

## BENCH CARD FOR JUDGES – MILITARY PENSION DIVISION

by Mark E. Sullivan, COL, USA (Ret.), and Kris J. Hilscher, Attorneys at Law, Raleigh, NC

✓	<b>Issue</b>	<b>Comments</b>
	Know the primary resources - law and rules	Uniformed Services Former Spouses' Protection Act, 10 U.S.C. 1408; Dept. of Defense Financial Management Regulation (DoDFMR), Vol. 7b, Ch. 29, "Former Spouse Payments from Retired Pay." For info on retirement systems, go to <a href="https://militarypay.defense.gov/pay/retirement">https://militarypay.defense.gov/pay/retirement</a> ("High-3" System and Blended Retirement System)
	Know the secondary resources	Website of N.C. State Bar's military committee: <a href="#">Silent Partner</a> infoletters on military divorce issues, and <a href="#">Just for Judges</a> infoletters on the Frozen Benefit Rule and on indemnification for the VA waiver [see FN 1 below]
	Check for pension division jurisdiction – must be ONE of these:	Required by 10 U.S.C. 1408(c)(4) <sup>1</sup>
	1. Domicile of servicemember [SM] or retiree in the state, OR	Check on state income taxes, home ownership, voting, vehicle title, tags, driver's license, in-state tuition
	2. Consent to court's jurisdiction	General appearance – the filing of motions or pleadings which recognize the court's authority
	3. Residence in the state, but not due to military assignment	Example: SM assigned to Ft. Belvoir, VA but resides nearby in District of Columbia; DC has pension division jurisdiction.
	Receive evidence of period of creditable service for SM or retiree	This is on LES [Leave and Earnings Statement], DD 214 [discharge stmt.], retirement orders, or "retirement points statement" [for Guard/Reserve personnel] <sup>2</sup>
	Check for "10/10" direct-pay requirements	If payment to be made by retired pay center <sup>3</sup> directly to former spouse [FS], then marriage and military service must overlap by at least 10 years. If 10/10 Rule is not met, then there is no garnishment of pension as property, but court may make pension share payable as spousal support (not to end at remarriage, cohabitation, or chg. of circumstances).

<sup>1</sup> For details, see the [Silent Partner](#) infoletter, *Military Pension Division: Scouting the Terrain*, found at the website of the N.C. State Bar's military committee: [www.nclamp.gov](http://www.nclamp.gov) > Publications,.

<sup>2</sup> For information on documents involved in a military divorce case, see the [Silent Partner](#), *Docs for Division*.

<sup>3</sup> For division of retired pay involving the Army, Navy, Air Force, Marine Corps or Space Force, retired pay center is Defense Finance and Accounting Service, or DFAS. Retired pay division for members of the Coast Guard and for commissioned officers in the Public Health Service and the National Oceanic and Atmospheric Administration is handled by the Coast Guard Pay & Personnel Center.

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	Understand “Frozen Benefit Rule” <sup>4</sup>	If divorce is after 12/23/16 and SM is not receiving retired pay at divorce, court may only divide SM’s hypothetical retired pay as if retirement occurred on the divorce date. Two data points are required for the order dividing the pension (see A. and B. below).
	A. Receive evidence as to the SM’s “retired pay base” at divorce date	This is the “High-3 pay” of the SM, i.e., the average of the highest three years of basic pay before divorce
	B. Receive evidence as to the SM’s “retired pay multiplier” at divorce	For those who will attain a retirement from active duty, this is years of creditable service up to divorce date; for those who will attain a Guard/Reserve retirement, this is total number of retirement points of the SM at divorce.
	Calculate marital/coverture fraction [portion of pension acquired during marriage] – <u>active-duty case</u> <sup>5</sup>	This is usually the number of months of marital pension service divided by total pension service [which will be “X” – unknown – for those not yet retired]. Retired pay center will accept an order containing total military service as an unknown and will make calculations at time of retirement.
	Calculate marital fraction [portion of pension acquired during marriage] – <u>Guard/Reserve case</u>	Count number of retirement points during marriage and divide by total retirement points. If SM is still drilling, the latter will be X, but ret’d pay center will fill it in at start of retired pay.
	Be aware of “denominator dilemma”	In Frozen Benefit Rule cases, what is the logic behind extending the denominator in marital fraction (total military service) when the benefit to be divided is fixed at the date of divorce? <sup>6</sup> Why not fix the denominator <i>at divorce</i> if the pension amount is fixed as of then?
	Use one of four acceptable clauses	See <u>Silent Partner</u> , <i>Military Pension Division: Guidance for Lawyers</i>
	Decide when payments to FS begin	Retired pay center will not pay FS until about 90 days after receipt of acceptable order or start of retired pay, whichever is later; require retiree to pay FS directly until DFAS begins payment.

<sup>4</sup> See Just for Judges infoletter, “Military Pension Division: The New Frozen Benefit Rule,” at [www.nclamp.gov](http://www.nclamp.gov) > Additional Resources, and also five Silent Partner infoletters on the Frozen Benefit Rule at [www.nclamp.gov](http://www.nclamp.gov) > Publications.

<sup>5</sup> The “Time Rule” in most states means that pension division is based on actual pay at retirement, not benefit earned at date of separation or divorce. But there are several states that, under state law, require division of date-of-divorce pension amt. (even before the Frozen Benefit Rule), including Texas, Florida, Oklahoma, Tennessee, and Kentucky.

<sup>6</sup> Both Maryland and Virginia recognized the inequitable result of an ever-expanding denominator when the pension amount to be divided is frozen at the divorce date: *Fulgium v Fulgium*, 203 A.3d 33 (Md. Ct. Sp. App. 2019) and *Starr v. Starr*, 828 S.E.2d 257 (Va. Ct. App. 2019). The double dilution of the former spouse’s share of the military pension was recognized in *Douglas v. Douglas*, 2014 Tex. App. LEXIS 12398, which held that the denominator in a “hypothetical clause” is the months of creditable service during marriage *up to the date of divorce*, rather than the date of retirement. The Texas Court of Appeals stated that accepting the husband’s proposition – that the denominator should be total years of service – would impermissibly dilute the ex-wife’s share acquired during the parties’ marriage.

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	Understand the “VA waiver”	Election of VA disability compensation may reduce amount of pension dollar-for-dollar (“VA waiver”). Example: If pension amount is \$3,000 and retiree gets 40% VA rating, which is about \$700 in disability compensation, then FS doesn’t get share of \$3,000 - - she/he receives share of \$2,300 (\$3000 - \$700).
	Understand the <i>Howell</i> case <sup>7</sup>	Restriction on court’s ability to order indemnification for FS if SM’s pension is reduced due to VA waiver. Possible exceptions, depending on state law: <i>Howell</i> may not apply if parties agree on express indemnification clause, or if there is unappealed court order for indemnification ( <i>res judicata</i> ), including divorce decree incorporating military pension settlement.
	Decide on reserving jurisdiction in case of reduction of retired pay due to disability	To deal with future VA waiver, reserve jurisdiction, and/or award \$1/year alimony in case pension share not paid in full due to VA waiver or receipt of military disability retired pay. <i>Howell</i> case notes that “a family court... remains free to take account of the contingency that some military retirement pay might be waived, or... take account of reductions in value when it calculates or recalculates the need for spousal support.”
	Use model military pension division order to minimize mistakes	Figures 29-1 and 29-2 at end of Ch. 29, Vol. 7b, DoDFMR
	Consider appointment of expert to draft the pension order	For example - - retired military attorney, Reserve or National Guard JAG officer

<sup>7</sup> *Howell v. Howell*, 137 S.Ct. 1400 (2017); see also “Military Pension Division: A Review of Cases Following *Howell v. Howell*” by Kristopher J. Hilscher, 36 J. AM. ACAD. MATRIMONIAL L. 89 (2023) and the Just for Judges infoletter, *The Death of Indemnification?*