the view held by the majority of states.]**

This _____ day of _____, 200__.

_____

JUDGE **Source: DODFMR 7000.14-R, Vol. 7B, Ch. 29, Appendix A, Figure 1**