

## Demo of USFSPA amendment to 2017 NDAA

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Spring of 2016, for the Fiscal year 2017 National Defense Authorization Act (NDAA), U.S. Representative Steve Russel (R-OK) introduced an amendment to adjust the USFSPA. This update was recommended by the September 2001 Department of Defense report to the Armed Service Committees, and 15 years later, it became law. The proposal was unanimously accepted by the bi-partisan House Armed Services Committee. Subsequently, NDAA was signed into law December 23, 2016. The Senate version (S. 2943 Sec. 641/2) said,

"In calculating the total monthly retired pay to which a member is entitled for purposes of subparagraph (A), the following shall be used:

- (ii) The member's pay grade and years of service at the time of the court order.
- (ii) The amount of pay that is payable at the time of the member's retirement to a member in the member's pay grade and years of service as fixed pursuant to clause(i)."

While the House bill (H.R. 4909 Sec. 625) said,

"[member entitlement] is to be determined using the member's pay grade and years of service at the time of the court order, rather than the member's pay grade and years of service at the time of retirement, unless the same"

As you can see, they are functionally the same and reconcile easily.

In most states, case law affirms that the marital asset is not to be affected by earning effort outside the bounds of the marriage. In Michigan, see the 1988 Kilbride Appellate decision, re-affirmed and extended in the 2009 Skelly Appellate court decision. Other states have similar laws. The Kilbride decision is not a mandate for single coverture fractions, but rather lays the foundation for a **litmus test** that **the marital retirement asset must be defined so that whatever either party does after the divorce cannot make it go up or down.**

*"We agree with defendant that the trial court erred in dividing the pension. The trial court's method of division and distribution is dependent, at least in part, on the future accrual of pension benefits by defendant after the divorce."*

*"To begin, we believe that an equitable distribution under the pension statute requires that the method employed reflect the fact that the value of the pension for distribution purposes in a divorce proceeding is only that value which accrued during the course of the marriage. Any accrual of value before or after the marriage may not be considered. Furthermore, the **decisions of the parties following the judgment of divorce must not affect the value of the distribution of a portion of the pension to the nonemployee spouse.** With these principles in mind..."*

This is not talking about COLA increases, which both members usually passively receive for all time after the divorce, although states like Indiana withhold COLA from division also because it is not yet earned at time of divorce. Because there were no promotions in Kilbride, a single coverture fraction worked fine *in that case*.

The new 2017 NDAA law duplicates that calculation in appropriate cases, and *also* creates equity where there is a promotion, consistent with the foundational argument of Kilbride.

Mathematically, the inequitable time-only coverture used by some courts has been::

$$\text{marital asset} = (\text{disposable retired pay}) * \frac{\text{marital duty time}}{\text{total duty time}}$$

An example, if the disposable retirement pay check was \$3298 in 2016 dollars, and 4700 duty points were accrued during the marriage and 5500 duty points were accrued during the entire military career, the marital asset would be \$3298 \* (4700/5500), or \$2818.29 in 2016 dollars.

Typically 50% of the marital asset is awarded to each party. The Dual Coverture (DC) method is implemented by using an additional coverture fraction of monthly pay. Because the *ratio* is the important number (not the two dollar amounts, per se), it's really important to note that the two monthly pay amounts for the two different ranks are taken off the same year's pay chart – do not take one from the year of divorce and one from the year of retirement. The DC method is:

$$\text{marital asset} = (\text{disposable retired pay}) * \frac{\text{marital duty time}}{\text{total duty time}} * \frac{\text{pay at divorce}}{\text{pay at retirement}}$$

The “pay at divorce” is the only thing fixed by paragraph (ii) of the law quoted above. The result is a DFAS percentage method that is not a DFAS fixed dollar method. It's called a percentage method because the two coverture fractions become a percentage number.

The new law is actually implemented by changing 10 USC 1408(a)(4) to define the disposable retired pay differently. The new definition of disposable retired pay automatically includes the second coverture fraction.

$$(\text{new disposable retired pay}) = (\text{old disposable retired pay}) * \frac{\text{pay at divorce}}{\text{pay at retirement}}$$

$$\text{marital asset} = (\text{new disposable retired pay}) * \frac{\text{marital duty time}}{\text{total duty time}}$$

Mathematically, it makes no difference whether this is written as one formula or two. Procedurally, after the law's enactment, the new definition of disposable retired pay will

automatically be used by DFAS, so a single time-based coverture is okay. For orders prior to the law's enactment, or when DFAS will not do the calculation and payout, the new law can be mimicked by spelling out the second coverture fraction in the division order.

The marital asset is not a fixed *dollar amount* because both parties receive cost of living increases proportional to the military pay table cost of living increases each year.

Also, the marital asset is not a *pre-fixed percentage at time of divorce* because the fraction is not possible to calculate until retirement is reached. For example, if no military duty is done after the marriage, the ex-spouse would get 50% of the total retirement. However, if post-divorce duty is done, the time-based or duty-based coverture fraction allows one to break out the unchanged marital asset from a retirement check and the spousal award will be less than 50% of the bigger retirement check.

The traditional single coverture solution is a mathematical precise and exact calculation designed to keep the divisible marital asset *the same*, not to dilute it in any way (again, we're not talking about COLA increase which happen for both parties each year and accrues even during the years before retirement pay starts). It is not some "increasing denominator dilution" or "tit-for-tat" correction or capricious "smaller piece of bigger pie" – it is a mathematically precise calculation that cannot equitably be done other ways.

A single coverture fraction works fine if there are no promotions and DC and NDAA 2017 will mimic this (because the 2<sup>nd</sup> fraction will be 1.0 or 100%). However, if promotion happens outside the marriage, **inequity happens with the old formula**. For example, if the disposable retirement pay check at higher rank was \$5000 in 2016 dollars, and everything else stays the same, the old formula would calculate a marital asset of  $\$5000 * (4700/5500)$ , or \$4272.72 in 2016 dollars. This is a 51.6% inequitable windfall to the ex-spouse even though they had nothing to do with the promotion and contributed nothing after the divorce!

At this point, some people say the promotion enhancement is "based on" early marital work and therefore it IS a marital asset even though it occurs from active effort outside the marriage. The phrase "based on" is used by some as a legally undefined phrase meant to keep things confusing and twist court understanding one way or the other. In this context "calculated from" is much more precise and legally meaningful.

Much more is written critiquing the phrase "based on" in other papers. For now, look at the divorce decree award language and realize that the standard threshold for a marital asset includes the phrase "earned during" or "accrued during", not "based on". Two quick case studies: if after divorce an ex-spouse writes a book "based on" the military marriage, are proceeds divided? No. If a military pilot gets a commercial job after divorce "based on" their military training and flight hours, is the civilian retirement divided? No.

The other way I've seen the inequitable 51.6% windfall perverted is an attorney citing a legal reference awarding *passively earned* interest after divorce as a marital asset, as an argument to divide *actively earned enhancements*. Not the same! In Michigan, the 2009 Skelly Appellate

court even clarified that even an asset already received during marriage is not a marital asset if additional post-divorce work is required to keep it.

In any case, by implementing the Dual Coverture method, Congress has decided the “based on” argument is false.

See what happens with the new formula from the method proposed in the **new NDAA law**. The higher rank retirement pay is \$5000 and everything else stays the same, the marital asset would be  $\$5000 * (4700/5500) * (\$3298/\$5000)$ , or \$2818.29 in 2016 dollars. Notice **the marital asset is exactly and precisely preserved, down to the penny**. These results are all in 2016 dollars, and the marital asset goes up proportional to military pay charts each year, and **both** parties benefit from this same COLA bump-up.

Conclusions:

- The new law is a DFAS percentage method that is not a DFAS fixed dollar method.
- In cases where promotions happen after divorce, equity (as defined by the litmus test) needs the new definition of disposable retired pay, or needs a second coverture fraction spelled out in the division order.

A more verbose version of the same material, including text suitable for use in a division order, is available from

<http://www.intrepidcreativity.com/articles/division-2017NDAA-USFSPA-tutorial>.

The most recent version of this document is available from the References section at the bottom of the above web page.

Additional engagement opportunities:

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