

# **DRAFTING MILITARY CLARIFICATION ORDERS**

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## About the Author

James (“Jim”) Cramp is the founder and principal at the Cramp Law Firm, PLLC, which provides a spectrum of family-related legal services in the San Antonio region. Jim is a strong and committed advocate for all families. His military background has made him particularly passionate about serving military and Federal civil service families in all stages of life.

Jim retired from military service in the grade of colonel after having served 29 ½ years on active duty. His military career included flying, operations, support, recruiting, training and headquarters assignments. Jim is a three-time commander at the detachment, squadron and group levels.

### Civilian and Military Education

- Juris Doctor (JD) (Magna Cum Laude),  
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- Executive Excellence Seminar,  
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- Master of Strategic Studies (MSS),  
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- American Bar Association
- State Bar of Texas
- San Antonio Bar Association
- Military Officers Association of America
- Harlan Society (law honors)

## **Overview**

The purpose of this paper is to introduce the military divorce practitioner to the task of drafting a clarification order after DFAS has rejected the initial order and requested a clarification order. (emphasis added). Instruction for the practitioner in how to perform all required calculations is beyond the scope of this paper, with the exception that this paper will demonstrate how to calculate a former spouse's award of a percentage of the Servicemember's hypothetical retired pay at time of divorce into a percentage of the Servicemember's actual retired pay at retirement for reasons that will be explained.

This paper presumes that the Service Member already is an active participant in the litigation either as the Petitioner or Respondent who has answered or otherwise filed a responsive pleading. This paper also presumes that the Service Member entered military service on or after September 8, 1980.

## **Establishing Need for Clarification**

In general, the need for a clarification order begins with notice from DFAS that the order submitted with the former spouse's original application cannot be approved. *See* Memorandum from DFAS to the Former Spouse (March 23, 2016) (on file with the author) at Exhibit "A." DFAS' letter should explain why the order was rejected (i.e. what needs to be done to get the order accepted). *See id.*

## **Analyzing the Task**

In analyzing the task, the practitioner must evaluate five factors: (1) trial court time lines; (2) DFAS time lines; and, (3) constraints on drafting the clarification

order; (4) information required to draft the clarification order; and, (5) the form for drafting the clarification order. This paper will explore briefly each factor.

## **(1) Trial Court Time Lines**

The trial court must possess plenary power to enter a clarification order. *See, e.g., Araujo v. Araujo*, 493 S.W.3d 232 (Tex. App.—San Antonio 2016, no pet.) (concluding the trial court did not render a valid domestic relations order because it did so after the trial court's plenary power had expired). In Texas, the trial court's plenary power expires 30 days after the signing of the divorce decree. *See, e.g., Tex. R. Civ. P. 329b(a)* (stating the time for filing post-trial actions ends 30 days after the judgement is signed).

If the trial court's plenary power has expired, it may be reactivated by filing a petition for entry of a postdivorce domestic relations order. *See, e.g., Tex. Fam. Code § 9.101* (stating that the trial court that rendered the divorce decree retains continuing exclusive jurisdiction to render an enforceable domestic relations order); *Tex. Fam. Code § 9.102* (stating that a party may petition the court for a qualified domestic relations order); *Araujo*, 493 S.W.3d. at 235 (acknowledging that plenary power may be reactivated in accordance with *Tex. Fam. Code § 9.101-02*).

## **(2) DFAS Time Lines**

Note in Exhibit "A" that DFAS informs the former spouse that the original application will be kept on file for 90 days from DFAS' receipt. *See* Memorandum from DFAS to the Former Spouse (March 23, 2016) (on file with the author) at Exhibit "A." If a clarification order is received by DFAS within that timeframe, no new application

for former spouse retired pay is required. *Id.* If a clarification order is submitted more than 90 days after DFAS' receipt of the original application, then a new, entire application must be submitted with the clarification order. *Id.*

### **(3) Constraints on Drafting the Clarification Order**

In this author's experience, determination of the information required to clarify the DRO requires examination of both the DRO and the final decree upon which the DRO is based. The former spouse's award in Figure 1, below, is a good example of a decree that needs to be clarified before a clarified DRO can be drafted. *See* Figure 1 (on file with the author's case records).

file revealed that the parties had married on May 17, 1997, and divorced on October 5, 2007, which translated to at least 10 years, 4 months of marriage that overlapped the Servicemember's creditable military service (i.e. 124 months as the numerator in the fraction that represents the marital interest). *See, e.g., Marshall v. Priess*, 99 S.W.3d 150, 158-59 (Tex. App.—Houston [14th Dist]. 2002, no pet.) (citing *Berry v. Berry*, 647 S.W.2d 945, 947 (Tex. 1983) as authority for the marital interest being a fraction, the numerator of which is the number of months the marriage overlapped creditable service and the

W-10. All right, title, and interest in and to the sum determined under the formula set forth below of the United States Armed Forces disposable retired pay to be paid as a result of Servicemember's interest awarded to Former Spouse of all increases in the United States Armed Forces disposable retired pay due to cost of living or other reasons, if, as, and when received by Servicemember.

**Fig. 1**

**50% of the following quotient: 120 months divided by the total number of months of creditable service in the Armed Forces on retirement of the United States Armed Forces disposable retired pay to be paid as a result of Servicemember's service in the United States Armed Forces, payable if, as, and when received by Servicemember. Said amount should be based on the current pay grade of the service member, which Respondent is a CW-2 with 12 years and 4 months of creditable service. Former Spouse shall receive 25% of the disposable military retired pay.**

Comparison of the award language in Figure 1 with the facts of this case revealed several errors, as follows:

- a. The use of 120 months to reflect the marital interest in the numerator was incorrect. Examination of the case

denominator of which is the number of months creditable service at time of divorce); Pleadings (in author's case records). Thus, use of 120 months of marriage/military overlap in the award's numerator disadvantages the former spouse by

reducing the percentage representing the marital interest. *See id.*

- b. The use of total number of months of creditable service at retirement for the denominator was incorrect under prevailing Texas law for the division of military retired pay for a member still serving at time of divorce. *See, e.g., Marshall*, 99 S.W.3d at 158-59 (citing *Berry v. Berry*, 647 S.W.2d 945, 947 (Tex. 1983) and explaining computation of the marital interest as a fraction determined at divorce).
- c. The use of 12 years and 4 months of creditable service as the hypothetical retired pay multiplier was incorrect. Examination of the case file revealed that the Servicemember's creditable military service started on October 19, 1995, and the Servicemember was still serving at time of divorce on October 5, 2007. *See* Officer Record Brief (in author's case records); Pleadings (in author's case records). Thus, the Servicemember had at best 12 years of creditable service at divorce and use of 12 years and 4 months inflates the hypothetical retired pay multiplier. *See* Department of Defense Financial Management Regulation 7000.14-R, Volume 7B (hereafter referred to as the DODFMR), Chapter 29, *Former Spouse Payments from Retired Pay*, Paragraph 29608 C. (describing how DFAS calculates the hypothetical retired pay multiplier). It should be emphasized that the National Defense Authorization Act 2017 (NDAA 2017), Public Law 114—328, enacted December 23, 2016, modified the

Uniform Services Former Spouse Protection Act's definition of "disposable retired pay" to be the total monthly retired pay to which the member is entitled based on the grade and **years of service at time of the court order**. 10 U.S.C. § 1408(a)(4) (as modified by NDAA 2017, Sec. 641). (emphasis added). It must be noted that the NDAA 2017's constraints only apply to orders submitted to DFAS on or after December 23, 2016. *See* DFAS Notice of Statutory Change, available at <https://www.dfas.mil/garnishment/usfspa/NDAA--17-Court-Order-Requirements.html> (last accessed August 27, 2017).

- d. The dual awards of (1) "50% of the following quotient: 120 months divided by the total number of months of creditable service in the Armed Forces on retirement of the United States Armed Forces disposable retired pay to be paid as a result of Servicemember's service in the United States Armed Forces, payable if, as, and when received by Servicemember...Said amount should be based on the current pay grade of the servicemember, which Respondent is a CW-2 with 12 years and 4 months of creditable service" followed by the award of (2) "Former Spouse shall receive 25% of the disposable military retired pay" are contradictory and therefore present an ambiguity. *Compare, e.g., Berry v. Berry*, 647 S.W.2d 945, 947 (Tex. 1983) (establishing the formula for division of retirement benefits when

the member still serves at time of divorce) *with Taggart v. Taggart*, 552 S.W.2d 422 (Tex. 1977) (establishing the formula for division of retirement benefits when the member is retired at time of divorce); *Joyner v. Joyner*, 352 S.W.3d 746, 749 (Tex. App.—San Antonio 2011, no pet.) (stating that an ambiguity exists if the decree is subject to more than one interpretation; further stating that whether an ambiguity exists is a question of law).

As evident in the analysis of the award at Figure 1, decretal award language may in fact contain unambiguous, incorrect or erroneous information. These unambiguous errors constrain the practitioner’s effort to clarify the decree and DRO. *See, e.g.*, Tex. Fam. Code § 9.007 (stating a Court “may not amend, modify, alter or change the division of property made or approved in the decree”); *Lohse v. Cheatham*, 705 S.W.2d 721, 726 (Tex. App.—San Antonio 1986, writ dism’d w.o.j. (stating that a court only has authority to clarify, not modify, a decree and further stating that **an unambiguous decree that contains errors which produce an unfair result is not subject to clarification**). (emphasis added).

Do not expect DFAS to rescue the situation either; the information contained in the order even if it varies from the Servicemember’s actual information. *See* DODFMR, Chapter 29, Paragraph 290607 (stating that DFAS will calculate a formula based on the variables provided even if they are different from the Servicemember’s actual information).

W-8. Fifty percent (50%) of the community portion of husband’s Air Force Reserve pay, more particularly defined in a Domestic Relations Order.

Fig. 2 7. Respondent is awarded one-half of Petitioner’s U.S Army retirement that accrued during the marriage as of \_\_\_\_\_.

**(4) Information Required to Draft the Clarification Order**

The information required to draft the clarification order will flow from the practitioner’s analysis of the order and correspondence received from DFAS. Figures 2 and 3 are excerpts from decrees submitted to the author for clarification. *See* Figures 2 and 3 (in author’s case records. See if you can identify each of the elements that requires clarification? An exhaustive discussion of all the factors that could require clarification is beyond the scope of this paper. By the author’s experience, the most typical need for a clarification order stems from a failure to include the following: (1) failure to calculate the community interest and former spouse’s interest; (2) failure to identify creditable military service to permit DFAS to calculate the hypothetical retired pay multiplier; (3) failure to calculate the Servicemember’s high-36 months’ base pay at time of divorce, which applies only if the member is still serving at time of divorce; and, (4) failure to retirement points earned for a Reserve Corps Servicemember during calculations of the community interest, former spouse’s interest, and creditable military service at

divorce that permits calculation of the hypothetical retired pay multiplier—and

understanding that the point totals are divided by 360 to determine the years and months equivalent. *See* DODFMR, Chapter 29, Paragraph 290608, *Acceptable Hypothetical Retired Pay Awards*.

\*\*\* Remainder intentionally blank \*\*\*

among those already deemed acceptable by DFAS. See DODFMR, Chapter 29, Figure 29-1 and 29-2, at Exhibit “G.”

### **(5) Form for Drafting the Clarification Order**

In this author’s opinion, the most prudent form to use when drafting a clarification order is to recite both: (1) the relevant parts of the divorce decree, and (2) the relevant parts of the domestic relations order (DRO), if a DRO had been produced and signed coincident with the or thereafter within the plenary power of the court. The author prefers this approach for two reasons: (1) often, both the decree and DRO require clarification, and (2) even if the divorce decree requires no clarification, the DRO’s division of disposable military retired pay emanates from the division of property set forth in the decree. Ultimately, as long as the court’s and DFAS’ requirements are met, how the order is drafted comes down to a matter of stylistic preference. Rather than expound on stylistic preference, a few examples of clarification orders are provided as Exhibits to this paper. It is worth emphasizing that in the case of Exhibit “F,” a DRO had never been produced. See Pleadings (author’s case file). This DRO was written in detail that “spoon feeds” the parties the information needed to self-execute the division of retired pay since the marriage did not overlap 10 years of creditable service and, thus, DFAS will not make direct payments to Former Spouse. See 10 U.S.C. § 1408(d)(2). In choosing how to express the clarification formula for the order, the author finds it extremely helpful to “feed DFAS its own language” by choosing the appropriate expression from

### **Calculating a Former Spouse’s Percent Award of Hypothetical Retired Pay into a Percent of Servicemember’s Actual Retired Pay**

Note that DFAS’ rejection letter at Exhibit “A” tasks the former spouse to obtain a clarification order that awards the Former Spouse a percentage of the Servicemember’s actual disposable retired pay. DFAS Letter at Exhibit “A.” In this author’s experience, few opposing counsels are comfortable doing that calculation. Yet, that calculation remains important since often the task of clarification of the former spouse’s award is the first step; the next step is enforcement of past due payments owed to the former spouse. A discussion of enforcement of past due payments is beyond the scope of this paper—but know that these two tasks generally are linked.

In this author’s experience, DFAS will accept a clarification order that properly divides the disposable retired pay as of a hypothetical divorce date (i.e. what should have been done correctly at time of the original order). As alluded to, and in this author’s experience, that is about as far as most opposing counsel are willing to go since that approach matches the initial task—and opposing counsel’s unfamiliarity with the DODFMR makes it “a bridge too far” to calculate the former spouse’s hypothetical award at time of divorce as a percentage of the Servicemember’s actual disposable retired pay at retirement. If the clarification order divides the

Servicemember’s disposable retired pay as of a hypothetical date of retirement (e.g. the date of an Informal Settlement Agreement, Mediated Settlement Agreement, or Final Decree of Divorce), DFAS will perform the calculations to determine the present value of that hypothetical retired pay and convert the Former Spouse’s award to a percent of the Servicemember’s actual retired pay at retirement. See DODFMR at Paragraph 290608.H. The example that follows conforms with the DFAS calculations described in DODFMR at Paragraph 290608.H., as follows:

Assumed Factors

- The DRO language reads:

IT IS ORDERED that Former Spouse have judgment against and recover from Servicemember **38.2567** percent of the disposable military retired pay the Servicemember would have received had the Servicemember retired as an O-4, with a high-36 months’ retired base pay of **\$6,410.25** and with **15 years and 0 months** creditable service on the date of divorce, that date being **January 31, 2012**. (emphasis added).

- The Servicemember retires effective **February 1, 2017 (last day of active duty is January 31, 2017)** as an **O-5** with **20 years, 0 months** creditable service (i.e. discerned from examination of his DD214, *Certificate of Release or Discharge From Active Duty*, or from the total retirement points on his final point statement divided by 360, further discussion of which is beyond the scope of this paper) and with a gross retired pay of **\$4,100.00** (i.e. discerned from examination of his Retiree Account Statement for his

initial retired pay payment, further discussion of which is beyond the scope of this paper). (emphasis added).

First, DFAS will compute the hypothetical retired pay multiplier at time of divorce, which in this example is **37.5 percent** (.025 of base pay per year x 15 years creditable service at divorce). (emphasis added).

Second, DFAS will compute the hypothetical retired pay, which in this example is **\$2,403.00** (noting that DFAS rounds down to the nearest whole dollar per DODFMR at Paragraph 030209). (emphasis added).

Third, DFAS will give the hypothetical retired pay at divorce a “**present value**” by applying military retiree Cost of Living Adjustments from the date of divorce up to the Servicemember’s actual retirement date (again, rounding down to the nearest whole dollar). Calculations are in the table on the below. (emphasis added).

Year	COLA	Hypo Ret Pay
2012	n/a	\$2,403.00
2013	1.7%	\$2,443.00
2014	1.5%	\$2,479.00
2015	1.7%	\$2,521.00
2016	0.0%	\$2,521.00
<b>2017</b>	<b>0.3%</b>	<b>\$2,528.00</b>

Note: Historical COLAs may be obtained from the DODFMR at Table 8.1.

Finally, DFAS will then take the Former Spouse’s award and convert it to a percentage of the Servicemember’s actual retired pay by multiplying the Former Spouse’s award times a fraction, the numerator of which is the present value of the hypothetical retired pay at retirement and



the denominator of which is the Servicemember's actual retired pay at retirement, or, in this example  $38.2567\% \times 2,528.00/4,100.00 = 23.5885\%$ . Thus, the Former Spouse is due **23.5885** percent of the disposable military retired pay in the year of retirement and all future years. This percentage, being 23.5885 percent of disposable retired pay, is the percentage that DFAS will load into its system and apply to the current and all future retired pay payments. *See id.*

award of Former Spouse SBP does not restart the 1-year clock for filing a deemed election. *Id.*

For the practitioner, there is good reason for knowing how to perform this calculation. In many instances, the task of producing a clarification order is combined with the task of enforcing past-due payments owed by Servicemember to the Former Spouse. The practitioner cannot calculate accurately the past-due payments without knowing the Former Spouse's award expressed as a percentage of actual disposable retired pay. Further discussion of this subject is beyond the scope of this paper.

#### **Bonus Discussion—Missed “Deemed Election” of the Former Spouse Survivor Benefit Plan (SBP) Beneficiary and Clarification Orders**

In the author's practice, too many Former Spouse clients have forfeited their court-ordered Former Spouse SBP coverage for failure to file a “deemed election” within one year of the original decree that awarded that benefit. *See* DODFMR, Chapter 43, Paragraph 430504.C.2. (stating that a deemed election must be received within 1-year of the date of the court order or filing involved). When that critical date has been missed, there is nothing the practitioner can do to rescue the Former Spouse while drafting the clarification order. *See id.* The DODFMR states that any order that clarifies a prior order and merely restates a prior

## **LIST OF EXHIBITS**

“A” — DFAS Letter

“B” — First Example of Clarification Order (that resulted from Figure 1)

“C” — Calculations that accompanied from Figure 1

“D” — Second Example of Clarification Order

“E” — Third Example of Clarification Order with Judgment for Arrears as provided courtesy of James N. Higdon, CAPT, USNR (Ret.)

“F” — Fourth Example of Clarification Order that will not be implemented by DFAS because the marriage did not overlap 10 years of creditable military service

“G” — Acceptable Award Expressions in the DODFMR