American Bar Association
Section of Family Law – Military Committee

FACT SHEET – V.A. PAYMENTS AND FAMILY SUPPORT

Q. Are VA benefits subject to levy, seizure or attachment?
A. In general, the answer is no. Under 38 U.S.C. §5301(a)(1), benefits paid by the Department of Veterans Affairs (VA) are not subject to levy, seizure or attachment. "However," adds Steve Shewmaker, a Georgia lawyer who is also an Army Reserve JAG lieutenant colonel, "the general rule is that they are available for consideration by the court in deciding matters of family support. *Levy, seizure or attachment* refers to collection of debts; the courts interpreting this have consistently stated that this does not mean the duty of support for a family."

Q. Do the cases on "family support" include alimony as an exception to 38 U.S.C. §5301(a)(1)?
A. Yes – alimony (also known as spousal support or maintenance) is one of the exceptions. A useful example would be a 1994 Iowa case involving an appeal from an alimony decision. The husband's main source of income was a VA disability check of $1,548 per month. It was based on a disability rating of 100%. In that case, *In re Marriage of Anderson*, 522 N.W.2d 99, 101-102 (Iowa App. 1994), the state Court of Appeals recognized this "family support exception" to 38 U.S.C. §5301(a)(1):

> The issue raised by the appellant has been answered by the United States Supreme Court in the case of *Rose v. Rose*, 481 U.S. 619, 107 S. Ct. 2029, 95 L. Ed. 2d 599 (1987). The *Rose* case involved nonpayment of child support as opposed to nonpayment of alimony. However, both are viewed as familial support by the United States Supreme Court in *Rose.* 481 U.S. at 631-32, 107 S. Ct. at 2037, 95 L. Ed. 2d at 611. The *Rose* case involved a disabled veteran whose sole means of support was his V.A. checks. The state court held him in contempt for failure to pay child support. The U.S. Supreme Court held a state court has jurisdiction to hold a disabled veteran in contempt for failing to pay child support, even if the veteran's only means of satisfying his obligation is to use veteran's benefits received as compensation for a service connected disability. 481 U.S. at 619, 107 S. Ct. at 2030, 95 L. Ed. 2d at 604. The Court held:
>
> > Neither the Veteran's Benefits provisions of Title 38 nor the garnishment provisions of the Child Support Enforcement Act of Title 42 indicate unequivocally that a veteran's disability benefits are provided solely for that veteran's support. We hold, therefore, that as enacted these federal statues were not in conflict with and thus did not preempt § 36-820 (the Tennessee child support statute). Nor did the Circuit Court's efforts to enforce its order of child support by holding appellant in contempt transgress the congressional intent behind the federal statutes.
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> 481 U.S. at 636, 107 S. Ct. at 2039, 95 L. Ed. 2d at 614.

Q. Are there cases in other states which also say this?
A. Yes. In a 1984 Louisiana Court of Appeals case, the trial court found that the husband, Mr. Collins, had virtually no source of income other than his VA benefits. The husband argued that VA

benefits are exempt from awards of temporary alimony ("alimony pendent lite") under the anti-attachment wording in Title 38. The Court of Appeals stated:

> Mr. Collins was obliged to, and did support Mrs. Collins out of his Veterans' benefits during the time they lived together. His obligation to support her out of whatever income and assets are available to him continues until their marriage is dissolved by divorce.
>
> An award of alimony pendente lite is not an "attachment, levy, or seizure" as contemplated in 38 U.S.C.A. § 3101(a) [the previous number for this section of Title 38].…
>
> The provisions of 38 U.S.C.A. § 3101(a) do not apply to awards of alimony pendente lite. The duty to pay alimony pendente lite does not arise as the result of the judicial process. An award of alimony pendente lite is the legal enforcement of a marital duty rather than a process for the collection of a debt. If no other income is available for the purpose, Mr. Collins must use his Veterans' benefits for the support of Mrs. Collins when she "has not a sufficient income for maintenance pending suit". La.C.C. Art. 148. The trial judge erred in discontinuing the previous award of alimony pendente lite.

Collins v. Collins, 458 So.2d 1008 (La. App. 1984)

In a 1990 Maryland case, the Court of Special Appeals said:

> Neither [the *McCarty* nor the *Mansell* case] purported even to suggest that… disability benefits actually received by a veteran cannot be counted as income to the veteran for purposes of determining his or her ability to pay alimony.
>
> The law generally is that such benefits *may* be considered as a resource for purposes of setting the amount of alimony and that doing so does not constitute an affront to the Federal anti-attachment and anti-alienation provisions, such as 38 U.S.C. § 3101 and 42 U.S.C. § 662(f)(2) protecting those benefits from the claims of creditors…. We find those cases persuasive and therefore hold that the VA disability benefits received by Dr. Riley may be considered as a resource for purposes of determining his ability to pay alimony. Accordingly, we reject his legal challenge to the order denying his motion to terminate or reduce alimony.

Riley v. Riley, 82 Md. App. 400, 409-10, 571 A.2d 1261 (1990).

The Vermont Supreme Court stated in a 1987 case:

> 38 U.S.C. § 3101(a) protects recipients of disability benefits from the claims of creditors and provides security to the recipient's family and dependents…. Section 3101(a) does not apply in the present case, however, since a wife seeking spousal maintenance is not a "creditor" under the statute. *Id.* Veterans' disability benefits may be considered for alimony or spousal maintenance payments…. Further, the instant proceeding is not litigation in which the wife seeks to attach, levy or seize plaintiff's veteran benefits…. While 38 U.S.C. § 3101(a) would preclude an assignment or apportionment of plaintiff's veteran disability benefits, it does not preclude consideration of disability benefits by a trial court as a source of income upon which an award of alimony may be based.

Repash v. Repash, 148 Vt. 70, 528 A.2d 744 (1987)

Q. Are there any other cases which support this?
A. Yes. Many other cases confirm this rule of law in the context of spousal support. Some of these are:

- Alabama - *Mims v. Mims*, 442 So.2d 102 (Ala. Civ. App. 1983)
- Arkansas - *Womack v. Womack*, 307 Ark. 269, 818 S.W.2d 958 (1991); *Murphy v. Murphy*, 302 Ark. 157, 787 S.W.2d 684 (1990)
- Colorado - *In re Marriage of Nevil*, 809 P.2d 1122 (Colo. App. 1991)
- Mississippi - *Hollis v. Bryan*, 166 Miss. 874, 143 So. 687 (1932)
- Montana - *In re Marriage of Strong*, 300 Mont. 331, 8 P.3d 763 (Mont. 2000)
- Nebraska - *Ray v. Ray*, 222 Neb. 324, 383 N.W.2d 752 (1986); *Pyke v. Pyke*, 212 Neb. 114, 321 N.W.2d 906 (1982)
- Oregon - *Matter of Marriage of Tribbles*, 63 Or. App. 774, 665 P.2d 1267 (1983); *Gerold v. Gerold*, 6 Or. App. 353, 488 P.2d 294 (1971)
- Pennsylvania - *Parker v. Parker*, 335 Pa. Super 348, 484 A.2d 168
- Virginia - *Lambert v. Lambert*, 10 Va. App. 623, 627, 395 S.E.2d 207 (1990)
- Wisconsin; *In re Marriage of Kraft*, 119 Wn.2d 438, 832 P.2d 871 (1992) *Weberg v. Weberg*, 158 Wis. 2d 540, 463 N.W.2d 382 (Wis. App. 1990); *In re Gardner*, 220 Wis. 493, 264 N.W. 643 (1936)

Q. Does that mean that veterans' benefits can also be divided at divorce in "property division"?
A. No. The law is clear on that, and Congress has spoken. The Uniformed Services Former Spouses' Protection Act clearly says that VA disability compensation payments under Title 38 of the U.S. Code are not subject to property division upon divorce. The same is true to a large extent with military disability retirement payments under Title 10, Chapter 61 of the U.S. Code.

Q. Has the U.S. Supreme Court also spoken?
A. Yes. The case is *Mansell v. Mansell*, 490 U.S. 581 (1989). The *Mansell* case involved a California court decree which divided a military retiree's disability benefits as part of the property settlement, not as alimony or spousal support. In the *Mansell* decision, the Court held that federal law does not permit state courts to divide or partition disability benefits as community or marital property upon divorce. It also prohibits the treatment of a waiver of military retired pay (to obtain VA payments) as marital or community property.

Q. How are the courts handling support cases with VA disability elections before and after the divorce?
A. Alexander R. Rhoads, an Iowa family law practitioner, states the rules this way:

> Congress has never passed a law stating that veterans' benefits may not be considered with respect to spousal support. Nor has the U.S. Supreme Court ever held that VA benefits cannot be considered in this manner.
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> - Where the disability benefits are elected before the divorce, disability benefits are income for purposes of support. See *Womack v. Womack*, 307 Ark. 269, 818 S.W.2d 958 (1991); *In re Marriage of Bahr*, 29 Kan. App. 2d 846, 32 P.3d 1212 (2001); *Riley v. Riley*, 82 Md. App. 400, 571 A.2d 1261 (1990); *Weberg v. Weberg*, 158 Wis. 2d 540, 463 N.W.2d 382 (Ct. App. 1990).

- Where disability has not been elected at divorce, but an election is pending or otherwise seems likely, the court may make a nominal award or otherwise reserve jurisdiction to make an award of support after the election is final. See *Collins v. Collins*, 144 Md. App. 395, 798 A.2d 1155 (2002) and *Longo v. Longo*, 266 Neb. 171, 663 N.W.2d 604 (2003) ($1 per year permanent alimony award).

- Where disability is elected after the divorce, the election of disability is a sufficient change of circumstance to permit an increase in alimony. See *Ashley v. Ashley*, 337 Ark. 362, 990 S.W.2d 507 (1999); *Kramer v. Kramer*, 252 Neb. 526, 567 N.W.2d 100 (1997); *In re Marriage of Murphy*, 151 Or. App. 649,950 P.2d 377 (1997); *In re Marriage of Jennings*, 138 Wash. 2d 612, 980 P.2d 1248 (1999).

- Where the trial court originally awarded nonmodifiable alimony, and the husband thereafter elected disability benefits, an Ohio court held that it was error not to reopen the judgment to make the alimony modifiable on the ground that the original judgment was no longer equitable. *Schaefferkoetter v. Schaefferkoetter*, 2003 WL 22359725 (Ohio Ct. App. 2003).

Q. So far the cases have only dealt with alimony. What about child support?

A. Child support may also be awarded based on disability payments to either parent being considered as income. Laura Wish Morgan notes the following cases to support this rule in her treatise, *Child Support Guidelines: Interpretation and Application* -

> *Loving v. Sterling*, 680 A.2d 1030 (D.C. 1996) (federal law does not prohibit treating child support obligor's veterans administration disability benefits as income under support guidelines); *In re Paternity of C.L.H.*, 689 N.E.2d 456 (Ind. Ct. App. 1997) (full amount of veteran's disability benefit was income under guidelines); *In re Marriage of Lee*, 486 N.W.2d 302 (Iowa 1991) (veterans' disability benefits, Social Security benefits, retirement benefits, and workers' compensation benefits are includable in income); *In re Marriage of Benson*, 495 N.W.2d 777 (Iowa Ct. App. 1992) (veterans' disability, Social Security disability, workers' compensation, retirement income, are all to be considered income for support); *Riley v. Riley*, 82 Md. App. 400, 571 A.2d 1261 (1990) (military disability is income); *In re Marriage of Strong*, 8 P.3d 763 (Mont. 2000); *Fox v. Fox*, 592 N.W.2d 541 (N.D. 1999); *Dye v. White*, 976 P.2d 1086 (Okla. Ct. App. 1999); *Wingard v. Wingard*, 11 D. & C. 4th 343 (Pa. Ct. Com. Pl.), *aff'd*, (1987); *Weberg v. Weberg*, 158 Wis. 2d 540, 463 N.W.2d 382 (Ct. App. 1990) (military disability pension is income).

Laura Wish Morgan, *Child Support Guidelines: Interpretation and Application* (1996, Supp. 2009)

Q. How do the courts explain the rule which allows VA benefits to be used in setting family support?

A. The Montana Supreme Court explained the law as follows in *In re Marriage of Strong*, 300 Mont. 33, 342, 8 P.3d 763, 769-770 (Mont. 2000):

> Should the court's new property distribution appear inadequate to provide for Brandy's "reasonable needs" post-dissolution, then the District Court may consider awarding Brandy spousal maintenance under § 40-4-203, MCA, in lieu of or in addition to what marital property the court may legally apportion to her. Even though Justin's VA disability benefits are his sole current source of income and, thus, would necessarily be used to satisfy his maintenance obligations, such action is permitted under the logic of the

U.S. Supreme Court's decision in *Rose v. Rose* (1987), 481 U.S. 619, 107 S.Ct. 2029, 95 L.Ed.2d 599.

In *Rose*, the Tennessee trial court held the veteran spouse in contempt for failing to pay ordered child support. The veteran challenged that action on appeal, arguing that it was impermissible since his income was composed almost entirely of disability benefits received from the VA. *See Rose*, 481 U.S. at 622, 107 S.Ct. at 2032, 95 L.Ed.2d at 605 (noting that the veteran also received nominal monthly disability income from the Social Security Administration). After reviewing the legislative history applicable to what is now 38 U.S.C. § 5301(a) (formerly 38 U.S.C. § 3101(a)), the Court held that VA disability benefits were never intended to be exclusively for the subsistence of the beneficiary. Rather, Congress intended such benefits

> to support not only the veteran, but the veteran's family as well. Recognizing an exception to the application of [§ 5301(a)'s] prohibition against attachment, levy, or seizure in this context would further, not undermine, the federal purpose in providing these benefits.

Rose, 481 U.S. at 634, 107 S.Ct. at 2038, 95 L.Ed.2d at 613. The Court thus held that the "[n]either the Veterans' Benefits provisions of Title 38 nor the garnishment provisions of the Child Enforcement Act of Title 42" preempt the authority of state courts to enforce a child support order against a veteran, even where the veteran's income is composed of VA disability benefits that would necessarily be used to pay child support. *See Rose*, 481 U.S. at 636, 107 S.Ct. at 2039, 95 L.Ed.2d at 614.

Under the logic of *Rose*, since "Congress clearly intended veterans' disability benefits to be used, in part, for the support of veterans' dependents," *Rose*, 481 U.S. at 631, 107 S.Ct. at 2036, 95 L.Ed.2d at 610-11, "a state court is clearly free to consider post-[dissolution] disability income and order a disabled veteran to pay spousal support even where disability benefits will be used to make such payments." *Clauson*, 831 P.2d at 1263 n.9. In addition to Alaska, several other jurisdictions have concluded that federal law does not prohibit considering veterans' disability pay as a source of income in awarding spousal maintenance. *See In re Marriage of Kraft* (Wash. 1992), 832 P.2d 871; *Womack v. Womack* (Ark. 1991), 818 S.W.2d 958; *In re Marriage of Nevil* (Colo. Ct. App. 1991), 809 P.2d 1122; *Riley v. Riley* (Md. Ct. Spec. App. 1990), 571 A.2d 1261; *Lambert v. Lambert* (Va. Ct. App. 1990), 395 S.E.2d 207; *Weberg v. Weberg* (Wis. Ct. App. 1990), 463 N.W.2d 382….

Q. What about apportionment? Isn't that the method that must be used to decide the amount of family support which a veteran must pay and the means to transfer that to the child or children?
A. No. This issue was covered in the *Rose* decision. The Supreme Court found no evidence that Congress intended this to be the exclusive means of setting family support or enforcing it, and stated that the VA regulations bear this out:

> Nowhere do the regulations specify that only the Administrator may define the child support obligation of a disabled veteran in the first instance. To the contrary, appellant, joined by the United States as *amicus curiae*, concedes that a state court may *consider* disability benefits as part of the veteran's income in setting the amount of child support to be paid.

The Court stated that:

> The statute simply provides that disability benefits "may . . . be apportioned as may be prescribed by the Administrator." 38 U. S. C. § 3107(a)(2). The regulations broadly authorize apportionment if "the veteran is not reasonably discharging his or her responsibility for the . . . children's support." 38 CFR § 3.450(a)(1)(ii) (1986).

The Supreme Court went on to say:

> In none of these provisions is there an express indication that the Administrator possesses exclusive authority to order payment of disability benefits as child support. Nor is it clear that Congress envisioned the Administrator making independent child support determinations in conflict with existing state-court orders. The statute gives no hint that exercise of the Administrator's discretion may have this effect.

Q. Can a court garnish the benefits of a veteran for child support or alimony?

A. Generally speaking, the answer is no. However, Congress enacted an exception in the case of a military retiree who has waived pension payments (in whole or part) to receive VA benefits. It is found at 42 U.S. Code § 662(f)(2). In *U.S. v. Murray*, the Georgia Court of Appeals reviewed a case brought by the ex-wife of a veteran who sought to garnish the veteran's VA disability compensation for alimony. The Court held that VA disability payments are subject to garnishment for alimony to the extent that they replace "waived retired pay." *U.S. v. Murray*, 158 Ga. App. 781, 282 S.E.2d 372 (1981).

Q. Does the tax-free status of VA disability compensation mean that it cannot be considered in determining support?

A. "No," says Jim Higdon, a retired Navy Reserve captain who practices in Texas. "There is no exemption for payments which are tax-free. They are counted as all other sources of money (except for means-tested benefits) in computing the income of the individual who is to pay support, even though they are not subject to income tax. Other military payments which are tax-free but are generally counted in determining support are the basic allowance for housing (BAH) and the basic allowance for subsistence (BAS). Pay and allowances in general are exempt from taxation when the servicemember is in a combat zone, yet they are also subject to consideration in calculating alimony and child support. Since such payments are tax-free, the entire amount should be considered."

Q. Are VA benefits exempted from consideration as "income" in setting child support because they are "means-tested payments"?

A. "Since they are not *means-tested payments* in the first place," responds John Camp of Warner Robins, Georgia, a family lawyer and a retired Air Force Staff Judge Advocate, "the answer is no." Camp continues, "*Means-tested* refers to payments which depend on a person's having little or no money. The individual is "tested" as to his means of support; if it falls below a certain level, then benefits are paid. While that is true for VA pensions, it does not apply to VA disability compensation. For the latter, the wealth or poverty of the recipient doesn't matter, nor does one's previous rank. If John Smith has a service-connected disability and applies for VA disability compensation, the payments will be made by the Department of Veterans Affairs without regard to whether he is rich and was formerly an admiral, or whether he is poor and used to be a corporal. The monthly amount doesn't vary due to these factors."

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Note: Portions of this Fact Sheet are adapted from Mark E. Sullivan, *The Military Divorce Handbook* (Am. Bar Assn., 2nd Ed. 2011).