

Avoiding Perils & Pitfalls in Handling a Military Divorce

Wyoming Center for Legal Aid
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- The views presented are those of the speaker and do not necessarily represent the views of the Department of Defense or its components.

5 CFR 3601.108

- This presentation draws substantially from Colonel (Retired) Mark Sullivan's book:

*The Military Divorce Handbook:
A Practical Guide to Representing Military
Personnel and Their Families*

-ABA Publishing, 2011

AND

**North Carolina Bar Association's
Legal Assistance for Military
Personnel**

<http://www.nclamp.gov/index.asp>



LEGAL ASSISTANCE FOR
MILITARY
PERSONNEL

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Getting Military Pension Division Orders Honored by DFAS

Should I Get a Divorce Overseas?

Who Can Help?

- The base legal office
- The SJA “Staff Judge Advocate”

The Big 3

- Getting Started: Service and SCRA
- SCRA and Judicial Flexibility
 - Planning for Military Moves and Deployments
 - “Family Care Plan”
 - Your Agreements
- Dividing Retirement and Benefits
 - What is Divisible? When?
 - Getting Jurisdiction over the Retirement
 - Disability: Dollar for Dollar Retirement Waivers

Getting Started:

- How to serve the military member:
 - Service is matter of state law
 - Use the Member's "Chain of Command" to facilitate service.
 - International Service
 - Must comply with treaties and host nation law!
 - Get help from a Base Legal Office!

SCRA = No Sneak Attacks.

- Service Members Civil Relief Act
- 50 U.S.C. App §§ 501 – 597b
- Among Other things:
 - §521: Protection From Default Judgments:
 - Affidavit of Service in ALL cases
 - Mandatory stay + attorney appointment
 - §522: D's Application for a further Stay
 - §521(g): Reopening the Default Judgment

§521 = Default Protection

Pitfall: P fails to submit the §521 Affidavit to the court so the judgment is voidable.

- Must Submit Affidavit “Whether D is in the military service”
- If so, Judge MUST grant the 90 Day stay Automatically when:
 - (1) there may be a defense to the action and a defense cannot be presented without the presence of the defendant; **OR**
 - (2) after due diligence, counsel has been unable to contact the defendant or otherwise determine if a meritorious defense exists.
- Then what?
 - Court may extend the stay
 - Court MAY NOT enter default without appointing an Attorney:
 - What does the attorney do?
 - Who pays?

Web search for
 “SCRA Affidavit”
 Produces this Virginia
 SCRA Affidavit

Print	Highlight Fields	Clear All Data
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AFFIDAVIT – DEFAULT JUDGMENT
SERVICEMEMBERS CIVIL RELIEF ACT
 Commonwealth of Virginia VA CODE § 8.01-15.2

Case No. _____

RETURN DATE AND TIME _____

☐ Circuit Court ☐ General District Court
☐ Juvenile and Domestic Relations District Court

CITY OR COUNTY _____

v./In re: _____

I, _____, the undersigned affiant, states the following under oath:

PRINT NAME

☐ The defendant/respondent is in military service. ☐ is not in military service.

The following facts support the statement above:

☐ The affiant is unable to determine whether or not the defendant/respondent is in military service.
 Pursuant to 50 U.S.C. app. § 521, if the court is unable to determine whether the defendant/respondent is in military service based upon the affiant's statement, the court, before entering judgment, may require the plaintiff/petitioner to file a bond in an amount approved by the court.

DATE _____

AFFIANT'S SIGNATURE _____

The above-named affiant personally appeared this day before the undersigned, and upon duly being sworn, made oath that the facts stated in this affidavit are true to the best of his or her knowledge, information and belief.

DATE _____

☐ CLERK ☐ DEPUTY CLERK ☐ MAGISTRATE ☐ JUDGE ☐ INTAKE OFFICER

FOR NOTARY PUBLIC'S USE ONLY:

State of _____ [☐] City [☐] County of _____

Acknowledged, subscribed and sworn to before me this _____ day of _____, 20 _____.

NOTARY REGISTRATION NUMBER _____

NOTARY PUBLIC:
 (My commission expires: _____)

NOTICE REGARDING APPOINTMENT OF COUNSEL TO REPRESENT ABSENT SERVICEMEMBER:
 Where appointment of counsel is required pursuant to 50 U.S.C. app. § 521 or § 522, the court may assess attorneys' fees and costs against any party, as the court deems appropriate, and shall direct in its order which of the parties to the case shall pay such fees and costs, except the Commonwealth unless it is the party that obtains the judgment.

FOR COURT USE ONLY:
☐ **ORDER OF APPOINTMENT OF COUNSEL**
 I find that appointment of counsel is required pursuant to 50 U.S.C. app. § 521 or § 522 and therefore, I appoint the lawyer indicated below to represent the absent servicemember named as defendant/respondent above.

NAME, ADDRESS
 OF COURT
 APPOINTED
 LAWYER: _____

NEXT HEARING DATE AND TIME _____
 DATE _____
 JUDGE _____

☐ **STAY OF PROCEEDINGS**
 I find that a stay of proceedings is required pursuant to 50 U.S.C. app. § 521 and, therefore, such a stay, for a minimum period of 90 days, is ordered until _____

DATE _____

JUDGE _____

FORM DC-418 REVISED 10/13

Print

Web search for
“SCRA Service
Verification”
Produces this
official website
to search
Service Status

SCRA - Single Record Request - Internet Explorer provided by USAF

https://www.dmdc.osd.mil/appj/scra/single_record.xhtml

50 USC Appx. §§501 et seq. as amended

The services provided on this site are FREE

Welcome to the Official
**Servicemembers Civil
Relief Act (SCRA) Website**

Home Single Record Request Multiple Record Requests User's Guide FAQs News My Account

Single Record Request

Use this page to request a Certificate verifying Active Duty Status for an individual on a specified date.

* Indicates a required field

* SSN

* Repeat SSN

* Birth Date
MM/DD/YYYY(e.g., 09/16/2012)

SSN
OR
Birth Date
Required

* Last Name

First Name

Tips & Notes

- Without a SSN, the DMDC cannot process your query. The date of birth must identify an individual.
- Check your submission information.
- Response time is approximately 30 seconds after submission.

Resources

[Download Adobe PDF](#)

[Unexpected results](#)

Done Trusted sites | Protected Mode: Off 150%

§522 = Servicemember Requested Stay

- **Pitfall:** D fails to follow the statutory guidelines in requesting a stay. Stay is not granted.
- (b)(1) At any stage before final judgment . . . the court may on its own motion and shall, upon application by the servicemember, stay the action for a period of not less than 90 days.
- (2) Application for a stay ... shall include:
 - (A) A letter or other communication setting forth facts stating the manner in which current military duty requirements materially affect the servicemember's ability to appear and stating a date when the servicemember will be available to appear.
 - (B) A letter or other communication from the servicemember's commanding officer stating that the servicemember's current military duty prevents appearance and that military leave is not authorized for the servicemember at the time of the letter.
- Court **MUST** appoint an attorney if denying the application.

PERIL: §521(g) – Servicemember Can Reopen the Case!

- Allows reopening default judgment to allow servicemember to defend if:
 - The servicemember was materially affected by reason of that military service; and
 - the servicemember has a meritorious or legal defense to the action or some part of it.
- SOL to reopen? 90 days after release or termination of military service. (20+ years!)

The Big 3

- Getting Started Service and SCRA
- ***But....Kids come first***
 - SCRA: Judicial flexibility
 - Is Custody Compatible w/ Military Service?
 - Planning for Military Moves and Deployments
 - “Family Care Plan”
 - Your agreements
- Dividing Retirement and Benefits
 - What is Divisible? When?
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Child Custody

- Judicial Flexibility in applying SCRA Stay
 - Is the Stay really Mandatory?
 - §521 Stay for non-appearing servicemember
 - §522 Stay when servicemember appears and requests
 - PERIL! what about motions in extended domestic cases?
 - 1. Servicemember appears and participates; then,
 - 2. Servicemember deploys; then
 - 3. Spouse files motion to change support, properly serves notice by mail to the old address, and servicemember fails to appear.
- Wyo. Stat. § 20-2-205, Temporary military duty; definitions; modification of orders; visitation assignment; electronic evidence.
- Custody modifications are temporary

Peril: Servicemember relies on the family care plan.

- What is a “Family Care Plan”? –
a ***military document*** that may purport to transfer custody by a power of attorney
- But is NOT binding on the court!

Child Custody Pitfall: Not Planning for the Military Move

- Incorporate IN THE AGREEMENT:
 - Local Plan
 - Long Distance Plan
 - Deployment Plan?
- Wyoming courts:
 - Some Courts generally consider planning for moves premature and speculative.
 - But with the military life: isn't it a question of when, rather than if?
 - And isn't that already a hectic time?

Arguments Against Custody

- Servicemember's frequent moves + frequent absence
=
non-care and instability
- Back up plans or family care plans incorporating legal strangers are insufficient:
 - not the new step parent
 - not the grandparents
 - not the baby sitter / girlfriend

Arguments for Custody

- Sense of Community
- Safe Environment
 - Fire / police / controlled access
- Unparalleled access to services:
 - Family advocacy services
 - Hospital / Mental health
 - Hobby shop / library / school
 - Service organizations
- Unique opportunity for travel + growth

The military lifestyle...

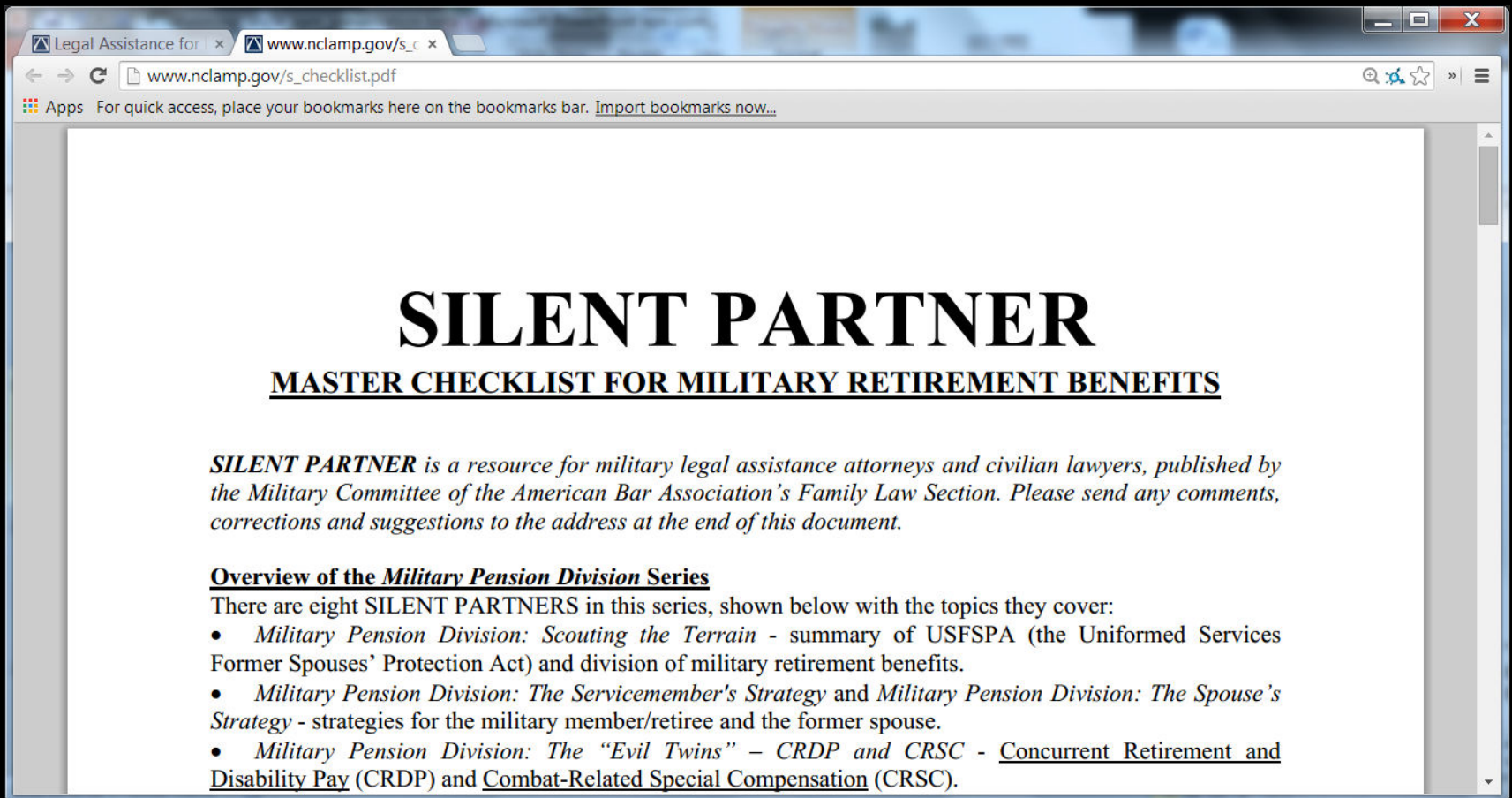


The Big 3

- Getting Started Service and SCRA
- *But....*Kids come first
 - SCRA: Judicial flexibility
 - Is Custody Compatible w/ Military Service?
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Get the Benefits Checklist:

- http://www.nclamp.gov/s_checklist.pdf



Survivor Benefit Plan

- SBP is a Death Annuity.
 - When retiring, the veteran can opt-in to a “life insurance” style death annuity for the spouse: The SBP.
 - Only one spouse can receive the SBP:
 - Prior or subsequent spouses are out of luck.
 - PUT IT IN THE AGREEMENT! Or what happens when the Retirement runs out?

Other Entitlements:

- 10/10: (10 years marriage overlapping 10 years of service) Direct garnishment of up to 50% of servicemember's retirement. BUT ONLY IF THE STATE COURT GRANTS IT!
- 20/20/20 (20 years marriage/ 20 Years service/ 20 years overlap) Spouse retains full access to retired services: medical/ commissary/ legal assistance.
- 20/20/15 : 1 year medical benefits + subsequent right to convert to a private health plan set up by the Defense Department. However, you must remain unmarried and not be covered under employer-sponsored medical coverage.
- CHCPB : Purchase a similar health plan. 1 Year.
Or indefinitely if Former Spouse is entitled to a share of the servicemember's pension or SBP coverage; not be remarried if below age 55; pays quarterly advance premiums; and meets certain initial application deadlines.

USFSPA: Uniformed Services Former Spouse's Protection Act

- 1. States may divide the pension as marital/community property
- **2. But Pension Division Jurisdiction is limited to a state where**
 - the SM was domiciled,
 - The SM consented to jurisdiction,
 - or resided not due to military assignment.
- **3. State courts can order the direct pay of pension division awards (where there is ten years' overlap between the marriage and creditable military service) through DFAS. (The 10/10 rule)**
- **5. Such direct payments may not exceed 50% of the SM's disposable retired pay (in most cases).**

PITFALL: Judgment Didn't Have Jurisdiction to Divide the Pension.

- Limited to a state where
 - the SM was domiciled; or
 - the SM consented to jurisdiction (appeared);
 - resided not due to military assignment.

What is Domicile?

- (1) Physical presence of the SM; and
- (2) Intent to remain

SCRA §571(1)

A servicemember shall neither lose nor acquire a residence or domicile for purposes of taxation with respect to the person, personal property, or income of the servicemember by reason of being absent or present in any tax jurisdiction of the United States solely in compliance with military orders.

1. Military records indicate NY is SM's "home of record"
 2. SM is stationed in DC, buys a home in Virginia, Goes to law school and is Barred in Virginia, registers to vote in Virginia, pays taxes to Virginia.
 3. SM moves to Wyoming pursuant to military orders.
 4. SM's Leave and Earnings Statement say SM pays taxes in Wyoming.
 5. SM is sued for divorce in WY, and receives valid service.
- *Don't be fooled! "Home of record" is just the figurative bus ticket when service ends.*
 - *Was WY actually the domicile? Or just about the lower taxes?*

Kelly v. Kelly

- 2003 WY 133, 78 P.3d 220 (Wyo., 2003)
- Included a QDRO “how-to” primer as an appendix.
- The primer was this website:

<http://www.dfas.mil/garnishment/usfspa/legal.html>

- Now updated to include an entire section for attorneys:

<http://www.dfas.mil/garnishment/usfspa/attorneyinstructions.html>

Example 4. The following language is acceptable for all active duty 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 \$ (dollar amount) and with ____ years of creditable service on ____.”

***The retired pay base is a base pay figure. As noted on page 9 above, the retired pay base is the final basic pay at retirement for members entering military service before September 8, 1980, and the “high-3” amount for member’s entering military service on or after September 8, 1980.**

Example 5. If a member entered military service before September 8, 1980, the following language is also acceptable because we can determine the member’s retired pay base by simply looking at the pertinent military pay table.

“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 ____.”

E. Examples of unacceptable former spouse award language.

Problems with award language usually occur when the parties are divorced prior to the member’s becoming eligible to receive military retired pay. The examples given below represent common mistakes we see in court orders attempting to divide military retired pay.

(1) “The former spouse is awarded one-half of the community interest in the member’s military retired pay.”

Here, we are not told how to calculate the community interest. Nor are we provided with any of the variables necessary to make such a calculation using either a formula or hypothetical retired pay award.

Alimony v. Pension Division

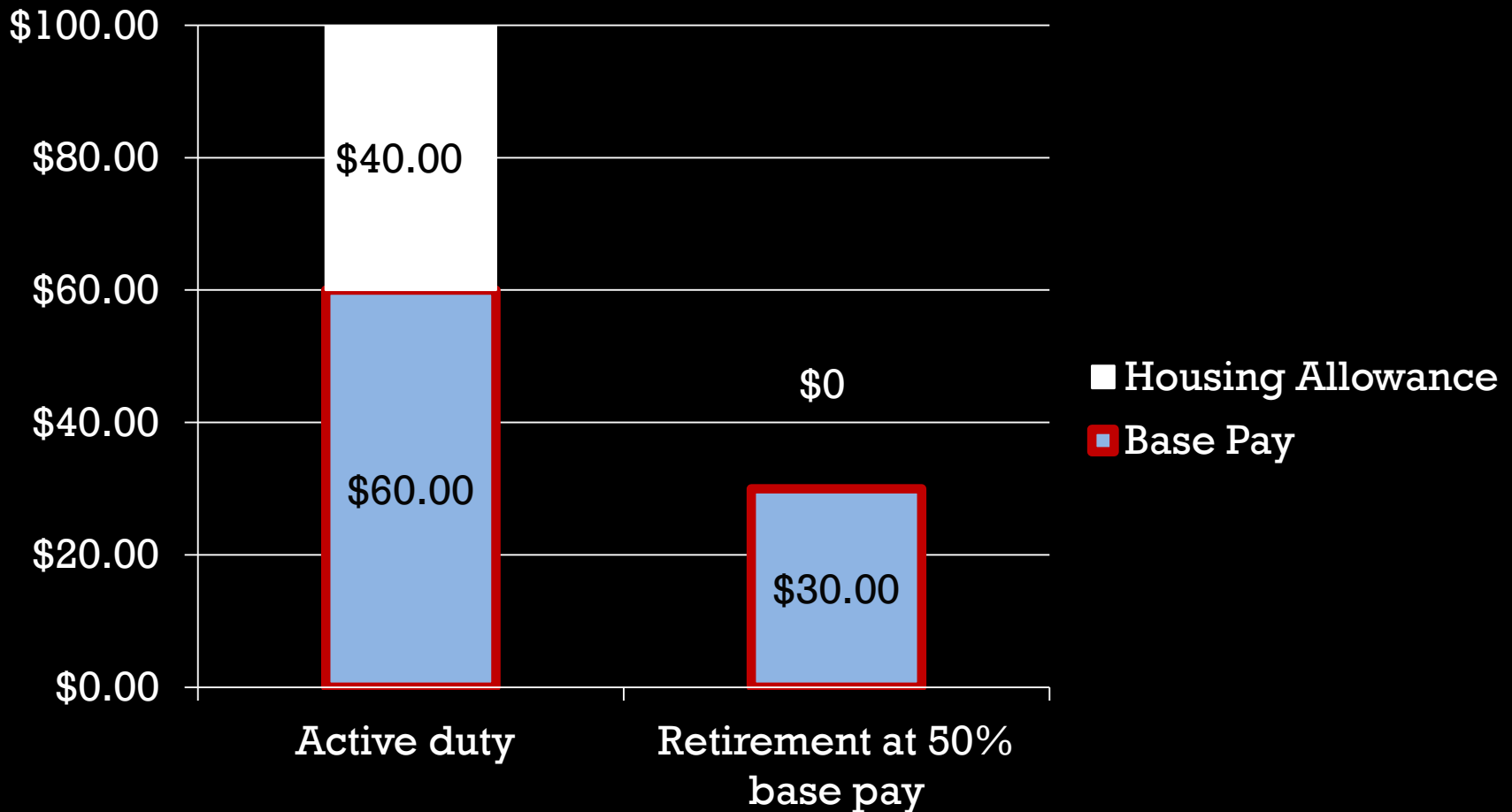
Alimony

- Payable from DFAS
- Payable now
- Predictable
- Payed when SM still has housing allowance, special pay, and bonuses

Pension Division

- Only payable from DFAS under 10/10 Rule
- Payable someday
- Probably a larger total dollar figure
- Payable when SM also loses Housing allowance, special pays, bonuses...
- What if SM doesn't retire?
What if SM wants to stay in longer?

When Would SM Prefer to Pay?

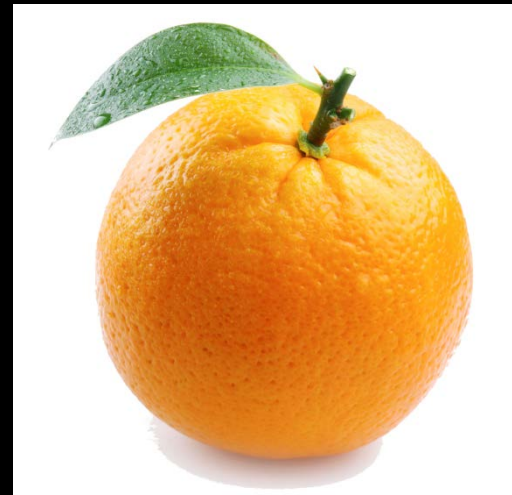


What is Divisible When?

Retirement



Disability



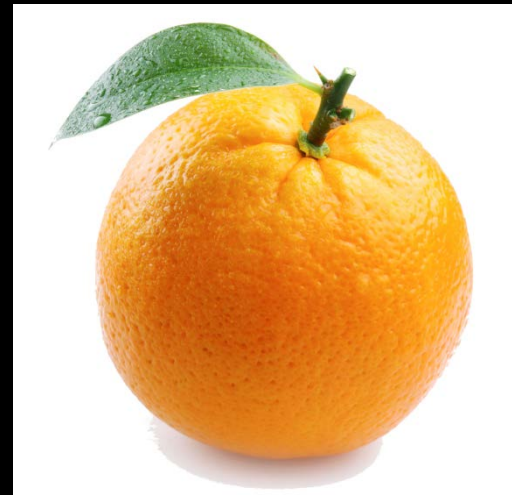
What is Divisible When?

Retirement

- Taxable
- Divisible



Disability



- Non-taxable
- Non-divisible
- **“dollar-for-dollar”
Retirement Waiver**

Dollar-for-Dollar Retirement Waiver



“Husband shall pay to wife 50% of his disposable retired pay”



Is this what they agreed?



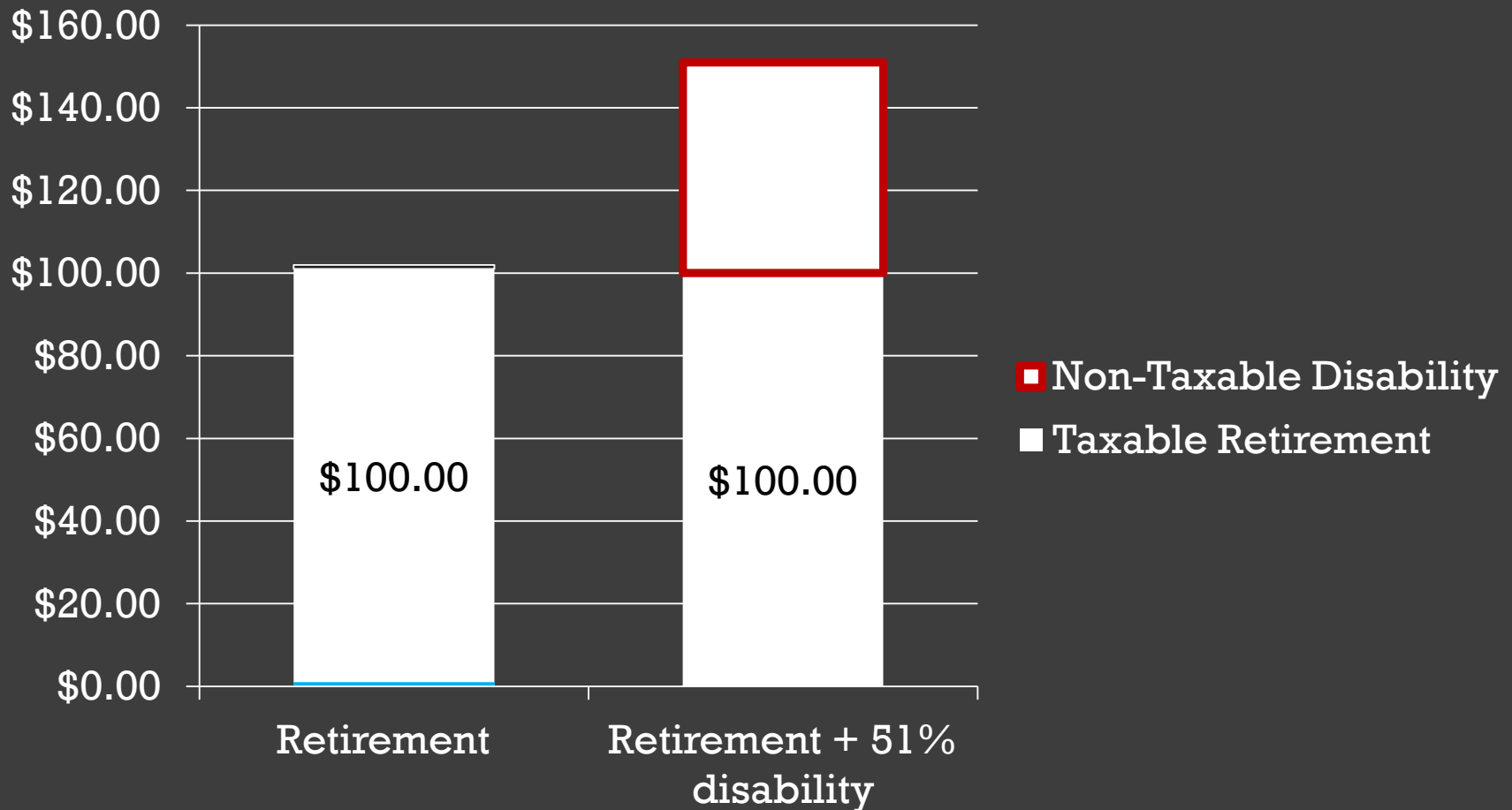
Example: \$2000 Per month retired pay, 40% disability (new spouse).



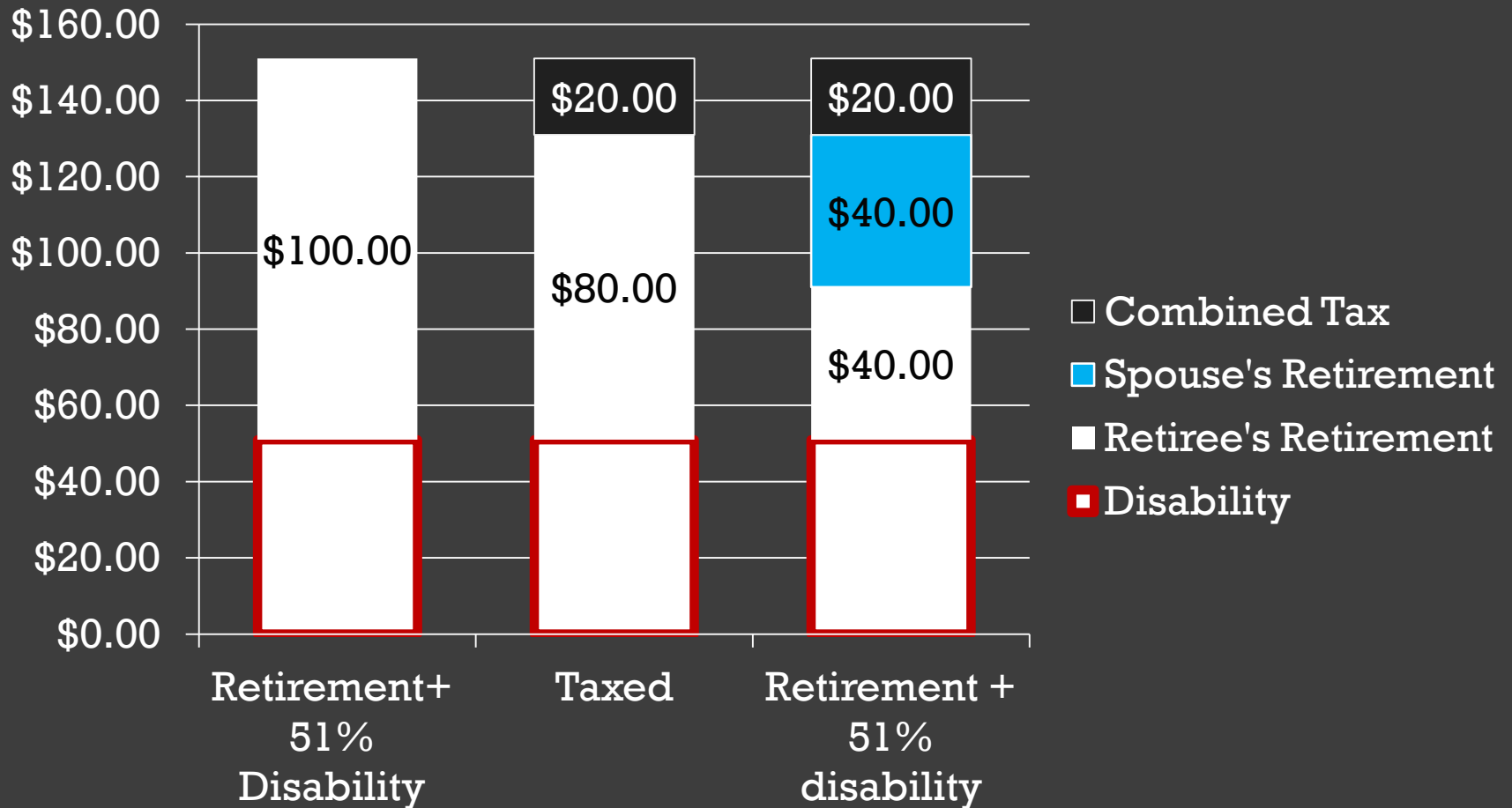
Fair ?



CRDP: Concurrent Retirement and Disability Payment
Eliminates the Retirement Waiver
For Disability over 50%*



CRDP



CRSC: *Combat Related Special Compensation*

Replenishes the waived retired pay, isn't taxed,
BUT IT'S NOT DIVISIBLE RETIRED PAY!!!



How should the Court React?

- Majority : Courts imply indemnification- that the service member will indemnify the spouse when waiving “their” retired pay.
- Minority : No indemnification. Under the federal scheme, the servicemember has a unilateral right to waive retired pay in favor of non-divisible disability pay. The court will not read extra provisions into the law or the parties’ own agreement.

ORIGINAL SENATE FILE NO. 0046
ENROLLED ACT NO. 46, SENATE

(b) In making a disposition of property pursuant to this section, a court shall not do any of the following:

(i) Consider any federal disability benefits awarded to a veteran for service-connected disabilities pursuant to title 38, chapter 11 of the United States Code;

(ii) Indemnify ... for any waiver or reduction in military retirement or retainer pay related to receipt of veteran disability benefits ...

(iii) Award any other income or property ... as compensation for any waiver or reduction in military retirement or retainer pay related to receipt of veteran Disability benefits...

Section 2. This act is effective July 1, 2013.

Consequences?

- Does not forbid considering disability pay regarding Alimony / child support.
- Does not forbid considering waiver of retirement for CRSC.
- Does not forbid parties from agreeing to indemnify.
- Probably limits the effects of drafting tools like Good faith clauses and clauses enabling courts to retain jurisdiction to modify.

Drafting Around the Retirement Waiver

- 1. Indemnity
 - A. Lay out the expectations of the parties in general terms
(x years of service, about \$x retirement, based on no waivers of retirement.)
 - B. Enumerate specific remedies
 - Indemnification
 - Alimony
 - DO NOT state the source of compensation will be VA Disability
- 2. Court retains Continuing jurisdiction to modify or award:
 - Pension or property division
 - Spousal support
 - Compensatory damages
 - To carry out the original intent of the court.
- 3. Good Faith and Fair Dealing clause
- 4. “Floor” for retired pay
- N.B. DFAS will only pay a portion of the “retired pay.”

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