



# LEGAL BRIEF

## MILITARY ENTITLEMENTS UPON SEPARATION OR DIVORCE

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### **Military Entitlements upon Separation or Divorce**

Being married to a military member entitles family member spouses to a wide variety of benefits and privileges. These benefits are derived from the military spouse's status as a military member and are dependent upon that status. A divorce directly impacts the benefits to which a family member spouse is entitled. This pamphlet is designed to cover the impact of separation and divorce on these military entitlements.

#### **I. Military Member:**

- A. May collect basic allowance for housing at the "dependent" or "difference" rate if the divorce decree or separation agreement stipulates child support. The amount of BAH is based on the individual's grade and may be terminated if not properly used to support dependents.
- B. May be authorized military family quarters if the military member has physical custody of the children.

#### **II. Dependent Spouse:**

- A. Loses all benefits- I.D. card, medical care, commissary, Base Exchange, and use of all base facilities, upon the final divorce decree. (Exception: See Former Spouses' Protection Act, below). If there is a court approved separation or interlocutory divorce, the dependent spouse retains all benefits/privileges until the divorce is final.
- B. Not authorized base housing, even if dependent spouse has custody of dependents and even if purported right is given in the divorce decree.
- C. Not automatically authorized alimony or child support payments by allotment.

#### **III. Dependents:**

- A. Authorized medical care at military facilities (regardless of who has custody).

- B. Authorized retention of unlimited I.D. card if in the custody of the military spouse.
- C. Authorized retention of limited I.D. card if in custody of non-military spouse. (Medical, Theatre). Base Exchange may be authorized if child is with nonmilitary spouse and is unmarried, under 21, legitimate or illegitimate, adopted or step-child, and more than 50 percent dependent on the military sponsor for financial support.
- D. Benefits end at age 21, marriage, or at age 23 if full-time student.

**IV. Other Factors:**

- A. On-base quarters may not be stipulated as part of a settlement, divorce decree, or separation agreement. On-base quarters are a benefit of the military member only, and the military member does not have an absolute right to on-base quarters.
- B. Commanders may not order military members to initiate allotment actions to satisfy child support or alimony payments. They also may not order military members to make support payments although they may take administrative action for failure to provide support as required by AFI 36-2906 and UCMJ Article 134. However, courts of competent jurisdiction may order such support.
- C. Involuntary allotments for child and spousal support are possible (see Uniformed Services Former Spouse’s Protection Act Rights and Benefits, below).
- D. Garnishment action may be initiated against federal wages for nonpayment of child support or alimony, but you must follow individual state rules on initiation and issuance of garnishment order.

**V. Uniformed Services Former Spouse’s Protection Act Rights and Benefits**

The Uniformed Services Former Spouse’s Protection Act (USFSPA) was designed to protect the financial rights of military dependent spouses in the event of a divorce.

A. Division of Retirement Pay and Direct Payment: USFSPA does not create an automatic entitlement to a portion of a military member’s retirement pay based on the number of years married or on the number of years of active duty service. However, under USFSPA, the former spouse of a retired military member may qualify for direct payment of a portion of the member’s retirement pay through involuntary allotment. A number of qualifications must be met before direct payment under the Act can be ordered.

1. First, the former spouse must have been awarded a portion of the military member’s retirement pay by a court of a State or United States territory. Currently, all states except Alabama have either statutory or common law provisions permitting the division of military retirement pay as a marital asset. Only decrees issued by courts having jurisdiction over a military member by reason of the military member’s residence (other than because of military assignment); the member’s domicile in the State or territory; or the member’s consent will be

recognized for purposes of direct payments. If a decree is issued in a jurisdiction other than those listed above, it will not affect the validity of the decree nor will it affect the military member's obligations under the decree. However, it will render the former spouse ineligible for direct payments from the government under USFSPA. Also, foreign divorces must be recognized by a competent court of a State or territory under USFSPA to qualify. Even so, it often will be difficult to qualify under a foreign divorce decree. Therefore, the choice of forum for divorce is very important if USFSPA protections are applicable.

2. Second, the divorce decree must award a specific dollar amount, or a specific percentage of the retirement pay. Therefore, the terms of the decree must be clear and unambiguous. Vagueness in drafting may render an otherwise eligible applicant ineligible.

3. Third, the marriage must have lasted for a minimum period of 10 years, and during that 10 years, the military member must have served at least 10 years of retirement creditable service. If the marriage is of less than 10 years duration or the military member has less than 10 years of service during the marriage, direct payment under USFSPA is inapplicable. However, USFSPA's inapplicability does not affect the dependent spouse's ability to receive a portion of the member's retirement pay under state law. It only affects direct payment through involuntary allotment by the government. It also does not apply to direct payment of retired/retainer pay for child support or alimony.

4. Fourth, the court order or decree awarding a portion of the military member's retirement pay must demonstrate that the provisions of the Servicemember's Civil Relief Act were complied with. This provision is only mandatory in those cases in which a divorce was initiated while the military member was on active duty.

Only disposable retirement pay is eligible for award under USFSPA. Disposable retirement pay is defined as gross pay less authorized deductions, including Survivor Benefit Plan Premiums. Direct payments under USFSPA may not exceed 50% of disposable retirement pay.

Direct payments under USFSPA may only be made prospectively. That is to say, payments may only be made from the time of the acceptance of the application forward. The government will not pay arrearages unless a valid garnishment order is produced. Otherwise, arrearages may be collected through the regulation collection procedures which normally include the court's power to enforce its decrees by its powers of civil and criminal contempt.

A former spouse need not wait until the military member retires to apply for direct payment. Upon acceptance of the application and meeting all of the Act's requirements, payments will begin automatically 90 days after the military member retires. A court may not order a military member to retire early so a spouse can collect retirement pay.

To apply for direct payment, the former spouse should send a completed DD Form 2293, a certified copy of the divorce decree ordering a division of the retirement pay, and other required or specified documents to the appropriate address listed on the form. The certified copy of the divorce decree must have been certified within 90 days preceding service on the Defense Finance and Accounting Office.

The DD Form 2293 may also be used to apply for direct alimony or child support payments. These payments are not governed by USFSPA or its restrictions. USFSPA applies only to direct payments of retirement pay.

B. Benefits under USFSPA

1. Generally, former spouses of military members are not entitled to any military benefits by virtue of their marriage to a military spouse. Dependent children normally retain most benefits after a divorce without regard to the custodial parent.

2. The most significant exception to the rule against former spouses retaining military benefits is a provision under USFSPA which deals with unremarried former spouses of military members, who were married to the military member for at least twenty years, during which period the military member performed at least twenty years of retirement creditable service. If this provision is applicable, former spouses may receive full AAFES and Commissary privileges, retain their military identification card, and are eligible for medical treatment in military medical facilities on a space available basis, and CHAMPUS coverage if they certify in writing that they are not covered under another employer-sponsored health plan. Former spouses over the age of 65 are not eligible for CHAMPUS medical care unless they have a Letter of Disallowance for Medicare, Part A, from the Social Security Administration.

3. If the former spouse was married to a military member for 20 years, and the military member performed over 20 years of creditable service, and there was only 15 or more years overlap of the marriage and creditable service, the former spouse may be eligible for some transitional medical benefits. Contact the CHAMPUS benefits advisor for more information.

This pamphlet only provides a general overview of the USFSPA. You should not rely on the pamphlet alone if you think you qualify for coverage under the Act. For more information about how the USFSPA applies to you, contact an attorney or your legal assistance office.

For more information about how separation and divorce may affect your legal rights, consult an attorney or your legal assistance office.

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