**BACKGROUND INFORMATION**

**RE: CHANGES TO MILITARY PENSIONS**

Please note that the attached model language uses a variation of the “frozen coverture method” to divide the service member’s military pension, as required by a recent change in federal law. This method will likely result in the former spouse receiving a smaller share of the pension than under the “traditional coverture method” that is consistent with most states’ laws, and that was previously permitted for military pensions. A recent U.S. Supreme Court decision has also complicated military pension division (as described in more detail below), giving rise to numerous methods of dealing with the potential inequities of the new law and SCOTUS ruling. However, none of them is perfect, and a particular method may not result in an exact 50/50 split of what has traditionally been defined as the marital portion of the pension. You should use the method that best suits your facts and circumstances.

SCOTUS – *Howell v. Howell*: On May 15, 2017, the Supreme Court ruled that federal law preempts states from treating military disability pay (or military retired pay that is waived to receive disability pay) as divisible marital property. Generally, a service member must waive an equal amount of otherwise divisible retired pay to receive military disability pay. As a result, even if the disability pay is awarded after divorce and after the parties have agreed to the appropriate division of the military pension, a service member can unilaterally increase his share of the pension and decrease the former spouse’s share. The *Howell* Court also ruled that states cannot order the service member to indemnify the former spouse, indicating that this would, in substance, be a division of disability pay as if it were marital property, especially if the indemnification results in a dollar-for-dollar reimbursement of the decrease in the former spouse’s payments. Subsequent state court decisions also seem to indicate that courts will not even enforce the parties’ agreement for the service member to indemnify the former spouse in this instance.

Change in Federal Law: The vast majority of states utilize the traditional coverture method (a.k.a. the time rule) to determine the marital portion of a participant’s pension benefit. Until recently, a state court could include a traditional coverture fraction in a military retired pay division order (**MRPDO**). However, for divorce decrees dated after December 23, 2016, Congress amended the definition of Disposable Retired Pay to limit a MRPDO assignment to a variation of the frozen coverture method, which results in a smaller assignment to the former spouse. We refer to the difference between the former spouse’s share under (1) state law traditional coverture, and (2) the revised federal law, as the “**Shortfall**.” Based on the Supreme Court’s reasoning in *Howell*, states are likely federally preempt from treating the Shortfall as divisible marital property.

State Court Reaction: We believe state courts will encourage equitable solutions that take into account the impact of these changes. For example, a state court may determine that equity requires it to make a distributive property or spousal support award, or reserve jurisdiction to make such an award, that puts the parties in a position that is similar to the position they would have been in absent federal preemption. In fact, the Supreme Court in *Howell* recognized the potential hardship on former spouses and noted that “…a family court, when it first determines the value of a family’s assets, remains free to take account of the contingency that some military retirement pay might be waived, or…take account of reductions in value when it calculates or recalculates the need for spousal support.”

Equitable Solutions: It is easy to create a formula to calculate the Shortfall mentioned above, or the impact on a former spouse of a current disability waiver, and to award these amounts to the former spouse. However, this disregards the Supreme Court’s warning against substance over form methods of dividing disability pay that attempt to ignore *Howell*. As mentioned earlier, this warning likely also applies to methods that divide the Shortfall as if it were marital property. Although there is no one clear solution, attorneys need to address these issues early and to be able to articulate them to the court.

The attached model divides the service member’s military pension as required by the new law. It does not include an additional award or other method for compensating the former spouse for the decrease in his/her share of the pension. We leave it to you to determine what is best for your specific situation, but we provide some ideas below.

The following is a non-exhaustive list of potential solutions for equitably dividing, or otherwise taking into account, the service member’s military pension:

**1. MRPDO + Unequal Property Division OR Spousal Support:** Most courts, especially in equitable distribution states, can take into account the “totality of the parties’ circumstances” when dividing marital property and awarding support. Some courts may view the uneven division of the military pension as a reason to award a greater portion of the remaining marital estate to the former spouse or to award (or increase the amount of) spousal support. Where possible, a court may wish to reserve jurisdiction for spousal support to address the possibility that the service member may waive retired pay after divorce to receive nondivisible disability pay.

**2. Present Value + Offset:** Although we normally recommend against offsetting retirement assets, you may want to calculate the present value of the former spouse’s share of the service member’s military pension as of divorce and award other marital assets (if available) in that amount to the former spouse as an offset. This avoids the impact of post-divorce retired pay waivers and may be a solution that does not need to be revisited down the road. However, this method has its weaknesses. For example, if the service member is not vested (i.e., has fewer than 20 years of service) the present value is discounted to take into account that the pension may never vest and, thus, the former spouse will receive other marital assets that represent less than 50% of the marital portion of the pension if the service member eventually becomes vested. On the flip side, if the service member never becomes vested he/she would have given up other marital assets in exchange for a pension that he/she will never receive.

**3. Direct Payments:** Calculate the former spouse’s share of the pension (including an equitable amount that takes into account the impact of the Shortfall) and require the service member to make direct payments to the former spouse. If this amount is too close to a dollar for dollar reimbursement of the former spouse’s decreased share, it may run afoul of Howell. Also, you will have to take into account the tax implications of this arrangement.

*In addition to this model language, we also offer negotiation services to help draft pension division language that is specific to your client’s circumstances and desires. Call us for more information.*

**MODEL LANGUAGE**

**SEPARATION AGREEMENT**

**ACTIVE DUTY - MILITARY PENSION**

*This language is for (1) an active duty member, not for a reserves or retired member, (2) who first entered service after 9/7/1980, and (3) whose marriage that lasted at least 10 years, during which the member earned at least 10 years of pension eligibility service. This language does not address the service member’s Thrift Savings Plan benefit, if any.*

**Division of Retirement Benefits in the Military Retirement System.**

The **[**Defendant/Plaintiff**]** is a member of the United States **[**Army/Navy/Air Force/Marine Corps/Coast Guard**]** (**Service Member**) and a participant in the Military Retirement System (**Plan**). For purposes of dividing marital property, the **[**Defendant/Plaintiff**]** (**Former Spouse**) is assigned a portion of the Service Member’s retired pay (including retainer pay and other similar payments, if applicable) from the Plan, as described below.

**1. Amount of Benefits Assigned:** The Former Spouse is assigned fifty percent (50%) of the Marital Portion of the Service Member’s “**Disposable Retired Pay**” (as defined in 10 U.S.C. Section 1408), including any lump sum payment from the Plan. The Marital Portion is the percent derived from dividing (1) the Service Member’s years of credited service earned during the marriage, by (2) total years of credited service at divorce. For this purpose, the marriage began \_\_\_\_\_\_\_\_\_\_\_ and ended \_\_\_\_\_\_\_\_\_\_.

**2. Cost of Living Adjustment:** The Former Spouse is assigned a pro rata share of any cost-of-living adjustments or other post-retirement benefit increases that the Service Member receives from the Plan.

**3. Voluntary Separation Payments and Career Status Bonus:** The Former Spouse is assigned a pro rata share of any voluntary separation incentive payment to the Service Member, such as payments under Voluntary Separation Incentive, Special Separation Benefit, or a similar program. The Former Spouse is also assigned a pro rata share of any Career Status Bonus or similar payment to the Service Member.

**4. Military Retired Pay Division Order:** The Former Spouse shall cause his/her attorney to retain QDRO Group to prepare a military retired pay division order (**MRPDO**) that is consistent with this Agreement.  The Former Spouse shall submit the MRPDO to the Defense Finance and Accounting Service (**DFAS**). The Service Member shall cooperate and provide any documents or authorization necessary to complete the MRPDO process.

**5. Survivor Benefit Plan Protection:** The Service Member shall timely elect the Former Spouse as irrevocable beneficiary under the military Survivor Benefit Plan (**SBP**) in an amount necessary to secure the Former Spouse’s assigned benefits, assuming that SBP premiums are the only deductions from Disposable Retired Pay under 10 U.S.C. Section 1408(a)(4)(A)(i)-(iv). The Former Spouse shall submit an SBP deemed election notice to DFAS no later than one year after the date of divorce.

**6. Indemnification for Service Member’s Action/Inaction:** The Service Member shall not act, or refuse to act, in any manner that could diminish the Former Spouse’s rights in this Agreement or in the related MRPDO. If the Service Member does take such action or inaction, the Service Member shall make payments directly to the Former Spouse to the extent necessary to indemnify and restore the Former Spouse to the position he/she otherwise would have been in without the Service Member’s action/inaction.

**7. Continued Jurisdiction:** The court shall retain jurisdiction to amend the provisions of this Agreement, to amend the MRPDO, to issue new orders, or to take other action to enforce the parties’ intent regarding the Service Member’s Plan benefits that are assigned to the Former Spouse.