

## Calculating Military Pay With Pre-Dissolution VA Waiver and SBP

Disposable Pay Law: 10 U.S.C. 1408(a)(4)

Definition of Disposable Pay for February 3, 1991 divorces and after:

(4) The term “disposable retired pay” means the total monthly retired pay to which a member is entitled less amounts which—

(A) are owed by that member to the United States for previous overpayments of retired pay and for recoupments required by law resulting from entitlement to retired pay; (**EXAMPLE:** Military member who takes an ‘early out’ payment but decides to re-enter service)

(B) are deducted from the retired pay of such member as a result of forfeitures of retired pay ordered by a court-martial or as a result of a waiver of retired pay required by law in order to receive compensation under title 5 or title 38; (**EXAMPLE:** VA Waiver after retirement)

(C) in the case of a member entitled to retired pay under chapter 61 of this title, are equal to the amount of retired pay of the member under that chapter computed using the percentage of the member’s disability on the date when the member was retired (or the date on which the member’s name was placed on the temporary disability retired list); or (**EXAMPLE:** Retired with a disability)

(D) are deducted because of an election under chapter 73 of this title to provide an annuity to a spouse or former spouse to whom payment of a portion of such member’s retired pay is being made pursuant to a court order under this section. (**EXAMPLE:** Survivor Benefit Plan (SBP) election)

NOTE: Under the original enactment of Uniformed Services Former Spouses’ Protection Act (USFSPA), the military pay center withheld taxes from gross retired pay, divided the post-tax amount between the member and the spouse pursuant to court order, and sent a check to each. **IMPORTANT** For divorces finalized BEFORE February 3, 1991.

SBP Case: IRMO Smith (2007) 148 Cal.App.4<sup>th</sup> 1115

**Allocation of SBP:** Under military procedure the maximum survivor continuance benefit is 55%. The court held in IRMO Smith that the parties are to split the cost of providing former spouse a 55% survivor continuance as to former spouse’s community interest. Former spouse is responsible for the additional coverage if former spouse wants to protect more than 55% of former spouse’s community interest.

Example: \$3,000 gross monthly benefit, former spouse’s interest is \$1,000, cost of full SBP is \$195, and full survivor benefit is \$1,650 (55% of \$3K). The community is only responsible for splitting the cost of providing former spouse a 55% survivor continuance on former spouse’s \$1,000 interest. Stated another way the community is responsible for protecting \$550. Mathematically, the community’s cost is wife’s proportional community interest (33.33%) times the SBP cost (\$195) which equals \$65.00 (33.33% of the FULL SBP of \$1,650 would be \$550). Military member’s responsibility is ½ of the community’s cost, which equals \$32.50. Former spouse is responsible for the remainder of the SBP cost if former

spouse wants to retain the maximum level of survivor benefits after military member's death. This means former spouse would be responsible for  $\$195 - \$32.50 = \$162.50$ . NOTE: This would actually INCREASE former spouse's benefit after military member died-since former spouse would go from receiving \$1,000 while military member is alive to receiving \$1,650 after military member's death. There are lower coverage limits that can be selected (55% is the maximum).

Disability Cases: IRMO Mansell (1989) 490 U.S. 581; IRMO Smith (2007) 148 Cal.App.4<sup>th</sup> 1115; IRMO Krempin (1999) 70 Cal.App.4<sup>th</sup> 1008; IRMO Olsen 24 Cal.App.4<sup>th</sup> 1702

**Pre-Dissolution VA Disability Pay Waiver:** Any sums paid to the member for disability as of the date of divorce are treated as separate property. The courts recognize that those sums are taken into consideration in the division of other assets and in considering resources for spousal support (4320 factors for example). HOWEVER, courts can distinguish a separate property disability existing on the date of divorce VS a post-divorce re-characterization of a community property award which divests former spouse from a portion of that award. NOTE: The domestic relations order attorney should include language in the military division order that reserves jurisdiction over the military pay for purposes of revising former spouse's percentage to maintain the same benefit payments-in the event former spouse's benefit is reduced because of a post judgment VA waiver-which reduces the amount of 'disposable pay' available for division.