

**A BETTER METHOD  
TO  
EQUITABLY DIVIDE MILITARY RETIREMENTS  
UPON DIVORCE**

by

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## Table of Contents

Biography .....	3
Abstract .....	4
I. Introduction.....	4
II. Advantages of Area Method.....	7
III. Area Method Description .....	8
IV. Comparison of Methods .....	10
V. Reference Guide .....	12
A. Selection of Method.....	12
B. Legal Language and Numbers.....	14
C. Calculating Numerators.....	16
D. Translation from DFAS Examples .....	17
VI. Poignant Visual Clarity.....	18
VII. Model-Based Jurisprudence.....	22
VIII. Conclusion.....	23

## **Biography**

Dr. Mork has spent his career handling data and numbers with fidelity, providing defensible numerical answers that capture truth. Aerospace flight test engineering work at the USAF Test Pilot School involved using data and metrics to create and test models of the real world on which lives depended. He now turns these skills toward modeling and elucidating military divorce asset division.

## **Abstract**

The Uniform Services Former Spouse Protection Act (USFSPA) allows military retirements to be divided as a marital asset. A Department of Defense report to the Armed Services Committees of Congress tasked the Defense Finance and Accounting Service (DFAS) to publish methods to equitably divide retirements. The Congressional report recommended that duty credit, longevity, and promotions enhancements be divided if accrued during a marriage and set aside from division if accrued outside a marriage. Societal and dollar implications are huge.

DFAS published the multi-step Hypothetical Method to answer the requirement, but it is plagued with obscure processes, confusing requirements for data, inability to handle some life situations and avoidance by courts familiar with coverture fraction formulas. The cumulative effect has precluded wide acceptance despite its equity.

The Dual Coverture Value Area Method is capable of duplicating the results of the Hypothetical Method and other methods much more easily, plus all life situations can be equitably handled. This article teaches the Area Method and includes tables and charts to assist implementing court orders. Additionally, the Area Method is shown to clarify court arguments with a simple model-based implementation.

### **I. Introduction**

Military retirements are a significant benefit, earned by both women and men. As of March 2011, there were more than twice as many military women divorcing than men<sup>1</sup>. Among enlisted, the military women divorce rate is about three times that of men. The overall military

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1. Kimberly Hefling, *Female GIs Struggle with Higher Rate of Divorce*, Military Times, Mar. 8, 2011. <http://www.militarytimes.com/news/2011/03/ap-female-gis-struggle-with-higher-divorce-rate-030811> (last visited Jan. 6, 2016).

divorce rate in 2011 is 64% higher than it was in 2001<sup>2</sup>. Military divorce is a significant social issue affecting both sexes. Dollar value of a military retirement in 2012 dollars range from \$945,000 for an E-7 to \$2,800,000 for an O-8 (20 yr E-7, or 30 yr O-8, living until age 75).

There are two pieces to a military retirement. The 401(k)-like Thrift Savings Program (TSP) is a defined contribution retirement that can be divided by separating the balance on account at the time of divorce, according to when contributions were made. The annuity portion of a military retirement is more difficult to value and separate because Federal law prevents distribution until a time well after many divorces. To accomplish this, many court orders use the Hypothetical Method published in the DFAS guide.<sup>3</sup> Hypothetical is an important method because it is the only DFAS method that answers the DoD USFSPA Report to Congress recommendation that promotion and longevity enhancements after divorce should not be divided.

The report says,

“Congress should amend the USFSPA to provide that all awards of military retired pay be based on the member’s rank and years of service at the time of divorce ... *DFAS should include a formula in its recommendations that could be used by parties who divorce while the member is still on active duty.*”<sup>4</sup>

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2. David Larter, *Air Force Divorce Rate Highest in Military*, Military Time, Dec. 31, 2011. <http://www.militarytimes.com/news/2011/12/airforce-divorce-rate-highest-in-military-123111> (last visited Jan. 6, 2016).

3. Defense Finance and Account Service (DFAS), *Guidance on Dividing Military Retired Pay*, Mar. 7, 2014. <http://www.dfas.mil/dam/jcr:1cbbab12-9765-4eee-8b5f-a6bab98b2e2c/AttorneyGuidance-03-07-2014> (last visited Dec. 4, 2015). The 2014 DFAS guide has broken formatting and is difficult to read. The 2012 or 2010 DFAS guides are substantially the same text: DFAS, *Dividing Military Retired Pay*, Jan. 4, 2010, <http://www.increa.com/articles/division-military-retirement-dual-coverture/USFSPA-Attorney-Instruction-01-04-10.pdf> (last visited Dec. 4, 2015); DFAS *Guidance on Dividing Military Retired Pay*, Apr. 2, 2012, <http://www.increa.com/articles/division-military-retirement-dual-coverture/AttorneyGuidance-01-29-2012-revised%2004-02-2012.pdf> (last visited Dec. 4, 2015).

4. Department of Defense, *A Report to Congress Concerning Federal Former Spouse Protection Laws*. Dec. 23, 2002. <http://prhome.defense.gov/Portals/52/Documents/RFM/MPP/docs/finalrpt.pdf> (last visited Dec. 4, 2015) at 71-72.

Additionally, state statutes such as Oklahoma SB1951 require military promotions and longevity actively earned outside of marriage not be divided. Additionally, assets brought into the marriage (including retirement longevity and rank) are typically not divisible, and DFAS has not proffered a method to set aside pre-marital service credit.

Lastly, the 2017 National Defense Authorization Act includes an amendment to the USFSPA that will require (if passed) all division orders across the nation be calculated in a way respecting that promotion enhancements outside of the marriage are not marital property. The Senate version (S. 2943 Sec. 642) says,

"In calculating the total monthly retired pay to which a member is entitled for purposes of subparagraph (A), the following shall be used:

- (i) The member's pay grade and years of service at the time of the court order.
- (ii) The amount of pay that is payable at the time of the member's retirement to a member in the member's pay grade and years of service as fixed pursuant to clause(i)."

While the House bill (H.R. 4909 Sec. 625) says,

"[member entitlement] is to be determined using the member's pay grade and years of service at the time of the court order, rather than the member's pay grade and years of service at the time of retirement, unless the same"

Although the Hypothetical Method is necessary and unique, the Dual Coverture Value Area Method (AM)<sup>5</sup> has matured to the point that action by DFAS and the legal community needs to be considered. AM has powerful advantages while maintaining backward compatibility with the Hypothetical Method and all other methods.<sup>6</sup> The author has submitted a request<sup>7</sup> to

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5. Brian Mork, *Division of Military Retirement Pay - Area Method*, <http://www.increa.com/articles/division-military-coverture-value/index.html> (last visited Dec. 10, 2015).

6. Brian Mork, *Dual Coverture vs. Hypothetical Method – Military Divorce Retirement Division*. Feb. 5, 2011. <http://blog.increa.com/2011/dual-coverture-vs-hypothetical-method/> (last visited Dec. 10, 2015).

DFAS to publish the Area Method instead of the Hypothetical Method, and is soliciting third party sponsorship in this goal.

## **II. Advantages of Area Method**

The Area Method is backward compatible with the Hypothetical Method and other pre-existing methods, meaning it provides the same results in all situations those methods can handle – only AM does it simpler. The Area Method has additional advantages:

- AM can set aside military retirement value both after and/or before marriage, to match all life situations. Hypothetical cannot do this.
- AM treats both the military member and the ex-spouse the same regarding time value of money adjustments. With Hypothetical, between the time of divorce and retirement, time value benefit for the ex-spouse benefit comes from national COLA numbers, while the military member's benefit comes from military pay chart raises. Without knowing the specific years of a case, it's impossible to know which spouse comes out ahead. What is known is that there is no reason to continuing using a method with known inequities.
- AM can divide retirements when there is more than one spouse. Hypothetical cannot.
- AM protects the ex-spouse from pre-marital set aside at higher rank. Hypothetical cannot.
- AM works the same for Active Duty or Reserve retirements.
- AM works the same no matter when a service member enlisted, whereas Hypothetical has confusing variations that must be used because it separately calculates retirement twice.
- The AM legal text is cut-and-paste, ensuring DFAS receives executable division orders the *first* time. Each individual case needs to customize only 3 numbers in the text.

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7. Brian Mork, "recommended-changes-DFAS.pdf," <http://www.increa.com/articles/division-dcv-practicum/recommended-changes-DFAS.pdf> (last visited Dec.10, 2015).

- AM uses something attorneys and courts are familiar with. Unlike Hypothetical, AM is a simple coverture fraction. The numerator of the division fraction is a number known at time of divorce. The denominator is the product of two numbers DFAS inserts upon retirement.
- AM is a single 1-step math formula instead of a 3-4 step process requiring complicated manual calculations such as High-3 base pay and COLA aggregations.
- AM treats military member first year 1% reduction of retirement and CSB/REDUX equitably. Hypothetical Method inequitably does not include this for the ex-spouses hypothetical amount.
- AM uses a visual representation that is simple for all stakeholders to understand. This is a *big* issue that promotes mediation out of court, avoids costs of appeals, and protects DFAS from having to deal with convoluted court orders.

### **III. Area Method Description**

A retirement asset value can be visualized as an area. The idea of an area diagram (multiplying two numbers together) works because a product of two numbers is how a military retirement is calculated.

$$\text{Monthly military retirement payment} = (2.5\% * \text{base pay}) * (\text{duty years})$$

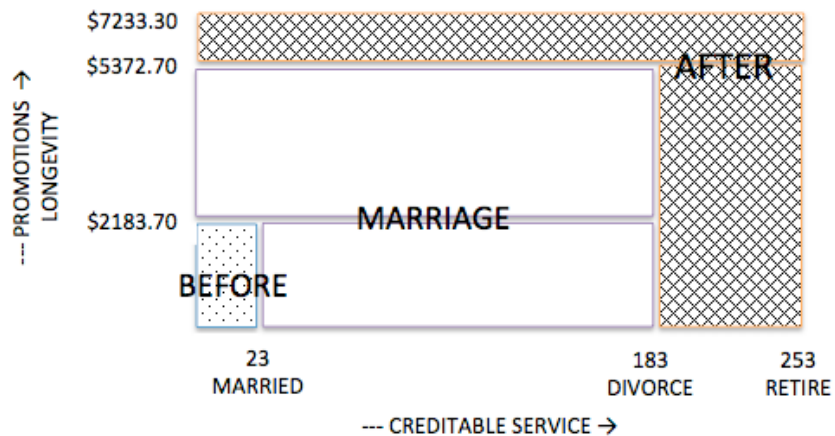
Consider an imaginary military person for an example in this document. The imaginary military member was married as a 1 yr 11 mo O-1 and divorced as a 15 yr 3 mo O-4 in June 2003. After divorce, the military member was promoted to O-5 and O-6 and retired in April 2010, after 21 yr 1 mo.



Below is a tabular summary of the information. If we were considering a Reserve military member (duty months = points/30), the Duty Months could be less than Longevity and probably include fractional months.

Event	Pay Chart Year	Rank	Longevity	Base Pay	Duty Months	Area
Marriage	2003	O-1	1yr 11mo	2183.70	23.00	50225
Divorce	2003	O-4	15yr 3mo	5372.70	183.00	983204
Retire	2003	O-6	21yr 1mo	7233.30	253.00	1830025

Using these numbers, the Area Method diagram looks like this:



The vertical axis of the diagram is base pay. All base pay numbers are taken from the same year military pay chart<sup>8</sup>. In the example, I used the 2003 pay chart because that was the year of divorce.

The horizontal axis is duty months of retirement service credit, or for a Reserve military retirement, the horizontal axis is (retirement duty points / 30).

The coverture fraction is the marriage area divided by the total area – that’s the white area divided by the total area. Area is the width times the height – the same as when calculating

8. DFAS, *Military Pay Charts - 1945 to 2015*. <http://www.dfas.mil/militarymembers/payentitlements/military-pay-charts.html> (last visited Dec. 20, 2015).

the area of carpet in a room. Putting in the numbers from the above table and diagram yields the spousal fraction DFAS needs in a division order.

$$\begin{aligned} \text{AM Numerator (married area)} &= 983204 - 50225 \Rightarrow 932979 \\ \text{AM Denominator (total area)} &= 1830025 \\ 50\% * 932979 / 1830025 &\Rightarrow \mathbf{25.49\%} \end{aligned}$$

That's it. The Area Method is easy and fast! A spreadsheet is available to do the calculations.<sup>9</sup>

In a court order, the AM method would be written like this:

The former spouse is awarded a percentage of the disposable military retired pay, to be computed by multiplying **50%** times a fraction, the numerator of which is **932,979** and the denominator is the member's total number of months creditable service for retirement times base pay upon retirement. Base pay is looked up on a **2003** chart. If a Reserve retirement is obtained, months = points / 30.

The court order needs to customize the bolded numbers above:

- the percentage (almost always 50%),
- the numerator (subtract areas as shown above),
- the year pay chart used (whatever year was used to calculate the numerator).

Upon retirement, DFAS plugs in the months of retirement service credit (points/30 for a Reservist) and the retirement base pay from the same year chart and calculates the spousal percentage.

QED.

#### **IV. Comparison of Methods**

This section shows that AM and Hypothetical give the same result under conditions that Hypothetical can do<sup>10</sup>. Hypothetical cannot do military duty before marriage, so the two

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9. Brian Mork, "area-method.xls", from <http://www.intrepidcreativity.com/articles/division-military-coverture-value/area-method.xls>.

methods cannot match in that situation. Other simpler methods can be duplicated also, but it seems more convincing to demonstrate the complicated method. Calculations can be viewed on a separate spreadsheet.<sup>11</sup> In order to get a match to a lesser method, the Area Method has to be re-done by *incorrectly* failing to set aside the pre-marital asset from division. It's easy to do the formula again subtracting zero for the time before marriage:

$$\begin{aligned} \text{AM Numerator (married area)} &= 983204 - 0 \\ \text{AM Denominator (total area)} &= 1830025 \\ 50\% * 983204 / 1830025 &\Rightarrow \mathbf{26.86\%} \text{ ex-spouse fraction.} \end{aligned}$$

Now let's see if the more complicated Hypothetical method matches the much simpler Area Method. For Hypothetical, the legal language would say:

The former spouse is awarded, as her sole and separate property, **50%** of the disposable military retired pay the member would have received had the member retired with a retired pay base of **\$5372.70** with **15 yr 3 mo** of creditable service on **17 June 2003**.<sup>12</sup>

Below, I'll follow the three Hypothetical numbered step-by-step instructions given in the DFAS Guide.<sup>13</sup>

**Step 2(a)** Hypothetical retirement in 2003 at time of divorce is  $2.5\% * 15.25 \text{ yr} * \$5372.70 \Rightarrow \$2048.34$

**Step 2(b)** In the table below, multiply individual COLA adjustments<sup>14</sup> together to determine the total increase in the time value of money between the time of divorce and retirement.

2004	1.021
2005	1.027
2006	1.041

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10. Mork, *supra*, *Dual Coverture vs. Hypothetical Method – Military Divorce Retirement Division*.

11. Brian Mork, "Area-Matches-Hypothetical.xls," <http://www.increa.com/articles/division-dcv-practicum/Area-Matches-Hypothetical.xls> (last visited Dec. 20, 2015).

12. DFAS, *supra*, 2014 *Guidance on Dividing Military Retired Pay*, Example 4 at 16, 22; 2012 ed. at 12, 17; 2010 ed. at 11, 16.

13. DFAS, *supra*, 2014 *Guidance on Dividing Military Retired Pay*, at 14; 2012 ed. at 10; 2010 ed. at 9.

14. Social Security Administration. *History of Automatic Cost-Of-Living Adjustments*. <https://www.ssa.gov/news/cola/automatic-cola.htm> (last visited Dec. 20, 2015).

2007	1.033
2008	1.023
2009	1.058
2010	1.000
<b>TOTAL COLA</b>	<b>1.220</b>

The COLA adjustment is 1.220, so the adjusted hypothetical retirement is \$2048.34 \* 1.220 => \$2499.83

**Step 2(c)** Calculate actual retirement and percentage. Note this requires looking up basepay on a 2010 year table. Retirement in 2010 as an O-6 after 21 yr 1 mo (21.0833 yr) gives a monthly base pay of \$9095.70 and 253.00 months of service duty.

Actual retirement in 2010 = 2.5% \* 21.0833 yr \* \$9095.70 => \$4794.19

Percentage = 50% \* \$2499.83 / \$4794.19 => **26.07%** ex-spouse fraction.

The Hypothetical Method is already more complicated, plus it needs further calculations to fix structural problems. The Hypothetical Method's 26.07% almost matches the Area Method's 26.86%. The difference is attributable to not using the same time value multiplier for both spouses. This is a known *second* problem with the Hypothetical Method in addition to not setting aside pre-marital contributions. For the years 2004-2010, Hypothetical damages the ex-spouse by giving lesser COLA to the ex-spouse while giving Military raises to the member. This affect can damage either party based on the specific range of years in each case. For the given range of years, the military pay chart increase is 1.257x (\$9095.70 / \$7233.30) compared to 1.220x COLA. Properly using military raises (which reflect the time value of money the military member actually realizes) over the years of consideration instead of the COLA multiplier as the multiplier in step 2(b) would give 26.07% \* 1.257 / 1.220 => **26.86%**, a perfect match.

## V. Reference Guide

### A. *Selection of Method*

The demonstration above included only one imaginary situation. The table below helps select the right method for your case. The selection chart on the Area Method web page<sup>15</sup> may also help because it sorts information based on whether benefits are divided or not. The Area Method can duplicate the results of every other method and handle more. The Area Method is always correct – others not so much.

<b>Method of Division →</b>	<b>Area Method</b>	<b>Dual Coverture</b>	<b>Hypothetical Method</b>	<b>Single Time Coverture Fraction</b>
Active Duty and Reserve?	Yes	Yes	Yes, but 6 confusing versions	Yes
Time-value of money after payments start?	Both receive military pay raises.	Both receive military pay raises.	Both receive military pay raises.	Both receive military pay raises.
Time-value of money after divorce before payments start?	Both receive military pay raises.	Both receive military pay raises.	Spouses treated differently (see text)	Both receive military pay raises.
Avoids hand-calculation of COLA and High-3 and REDUX and 1% reduction?	Yes	Yes	No	Yes
Post-marriage merit promotion enhancement to only military member, per Appellate courts and DoD report to Congress? (cross-hashed section over white section)	Yes	Yes	Yes	No
Able to set aside service credit pre-existing the marriage? (required in many states, represented by width of dotted section)	Yes	Yes	No	Yes
Able to set aside promotion value pre-existing the marriage? (represented by	Yes	No	No	No

15. Mork, *supra*, *Division of Military Retirement Pay - Area Method*, hashtag #selectionchart.

height of dotted section)				
Protects ex-spouse from pre-marital set aside at higher rank? (allows division of white section over dotted section)	Yes	No	No	No
Handles service and promotion for multiple spouses? (ask for example diagram if interested)	Yes	No	No	No

### ***B. Legal Language and Numbers***

The text blocks below show the cut-and-paste text to put into a court order. Replace the bolded numbers with your specific numbers according to the notes.

<p><b>Area Method</b></p> <p>“The former spouse is awarded a percentage of the member’s disposable military retired pay, to be computed by multiplying <b>50%</b> times a coverture fraction, the numerator of which is <b>932979</b>, and the denominator is the member’s total number of months creditable service for retirement times base pay upon retirement. Base pay for this formula will be looked up on the <b>2009</b> year pay chart. If a Reserve retirement is obtained, months are retirement points divided by 30.”</p> <ul style="list-style-type: none"> <li>• 50% is normal; use whatever court orders.</li> <li>• Numerator is calculated according to Section VI.C Calculating Numerators, below.</li> <li>• Year must match whatever chart was used to calculate the numerator.</li> <li>• Include the last sentence only if a Reserve retirement may be possible.</li> </ul>
<p><b>Dual Coverture</b></p> <p>“The former spouse is awarded a percentage of the member’s disposable military retired pay, to be computed by multiplying <b>50%</b> times two coverture fractions. The first numerator of which is <b>160 months</b>, the first denominator is the member’s total number of duty months for retirement. The second numerator is <b>\$5372.70</b>, and the second denominator is the member’s base pay upon retirement. Base pay for this formula will be looked up on the <b>2003</b> year pay chart. If a Reserve retirement is obtained, months are retirement points divided by 30.”</p> <ul style="list-style-type: none"> <li>• 50% is normal; use whatever court orders.</li> <li>• First numerator is months of married military.</li> </ul>

- Second numerator is base pay of member upon divorce.
- Year must match whatever chart was used to calculate the numerator.
- Include the last sentence only if a Reserve retirement may be possible.

### **Hypothetical Method**

“The former spouse is awarded **50%** of the disposable military retired pay the member would have received had the member retired with a retired pay base of **\$5372.70** and with **15.25 years** of creditable service on **4 June 2010**.”

- 50% is normal; use whatever court orders.
- Base Pay must be hand-calculated by member, attorney, or court from pay charts at time of divorce, adjusted for High-3, 1%, REDUX.
- Time is years of creditable service at time of divorce; for a Reservist, years = points/360, or months = points/30.
- Date is date of separation or divorce (when ex-spouse stopped contributing to the military retirement effort).
- The DFAS guide gives 6 different texts<sup>16</sup> depending on specific situations, which tends to confuse courts and attorneys. Text here is the most general purpose.

### **Single Time Coverture**

“The former spouse is awarded a percentage of the member’s disposable military retired pay, to be computed by multiplying **50%** times a coverture fraction, the numerator of which is **160 months**, and the denominator is the member’s total number of duty months for retirement. If a Reserve retirement is obtained, months are retirement points divided by 30.”

- 50% is normal; use whatever court orders.
- Numerator is months of married military.
- Include the last sentence only if a Reserve retirement may be possible.

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16. DFAS, *supra*, 2014 *Guidance on Dividing Military Retired Pay*, at 16-17, 22-23; 2012 ed. at 11-13, 17-18; 2010 ed. at 11-12, 16-17.

### ***C. Calculating Numerators***

The Area Method can handle any life situation, unlike the other methods. The denominator of the Area Method coverage fraction will always be member’s total number of months creditable service for retirement times base pay upon retirement (looked up on the same year pay chart used for the numerator).

$$C = \frac{\text{numerator from table}}{D_R P_R}, \text{ where}$$

C = coverage fraction

D<sub>R</sub> = duty months at time of retirement

P<sub>R</sub> = monthly base pay at time of retirement

The table below identifies how to calculate the numerator based on different life situations. The tabulated text describes the white “marriage portion” of the diagram. Multiple spouses can also be handled with AM; if you’d like help calculating the correct area for these cases, please contact me.

<b>Sequence of Life</b>	<b>Area Method Numerator</b>
married – military – retired – divorced	No fraction required; coverage = 1.00
married – military – divorced – retired	Retirement base pay at divorce times retirement service credit at divorce.
military – married – retired – divorced	Retirement base pay times retirement service credit, minus base pay at marriage times retirement service credit at marriage.
military – married – divorced – retired (this is the imaginary case above)	Retirement base pay at divorce times service credit at divorce, minus base pay at marriage times retirement service credit at marriage.



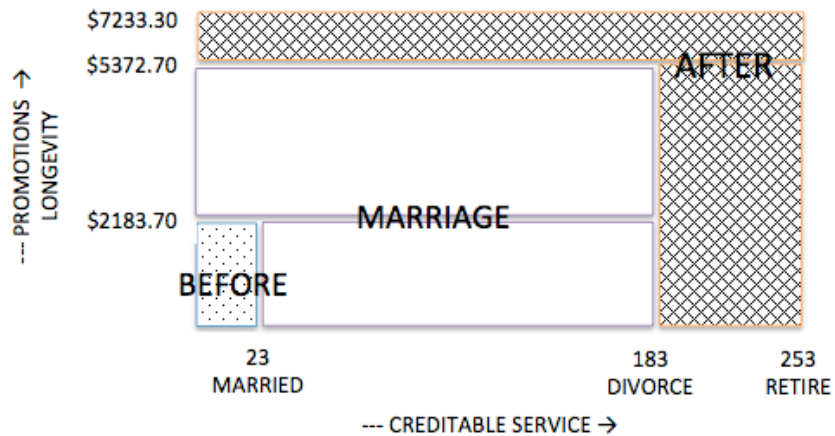
**D. Translation from DFAS Examples**

The purpose of any “method” or “formula” is to calculate a single spousal percentage number. The Area method calculates the same percentage number as DFAS methods and examples, as shown in the table below. The table identifies which type of Area Method lifestyle or mathematical numerator matches each of the examples published in the DFAS Guide.

<b>DFAS Published Example</b>	<b>Area Method giving the same result</b>
Fixed Dollar	N/A – percentage calculation not required (just state dollar amount).
Fixed Percentage	N/A – percentage calculation not required (just state percentage).
Formula Example 2	married – military – divorce - retired
Formula Example 3	married – military – divorce - retired
Hypothetical Example 4 & 7	married – military – divorce - retired
Hypothetical Example 5 & 8	married – military – divorce - retired
Hypothetical Example 6 & 9	married – military – divorce - retired
<i>Hypothetical unable (no examples)</i>	military – married – retired – divorced
<i>Hypothetical unable (no examples)</i>	military – married – divorced – retired

## VI. Poignant Visual Clarity

In addition to making calculations easy for all life situations, the area diagram also provides a poignant visual aid to clarify three issues that have been argued in courts since the creation of USFSPA. These issues constitute a majority of litigation about military retirement, and now there is no reason to continue the wasted court time and expense.



First, the area diagram shows why the single-coverage time fraction used in many civilian retirement situations is inappropriate for military retirements. If a time-based single coverage fraction were used, the cross-hatched area to the *right* of the diagram would be the only part set aside from division. All the cross-hatched part *above* the white portion and all the dotted part below the white portion, would be divided even though the ex-spouse contributed nothing toward these portions.

Because a single time coverage fraction has an increasing denominator when a military member works more after divorce, some claim a decrease in ex-spouse's portion is balanced by letting the ex-spouse take a portion of post-divorce promotion enhancements. However, that claim is made only by someone who does not understand military retirements or chooses to not pursue equity when it is now mathematically trivial to do so with the Dual Coverage Value Area Method. With a single time coverage, the increasing denominator ensures the *marital portion* of

the retirement does *not* change up or down (except COLA increases) based on post-divorce work by the military member; this is a mathematical fact that is now self-evident. This is consistent with the well-endowed Congressional study conclusion that it is incorrect and disingenuous to allow an ex-spouse to invade post-divorce promotion enhancements in order to balance or inure benefit.

Visually, the area diagram again helps clarify this beyond debate: the white portion does not become larger or smaller no matter how big the cross-hashed portion grows based on additional post-divorce effort of the military member, while *simultaneously* both parties benefit from time-value of money while waiting for retirement payments to start. In fact, this is the litmus test that should be applied to all methods: additional work effort by the military member after the divorce must 1) not change the marital asset white portion, and 2) must not divide any portion other than the marital asset white portion. Area Method meets this litmus test while all other methods fail in some life situations. One example of failure is the single time coverture paragraph above.

Secondly, the area diagram removes a vague and legally undefined concept from the divorce lexicon. Litigation often comes about when one party implicitly or explicitly claims post-marital gains are “based on” or could not happen “but for” actions during the marital years. This unnecessary confusion<sup>17</sup> creates a legal quagmire as trial judges and appellate courts try to understand an obscure bureaucratic process called military retirement.

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17. Instead of “based on”, other more meaning phrases such as “calculated from” or “accrued during” could be used.

As an example, consider how the dissenting opinion in one VT Supreme Court case<sup>18</sup> stated, “some power to produce added value was acquired during the marriage [therefore post-divorce benefit acquisition should be divided],” while the majority opinion wrote, “it may be plausible to infer [stipulated] intent [to divide post-divorce accruals]” and then chose to not divide the post-divorce accruals. Even after the time and expense of a trial court, appellate court and supreme court, the opinions are self-mitigated, measured, convoluted, and conflicting – the epitome of jurisprudence without firm ground.

I would candidly point out that “some power to produce” is also acquired during childhood upbringing, adolescent norming, college education, and military training and is impotent to incite division. For example, if the military provided flight training during married years, post-divorce civilian commercial airline retirement is not divisible just because flight skills learned in the military gave “power to acquire” a civilian job after the divorce. Most pertinently, power to acquire does not meet the legal threshold of actually acquiring. Which does the division order say? Acquiring military promotions are notoriously difficult and merit based—let alone the fact they fully manifest in retirement pay only after 3 years of *additional* promoted service (none of which an ex-spouse contributes toward).

Such is the wrangling in court without DCV-AM. With AM, clarity and symmetric equity reign. With its visual simplicity, AM nullifies the specious *post hoc ergo propter hoc* argument analogous to “anything earned at older age should be divided” because older age is “based on” younger age or could not happen “but for” younger age or is “empowered” by younger age.

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18. 2014 VT 63. Spencer v. Spencer (2012-465). <http://law.justia.com/cases/vermont/supreme-court/2014/2012-465.html>.

Even more, Area Method research reveals for the first time the symmetry and reversibility of the faulty argument to damage or manipulate windfall to either party. Specifically, the symmetry of the diagram belies the same argument never being used with spouses reversed. Notice the after-marriage hashed part above the white marriage portion must be calculated using details of the white portion. *In that sense*, it is “based on” the marriage portion and those words have been used to defraud military members by dividing the cross-hatched portion overlying the white portion. *However*, now look at the way the white marriage portion overlies and is calculated from the dotted portion. Therefore (following the faulty logic of “based on”), the ex-spouse should not share in the white portion overlaying the dotted section. Good for the goose is good for the gander. This application of the argument has ever been made in court, exposing the anti-military bias of the “based on” line of argument, and the necessity to use a symmetrically equitable method like AM.

Lastly, the area diagram removes habits of inequity. Consulting for cases across the nation, the author has heard *a priori* claims that, “Single coverture time fraction is how we do it in our state” without regard to life events of the case at hand. This does not demonstrate awareness of the impact, appropriateness, or resultant inequity. In progressive jurisdictions, legislatures are clarifying this issue in statute, however actually implementing the intent of equitable statute has been impeded without the Area Method. That barrier is now gone. The legal dogma of “only time-based single covertures” is now relegated to an example of inappropriate commitment to “we’ve always done it this way” or ideological “cart before the horse.” Life situation must guide the division method, not the other way around. If only AM can do a division equitably, then AM must be used. My hope is that attorneys and courts are willing to adopt the Area Method on a regular basis because it is so flexible, simple, and lucid.

## VII. Model-Based Jurisprudence

USFSPA falls short of its potential because it defines what can be legally ordered without explanation of how to implement an order to do so. Division has continued to be a contentious high-dollar activity because mathematical tools and methods have been insufficient to deal with common-sense intents of courts applied to real lives. USFSPA standardization can be complete when DCV-AM standardization replaces other percentage-based methods.

Presently, our legal system is being asked to drive square pegs into round holes. An example of this is when someone says, “Division of promotion enhancements gives a windfall to the ex-spouse, but that balances against the military member increasing the denominator of a coverture fraction by working more.” An arbitrary game of “tit for tat” ensues, instead of deterministic equity. The Area Method can now quantitatively demonstrate this example bad argument as a careless inequity, while simultaneously providing an alternative. Tit for tat can be emotionally satisfying and expedient but it is a logical and legal failure. The quagmire has been tolerated because proper tools have not been available. Now, with the Dual Coverture Value Area Method, we can have emotional closure and expediency, along with logical and legal coherence.

With insufficient tools, the legal system must arbitrate, litigate, thrash, and adjudicate each case. It is a dice roll to predict which party comes out ahead based on regional precedence, skill sets of attorneys, and moods of judges. Now, with a capable tool, logic and legal solutions can be embedded in a jurisprudence model or framework that can be applied over and over to multiple cases. Modeling is well-developed in technical fields such as System Engineering<sup>19</sup>, but

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19. Barclay Brown, *Model-based Systems Engineering: Revolution or Evolution?*, IBM Rational thought leadership white paper. Dec. 2011.

is a nascent concept in legal fields<sup>20</sup>. That said, divorce practitioners have adopted the modeling paradigm in at least one area. Nearly every practitioner has used child-support calculators and most courts simply order the standard child-support amounts cranked out by these models. The Dual Coverture Value Area Method is now available to similarly accomplish division of military retirement assets.

The Area Method reflects a military retirement division framework cast into a simple spreadsheet model.<sup>21,22</sup> Anybody capable of using a spreadsheet can tap into the logical, statutory, and legal precedence embedded in the spreadsheet. Simply provide factual input numbers and the DFAS division percentage is calculated automatically.

### **VIII. Conclusion**

The Area Method will benefit all parties to a divorce because it is so transparent and equitable. It can save significant costs for both parties and DFAS will benefit because division orders will be clear the first time and easy to calculate. Not only does AM offer pragmatic equity for all life situations, it clarifies ideological arguments that have plagued uniform implementation USFSPA.

If you agree that the Area Method is a fantastic modernization of how military retirements are divided for divorce, please consider using it at mediation or your next court filing. This method has been submitted to DFAS to publish instead of the Hypothetical Method. Please let me know if you are willing to endorse the method for publication in the next version of DFAS' guidance to attorneys.

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20. Andre Valente and Joost Breuker, *Law Functions: Modeling Principles in Legal Reasoning*, in Proceedings of Jurix 1991. <http://jurix.nl> (last visited Jan. 6, 2016).

21. Brown *supra*, see Section “The Essence of a Model,” at 3.

22. Mork, *supra*, “area-method.xls”