Greetings from the Chair

Dear Colleagues,

Welcome to this Spring 2013 issue of ROLL CALL, an award winning publication assembled by our dedicated Editors, Kristen Coyne and Theresa Buchanan. This special edition of ROLL CALL is devoted exclusively to a conversation on issues between military retirement pay and VA Disability benefits. This is an important and controversial topic across the country. My jurisdiction (Oklahoma) has for several years been at the center of this battle at the state legislative level. This has also been true in Editor Kristen Coyne’s state of Arizona. In order for all of us to stay informed and up to date on this topic, we need your assistance and support.

Next, mark your calendars! Time is of the essence. We hope you will attend the Spring CLE Conference in Anchorage, Alaska during the week of April 17-19, 2013. In order to register, go to: http://www.americanbar.org/calendar/2013/04/section_of_familylaw2013springcleconference/registration.html

MilComm will be responsible for a significant military-family law program beginning 1:00 pm on April 17, 2013 (the day before the ABA/FLS Spring Conference begins), which you are welcome to attend. Further, at the Conference we will be producing an important CLE program titled: “Domestic Violence: The Camouflage Connection.” This program is sure to provide essential information for you to fully understand the complexities of domestic abuse allegations on a servicemember’s employment and career.

As always, we want to produce CLE programs of interest to you and your practice. If you have any ideas or suggestions for future CLE seminars, please contact me. Likewise, if you have any suggestions, ideas or concerns regarding how the Military Committee may better meet your needs, then please e-mail me. We encourage, welcome and more importantly want your participation. Thanks in advance.

Lastly, for a useful resource tip regarding that next military-family law case on your desk, please bookmark the Committee’s home page by going to www.abanet.org/family/military. I think you will find it a beneficial icon to have on your desktop.

In closing, if you would like to submit an article to ROLL CALL, then please contact me, Kristen Coyne and/or Theresa Buchanan. We want your input! Thanks and enjoy this issue.

Phillip J. Tucker, Chair
phil@tuckerlawfirm.com

Introduction from the Editor

In this first edition of 2013, the issue will review the highly controversial and emotionally charged area of the interaction between military retirement benefits, and military disability benefits.
If this is a new area to you, I would strongly recommend that you go to the Military Committee Page, www.abanet.org/family/military, and read the SILENT PARTNER Military Pension Division Series. There are six SILENT PARTNERs in this series.

• **Military Pension Division: Scouting the Terrain** is a general introduction to the topic. It discusses the passage of USFSPA (the Uniformed Services Former Spouses’ Protection Act), what the Act does (and doesn’t do), and how the question of “federal jurisdiction” is critical in knowing whether a pension can be divided by a court or not. It also covers deferred division of pensions and present-value offsets, direct payment from DFAS (Defense Finance and Accounting Service), early-out options and severance pay, dividing accrued leave, and military medical benefits.

• **Military Pension Division: The Servicemember's Strategy** contains information on how to assist the servicemember (hereafter "SM") in this area, and

• **Military Pension Division: The Spouse’s Strategy** covers how to help the SM’s spouse.

• The wording and administrative requirements for garnishment of retired pay from DFAS, including a sample military pension division order/agreement, are in Getting Military Pension Division Orders Honored by DFAS. It also contains a checklist used by DFAS to determine whether a court decree for pension division will be accepted for direct payment to the spouse/former spouse.

• Retrieving an apparently “lost” pension benefit for the spouse/former spouse is covered in “Lost” Military Pensions: The Ten Commandments.

• The sixth info-letter deals with the complicated world of Concurrent Retirement and Disability Pay (CRDP), service-connected disability, and Combat-Related Special Compensation. Its title is Military Pension Division: The “Evil Twins” – CRDP and CRSC.

    It is our goal to make this publication a collaborative effort of all members of the section. To that end, we invite and encourage input—articles, case notes, web sites, personal experiences, and suggestions are all welcome.

    I must emphasize, however, that as a collaborative effort we do not edit, check or rewrite input of our authors. Their work is simply that, their work. Neither the committee, nor the ABA vouches for its accuracy, application, nor endorse their viewpoint. We are simply trying to inspire conversation and contemplation.

    I look forward to hearing from you all in the near future.

**Kristen MH Coyne**
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1 SILENT PARTNER is prepared by COL Mark E. Sullivan (USAR, Ret.). For revisions, comments or corrections, contact him at 919-832-8507; or Mark.Sullivan@ncfamilylaw.com.
Imagine this all-too-common scenario: Colonel and Mrs. Smith are divorcing after 25 years of marriage. Colonel is in the process of retiring after 25 years of active duty in the Air Force concurrent with the marriage. As part of the retirement process, Colonel was counseled to apply for VA Disability benefits, which he does, retiring January 1, 2012. The court issues the final Judgment and Decree of Divorce on February 1, 2012, granting Wife the following:

“Wife shall be entitled to receive a percentage of the Member’s disposable monthly retirement pay. Wife’s share of the Member’s retired pay shall be determined under the following formula: The total years and months of the Member’s participation that occurred during the parties’ marriage (the parties were married on April 1, 1987, and the Member’s date of separation occurred January 1, 2012), shall be divided by the total years and months by the Member’s participation in said Plan. The percentage arrived at by the above fraction shall be divided by 2 and this percentage shall determine the amount of the Member’s gross military retirement pay which the Wife shall receive. Wife shall not be entitled to any VA Disability benefits.”

A Military Qualifying Court Order issues, and Wife begins to receive her portion of Colonel’s military retired pay (50%) directly on April 1, 2012. In September, 2012, the Veteran’s Administration sends Colonel an award letter, informing him that he is 30% disabled due to service-related injuries, and that he will begin receiving VA disability benefits in the amount of $395 per month. In order to receive these benefits, the law required Colonel to waive an equal amount of his retirement benefits, which he does. Now, from the Air Force, the gross monthly retirement pay is reduced $395 because the remainder has been waived for Colonel to receive a like sum of $395 in veterans’ benefits which are not divisible and not subject to attachment. This means that the Air Force now sends Mrs. Smith $198 less in military retirement. Mrs. Smith wants the $198
back. Will she get it? Well, despite a federal law that has preempted state law in this particular area, the answer ultimately depends on the jurisdiction in which the parties divorced.

A split in authority, and a trap for the unwary, has existed for two decades in the area of spousal division of military retirement pay. Despite repeated appeals to Congress and the United States Supreme Court to provide a unifying solution to the problem, the states remain divided, frustrating practitioner’s who thought they had received a final binding judgment of divorce or dissolution.

I. Neither Congress Nor the Supreme Court Has Provided Guidance on this Issue Since the 1980s

A. The Supreme Court Initially Prohibited any Division of Retirement Pay upon Divorce

The issue now confronting, and confounding, the state courts – how to account in a divorce for that portion of a military member’s retirement that is waived to receive disability pay – has its genesis in the 1981 United States Supreme Court case of McCarty v. McCarty.2 In McCarty, a state domestic relations court ordered the military member, over his objections, to pay half of his military retirement pay to his ex-wife as part of the property division in a community property state.3 The Supreme Court reversed.

According to the Court, federal law prohibited a state court from dividing any and all military retirement pay under state community property laws.4 The main factor in reaching this decision was the authority of Congress to enact laws governing military matters. Specifically, Congress had permitted the division of Civil Service retirement benefits and Foreign Service retirement benefits in a divorce, but had “neither authorized nor required the community property division of military retired pay.”5

The court also recognized that, “[h]istorically, military retired pay has been a personal entitlement payable to the retired member himself as long as he lives.”6 Further, Congress enacted a military retirement system both to provide for the retired service member and to meet the personnel management of the armed forces; permitting the division of retirement pay in a divorce could frustrate these objectives.7

As a result, the Court decided that it was up to Congress alone to provide for the division of military retirement pay in a divorce or dissolution, despite the hardship that this might inflict on the former spouse:

“We recognize that the plight of an ex-spouse of a retired service member is often a serious one. . . . Congress may well decide, as it has in the Civil Service and Foreign Service contexts, that more protection should be afforded a former spouse of a retired service member. This decision, however, is for Congress alone. We very recently have re-emphasized that in no area has the Court accorded Congress greater deference than in the conduct and control of

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3 Id. at 210, 101 S.Ct. at 2730.
4 Id. at 232, 101 S.Ct. at 2741.
5 Id. at 231-232, 101 S.Ct. at 2740-41.
6 Id. at 224, 101 S.Ct. at 2737 (emphasis in original).
7 Id. at 233, 101 S.Ct. at 2741.
military affairs. . . . Congress has weighed the matter, and '[i]t is not the province of state courts to strike a balance different from the one Congress has struck.'”

In deciding as it did, this Court specifically called upon Congress to act, and Congress did.

B. Congress Responded to McCarty by Permitting Division of Military Retirement Pay

In response to McCarty, Congress acted the Uniformed Services Former Spouses' Protection Act (“USFSPA”). Relevant to this discussion, Congress specifically permitted the division of military retirement pay in a divorce or dissolution:

“Subject to the limitations of this section, a court may treat disposable retired pay payable to a member for pay periods beginning after June 25, 1981, either as property solely of the member or as property of the member and his spouse in accordance with the law of the jurisdiction of such court.”

The problems that are confronting the state courts today stem from the definition of “disposable retired pay,” which the USFSPA defines as:

“the total monthly retired pay to which a member is entitled less amounts which . . . are deducted from the retired pay of such member as a result of forfeitures of retired pay ordered by a court-marital or as a result of a waiver of retired pay required by law in order to receive compensation under title 5 or title 38[.]”

In sum, in enacting the USFSPA, Congress permitted the division of retirement pay in a divorce or dissolution, but specifically exempted from division that portion of retirement pay waived to receive disability benefits.

C. The Supreme Court Interpreted and Applied the USFSPA in a Narrow (and Easy) Case

Despite the (admittedly unclear) language of the USFSPA, one state domestic relations court blatantly acted contrary to that law when it ordered in a divorce action the division of both the retirement pay and disability benefits of a veteran. In Mansell v. Mansell, the Supreme Court confronted the USFSPA when it addressed whether state courts could treat as property divisible upon divorce military retirement pay waived to receive veterans’ disability benefits. This Court held that the state courts may not do so.

In Mansell, the military member and his spouse divorced in California at a time when he was receiving both military retirement pay and disability pay. The parties entered into a property settlement which provided, in part, that the military member would pay his wife 50% of his total military retirement pay, including that portion of retirement pay waived so that he

8 Id. at 235-36, 101 S.Ct. at 2742-2743. 9 10 U.S.C. § 1408(c).

12 Id. at 585, 109 S.Ct. at 2027.
could receive disability benefits. In 1983, the military member asked the trial court to modify the divorce decree by removing the provision that required him to share his total retirement pay with his former spouse. When the lower court denied this request without opinion, the military member appealed and, eventually, petitioned the Supreme Court for certiorari, which the Court granted.

The factual situation facing the Court in this case was not difficult; indeed, the state court had explicitly divided both military retirement pay and the disability pay that the military member was already receiving. Therefore, noting that the language of the USFSPA was “plain and precise,” the Supreme Court held that “state courts have been granted the authority to treat disposable retired pay as community property; they have not been granted the authority to treat total retired pay [including disability pay] as community property.” The Court prohibited the lower court from making this explicit division.

Rejecting the former spouse’s arguments to the contrary, the Court concluded that the USFSPA’s legislative history, “read as a whole, indicates that Congress intended both to create new benefits for former spouses and to place limits on state courts designed to protect military retirees. Our task is to interpret the statute as best we can, not to second-guess the wisdom of the congressional policy choice.” Expanding on that notion, the Court held that its job was not “to misread the statute in order to reach a sympathetic result when such a reading requires us to do violence to the plain language of the statute and to ignore much of the legislative history.” The Court ended with yet another call to Congress to correct this holding.

Two justices dissented in Mansell. The dissent noted that the “harsh reality” of the majority opinion was “that former spouses . . . can, without their consent, be denied a fair share of their ex-spouse’s military retirement pay simply because [the veteran] elects to increase his after-tax income by converting a portion of that pay into disability benefits.” In discussing the majority opinion, the dissent noted:

“Today, despite overwhelming evidence that Congress intended to overrule McCarty completely, to alter preexisting federal military retirement law so as to eliminate the preemptive effect discovered in McCarty, and to restore to the States authority to issue divorce decrees affecting military retirement pay consistent with state law, the Court assumes that Congress only partially rejected McCarty, and that the States can apply their community property laws to military retirement pay only to the extent that the Former Spouses’ Protection Act affirmatively grants them authority to do so. * * * The McCarty decision, however, did not address retirement pay waived to receive disability benefits; nor did it identify any explicit statutory provision precluding the

13 Id. at 585-586, 109 S.Ct. at 2027.
14 Id. at 586, 109 S.Ct. at 2027.
15 Id. at 590, 592, 109 S.Ct. at 2029, 2030.
16 Id. at 594, 109 S.Ct. at 2031.
17 Id. at 594, 109 S.Ct. at 2032.
18 Id.
19 Id. at 595, 109 S.Ct. at 2032 (O’Connor, J., dissenting).
States from characterizing such waived retirement pay as community property. Thus, I reject the Court’s central premise that the States are precluded by McCarty from characterizing as community property any retirement pay waived to receive disability benefits absent an affirmative grant of authority in the Former Spouses’ Protection Act.”

The dissent stated that “Congress intended, by enacting the Former Spouses’ Protection Act, to eliminate the effect of McCarty’s preemption holding altogether, and to return to the States their authority ‘to treat military pensions in the same manner as they treat other retirement benefits.’”

After Mansell, and as it still stands today, a state domestic relations court may not divide any part of a military member’s disability pay received prior to a divorce. The state courts uniformly apply Mansell in such circumstances. The courts differ, however, in those cases where the military member divorces before receiving disability pay. The courts are struggling to decide how (or if) that portion of the retirement pay waived to receive disability benefits after a divorce can (or should) be divided.

II. A Comparison of State Court Decisions and Their Rationale

A. The Restrictive View – No Award to the Former Spouse

Some state courts have simply applied the holding of Mansell and its interpretation of the USFSPA, ruling that such any attempt to divide or otherwise account for retirement pay waived to receive disability pay is not permissible. Most recently, the Vermont Supreme Court, in Youngbluth v. Youngbluth, held that, when the original property division order states an exact percentage and contains no indemnity clause, a former spouse cannot use an enforcement proceeding to receive an increased percentage to offset the military service member’s subsequent application and receipt of disability benefits.

In Youngbluth, Husband was forced to retire from the military during divorce proceedings with his wife. The final judgment and decree of divorce granted the wife “35% of the marital portion of the retirement plan,” which equated to 19.81% of the Husband’s retirement. Following the filing of the final judgment and decree of divorce, Husband applied for and was granted a 30% disability rating from the Veterans Administration. As a result, wife’s percentage of Husband’s retirement was reduced. Wife filed a motion to modify or amend the original order, and the trial court agreed that she should receive 22.4% of Husband’s disposable retired pay to equalize the roughly $700 per month she would have received under the original order of 19.81%.

Husband appealed and the Vermont Supreme Court reversed, finding that the original decree could not be “modified” under Vermont law because the division of retirement is a property settlement and final. Furthermore, the court found that the plain language of the USFSPA as well as the legislative history prohibited a court


20 Id. at 595-596, 109 S.Ct. at 2032.
21 Id. at 596, 109 S.Ct. at 2032.
22 Chart A at the end of this article provides a list of these cases.
from granting a larger percentage of a service member’s disposable retirement benefits when a portion of disposable retirement is waived to receive disability benefits. Therefore, the court held that “when the original property division order states an exact percentage and contains no indemnity provision — a former spouse cannot use an enforcement proceeding to receive an increased percentage to offset the military service member’s subsequent application and receipt of disability benefits.”

The Vermont Supreme Court suggested that, had an indemnification clause been included in the decree, or had Wife attempted another procedural avenue to an enforcement proceeding, the result may have been different. In restrictive states, such as Vermont, an indemnification clause, as well as a reservation of jurisdiction for the court to effectuate the intent of the parties in dividing the retirement, may provide some support for an award for an aggrieved spouse.

B. The Middle Ground – Permit Award in Other Ways

Other courts preclude a post-judgment division of disability benefits, but in dicta, would allow courts to consider the economic impact on the other spouse and grant another form of relief, such as an increased alimony award. While Clauson prohibited a dollar for dollar compensation of amounts waived to receive disability benefits, the court noted that federal law did not preclude courts from considering the economic impact that

24 See Youngbluth, 2010 VT 40, ¶ 28; Ex Parte Billeck, 777 So.2d 105 (Ala. 2000).

25 See Clauson v. Clauson, 831 P.2d 1257 (Alas. 1992). Chart B at the end of this article provides a list of these cases.

26 10 U.S.C. 1408(c)(1).

27 481 U.S. 619.

28 Id. at 636.

29 Id. at 634.
portions of his military retirement, the court retains jurisdiction to determine whether equity requires a spousal support award.

C. The Permissive View
USFSPA Presents No Obstacle to Former Spouses

Other state courts have simply declared Mansell and the USFSPA inapplicable, and instead rely on a contract theory to retain the authority to enforce marital settlement agreements. These courts hold, generally, that when a property-settlement agreement in a divorce proceeding divides military-retirement benefits, the non-military spouse has a vested interest in his or her portion of those benefits as of the date of the court’s decree and that the vested interest cannot thereafter be unilaterally diminished by an act of the military spouse.

Recently, the Ohio Court of Appeals for the Second District adopted this philosophy in ruling in Bagley v. Bagley. On September 13, 1995, a Decree of Dissolution ended the Bagleys’ 24-year marriage. In the Separation Agreement incorporated into the decree, the parties waived spousal support and divided property. At the time of the Decree of Dissolution, Husband had just retired from the United States Air Force and was receiving military retirement pay, had applied for disability benefits, but was not yet receiving them. The Separation Agreement noted that Wife was entitled to “the marital portion” of Husband’s retirement pay, “one-half (1/2) of the amount available to the Husband under the 20/20/20 Rule of Former Spouse benefits.” The Separation Agreement contained a clause prohibiting Husband from reducing Wife’s share of retirement pay by taking civil service employment, but did not address waiver of disposable pay to receive VA disability.

Husband began receiving VA Disability benefits in January 1996, with a disability rating of 30%. An amended Military Qualifying Court Order was submitted in 2009, which granted Wife an amount equal to the reduction of her portion of the retirement caused by his election to receive partial veteran’s disability benefits and the corresponding waiver of a portion of his retirement.

Husband appealed and the Second District Court of Appeals affirmed, reasoning that the trial court, in approving the Amended MQCO, merely interpreted and effectuated the intent of the separation agreement. There, Husband agreed that it was his intent to provide Wife with an amount that fairly represented her marital share of his retired pay. Further, the court found the indemnification clause relating to a reduction of her portion due to civil service employment evidence of his intent to compensate Wife with a full portion of his retired pay, even those portions waived to receive VA disability benefits. The court also reasoned that the MQCO did not violate the USFSPA, finding that the Amended MQCO was not a division of the waived retirement pay, “but rather an award of damages equal to the value of the property not conveyed—the amount of retirement benefits lost.” The court noted the conflicting opinions among the states, but concluded that the better reasoning would maintain “the original intent of the property division distribution[, which] does

30 Chart C at the end of this article provides a list of these cases.
31 2011-Ohio-1272 (2nd Dist.).
33 Id.
34 Id.
35 Bagley, citing 2 Turner, Equitable Distribution of Property (3 Ed.) Section 6:10.
not violate the FSPA as long as the military retiree would be able to satisfy the obligation from other than disability retirement assets.\(^{36}\)

### III. Solutions: Legislative and Judicial

Practitioners confronting the morass of conflicting state court decisions have attempted to address them through calls for legislative reformation and petitions to the United States Supreme Court. Neither solution has ameliorated the problem.

#### A. Congressional Action

In 2001, the American Academy of Matrimonial Lawyers (“AAML”) responded to a Request for Comments by Congress for review of the USFSPA. Marshal S. Willick, on behalf of the AAML noted that “there is a lack of predictability and uniformity to the results, and similarly-situated people are treated differently because of trivial differences between their divorce decrees, or on the perceptions of individual judges. The current confusion is benefitting no one, and causing much litigation that should have been avoidable, often between spouses that have been divorced for decades.”\(^{37}\) The AAML recommended that VA disability awards “should be in addition to, not require a waiver of, longevity retired pay.” If fiscally impossible, the USFSPA should be amended to “include a provision prohibiting the conversion to disability pay of any portion of disposable retired pay that has already been awarded to a former spouse as the separate property of that former spouse.”\(^{38}\) Effective January 1, 2004, Congress passed legislation to allow concurrent receipt of military pay for those former service members who have a VA disability rating of at least 50 percent, known as Concurrent Retirement and Disability Pay (“CRDP”), that would be phased in over the course of ten years.\(^{39}\) As noted by Mark E. Sullivan, the “CDRP will go a long way toward ameliorating the unfairness of unilateral changes in military pension division orders by retirees who, after the fact, obtain VA disability compensation and thus reduce the share of the former spouse,”\(^{40}\) at least for those former service members receiving a disability rating of 50 percent or more.

#### B. Supreme Court Review

Since Mansell v. Mansell,\(^{41}\) the Supreme Court has declined to hear cases that present this confounding and divisive issue among the states, including the California court’s decision in Mansell after remand. On remand, the state appellate court ruled against the veteran on the ground that state law precluded the reopening of the settlement agreement that had divided his VA disability as well as his military retired pay.\(^{42}\) The Supreme Court denied certiorari.\(^{43}\) Since Mansell, petitions have been filed in at least three separate cases, requesting that the Court confront the more difficult post-decree waiver of retirement.\(^{44}\) Given the Court’s

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36 Id. ¶26.
38 Id.
40 Id.
42 In re Marriage of Mansell, 265 Cal. Rptr. 227 (Ct. App. 1989).
44 Seddio v. Michaels, 529 U.S. 1068 (2000); Padot
repeated denial of petitions on this issue, it is unlikely that a petition for certiorari would be granted in the near future.

III. Avoiding the Pitfalls of Waivers of Retired Pay After the Decree

Given the complexity and expense of bringing an action subsequent to the filing of a decree that divides military retirement, the best offense seems to be a good defense of drafting the decree to meet the needs of your clients.

A. Representing the Service Member

For practitioners representing the service member in a divorce or dissolution, the following practice points may be useful.

1. Retirement clauses should include a provision that divides only the “disposable retired pay” as defined by 10 U.S.C 1408.

2. VA disability benefits should be specifically excluded from division, whether elected prior to or after the filing of the final decree.

3. Any indemnity for a waiver of military retired pay should be clearly excluded.

4. Use percentages of disposable retired pay rather than specific dollar amounts.

B. Representing the Spouse

For practitioners representing the spouse in a divorce or dissolution, the following practice points may be useful.

1. Insure that a clause is included for the court to retain jurisdiction over the retirement so as to effectuate the intentions of the parties in dividing the pension.

2. Include an indemnity clause that protects the former spouse should military retired pay be waived to receive VA disability benefits.

3. Specifically reserve the court’s jurisdiction regarding an award of spousal support should the former spouse be deprived of military retirement benefit through a future waiver.

4. Define the portion of military retirement to be divided as “gross” rather than “disposable.”

IV. Conclusion

Despite the uniformity that a federal statute should bring in its application, the state courts have rendered an assortment of rulings in their interpretations of the USFSPA.

45 Although this is a controversial clause, courts have been inclined to approve such division if the parties reach this language through agreement.
Practitioners handling a divorce or dissolution involving a member of the armed forces should fully understand the relevant decisions in the jurisdictions in which they practice, to address these issues early in the proceedings and to prepare adequately to assist their clients when circumstances surrounding the division of military retirement pay change.

### CHART A

<table>
<thead>
<tr>
<th>State</th>
<th>Case</th>
<th>Holding</th>
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<tbody>
<tr>
<td>Alabama</td>
<td><em>Ex Parte Billeck</em>, 777 So.2d 105 ( Ala. 2000)</td>
<td><em>Mansell</em> and USFSPA prohibit the trial from considering disability benefits in alimony award; suggests that result may be otherwise if a specific amount or an indemnification provision had been included in divorce decree.</td>
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<tr>
<td>Colorado</td>
<td><em>In re Marriage of Poland</em>, 264 P.3d 647 (Colo. Ct. App. 2011)</td>
<td>In re Marriage of Warkocz, 141 P.3d 926 (Colo. App. 2006) not applicable to TDRL pay</td>
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<tr>
<td>Kansas</td>
<td><em>In re Marriage of Pierce</em>, 982 P.2d 995 (Kan. Ct. App. 1999)</td>
<td>USFSPA restricts trial court’s jurisdiction over disability benefits; therefore, trial court cannot order veteran to convert disability back to retirement or pay from disability; suggesting different outcome if veteran agreed not to convert retirement or agreed to indemnification provision; reasoning of other states permitting relief to former spouse “is inconsistent with the law of this state.”</td>
</tr>
<tr>
<td>Kentucky</td>
<td><em>Copas v. Copas</em>, 359 S.W.3d 471 (Ky. Ct. App. 2012)</td>
<td>Court may not take into consideration disability pay when dividing retired military pay</td>
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<tr>
<td>State</td>
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<td>Holding</td>
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<tr>
<td>Mississippi</td>
<td>Mallard v. Burkart, 95 So.3d 1264 (Miss. 2012)</td>
<td>Find that <em>Mansell</em> applies even though the &quot;harsh reality of this holding is that former spouses . . . can, without their consent, be denied a fair share of their ex-spouse's military retirement pay simply because [the military spouse] elects to increase his after-tax income by converting a portion of that pay into disability benefits.&quot; <em>Mansell</em>, 490 U.S. at 595 (O'Connor, J., dissenting)</td>
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<tr>
<td>Missouri</td>
<td>Morgan v. Morgan, 249 S.W.3d 226 (Mo. Ct. App. 2008)</td>
<td>Trial court precluded from altering original decree to award share of retirement waived for disability; suggesting different outcome if trial court had ordered veteran not to take disability or had ordered indemnification.</td>
</tr>
<tr>
<td>Nebraska</td>
<td>Kramer v. Kramer, 567 N.W.2d 100 (Neb. 1997)</td>
<td>Veteran permitted to seek reimbursement for past retirement paid to former spouse retroactively converted to disability; to allow otherwise would essentially award former spouse share of disability, a result prohibited by the USFSPA.</td>
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<tr>
<td>Texas</td>
<td>Jackson v. Jackson, 319 S.W.3d 76 (Tex. Ct. App. 2010) Gillin v. Gillin, 307 S.W.3d 395 (Tex. Ct. App. 2009)</td>
<td>Denying fiduciary duty claim because veteran was never in receipt of retirement paid to former spouse; suggesting that order prohibiting veteran from waiving retirement pay for disability may not be enforceable. USFSPA restricts the trial court from ordering veteran to waive retirement pay for disability benefits; former spouse will receive nothing if retirement pay reduced to zero.</td>
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<tr>
<td>Vermont</td>
<td>Youngbluth v. Youngbluth, 6 A.3d 677 (Vt. 2010)</td>
<td>USFSPA precludes trial court from increasing percentage of retirement pay to former spouse when divorce decree did not contain specific dollar amount or indemnification provision; suggesting different result if indemnification provision existed.</td>
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<td>State</td>
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<tr>
<td>Alaska</td>
<td>Clauson v. Clauson, 831 P.2d 1257 (Alas. 1992)</td>
<td>Trial court prohibited from ordering veteran to pay former spouse the amount of retirement pay waived for disability; “The court was clearly trying to regain the status quo as if the Mansell decision did not exist. . . . This simply cannot be done[,]” However, courts may consider the economic impact of a waiver of retirement pay for disability benefits, and compensate the former spouse accordingly.</td>
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<td>Arkansas</td>
<td>Ashley v. Ashley, 990 S.W.2d 507 (Ark. 1999)</td>
<td>USFSPA prohibits trial court from awarding former spouse share of retirement pay waived for disability benefits, but court may consider alimony increase.</td>
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<td>Illinois</td>
<td>In re Marriage of Wojcik, 838 N.E.2d 282 (Ill. App. Ct. 2005)</td>
<td>Trial court proscribed from dividing present or future disability benefits as a marital asset, or using those benefits as a basis for an offsetting award of marital property by USFSPA and Mansell; nonetheless, in making award of marital property, trial court could consider non-marital assets (disability benefits).</td>
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<tr>
<td>Arizona</td>
<td>Harris v. Harris, 991 P.2d 262 (Ariz. Ct. App. 1999)</td>
<td>Extending Gaddis, supra, to permit trial court to order veteran, in contravention of Mansell and the USFSPA, not to reduce former spouse’s vested interest in her portion of retirement pay by increasing disability benefits. Precluding veteran from reducing former spouse’s vested interest in her portion of retirement pay by taking civil service employment.</td>
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<td>In re Marriage of Gaddis, 957 P.2d 1010 (Ariz. Ct. App. 1997)</td>
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**CHART C**

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TO THE EDITOR:

I’ve been asked for (and given) reprint permission for a recent analysis of VA Disability in the context of alimony orders, which is reproduced in this issue of Roll Call, along with an article by Ms. Campbell and Mr. Fischer. A few comments regarding their article may be illuminating for the reader.

First, the “all-too-common scenario” they posit in their opening paragraph is a pretty rare case – a retirement of January 1, a divorce of February 1, and a stream of payments beginning April 1. Much more often, the application for and award of VA disability either significantly predates or post-dates the divorce, making the analysis (in most States) pretty straightforward.

Specifically, most opinions hold that Mansell is relevant only when the disability predates the divorce. The great bulk of opinions hold that, otherwise, the former spouse should be entitled to indemnification from any post-divorce recharacterization by the military member, either directly or indirectly, with some
States requiring indemnification clauses, and others stating that they are unnecessary.

Only one poorly reasoned decision from North Carolina has (to my knowledge) held that indemnification clauses may not be used, although the Texas decisions are unnecessarily expansive. Cases pointing in every direction are collected in Section VI(D) of “Divorcing the Military: How to Attack, How to Defend,” posted at http://willicklawgroup.com/military-retirement-benefits/ with a great deal of related material.

Where the VA disability already exists at the time of divorce, courts are free to take that fact into account as part of the separate property cash flow analysis they do in deciding alimony questions (this is the primary subject of my earlier article reproduced in this issue). Alimony and property division are very, very different analyses.

Ms. Campbell and Mr. Fischer correctly note that several State courts have entered orders effectively enabling or creating inequity, but a careful reading of those cases indicates that most are the result of poor draftsmanship or word-choice by the attorney for the former spouse upon divorce, in conjunction with State law requiring strict application of language, no matter how unfortunately phrased.

I know of no Congressional or federal court fix for poor lawyering, but I do not think active encouragement of using language designed to produce inequity when representing the military member is helpful.

So I do not think it appropriate to state that “courts are struggling to decide how (or if) that portion of the retirement pay waived to receive disability benefits after a divorce can (or should) be divided.” To frame it that way, I believe, is to present a false issue.

Respectfully, there are a few other errors in the article submitted. For example, it is pretty unfair to blast the California divorce courts for having “blatantly acted contrary to [the USFSPA]” in Mansell. The Mansells were separated in 1977, and divorced in 1979 – years prior to the USFSPA. The courts on remand held (correctly) that McCarty was not retroactive so as to invalidate their pre-McCarty decree.

The matter is not really as “confounding and divisive” as the authors indicate, in my opinion. Post-divorce recharacterization of any asset distributed upon divorce, by either party, is illegitimate as a litigation goal, and ethical counsel will draft documents in accordance with the requirements of their State laws as necessary to prevent it.

Marshals S. Willick

Vol. 53 — The Actual Legal Analysis as to 38 USC 5301 and Alimony

Posted on October 16, 2012 by Marshal S. Willick

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1 Reprinted with permission from his website at http://willicklawgroup.com
A legal note from Marshal Willick about the actual legal analysis of the federal code section (and other statutes) at the root of the efforts to corrupt family law by the militant fringe groups, and how military disability benefits are analyzed in child and spousal support cases. Several attorneys wrote in, after seeing the prior legal notes relating to questions of federal preemption, legislation elsewhere, and the small band of militants trying to misuse the law for their own personal economic advantage, asking what the underlying legal merits of the dispute actually might be. This note addresses the federal law involved as it impacts support cases.

I. BACKGROUND: RETIRED PAY, DISABILITY PAY, AND THE CONCEPT OF FEDERAL PREEMPTION

Retirement benefits are essentially a form of deferred reward for service, and so are generally divisible upon divorce, while disability benefits are conceptualized as compensation for future lost wages and opportunities because of disabilities suffered, and are thus typically not divisible or attachable. When accepting a disability award requires relinquishing a retirement benefit, the interests of the parties as to the proper characterization of the benefits become instantly polarized. The fact pattern of one party relinquishing (divisible) retirement benefits in order to receive (non-divisible) disability benefits plays out two ways in divorce litigation.

First, the question of indemnification – whether the converting party must reimburse the other party, if that other party had been previously awarded a share of the benefits that the converting party has chosen to give up and convert to some other form. Second, the role of disability benefits as part of the economic resources to be considered when setting child and spousal support.

A great deal has been (and can be) said about indemnification. See, e.g., Willick, Divorcing the Military: How to Attack, How to Defend, posted at http://willicklawgroup.com/military-retirement-benefits/. This note, however, is concerned with the intersection of military disability claims and support obligations; the question of property indemnification will wait until another day.

In our federal system, virtually all of family law is left to the States, not the federal government. As the United States Supreme Court put it: “We have consistently recognized that ‘the whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States.’” Rose v. Rose, 481 U.S. 619, 625, 107 S. Ct. 2029, 95 L. Ed.2d 599 (1987).

Sometimes, Congress wishes to “occupy the field” in a particular question of law, and generally, it has the power to do so, even when it results in unintended consequences of unjust enrichment and inequity. See Carmona v. Carmona, 603 F.3d 1041 (9th Cir. 2010) (revised op’n on rehearing) (permitting a former spouse who had bargained away certain benefits for value to nevertheless make a claim to them despite her agreement, the order of the divorce court, and the wishes of the employee, due to the happenstance of the timing of divorce and retirement, and the preemptive scope of ERISA).

Preemption is explained, again by the United States Supreme Court, as
necessary for a federal system, but to be very strictly limited because of the obvious opportunity for abuse and inequity: “On the rare occasion when state family law has come into conflict with a federal statute, this Court has limited review under the Supremacy Clause to a determination whether Congress has ‘positively required by direct enactment’ that state law be preempted. . . . Before a state law governing domestic relations will be overridden, it ‘must do “major damage” to “clear and substantial” federal interests.’”

II. THE DISTINCTION BETWEEN PROPERTY DIVISION AND SUPPORT

Community property is defined as “All property . . . acquired after marriage by either husband or wife, or both,” subject to a few exceptions. NRS 123.220. Upon divorce, courts are directed “to the extent practicable, make an equal disposition of the community property of the parties,” again with a few exceptions. NRS 125.150(1).

Child and spousal support is determined through a completely different analysis. Child support is based on a percentage of “gross income,” the definition of which is deliberately expansive, including “the total amount of income received each month from any source . . . .” NRS 125B.070.

A court determining spousal support is directed to award whatever “sum . . . appears just and equitable.” In figuring out what is “just and equitable,” courts are directed to consider “the financial condition of each spouse.” Courts are further authorized, if they find it appropriate, to “set apart such portion of the . . . separate property” of either spouse that is “deemed just and equitable” to support the other party, or the parties’ children. NRS 125.150.

Obviously, support draws from a much wider net than community property, since it considers the totality of economic resources of both parties, and is directed to achieve equity rather than (as with property division) a presumptively equal division of that which accrued during the marriage.

III. DISABILITY INCOME IS INCOME

Most States, including Nevada, treat disability income as the separate property income stream of the employee spouse, which may not be divided as property with the non-employee spouse. See, e.g., Powers v. Powers, 105 Nev. 514, 779 P.2d 91 (1989) (disability retirement has two components, retirement and disability, and only the retirement component is divisible upon divorce). However, nothing requires a court in most cases to ignore reality or engage in the fantasy that the income stream does not exist when balancing the support rights and obligations of two parties.

In extremely rare circumstances, some forms of benefits have been expressly exempted from being counted as “income,” due to competing policy directives. For example, the Nevada Supreme Court started its analysis in Metz v. Metz, 120 Nev. 786, 101 P.3d 779 (2004), with the irrefutable observation that all income of a child support obligor is contemplated within the scope of “gross income,” and that NRS 125B.020 states that parents have a duty to support their children.

Nevertheless, the Court found that a federal statute may preempt a state statute when they squarely conflict, and found that SSI is a welfare program designed to
assure that the recipient’s income is maintained at a level viewed by Congress as the minimum necessary for subsistence, whereas SSD is a disability insurance program that provides benefits for disabled workers, intended to replace lost income because of the disability. After discussion of how and why the statutory schemes differ, the Court found that while both SSI and SSD qualify as a source of a parent’s gross monthly income under NRS 125B.070, the federal exemption for SSI benefits also preempted Nevada law, so the SSD funds, but not SSI, could be counted for figuring child support.

IV. 38 U.S.C. § 5301

The issue relates to former military members who have converted their retirement benefits into disability benefits. As discussed in legal note Vol. 47, “Military Retirement Militant Groups,” posted at http://willicklawgroup.com/full-list-of-newsletters/, some members of this group believe that they should be treated differently than firefighters, cops, or schoolteachers – they howl that when they recharacterize retirement benefits as disability benefits, divorce courts should be unable to see, acknowledge, or take into account the income stream they receive when figuring out how to apportion rights and responsibilities between the parties, but must instead pretend that they are not receiving the money that they are putting in their pockets every month. They are wrong.

The myopic focus of the “5301 club” is 38 U.S.C. § 5301(a):

(a) Payments of benefits due or to become due under any law administered by the Secretary [of Veterans Affairs] shall not be assignable except to the extent specifically authorized by law, and such payments made to, or on account of, a beneficiary shall be exempt from taxation, shall be exempt from the claim of creditors, and shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary. The preceding sentence shall not apply to claims of the United States arising under such laws nor shall the exemption therein contained as to taxation extend to any property purchased in part or wholly out of such payments.

V. THE ACTUAL CASE LAW ON THE SUBJECT

Probably the single most important case is Rose v. Rose, 481 U.S. 619, 625, 107 S. Ct. 2029, 95 L. Ed.2d 599 (1987). In Rose, the U.S. Supreme Court reviewed a contempt judgment against a veteran whose sole source of income was his V.A.
disability compensation. He had refused to pay the child support ordered, claiming that he was constitutionally allowed to keep all V.A. benefits for himself. In a thorough review of the relevant statutes and rules, the Court held that “these benefits are not provided to support [the veteran] alone.” Explaining, the Court stated:


Additional compensation for dependents of disabled veterans is available under 38 U.S.C. § 315, and in this case totaled $90 per month for appellant’s two children. But the paucity of the benefits available under § 315 [now 38 U.S.C. § 1115] belies any contention that Congress intended these amounts alone to provide for the support of the children of disabled veterans.

Moreover, as evidenced by § 3107(a)(2) [now 38 U.S.C. § 5307] . . . Congress clearly intended veterans’ disability benefits to be used, in part, for the support of veterans' dependents. The Court added that “children may rightfully expect to derive support from a portion of their veteran parent’s disability benefits.” There can be no doubt that family support is one of the purposes for the V.A. payments given to a veteran. Of course, members of the 5301 club attempt to ignore this holding out of existence, since it is incompatible with their world-view.

Generally, State courts make alimony awards where necessary to do substantial justice to the parties in front of them, taking into account the entirety of the actual financial circumstances of those parties. Many courts have awarded alimony upon divorce to one spouse on the basis that the other spouse has a separate property stream of income.

Some courts have noted that such an order is particularly appropriate in the military cases in which the member was enjoying a separate property cash flow from disability benefits applied for before divorce that would have been divisible retirement benefits but for the member’s election. Where V.A. disability exists at the time of divorce, the court cannot divide those benefits as property, but the cash flow “may be considered as a resource for purposes of determining [one’s] ability to pay alimony.” See Riley v. Riley, 571 A.2d 1261 (Md. Ct. Spec. App. 1990); In re Marriage of Howell, 434 N.W.2d 629, 633 (Iowa 1989).

There are former military members who continue trying to argue that an alimony order effects an “attachment, levy, or seizure” of veterans’ disability benefits under 38 U.S.C. § 5301(a)(1), but that argument is contrary to virtually all law on the subject. See, e.g., Case v. Dubaj, ___ F. Supp. ___ (W.D. Pa. No. 08-347, Aug. 29, 2011) (no 42 U.S.C. § 1983 violation could be asserted against county support enforcement workers who seized or froze a bank account consisting entirely of veterans’ disability benefits, because 38 U.S.C. § 5301 does not apply to claims for spousal and child support); Annotation, Enforcement of Claim for Alimony or Support, or for Attorneys’ Fees and Costs Incurred in Connection Therewith, Against Exemptions, 52 A.L.R. 5th 221 §28[a] (“With few exceptions, the cases hold that payments arising from service in the Armed Forces . . ., though exempt as to the claims of ordinary creditors, are not
exempt from a claim for alimony, support, or maintenance . . ."); Commonwealth ex. rel. Caler v. Caler, 1981 WL 207422 (Pa. Com. Pl. 1981) (exemption statutes such as § 5301(a) “are generally held to apply only to claims arising from the debtor-creditor relation and have no application to claims for family support absent clear statutory language to the contrary”); In re Marriage of Dora Pope-Clifton, 823 N.E.2d 607 (Ill. App. 2005) (veteran’s bank account could be frozen to satisfy his support obligations despite the fact that the proceeds in the account consisted of veterans’ disability funds because “veterans’ benefits are not for the sole benefit of disabled veterans,” but rather, “[are] intended to benefit both veterans and their families”).

The South Dakota Supreme Court, summarizing the national decisional law in 2011, noted that “An overwhelming majority of courts have held that [federal veterans’] disability payments may be considered as income in awarding spousal support.” Urbaniak v. Urbaniak, 807 N.W.2d 621, 626 (S.D. 2011) (quotation omitted).

As noted by the collected opinions, that conclusion should be undeniable as a statement of current law on the subject. “These courts conclude that federal law does not prohibit an award of alimony against a spouse receiving military disability pay and, once alimony is awarded, federal law will not relieve the paying spouse from paying such alimony obligations, even if most of the veteran’s income consists of military disability benefits.” Urbaniak, supra; see In re Marriage of Wojcik, 838 N.E.2d 282, 299 (Ill. Ct. App. 2005); Morales and Morales, 214 P.3d 81, 85 (Or. Ct. App. 2009); Youngbluth v. Youngbluth, 6 A.3d 677, 687 n.3 (Vt. 2010).

The courts so holding have relied upon the United States Supreme Court’s holding in Rose, supra. The Montana Supreme Court, reviewing Rose in a similar case in 2000, observed: “After reviewing the legislative history” of the provision, “the Court held that [veterans’] disability benefits were never intended to be exclusively for the subsistence of the beneficiary.” Strong v. Strong, 8 P.3d 763, 770 (Mont. 2000); see Rose, 481 U.S. at 634. Rather, they were intended to support “the veteran’s family as well.”

Accordingly, the courts reviewing this subject have held, with near unanimity, that to recognize an exception to the statute’s prohibition against attachment, levy, or seizure in the child support context “would further, not undermine, the federal purpose in providing these benefits.” In Rose, the United States Supreme Court concluded that “regardless of the merit of the distinction between the moral imperative of family support obligations and the businesslike justifications for community property division, . . . [the statute] does not extend to protect a veteran’s disability benefits from seizure where the veteran invokes that provision to avoid an otherwise valid order of child support.”

Other courts have used “the logic of Rose” to hold that “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 necessarily be used to make such payments.” Strong v. Strong, 8 P.3d 763, 770 (Mont. 2000).

In the absence of further federal legislation or a changed opinion from the United States Supreme Court, those arguing that courts may not consider
disability or any other form of benefits in fashioning child support and spousal support orders are arguing out of wishful thinking, without any kind of legitimate legal basis.

These limitations on the extent of the exemption from execution are analogous to limitations on “assignability” found in other federal retirement and benefit schemes that protect income streams from attachment. For example, the Social Security Act, 42 U.S.C. § 407, contains limiting language comparable to that found in 38 U.S.C. § 5301, and subsection (a) of that section states: The right of any person to any future payment under this subchapter shall not be transferable or assignable, at law or in equity, and none of the moneys paid or payable or rights existing under this subchapter shall be subject to execution, levy, attachment, garnishment, or other legal process, or to the operation of any bankruptcy or insolvency law.

Most States, including Nevada, consider Social Security exempt from direct or indirect inclusion in property settlements. See Wolff v. Wolff, 112 Nev. 1355, 929 P.2d 916 (1996); Boulter v. Boulter, 113 Nev. 74, 930 P.2d 112 (1997). But they do figure in the income available to the party receiving them, and courts can, do, and should consider those payments in figuring the total economic resources of such parties. See Metz, supra; Hern v. Erhardt, 113 Nev. 1330, 948 P.2d 1195 (1997) (considering Social Security disability benefits applied to offset child support arrearages).

The bottom line to the case law is a reminder that any given statutory provision exists in the context of other provisions, and of decades (or longer) of interpretation, rather than in a vacuum. Those myopic partisans determined to read 38 U.S.C. § 5301 – or any other provision of statutory or case law – alone and outside its full legal context, are in error, and misinterpreting the law, as so succinctly summarized in Paul Simon’s pithy quote below.

VI. CASE STUDY: BROWNELL

Some months ago, the New Hampshire Supreme Court decided In the Matter of Ronald Brownell and Irene Brownell, 44 A.3d 534, 163 N.H. 593 (2012). It is the latest example of a military veteran, having been advised to ignore court orders by the militant veteran fringe groups, landing in deep trouble.

A. THE CASE ITSELF

After a 13 year marriage, Ronald and Irene separated in 2010, and were divorced in 2011. Ronald was totally and permanently disabled, and received $962 in monthly social security benefits and some $2,578 in monthly V.A. disability benefits, which was awarded based on post-traumatic stress disorder from serving in Vietnam. Irene also suffered from post-traumatic stress disorder, as well as other ailments, but had no income or assets beyond some $200 in monthly food stamps.

Ronald also inherited trust income, which paid him $79,000. The trial court issued an “anti-hypothecation order,” but Ronald spent all $79,000 by the time of the divorce hearing anyway. The appellate court’s recitation indicates that he used more than $30,000 of it to buy illegal narcotics, and spent the rest buying a truck and a trailer for himself, gave his children $9,000, and paid $6,000 for his daughter’s wedding. Apparently, another $15,000 was to be received in the future. The whole time he was spending that
money, Ronald was ignoring the trial court’s temporary spousal support order of $1,250 per month. Irene, unable to pay the mortgage on the marital home, lost it to foreclosure by the time of the divorce trial, and was homeless and living in a shelter. The trial court specifically found that Ronald had “no credibility,” as he lied when he said at one hearing that he had received only $25,000 from the trust (having in fact received $41,000), lied again a month later when his interrogatory responses said that he had only received $31,500 from the trust, when, in fact, he had received $51,000, and lied yet again on his financial affidavit, which claimed that he had “no cash,” although in fact in that month alone he received $10,500 in cash from the trust, which he then spent on illegal drugs. The divorce decree ordered Ronald to pay Irene half of his trust distributions, which the court calculated to be $47,000, and found Ronald in indirect civil contempt for not paying alimony as ordered and by hypothecating marital property. Ronald appealed.

His primary argument was that “federal law” precluded the trial court from “counting” his V.A. benefits as income for alimony purposes, because 38 U.S.C. § 5301(a)(1) provides that federal veterans’ disability benefits “shall be exempt from the claim of creditors, and shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary.” By Ronald’s reasoning, since he had too little income from “alternative sources” to make the entirety of the alimony payments, the trial courts alimony order was an “attachment, levy, or seizure” of his V.A. benefits in violation of the federal statute.

Citing multiple cases from all over the country, the appellate court dryly observed that his assertion “is contrary to the governing law,” and quoted multiple authorities stating that “An overwhelming majority of courts have held that [V.A.] disability payments may be considered as income in awarding spousal support.” Like most of those courts, the New Hampshire court relied on Rose.

The Court also resisted the typical second bogeyman argument in such cases, stemming from Mansell v. Mansell, 490 U.S. 581, 594-95, 109 S. Ct. 2023, 104 L. Ed.2d 675 (1989), holding like virtually all other courts that the “federal question in Mansell was a narrow one” relating solely to a State court’s ability to treat military retirement pay that a retiree has waived in order to receive veterans’ disability benefits as property that can be divided on the dissolution of a marriage.” Finding that Ronald sought to conflate that property question with the very different question of a divorce court’s considering all income sources in determining alimony, the court rejected Ronald’s argument as spurious.

The court then dealt with a few other non-military issues, and affirmed the trial court order.

B. WHY WOULD SOMEBODY DO SUCH THINGS?

Background facts not found in the opinion illustrate why Ronald Brownell was willing to risk contempt sanctions and jail time. In an e-mail string proudly circulated by one of the 5301 club military fringe group leaders, Ronald’s daughter conceded that it was garden-variety spite, which Ronald tried to dress up with pretense to federal preemption: “I know he would rather die than pay her a cent . . . he has said over and over he will never pay
Of course, every divorce lawyer is familiar with that kind of ignorant obstinace; the question is why this litigant felt that he could have some possibility of convincing the court system that it was powerless to try to protect the equally-disabled and utterly destitute spouse. The answer is the prattling poison of the fringe groups. The daughter noted that Ronald had been encouraged to act as he did by that group, but ironically appeared to not understand that they had led him to ruin: I just don’t know what to do here and I am worried and the 5301 group is the only outlet available to reach out to for support so please, anything you have to say will be greatly appreciated, because when I spoke with you both on the phone you had a lot of great advise [sic] for me in the beginning of all of this.

In response to the e-mail from the daughter, one of the self-appointed leaders of that group conveyed his sympathies, adding the Kafka-esque summary of the facts of the case: “the way this nation treats its wounded soldiers is a national disgrace.”

Totally disregarding the equities of the situation, the needs of both parties for subsistence, Ronald's defiance of court orders in favor of blowing tens of thousands of dollars on drugs, or anything else outside of the myopic self-absorption of whether one of the litigants was ever in the military, the group leader added more delusion:

Attorneys such as the one representing your father’s former spouse have learned to exploit loopholes that exist in the law – namely a process called “indemnification” and, as I suspect in your father’s case alimony to circumvent federal laws which protect veterans from having their disability compensation stripped away. . . . state legislatures are infested with these attorneys. . . . miscreants that have worked tirelessly to create a legal environment in which wounded veterans are sitting ducks and lambs to the slaughter . . . . It is high time attention be brought upon this holocaust that’s occurring . . . what has happened to your father is a national disgrace.

In short, these groups are of the opinion that if a divorcing couple includes one party receiving thousands of dollars each month in V.A. benefits, and the other is utterly destitute, he should keep the entire income stream, and she should starve and be homeless, and it is a “disgrace” if a court thinks otherwise and does something to prevent such an inequity.

After deluding saps such as Ronald with their snake oil, leaving the individuals in contempt, the groups in question hold them up as martyrs for their cause. This is not an isolated matter; one of their websites (veteransnewsnow.com) reports several more of their acolytes reporting to jail for contempt sanctions for outright refusal to pay child and spousal support, in Iowa, Minnesota, and Texas. In a case like Brownell, they want the court to be prohibited from ever knowing that the disabled member has thousands of dollars in monthly income, and wants courts to be prevented from doing equity between spouses if one of them ever wore a uniform.

VII. LEGAL EVOLUTION AND SOCIAL CONTEXT

Recently, another of the fringe
group members receiving V.A. benefits and angry about having been ordered to pay alimony in accordance with State law attempted to have the orders against him reviewed by the United States Supreme Court, but the Court elected not to hear the case. See Barclay v. Barclay, ___ P.3d ___ (Or. Ct. App. No. A143881, Sept. 28, 2011), cert. den., ___ U.S. ___, No. 11-1453, Sept. 28, 2012.

Where this leaves matters is with the “overwhelming majority” of opinions around the United States noted above stating that – of course – in the absence of explicit federal legislation requiring otherwise, all separate property monthly income streams being paid to either party to a marriage may be taken into account as part of their financial resources when determining a balancing of financial interests between them for an alimony or child support decision.

The fringe groups in question see no reason to obey judicial or other authorities who disagree with them, but the noise they generate is entirely disproportional to the (mostly non-existent) legitimacy of their legal position. Those wanting a further discussion of who they are and how they operate can review legal notes Nos. 46, 47, and 49, all posted at http://willicklawgroup.com/full-list-of-newsletters/.

VIII. QUOTES OF THE ISSUE

“A man hears what he wants to hear, and disregards the rest.”

“Too often we . . . enjoy the comfort of opinion without the discomfort of thought.”
– John F. Kennedy.

Quick Tips for Handling Military Retirement Benefits

by Amy M. Privette

Amy Privette, a North Carolina State Bar Certified Paralegal, wrote this when employed by the Law Offices of Mark E. Sullivan, P.A., where her main area of practice was family law, with a special focus in the area of military divorce and federal pension division issues. Ms. Privette is now in law school at Regent. Reprinted from last issue.

Military retirement benefits are not handled in the same manner as private pension plans that are governed by ERISA (Employee Retirement Income Security Act). Allocating and dividing military retirement benefits as part of a divorce case is not easy. The best advice is to find someone “in the know” who can help you and your client navigate the minefield of military pension division, Survivor Benefit Plan (SBP), medical insurance coverage, and other retirement benefits. Still, for those bold enough to take on the challenge, here are some tips to help you
get started:

1. **Get the docs!** There are numerous documents that you need to request from the military servicemember in order to evaluate what retirement benefits are available. This could include a Leave and Earnings Statement (for active duty members), Retirement Points Statement (for Reserve and Guard members), Retiree Account Statement (for retirees), SBP election forms, retirement orders and discharge papers, and Officer or Enlisted Record Briefs.

2. **Know the rules!** The division of military retired pay is authorized by the Uniformed Services Former Spouses Protection Act (USFSPA), 10 U.S.C. § 1408. It is an enabling act which allows states to divide military retired pay but leaves the specifics of how to do it up to each state. SBP is the survivor annuity program that allows the former spouse to continue receiving a stream of payments after the servicemember/retiree dies. SBP is provided for under 10 U.S.C. § 1447 et seq. Volume 7B of the Department of Defense Financial Management Regulation, DoD 7000.14-R (DoDFMR) expands upon the federal statutes to provide more detailed guidance as to the division of military retirement benefits. See also 10 U.S.C. § 1408 (c)(4) for specific rules regarding which courts have jurisdiction to divide military retirements.

3. **Identify the system!** Active duty retirement occurs under one of 3 systems: a) Final retired pay; b) High-3; or c) CSB/Redux - [http://militarypay.defense.gov/retirement/ad/01_whichsystem.html](http://militarypay.defense.gov/retirement/ad/01_whichsystem.html). Reserve/National Guard retirements are based on retirement points, NOT time, and the servicemember must have at least 20 “good” years of service (50 points are required to have a “good” year) to be retirement eligible. Active duty retirements pay out immediately upon retirement whereas Reserve or Guard retirements generally do not pay out until the retiree reaches age 60. The cost of providing SBP coverage to a former spouse can also differ depending on whether it is an active duty or reserve retirement.

4. **Use the right lingo!** **SCRA** – When the servicemember has not yet retired, the pension division order must state that the servicemember’s rights under the Servicemembers Civil Relief Act, 50 U.S.C. Appx. 501 et seq. have been honored. **DFAS** is the retired pay center for Army, Navy, Air Force, Marine Corps (and reserve units, also Air and Army National Guard). There are separate pay centers for retirees of Coast Guard, Public Health Service, National Oceanographic and Atmospheric Administration. **Disposable Retired**
Pay is gross retired pay less any VA disability waiver and premium for SBP (if coverage is for former spouse of this divorce). This is the type of pay that the pay center divides, regardless of what the court order says. COLAs (cost-of-living adjustments) are usually applied to retired pay in January and are automatically included in the share received by the former spouse unless the court order awards the spouse a flat dollar amount. The pension is not a “fund,” so you cannot refer to the account balance or the part of the fund acquired during the marriage or vested at the date of divorce. Use a MPDO (Military Pension Division Order) to divide the retirement benefits, not a QDRO, since this is not a qualified plan governed by ERISA.

5. Choose wisely! There are four acceptable methods for dividing military retired pay: a) fixed dollar amount; b) percentage; c) formula clause; and d) hypothetical award. There are pros and cons to each method, so make sure you evaluate which would be best for your case. A full explanation of the four methods can be found in the Attorney Instruction Guide available at the DFAS website: http://www.dfas.mil/garnishment/usfspa/attorneyinstructions.html

6. Don't forget the SBP! SBP is a unitary benefit and cannot be divided between a present and former spouse. Without the Survivor Benefit Plan, the stream of retired pay payments to the former spouse cease upon the death of the servicemember/retiree. The benefit paid out is 55% of the selected base amount. The maximum base amount is the full retired pay check; the minimum base amount is $300.00. The cost for coverage for active duty cases is generally 6.5% of the selected base amount, paid upon retirement by deduction from pension check. If the former spouse predeceases the retiree, then the spouse’s share of the retired pay automatically reverts back to the retiree – at NO cost. If the former spouse gets remarried before age 55, then her coverage under SBP is suspended.

7. Watch the clock! There must be ten years of marriage overlapping ten years of military service in order for the former spouse to get pension payments directly from the pay center. Even with an overlap of less than ten years, the former spouse is still eligible to claim a share of the retired pay, but the retiree will have to make the payments. There are two deadlines for setting up SBP coverage for the former spouse. When the servicemember makes election, it must be done within one year of divorce; when the former spouse sends in a “deemed election,” it must be done within one year of order requiring the member to elect SBP coverage.
8. **Beware of disabilities!** Certain types of disability compensation can reduce the retired pay that is divisible with a former spouse. The primary types of disability payments are military disability retired pay, VA disability compensation, and Combat-Related Special Compensation (CRSC). The Court cannot divide VA disability compensation (see 1989 Mansell decision by the US Supreme Court), and only a small part of military disability retired pay is subject to pension division (although disability benefits ARE subject to consideration in support cases, in general). When the military retiree has a VA disability rating of less than 50%, election of VA payments means a dollar-for-dollar reduction of retired pay; thus, the retired pay share for the former spouse gets reduced due to the unilateral action of retiree. Courts and agreements often employ indemnification language to guard against this and to protect the property share awarded to a former spouse.

9. **But wait…there’s more!** When representing the former spouse, don’t rely on Servicemembers Group Life Insurance to secure benefits; 1981 Supreme Court decision says courts cannot enforce orders or agreements that require SGLI. *Ridgway v. Ridgway*, 454 U.S. 46 (1981). If there has been 20 years of marriage which overlaps 20 years of military service, then the former spouse may qualify for full medical benefits as a 20/20/20 spouse. For shorter term marriages, look in to CHCBP (Continued Health Care Benefit Program) as a means of providing health insurance coverage.

**PORTALS FOR PRACTICE**

*(Presented without endorsement)*

Pension links:

- [http://militarypay.defense.gov/retirement/calculator/02_highthree.html](http://militarypay.defense.gov/retirement/calculator/02_highthree.html)
- [http://www.abanet.org/family/military/silent/pension_division.pdf](http://www.abanet.org/family/military/silent/pension_division.pdf)
- [http://www.abanet.org/dch/committee.cfm?com=FL115277](http://www.abanet.org/dch/committee.cfm?com=FL115277)

Other links:

- [http://www.abanet.org/legalservices/helpservicemembers/lamphrdirectory.html](http://www.abanet.org/legalservices/helpservicemembers/lamphrdirectory.html)
- [http://usmarriagelaws.com/search/united_states/index.shtml](http://usmarriagelaws.com/search/united_states/index.shtml)
http://www.visajourney.com/faq/k1faq.htm

http://www.abanet.org/legalservices/helpreservists/legalassistdir.pdf

https://www.jagcnet2.army.mil/forums

http://usmilitary.about.com/od/theorderlyroom/a/medseparation.htm

http://militarypay.defense.gov/retirement/calc/index.html

http://www.nclamp.gov/s_mpdlost.asp

http://www.usimmigrationsupport.org/greencard_adoption.html


http://www.cpol.army.mil/
Editor’s Note: Do You Have Your Own Copy of The Military Divorce Handbook?- Second Edition.

The Military Divorce Handbook: A Practical Guide to Representing Military Personnel and Their Families by Mark E. Sullivan is a useful outline that guides the family law practitioner through the unique and difficult issues involved when a military retiree or servicemember divorces. Included in the book are a clear explanation of the Servicemembers Civil Relief Act, how to locate and serve the military member, visitation and custody, domestic violence, military tax issues, pension division, family support, medical care, and the division of military retirement benefits. The book includes is a CD-ROM full of checklists, instruction sheets, forms and info-letters. Here is what’s new in the new edition:

“What’s NEW?”

THE MILITARY DIVORCE HANDBOOK (ABA, 2nd Ed. 2011)

A. Chapter 1: New section on getting documents from the government (pay records, retired pay statements, other military or federal records), with sample motion, order and cover letter; complete and up-to-date instruction outlines on the Privacy Act, the Freedom of Information Act (rules, exceptions, exemptions), courtesy of the Army JAG School.
B. Chapter 2: Complete outline of Servicemembers Civil Relief Act cases; article on “Appointment Practice under the SCRA” and article, “Are We There Yet? A Roadmap for Appointed Attorneys.”
C. Chapter 3: “Leaving on a Jet Plane” article by Noel and Phil Tucker, Family Medical Leave Act materials; flow chart on family care plans and Dept. of Defense rules; DD Forms 2870 and 2871 re Release and Restriction of Medical/Dental Information
D. Chapter 4: Checklist for what information to gather at initial consultation on family support; article on bonuses (re support and property division) by Jim Wherry; information on Regular Military Compensation Calculator (to compare military pay and benefits to civilian salary); two UIFSA articles; three articles on former spouse medical coverage and CHCBP (Continued Health Care Benefit Program); information on DoD Instruction re ID cards (gateway to military benefits)
E. Chapter 5: Updated with new cases
F. Chapter 6: Article and fact sheet on MSRRA (Military Spouse Residency Relief Act)
G. Chapter 7: Updated instructional materials from Army JAG School – deployment tax outline, income tax outline, divorce tax outline
H. Chapter 8: “Insider’s Guide to DFAS Pension Division Regulations”; client questionnaire for military pension cases; checklist on how to avoid consenting to pension division jurisdiction; clarification order for reimbursement of former spouse; “floor language” for military pension division (by Jim Higdon); “Recall – the Gap and the Reset” with sample clauses (for recall of servicemember to active duty and later re-retirement); section on how foreign courts can divide military pensions; dialogue on CSB/Redux with John Kirchner; bonus article by Jim Wherry (re support and property division); how to get paid arrears by DFAS; charts and explanations on “mirror award” and reduced basis for Survivor Benefit Plan; checklist of SCRA protections; brief on calculation of Guard/Reserve pensions according to points; “Plan A/Plan B” order for use when it is unknown whether member will retire from active duty or from Guard/Reserve; short and long waivers of military pension division (sample clauses); and expanded treatment of Combat-Related Special Compensation and Concurrent Retirement and Disability Pay.

The Military Divorce Handbook is priced at $179.95, with a price of $149.95 available to members of the ABA Section of Family Law. Learn more about the book and order online at http://www.abanet.org. To order by phone, call the ABA Service Center at 1-800-285-2221 and request product code 5130135. Orders can be faxed to 1-312-988-5568.