

December 2012

## MEMORANDUM FOR RECORD

FROM: Dr. Brian Mork

SUBJECT: Rebuttal to Sullivan's 2001 letter against findings of the U.S. Armed Services Committee Report, Revision 2.33

### INTRODUCTION

Military retirements are a significant benefit, earned by both women and men. Value of a military retirement asset in 2012 dollars ranges approximately from \$945,000 to \$2.8 million<sup>1</sup>. Military Times articles in December 2010 and March 2011 state that the overall military divorce rate in 2011 is 64% higher than it was in 2001, and that there are more than twice as many military women divorcing than men. Among enlisted, the military women divorce rate is about 3x that of men. Military divorce is a significant social issue affecting both sexes. This is a huge social issue that is not men v. women. Rather, it is military members serving a nation v. a legal system that fails to understand.

A 2001 United States Armed Services Committee report to Congress concludes that retirement pay increases attributable to promotions after a divorce and additional time served by a military member after a divorce are the member's separate property and are not to be divided as a marital asset under USFSPA<sup>2</sup>. In other words, retirement contributions after the marriage belong to the contributing party:

“ [When] courts treat post-divorce promotions and longevity pay increases earned by the member as marital assets, this treatment of military retired pay is inconsistent with the treatment of other marital assets in divorce proceedings— only those assets that exist at the time of divorce or separation are subject to division. Assets that are earned after a divorce are the sole property of the party who earned them. [It is proper to] base all awards of military retired pay on the member's rank and time served at the time of divorce. This provision should be exclusively prospective. The pay increases attributable to promotions and

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<sup>1</sup> 20 yr E-7, or 30 yr O-8, living until age 75.

<sup>2</sup> Uniformed Services Former Spouses Protection Act, the body of Federal Law speaking on these issues.

additional time served should be the member's separate property." (page 4, underlines added)

"Assets that accrue subsequently are the sole property of the party who earned them. Post-divorce promotions and longevity pay increases are to military retired pay (which is a defined benefit plan) what post-divorce accruals and contributions are to private, defined benefit and defined contribution plans." (page 71)

The report to Congress does not have statutory authority or case law authority to bind state courts, which typically have jurisdiction for family law divorce cases.

Nevertheless, most divorce decrees are consistent with the Congressional report.

Some states such as Oklahoma have recently secured the Congressional recommendation into state law. Oklahoma SB1951, signed into law May 2012, states:

"If a state court determines that the disposable retired or retainer pay of a military member is marital property, the court shall award an amount consistent with the rank, pay grade, and time of service of the member at the time of separation."

Plain and simple reading of the typical divorce decree is often unambiguous and clear, and these final divorce decrees *are* legally binding. However, the legal process of transitioning from the finalized divorce decree to actionable court orders provides ample opportunity to "creatively reinterpret". For example, here are two examples of divorce decree asset division awards to non-military ex-spouses:

- "One-half (1/2) of spouse's Air Force Retirement from the date of marriage, through the date of service of the Petition for Dissolution of Marriage upon the military member. Any Air Force Retirement accrued after dissolution shall be the military member's sole and separate property."
- "Plaintiff is awarded 50 percent of Defendant's United States Air Force pension plan that accrued during the marriage, as sole and separate property, free and clear of any claim by the Defendant. The Defendant is awarded the balance of the USAF pension plan, as his sole and separate property, free and clear of any claim by the Plaintiff."

Regardless of the obvious intent of these passages, these are both real-life examples of divorce decrees where the intent was later corrupted in the asset division order (military equivalent to a QDRO) to give the ex-spouse an asset award dividing retirement contributions and promotions enhancements earned *after the marriage*. Why does this happen?

Mark Sullivan is a dominant figure nationally in this area of law, speaking and writing extensively. He founded the American Bar Association military family law sub-committee, and publishes legal templates that attorneys use to draft their own client documents. Mr. Sullivan wrote a memorandum in response to the 2001 Armed Services Committee report to Congress. Mr. Sullivan's paragraph 4(B), page 2 of his memorandum discusses promotion enhancements after divorce, and that is the scope of the document you are reading. His memorandum's editorial content substantiates that it is materially a critique of the Armed Services Committee DoD report. Contrary to the DoD report, Sullivan advocates that post-divorce promotions and longevity pay increases earned by a military member after divorce are marital assets. He advocates that the non-participating spouse should receive division of what is earned after the marriage is over.

## ARGUMENTS

In his memorandum, Sullivan asks rhetorically, "What's wrong with [the DoD report] recommendation?" and then answers this question with several arguments against the DoD recommendation. All Sullivan quotes come from Paragraph 4(B) of his memorandum. **This memorandum will address them one by one and then explain related issues.**

1. Sullivan states that the DoD recommendation is an "unwarranted, misguided interference" into pension division case law developed over 30 years in 50 states.

Conflicting with Sullivan's claim, one can observe the Federal government is loath to get involved in Family Law state cases, and would not press the issue unless there were compelling reasons to do so--and there are:

- a. The bulk of prior case law applies to civilian pension plans, which misleads people when considering military retirement pay. As demonstrated exhaustively in this memorandum, referencing prior civilian case law is not a solution to the problem because blurring civilian with military retirement vehicles is the problem. The DoD report was commissioned to address this concern, and a recommendations were formed after input from dozens of national organizations.
  - b. Because Mr. Sullivan is respected as an expert in military family law, his memorandum witnesses to the reader exactly the point I'm trying to make. Despite his experience, he misappropriated an Illinois court civilian retirement case, and incorrectly applied it to military issues. As a result, he makes faulty conclusions, misleading statements, and errors of fact that are discussed throughout this memorandum. If an esteemed attorney can make these errors, this confirms that DoD guidance is not "unwarranted or misguided". Instead, it is desperately needed!
2. Sullivan comingles and aggregates metrics from civilian and military "post divorce increase" litigations to generate misleading statistics favoring his position. He admits "many states allow no consideration of post-divorce increases in pension benefits in the division process". This agrees with Federal DFAS guidance to attorneys, which states, "Many States take the approach that the former spouse should not benefit from any of the member's post-divorce promotions or pay increases based on length of service after the divorce."<sup>3</sup> However, he continues, saying that "many states allow, may require [sic], the court to award the non-participant spouse a share of post-divorce increases." The underline is in his original, shifting attention from the

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<sup>3</sup> DFAS "Guidance on Dividing Military Retired Pay", revision 4/2/12, pg 6, para (IV)(B).

word prior. By saying the states “may” require, what he’s really saying is that they don’t require division of post-divorce increases without further convincing.

Sullivan lumps together all types of “post-divorce increases” in his claim, skewing the numbers into conclusions reverse from reality. If one properly considers only relevant post-divorce work-based increases similar to military promotion enhancements, I know of no states that require division or even allow division. Military post-divorce promotion enhancements represent active work by one party after the divorce; therefore, these promotion enhancements are not marital property. Passively accrued or earned increases after divorce due to interest or “time value of money” are a totally different concept. Sullivan’s claims regarding one type are inappropriate when discussing the other.

3. Sullivan presents an argument that because asset division dates are determined differently in different states, therefore promotion enhancements acquired by work after the marriage should be divided. He says non-uniform date selection between states creates “magic dates” of division.

Sullivan’s logic seems flagrantly *non-sequitur* and a specious distraction. Whatever date is responsibly chosen by a court should be used. Given any date, benefits actively earned after that date belong solely to the earner. Trying to argue that work-earned enhancements after marriage should be divided as a marital asset because an asset division date is different in a different state seems “magical”. If he is critiquing the date variations, he should *support* standardization recommended by the Congressional report

4. Sullivan presents one argument as the most *pervasive* **and** the most *persuasive*, so it is worth a longer discussion. Sullivan says that nine state courts often base support of dividing post-marriage enhancements on this argument, but he *again* fails to distinguish between civilian/military litigation. He quotes an excerpt from an Illinois case to represent his argument:

“[T]he greater-value later years would not have been possible without the lesser-value earlier years. We cannot say the years after the marriage were more valuable than the years during the marriage. Because of the time value of money, the opposing would appear to be true, unless contributions were significantly greater in later years.” In re Marriage of Wisniewski, 675 N.E.2d 1362, 1369 (Ill. Ct. App. 1997).

Sullivan’s argument is pictured below. Figure 1 represents a civilian retirement marital asset worth about \$230 at the time of divorce. The vertical black line represents the time of divorce. Due to company rules, the asset cannot be paid out until 10 years after the divorce when it’s worth \$1000. The question is how to divide the original value (dark red) and the increased value (light blue). People tend to agree that the dark red should be divided 50:50. Regarding the post-marriage increase, in the words of the court, the blue portion would be divided because it “would not have been possible without” the dark red part. In other words, the blue part can be seen as interest earned on the red part. Although it was passively earned *after* the divorce, the required delay of payment should not deprive the ex-spouse of “interest on her money”, or the “time value of [her] money”. Sullivan wants to extend this logic to military retirements.

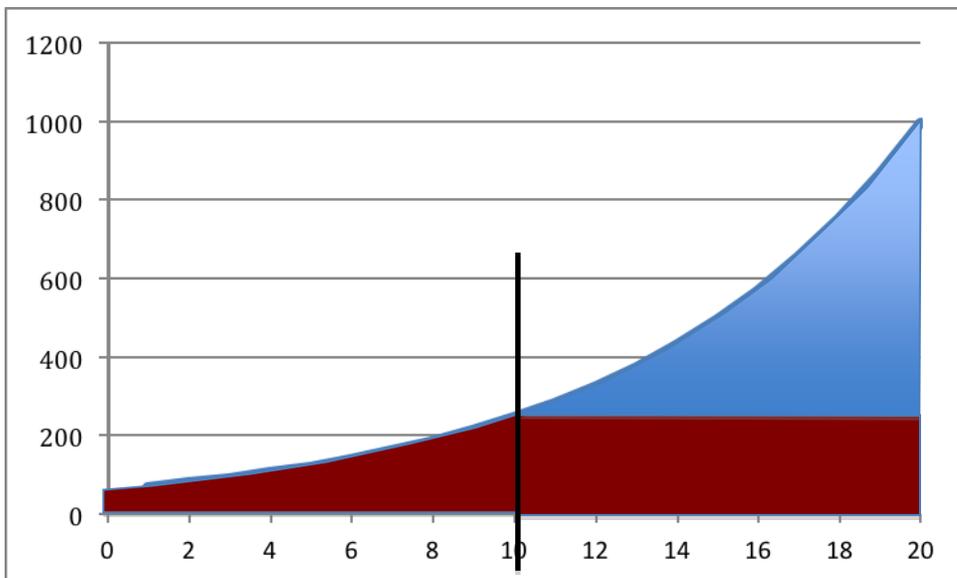


Figure 1 - Civilian Retirement

- a. The first problem with Sullivan’s argument is that the quoted court decision is for a case opposite from military retirements. Specifically, the defendant in the Illinois case asked for a fixed monthly dollar amount to be assigned to the ex-spouse as a fraction of the dark red value at the time of the black line. See the cited case, page 4, column 2, available for download from <http://www.increa.com/articles/division-promotion-enhancement/>. Sullivan himself, one paragraph earlier in his memorandum, explains military retirements “award a percentage of the member’s retired pay”, which grows in dollar value each year due to COLA, and therefore pays the ex-spouse “time value of money” while both parties wait to receive the asset. In other words, the Illinois decision against civilian fixed payments has nothing to do with a percentage-based military award, and the court’s reasoning is rather irrelevant and misleading when considering military situations.
- b. Secondly, the Illinois court strives to award the “time value of money” to the ex-spouse while waiting to receive payments. The DoD report recommendation as implemented in with the DFAS Hypothetical Method, or the quantitatively equivalent Dual Coverture Method introduced by Dr. Mork, accomplishes the court’s goal in the form of COLA or military pay increases for the ex-spouse—covering all time after the divorce, both before and after payments begin. The DoD Report and the DFAS Attorney Guidance Handbook clarify at some length this benefit to the ex-spouse, and I cannot explain why Mark Sullivan or any other lawyer or judge misses this point other than to intentionally ignore it. In as much as an increasing amount IS included in a percentage military retirement, the Illinois court’s desire to award “time value of money” should be cited in support of the DoD recommendations!
- c. The next problem with Sullivan’s argument is that he exhibits confusion between passively earned interest and actively earned enhancements. We are talking about the top light-blue portion of Figure 1. The Illinois court said that the blue portion must be equally divided, even though it was earned after the divorce. As

shown in the diagram, this logic applies to pension retirements where retirement value compounds non-linearly during the later years—akin to compounded interest in a bank account. As shown in Figure 1, if a marriage lasts  $\frac{1}{2}$  of a career, a pensioner may not keep all the interest earned during later  $\frac{1}{2}$  of the career because it is passively accrued faster due to compounding interest, and it includes return on the ex-spouse's dark red value still trapped in the retirement plan. As stated by the Illinois court, the interest earning years could be seen as "equal" or "comingled", so each party gets half the interest compounding, no matter when earned.

However, *a military retirement is not diagrammed in Figure 1, nor was a military retirement considered by the Illinois court.* Here are the differences:

- i. In the case cited by Sullivan and other civilian cases, value after divorce increases due to time-based passive factors. In the case of military retirement, monthly retirement pay is calculated from two factors: years of service (or points of service for a Reservist), and *also* rank of the last 3 years. Military division orders often pro-rate points of a Reservist, but arguments of Sullivan and others would have you ignore the second factor, which should be used in a *Dual Coverture* fraction. Rank attained after marriage is not a passive time-based increase, nor is it automatic. It is a difficult performance work-based competitive accomplishment that an ex-spouse contributes nothing to and should not share in the benefit of. The effect of promotions is easy to quantitatively separate with either the *Dual Coverture* or *Hypothetical Methods*.
- ii. A military retirement is not analogous to a marital asset bank account where money is trapped until years later. With a bank account, the interest (blue part) earned during the interim delay would be divided at the later time. However, a military promotion enhancement is NOT passive "earned interest". A promotion's value is not "based on" or "calculated from" an

existing balance in the account like compounding interest would be. It is earned only by difficult and demanding post-marriage work including additional college study, deployments, risk of life, etc.

- iii. There is a civilian analogy that may help clarify why promotion enhancements need to remain with the military member. A typical civilian 401(k) would be divided at the time of divorce. Either spouse may then go on in life and make further work-based post-marriage contributions to the 401(k) balance they have. The contributions made after the separation, and related earned interest, are not divisible because they are not part of the marital estate. I can't believe there's a court in this land that would order someone to divide post-divorce contributions to their post-division 401(k). Yet this is what Mark Sullivan proposes by arguing to divide promotion enhancement contributions.

For a military member, promotion enhancements and further duty are the *only way for a military member to make post-marriage contributions to their defined benefit retirement pay*. A military member must be allowed to make these contributions unencumbered, otherwise they are deprived of independent and free retirement savings for the rest of their life. Remember, this is NOT alimony. This is asset division. If the military member has no way to independently contribute to their own retirement, the foundational concept of divorce separation is denied.

My goal is to provide understanding to attorneys and courts as they consider the division of post-marriage promotion enhancements, and then ask that they act with integrity to pursue equity. With that in mind, there are other clarifications worth making.

5. Military retirements encapsulate passively earned increases (“compound interest” or “time value of money”) in the form of COLA charts or military pay increase charts. With Hypothetical Method or Dual Coverture method, both spouses receive this benefit. The DoD report, which considered dozens of cases and input from dozens

of national organizations, made a correct recommendation and the DFAS Attorney Guide specifically explains that the Hypothetical method does give time value of money to the ex-spouse. It is misleading to cite the Illinois case or any “time value of money” argument implying that an ex-spouse would not receive it. In fact, any such case law should be used by the attorney **for** the military member as support for the Dual Coverture or Hypothetical Methods.

Two court cases exhibit the confusion around the issue of time value of money. The first exhibits confusion of an attorney. The second illustrates confusion of a court.

- a. The Illinois court’s decision to equally divide post-marital increases (blue portion of Figure 1) reflect equity only for *similar* civilian cases when this increase is *passively* earned. Yet, for some reason, Sullivan cited this as relevant for a military promotion enhancement discussion.
  - b. A more recent 2010 New Jersey Appellate Court decision accepted the Dual Coverture method, but then denied the military member’s request for it because they believed it did not award the time value of money based on which year pay chart was used. This is factually incorrect; the year of the pay chart ratio does not change the ratio. So long as the same year pay chart is used to generate the rank pay fraction, time value of money IS awarded to the ex-spouse. For more details, see the discussion at <http://www.increa.com/articles/division-military-retirement-dual-coverture/>
6. Military promotion enhancements are earned because of active effort by the post-divorce military member, with no contribution by the ex-spouse. Promotions are NOT post-divorce increases that are passive like compounding interest, as exhibited by Mr. Sullivan in the Illinois case citation. Here is a short list of how promotion enhancements are different than passively earned enhancements:
- a. A promotion does not happen just because more years transpire, nor are promotion effects comingled like years of compound interest. Promotions are

special, unique, and competitive. Only a small portion of individuals accomplish this due to specific, difficult, pro-active effort. The military "up or out" policy ensures most are not promoted.

- b. Additional college education is required for promotion.
  - c. For higher ranks, military deployments are required for promotion.
  - d. A promotion incurs military service obligations not shared by the ex-spouse.
  - e. The military retirement system is mathematically precise and explicit. It is easy to quantify and separate events of a person's career and their impact on retirement pay.
  - f. Unlike co-contributing capital money into an investment, often-times prior application and denial of promotion is prima-facia evidence that what a prior spouse contributed was not sufficient for promotion.
  - g. Promotion, contrasted with retirement enhancement from that promotion, are not the same. Promotion is *required* for retirement promotion enhancement, but is not *sufficient* to cause it. Making promotion manifest into increased retirement pay requires a continuum of 3 years of duty *after* gaining the increased rank. If a divorce occurred before or near a promotion, an ex-spouse contributes nothing during the 3 required years that actually earn the retirement pay change.
7. When a civilian pension uses the word "earned interest" they mean compounded interest or multipliers that increase while both parties do nothing but wait. When a military retiree uses the word "earned promotion" they mean duty and work. Blurring these definitions creates confusion and inequitable division of military retirement pay. Several questions can clarify which category of increase we are dealing with.

<b>Question</b>	<b>Passive Earned Enhancement (divisible)</b>	<b>Work Earned Enhancement (not divisible)</b>
Is the post-divorce increase created from additional work effort of the retiree after divorce?	No	Yes
After divorce, who contributes effort toward the after-divorce increase in value?	Nobody, both wait to receive payments.	Only retiree contributes

Does the size of the increase change proportional to the ex-spouse's portion that is delayed payment?	Yes	No
Is the promotion enhancement "based on" marital effort or marital asset? (See entire section about manipulative and deceptive "based on" arguments, starting paragraph 9 page 13.)	Yes	No
Does the method of calculating the enhancement make it become a marital asset?	Yes, returns time value of money to ex-spouse	No
Is the enhancement a divisible marriage asset?	Yes	No

8. USFSPA allows a military retirement to be treated as an asset for division, and what is to be divided is the asset *at the time of marriage*, subject to COLA increases which compensates the ex-spouse for the delay in receiving the asset. It is worth noting that a Hypothetical or Dual Coverture method does more than compensate the ex-spouse, because after receipt of payments, the ex-spouse will get continued military pay raises each year. This is better than just dividing the asst and sending the spouse off into their private divorced life.

USFSPA gives no authority to invade non-marital assets earned (not passively, but rather worked for) outside the bounds of the marriage. If a divorce occurs when a military member is (for example) a 17-year Major, the USFSP Act says the contemporary retirement of such a person can be treated as a marriage asset that can be divided. The COLA adjusted amount going to the former spouse sufficiently compensates for any interim wait, because the ex-spouse will continue to get higher and higher dollar amounts for each year after the dissolution of marriage. This concept is what the New Jersey court referenced earlier failed to understand. If you want to understand how this works out dollar by dollar, please see the example calculations shown in the document "Attorney Instructions - Division of Reserve Military Retirement", downloadable from <http://www.increa.com/articles/division-reserve-military-retirement/>.

If the military member does more duty or earns more promotions, the ex-spouse should NOT benefit from these enhancements because they ex-spouse makes no contribution in any way to these enhancements and the enhancements are not marital property subject to USFSPA. Just as the spouse is able to do work after marriage and contribute to their separate retirement plan unencumbered, the military member must be able to do work after marriage and contribute to their retirement plan encumbered the only way they can—with more duty and more promotions.

9. Military promotion enhancements are not subject to the concept of a “based on” argument. For example, the first sentence in the Illinois ruling quoted above says, “The greater-value later years would not have been possible without the lesser-value earlier years.” For financial compound interest, this observation is correct. However, quoting this based on argument when discussing a military promotion enhancement reflects the civilian/military confusion Mr. Sullivan is promulgating. The phrase and concept of “based on” is broad enough to capture anything a person does later in life because later life is always based on earlier life. This absurd logic is not an appropriate standard to establish that anything is a divisible marital asset or not.

#### “BASED ON” ARGUMENTS

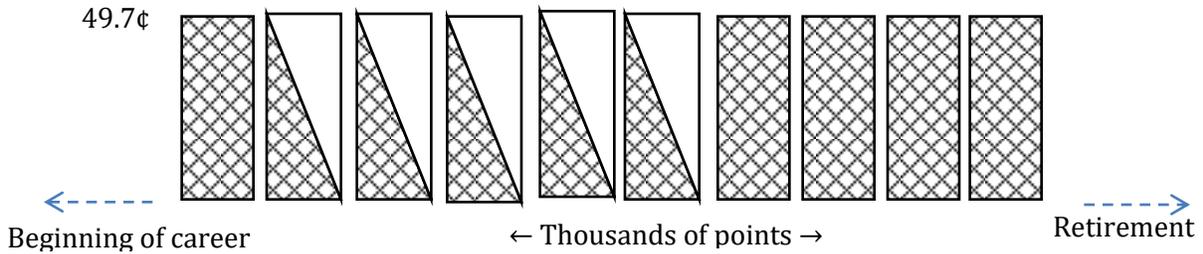
Litmus test – Should the ex-spouse monthly dollar amount (expressed in constant year dollars) increase due to after marriage military member work or after marriage merit promotions? No. The only reason an ex-spouse monthly dollar amount should increase is due to time value of money due to forced delay receiving the money. The military member is also forced to delay receipt of monies, and both should enjoy “time value increases” at the same rate – according to the pay rates manifest in military pay tables. Mork’s Dual Coverture or Area Method do this. The only other method that accomplishes this desired effect is the DFAS Hypothetical method, and it is second best because it causes the military member to get time value increases from pay tables, while the ex-spouse gets time value increases from COLA rates—allowing disparity. Any other method gives the ex-spouse a portion of NON-marital

assets earned after the marriage.

Paragraph 10 through Paragraph 16 go into greater detail about the “based on” argument in order to make three points:

- a. The written phrase and the concept “based on” is not a legal term of art, and it is not legally defined. In this context, it means “calculated from,” and that is the more precise preferred phrase for anyone intending to be clear. The claim that "a military member's non-divisible benefit is calculated from the ex-spouse's divisible points (and therefore cheating the ex-spouse)," is a moot point of perspective. If true, it is equally true that "the ex-spouse's benefit is calculated from the military member's non-divisible points (and therefore cheating the military member)." Which is based on which? It works both ways!
- b. If used one way, then “based on” is an insufficient threshold to declare something marital property. Examples: “any year in life is based on a prior year in life”, or “a later job is obtained based on experience during the marriage”, or “promotion enhancement is based on work during the marriage”.
- c. If used another way, then “based on” associates marital property, and does not apply to a military retirement. Examples: “interest accrued is based on the original value”. According to the civilian Illinois case and others, this is sufficient standard to divide an asset, however this use of the phrase “based on” is contrary to a military promotion enhancement.

10. Military retirement enhancements due to promotion and additional duty are not based on prior years, they are based only on post-marriage work. See the diagram below, which diagrams the military retirement asset. Although there may be thousands of points in a person’s career, only ten are shown below, centered around the time of divorce.



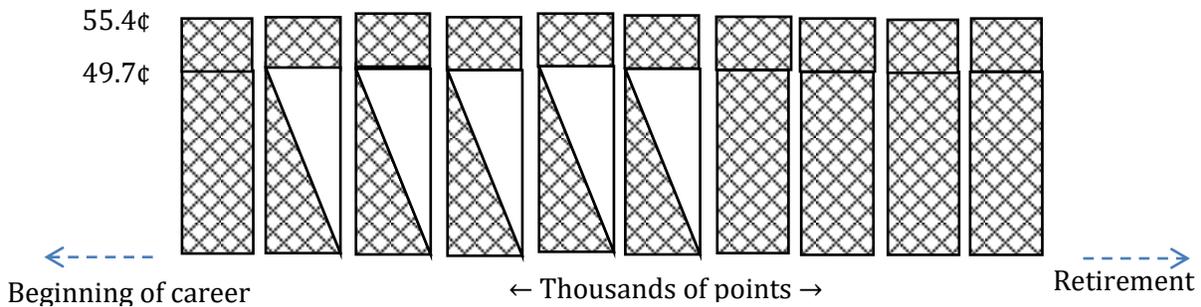
**Figure 2 - Military Retirement Valuation and Division**

In a Reserve military retirement, each point is worth a certain number of pennies, represented by the vertical height of the bar. The exact point value can be calculated from the Federal formula for military retirements, and is simple to calculate: multiply the monthly income of a person's rank times 2.5% divided by 360. In 2012, the monthly income of an 18 year Major (O-4) is \$7162, so each point is worth  $\$7162 \times 0.025 / 360$ , or 49.7 ¢. Gross retirement pay could be simply calculated by multiplying the number of points by the point value. Remember the value of each point continues to rise each year due to COLA increases to military pay charts.

In Figure 2, a point earned before the marriage is shown on the left, with cross-hatching. Points earned during the marriage are diagonally divided 50:50 with the ex-spouse: the military member gets the cross-hatched value and the ex-spouse gets white value. After the divorce, the military person went on and earned more points, so these are shown with cross-hatching only to represent that they are not marital property and are not divided. So far, this type of division can be done with the single point-based coverture fraction most courts are familiar with. The coverture fraction of our diagram would be 5/10 or 0.50. With a normal 50:50 division, the division fraction would be half of this or 0.25 (25%) going to the ex-spouse. In other words, 25% of the area of the diagrammed points is white.

If the military member works for and accepts a promotion after marriage, the promotion results in increased retirement pay. This promotion enhancement is shown in Figure 3 with the top hat cross-hatched enhancements assuming the prior

Major (O-4) became a Lieutenant Colonel (O-5). Using the same 2012 military pay chart that was used before, retirement points are now worth  $\$7982 * 0.025 / 360$ , or 55.4¢ each. This can be diagrammed as the original 49.7¢ plus 5.7¢ of promotion enhancement. The vertical height in the diagram changes because each point is worth more, caused by the military member's promotion.



**Figure 3 - Military Retirement with Promotion Enhancement**

11. Note the value of each point goes up each year due to COLA increases of military pay, and each portion shares proportionally in the increases. This happens for every year after divorce, giving time-value of money to both parties.
12. The size of the promotion enhancement is not dependent on the prior value of the diagonal shared value or the solid cross-hatched value. This is opposite to a civilian retirement where passive earnings or increases may occur while waiting for the retirement value to be disbursed. The military retirement enhancement due to promotions after the marriage is not dependent on the marriage points, and it does not change the spousal fraction in any way. *The promotion enhancement is not larger or smaller in any way based on the prior points, and the enhancement exists only due to post-marriage work.*
13. One may argue in some Talmudic way that the military member is inappropriately “re-using” marital points or “stacking value” to benefit the promotion enhancement, and therefore the ex-spouse should get “a cut” of the increase. However, there are

problems with that line of thought.

- a. The promotion enhancement is competitively and pro-actively earned by the military person with duty, schooling, education, and deployments. No contribution is made by the ex-spouse to earn the enhancement. The diagonally divided “asset capital” in no way contributes to the existence or value of the subsequent enhancement.
- b. The diagonally divided marriage asset point value is not impacted in any way when the retiree creates additional value by working. The division was already done and complete, waiting to be paid, and compensated for time-value of money.
- c. The creation and calculation of the top hat cross-hatched portion is a post-marital private contract between the retiree and employer. Divorce does not empower an ex-spouse to invade an after-marriage 3<sup>rd</sup>-party event. For example, if someone walked up to the military member after the divorce and gifted them \$500K because they were previously married in the military, half would not be given to the ex-spouse. Division would be even more egregious if the military member had to work for the extra \$500K.
- d. Incorrect logic would also deprive the non-military spouse. For example, if there was military duty before the marriage, then the marriage portion would be “based on” the pre-existing asset, with diagonally divided value laying across the pre-marriage points (peek ahead to Figure 4). Some of what the ex-spouse would receive has to be given back to the military member. If “based on” is sufficient to cause division, then it must be equitably used in both directions.

14. Analogies may clarify the situation:

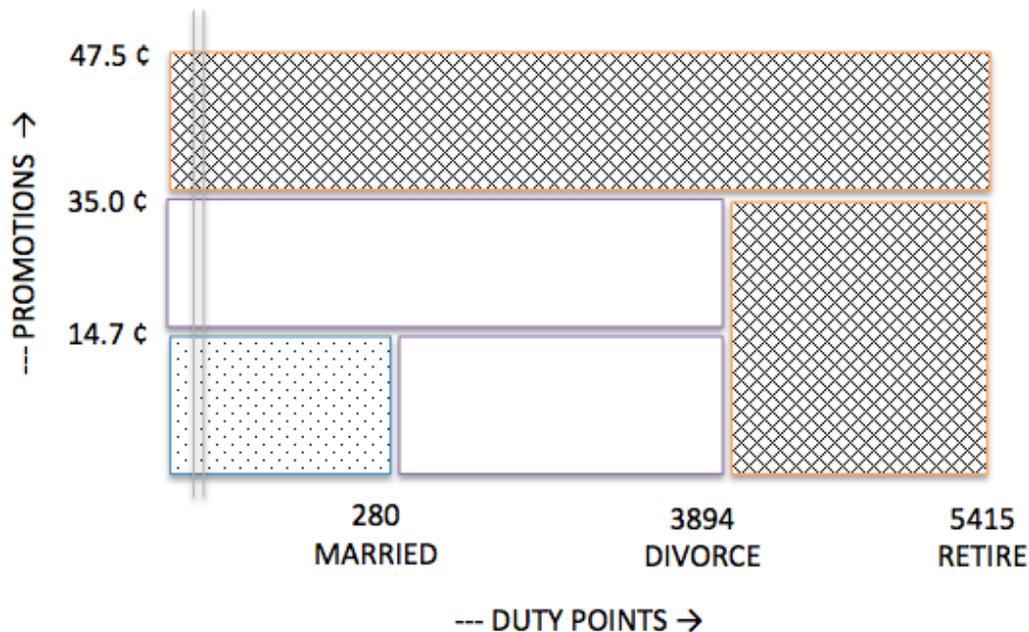
- a. Consider a military pilot who logs 3000 hours of flight time during a marriage and is then divorced. After the divorce, the pilot gets a job flying for United Airlines. The job is obtained based on flight hours earned while in the military and while married, and the commercial retirement in no way impacts the military retirement.

A court should not say the civilian job retirement is “based on” pilot experience and therefore should be divided as a marital asset. Consider the reverse: if an ex-spouse writes a best selling book after marriage based on being married to a military pilot, does the “based on” relationship does not make book profits divisible.

- b. A military Reserve contract officer is divorced and later retires. After divorce but before military retirement, she goes to a Federal civilian contracting job and buys back credit for military experience to plus-up or enhance her civilian retirement. Because the purchased civilian annuity increase is funded only by the military member after the marriage, and no way waives or decreases military retirement, a court should not say the post-marriage benefit is “based on” military experience and therefore should be divided.
- c. An employee may learn to weld during a marriage, but getting a welding job after the marriage “based on” what happened during the marriage in no way makes earnings on the later job a marital asset.

15. To fully capture the financial relationships of retirement increases during different phases of life, the diagram below shows the military retirement asset as 2-dimension blocks. This works because military retirement *is* 2-dimensional: value is point value multiplied by duty points, analogous to “width times height gives area”.

The two vertical lines on the left delineate one retirement point (for clarity, all 5415 points across the diagram are not shown, and lumped together as blocks rather than individual sticks). Adding up all the individual vertical point stacks, the 2-D area in the diagram represent dollar value paid to a retiree each month.



**Figure 4 - Military Retirement 2-dimensional Valuation and Division**

The horizontal dimension represents military duty retirement points earned across time. Imagine 5,415 vertical bars across the page, where each is one point, consisting of value earned at different phases of life stacked up. For example, on the left side of the diagram, the first points are worth 14.7¢ + 20.3¢ + 12.5¢, or 47.5¢ each. In the example shown, when married, 280 points of Active Duty or Reserve duty had been earned, so picture 280 vertical bars, each consisting of dotted, clear, and hashed portions. Comparing with the diagram, one can see that when divorced, 3894 points had been earned, and when retired 5415 points had been earned.

Multiplying (points \* value) at any point in time gives the value of a military retirement monthly payment. In the diagram, notice the 5415 duty points times the 47.5¢ per point yields a total monthly retirement pay of \$2572.13. This value represents the total area of all sections added together.

When more military duty is performed, the retirement asset grows sideways. When a promotion is merit-based earned by the military member, the retirement asset

grows vertically. The dollar value for BOTH parties grows proportionally vertical when a COLA-based military raise is made across the board. This is how BOTH parties get time-value of money for the years after attaining retirement status, while waiting for Reserve retirement pay to actually start.

Once this chart is understood, you can see that it's trivial to calculate a relative portion of the marital asset by calculating the area of the different phases of life. The rectangular dotted portion was a pre-existing asset that was brought into the marriage, and is quantifiably separate, and not co-mingled. This is  $280 * \$0.147$  or \$41.16.

The L-shaped clear region of the chart is the marital portion that was earned during the marriage. Some horizontal value was added by adding more points. Some vertical value was added to both present and past points by getting promoted. This L-shaped clear region is the only part of the military retirement that is a divisible marriage asset. This is calculated from  $(3894 * \$0.35) - \$41.16$ , or \$1321.74.

The L-shaped cross-hatched portion was earned all after the marriage, and is quantifiably separate and not co-mingled. To calculate the proper coverture fraction, simply take the clear portion and divide by the total area to get a coverture fraction. It's that simple! Multiply by the spousal fraction (50%) to get the division fraction. That's  $50\% * \$1321.74 / \$2572.13$ , or 0.257. Every year, when the military pay tables increase, the 0.257 division fraction stays the same while the dollar values for both parties go up proportionately. ***Years of debate and thousands of dollars can be saved in court by simply looking at this one diagram!***

16. For a military retirement shown in Figure 3, the size of the point value before promotion does not affect the size of the promotion enhancement—only the work of promotion(s) determines the size of the promotion enhancement top hats. One can compare Figure 1 and Figure 3 to understand why a civilian retirement is wholly different than a military retirement, and why Sullivan's desire to use civilian case law

is inappropriate.

With a civilian retirement such as a 401(k) account or investment account, the size of the enhancement would be proportional to the size of the underlying value at the time of divorce (Figure 1 red portion). This can be said in a simple way: “If your capital investment is twice as large, you earn twice as much interest.” For the civilian retirement diagram, if the red portion marital portion were larger, then that directly contributes to a larger blue portion.

With a military retirement, you can view Figure 4 to see that claiming “based on” relationships is without logical or legal merit. It is illogical to claim that post-marital cross-hatched portion is based on the clear marital portions. In fact the the opposite claim could be made: the clear marital portion is based on pre-existing dotted portion! Instead, a proper understanding is that each region has both points and promotions that were earned uniquely during that phase of life and they do not comingle in either direction. Only the marriage time is divisible. The phrase “based on” does not belong in legal military retirement documents. Instead, say “actively earned during” and everything becomes clear. If someone insists on using the phrase “based on”, then everybody must be clear how it is used:

- **CIVILIAN** retirement: time-value of money enhancement **IS BASED ON** the spousal contribution or spousal portion.
- **MILITARY** retirement: promotion enhancement for any phase of life **IS NOT BASED ON** the spousal contribution or spousal portion from earlier phases of life.

## WRITING THE DIVISION ORDER

17. The only formulas that can handle duty before the marriage as diagrammed in Figure 4. This Dual Coverture *Value* method more fully explained in “An Attorney Guide for Dividing Military Reserve Retirement According to Federal Guidance”. Dual Coverture methods can also be used for Active Duty retirements if you count a year as 365 or 366 points. To accomplish the division diagrammed in Figure 3, the only two suitable methods are the Hypothetical Method introduced by DFAS, and the Dual Coverture method introduced by Dr. Mork. Both methods yield the same division. Dual Coverture is simpler. If you wish to use the Hypothetical Method, reference the April 2012 DFAS publication titled “Guidance to Dividing Military Retired Pay”.<sup>4</sup> If there is no military duty before marriage, the Dual Coverture Value method simplifies to the Dual Coverture method, which is so simple it can be captured in one equation:

$$\text{Spousal Fraction} = 50\% * (R_D/R_R) * (P_D/P_R)$$

Where:

$R_D$  = rank monthly base pay, using rank and years of service upon dissolution;  
look up on the same pay chart as  $R_R$ .

$R_R$  = rank monthly base pay, using rank and years of service upon retirement;  
look up on the same year's pay chart as  $R_D$ .

$P_D$  = duty points accumulated prior to dissolution of the marriage,

$P_R$  = duty points accumulated prior to retirement.

Example:

$$\text{Marital Asset} = (\$7162/\$7982) * (4320/5444) = 71.2\%$$

$$\text{Spousal Fraction} = 50\% * \text{Marital Asset} = 35.6\%$$

Ex-spouse should receive 35.6% of the retired monthly payments.

Here's how to connect the numbers with the visual diagrams. The ( $R_D/R_R$ ) ratio separates off the top hat portion of Figure 3 as separate post-marriage property.

The ( $P_D/P_R$ ) ratio separates off the solid cross-hatch portion of Figure 3 as separate

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<sup>4</sup> This April 2012 DFAS publication is an update to the earlier DFAS publication “Attorney Instructions Dividing Military Retired Pay.”

post-marriage property. The 50% divides the diagonally divided marked points. This matches the DoD report recommendations and produces the same results as the DFAS Hypothetical Method—just a whole lot simpler.

If the rank ratio ( $R_D/R_R$ ) is neglected according to Mr. Sullivan's position, the coverture fraction would be 39.7%. Instead of collecting a proper \$2841.59/mo, the ex-spouse would collect \$3168.85/mo. The \$327.26/mo windfall is an inappropriate 11.5% increase, totaling \$78,542 during a 20 year retirement. This number will be different for each case; please work **your** numbers to see the effect. If an attorney worked on contingency, a significant portion of the windfall would go to the attorney. I cannot understand why the Reserve Office Association website sponsors Mr. Sullivan's web links under the innocuous link "Legal Assistance from North Carolina State Bar", when his methods are inequitably damaging to Reserve Officers and preferentially net contingency payments to himself.

If there is military duty before marriage as shown in Figure 4, the fraction is adjusted to calculate using 2-dimensional *value* of retirement rather than basepay and points. See the spreadsheet calculator downloadable from <http://www.increa.com/articles/division-military-retirement-dual-coverture>.

## SUMMARY

My goal is to provide understanding to attorneys and courts as they consider the division of post-marriage promotion enhancements, and then ask that they act with integrity to pursue equity. Toward that end, this memorandum demonstrates:

- Each point in Sullivan's memorandum is countered with facts supporting the opposite position.
- Blurring civilian and military retirement case law causes non-equity.
- Because damaging military members pays much better than defending them, education and integrity is required by attorneys to strive for equity.

- Military retirement promotion enhancements before or after divorce are not marital assets and belong only to the military member, per legally binding divorce decrees.
- After a divorce, military members must be allowed to “contribute rank and duty” to their military retirement asset, free and clear of claim.
- A Dual Coverture method is a simpler way to do proper division, yielding the same result as the DFAS Hypothetical Method.
- A Dual Coverture Value method is associated with a 2-dimensional graphical representation of military retirement value that yields tremendous clarity. It is the only way to divide assets when military duty was done before marriage.