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Former Spouse Benefits

Former Spouse Protection Act

The U.S. Supreme Court decision, *McCarty v. McCarty*, June 26, 1981, held that existing federal law precluded the award of military retirement benefits as marital property upon divorce. In the same decision, the Court “invited” congressional action. Congress responded with the Former Spouse Protection Act (FSPA), public law 97-252 (Title 10 U.S. Code, Sec. 1408 etc. seq.). Effective February 1, 1983, FSPA overtook the *McCarty* decision and returned to state courts the right to consider military retired pay as property upon divorce.

A division can range from nothing to a *maximum of 50%* of disposable retired pay at the discretion of the court. Disposable retired pay was generally defined as the retired or retainer pay minus:

- obligations of the member to the United States, including court-martial ordered fines
- properly withheld federal, state, or local income taxes
- amounts deducted to pay for a court ordered Survivor Benefit Plan for the former spouse
- amounts received as veteran’s or military disability pay

The FY 91 Defense Authorization Act (P.L. 101- 510) redefined disposable pay and no longer allows federal, state or local income taxes to be subtracted. This provision was effective for divorces and separations after February 4, 1991.

In states that formerly divided military retired pay, FSPA allowed modification of decrees to award retirement benefits only for those divorces which occurred between the *McCarty* decision and the enactment of FSPA, the so called “window period.” State courts have supremacy in family law cases. Some states ignored this provision of FSPA and opened divorces granted prior to June 26, 1981. P.L. 101-510 specifically disallows this practice and allowed payments made as a result of such action to cease in November 1993.

Retired pay awarded as property is not affected by remarriage.

FSPA allows direct payment of retired pay from the service finance center of the member, upon presentation of a valid court order, for alimony, child support, or property division.

The following apply:

1. Direct payment of retired pay as property is authorized only if the marriage lasted at least 10 years during 10 years of the member’s creditable service.
2. Direct payments cannot exceed 50% of disposable retired pay divided as property; an additional 15% can be paid on a garnishment order (such as child support).
3. A valid court order must certify that the servicemember’s rights were observed under the Soldiers’ and Sailors’ Civil Relief Act of 1940.

Survivor Benefit Plan

The original Former Spouse Protection Act allowed the servicemember to designate a former spouse as the beneficiary of the Survivor Benefit Plan (SBP). However, the member could change the designation to a new spouse upon remarriage. Public Law 99-661, effective November 14, 1986, gave state courts the *option* to order the servicemember to participate in the Survivor Benefit Plan with the former spouse designated as the beneficiary. When the former spouse is designated as the SBP beneficiary and the agreement is incorporated in or ratified by a court order, the servicemember may NOT change beneficiaries without written concurrence from the former spouse.

To assure coverage under SBP, the former spouse should submit a written request and a court-certified copy of the court order to the Defense Finance Accounting Service (DFAS). Public Law 104-201, effective September 28, 1996, allows court orders to be faxed or sent by e-mail. (*NMFA recommends such a transmission be followed up with "return receipt requested" mail.*) The request and copy of the court order must be filed with DFAS within one year of the date of the court order.

Military Benefits

Medical

- An unremarried former spouse, who had been married to a servicemember for 20 years during which the member served 20 years creditable toward retirement (a 20/20/20 former spouse), remains eligible for care in the military health system, including TRICARE (formerly CHAMPUS). The former spouse may enroll in TRICARE Prime, where available, at the same rate as a retiree, with the accompanying enrollment fee and co-pays. If the former spouse uses TRICARE Standard, the former spouse is responsible for the co-pays and any amount over the TRICARE allowable charges.
- Unremarried former spouses, married for 20 years, 15 of which were concurrent with 20 years of the servicemember's service creditable toward retirement (a 20/20/15 former spouse) and whose divorce occurred before April 1, 1985, were granted space available care in military treatment facilities and TRICARE eligibility effective January 1, 1985 by Public Law 98-525.
- An unremarried 20/20/15 former spouse whose divorce occurred after 1 April 1985 is entitled to space available care and TRICARE for one year from the date of divorce. These former spouses, as well other former spouses who do not qualify for any kind of military medical care, have the right to enroll in the Department of Defense (DoD) Continued Health Care Benefit Program (CHCBP.) Coverage under this plan is almost identical to that of TRICARE Standard and covers preexisting conditions, including pregnancy. The plan must be purchased quarterly and former spouses may retain the plan for 36 months after the loss of eligibility for military medical care. The quarterly cost of the plan is \$993 for singles and \$1,996 for families (effective May 1, 1997.)
- Effective October 1, 2003, DEERS will reflect TRICARE eligibility for unremarried former spouses using the former spouse's own Social Security number and not the former sponsor's. Health care information will be filed under the former spouse's own SSN and name. ID cards will also reflect this change.
- Former spouses who have employer sponsored medical insurance are not eligible for military medical care or TRICARE. If the employer sponsored medical insurance is optional, former spouses may decline that insurance and remain under TRICARE. If the former spouse disenrolls from the employer sponsored health plan, military medical benefits can be restored effective the date of disenrollment.

Medical benefits cease upon remarriage and can never be reinstated.

Commissary and Exchange Privileges

- A 20/20/20 former spouse is entitled to full commissary and exchange privileges.
- The entitlement to these privileges ceases upon remarriage but can be reinstated if the remarriage ends because of death or divorce.

Additional Information

A Guide for Military Wives Facing Separation or Divorce may be obtained from EX-POSE (Ex-Partners of Servicemen/ women for Equality), P.O. Box 11191, Alexandria, VA 22312; (703) 941-5844; Fax: (703) 212- 6951; E-mail: ex-pose@juno.com; Web site: www.angelfire.com/va/EXPOSE. The cost of the guide is \$5.00 for EX-POSE members and \$10.00 for non-members.

Divorce and the Military II may be obtained from the American Retirees Association (ARA), P.O. Box 2333, Redlands, CA 92373 or (703) 527-3065. ARA's Web Site: www.americanretirees.com. The cost of the book is \$19.95, plus shipping and handling of \$4.55.

Active duty servicemembers are reminded that they may seek information on the Former Spouse Protection Act from their installation's legal assistance office.

For military health care and TRICARE information, go to www.TRICARE.osd.mil.

There are still legislative proposals pending that could change provisions in FSPA. The report of the DoD study on the issue is available at www.defenselink.mil/prhome/spouserev.html.