

COURT OF APPEALS  
DIVISION II

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No. 38831-6-II  
THE COURT OF APPEALS STATE OF WASHINGTON  
DIVISION II BY E  
OF THE STATE OF WASHINGTON DEPUTY

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GLENN DAVID MCDERMOTT

Appellant/Petitioner,

and

KRISTEN JENKINSON-MCDERMOTT

Respondent

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ON APPEAL FROM PIERCE COUNTY SUPERIOR COURT  
(Hon. Ronald E. Culpepper)

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APPELLANT'S REPLY BRIEF

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CHARLES F. SCHMIT, JR.  
WSBA No. 7447  
Morton McGoldrick, P.S.  
820 "A" Street, Suite 600  
Tacoma, WA 98402  
(253) 627-8131

ORIGINAL

TABLE OF CONTENTS

	<u>Page(s)</u>
I. STATEMENT OF THE CASE . . . . .	1
II. RESPONSE TO RESPONDENT/CROSS- APPELLANT’S CROSS APPEAL. . . . .	4
A. The Trial Court did not abuse its discretion in admitting and considering the “declarations and exhibits” offered by Colonel McDermott on reconsideration. . . . .	4
III. RESPONSE TO RESPONDENT’S BRIEF . . . . .	10
A. Standard of Review . . . . .	10
B. Time Rule Method. The time rule method is not the correct method of implementing the intent of the parties to award Ms. Jenkinson-McDermott 50% of Col. McDermott’s military pension valued at the Date of separation, after excluding his Pre-marriage military service. . . . .	10
C. Intent of the Parties. The entire record before the trial court and this Court supports the conclusion that the intent of the parties at the time the CR 2A Agreement and Decree was to divide Col. McDermott’s military pension as of the date of separation, July 26, 2009, excluding his pre-marriage service, i.e., the hypothetical award method. . . . .	13
D. Attorney’s Fees. Ms. Jenkinson-McDermott Should not be awarded her attorney’s fees on Appeal either based on the merits of the issues On appeal or on her alleged economic need for fees. . . . .	21

IV.	CONCLUSION .....	24
V.	APPENDIX .....	A-1

Department of Defense Finance Management  
Regulation, DoD 7000.14-R, Volume 7B,  
Chapter 29

## TABLE OF AUTHORITIES

### STATE CASES

<u>Cases:</u>	<u>Page(s)</u>
<i>Marriage of Bulicek</i> , 59 Wn. App. 630, 800 P.2d 394 (1990). . . . .	12, 14, 24
<i>Chaffee vs. Chaffee</i> , 19 Wn.2d 607, 625, 145 P.2d 244 (1943). . . . .	12
<i>Marriage of Chavez</i> , 80 Wn. App. 432, 909 P.2d 314 (1990). . . . .	11, 12, 14, & 24
<i>Coons v Coons</i> , 6 Wn. App. 123, 129, 491 P.2d 1333 (1971). . . . .	22
<i>Everett vs. Estate of Sumstad</i> , 95 Wn. 2d. 853, 855, 631 P.2d 366 (1981). . . . .	8
<i>Holiday vs. Merceri</i> , 49. Wn. App. 321, 324, 742 P.2d 127 (1987). . . . .	9
<i>Riley Pleas, Inc. vs. State</i> , 88 Wn.2d 933, 568 P.2d 780 (1977). . . . .	8, 12
<i>Marriage of Rockwell</i> , 141 Wn. App. 235, 170 P.3d 572 (2007). . . . .	11, 12, 13, 14, 21, & 24
<i>State vs. Neal</i> , 144 Wn.2d 600, 609, 30 P.3d 1255 (2001) . . . . .	8
<i>Wagner Development, Inc. vs. Fidelity and Deposit Co. of Maryland</i> , 95 Wn. App. 896, 997 P.2d 639 (1999). . . . .	7

*Washington Shoe Manufacturing Co. vs. Duke*,  
126 Wash. 510 218 P. 232 (1923)..... 8

**MISCELLANEOUS**

Department of Defense Finance Management Regulation  
DOD 7000.14-R, Volume 7B, Chapter 29 at page 29-10 ..... 1, 11 &  
Appendix A-1

## **I. STATEMENT OF THE CASE**

There are portions of Ms. Jenkinson-McDermott's statement of the case that are inaccurate or misleading and warrant a reply.

At page 3 of her brief, Ms. Jenkinson-McDermott referred to Ms. Grady's April 4, 2008 letter which enclosed her proposed Supplemental Decree Re Division of Military Pension (CP 180-186). Ms. Jenkinson-McDermott incorrectly characterized that order as a "time rule method" order and in doing so cited only the first subparagraph of paragraph 3(g) of Ms. Grady's order. The second sub-paragraph of 3(g) provided for the application of cost of living allowances (COLAs) that would be applied to military retired pay between the date of the parties' separation (7/26/06) and Col. McDermott's actual date of retirement. Pursuant to this subparagraph, those COLAs would be applied to the date of separation amount of Col. McDermott's retired pay (\$2,127.26), that was awarded to Ms. Jenkinson-McDermott in the first subparagraph. This second omitted paragraph, coupled with the first paragraph, showed Ms. Grady's attempt to articulate the hypothetical award method recognized by DFAS and codified in the Department of Defense Finance Regulation DoD 7000.14-R, Volume 7B, Chapter 29 (a copy of this regulation is provided in the Appendix to this Brief).

At page 4 of her brief, Ms. Jenkinson-McDermott stated that, “Despite repeated requests, Mr. Schmit did not provide further comment regarding the proposed Supplemental Decree.” This statement is inaccurate and misleading. First, there is nothing in the record other than Mr. Tomlinson’s statement, to document these “repeated requests.” However, more importantly, Col. McDermott, through counsel, provided Mr. Tomlinson with his concerns about Ms. Jenkinson-McDermott proposed Supplemental Decree.

On June 27, 2008, Mr. Tomlinson and the undersigned had a phone conversation wherein Col. McDermott’s concerns were discussed, the primary one being the inclusion of a paragraph regarding additional compensation for Ms. Jenkinson-McDermott in the event that Col. McDermott received VA Disability. (CP 92) Ms. Jenkinson-McDermott finally agreed to remove this paragraph and others, in her second revised Supplemental Decree which she filed on November 2, 2008, a month after filing her Notice of Presentation. (CP 45)

On September 12, 2008, Mr. Tomlinson and the undersigned met at the Pierce County Courthouse and discussed at length the VA Disability issue and the case in general. (CP 92)

On October 3 and October 28, the undersigned wrote letters to Mr. Tomlinson that detailed the provisions that Col. McDermott wanted included in the military order. In both letters the hypothetical award method, as it applied to Col. McDermott's retirement, was discussed at length. (CP 92, 94 – 95)

Therefore, as the Court can see, Col. McDermott, through counsel, had frequent communications with Ms. Jenkinson-McDermott attorney through the date that she filed her Notice of Presentation in an attempt to correct the defects in Ms. Jenkinson-McDermott's proposed Supplemental Decree.

At page four of her brief, Ms. Jenkinson-McDermott stated that the Supplemental Decree attached to her October 3, 2008 Notice of Presentation of Supplemental Decree utilized the time rule method. As will be discussed in the reply section of this brief, this Supplemental Decree actually utilized the hypothetical award method, the same method earlier proposed by Ms. Grady in her April 4, 2008 proposed military order.

At page 7 of her brief, Ms. Jenkinson-McDermott stated that the undersigned, for the first time, objected to the time rule method on November 12, 2008. This too is incorrect. As previously noted, Col.

McDermott, through counsel, voiced his objections to awarding his former wife a percentage of his military pension calculated as of the date of his retirement by phone, in person, and in two letters (October 3 and October 28), both of which asserted that the hypothetical award method should be used.

Lastly, at page 8 of her brief, Ms. Jenkinson-McDermott stated that the Qualifying Court Order that Ms. Grady had prepared to award Col. McDermott his portion of Ms. Jenkinson-McDermott's date of separation FERS Pension (i.e., the hypothetical award method) had never been signed by both of the parties. This is misleading at best. What Ms. Jenkinson-McDermott avoided to say was that this order had been agreed to by both parties. Col. McDermott agreed to it because it was prepared by his attorney, Ms. Grady. Ms. Jenkinson-McDermott agreed to it, because she and her attorney had, in fact, signed it and returned it to Mr. Bjornsen, who had by that time replaced Ms. Grady as and Col. McDermott's attorney, instructing Mr. Bjornsen to enter the FERS Qualifying Court Order with the court. (CP 39, 69, 134)

## **II. RESPONSE TO RESPONDENT/ CROSS-APPELLANT'S CROSS APPEAL**

**A. The Trial Court did not abuse its discretion in admitting and considering the "declarations and exhibits" offered by Colonel McDermott on reconsideration.**

Ms. Jenkinson-McDermott has focused her argument in her cross appeal on CR 59(4) “newly discovery evidence.” However, as she correctly noted, Colonel McDermott’s Motion for Reconsideration was not based on just CR 59(4). It was also based on CR 59(3), (7), (8), and (9) and it is submitted that CR 59(7) and especially CR 59(7) were appropriate basis for the trial court’s decision to consider the information provided by Col. McDermott on reconsideration.

The focal point of this cross appeal is the FERS Qualifying Court Order prepared by Ms. Grady which was agreed to by Ms. Jenkinson-McDermott and her attorney. Ms. Jenkinson-McDermott wants this order excluded from the appellate record, not because it is irrelevant and not because she was unaware of its existence prior to it being offered to the trial court, but simply because it is the best evidence that the parties intended the CR 2A Agreement and Decree to award a portion of each parties’ date of separation retirement. Simply put, the FERS Qualifying Court Order disproves Ms. Jenkinson-McDermott’s argument that the time rule method was intended by the parties and should be used to implement the Decree. For the following reasons, we believe the trial court made the correct decision in admitting and considering this order.

Ms. Grady's FERS Qualifying Court Order (CP 130-134) was not submitted to the trial court on reconsideration as newly discovered evidence. It was a re-submission of evidence that had already been presented to the trial court in response to Ms. Jenkinson-McDermott's November 14, 2008 motion.

The FERS order was referred to and authenticated by Col. McDermott in his November 12, 2008 declaration, which had been properly filed with the trial court. (CP 67) In that declaration, Col. McDermott told the trial court that the FERS order awarded him \$1,561 as his portion of his former wife's FERS pension, which was valued as of the date of separation and that the order evidenced the intent of the parties to do the same for Ms. Jenkinson-McDermott's portion of Col. McDermott's military pension. (CP 68) In his declaration, Col. McDermott also told the trial court that his former wife and her attorney agreed to and actually signed the FERS order, further confirming the intent of the parties to award 50% of the date of separation values of their respective pensions. (CP 69) Nothing was filed by Ms. Jenkinson-McDermott to refute what Col. McDermott said in his declaration regarding the FERS order. Therefore, a copy of the signed FERS order was not new evidence, but merely supplemental evidence, the substantive portion of which had

already been properly presented to the trial court through Col. McDermott's declaration. It was also the document that the trial court actually looked for in preparing for the November 14, 2008 hearing. (RP 29) Therefore, we believe that the FERS order was properly resubmitted to the trial court on reconsideration, not as new evidence, but as previously offered evidence that the trial court should consider in order to see that substantial justice was done in this case.

Ms. Jenkinson-McDermott has cited *Wagner Development, Inc. vs. Fidelity and Deposit Co. of Maryland*, 95 Wn. App. 896, 997 P.2d 639 (1999) in support of her argument that the trial court should not have considered the FERS order. However, *Wagner Development, supra*, is distinguishable from this case in that *Wagner Development* attempted to present on reconsideration of a summary judgment ruling, evidence that not only was never offered at the summary judgment hearing, but evidence that actually raised a new theory of recovery for *Wagner Development*. Not surprisingly the trial court's decision not to consider this new evidence was affirmed on appeal. In this case, however, the FERS order was actually offered at the November 14, 2008 hearing and merely served to supplement the evidence already submitted to the court through Col.

McDermott's declaration. It did not present to the trial court any new theory or issue.

The decision to admit evidence lies within the sound discretion of the trial court and that decision should not be overturned absent a manifest abuse of discretion. *State vs. Neal*, 144 Wn.2d 600, 609, 30 P.3d 1255 (2001). The trial court in this case was being asked to determine the intent of the parties when they entered into their CR 2A Agreement. That agreement was a contract, the construction of which is governed by the legal principles applicable to contracts. *Riley Pleas v. State*, 88 Wn.2d 933, 937-938, 568 P.2d 780 (1977). In determining the intent of the parties with regards to their CR 2A Agreement, the trial court was required to analyze the terms of the parties' agreement "in light of the surrounding circumstances." *Everett vs. Estate of Sumstad*, 95 Wn. 2d. 853, 855, 631 P.2d 366 (1981). The trial court was also to look at the outward expressions and acts of Col. McDermott and Ms. Jenkinson-McDermott in determining the parties' intent. *Washington Shoe Manufacturing Co. vs. Duke*, 126 Wash. 510, 516, 218 P. 232 (1923). And what was the most significant outward expression and act evidencing Col. McDermott and Ms. Jenkinson-McDermott's intent with regards this CR 2A Agreement? The FERS order prepared by Ms. Grady and agreed

to by Ms. Jenkinson-McDermott and her attorney was that significant outward expression and act.

By admitting the FERS order into the record, the trial court was considering the very evidence it was required to consider in order to determine the parties' intent. Therefore, in order to prevail on her cross-appeal, Ms. Jenkinson-McDermott must convince this Court that the trial court abused its discretion in considering this crucial "outward expression and act" of the parties, one that would have helped it to discern the intent of the parties' CR 2A contract. To find an abuse of discretion, Ms. Jenkinson-McDermott must convince this Court that no reasonable person would have made the same decision as the trial court when it considered the order about which Col. McDermott had already testified, to which Ms. Jenkinson-McDermott had agreed and over which the trial court had already expressed curiosity. *Holaday vs. Merceri*, 49. Wn. App. 321, 324, 742 P.2d 127 (1987).

The trial court's decision to consider the FERS order was consistent with its responsibility to view "all of the surrounding circumstances." It was logical, legally proper and most certainly not an abusive use of its discretion. The FERS order is properly before this Court in the appellate record for this Court's de novo consideration.

### **III. RESPONSE TO RESPONDENT'S BRIEF**

**A. STANDARD OF REVIEW.** We agree that the review of the trial court's construction of the CR 2A Agreement and Decree is *de novo*.

**B. TIME RULE METHOD:** The time rule method is not the correct method of implementing the intent of the parties to award Ms. Jenkinson-McDermott 50% of Col. McDermott's military pension valued at the date of separation, after excluding his pre-marriage military service.

Ms. Jenkinson-McDermott has mischaracterized our argument regarding the hypothetical award method. The hypothetical award method is not a better and more appropriate method of dividing Col. McDermott's pension because "it does not give the wife the benefit of any of the husband's pay increases due to promotion or service time either prior to the marriage or after the separation." (brief of Ms. Jenkinson-McDermott at 14) The hypothetical award method is the appropriate method and the only method to implement the CR 2A Agreement and Decree and the intent of the parties to divide each parties' date of separation pension benefit after excluding their respective pre-marriage federal service.

Contrary to Ms. Jenkinson-McDermott's assertion at page 14 of her brief, there is no court in the State of Washington that we are aware of (other than the trial court in this case), that has ever rejected the hypothetical award method or a method similar to it. The court in *The*

*Marriage of Rockwell*, 141 Wn. App. 235, 170 P.3d 572 (2007) chose the time rule method over the subtraction method. It never addressed the viability of the hypothetical award method because neither party in that case argued for its use. Moreover, the subtraction method and the hypothetical award method are different methods.<sup>1</sup> According to the Department of Defense Finance Management Regulation DoD 7000.14-R, Volume 7B, Chapter 29 at page 29-10, the subtraction method is not an accepted method of dividing a military pension. The hypothetical award method is, as is the formula method, DFAS's name for the time rule method.

Ms. Jenkinson-McDermott has further mischaracterized our argument when at page 16 of her Brief, she stated,

“Here, the husband seeks to distinguish the rules in *Bulicek* and *Chavez* on the basis that in the case at hand, the husband had years of service both prior to the marriage and after separation, unlike the servicemen in *Bulicek* and *Chavez*.”

Ms. Jenkinson-McDermott mischaracterizes the distinction between this case and *Marriage of Bulicek* and *Marriage of Chavez*. That is because

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<sup>1</sup> As the Corrected Calculation of Retired Pay as of July 26, 2006 (Date of separation) (CP 201) demonstrates, using the hypothetical method to exclude Col. McDermott pre-marriage service only reduces Ms. Jenkinson-McDermott's percentage of his date of separation retired pay by 5.21% (38.14% vs. 32.93%), not the significant disparity created by using the subtraction method as noted in *Rockwell*, *supra*, at 253.

this case should be determined not on what has “typically” been done in the past with regards to the division of military pensions, but on how Col. McDermott and Ms. Jenkinson-McDermott contracted to divide their respective pensions through their CR 2A Agreement and as evidenced by their acts and documents prepared subsequent to the CR 2A Agreement. That is why *Marriage of Rockwell*, supra, is no more dispositive of the issue before this Court than is *Marriage of Bulicek*, supra, or *Marriage of Chavez*, supra.

A CR 2A Agreement is a contract. *Riley Pleas, Inc. vs. State*, supra, at 937-938. In this case, it was Col. McDermott and Ms. Jenkinson-McDermott’s contract on how they agreed to divide their respective pensions. As with any contract, a party to a CR 2A Agreement can agree to any term that he or she wishes, even if a term is disadvantageous to them. *Chaffee vs. Chaffee*, 19 Wn.2d 607, 625, 145 P.2d 244 (1943). Therefore, if, in the CR 2A Agreement, Ms. Jenkinson-McDermott had contracted to receive nothing of Col. McDermott’s pension or only a fixed dollar sum of \$100 per month, no court could have said that she could not have so contracted and no court could have required her to use the “typical” time rule method to determine her pension interest. This is the distinction between *Rockwell*, supra, *Bulicek*, supra, *Chavez*, supra, and

this case. None of the holdings in those cases were based on a contract between the parties. It is therefore submitted that the focus of this Court should be squarely on the intent of the CR 2A Agreement as evidenced by the parties' subsequent actions in implementing their contract. We believe the record before this Court demonstrates an intent of the parties to divide their pensions in a non-typical manner, where each would receive 50% of the other's monthly pension payment determined as of the date of separation and also excluding their pre-marriage federal service. If this Court finds that to have been their intent, as we believe the record shows, then the only method that can accurately implement this intent is the hypothetical award method, a method specifically approved by DFAS and the Department of Defense. The fact that the time rule/formula method has been typically used in other cases, to include *Marriage of Rockwell*, supra, is not relevant. This case must be governed by the parties' contract and the evidence of their intent to implement that contract.

**C. INTENT OF THE PARTIES: The entire record before the trial court and this Court supports the conclusion that the intent of the parties at the time of the CR 2A Agreement and Decree was to divide Col. McDermott's military pension as of the date of separation, July 26, 2009, excluding his pre-marriage military service, i.e., the hypothetical award method.**

In support of her argument, Ms. Jenkinson-McDermott has asserted that the Supplemental Decree Re Division of Military Pension

entered by the trial court on November 11, 2008 is consistent with the Decree and with the “preferred practice” discussed in *Marriage of Bulicek, supra*; *Marriage of Chavez, supra*; and *Marriage of Rockwell, supra*. While it is admitted that the time rule/formula method used in the November 11, 2008 Supplemental Decree may be consistent with the method discussed in the above cases, the evidence in the record shows that the order is not consistent with the CR 2A Agreement, the Decree, or the intent of the parties.

Ms. Jenkinson-McDermott asserts at page 20 of her brief that the November 11, 2008 Supplemental Decree was substantially unchanged from the Supplemental Decree proposed by Colleen Grady in her April 4, 2008 letter to Ms. Jenkinson-McDermott’s attorney. The obvious implication is that both orders were identical in substance and that Col. McDermott, through Ms. Grady’s April 4, 2008 proposed order, must have also intended to use the time rule/formula method. However, in making this argument, Ms. Jenkinson-McDermott has, again, conveniently neglected to cite the entire paragraph 3(g) of Ms. Grady’s order. The reason for this omission is that, if one does look at the entire paragraph, it becomes clearly evident that the April 4, 2008 Supplemental Decree was intended to use the hypothetical award method, just as was the FERS

Qualifying Court Order prepared by Ms. Grady and approved and signed by Ms. Jenkinson-McDermott and her attorney.

As discussed at page 27 of Col. McDermott's opening brief, Ms. Grady's April 4, 2008 was significantly different from the Supplemental Decree finally presented by Ms. Jenkinson-McDermott to the trial court for entry on November 11, 2008. Ms. Grady's order stated that it was Col. McDermott's date of separation retired pay that was to be divided, not his actual retired date pay. This was clearly evidenced by the fact that the order actually contained the value of Col. McDermott's retired pay as of the date of separation, as calculated in the attachment to Ms. Grady's April 4, 2008 letter. (CP 187-188) This date of separation retirement amount was \$5,599 per month. The order then told DFAS what Ms. Jenkinson-McDermott was to be awarded from this \$5,599 date of separation retirement, i.e., \$2,127.26. (CP 53; 150)

If Ms. Grady's order had intended to award a portion of Col. McDermott's yet to be determined date of retirement retired pay, there would have been absolutely no reason for the order to even mention the value of Col. McDermott's date of separation retirement or Ms. Jenkinson-McDermott's portion of it. The only reason for including \$5,599 and \$2,127.26 in the order was to give DFAS the figure it was to

use for Ms. Jenkinson-McDermott's share of the date of separation retirement.

Ms. Grady's April 4, 2008 order further evidenced the intent of the parties to implement the CR 2A Agreement and Decree to award a portion of the date of separation retirement in the subparagraph of paragraph 3(g) that followed the one paragraph that Ms. Jenkinson-McDermott cited. In that subparagraph, consistent with the hypothetical award method approved by DFAS, COLA's applied to military retired pay subsequent to the date of the parties' separation and subsequent to Ms. Jenkinson-McDermott's date of separation award of \$2,127.26, would be applied to that award amount, up through Col. McDermott's actual date of retirement. The end result would be that Ms. Jenkinson-McDermott's \$2,127.26 would be treated as if Col. McDermott had actually retired on July 26, 2006 and each year thereafter she would have received the benefit of annual COLAs just as Col. McDermott would. This application of COLAs is consistent with the procedure followed by DFAS when it implements a hypothetical award.

In her brief at page 21, Ms. Jenkinson-McDermott further argues that Col. McDermott submitted pay charts, discharge information, etc. in support of his argument to the trial court and that neither this

information or the information needed by DFAS in order to implement a hypothetical award (colonel with 19 years 10 months service with an active duty base pay of \$7,634.10 - page 22 of her brief) were discussed by the parties at the time of settlement or mentioned in the Decree. It is acknowledged that the record before this Court does not indicate that this specific information was discussed at the time of settlement or at the time entry of the Decree, but that does not change the parties' intent. This specific information about Col. McDermott's military pension was the information to be used to implement the CR 2A Agreement and Decree. It is clear from both the CR 2A Agreement and the Decree that the parties' agreement to award Ms. Jenkinson-McDermott a portion of Col. McDermott's date of separation retirement was "To be accomplished by a separate order. . ." subsequent to the Agreement and the Decree, (CP 17; 25) which explains why neither contained the information necessary to implement the subsequent order.

In her brief at page 22 – 23, Ms. Jenkinson-McDermott further argues that the FERS Qualifying Court Order prepared by Ms. Grady and approved and signed by Ms. Jenkinson-McDermott and her attorney, did not evidence her agreement to use the hypothetical award method to determine Col. McDermott's interest in her date of separation

FERS pension or her interest in Col McDermott's date of separation military retired pay. In an attempt to divert focus on the fact that she actually agreed to the order awarding Col. McDermott his portion of her hypothetical date of separation FERS pension, Ms. Jenkinson-McDermott has pointed to paragraph 2(b) of her attorney's December 3, 2007 letter to Ms. Grady, wherein he stated:

"Paragraph 7 needs to be revised to provide that Dr. McDermott will received 50% of the marital portion of the gross monthly annuity Kristen receives, with a marital portion being determined by multiplying the gross monthly annuity by a fraction, the numerator of which is the number of months of service between the date of marriage and the date of separation, and the denominator being the total months of service." (CP 30)

Ms. Jenkinson-McDermott now asserts that this sentence evidenced a clear indication of the parties' intent to use the time rule/formula method in dividing her FERS pension. Taken out of context of the entire FERS Qualifying Court Order, one might reach that conclusion. However, the sentence cannot be read out of the context.

The issue that Ms. Jenkinson-McDermott's attorney was addressing in paragraph 2(b) of his December 3, 2007 order was an error in Ms. Grady's proposed FERS Qualifying Court Order that awarded Col. McDermott a portion of Ms. Jenkinson-McDermott date of dissolution

retirement, instead of the date of separation retirement as agreed to in the CR 2A Agreement and Decree. Since Ms. Jenkinson-McDermott had pre-marriage federal service just as Col. McDermott had pre-marriage military service (CP 138), the fraction described in paragraph 2(b) was simply a narrative of Col. McDermott's percentage of what he "earned" during Ms. Jenkinson-McDermott's total months of service, which were her pre-marriage service in addition to the marital service to the date of separation. This conclusion is clearly evidenced by the fact that after Ms. Grady corrected her error and changed "date of dissolution" to "date of separation," Ms. Jenkinson-McDermott and her attorney agreed to and signed the FERS Qualifying Court Order which specifically awarded Col. McDermott a sum certain as his portion of her date of separation, not date of Decree, FERS pension: \$771.56, together with the application of subsequent cost of living allowances found in the second subparagraph to paragraph 3(g) of the FERS Order. (CP 153) If paragraph 2(b) of the December 3, 2007 letter and Ms. Grady's agreed FERS Qualifying Court Order had been intended to be a time rule/formula order as now argued by Ms. Jenkinson-McDermott, there never could have been a sum certain awarded to Col. McDermott in the FERS Qualifying Court Order to which she agreed. Because in order to do so, one would have had to have known

Ms. Jenkinson-McDermott's actual date of retirement monthly pension, which is, of course, impossible since Ms. Jenkinson-McDermott has not retired. Instead, the agreed FERS order stated that, "As of the date of separation, July 26, 2006, the Respondent/Employee's Retirement is valued at \$1,561 monthly" (CP 153) and then it awarded Col. McDermott his \$771.50 portion of that hypothetical date of separation pension. (CP 158)

Moreover, if that portion of paragraph 2(b) of Ms. Jenkinson-McDermott's attorney's December 3, 2007 letter was intended to be such a "clear articulation of the time rule method," (page 23 of Ms. Jenkinson-McDermott's brief) then why was not the time rule/formula method, with the "months of marriage divided by the months of total service to the date of retirement times the monthly retirement pension divided by two" language used in the Supplemental Decree Re Division of Military Pension that Ms. Jenkinson-McDermott's attorney sent to Ms. Grady in his December 3, 2007 letter? (CP 33-36) That order merely reiterated the language in the CR 2A Agreement and Decree by awarding Ms. Jenkinson-McDermott ". . . the right to receive 50% of the disposable retired pay from the military pension of Petitioner/Member Glenn David McDermott, earned between the date of marriage, July 11, 1981, and the

date of the parties' separation, July 26, 2006." (CP 33-34) The inescapable conclusion is that such a time rule method order would have been inconsistent with the method used to divide Ms. Jenkinson-McDermott's FERS pension, which she and her attorney agreed should be a portion of her date of separation pension, excluding her pre-marriage service and not a portion of her actual, yet to be determined, date of retirement pension.

**D. ATTORNEY'S FEES. Ms. Jenkinson-McDermott should not be awarded her attorney's fees on appeal either based on the merits of the issues on appeal or on her alleged economic need for fees.**

Col. McDermott obviously asserts that his appeal has merit and that this appeal should not be decided by the holding of *Marriage of Rockwell*, supra, but should be based on the specific facts of this case, which support Col. McDermott's position that the parties intended to award Ms. Jenkinson-McDermott a portion of his date of retirement military pension, less that portion earned by him prior to marriage and to implement this intent, the hypothetical award method should have been adopted by the trial court.

However, assuming arguendo, that this Court were to conclude that the trial court properly utilized the time rule/formula method and that Col. McDermott's appeal has no merit, in order to award Ms.

Jenkinson-McDermott attorney's fees on appeal, she still must also demonstrate a need for fees. *Coons v Coons*, 6 Wn. App. 123, 129, 491 P.2d 1333 (1971). We do not believe Ms. Jenkinson-McDermott will be able to demonstrate that need.

Ms. Jenkinson-McDermott claims that Col. McDermott's income is at least 50% more than hers. There is nothing in the record to show Ms. Jenkinson-McDermott's current income, which makes it difficult to address that allegation. We do know, however, that from her November 14, 2006 FERS Employee Data document (CP 129), Ms. Jenkinson-McDermott has at least 25 years of federal service and that in 2006 the average of her three highest salaries was \$84,868 (CP 129). According to discovery answers provided by Ms. Jenkinson-McDermott in this case, her 2007 income from all sources was \$165,265, more than Col. McDermott's income. (CP 85) All of these facts would suggest a significant current monthly income. It is submitted that a person with no dependents and with an annual income of \$165,000 has the ability to pay his or her fees. The fact that Col. McDermott's salary may be more than Ms. Jenkinson-McDermott's may establish his ability to pay fees but it does not, in and of itself, establish that Ms. Jenkinson-McDermott is unable to pay her own fees. *Coons*, supra, at 128.

In addition, the fact that it took over one year from the date of the Decree to enter an order awarding Ms. Jenkinson-McDermott a portion of Col. McDermott's military retired pay should not be a factor in awarding fees against Col. McDermott. This was not a case where from day one Ms. Jenkinson-McDermott was proposing the Supplemental Decree that the trial court eventually adopted. As previously noted, Ms. Jenkinson-McDermott changed her proposed Supplemental Decree twice after she filed her October 3, 2008 Notice of Presentation of Supplemental Decree Re Division of Military Pension and up until November 5, 2008, Ms. Jenkinson-McDermott was still insisting on provisions in her order that were not agreed upon in the CR 2A Agreement and not found in the Decree. The fact that Ms. Jenkinson-McDermott eventually agreed to delete those paragraphs was an admission that those paragraphs were improperly included in her proposed orders and were in and of themselves a cause for delaying the entry of an order.

In addition, we do not believe that this matter can be accurately described as "highly litigated" (page 26 of Ms. Jenkinson-McDermott's brief). If anything, this was a relatively non-contentious case with an agreed settlement, agreed Decree and only two court

hearings: Ms. Jenkinson-McDermott's motion to present and Col. McDermott's motion for reconsideration.

Given all of the above and what we believe the evidence will show regarding Ms. Jenkinson-McDermott's income, we believe that Ms. Jenkinson-McDermott will not be able to demonstrate that she cannot pay her own fees and that she has a need for an award of fees. As a result, fees cannot be awarded to Ms. Jenkinson-McDermott.

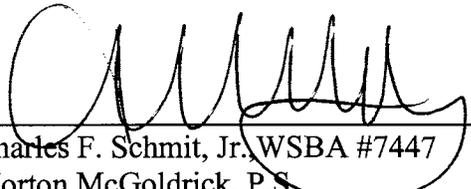
#### **IV. CONCLUSION.**

Neither *Bulicek*, supra, *Chavez*, supra, or *Rockwell*, supra are dispositive since none of these holdings were based on CR 2A Agreements and the intent of the parties to divide a pension.

The overwhelming evidence before this Court supports a finding that both Col. McDermott and Ms. Jenkinson-McDermott intended to award each other 50% of their respective hypothetical date of separation pension payment, less what was earned by them prior to marriage. The time rule method Supplemental Decree Division of Military Pension does not divide Col. McDermott's military retired pay consistent with this intent and the trial court erred when it entered said order. The hypothetical award method order proposed by Col. McDermott (CP 113-

117) was the order that properly implemented the parties' intent and should have been entered by the trial court.

RESPECTFULLY SUBMITTED this <sup>9th</sup>9 day of November, 2009.

By:   
Charles F. Schmit, Jr., WSBA #7447  
Morton McGoldrick, P.S.  
Attorneys for Appellant  
820 "A" Street, Suite 600  
Tacoma, WA 98402  
(253) 627-8131

APPENDIX  
A-1

**SUMMARY OF MAJOR CHANGES TO  
DoD 7000.14-R, VOLUME 7B, CHAPTER 29  
“FORMER SPOUSE PAYMENTS FROM RETIRED PAY”**

All changes are denoted by blue font

Substantive revisions are denoted by a ★ preceding the section,  
paragraph, table, or figure that includes the revision

Hyperlinks are denoted by underlined, bold, italic, blue font

PARA	EXPLANATION OF CHANGE/REVISION	PURPOSE
All	Office of the Assistant General Counsel for Garnishment Operations (DFAS-HGA/CL) made discretionary changes to clarify processes involved with applications made under the Uniformed Services Former Spouses Protection Act (USFSPA), Title 10, United States Code, Section 1408.	Update
TOC	Updated TOC with new section titles and section numbering; removed paragraph numbers from the TOC.	Update
2901	Reworded Purpose section.	Update
2902	Updated the Definitions section with new verbiage to some existing definitions. adding some new definitions, and eliminating others.	Update
290301	Created a new section 2903 (Awards That Can Be Collected Under the USFSPA).	Add
290401	Updated information on the application process of former spouses.	Update
290402	Added paragraph on possible need to provide additional documentation during application.	Add
290403	Added fax numbers to DFAS-Cleveland contact information.	Add
290404	Added paragraph on when former spouses may apply.	Add
290604	Added language on the “10/10” eligibility rule.	Add
290605	Added paragraph concerning state law jurisdiction.	Add
290606	Added paragraph on consent to a separation agreement.	Add
290607	Added paragraph on acceptable formula awards.	Add
290608	Added paragraph on acceptable hypothetical Retired Pay award.	Add
290609	Shortened and revised information concerning Divorce, Dissolution, Annulment, or Legal Separation with regard to a Member’s Military Retired Pay.	Update

<p style="text-align: center;"><b>SUMMARY OF MAJOR CHANGES TO DoD 7000.14-R, VOLUME 7B, CHAPTER 29 “FORMER SPOUSE PAYMENTS FROM RETIRED PAY”</b></p> <p style="text-align: center;">All changes are denoted by blue font</p> <p style="text-align: center;">Substantive revisions are denoted by a ★ preceding the section, paragraph, table, or figure that includes the revision</p> <p style="text-align: center;">Hyperlinks are denoted by <u>underlined, bold, italic, blue font</u></p>		
290610	Added paragraph on Survivor Benefit Plan premiums.	Add
290611	Rewording of former paragraph 291106 concerning conflicting court orders.	Update
290612	Added paragraph on conditional awards.	Add
290613	Added paragraph on percentage awards.	Add
290614	Added paragraph on errors in court orders.	Add
2907	Created section 2907 on Disposable Retired Pay Deductions, with information taken and revised from previous paragraph 290803.	Add/Update
2908	Created section 2908 on Starting Payments, with information taken and reworked from previous section 2911.	Add/Update
2909	Created Section 2909 on payment amounts, with new information as well as information based on previous section 2911.	Add/Update
2910	Added section 2910 on priority of payments.	Add
2911	Added section 2911 on stopping retired pay payments.	Add
2912	Added section on the administrative appeals process.	Add
2913	Extrapolated previous section 2910 (Liability of the Designated Agent) to create new section 2913 (Liability), adding new information.	Add
Figure 1	Added Figure 1.	Add

**TABLE OF CONTENTS**

**FORMER SPOUSE PAYMENTS FROM RETIRED PAY**

- ★ 2901 Purpose
- ★ 2902 Definitions
- ★ 2903 Awards That Can Be Collected Under the USFSPA
- ★ 2904 Application by Former Spouse
- ★ 2905 Notice
- ★ 2906 Court Orders
- ★ 2907 Disposable Retired Pay Deductions
- ★ 2908 Starting Payments
- ★ 2909 Payment Amount
- ★ 2910 Priority of Payments
- ★ 2911 Stopping Payments
- ★ 2912 Administrative Appeal Process
- ★ 2913 Liability
- ★ Figure 1 Appendix A

## CHAPTER 29

FORMER SPOUSE PAYMENTS FROM RETIRED PAY★2901 PURPOSE

This chapter explains how a former spouse can apply for payments from a military member's military retired pay and how the former spouse's payments will be administered.

★2902 DEFINITIONS

290201. Alimony. Alimony is a legal obligation where a member is ordered to pay an amount for the support and maintenance of a spouse or former spouse. This definition includes attorney's fees, interest, and court costs. Alimony does not include child support, property settlement, equitable distribution of property, or any other division of property.

290202. Child Support. Child support is a legal obligation where a member is ordered to pay an amount for the support and maintenance of a child. This definition includes costs for health care, arrearages, attorney's fees, interest, penalties, and other related relief.

290203. Court. Court means any court of competent jurisdiction of any state (in the United States), the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the Virgin Islands, the Northern Mariana Islands, and the Trust Territory of the Pacific Islands and any court of the United States, as defined in Title 28, United States Code (U.S.C.), section 451. Court also includes a court of a foreign country with which the United States has an agreement requiring the United States to honor any court order of such country.

290204. Court Order. Court order means a final decree of divorce, dissolution, annulment, or legal separation issued by a court, or a property settlement incorporated into such an order. Court order also includes orders issued incident to a divorce, such as an order dividing military retired pay or a qualified domestic relations order (QDRO) that divides military retired pay. (NOTE: A QDRO is not required but will be accepted.) A court order also includes a support order as defined in section 453(p) of the Social Security Act (Title 42 U.S.C section 653(p)).

290205. Creditable Military Service. Creditable military service means service counted towards the entitlement to receive military retired pay.

290206. Designated Agent. Designated agent is the agent authorized to review applications for direct payment made under this Regulation. See paragraph 290403 for specific designations.

290207. Disposable Retired Pay. Disposable retired pay is defined in paragraph 290701.

290208. Entitlement. Entitlement is the legal right of a military member to receive military retired pay.

290209. Final Decree. A final decree is an order from which no appeal may be taken or from which no appeal has been taken within the time allowed for taking such appeals under the laws applicable to such appeals, or a decree from which timely appeal has been taken and such appeal has been finally decided under the laws applicable to such appeals.

290210. Former Spouse. Former spouse is the former husband or wife, or if the parties are legally separated, the current husband or wife, of a military member.

290211. Formula Award

A. For members retiring from active duty, a formula award is an award expressed in terms of a marital or coverture fraction, where the numerator is the number of months the parties were married while the member was performing creditable military service and the denominator is the number of months of the member's total creditable military service.

B. For members retiring from Reserve duty, the fraction must be expressed in Reserve points rather than months, i.e., the numerator is the Reserve points earned during the months the parties were married while the member was in the Reserves.

290212. Garnishment Order. A garnishment order is an order directing an employer to issue payments from a member's pay to satisfy a legal obligation for child support, alimony, or division of property other than a division of military retired pay.

290213. Hypothetical Retired Pay Award. Hypothetical retired pay award is an award based on a percentage of a retired pay amount calculated using variables different from the member's actual retirement variables. This retired pay amount is called the member's hypothetical retired pay. It is usually calculated as if the member had retired at the time the court divided the member's military retired pay. Thus, the former spouse does not benefit from the member's pay increases due to promotions or increased service time after the divorce.

290214. Member. Member is an individual who is on active duty, who is a reservist, or who is retired from military service.

290215. Renounced Pay. Renounced pay is military retired pay to which a member is entitled, but which the member has waived receipt.

290216. Retired Pay. Retired pay is the statutory entitlement due a member based on conditions of the retirement law, pay grade, years of service, and the date of retirement. Retired pay includes "retainer pay."

290217. Retired Pay Award. Retired pay award is a portion of military retired pay awarded to a former spouse or current spouse as a property division.

290218. USFSPA. USFSPA is the Uniformed Services Former Spouses' Protection Act. Public Law 97-252, enacted on September 8, 1982, states that the section of Title 10 addressing former spouse protection, may be cited as the "Uniformed Services Former

Spouses' Act". Therefore, USFSPA is used throughout this chapter and refers to the provisions of Title 10, USC, section 1408.

**★2903 AWARDS THAT CAN BE COLLECTED UNDER THE USFSPA**

290301. Child Support. A former spouse can collect child support if there is a court order that awards child support, and the former spouse and military member have ever been married to each other.

290302. Child Support Arrearages. To collect child support arrearages, a former spouse must submit a recent court order that lists the total arrearages. The order cannot be older than two years from the date the Defense Finance and Accounting Service (DFAS) receives it.

290303. Alimony. A former spouse can collect current alimony under the USFSPA, but not alimony arrearages.

290304. Retired Pay Award. A former spouse can collect current retired pay award payments, but not retired pay award arrearages.

290305. Property Other Than a Division of Retired Pay. A former spouse can collect a property division, other than a retired pay award, by garnishment if the order awards it to the former spouse and if the former spouse was also awarded alimony, child support, or a division of retired pay. See subparagraph 290401.B for more information.

**★2904 APPLICATION BY FORMER SPOUSE**

290401. Application Process

A. The former spouse must submit a completed DD Form 2293 (Request for Former Spouse Payments From Retired Pay) and a copy of the court order awarding alimony, child support, or military retired pay. A court order for child support arrearages cannot be older than 2 years from the date the designated agent receives it. The court order must be certified by the clerk of the court that issued the order.

B. If the former spouse is applying for a property division other than a retired pay award, then the former spouse must submit a garnishment order in addition to the DD Form 2293 and the court order.

C. The former spouse may mail the application to the appropriate designated agent given in paragraph 290403, or may fax it if a fax number is provided. Please read the instructions and certification on the DD Form 2293 carefully.

290402. Additional Documentation. A former spouse may need to provide additional documentation if the designated agent cannot determine whether the former spouse is eligible for USFSPA payments based solely on the DD Form 2293 and the court order.

290403. Where to Send an Application for USFSPA Payments. The former spouse should send all application documents to the following designated agent for the appropriate Uniformed Service:

- A. Army, Navy, Air Force, Marine Corps.  
DFAS-Cleveland Site  
DFAS-HGA/CL  
P.O. Box 998002  
Cleveland, OH 44199-8002  
  
Fax: 877-622-5930 or 216-522-6960
- B. United States Coast Guard  
Commanding Officer (L)  
Pay and Personnel Center  
444 Quincy Street  
Topeka, KS 66683-3591
- C. Public Health Service  
Office of General Counsel  
Department of Health and  
Human Service, Room 5362  
330 Independence Avenue, SW  
Washington, D.C. 20201
- D. National Oceanic and Atmospheric Administration  
Submit to Coast Guard address.

290404. When to Apply for USFSPA Payments. A former spouse may apply for payments anytime after the court has issued a court order enforceable under the USFSPA. Although payments won't start under the USFSPA until after the member becomes eligible to receive military retired pay, the designated agent can approve a former spouse's application prior to that, and retain the application pending the member's retirement.

**★2905 NOTICE**

290501. Notification to Former Spouse of Approval or Disapproval of an Application. Within 30 days of the date of receipt of a former spouse's application, the designated agent will notify the former spouse if his or her application has been approved or disapproved. If approved, then the designated agent will state the month the former spouse's payments will tentatively begin. If the designated agent cannot approve the application, then the notice will include an explanation regarding the reason(s) why.

290502. Notification to the Member of Approval of an Application. If a former spouse's application is approved, the designated agent will notify the member affected within 30 days of the date of receipt of the application. The member will not be notified if the application is not approved.

290503. Contents of Notice to Member

A. The notice will explain that payments issued under the USFSPA cannot exceed 50 percent of the member's disposable retired pay, and will contain the month that the payments will tentatively begin.

B. The notice will inform the member that he/she must notify the designated agent if the court order has been amended, superseded, or set aside.

C. The notice will inform the member that if he/she submits information in response to this notice, he/she consents to the disclosure of that information.

D. The notice will include a copy of the court order.

E. The notice will advise that the member's failure to respond within 30 days of the date that the notification is mailed may result in the payment of retired pay as set out in the notice to the member.

290504. How to Prevent the USFSPA Payments from Starting. The member must provide documentary evidence that a former spouse's court order is legally defective or has been appealed, amended, or set aside. If the designated agent determines that the documentary evidence is sufficient to bar payments to a former spouse, then the designated agent will not start the payments. The designated agent will then inform the former spouse that payments will not start, and provide copies of the documentary evidence to the former spouse.

★2906 COURT ORDERS

290601. Contents of Court Order

A. The court order must be regular on its face. This means that a court of competent jurisdiction issued the order and nothing on its face provides reasonable notice that it was issued without authority of law.

B. The court order must award former spouse alimony, child support, or a retired pay award.

C. If the order contains a retired pay award, then that award must be expressed as a fixed dollar amount or as a percentage. A retired pay award expressed as percentage will automatically receive a proportionate share of the member's cost-of-living adjustments, while one expressed as a fixed amount will not.

D. The designated agent will construe all percentage awards (such as a percentage of gross retired pay) as a percentage of disposable retired pay, regardless of the language in the order.

E. If the former spouse and the member were divorced before the member became eligible to receive military retired pay, then the retired pay award may be expressed as a formula or hypothetical award in accordance with paragraphs 290607 and 290608.

290602. Divorces Finalized While the Member is Still on Active Duty

A. For court orders issued prior to December 19, 2003, the court order must show that the member's rights under the Soldiers' and Sailors' Civil Relief Act of 1940 (50 U.S.C. Appendix §§ 501 et. seq.) were complied with.

B. For court orders issued on or after December 19, 2003, the court order must show that the member's rights under the Servicemembers Civil Relief Act (50 U.S.C. Appendix §§ 501 et. seq.) were complied with.

290603. Qualified Domestic Relations Orders. There is no requirement in the USFSPA that a former spouse submit a qualified domestic relations order, but the designated agent will accept one if it is submitted and if it meets the requirements of the USFSPA.

290604. Requirements That Apply to a Retired Pay Award But Do Not Apply to Enforcement of Child Support or Alimony Obligations

A. In the case of a retired pay award, the designated agent must be able to determine from the application that the court dividing military retired pay had jurisdiction over the member by reason of one of the following:

1. The member resided in the territorial jurisdiction of the court at the time of the legal proceeding due to other than military assignment;

2. The member's domicile was in the territorial jurisdiction of the court at the time of the legal proceeding; or

3. The member consented to the jurisdiction of the court. The member indicates his or her consent to the jurisdiction of the court by participating in some way in the legal proceeding.

B. Also, in the case of a retired pay award, the designated agent must be able to determine from the application that the former spouse and the member were married for at least 10 years during which the member performed 10 years or more of creditable military service (the "10/10" requirement). There is no "10/10" requirement for payment of alimony or child support awards under the USFSPA.

290605. State Law Jurisdiction. The satisfaction of state law jurisdictional requirements is not sufficient alone to satisfy the additional jurisdictional requirement stated in paragraph 290604. If the court states that it has USFSPA jurisdiction, then it must state the basis for the finding, i.e., member's residence, member's domicile or member's consent.

290606. Member's Consent to a Separation Agreement. If the member signed a separation agreement, then the designated agent will presume that the member consented to the jurisdiction of any court that at any time incorporates the agreement into a court order.

290607. Acceptable Formula Awards

A. The method of calculating the formula must be set forth in the court order.

B. For members retiring from active duty, the numerator of the fraction expressed in terms of whole months of marriage during military service must be provided in the court order. For members retiring from Reserve duty, the numerator expressed in terms of Reserve retirement points earned during the marriage must be provided in the court order. If the numerator is not provided in the court order, then either the court will have to clarify the award or the parties will have to agree on the numerator and provide it to the designated agent in a notarized statement signed by both parties. See Appendix A (Figure 1) for the sample Military Retired Pay Division order.

C. The designated agent will provide the denominator. For members retiring from active duty, this will be the member's total months of active duty service. Any days or partial months of service will be dropped. For members retiring from Reserve duty, this will be the member's total Reserve retirement points. All fractions will be carried out to 4 decimal places. See Appendix A (Figure 1) for examples of acceptable formula award language.

D. Example: The court order awarded the former spouse a percentage of the member's disposable retired pay calculated by multiplying  $\frac{1}{2}$  times a fraction, where the numerator is 144 months of marriage during military service, and the denominator is the member's total months of active duty service. The member later retired after 20 years (or 240 months) of service. The former spouse's award is 30.0000 percent of the member's disposable retired pay ( $\frac{1}{2} \times \frac{144}{240}$ ).

290608. Acceptable Hypothetical Retired Pay Award

A. To calculate a hypothetical retired pay award, the designated agent must first calculate the hypothetical retired pay amount. This is calculated by multiplying the hypothetical retired pay multiplier times the hypothetical retired pay base. See Appendix A (Figure 1) for the sample Military Retired Pay Division Order.

B. The hypothetical retired pay multiplier is 2-1/2 percent times the hypothetical years of creditable service. We calculate a reservist's years of creditable service by dividing the Reserve retirement points on which the award is based by 360.

C. For members entering military service before September 8, 1980, the hypothetical retired pay base is the member's basic pay at the time the court divided the member's retired pay. For members entering military service on or after September 8, 1980, the hypothetical retired pay base is the average of the member's highest 36 months of basic pay at the time the court divided the retired pay. This will usually be the most recent 36 months prior to the division date. In order to enable the designated agent to calculate the hypothetical retired pay amount, the court order must provide:

1. The percentage the former spouse is awarded;
2. The hypothetical years of creditable service, or, in the case of a reservist, the Reserve retirement points on which the hypothetical retired pay is to be based;
3. The hypothetical retired pay base, or the member's hypothetical rank, and
4. The hypothetical retirement date.

D. If the court intends that the hypothetical retired pay be calculated based on the pay tables in effect at the time the member becomes eligible to receive military retired pay, then the court order must provide:

1. The percentage the former spouse is awarded;
2. The hypothetical years of creditable service, or, in the case of a reservist, the Reserve retirement points on which the hypothetical retired pay is to be based;
3. The member's hypothetical rank; and
4. A statement that the calculation is to be made as of the member's actual retirement date.

E. If the award language is missing any necessary variables, then either the court will have to clarify the award or the parties will have to agree on any missing variables and provide them to the designated agent in a notarized statement signed by both parties.

F. All percentage hypothetical retired pay awards will be converted into a percentage of a member's actual disposable retired pay according to the following procedure:

Example: The court order awarded the former spouse 50 percent of the disposable retired pay the member would have received had the member retired with 17 years of creditable service, a retired pay base of \$2,200.00 per month, and a hypothetical retirement date of June 1, 1999. The member actually retired on June 1, 2002, with 20 years of creditable service, a retired pay base of \$2,400.00 per month, and an initial gross retired pay of \$1,200.00 per month ( $.025 \times 20 \times \$2,400.00$ ).

1. First, the designated agent will calculate the member's hypothetical retired pay, which in this case is \$935.00 per month (.025 x 17 x \$2,200.00).

2. Next, the designated agent will adjust the hypothetical retired pay amount for retired pay cost-of-living adjustments (COLAs) the member would have received from June 1, 1999 (the hypothetical retirement date) up to June 1, 2002 (the actual retirement date).

dropped)	12/1/1999	1.7%	\$935.00 x 1.017 = \$	950.00 (cents are
	12/1/2000	3.5%	\$950.00 x 1.035 = \$	983.00
	12/1/2001	2.6%	\$983.00 x 1.026 = \$	1,008.00

3. Finally, the designated agent will convert the former spouse's percentage of hypothetical retired pay to a percentage of the member's actual disposable retired pay as follows:

$$50\% \times \$1,008.00 / \$1,200.00 = 42\%.$$

This is the percentage the designated agent will establish in the retired pay system.

290609. Decrees of Divorce, Dissolution, Annulment, or Legal Separation Issued Before June 26, 1981 That Did Not Divide the Member's Military Retired Pay. Any court order that contains a retired pay award, which was issued before June 26, 1981 will be honored if it otherwise satisfies the requirements and conditions shown in this chapter. If the pre-June 26, 1981, decree or property settlement incident to the decree did not divide the member's military retired pay, and did not reserve jurisdiction to divide it, then we cannot honor an application for payment based on an order issued on or after June 26, 1981, dividing retired pay as property.

290610. Survivor Benefit Plan (SBP) Premium. Pursuant to 10 U.S.C. 1452, the SBP premium must be deducted from the member's retired pay. The SBP premium cannot be deducted from the former spouse's portion of the member's retired pay. Any provision in a court order stating that the premium should be deducted from the former spouse's portion is unenforceable. The former spouse and the member will have to work out this issue between them.

290611. Conflicting Court Orders. If the designated agent is served with orders containing conflicting awards, then the designated agent will pay the lower award until served with an order that resolves the conflict.

290612. Conditional Awards. The designated agent cannot honor a court order that makes the former spouse's payments conditional on the occurrence of some other event. There is no authority for the designated agent to ascertain whether a condition in a court order has been satisfied. The former spouse will need to obtain a modified court order without the condition.

290613. Awards of a Percentage of the Retired Pay Accrued by the Member During the Marriage. The designated agent cannot honor awards based on the value of what has accrued because military retired pay does not accrue over time. Military retired pay is not a pension. Rather, it is a statutory entitlement computed at the time the member retires and it is based on the member's rank and total years of service at the time of retirement.

290614. Factual Errors in Court Orders. If a party submits documentary evidence that shows a factual error in a court order, then this will not be sufficient to modify or stop payments being made pursuant to the court order. The party asserting the error must move the court to correct the order. The designated agent does not have the authority to correct errors in court orders.

★2907 DISPOSABLE RETIRED PAY DEDUCTIONS

290701. Disposable Retired Pay. Disposable retired pay is defined by the USFSPA as gross retired pay minus authorized deductions.

A. If the former spouse and member were divorced on or before February 2, 1991, then the USFSPA authorizes the following deductions:

1. Amounts owed to the United States.
2. Amounts withheld as Federal and State income tax withholding, consistent with the member's current actual tax liability.
3. Fines and forfeitures ordered by a court-martial.
4. Amounts waived in order to receive compensation under Titles 5 or 38 of the United States Code.
5. SBP premiums paid, but only if the former spouse applying for a retired pay award payment under the USFSPA is the beneficiary of the SBP.
6. The amount of retired pay for a member retired under Title 10, Chapter 61 computed based on percentage of disability.

B. If the former spouse and member were divorced on or after February 3, 1991, then the USFSPA authorizes the following deductions:

1. Amounts owed to the United States due to the overpayment of retired pay, or amounts required to be recouped due to the member's entitlement to retired pay.
2. Fines and forfeitures ordered by a court-martial.
3. Amounts waived in order to receive compensation under Titles 5 or 38 of the United States Code.

4. SBP premiums paid but only if the former spouse applying for a retired pay award payment under the USFSPA is the beneficiary of the SBP.

5. The amount of retired pay for a member retired under Title 10, Chapter 61 computed based on percentage of disability.

290702. Other Deductions Included in Court Order. If a court order directs the use of deductions other than those authorized above to compute the former spouse's award, then that provision of the court order is unenforceable. The designated agent will use only the deductions authorized above.

**★2908 STARTING PAYMENTS**

290801. Starting Payments. If the former spouse's application is approved, then payments will start no later than 90 days after the date the designated agent received the former spouse's complete application, or no later than 90 days after the date the member becomes eligible to receive military retired pay, whichever is later.

290802. Timing of Payments. Payments will be issued in conformity with normal pay and disbursement cycles, which means payments will be issued monthly. Payments will be deducted from the month's pay and paid on the first business day of the following month. For example, a payment issued for the month of March would be sent at the beginning of April.

**★2909 PAYMENT AMOUNT**

290901. Limitations

A. If the former spouse applies for payments under the USFSPA only, then the maximum amount a former spouse can receive is 50 percent of the member's disposable retired pay.

B. If the former spouse applies for payments under the USFSPA and there is also a garnishment order for support, then the maximum amount that can be paid toward both obligations is 65 percent of the member's disposable earnings calculated in accordance with 42 U.S.C. 659 (child and spousal support statute) and its implementing regulation.

C. For garnishments for property other than a retired pay award, the maximum amount payable is 25 percent of disposable earnings in accordance with 15 U.S.C. 1673.

290902. Cost-of-Living Adjustments. If a retired pay award is expressed as a percentage, then payments will increase in proportion when the COLA is added to the member's pay. If the retired pay award is a fixed amount, then COLAs cannot be added and the former spouse's payment will remain fixed.

290903. Offset of Former Spouse's Payment for Garnishment or Other Obligation. A former spouse's payment cannot be offset or garnished for any legal obligation, including child support owed to the member.

★2910 PRIORITY OF PAYMENTS

291001. Multiple Awards. If a court order includes multiple types of awards to a former spouse, then the former spouse may designate the priority of payment. If the former spouse does not specify otherwise, then the designated agent will pay the retired pay award first, child support second, and spousal support third.

291002. Multiple Former Spouses. If the designated agent is served with applications from more than one former spouse, then the designated agent will honor the applications on a first-come, first-served basis.

291003. Garnishment Orders for Support and Applications Under the USFSPA. If the designated agent is served with both a garnishment for support and an application under the USFSPA, then the designated agent will pay whichever is served first. If the garnishment is served first and is payable directly to the former spouse, then the former spouse may reverse the priority of payments by instructing the designated agent to terminate deductions pursuant to the garnishment, and then later requesting that garnishment deductions be reestablished.

★2911 STOPPING PAYMENTS

291101. Erroneous Payment Information From Former Spouse. The former spouse has a continuing duty to provide the designated agent with correct payment instructions. If a former spouse's payments are returned due to erroneous payment instructions (i.e., an old address or incorrect account number for direct deposit payments), then the designated agent will send notice to the last known correspondence address that, unless new payment instructions are received within 30 days of the date of the notice, payments will stop. If the former spouse submits new payment instructions after the payments have terminated, then the designated agent will restart the payments on a current basis, and will not make up any missed payments.

291102. Termination and Suspension of Retired Pay Award Payments

A. Unless the court order specifies otherwise, payments will stop upon the designated agent's receipt of notice of the death of either party. Payments will be prorated for the month of the death of either party.

B. Unless the court order specifies otherwise, retired pay award payments will not stop upon the designated agent's receipt of notice of the former spouse's remarriage.

C. If the designated agent is served with an order staying payments, then the designated agent will stop the payments until served with an order indicating that the former spouse's payments are to resume.

D. If the designated agent has already started payments and is served with documentation showing that an appeal of the order has been filed within the forum State's appeal timeframe, then payments will stop. The designated agent will not recoup any payments already issued.

291103. Termination of Child Support Payments Under the USFSPA. Child support payments will stop in accordance with the provisions of the court order. If the court order is silent as to when the payments should stop, then payments will stop in accordance with the law of the State that issued the court order. The member has the burden of providing sufficient documentation to justify stopping payments on or before a child's age of majority. The former spouse has the burden of providing sufficient documentation to justify continuing payments after a child's age of majority.

291104. Termination of Alimony Payments Under the USFSPA. Alimony payments will stop in accordance with the provisions of the court order. If the court order is silent as to when the payments should stop, then payments will stop in accordance with the law of the State that issued the court order. If the designated agent does not already have sufficient documentation to stop payments, then additional evidence such as a marriage certificate will be required.

291105. Payments and Bankruptcy. Absent a court order, there is no authority to stop a former spouse's retired pay award, current and arrearage payments toward child support, and current spousal support payments if a member files bankruptcy.

291106. Certification of Eligibility. The designated agent may request that a former spouse submit a signed certification of continued eligibility. The certificate of eligibility should include notice of a change in status or circumstance that affects eligibility, if any such change exists. If the former spouse fails or refuses to comply with the certification requirement, then the designated agent may stop the payments after notice to the former spouse.

★2912 ADMINISTRATIVE APPEAL PROCESS

291201. If either party disagrees with a determination by the designated agent, then that party may request reconsideration by writing to the designated agent. If the party requesting reconsideration asserts that the designated agent has erroneously overpaid the other party, then the request for reconsideration will be considered a claim against the designated agent. An attorney will review the request and issue a decision in writing.

291202. If the party requesting reconsideration disagrees with the attorney's determination, then that party may submit an appeal to the designated agent, which must be received within 30 days of the date of the initial determination. The designated agent will forward the appeal to the Defense Office of Hearings and Appeals for their decision.

291203. Parties are referred to Department of Defense Instruction Number 1340.21 (available at <http://www.dtic.mil/wlis/directives/corres/ins1.html>) for additional information concerning the submission of claims and appeals.

**★2913 LIABILITY**

291301. Neither the United States nor any employee of the United States shall be liable regarding any payment made from retired pay to a retiree or former spouse pursuant to a court order that is regular on its face, if such payment is made in accordance with the USFSPA.

291302. If the designated agent processes a former spouse's application properly based on all documentation in its files at that time, then the designated agent is not liable for payments issued or missed.

291303. If the court order awarding child support or alimony appears on its face to conform with the laws of the jurisdiction from which it was issued, then the designated agent will not be required to ascertain whether the court had obtained personal jurisdiction over the member.

STATE OF \_\_\_\_\_  
COUNTY OF \_\_\_\_\_

COURT OF \_\_\_\_\_  
Case No. \_\_\_\_\_

\_\_\_\_\_  
Petitioner

**MILITARY RETIRED PAY DIVISION ORDER**

\_\_\_\_\_  
Respondent

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

**FINDINGS OF FACT:**

1. The Petitioner's Social Security Number is \_\_\_\_\_ and current address is \_\_\_\_\_.
2. The Respondent's Social Security Number is \_\_\_\_\_ and current address is \_\_\_\_\_.
3. The Parties were married on \_\_\_\_\_. Their marital status was terminated on \_\_\_\_\_ pursuant to a(n) \_\_\_\_\_ entered in \_\_\_\_\_ County, State of \_\_\_\_\_. This current order is entered incident to the aforementioned order.
4. The parties were married for a period of ten or more years during which time the Petitioner/Respondent performed at least ten years of creditable military service.
5. If the military member was on active duty at the time of this order, Respondent/Petitioner's rights under the Servicemembers' Civil Relief Act, 50 U.S.C App. 501-548 and 560-591, have been observed and honored.
6. This court has jurisdiction over the Respondent/Petitioner by reason of [choose those that apply] (A) his or her residence, other than because of military assignment, in the territorial jurisdiction of the court, during the [divorce, dissolution, annulment, or legal separation] proceeding, (B) his or her domicile in the territorial jurisdiction of the court during the [divorce, dissolution, annulment, or legal separation] proceeding, or (C) his or her consent to the jurisdiction of the court.

**CONCLUSIONS OF LAW:**

1. This court has jurisdiction over the subject matter of this action and the parties hereto.
2. Petitioner/Respondent is entitled to a portion of Respondent/Petitioner's United States military retired pay as set forth herein.

★ Figure 1. Appendix A

**IT IS THEREFORE ORDERED THAT:**

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

[Retired member] "The former spouse is awarded \_\_\_ percent [or dollar amount] of the member's disposable military retired pay."

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

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

[Active duty hypothetical calculated as of time of division, for all members regardless of service entry date] "The former spouse is awarded \_\_\_% of the disposable military retired pay the member would have received had the member retired with a retired pay base of \_\_\_\_\_ and with \_\_\_\_\_ years of creditable service on \_\_\_\_\_."

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

[Active duty hypothetical calculated as of member's actual retirement date] "The former spouse is awarded \_\_\_% of the disposable military retired pay the member would have received had the member retired on his actual retirement date with the rank of \_\_\_\_\_ and with \_\_\_\_\_ years of creditable service."

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

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

[Reservist hypothetical calculated as of the date the member becomes eligible to receive retired pay] "The former spouse is awarded \_\_\_% of the disposable military retired pay the member would have received had the member become eligible to receive retired pay on the date he [or she] attained age 60, with the rank of \_\_\_\_\_, with \_\_\_\_\_ Reserve retirement points, and with \_\_\_\_\_ years of service for basic pay purposes."

This \_\_\_\_\_ day of \_\_\_\_\_, 200\_\_.

\_\_\_\_\_  
JUDGE

★ Figure 1 (Continued)

BIBLIOGRAPHY

CHAPTER 29 – FORMER SPOUSE PAYMENTS FROM RETIRED PAY

Uniformed Service Former Spouses' Protection Act,  
Title 10, United States Code, Section 1408

60 Fed. Reg. No. 66  
April 6, 1995



James Tomlinson  
Davies Pearson  
920 Fawcett Ave.  
P.O. Box 1657  
Tacoma, WA 98401

U.S. Mail  
 Telecopier  
 Messenger – via office  
messenger

DATED this 9th day of November, 2009, at Tacoma, Washington.



\_\_\_\_\_  
Susan K. Toma