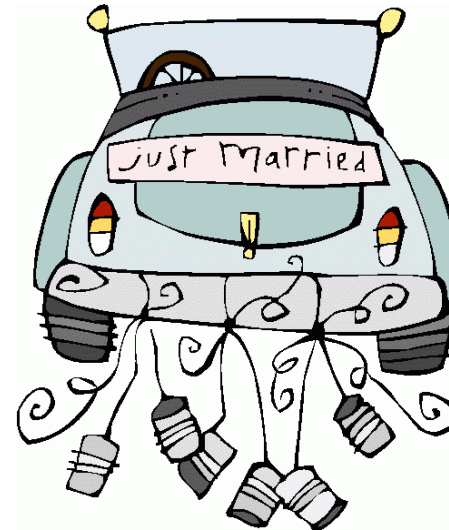


Financial Implications of Marriage and Divorce



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Disclaimer

The opinions expressed are those of the presenter and are not those of the Department of the Army or the Department of Defense.

This presentation is not intended to be a substitute for legal or tax advice. Rather, it is designed to create an awareness of the need for planning and to help individuals become better acquainted with family law terminology and issues.

State laws vary - be sure to check your state laws

Getting married

- ▶ **Realistic agreements with respect to:**
 - ▶ Division of labor
 - ▶ Scope and costs
 - ▶ Who/how to pay for it
- ▶ **The Legal Mechanics**
 - ▶ Get a license in the jurisdiction you're getting married in and then get married in that jurisdiction
 - ▶ Common law marriage?
- ▶ **Be honest** before the wedding about income and debt load

Same-sex marriages

- ▶ Validly entered into before Obergefell v. Hodges (June 28, 2015) still valid
- ▶ Beware of legal challenges to providing spousal employment benefits to same-sex married couples (Houston health care case)
- ▶ May have restricted access to adoption, foster placements

Foreign Spouses

- ▶ Immigration issues:
 - ▶ Bringing spouse to the US from overseas
 - ▶ Married to spouse not here legally
 - ▶ Fiance(e) visas

Previously divorced?

- ▶ **Do they have a copy of the court order?**
- ▶ **Are there financial obligations in it that are not yet performed?**
 - ▶ Support
 - ▶ Maintain insurance (health or life)
 - ▶ Property (e.g. sale of house, retirement issues (QDROs, DD2293, 2656-10, etc.)

Post-nuptial finances

- ▶ **Do a budget**
- ▶ **Combining finances**
 - ▶ Joint checking/savings/brokerage accounts?
 - ▶ Separate accounts?
 - ▶ “house” account?
 - ▶ “emergency” fund
- ▶ **Retirement planning**
 - ▶ How much each should save for their future
 - ▶ IRAs/Roths/TSP/401k, etc.
- ▶ **Children’s savings (529s?)**

“Joint” ownership types

- ▶ **“Convenience” accounts:** (“Joint fiduciary”)
 - ▶ Permits another to have certain account privileges (e.g. writing checks, deposits) but no ownership interest (not available in all states)
- ▶ **“Joint” account:**
 - ▶ Multiple owners, on death shares TBD
 - ▶ Little creditor protection
- ▶ **“Joint with right of survivorship”**
 - ▶ Little creditor protection
 - ▶ Can be used for financial accounts, real property, vehicles

“Joint” ownership types, cont.

- ▶ **“Tenants in Common”**
 - ▶ Multiple owners, on death shares TBD
 - ▶ Little creditor protection

- ▶ **“Tenants by the Entirety”** (usual with survivorship component)
 - ▶ For spouses only
 - ▶ 26 states (see notes)
 - ▶ Real property, vehicles, financial accounts
 - ▶ Creditor protection (each spouse owns 100%)

Estate Planning: Probate crash course

- ▶ Legal way to change title
- ▶ Court controlled
- ▶ Legal process
- ▶ Will validated
- ▶ Debts/claims paid
- ▶ Probate assets gathered & distributed IAW your will (or state intestacy law if no will)
- ▶ Taxes determined & Paid

Probate v. Non-probate assets

Probate= “orphan” property	Non-probate:
>Solely titled	>“Joint with Right of Survivorship”
>Just “joint”	>“Tenants by the Entirety”
>“Tenants in Common”	>Pay on Death/ Transfer on Death (P.O.D./T.O.D.) (usually)
	>Beneficiary Designations
	>Intervivos Trust Property

Providing for children at your death

- ▶ Beneficiary designation to a minor child by name = guardianship
- ▶ Do NOT leave \$\$ to an adult who you think will take care of your kids for you
- ▶ Trusts for minor in your Will?? (testamentary trusts)
 - ▶ You decide what age for principal
 - ▶ Separate or single trust
 - ▶ Trustee can be someone you know or an institutional Trustee (e.g. bank)
- ▶ Blended Families - trust for your kids from previous relationship?
 - ▶ Current spouse has no obligation to support other kids

Special Needs Children

- ▶ Is the child going to be a Medicaid recipient?
- ▶ “ABLE” Accounts
- ▶ “Supplemental Needs” Trusts
- ▶ Guardianship/Conservatorship
- ▶ Local agencies may be able to help with planning
- ▶ Private counsel may be required

Types of Assets upon Divorce

- ▶ “Separate” property
 - ▶ Property acquired before the marriage (includes interest earned on that property during the marriage)
 - ▶ Property acquired during the marriage by gift or inheritance
- ▶ “Marital” property
 - ▶ All property acquired during the marriage (unless can be traced to separate property, e.g. buying house with an inheritance) (“marriage” may be up to date of separation or up to date of divorce)
- ▶ “Hybrid” property
 - ▶ Separate property comingled with marital (e.g. separate home paid for with marital income from job)
 - ▶ Tracing nightmare to pull apart the separate from the marital

Classification of assets upon divorce

▶ Date of “separation”

- ▶ Asset stops accruing on date of separation but would be valued as of date of divorce (+/- market increases or decreases)

▶ Date of divorce

- ▶ Asset stops accruing on date of divorce, valued on date of divorce

Division of assets/debts on divorce

- ▶ **Equitable Distribution States**
 - ▶ “fair”
 - ▶ Statutory factors to consider?
- ▶ **Community Property (nine states)**
 - ▶ 50/50
 - ▶ Factors
- ▶ **Same applies to debt**
 - ▶ marital v. separate
 - ▶ Debt runs with the asset
 - ▶ Student loan debt generally goes to the person who got the education, but if loan used to support family (like Pell grant) then may be marital
- ▶ “upside down” assets

Division of Real Estate-Tax issues

- ▶ **Primary residence:**

- ▶ Tax and mortgage interest deduction
- ▶ Capital gains on sale?
 - ▶ \$500K if married
 - ▶ 2 in 5 rule (some exclusions for military)

- ▶ **Rental properties:**

- ▶ On sale, who pays capital gains, if any?
- ▶ On sale, who pays taxes on the depreciation recapture?

Division of Personal Property

- ▶ **Furniture, household goods (make a list?)**
- ▶ **Pets**
- ▶ **Vehicles** (note payments, maintenance & repairs, insurance?)(limit time to register if being transferred)
- ▶ **Stocks/mutual funds/checking and savings**
 - ▶ Cash assets easy to divide
 - ▶ Split stocks “in kind” to allocate future capital gains

Division of Pre-tax dollars Accounts

- ▶ Roth IRAs, IRAs, 401k, 403b, TSP
- ▶ Any division in divorce should be done with a special court order (QDRO and the like) to create a tax-free rollover
- ▶ Receiving spouse can elect to take a taxable payout rather than a rollover (will be taxable to the recipient spouse)
- ▶ Orders entered by court on or after the divorce order

Military retired pay (legacy system)

- ▶ Retired pay = years of service x .025 (retired pay multiplier) x high 36 avg monthly base pay
 - ▶ EX: 30 years x .025 x \$9200 = \$6900/mo
- ▶ TSP participation available but no Government matching

Blended retirement System (new system)

- ▶ Had to opt in by December 31, 2018 (400,000 did)
- ▶ New hires after December 31, 2018 automatically covered.
- ▶ Retired pay = years of service x .02 (retired pay multiplier) x high 36 avg monthly base pay
 - ▶ EX: 30 years x .02 x \$9200 = \$5520/mo
- ▶ TSP participation available. Automatic Government contribution of 1%. Up to 4% match against 5% contribution

Military Retired Pay -USFSPA

- ▶ Gives states authority to divide as property based on Uniformed Services Former Spouse Protection Act 10 USC §1408
- ▶ Must determine “marital share” (fraction?, %, hypo, fixed\$?) (fixed doesn’t get COLAs)
- ▶ Does the state have a preferred formula?
- ▶ AR and IN not divisible unless vested. AL requires ten years of service during marriage. PR no division of non-contributory plans.
- ▶ Beware the “Gilmore” Rule in community property states - (retired pay due upon eligibility, not actual receipt)
- ▶ Beware of “reservation” - TBD at a future date

Military Retired Pay, cont.

- ▶ “disposable” retired pay is what gets divided (not gross!!!)
- ▶ “disposable” is gross retired pay minus 6.5% SBP premium, minus VA disability offset (<50% disabled), minus medical retirement, minus debt to government
- ▶ Court can’t award more than 50% of the disposable
- ▶ Typically, Former Spouse’s share is “disposable” x “ $\frac{1}{2}$ the marital share”

Military Retired Pay, cont.

- ▶ “10 year rule” - less than ten years of service during the marriage means DFAS won't pay directly to Former Spouse. Has nothing to do with entitlement.
- ▶ Former Spouse must submit DD 2293 to DFAS to initiate direct payment

NDAAs 2017 change the calculation

- ▶ For those retired on date of divorce =
retired base pay x $\frac{1}{2}$ marital share (same)
- ▶ For those on active duty on the date of divorce=

Calculate retired pay as if SM retired on date of divorce=

.025 (retired pay multiplier (.02 for BRS)) x current “high-3” base pay x current years of service on d.o.d.

EXAMPLE - Retired on Divorce

14 years of service during marriage (date of marriage to date of divorce), 22 years total service

FS share = $14/22 \times .50 = 31.82\%$

Assume “retired base pay” (high-36) on date of retirement = \$9000

Gross retired pay = \$9000 (retired base pay) $\times .025$ *(retired pay multiplier) $\times 22$ years = \$4950

FS entitled to share of “disposable retired pay” (NOT gross):

Gross= 4950

SBP = - 322 (6.5% of gross)

VA Offset= -0- 0 (>50% disabled)

“Disposable” = \$4628

FS share = $\$4628 \times .3182 = \1474.86

EXAMPLE- Active Duty on Divorce

(AD) COL Jones divorces on June 1, 2018

“marital share equals 50% times the number of months of service during marriage (276) divided by the total months of service on the date of divorce (336) times the disposable retired pay the SM would have received had she retired on the date of divorce (June 1, 2018) with a high-3 of \$10000.”

DFAS requires that the order provide the date of divorce and high-3. They will not figure it for you!!!

= $50\% \times 276/336 \times \$10000 \text{ high-3} \times .025 \times 28\text{yrs} =$
\$2875.00 plus retiree COLAs until date of actual retirement

Indemnification

- ▶ May see language in agreements indemnifying spouse against the deductions from gross retired pay, merging with another retirement, VA disability offset, etc.
- ▶ Parties can agree, but courts cannot order indemnification of VA waiver/offset (see Howell v. Howell, 137 S.Ct. 1400 (2017)).
- ▶ OPM will not allow merger of active duty time with civilian Federal service without a promise that FS receives same amount as would from DFAS.

<https://www.opm.gov/retirement-services/publications-forms/pamphlets/ri84-1.pdf>

Military Survivor Benefit Plan

- ▶ Routinely award by courts
- ▶ Can't be awarded if spouse waived at retirement
- ▶ What level to elect?
 - ▶ Maximum = 55% of base on death, minimum \$300.
- ▶ FS must notify DFAS within one year of divorce for “deemed election” by DD2656-10 else must rely on SM to timely designate at retirement - BCMR to fix failure
- ▶ Premium is 6.5% of gross
 - ▶ DFAS can't shift payment of premium (e.g. agreement says FS pays 100% of premium, DFAS will still deduct from SM. FS will need to reimburse SM directly.)
- ▶ Life insurance as alternative?

Military Survivor Benefits - Termination/Suspension

- ▶ If FS remarries before age 55, SBP suspends
 - ▶ Can be reinstated if FS “un-remarries”
- ▶ FS can voluntarily terminate
- ▶ FS dies (then SM can name current spouse or SM re-marries after death of FS, new spouse covered if named beneficiary within one year of marriage)

20-20-20 and 20-20-15

Former Spouses

- ▶ Former spouse married to the SM for at least 20 years, 20 years of service for the SM and 20 years overlap of service and marriage = “20-20-20”
- ▶ 20/20/20 spouse - continues with TRICARE so long as not covered by employer plan and doesn't remarry (PX and commissary, too)
- ▶ 20/20/15 spouse - can buy a year of TRICARE
- ▶ All others former spouses can get 36 months continuation coverage with CHBCP

Child support

- ▶ **Military branch support regs apply absent court order or written agreement (see Notes)**
 - ▶ Can't get BAH-With if not supporting at least at BAH-Diff
 - ▶ Command will enforce its regs.
- ▶ **State law**
 - ▶ Referrals to Child Support Enforcement Office
 - ▶ Legal Assistance
 - ▶ Private Counsel
 - ▶ Local Legal Aid
- ▶ **Written agreement**

Child Support Calculation- Civilian

- ▶ Can be set by agreement, by court order or administratively (Child Support Enforcement Agency)
- ▶ Know your state's statutory formula(e).
- ▶ What is income? (is BAH included? Is it on gross or post-tax?)
- ▶ Does child care, health care factor in?
- ▶ Is there an adjustment for custodial time, other children?
- ▶ Duration (age of majority, continuation for college or disability)
- ▶ How paid? Directly to other parent, allotment, through Child Support Enforcement, income withholding order?
- ▶ Always modifiable on material change
- ▶ Not taxable to recipient

Child Support Calculation- Civilian, cont.

- ▶ “Sole” - one parent has primary custody of all children
- ▶ “Shared” formula - custody for more than a certain number of days
- ▶ “Split” - Each parent has primary custody of one or more children
- ▶ Is it per child or unitary amount for all children? (beware when a child ages out if not pro rata)

Spousal Support - Civilian

- ▶ Does your state have a presumptive formula? Is it rebuttable? Factors?
- ▶ Amount = Need v. ability to pay (do a budget)
- ▶ Permanent? Duration? Rehabilitative? Reservation for the future?
- ▶ Termination (death, remarriage, cohabitation, years)
- ▶ Modification? (state law)
- ▶ Beware of “unitary” awards that combine child support and spousal support (difficult to modify)

Tax implications of child and spousal support

- ▶ Child support not taxable
- ▶ Spousal support
 - ▶ Taxable as income to spouse/tax deductible from income for payor:
 - ▶ For agreements and court orders before January 1, 2019
 - ▶ Future modifications to these agreement might be taxable
 - ▶ Agreements or court orders after December 31, 2018
 - ▶ Not a taxable/tax-deductible event

Prenuptial Agreements

- ▶ State statute authorizes
- ▶ In derogation of the state laws on division of assets and spousal rights
 - ▶ May re-define marital and hybrid property as separate
 - ▶ May waive rights to “elect against the will”
 - ▶ May waive retirement and survivor benefit rights
 - ▶ May need to sign additional docs later to perfect this waiver
 - ▶ May waive spousal support
- ▶ Typically not effective to waive child support or define custody
 - ▶ Child support is the right of the child
 - ▶ Custody is based on best interest of child

Prenuptial Agreements, cont.

- ▶ Validity issues:
 - ▶ Both parties should be represented by counsel (or express knowing waiver of right)
 - ▶ Signed well in advance of wedding
 - ▶ Full disclosure of assets and liabilities
 - ▶ Not typically binding as to child support and child custody

Post-nuptial Agreement

- ▶ Can wait until after the wedding (but before divorcing) to define rights in marital property upon divorce/death
- ▶ Same idea as prenup, just after the marriage

Marital Settlement Agreements

- ▶ **Prepping for divorce**
- ▶ **Settling issues arising out of the marriage:**
 - ▶ Child support
 - ▶ Spousal support
 - ▶ Parenting time with the child
 - ▶ Property division
 - ▶ Real, personal, tangible and intangible, retirements & survivor benefits
 - ▶ Life Insurance
- ▶ **Lots cheaper than litigating!**

Getting divorced

- ▶ **State specific**
- ▶ **Grounds?**
 - ▶ Adultery, desertion, bigamy, separation, etc.
 - ▶ **“No-fault”/“irreconcilable differences”**
 - ▶ Sometimes requires a period of physical separation coupled with intent to end the marriage

Coping with the process

- ▶ **Manage stress**
 - ▶ Counselling?
- ▶ **Knowledge of the process and possible court outcomes creates realistic expectations**
- ▶ **“Taking the high road”**
- ▶ **Big fights costs LOTS of money (better be a lot at stake)**
- ▶ **DIY to save money may cost you - get some legal help**
 - ▶ Military legal assistance
 - ▶ Legal Aid
 - ▶ Self-help clinics

Filing for divorce

- ▶ **Jurisdiction**

- ▶ Where they are now

- ▶ Legal state of domicile (check the LES)

- ▶ **Division of military retired pay has special rules for jurisdiction=**

- ▶ 10 USC §1408(c)(4) ...unless the court has jurisdiction over the member by reason of (A) his residence, other than because of military assignment, in the territorial jurisdiction of the court, (B) his domicile in the territorial jurisdiction of the court, or (C) his consent to the jurisdiction of the court.

Alternatives to Litigation

▶ **Mediation**

- ▶ Parties meet with a trained neutral to resolve issues
 - ▶ Some family law mediators draft agreements

▶ **“Collaborative” attorneys**

- ▶ “adversarial” representation with goal to settle
- ▶ If can’t settle, parties must hire other counsel

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