An Attorney Guide for

Dividing Military Reserve and Active Duty Retirement

According to Federal Guidance

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I. INTRODUCTION

I(A) Military retirements are a significant benefit, earned by both women and men. As of March 2011, there were more than twice as many military women divorcing than men.[1] Among enlisted, the military women divorce rate is about 3x that of men. The overall

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[1] http://www.militarytimes.com/news/2011/03/ap-female-gis-struggle-with-higher-divorce-rate-030811/

military divorce rate in 2011 is 64% higher than it was in 2001[2]. Military divorce is a significant social issue affecting both sexes. This benefit in 2012 dollars often ranges from $945,000 to $2.8 million.[3] According to the Uniformed Services Former Spouse Protection Act (USFSPA), a Reserve military retirement may be divided as a marital asset at the time of divorce. However, Federal law prevents disbursement of the retirement payments until later in life. Dividing value of the asset gets complicated when a military member does more military duty or gets promoted after divorce but before payments start. In this case, the overall retirement asset grows, but the marital asset does not. Quantitatively describing the marital portion is the key to all division methods.

I(B) This document discusses Reserve military retirements directly and the concepts are also suitable for an Active Duty retirement. Reserve retirements use the concepts of "duty points". Active Duty retirements can be done by simply counting a day of duty as a point – 365 or 366 per year.

I(C) This document provides an in-depth analysis of underlying issues. It links this analysis to specific legal language and formulas suitable for a division order. It gives mathematical examples. It strives to eliminate confusion of both attorneys and courts as they grapple with this issue, yielding more equity and consistency, resulting in higher respect for our Nation's courts and less wasted court time. This document and the original work displayed within it are copyrighted. My intent is to liberally license this work for use by others and would value communication from attorneys, litigants, courts, or government offices.

I(D) This document exhibits that the value of a military retirement marriage asset results when two things are multiplied together: 1) which monthly retirement payments are divisible, and 2) how the division is done each month.   For example, $1000 each month times 36 months is a $36,000 asset. Changing either the amount or the months changes the

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[2] http://www.militarytimes.com/news/2011/12/airforce-divorce-rate-highest-in-military-123111/
[3] 20 yr E-7, or 30 yr O-8, living until age 75.

asset. Also, the value of each monthly payment is a product of two things: 1) point value, and 2) the number of retirement points.

II. WHICH PAYMENTS ARE DIVIDED

II(A) Military members used to get one defined payment retirement plan. If you received an Active Duty retirement, payment started immediately upon reaching retirement status. If you received a Reserve Military retirement, payment starts upon military member age 60, no matter when you reached retirement status. This is the situation under which UFSPA laws were written. The situation has since changed since then. Military members can also do 401(k)-ish retirements called TSPs. Since these are defined contribution plans, they are easy to divide at the time of divorce and not deal with later, and are not dealt with in this document.

II(B) In addition to TSPs, as of early 2008, a new Reserve military retirement defined payment retirement plan came into existence. The two defined benefit plans are often incorrectly conceptually blurred together even though they are not comingled. Often, one can be a marital asset while the other is not, or they are equitably divided differently. A division order that addresses only one of the two retirements is faulty and probably inequitable. 10 USC 12731(a) defines one retirement asset, computed under 10 USC 12739. 10 USC 12731(f)[4] defines he other retirement asset. The 12831(f) asset did not exist, nor could it be earned, prior to 18 January 2008. The 12731(a) retirement is earned by military days worked throughout a military member's career. The 12731(f) retirement is earned only on military days worked after 28 January 2008. If a military career or a marriage spanned 28 January 2008, a military retirement division order must treat the two retirements differently in order to equitably divide the asset.

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[4] http://www.law.cornell.edu/uscode/10/usc_sec_10_00012731----000-.html

II(C) Regardless of when a military Reserve member enters retired status, 12731(a) authorizes no retirement payments before military member age 60. However, as of January 2008, 10 USC 12731(f) authorized a new retirement comprised of payments only before age 60 – a new, separate, and distinct asset to be divided. The two retirements are separate, contiguous, do not overlap, and quantifiably separable. An Air Force news release[5] explains the new law.

II(D) It's important to note 10 USC 12731(f)(2)(A) clearly and quantifiably defines the receipt of retirement pay before age 60 as dependent only on military duty done January 28th, 2008 and after. Because of the hard date in the sand, there is no commingling of prior dates. If a marriage ends before January 28th, the ex-spouse in no way contributes to the retirement points accumulated after January 28th, which are the only dates which authorize a 12371(f) retirement. Early retirement payments before age 60 created only by duty <u>after</u> 28 Jan 2008 cannot be marital property of a marriage that ended <u>prior</u> to 28 Jan 2008.

II(E) One may argue in some Talmudic way that the military member "re-uses" marital points to *calculate* the before-age-60 benefit, and therefore the ex-spouse should get "a cut" of the benefit. However, there are problems with that line of thought:

II(E)(1) The enhanced value of the new retirement is created by earning more pay dates, not enhancing how much is paid on each pay date. Prior case law precedence is about determining how much is paid on each date, and does not apply. This is an issue of first impression. The new dates are an enhanced value that is separate, distinct, and quantifiably separate retirement benefit as mandated in Federal statute. The ex-spouse contributed nothing toward the extra days, which create additional pay <u>dates</u>, not additional pay <u>amount</u>.

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[5] http://www.afrc.af.mil/news/story.asp?id=123136886

II(E)(2) Once the new retirement benefit is earned or authorized, exactly how it is *calculated* is a Federal law entitlement matter between the military member and the Federal government, in so much as it does not affect the proper marriage asset retirement in any way. If additional value or dual-use value of each point is added to each duty point solely by the work of one person, then the added benefit associated with the added value belongs to only that person who added the value. By this test, the second retirement belongs only to the military member because only the military member participated in creating the dual-use, or increasing the point value.

II(E)(3) The enhanced benefit is *earned and authorized* by only work of the military member, so the second retirement belongs only to the military member regardless of how it's calculated. The size of the retirement check and how the size is calculated does not matter. If the US government chose to pay a huge bonus for duty done after 28 January 2008, that would be of no concern to an ex-spouse if the marriage ended prior to 28 January 2008.

Large post-marriage bonuses are not hypothetical. A real example is the $80,000+ pilot bonus which has been offered to military aviators at various times. This bonus is based on prior duty and skills learned as a military pilot (perhaps during marriage) but the contract occurs at a specific later point in time. If the contract time happens after a marriage, the pilot bonus is not a marital asset and there is no division no matter if it is based on prior skills. The pilot bonus is used as a retention tool for Air Force personnel management. In a similar way, Reserve Air Force uses 10 USC 12731(f)(2)(A) retirement as a retention tool. The contract for creating the additional retirement occurs at a specific point in time, and if the marriage does not include that time, the second retirement asset is not a marital asset.

II(E)(4) If 10 USC 12371(f) authorized retirement payments before military member age 60 are not marital assets, a divorce court has no authority or jurisdiction to

divide them. By way of analogy, an employee may learn to weld during a marriage, but getting a welding job after the marriage in no way makes earnings on the later job a marital asset. The phrase "based on" is inappropriately vague for use in legal documents. The faulty logic of "based on" arguments is also discussed in a sister document "Memorandum for Record: Division of Military Retirement Promotion Enhancements Earned After Divorce."

II(E)(5) The additional value of points (payments before age 60) earned by the military member after the marriage in no way decreases the value of each duty point to the ex-spouse. 5 USC 8332(c)(4)[6] is an example of how the ex-spouse interests are protected by Federal Law: only if the point value is decreased, then the ex-spouse may invade the additional or dual-use value to the extent required to make their original point value whole. This specific statute deals with the case when post-marriage enhancement to each retirement point is cash-purchased by an ex-Reserve Federal civilian employee, instead of enhancing the point value by doing more military work after the marriage. However, the idea that enhanced point value belongs entirely to the military member except in the case where it decreases ex-spouse payments, is well established.

II(E)(6) The extra before-60 retirement asset requires no prior rank, no prior seniority, no prior duty. It unfortunately goes under the same name of "military retirement", even though it is quantifiable separable and independent. Simply because 12371(a) and 12371(f) are both called by the same colloquial name "Reserve Military Retirements", courts may become confused. By not separately allocating the separate and distinct retirement assets, a court can error as badly as if they lumped all "IRAs" or all "401(k)s" or all "pensions" together just because they have the same name, no matter if they were earned during the marriage or years after a marriage. Lumping together like this creates an incorrect division of marital

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[6] http://www.law.cornell.edu/uscode/5/usc_sec_05_00008332----000-.html

assets.

II(E)(7) Lastly, by analogy, consider where faulty logic would take the court. Consider the military pilot, with a divorce decree stating division of "military retirement accrued during the marriage." Then, years after the divorce, she gets a job with Delta Airlines as a commercial pilot. Getting this job is quantitatively based on flight experience hours attained during the marriage. What job and pay level is obtained is calculated from experience attained during the marriage. An ex-spouse would not be expected to receive a portion of the commercial pilot retirement as an asset under USFSPA.

II(F) Ideologically, this is a question of whether an ex-spouse should have a portion of good things that happens to a military member after the marriage, or whether a best-effort attempt is to be made to divide a military retirement asset *earned during the marriage* within the Federal requirement that it *cannot be disbursed until later* in life. To attempt to give the ex-spouse a portion of every good thing after the divorce dishonors the concept of divorce. Under these conditions, should courts also try to divide a portion of the bad after marriage that are unique to military work – military deployments, absence from family, inability to spend time with children? Both sides bear the burden of delayed payment, and both are compensated in the form of time-value of money through the intervening years that raises the dollar amount of payments.

III. FORMULA TO SIZE DUAL COVERTURE PAYMENTS

III(A) The traditional coverture fraction is used with many retirement plans to prorate how the division is done each month. A coverture fraction is calculated as a ratio of marital asset divided by total asset. This is quantifiably trivial to do for Reservists because all of the duty points during a career are associated with a specific date. One simply counts the points

during the marriage and at retirement. For an Active Duty retirement, each day counts as a point. The **Coverture Fraction** is calculated thus:

$$C = \frac{D_D}{D_R}$$

III(B) The mathematical symbols are explained in Section XVI of this document. In this case, D stands for "Duty points" at the time of divorce or retirement according to the subscript (D or R). For example, if a Reservist had 3580 points during the marriage and 4700 points at the end of career, the coverture fraction would be 3580/4700 or 0.7617.

III(C) Some lawyers for military ex-spouses recoil when they realize the denominator can get bigger and bigger if the military member does more duty after divorce, apparently diluting their client's share of the retirement. They are concerned that the military member can keep working more and more, giving their client less and less. This reflects misunderstanding because the shrinking fraction does NOT decrease the marital asset to be divided, and does not decrease the dollar amount to the ex-spouse. Instead it exactly offsets the fact that the military member continues to do more work that is not to be shared. The ex-spouse's percentage portion of the *marital asset* remains the same, plus they get present-value to future-value bump ups. See the examples in Section XII of this document or read the DFAS Attorney Instructions document.

III(D) Unlike many civilian pensions, which depend only on time of service, a Reservists' retirement is dependent on base pay. One must look up base pay in a pay chart table. Because a military retirement is dependent on both <u>amount of duty</u> and <u>rank</u> to give the base pay number, two coverture fractions need to be used, hence it is appropriate to refer to the Dual Coverture method for military retirements. Reference 10 USC 12739 for an overview of Reserve military pay and 10 USC 1407 for specific reference to base pay.

III(E) The Dual Coverture method is given credibility in a January 2011 New Jersey

Appellate court decision. However, the judges made a factual mistake by claiming the method does not correct for present-value and future-value. They incorrectly claimed the ex-spouse would be denied passive enhancement from present-value to future-value (inflation or Cost of Living Adjustments) between dissolution of the marriage and final retirement. In fact, both the Dual Coverture and DFAS Hypothetical methods give time-value of money to the ex-spouse. See the explicit rebuttal of the judge's claim in the DFAS Attorney to Instructions document, pg 10, Step IV(2)(b).

III(F) A very thorough position paper on division of military promotion enhancements is available from the increa.com website[7]. The downloadable rebuttal document to Mark Sullivan's view that all promotions enhancements should be divisible as marital assets is a *must-read*. In this document, only summary points will be given:

> III(F)(1) Deeply buried in court precedence is the concept that chronological sequence of dates determination of what is "during a marriage". Sans compelling reasons why not, dates should be used.
>
> III(F)(2) Promotions are special, unique, and competitive. Only a small portion of individuals accomplish this due to specific, difficult, pro-active effort. The military "up or out" policy ensures most are not promoted.
>
> III(F)(3) The military retirement system is mathematically precise and explicit. It is easy to quantify and separate events of a person's career and their impact on retirement pay.
>
> III(F)(4) Promotion, contrasted with retirement enhancement from that promotion, are not the same. Promotion is *required* for retirement promotion enhancement, but is not *sufficient* to cause it. Making promotion manifest into increased retirement pay requires a continuum of 3 years of duty *after* gaining the increased rank. If a divorce occurred before or near a promotion, an ex-spouse contributes nothing during the 3 required years that actually earn the retirement pay change.

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[7] http://www.increa.com/articles/division-promotion-enhancement

III(F)(5) Often times prior application and denial of promotion is prima facia evidence that what a prior spouse contributed was not sufficient for promotion.

III(G) Mathematically, when there is no military duty before the marriage, the **Dual Coverture** fraction is calculated thus:

$$C = \left(\frac{P_{RL}}{P_{RH}}\right) \times \left(\frac{D_D}{D_R}\right)$$

III(H) The mathematical symbols are explained at the end of this document. The two D values are a ratio of Reserve retirement points (<u>amount of duty</u>). The two P numbers create a ratio of <u>pay</u> of the lower and higher rank. In order to get the rank ratio, you could use pay charts dated at retirement (P_{RL} and P_{RH}), or the pay charts dated at divorce (P_{DL} and P_{DH}); the ratio will be about the same. An example might be 3280 points and Captain pay at dissolution, and 4900 points and Major pay at retirement, giving C = (3280/4900) * ($5670/$6065) or 0.6258.

III(I) It's important to note if military duty was done before the marriage, then the Dual Coverture Value method must be used, and this is beyond the capability of the DFAS methods. See the spreadsheet downloadable from the increa.com web page[8]. This correction accounts for the fact that all duty and promotion before the marriage are pre-existing assets like a car or motorcycle brought into the marriage, and they are not divisible.

III(J) The Federal government has spoken their interest in these matters in order to standardize the way individual states handle Federal retirement benefits. In 2001, the Department of Defense was required by the US Legislature to investigate equity in allocating military retirements after a divorce. They considered input from several dozen

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[8] http://www.increa.com/articles/division-military-coverture-value

national organizations, representing all view points. The final Report to the Senate and

House Committee on Armed Service Committees[9], describes equitable division methods:

> " [When] courts treat post-divorce promotions and longevity pay increases earned by the member as marital assets, this treatment of military retired pay is inconsistent with the treatment of other marital assets in divorce proceedings—only those assets that exist at the time of divorce or separation are subject to division. Assets that are earned after a divorce are the sole property of the party who earned them. [It is proper to] base all awards of military retired pay on the member's <u>rank and time served at the time of divorce</u>. This provision should be exclusively prospective. The pay increases attributable to promotions and additional time served should be the member's separate property." (page 4, underline added)

> "Assets that accrue subsequently are the sole property of the party who earned them. Post-divorce promotions and longevity pay increases are to military retired pay (which is a defined benefit plan) what post-divorce accruals and contributions are to private, defined benefit and defined contribution plans." (page 71).

> "Congress should amend the USFSPA [laws] to provide that all awards of military retired pay be based on the member's rank and years of service at the time of divorce. This provision should be exclusively prospective. For example, if a future divorce occurs when the member is an O-4 (i.e., Major/Lieutenant Commander) with 14 years of creditable service, the award of military retired pay must be based on that rank and time served. That the member retires as an O-6 (i.e, Colonel/Captain) with 24 years of service is irrelevant to the award of military retired pay as property. (page 71)

> "The pay increase attributable to the promotions and additional time served should be viewed as the member's separate property. [emphasis mine] However, as a matter of equity, the former spouse should benefit from increases in the pay table applicable to the O-4 grade. Thus, as the pay for an O-4 with 14 years of service is increased due to increases in the pay table, so too is the value of the allocation to the former spouse. The objective in this regard should be to provide the former spouse, on a present value basis, with approximately the same amount of retired pay that he or she would have actually received had payments begun on divorce. DFAS should include a formula in its recommendations that could be used by parties who divorce

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[9] http://blog.increa.com/wp-content/uploads/2011/02/USFSPA-DOD-report-to-congress.pdf

while the member is still on active duty. (page 72)

III(K) Answering the reports recommendations, DFAS published the **Hypothetical Method**[10] The Hypothetical Method is designed for military members who do more duty after the marriage and/or are promoted after the marriage. With the weight of the Federal government defining what equitable means in this case, it would be unwise for a state court to set precedence against the intent of Federal guidance, and it would be unwise for an attorney to argue against a method that has been vetted through the highest legislative authorities in the United States. The only way I've seen this done successfully is to confuse the court into submission.

IV. EXAMPLE LANGUAGE FOR DIVISION ORDER

IV(A) For those members who have earned *or may in the future earn* a 12371(f) retirement enhancement by earning points after 28 January 2008, a decision must be made as to whether the 12371(f) payments before age 60 are a divisible asset or not. **Caution**: If the division order is silent on this issue, DFAS will assume to divide both retirements the same. The proper division would depend on the period of marriage, divided into 3 possibilities:

IV(A)(1)   If the marriage was entirely before 1/28/08, then the before age 60 payments were earned only after the marriage, so the payments before age 60 would be retained 100% by the military member, so the order must state that payment division will begin only upon the military member reaching age 60.

IV(A)(2)   If the marriage was entirely after 1/28/08, then the before age-60 monthly payments are divided same as after age-60 monthly payments. Correct

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[10] DFAS "Guidance on Dividing Military Retired Pay", 4/2/2012, pg 8. Downloadable from http://www.increa.com/articles/division-military-retirement-dual-coverture.

division will occur by not mentioning this issue at all in the order, or by directing DFAS to divide all payments the same.

IV(A)(3)   If the marriage spans 1/28/08, before age-60 monthly payments need to be prorated differently than age-60 and after payments. The coverture fractions for the two retirements will be different, so two formula paragraphs must be written for DFAS to use. Read the later parts of this document to understand the text about dual coverture ratios due to merit based rank promotions after a marriage. If there was no duty before marriage, here are the formula paragraphs (to be used together) telling DFAS how to calculate the percentage based award:

> "For division of retirement pay paid at and after member age 60, the former spouse is awarded a percentage of the member's disposable military retired pay, to be computed by multiplying 50% times two fractions, the first numerator of which is *[put here the total number of points earned during the marriage]*, and the first denominator of which is the total number of points during the member's creditable service, and the second numerator is the base pay of a *[put here the military pay chart service time and rank at the time of divorce, such as "17 year Major" or "18 year O-5"]* taken from a 2012 military pay table, and the second denominator is the base pay of the member upon retirement, taken from the same military pay table.
>
> For division of retirement pay paid before member age 60, the former spouse is awarded a percentage of the member's disposable military retirement pay, to be computed by multiplying 50% times a fraction, the numerator of which is *[put here the number of points earned during the marriage after 1/28/08]*, and the denominator of which is the total number of points during the member's creditable service after 1/28/08, and the second numerator is the base pay of a *[put here the military pay chart service time and rank at the time of divorce, such as "17 year Major" or "18 year O-5"]* taken from a 2012 military pay table, and the second denominator is the base pay of the member upon retirement, taken from the same military pay table."

IV(B) These two formula paragraph examples reflect the Dual Coverture method considered and sanctioned by the New Jersey Appellate Court in January 2011 (no military duty before marriage). If you stipulate that the military pay raises through the years are the same as COLA, the resulting non-military spouse benefit is the same as provided by the DFAS-

published Hypothetical Method. This method matches what is advocated by the Armed Services Committee Report to Congress and DFAS.

IV(C) Note the New Jersey Court made a significant factual error considering the Dual Coverture method, spending 2 pages of their opinion incorrectly discussing that the above methods deprive time-value of money to the non-military member. With the two formula paragraphs above, there is no requirement to mention COLA for either person in order to get COLA for both. The two above paragraphs create **fractions or percentage** (such as 0.6583 or 65.83%), and because these fractions will be applied to the disposable retirement pay for any month of retirement, COLA automatically happens for both people because the retirement pay goes up each year. DFAS agees, when they write on page 8 of the their Attorney Guide:

> "Since a Hypothetical [or Dual Coverture] award also works out to a percentage of disposable retired pay, it too would be a type of **percentage** award, and as such would automatically include a proportionate share of the member's COLA."

v. HYPOTHETICAL METHOD IS THE SAME AS DUAL COVERTURE

V(A) This section demonstrates that the DFAS Hypothetical method yields the same result as the Dual Coverture methods, including the fact that both do present-value (time of divorce) to future-value (time of payments) conversion. "DFAS Step" numbers refer to the steps explained in the document "Guidance on Dividing Military Retired Pay", released by DFAS on 4/2/2012. The specific example numbers used in each of the formulas also come from the DFAS document, except footnoted places where DFAS looked up numbers wrong. Be sure to use your actual numbers!

V(B) DFAS Step 2(a) page 10 calculates the hypothetical retirement pay. Notice that 6480/360 is equal to 18 years.

$$P_H = 0.025 \times P_{DL} \times \frac{D_D}{360}$$

$977.67[11] = 0.025 * \$2172.60[12] x 6480 / 360

V(C) The mathematical symbols are explained in Section XVI of this document. This formula calculates military Reserve retirement pay. You can use it for Active Duty retirement pay if you count each day as a point. It is mandated by Congress and cannot be changed by any divorce order or court action.

V(D) For those joining the military more recently, the retirement pay is not based on a single month's pay rate, but rather an average of the military member's last 36 months' pay. This difference doesn't matter as we develop the formula for the Dual Coverture method calculations because all the calculations are used only to get a valid coverture *fraction*. After the coverture fraction is determined using ratios, it will be used to multiply by the REAL 36-month average retirement pay, so both parties will be treated equally regardless of "High-3" or "Redux" retirements. Unlike a Dual Coverture method, with the Hypothetical Method, DFAS requires a hypothetical 36-month average be manually calculated for the date of divorce, and submitted with the division order. This is a burden of the Hypothetical Method and makes the Dual Coverture method more attractive.

V(E) DFAS Step 2(b) page 10 increases the hypothetical retirement pay with COLA adjustments for all years between dissolution and retirement. Claiming that this step doesn't happen was the mistake of the New Jersey Appellate Court in January 2011[13]:

$$P_{HC} = (\prod_{Y=1}^{N} A_Y) \times P_H$$

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[11] This is not $918.00 DFAS made a mistake
[12] This is not $2040.00. DFAS made a mistake looking up the number on the pay chart.
[13] Barr v. Barr

$$\$1064.15^{[14]} = (1.025^{[15]} \times 1.035 \times 1.026) * \$977.67$$

$$\$1064.15 = 1.0885 * \$977.67$$

V(F) The capital Pi symbol and the A_Y symbol indicate to multiply all the annual COLA increases together to do a present-value to future-value correction. In the DFAS example in step 2(b), 1.025 x 1.035 x 1.026 gives a Pi value of 1.0885. As footnoted, DFAS used one incorrect number compared to the real numbers published by the Social Security Administration[16].

V(G) DFAS Step 2(c)(1) calculates the actual retirement pay using the Congressionally mandated retirement pay formula. Notice that 8280/360 is 23 years.

$$P_H = 0.025 \times P_{RH} \times \frac{D_D}{360}$$

$$\$1840.23 = 0.025 * \$3200.40 * 8280 / 360$$

V(H) DFAS Step 2(c)(2) calculates the coverture fraction, required in the court order, by taking a ratio:

$$C = \frac{P_{HC}}{P_R}$$

$$0.5783 = \$1064.15 / \$1840.23$$

If you want to calculate the overall fraction, be sure to also include the court-ordered 25% as specified at the beginning of the DFAS example.

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[14] This is not $990. DFAS made a mistake (see prior footnotes).
[15] This is not 1.017. DFAS made a mistake looking up the value.
[16] http://www.ssa.gov/cola/automatic-cola.htm

$$14.46\%^{[17]} = 25\% * 0.5783$$

V(I) In order to be able to do the entire calculation in one step, I'll substitute the first three equations into the last equation, and cancel things that are in the numerator and denominator:

$$C = \frac{\prod_{Y=1}^{N} A_Y \times 0.025 \times P_{DL} \times \dfrac{D_D}{360}}{0.025 \times P_{RH} \times \dfrac{D_R}{360}}$$

$$C = \prod_{Y=1}^{N} A_Y \times \frac{P_{DL}}{P_{RH}} \times \frac{D_D}{D_R}$$

$$0.5783 = 1.0885 * \$2172.60/\$3200.40 * 6480/8280$$

V(J) The 1.0885 in the formula represents government COLA raises each year that approximately match the military pay raises each year (see Figure 2 below). In other words, you can do the work of multiplying out all the COLA raises or just use a military pay chart to divide retirement rank base pay by divorce rank base pay. You can use a pay chart from either time of life because the *ratio* of rank base pay will be the same in any two yeas. In other words, you can use the lower rank (P_{RL} and P_{DL}) or higher rank (P_{RH} and P_{DH}). In the DFAS example, this would be 1999 or 2002.

V(K) Saying that the complicated DFAS COLA multiplication is the same as just picking low and high rank off a pay chart is mathematically expressed like this:

$$\prod_{Y=1}^{N} A_Y = \frac{P_{RL}}{P_{DL}} = \frac{P_{RH}}{P_{DH}}$$

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[17] This does not match DFAS 13.45% because of incorrect numbers footnoted prior.

1999 18 yr E-6 = $2172.60[18]
2002 18 yr E-6 = $2602.80
1999 23 yr E-7 = $2647.20
2002 23 yr E-7 = $3200.40

COLA increase =   1.025 x 1.035 x 1.026 = 1.09[19]
Rank E-6 increase = $2602.80 / $2172.60 = 1.20
Rank E-7 increase = $3200.40 / $2647.20 = 1.21

V(L) Substituting in for the Pi and A_Y term, and simplifying gives:

$$C = \frac{P_{RL}}{P_{DL}} \times \frac{P_{DL}}{P_{RH}} \times \frac{D_D}{D_R}$$

Cancelling terms that show up in the numerator and denominator,

$$C = \left(\frac{P_{RL}}{P_{RH}}\right) \times \left(\frac{D_D}{D_R}\right)$$

V(M) Notice this is the Dual Coverture formula! *The DFAS Hypothetical Method is the same formula as the Dual Coverture Method.* If you stipulate that COLA is the same as military pay raises, then the two methods give the same result. Both are correct when there was no military duty before marriage. The Dual Coverture method seems much simpler.

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[18] This is not $2040.00 as DFAS has in their example. They made a mistake looking up the number.
[19] For the specific example years chosen by DFAS, the enlisted ranks just happened to get an abnormally huge raise (10% in 2002), so the rank increases came out higher than COLA *in this example*.

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VI. PRESENT VALUE TO FUTURE VALUE – TIME VALUE OF MONEY

VI(A) After dissolution of a marriage, a military member may do additional military work or earn a promotion, which will raise the value of the military retirement asset. This work-earned additional value is NOT the same thing as passively-increased value by virtue of simply waiting until the payment can be made—such as interest earned in a 401(k). Work-earned value would be retained 100% by the military member while passively-earned value would be divided. This is how both the Hypothetical and Dual Coverture methods work in accordance with extensive and comprehensive DoD and Congressional guidance, vetted through dozens of national family law organizations. Nationally known attorney Mark Sullivan argues against this because he fails to distinguish between civilian *passive* post-marriage enhancements and military *active merit-based* post-marriage enhancements[20]. Understanding the difference appears problematic for attorneys and courts, and an attorney striving for clarity must pay special attention to this area.

VI(B) For an example of the common confusion, a January 2011 New Jersey Appellate Court decision gave credence to the Dual Coverture method, and then factually erred when they declared that data from dissolution dated charts fails to give the non-military member corrections from the date of divorce up to the date of retirement payments. They were wrong. So long as both numerator and denominator are taken from the same year's chart, both Hypothetical Method and Dual Coverture methods generate the same fraction. This fraction is then applied to a retirement dollar amount that goes up each year for both spouses. The Dept of Defense Congressional study report quoted above tells attorneys and courts that the methods give time-value of money to both. The Federal agencies, attorneys, and accountants who reviewed the Congressional report all agreed. For the NJ Appellate Court to be correct, everybody else has to be wrong!

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[20] Download a thorough rebuttal to Sullivan's claim from http://www.increa.com/articles/division-promotion-enhancement.

VI(C) Although both Hypothetical and Dual Coverture give time-value increasing dollar benefit, the precise choice of how to do that remains for the court. The DFAS Hypothetical Method uses annual Cost of Living Adjustments (COLA) to correct retirement payments from present-value to future-value (date of divorce to date of retirement). The Dual Coverture method uses annual Military Pay raises to correct from present-value to future-value. See Figure 1.
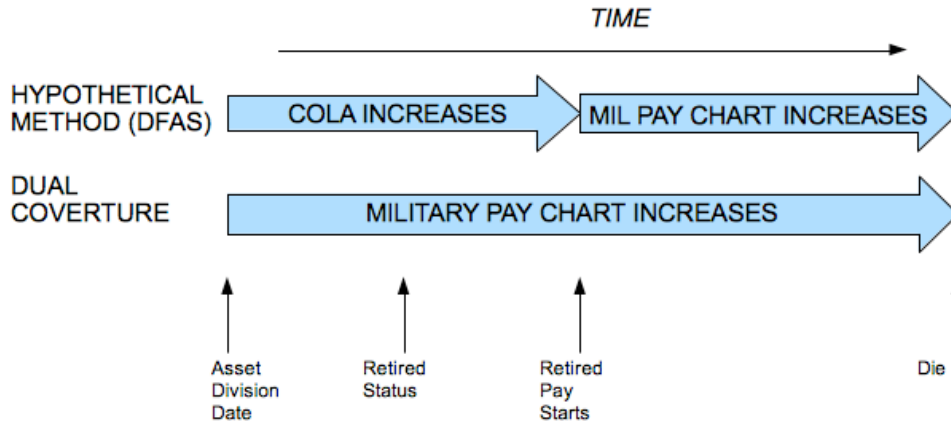

Figure 1. Ex-spouse gets either COLA increases or military pay chart increases, depending on which method is used.

VI(D) Either one of the adjustments may be higher or lower each year, as shown in Figure 2. Charted values for COLA, updated each January, were obtained from the SSA website.[21] Military pay rate changes for each January were obtained for a 20 year Lt Col (O-5) from DFAS' website[22]. Averaged over all the years shown (1988 through 2012), COLA averaged 3.03% and military pay averaged 3.32%. In other words, there isn't much difference. If anything, ex-spouses benefit by using the military pay (Dual Coverture).

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[21] http://www.ssa.gov/cola/automatic-cola.htm. SSA also offer the same numbers shifted by one year, and it is not clear why the dates are shifted (http://www.ssa.gov/oact/cola/colaseries.html).
[22] http://www.dfas.mil/militarymembers/payentitlements/militarypaytables.html

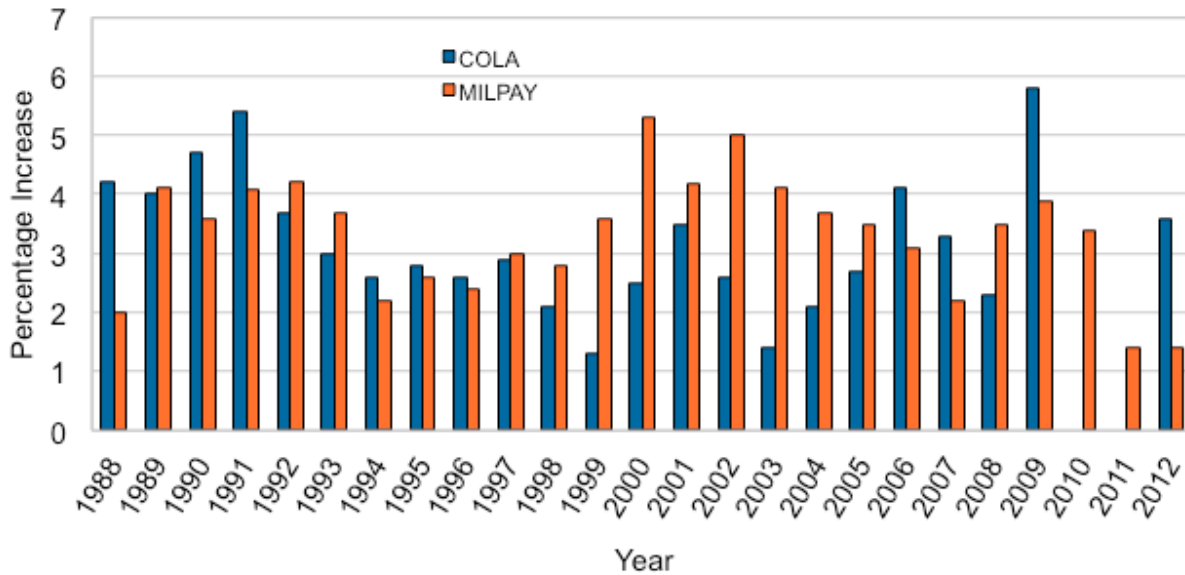## Cost of Living Adjustment compared to Military Pay Raise

Figure 2. Approximately the same, averaged over the years.

VI(E) It seems unreasonable to litigating COLA vs. military pay chart raises. One could argue that if the spouse had been able to receive their portion of the retirement at time of divorce, properly invested increases after the divorce *might* mimic nation-wide COLA or nation-wide inflation rates. However, the military person's actual retirement *will be* based on military pay chart increases, and it's difficult to explain why both spouses should not be subject to the same adjustments, and use the same actual retirement as the basis.

VII. DUAL COVERTURE IS BETTER

VII(A) Although they both create the same coverture fraction, there are reasons why the Dual Coverture Method is better than the Hypothetical Method.

VII(A)(1)   Dual Coverture is **simpler to understand** for attorneys and judges because it's based on a Coverture method that has been used for civilian pensions for decades. It can be easily visualized as stacks of increased point values, as shown in the document "Division of Military Retirement Promotion Enhancements Earned After Divorce"[23], or as increase in block areas as shown in this document.

VII(A)(2)   Dual Coverture much more simply **accommodates younger military** members who joined the service more recently. The Hypothetical Method requires extra hand-calculations by the attorneys, prone to error and dispute. For service members who began before Sept 8, 1980, their retirement is based on the final highest monthly salary level. However for military members who began Sept 8, 1980 or after, retirement is based on the average of the highest 36 months salary level (see 10 USC 1407 vs. 10 USC 1406). DFAS will not calculate the hypothetical "high 36" value for a Hypothetical Method award, and requires this number be submitted for a valid asset division order to be accepted by DFAS (reference DFAS Instructions to Attorneys, pg 9, top paragraph). Individual parties are left with the task if they choose to do the Hypothetical Method.

With the Dual Coverture fraction method there is no need to name the hypothetical 36-month pay average in the order. DFAS does the 36-month average at the time of payment as part of the normal retirement calculation, and simply applies the proper fraction submitted with the order. COLA and 36-month averaging are "automatically built in" for both spouses.

VII(A)(3)   Dual Coverture **equitably bases payments to both spouses on the same retirement value** of gross pay, using military pay charts. Specifically, while both parties wait until retirement to receive monies, the Hypothetical method

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[23] Available from the Reference section of web page titled, "Division of Military Retirement Pay – Promotion Enhancements," http://www.increa.com/articles/division-promotion-enhancement

awkwardly gives "time value of money" to the military member in the form of military pay increases, while the ex-spouse gets "time value of money" in the form of national COLA rates, hand calculated for each year. There is no reason to calculate these differently unless a Court is *trying* to be inequitable.

VII(A)(4)   The Dual Coverture Value method is capable of dividing duty and promotion enhancements during the marriage window, setting aside asset value earned **both after and before the marriage**. The Hypothetical Method can only set aside duty and promotions earned after the marriage.

VIII. DUAL COVERTURE <u>VALUE</u> (DCV) METHOD

VIII(A) The Dual Coverture method is suitable for situations where there is no military duty before the marriage. The following diagram will help understand how to handle more complex life situations. The diagram introduces a method called the Dual Coverture *Value* (DCV) method because it represents the monthly retirement payment *value* as a 2-dimensional diagram. It is capable in situations that no other method can handle, while matching the results of other methods for all situations the other methods can handle.

VIII(B) The area of the diagram below represents the value of a military retirement. It has 2 dimensions because a military retirement is not based only on time. A single time-based cannot do the proper division. A military retirement is based on rank and time, so two coverture fractions of rank and time must be used to calculate division of value. This matches the 2-dimensional area of the diagram.
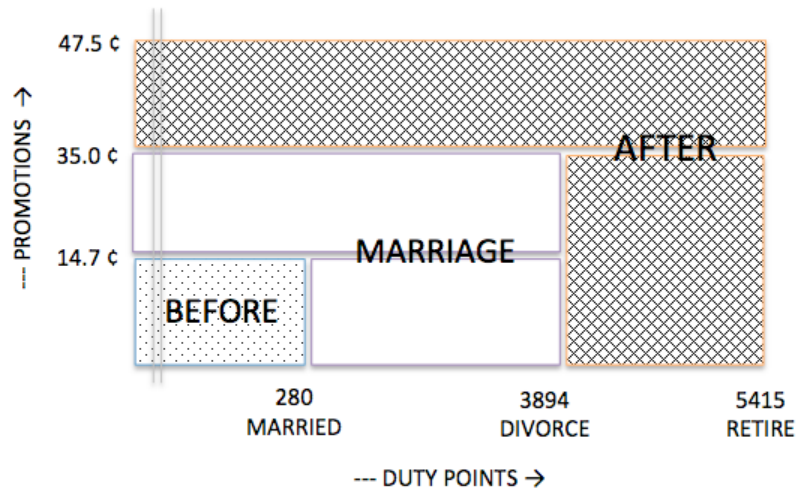
Figure 3. Retirement monthly payment is a combination of retirement earned during three phases of life: before marriage, during marriage, and after marriage. Dollar value corresponds to area in the diagram.

VIII(C) The vertical dimension of the diagram represents retirement point value. A point value is typically 20 to 60 cents, depending on a person's rank. The point value comes from the Federally mandated retirement formula: 2.5% * (rank basepay) / 360. In the diagram, the example person had a point value V_M (value at marriage) = 14.8¢ when they were marriage, and V_D (value at divorce) = 20.3¢ when divorced. When retired, the military person had a point value of V_R (value at retirement) =47.5¢. *All the point values must be calculated from basepay looked up on the same year paychart, because what you're after is the ratio of pay for different military rank.*

VIII(D) The horizontal dimension represents military duty retirement points. For an Active Duty person, points are days (365 per year, plus leap years). The vertical tan lines toward the left of the diagram are meant to represent "one point" with value stacked up to 47.5¢. Picture these lines all the way across the page to show over 5000 points. It would be visually too crowded, so all the point divisions are not shown – one must remember the vertical point bars next to each other on the page. When married, they had D_M (duty points at marriage) = 280 points. When divorced they had D_D (duty points at divorce) = 3894

points and when retired, the military member had D_R (duty points at retirement) = 5415 points.

VIII(E) Multiplying point count times point value at any time gives the value of a military retirement ($/mo) that has been earned. For example, 5415 duty points times 47.5¢ per point yields a total monthly retirement payment of $2443.38.

VIII(F) **Before Marriage**. The dotted area of the diagram was earned before the marriage (14.7¢ x 280 points or $41.16). This portion of the overall $2443.38 was earned before the marriage, and is not a marriage asset. The 14.7¢ value is quantifiably separate, and is not co-mingled when brought into marriage. It pre-existed the marriage and because it never comingled, it is not a marital asset. This is the quantifiable separability required by the New Jersey Appellate court. Sadly, the New Jersey court failed to understand that the area of the diagram goes up every year when military pay charts increase, which does give time-value of money to the ex-spouse while waiting to be paid. During court divorce proceedings during deposition or discovery, each party lists bank accounts and assets. It is appropriate to list "O4@5 years[24] military rank and 280 points of military retirement" as an asset before the marriage. It pre-exists the marriage, is quantifiably separable, and is not co-mingled with anything during later years, and is not a marital asset. This is identical to listing a car or motorcycle or dining room table you owned before the marriage, and having those items exempt from division. *No method other than DCV values can separate the pre-marriage retirement asset.*

VIII(G) **During Marriage**. The white area of the diagram is the marital portion that was earned during the marriage. This is the only part of the military retirement that is a divisible marriage asset.

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[24] Or whatever applies in your situation to look up on the pay chart.

VIII(H) **After Marriage**. The hashed area of the diagram represents duty points and enhanced point value (promotions) earned after marriage. This value is not passively earned like interest on a bank account or time-value of money or dividends of a 401(k) type retirement. Case law sometimes allow civilian passively-earned enhancements after a marriage to be divided when the receiving party has to wait to get the money. Dividing the bank passively earned interest is appropriate because the ex-spouse will collect the marital asset capital and the interest earned on that capital. However, military duty and promotions are *actively earned* enhancements based on effort, new duty, schooling, study, and testing. They are not earned like bank interest—they are earned by work and effort. Done after marriage, this effort is not shared by an ex-spouse. The 12.5¢ of enhanced retirement value earned after the marriage are not a marital asset and is not divisible.

VIII(I) Some have argued that military promotion enhancements earned after the marriage are divisible because they are "based on" duty during the marriage. Notably, the same attorneys are silent about why the marriage portion should *not* be divisible because it is based on duty *not* during the marriage. The "based on" argument is a red herring using words that are carefully crafted to have no or vague or shifting legal meaning. This issue is well-documented in a rebuttal to attorney Mark Sullivan's critique of the DoD report to Congress.[25]

VIII(J) Once the area chart is understood, you can see that it's trivial to calculate the fraction of the asset that is a marital asset by calculating the area of the diagram for the married part divided by the total area. This is the very definition of a coverture fraction!

Numerator (marriage part) = Value at Divorce – Value at Marriage
Denominator (total)= Value Retire.

VIII(K) Symbolically, the Coverture Fraction equals:

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[25] Downloadable from http://www.increa.com/articles/division-promotion-enhancement.

$$C = \frac{D_D V_D - D_M V_M}{D_R V_R}$$

VIII(L) Notice if there was no duty before marriage, this is the same as the Dual Coverture. Specifically, if P_M and V_M are zero and the second term of the numerator vanishes:

$$C = \frac{D_D V_D}{D_R V_R}$$

which can be re-written in the same form as the previously discussed Dual Coverture previously discussed in paragraph III(G):

$$C = \left(\frac{V_D}{V_R}\right) \times \left(\frac{D_D}{D_R}\right)$$

Notice the value of a retirement point is 2.5% * retirement pay / 360. Putting this into the equation shows that the two are identical (The ratio V_D/V_R is the same as the ratio P_{RL}/P_{RH}):

$$C = \left(\frac{2.5\% \times P_{RL} / 360}{2.5\% \times P_{RH} / 360}\right) \times \left(\frac{D_D}{D_R}\right)$$

$$C = \left(\frac{P_{RL}}{P_{RH}}\right) \times \left(\frac{D_D}{D_R}\right)$$

VIII(M) The legal formula language for using the Dual Coverture Value method is shown here (replace all bold value with *your* numbers):

> "The former spouse is awarded a percentage of the member's disposable military retired pay, to be computed by multiplying **50%** times a Coverture Fraction. The Coverture Fraction numerator is (**3894** points * basepay of **W3@15yr)** minus (**280** points * basepay of **E5<2 yr)**. The Coverture Fraction denominator is member's

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total number of retirement points earned * basepay upon retirement. For this calculation, all three basepay values will be looked up on the **2012** year pay chart."

VIII(N) In my opinion, it's easier to write the same thing with the formula shown, which is better than trying to precisely describe math with English sentences:

"The former spouse is awarded a percentage of the member's disposable military retired pay, to be computed by multiplying 50% times a Coverture Fraction. The coverture fraction is

$$C = \frac{3894 * 5040.60 - 280 * 2265.90}{D_R * BP_R}$$

where D_R is number of retirement points earned, and BP_R is retirement basepay. For this calculation, BP_R values will be looked up on the **2012** year pay chart."

VIII(O) You can download a spreadsheet the Dual Coverture Value calculation from

http://www.increa.com/articles/division-military-retirement-dual-coverture.[26]

VIII(P) Besides dividing each monthly payment, don't forget if you are working with a Reserve retirement with a marriage and duty spanning 28 January 2008, some or all of the monthly retirement payments before military member age 60 may not be marital assets; they must be divided with a different coverture fraction. See the 3-D Value section below and the document "Division of Reserve and Active Duty Military Retirements" from the references below. The Dual Coverture Value method described in this document is a 2-dimensional method. If Reserve retirement before age 60 is involved in your situation, please contact me and I'll describe to you the extended 3-dimensional method.

VIII(Q) Summarizing, the DCV method is done with these steps:

1. Write down the points for each transition of life (start military, marriage, divorce, retirements), accurate down to the day. During Active Duty, it's one point per day. Reserve points can be obtained from a Reserve Point Summary

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[26] If the PDF file has corrupted this clickable link, just manually type in the URL as shown.

Statement.

2. Look up military monthly base pay on a pay chart, using longevity and rank of the military person at each transition of life. It is important to use the *same paychart*, not any specific year pay chart. It is often convenient to use the year of divorce since that's when everybody is looking at the issue.
3. Convert paychart base pay to point values. Divide by 360 and multiply by 2.5%. These numbers should come out approximately 20¢ to 80¢.
4. Draw the DCV area diagram.
5. Write down how to calculate the marriage portion of the diagram, by looking at the DCV area diagram. All the numbers should be known, because this will be based only on present day or history.
6. Write down how to calculate the total area of the DCV area diagram. This may contain numbers you don't know yet such as total retirement points.
7. Write down the words to divide the marriage portion by the total portion. You should get a fraction 0.0 to 1.0, which is the coverture fraction.
8. The division order language will be 50% times the coverture fraction times the monthly disposable retirement pay. On rare occasions, something other 50% may be used if the marital asset is not divided equally.

IX. ICONIC SIMPLICITY

IX(A) The DCV method of diagraming phases of life and the divisibility of retirement earned during those phases of life is so lucid and simple that the patterns can be reduced to essentially icons. The horizontal axes represents time moving from left to right across the bottom of the icons. The vertical axes represents the value of each point, dependent on promotions. Remember, the specific dollar amount corresponding to any area goes up each year as the military base pay goes up.

IX(B) In each diagram below, the white portion would be the divisible marital asset, while the dotted portion would not be divisible. The coverture fraction is calculated by dividing the white area by the total area. The exact point counts and point values that apply for a given case would be used to calculate the areas.

IX(C) The legal division order language would simply describe how to calculate the white area divided by the total area. Remember, horizontal divisions (vertical lines) are point

counts at that moment in life, and vertical divisions (horizontal lines) are point values (2.5% * basepay / 360) for whatever rank.
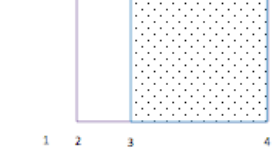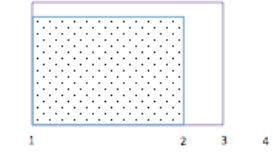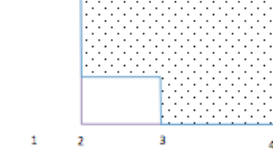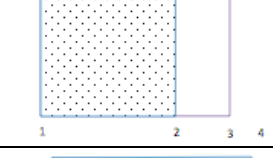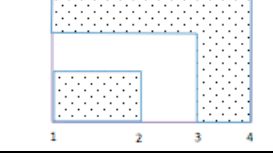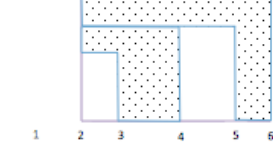
Icon Picture	Sequence of Events	Formula to calculate Coverture Fraction (*)
	This diagram represents becoming 1) married, 2) military, 3) retired, 4) divorced. In other words, the entire military career was shared with the same spouse. No coverture fraction is required. Spouse receives nominally half of monthly payments.	N/A
	This diagram represents becoming 1) married, 2) military, duty with or without promotions, 3) divorced, duty without promotions, 4) retired. Because there are no promotions after the marriage, this can be handled like civilian retirements with a single coverture fraction.	$C = D_D/D_R$ (+)
	This diagram represents becoming 1) military, 2) married, duty and promotions, 3) retired, 4) divorced.	$C = (D_R V_R - D_M V_M)/(D_R V_R)$
	This diagram represents becoming 1) married, 2) military, duty with or without promotions, 3) divorced, duty with promotions, 4) retired. In this situation, the Dual Coverture Value method simplifies to the Dual Coverture method.	$C = (D_D V_D)/(D_R V_R)$ (+)
	This diagram represents becoming 1) military, duty with or without promotions, 2) married, duty without promotions, 3) divorced, no more duty or promotions, 4) retired.	$C = (D_D - D_M)/D_R$
	This diagram represents becoming 1) military, duty with or without promotions, 2) married, duty and promotions, 3) divorced, duty and promotions, 4) retired.	$C = (D_D V_D - D_M V_M)/(D_R V_R)$
	This diagram represents becoming 1) married #1, 2) military, duty with or without promotions, 3) divorced, duty and promotions, married #2, 4) married, duty without promotions, 5) divorced, 6) retired.	$C1 = (D_{D1} V_{D1})/(D_R V_R)$ $C2 = (D_{D2} V_{D2} - D_{M2} V_{M2})/(D_R V_R)$

TABLE 1

(*) The symbols and subscripts in the third column are defined in Section XVI.
(+) These are the only two situations possible with published DFAS methods. See Table 3.

x. SAME AS DFAS METHODS—ONLY SIMPLER

X(A) A summary of division methods is given in the following table.

Method of Division ->	Dual Coverture Value	Dual Coverture	DFAS Hypothetical Method	Civilian Single Coverture Fraction *
Time-value of money after divorce, but before before payments start?	Both receive military raises.	Both receive military raises.	Military receives military raises; ex-spouse receives COLA	Both receive military raises.
Requires manual calculation of COLA and hypothetical "High-3" basepay?	No	No	Yes	No
Time-value of money after payments start?	Both receive military raises.	Both receive military raises.	Both receive military raises.	Both receive military raises.
Post-marriage merit promotion enhancements belong only to military member?	Yes	Yes	Yes	No
Follows DoD report to Congress?	Yes	Yes	Yes	No
Able to set aside asset value pre-existing the marriage?	Yes	No	No	No
Handles division for multiple spouses?	Yes	No	No	No

TABLE 2

* Although civilian methods are inappropriate for dividing a military retirement, this column is included in the table because some attorneys continue to promote this method which damages military members with inequity. For details, see "Division of Military Retirement Pay - Promotion Enhancement"[27]. Continuing to use civilian methods when they are documented to be inferior and inappropriate and inequitable is inexplicable.

X(B) Only the Dual Coverture Value method allows proper handling of military duty and

promotions that existed as a pre-marriage asset. Analogous to a car or dining room table

pre-existing the marriage, assets that someone brings into the marriage are not divisible.

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[27] http://www.increa.com/articles/division-promotion-enhancement

Pre-existing asset value can be quantitatively separated and does not comingle with the rest of the retirement. Only the Dual Coverture Value method can do this. Additionally, when more than one spouse is involved, only a Dual Coverture Value formula can properly divide a military retirement.

X(C) In the Fall 2012 newsletter of the ABA Family Law Military Committee[28], Amy Privette, a past paralegal for Mark Sullivan, wrote an article titled "Quick Tips for Handling Military Retirement Benefits". She identified four DFAS methods of dividing military pay: fixed dollar, percentage, formula, and hypothetical award. These correspond to Sections IV(A), IV(C), and IV(D) of DFAS document titled "Guidance on Dividing Military Retired Pay." William Trojan, of Troyan, Inc, has been involved for years preparing military division orders. On his web page[29], he writes that "The military recognizes only two formulas for the division of a member's net disposable pay… either: Fixed Dollar, or Percentage".

X(D) However, Privette incorrectly stated that the division had to include one of these four methods. Trojan erred by saying there are only two (2) acceptable *formulas*. In fact, there are two (2) acceptable *methods* for DFAS. Quoting paragraph IV(A) from the DFAS document, "… for a retired pay as property award to be enforceable, it must be expressed either as a fixed dollar amount or as a percentage of disposable retired pay". *DFAS does not mandate how to calculate the fixed dollar amount or percentage.*

X(E) It is critical to realize that ANY method or formula that creates a fraction percentage is acceptable to DFAS, so long as the fraction is possible for DFAS to calculate. What DFAS calls "hypothetical" is only one way to calculate a fraction or percentage, and so fit into DFAS' second acceptable method. In DFAS words, "If a court order provides a formula award and also provides all the variables necessary to compute the formula, we will complete the calculation as is using those variables provided in the order." In other words,

[28] http://apps.americanbar.org/dch/committee.cfm?com=FL11527
[29] http://www.troyaninc.com/QDRO/Newsletters/Recent-Case-Law-Coverture-Fraction-Challenged.aspx

any formula is acceptable, so long as it creates a calculable fraction or percentage. If the fraction or percentage from two different methods is the same, then any two methods are the same. How you got to the fraction just doesn't matter.

X(F) All Dual Coverture methods create fractions and can be calculated by DFAS. It is instructional to take each of the DFAS proposed methods of creating fractions and correlate them to the much simpler Dual Coverture Value method of creating the same fraction. To use one of the DCV formulas, simply name the formula substituting in your values for everything except D_R and V_R. DFAS will supply those two values when they run the formula. It's important to note that a point value (V_R) used in a DCV formula must be calculated from the same year chart as other point value numbers in the DCV formula.

DFAS Method	Simpler DCV Formula giving the same fraction.
Fixed Dollar	Coverture fraction not required
Named Percentage	Coverture fraction not required
Formula Example 2	$C = D_D/D_R$
Formula Example 3	$C = D_D/D_R$
Hypothetical Example 4 & 7	$C = (D_D V_D)/(D_R V_R)$
Hypothetical Example 5 & 8	$C = (D_D V_D)/(D_R V_R)$
Hypothetical Example 6 & 9	$C = (D_D V_D)/(D_R V_R)$
Impossible with DFAS methods	All other DCV situations

TABLE 3

XI. DCV ALSO DOES 12731(f)(2)(A) EARLY RETIREMENT

XI(A) The Dual Coverture Value method diagrammed in the icon table above is a 2-dimensional method, visualized with areas. If you are dealing with a Reserve military retirement (not Active Duty) and military duty spanning January 28, 2008, there is one

more extension to the DCV method you must consider. Visualize the "before-marriage-after" diagram or one of the seven iconified area diagrams above as a monthly slice of income—the diagram represents how each month of retirement pay will be divided. Now, in your mind, turn the diagram edge-on and stack each successive month of retirement pay on top of prior months and you'll build a 3-dimensional stack of the area diagrams, or a stack of monthly payments. The volume of this stack represents the accumulated value of a military retirement as the months or years go by.

XI(B) Traditionally, the stack starts when the military member turns 60 years of age because that's when a Reserve retirement begins to pay out. However, 10 USC 12731(f)(2)(A) created a new and quantifiably separate retirement for Reservists that does not comingle in any way with the traditional retirement. The new law clearly and quantifiably defines the receipt of retirement pay before age 60 dependent only on military duty done January 28th, 2008 and after. As a result of this law, the "stack" of monthly payments may begin prior to military member age 60. The coverture fraction that applies to each slice of the stack may be different before and after military member age 60 based on when the marriage occurred. Because of the hard date in the sand, there is no commingling and the new retirement benefit is properly divided with its own coverture fraction as a separate asset.

XI(C) Two simple conditions can be quickly handled. If a marriage exists only after January 28th, 2008, then all monthly slices are to be divided the same way as described above. If a marriage ends before January 28th, the ex-spouse in no way contributes to the retirement points accumulated after January 28th, which are the only points authorizing pay before age 60. Getting these extra months of pay is based only on duty after January 28th. Under this second condition, the slices before age 60 would have a coverture fraction of zero -- in other words, the non-military spouse would receive no portion of the payments before age 60 because the spouse in no way contributed to the duty points causing the payments. In this situation, the asset division order must explicitly tell DFAS to not divide payments

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before age 60, and divide payments like normal after age 60.

XI(D) If the marriage spans January 28th, then the payments age 60 and following should be divided with a coverture fraction as described in all the paragraphs above. For payments before age 60, a new area value diagram must be created. The horizontal axes of the second diagram would include points ONLY earned after January 28th. The vertical axes would start with point value as of January 28th and show only promotions after that date. This second area value diagram would yield a second coverture fraction to apply for all payments before age 60. DFAS must be provided with both coverture fractions and directed to use one before age 60 and the other for age 60 and following.

XII. EXAMPLE CALCULATIONS

XII(A) Three examples below show that Dual Coverture and Hypothetical both yield the same correct numbers. You can try the examples yourself using the spreadsheet downloadable from the References section of the Increa Dual Coverture webpage.[30]

1. *Dual Coverture fraction, retire in 2011 as LtCol (O-5)*
2. *Dual Coverture fraction, retire in 2011 as Col (O-6)*
3. *DFAS recommended Hypothetical method, retire in 2011 as LtCol (O-5)*

XII(B) Ignoring rounding, all methods give the same payment to ex-spouse. The examples show identical answers for LtCol or Col, which is correct since the Dept of Defense report and DFAS guidance clearly state equity occurs when a military member's promotion outside of the marriage does not change increase or decrease ex-spouse retirement payment dollar amount. See my published memorandum on the issue of promotion

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[30] http://www.increa.com/articles/division-military-retirement-dual-coverture

enhancements after divorce.[31]

XII(C) Here are the numbers used for the first three examples:

At marriage:	Not in the military.
At divorce:	2006, 17 yr Major (O-4), pay $6054, 4420 points, OR
	2006, 23 yr LtCol (O-5), pay $7214, 4420 points, OR
	2006, 23 yr Col (O-6), pay $8215, 4420 points.
At retirement:	2011, 23 yr LtCol, pay $8313, 4900 points, OR
	2011, 23 yr Col, pay $9465, 4900 points.

1. Dual Coverture, divorce in 2006 as Major and retire in 2011 as LtCol. This is the baseline situation the others will be compared to. Pay ratios must be taken from the same

Total retirement pay = 2.5% * $8313 * 4900/360 = $2829

Dual Coverture fraction = (4420/4900) * ($6054/$7214) = 0.7570

Spouse payment = ½ * 0.7570 * 2829 = **$1071**

2. Dual Coverture, divorce in 2006 as Major and retire in 2011 as Col. This shows that if the military member is merit-based promoted after the marriage, that spousal portion *should* and *does* stay exactly the same. The marital asset is NOT diluted as claimed by some.

Total retirement pay = 2.5% * $9465 * 4900/ 360 = $3221

Dual Coverture fraction = (4420/4900) * ($6054/$8215) = 0.6648

Spouse payment = ½ * 0.6648 * $3221 = **$1071**

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[31] http://www.increa.com/articles/division-promotion-enhancement

3. DFAS Hypothetical method, divorce in 2006 as Major and retire in 2011 as Lt Col. The step labels below match the paragraph numbers starting on page 9 of the DFAS instruction document. This shows that the Hypothetical and Dual Coverture method give the same result, as claimed in Section V, above. Remember, as shown in Section VI, Hypothetical COLA is *approximately* the same as actual military pay raises, but can be different based on which exact years the marriage covered. It is more equitable to use the same time value of money factor for both parties, as the Dual Coverture and Coverture Value methods do.

2(a) Hypothetical total retirement as Maj = 2.5% * 6054 * 4420 / 360 = $1858

2(b) COLA adjusted = 112% * $1858 = $2081. The COLA factor in Step 2(b)
    comes from multiplying together five published rates (2007 through 2011)
    as shown above in paragraph V(E).

2(c) Total retirement pay (Federal formula) = 2.5% * $8313 * 4900/360 = $2829

2(c) Spouse payment fraction = ½ * 2081 / 2829 = 0.3678

Spouse payment = 0.3678 * 2829 = **$1055**

XII(D) The magnitude of error if rank promotions are incorrectly divided is significant. The error may be higher or lower in your specific case, so run this example with your numbers. One can determine the magnitude of error by intentionally creating a bad coverture fraction. In order to create the fraction or percentage required by DFAS, the Dual Coverture method includes two numerical ratios multiplied together because the military retirement formula itself includes the same two numbers multiplied together (time of service measured in points, and the monthly pay according to rank).

        ex-spouse fraction = ½ x (point ratio) x (rank ratio)

        ex-spouse fraction = ½ x (4239/5978) x (7003.80 / 8841.30)

        ex-spouse fraction = ½ x 0.7091 x 0.7922

        ex-spouse fraction = 0.2809 (28.09%)

   Notes on above calculations:

1. The 28.09% fraction required by DFAS will stay the same for the rest of the spouses' lives, but the DOLLAR amount will go up every month for BOTH spouses due to automatic military pay chart increases.
2. The rank ratio was taken from a 2006 military pay chart. The numerator is "Lt Col over 20 years" (at divorce), and the denominator is "Col over 26 years" (at retirement). A rank ratio from any other year chart is similar since the military keeps the *ratio* similar year to year. For example, the 1999 pay chart gives a ratio of 5277.90 / 6694.2 or 0.7884, instead of 0.7922.

XII(E) As calculated, the proper DFAS fraction is 28.09%. If the rank ratio (0.7922) is inappropriately not included in the above equations, then the ex-spouse fraction would incorrectly be 35.45%. Assuming a monthly retirement of $4500 (use your numbers) in 2012, the correction 2012 spousal amount would be 28.09% * $4500, or $1264.50/mo. If the rank fraction is incorrectly not included, the 2012 spousal amount would be 35.45% * $4500, or $1595.25/mo. *The incorrect payment is $330.75 too high each month, a 26% increase over the proper $1264.50/mo. Accumulated over a 20 year retirement, this equals $79,380*.
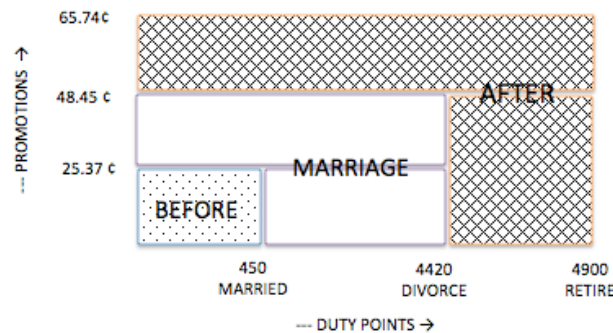
XII(F) The 26% inequitable windfall comes *from* one person *to* the other person, resulting in a relative error twice as large, or 52%. <u>A 52% windfall is significantly INequitable!</u> When figuring medical insurance coverage during custody finances, anything over 5% salary is often considered too much to force a non-custodial spouse to buy insurance. When refiguring spousal support payments, typically a 15% change in salary is considered significant. *The error caused by not including a rank ratio in the DFAS fraction calculation is much higher than either court standard of "significant".*

XII(G) Two more examples highlight the proper performance of the Coverture Value method. We will use the same numbers as the previous examples:

At marriage: 1991, 2 yr Lt (O-2), pay $1817, 450 points

At divorce: 2006, 17 yr Major (O-4), pay $6054, 4420 points

At retirement: 2011, 23 yr Col, pay $9465, 4900 points.

XII(G)(1) <u>Dual Coverture Value, divorce in 2006 as Major and retire in 2011 as Col.</u>

For the Coverture Value method, it is very advantageous to view the numbers on an area value chart:

The point values along the left side of the value graph come from military pay salary looked up ALL on the 2011 pay chart. Colonels is 2.5% x $9465/360, or 65.74¢; Major is 2.5% x $6977/360, or 48.45¢; Lt is 2.5% * $3653/360, or 25.37¢. Note the total retirement value is (65.74¢ x 4900 points), or $3221.76.

XII(G)(2) Using the Dual Coverture Value method gives:

$$C = \frac{D_D V_D - D_M V_M}{D_R V_R}$$

Coverture Fraction = (4420 * 48.45¢ – 450 * 25.37¢) / (4900 * 65.74¢) = 0.6294

Spouse payment = ½ * 0.6294 * $3221.26 = **$1013**

If you plug in zeros for the pre-existing marriage portion, you'll get a number

matching the prior examples. This is *incorrect*, but is the only way to match the prior examples, which use *methods that cannot separate assets pre-existing the marriage*. This shows why the prior methods should not be used with asset value pre-existing the marriage.

Coverture Fraction = (4420 * 48.45¢ – 0 * 0¢) / (4900 * 65.74¢) = 0.6648
Spousal payment = ½ * 0.6648 * $3221.26 = **$1071**

XII(H) If you want, you can try several more scenarios using the spreadsheet downloadable from http://www.increa.com/articles/division-military-retirement-dual-coverture.[32]

> XII(H)(1)   Example: At a date after the marriage, do a promotion with no change in duty points. Effect: Marital asset does not change; ex-spouse payment does not change, coverture fraction is smaller.

> XII(H)(2)   Example: Perform some duty points after marriage, with no rank change. Effect: No change to marital asset. This does NOT dilute the marital asset, or affect the spousal portion in any way. The denominator gets larger, and fraction gets smaller.

> XII(H)(3)   Example: Delay retirement by 1 year with no more duty. Effect: All fractions stay the same, but the dollar amount goes up for BOTH parties because BOTH parties get time value of money due to military chart pay raises each year. It is not right to give one person COLA and the other person military pay raises. This is what the Hypothetical Method does (see Figure 1). The Dual Coverture method is better because it equitably gives both people the same increases.

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[32] If the PDF file has corrupted this clickable link, just manually type in the URL as shown.

XIII. INTERACTION WITH SURVIVOR BENEFIT PLAN

XIII(A) It's better to avoid SBP awards for two reasons. First, because it is a statutory unitary benefit, awarding to an ex-spouse would prevent any future spouse from sharing in the benefit.

XIII(B) Secondly, creating SBP as a new marital benefit tangles this insurance into the financial mix unnecessarily. Because it *could* be purchased is surely no reason to force anybody do to do. Doing so would be similar to forcing the couple to purchase new real estate after divorce is initiated just for the pain of figuring out how to divide it. If the facts warrant ordering the military member to provide life insurance, it is usually cheaper and saves legal wrangling by simply buying term life insurance.

XIII(C) Nonetheless, courts have ordered military members to buy SBP annuity insurance and then direct the ex-spouse pay the benefit. This adds another complication on the division order submitted to DFAS because the simple fraction submitted to DFAS now has to be corrected to compensate for the premium so as to be invisible to DFAS. DFAS writes:

> If the amount of the former spouse's award is expressed as a dollar amount or percentage of disposable retired pay less the amount of some other obligation (e.g., the amount of the Survivor Benefit Plan premium or the former spouse's child support obligation), the entire award is unenforceable. …
> Similarly, set-offs against the former spouse's award are not permitted. Although the award language may be acceptable, if another provision of the court order requires that another amount be set-off from the former spouse's share, such as an SBP premium or other financial obligation that the former spouse owes the member, the set-off is unenforceable.[33]

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[33] DFAS "Guidance on Dividing Military Retired Pay", 4/2/2012, pg 5. Downloadable from http://www.increa.com/articles/division-military-retirement-dual-coverture.

XIII(D) No matter if DCV is used or any other method is used to generate the spousal fraction, the fraction submitted to DFAS must be corrected to accommodate SBP or other offsets:

$$F = \frac{P_R F' - S}{P_R - S}$$

F' = spousal fraction before correction

F = spousal fraction after correction (submit to DFAS)

PR = base pay at retirement

S = spousal premium payment for SBP or anything else.

XIII(E) For example, suppose retirement pay was $4113.00 and the spousal fraction was 47.15% (half of a coverture fraction of 94.3%), and the SBP premium was $278.92. Here is a demonstration that the intuitive answer matches the way DFAS must do it:

Spousal portion before correction = $4113.00 * 0.4715 = $1939.28

Spousal portion after SBP premium = $1939.28- $278.92 = **$1660.36**

Corrected fraction F = (4113 * 0.4715 – 278.92) / (4113 – 278.92)

F = 0.4331

DFAS calc Net Disposable = $4113 - $278.92 = $3834.08

DFAS calc spouse portion = $3834.08 * 0.4331 = **$1660.36**

Conclusion is that the corrected fraction method works.

XIV. INTERACTION WITH FEDERAL CIVILIAN RETIREMENT

XIV(A) A Reserve military member who accepts a Federal civil servant job and is not yet collecting military retirement pay, will have an option to purchase an extra civilian retirement annuity.[34] In a number of legal resources circulating for the last decade, this has carelessly been referred to as "rolling over" military retirement into a civilian retirement – implying behavior similar to rolling over IRA value from one account to another. These words give the impression that the military retirement is reduced in some way while increasing civilian retirement. This is NOT true.

XIV(B) Related statutes and Federal Regulations will contain words such as "If you are receiving retired military pay, in addition to making the required deposit [aka purchase the annuity], you must waive your retired military pay..." Sometimes people quit reading there. Instead, continue reading: "...unless the retired military pay was awarded ... under provisions of 10 USC 12731-12739 (retired pay under Chapter 1223 for members of the Reserves)."[35] In other words, a military member with a Reserve retirement DOES have to purchase the annuity, and does NOT have to waive any military retirement value.

XIV(C) People who use the phrase "rolling over" military time are corrupting a court's understanding by implying value rolls over like a 401(k) or IRA. Instead, it is correct to speak of "buying" military time with post-marriage dollars to gain an additional annuity, in accordance with 5 CFR 842.307. The size of the annuity authorized for purchase is proportional to how much military duty was done in the military—more military duty means a person may buy a bigger annuity at more cost. For a Reserve officer not yet collecting retirement, buying additional civilian annuity in NO WAY burdens or encumbers or reduces any military retirement. The only connection to your military time is that the

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[34] Federal Employee Retirement System (FERS) Handbook, Chapters 22 and 23.
[35] FERS Handbook, Chapter 22, Paragraphs 22B1.1-1(C) and 22A3.1-3.

military time sets how BIG of an annuity one can purchase; NO value is transferred one way or the other.

XIV(D) Buying an annuity – at a cost of approximately $15,000 for a mid-grade officer – is a totally separate post-marriage contract between a civil servant employee and the Federal government and does not affect military retirement pay in any way. Purchasing this separate civilian annuity creates a new benefit that is not marital property because it is not earned or accrued during marriage, and does not exist (even in a latent form such as a pending military retirement) until purchased by the military member with post-marriage dollars. An analogous situation would be if a military pilot were hired by a commercial airline because of pilot flight hours of military experience; gaining a new civilian retirement based on military experience doesn't make it marital property.

XIV(E) Prior law required some military members to waive some or all Active Duty military retired pay in order to earn a civilian retirement. However, on October 5, 1999, President Clinton signed the National Defense Authorization Act for Fiscal Year 2000 (P.L.106-65). Section 651 of this law repeals section 5532 of title 5, United States Code. This action ends the reductions in retired or retainer pay previously required of retired members of a uniformed service who are employed in a civilian office or position of the U.S. Government. This repeal is effective retroactively to October 1, 1999.

XIV(F) For a FERS civilian retiree, a military retirement division order cannot invade a possible Federal civil servant retirement entirely earned or purchased after the marriage. Civil retirement is not marital property subject to USFSPA, since during the marriage there was no civilian job, and USFSPA authorizes courts to tap *only* military retirements as a marital asset.

XIV(G) For all cases of civilian retirement (CSRS and FERS), 5 USC 8332 already provides that the ex-spouse portion of the military retirement will be made whole if it is damaged in

any way by later civil servant employment choices, therefore any attempt to change this in the division order is an indication of manipulative legal orders.

XIV(H) DFAS has a fiduciary responsibility requiring the purchased asset of civilian annuity payments –which are not part of the military retirement asset dividable under USFSPA – be protected and distributed only to the rightful owner. This is supported 5 USC 8332(c)(4), which requires:

> "The period of civil service employment by the employee or Member shall not be taken into consideration in determining the amount of the deductions and withholding or the amount of the payment to the former spouse."

XIV(I) Even if the buy back option affected or reduced the military benefit (which is not true for Reservists not yet receiving retirement pay), 10 USC 1408(a)(5) clarifies that any USFSPA garnishment or withholding must only be from USC Section 12731 (military) retirement benefits, and in aggregate form may not exceed 50% of "disposable retired pay" as defined in 1408(a)(4). Any order attempting to cause DFAS to garnish additional portions of a post-marriage non-12731 civilian retirement would certainly exceed this. There is no authority to divide civilian retirement pay as property under USFSPA

xv. COST OF INEQUITY

XV(A) The resultant damages of doing military division with a single (civilian) coverture when it should be done with DCV methods (military promotions) are significant. Rank promotions average around 17% increase in base pay (some higher or lower) and retirement is proportional to base pay. Because a mistake would comes *from* the military member *to* the non-military member, a mistake creates a double, or 38% average, error in equity. In at least one case, when challenged with a reconsideration motion, the trial judge declined to correct the order, simply saying the difference was insignificant.

XV(B) If one allows the court itself to define what is "significant", it's obvious this is not true. A 38% equity error is much larger than the 15% rule of thumb on income changes to change support payments, or the 5% threshold where medical insurance would be ordered for child support. Over the course of retirement, this inequity can easily be $380,000 or more. Multiply this error by the number of military in the nation and the number of divorces, and you'll see that this is a $Billion dollar issue that needs the lucid, equitable clarify of the Dual Coverture Value method.

XVI. DESCRIPTION OF MATHEMATICAL SYMBOLS

C = coverture fraction, ranging from 0.0 up to 1.0

D_M = duty points accumulated at marriage date

D_D = duty points accumulated prior to dissolution of marriage

D_R = duty points accumulated prior to retirement

F' = spousal fraction, usually ½ * C.

F = spousal fraction corrected for offsets such as SBP premiums (pg 42).

S = SBP premium or other offset paid by the ex-spouse.

P_{RL} = base pay at retirement, using dissolution rank and years of service at dissolution, look up on a chart dated year of retirement.

P_{RH} = base pay at retirement, using retirement rank and years of service at retirement, look up on a chart dated year of retirement.

P_{DL} = base pay at dissolution, using dissolution rank and years of service at dissolution, look up on a chart dated year of dissolution.

P_{DH} = base pay at retirement, using retirement rank and years of service at retirement, look up on a chart dated year of retirement.

P_H = Hypothetical retired pay at time of dissolution of marriage

P_{HC} = COLA-increased Hypothetical retired pay to bring up to retirement date

A_Y = COLA adjustment for any given year. For example, 2.3% would give 1.023.

V_M = value of a retirement point, rank at time of *marriage*, 2.5%*P/360, P is pay

from the same year chart as other V values. If marriage occurred before military duty, $V_M=0$ (zero).

V_D = value of a retirement point, rank at time of *divorce*, 2.5%*P/360, P is pay from the same year chart as other V values.

V_R = value of a retirement point, rank at time of *retirement*, 2.5%*P/360, P is pay from the same year chart as other V values.

In order to clarify the four values above obtained from military pay charts, it's helpful to repeat their definitions in a table:

BASE PAY CHART VALUES	Using chosen chart, lookup dissolution years of service and rank, e.g. 17 yr Major.	Using chosen chart, lookup retirement years of service and rank, e.g. 23 yr LtCol.
Use dissolution year pay chart, e.g. 2006	P_{DL}	P_{DH}
Use retirement year pay chart, e.g. 2011	P_{RL}	P_{RH}

/* END */

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