

Wise

Women In Search of Equity for Military in Divorce



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HOUSE BILL 2265 - MILITARY PENSION BILL

**Presented before the Pennsylvania Legislature
House Judiciary Committee**

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Madam Chair and Members of the House Judiciary Committee, thank you for the opportunity to testify before you on this very important issue. My name is Patricia Bruce and I am the National Director of WISE, a nonprofit association advocating equity for military members in divorce. I am here today to represent the members of WISE who are legal residents of the State of Pennsylvania and to offer the support of WISE for HB 2265 - Military Pension Bill, introduced by Representative Larry Roberts.

While a non-military citizen who is in the process of a divorce may have their retirement divided by the courts as community property as directed by state law, members of the military who are divorced in the State of Pennsylvania are affected not only by the laws of the State, but also the Uniformed Services Former Spouses' Protection Act (USFSPA).

In the event that there may be some of you who are not totally familiar with the Uniformed Services Former Spouses' Protection Act, I would like to give you a little background information.

Prior to 1981, State courts disagreed as to whether they were authorized or constrained by Federal legislation or Federal legal precedent in dividing military retired pay in divorce-related property settlements. Inconsistencies between the States and perceptions of unfairness and arbitrariness have been common grounds for criticisms of the system.

The Supreme Court ruled (6-3) on June 25, 1981, in the case of McCarty v. McCarty, that the former spouse of a military member or retiree could not be awarded any share of that member's/retiree's retirement pay as part of a divorce property settlement in a community property State, because then-current Federal law did not authorize the treatment of military retired pay as divisible property in such a settlement. In reaching this ruling, however, the court did not endorse its social impact and the effect that this ruling would have on the plight of a former spouse. Justice Blackmun, writing for the majority, invited congress to consider a change in the law to allow such a division to be made.

Congress responded with the Uniformed Services Former Spouses' Protection act (USFSPA) Public Law 97-252: 10 USC 1408 which was enacted in September 1982 and has subsequently been amended many times to the detriment of military members in an overwhelming majority of instances.

It is important to note that no other retirement plan in the United States is similar to that of the retirement system of the Uniformed Services. In retirement, military retirees are on a retainer. Military retired pay serves as reduced compensation for reduced current services. Military retirees are subject to recall and are also subject to employment and travel restrictions. They are also subject to the more restrictive Uniform Code of Military Justice (UCMJ). Military retired pay is not based on investing current pay for deferred compensation. Military members do not contribute to the retirement fund. Instead, it is reduced pay for reduced current services as stated in the McCarty decision. Although Congress passed the USFSPA stating that the State courts **MAY** divide military retired pay in a divorce, USFSPA did not alter the definition of military retired pay.

While the intent of the law was a noble one, the application of the law by the State courts has proven to be at the very least, misunderstood. The testimony presented during the floor debate of the USFSPA addressed several of the problems that could occur as a result of the passage of this law. These concerns have come to be very real.

There are gross misunderstandings about what the USFSPA does and doesn't do. But for the purpose of clarification I respectfully submit the following:

1. What the USFSPA does:

- a. The USFSPA allows the states to divide military retired pay solely as property of the military member or the property of the former spouse and the military member.
- b. The USFSPA allows the states to implement a means for garnishing the military retiree's pay to affect timely and correct payments to a former spouse.
- c. The USFSPA mandates that if the garnishment mechanism portion of 10 USC 1408 is used by the courts that DFAS can only pay up to 50% on the garnishment as per the restrictions under Social Security laws.
- d. The USFSPA mandates that the states may use any means under law to ensure that payments of a court ordered share of retired pay are paid in a timely and correct manner to the former spouse by the military member.

The Uniformed Services Former Spouses' Protection Act says that the State Courts **may** divide military retirement "as" property in a divorce and allows a "garnishment mechanism" for doing so. It does not dictate HOW the states divide.

Because of this, we frequently see cases where state divorce courts have divested military retirees of 100 percent of their retired pay in a mix of pay as property, pay as alimony, spousal support and pay as child support. The USFSPA provides that 65 percent of the total amount of retired pay can be garnished by the federal government. The remaining 15 percent can be collected as state law enforcement measures. A similar method is being used by state courts to circumvent the USFSPA's protection of VA disability pay.

The USFSPA does not permit the “garnishment” of disability pay. However, because the state is not permitted to award disability pay as “marital property,” the courts have been awarding payment as alimony. In the case of a 100-percent disabled veteran, this disability retirement may well be their only source of income.

2. What the USFSPA doesn't do

- a. The USFSPA does not mandate that the state courts **MUST** divide military retired pay.
- b. The USFSPA does not mandate that the state courts must use the garnishment mechanism of 10 USC 1408.
- c. The USFSPA does not mandate how much or little the state may or may not award to a former spouse as property in a divorce.
- d. The USFSPA does not limit the amount of a property award by the states.
- e. The USFSPA does not mandate that a military retiree shall pay directly to the former spouse a share that is not paid through a garnishment.
- f. The USFSPA does not create a right or entitlement to the military retired pay to the former spouse.

The law does not say military retired pay **IS** property. It says that states **MAY** treat military retired pay **LIKE** property. It is the decision of each individual state. If the state chooses to divide as property, it also has the choice of how and under what conditions they do divide.

Because of this, we ask you to consider the following:

While Congress has no control or jurisdiction over State courts in how they divide military retired pay, it does have control over the use of Federal compensation and benefits as well as administrative mechanisms in the disbursement of Federal compensations and benefits related to such law. Courts are limited by congressionally mandated controls concerning the division of these other federal benefits in a divorce-related settlement.

Military retired pay is a federal retirement with the funding provided for in the annual Defense Authorization Act. All other federal retirements specifically state within their retirement laws how these benefits will be divided upon the divorce of the employee. There is no such provision written into the Uniformed Services Former Spouses Protection Act.

Because Congress left this matter up to the States, it is up to each State to determine how they will divide military retired pay in a divorce action.

This treatment of military retired pay is inconsistent with the treatment of all other federal retirement plans. WISE believes that because military retired pay is not comparable to that of the civilian community and is a federally funded plan, the laws governing how it is divided in divorce should, at the very least, be consistent with that of other federal plans. The passage of HB 2265 would correct an aspect of the law that treats retired servicemen and women in a discriminatory manner in contrast to other federal retirees.

This law would provide for termination of payments to former spouses from the retired pay of servicemen and women, in cases where the former spouse remarries. This is a bedrock principal of federal retirement law and its adoption is a matter of equity and fairness to our military personnel.

There is simply no reason why we should treat men and women who serve honorably in our Armed Forces, but who divorce, any less favorably than men and women who serve in the Civil Service, Foreign Service and Central Intelligence Agency.

I offer for your consideration the following comparison of other Federal plans:

Central Intelligence Agency: 50 USC 2032(a)(2)

Payments stop to remarried former spouses under the age of 60.

Spouse must be married to the annuitant for a certain number of years before becoming eligible to receive a marital share.

Marital share is calculated based on the duration of marriage, not on entire career of the agency member.

Foreign Service: 22 USC 4068/ 22 USC 401j(a)(1)(B)

Payments stop to remarried former spouses under the age of 60.

Spouse must be married to the annuitant for a certain number of years before becoming eligible to receive a marital share.

Marital share is calculated based on the duration of marriage, not on entire career of the agency member.

Railroad Retirement Plans:

The former spouse must have been married to the annuitant for at least ten years while the benefits were accruing.

Social Security: 42 USC 402

Former spouse must have been married to the eligible worker for at least 10 years.

Be at least 62 years old and UNMARRIED.

During the floor debate on the USFSPA in 1982, Congressman Bill Nichols stated:

“The recent change in the Foreign Service Personnel System and the changes proposed in the CIA personnel system, currently in conference have been used to argue the need for change in the military (system).

Both of these systems restrict payments of portions of retired pay to situations in which the marriage lasted 10 years, during which time the member was an employee of the system.

In addition, payments of retired pay to former spouses terminate upon remarriage of a former spouse...

A similar restriction is only fair for the military member as well, to a large extent, in a similar situation”.

One major misconception of the law is that military retired pay is not divided unless the spouse and military member is married for at least ten years. This is totally incorrect. What USFSPA says is that the Defense Finance and Accounting System (DFAS) of the Department of Defense will only garnish the military retired pay of a member if a ten year marriage and military service of the member overlap. Anything less than ten years is paid monthly, directly by the military retiree to the former spouse.

While some have expressed concern over the method which Defense can use to stop payments upon the remarriage of the former spouse, I offer that this could be addressed by the Courts as a modified court order to the original divorce decree and submitted to DFAS in the same manner as the original court order was presented. As DFAS involvement was merely a garnishment mechanism, when the obligation of the garnishment has been ended, as in any garnishment, the payments would subsequently stop.

For those military members who have had their retirement divided for less than ten years of marriage, upon the remarriage of their former spouse, they could return to the court for a modification. For future military members who are in the process of a divorce, the stopping of the division upon the remarriage of the former spouse could be stipulated in the divorce decree.

While this is a very emotional and complex issue, the State of Pennsylvania has a distinct opportunity to correct the inequities that face our military in divorce by aligning the division of military retired pay with that of other federal retirement plans.

On behalf of our military members, active duty, reserve and retired, we thank you for your consideration of this much need legislation. **Where Justice is not blind, WISE is working to balance the scales!**