

Winds of Change: New Rules for Dividing the Military Pension at Divorce

by
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Introduction

The point I wish to make is that those things cause the soldier to remember that the people at home are behind him. You do not know how much that is going to mean to us who are going abroad. You do not know how much that means to any soldier who is over there carrying the flag for his country. That is the point which should be uppermost in the minds of those who are working for the soldier.

—Major General John Joseph Pershing¹

To serve in the military of this great nation is an honor. It is also a duty that is performed by only .4% of the U.S. population. Approximately 1.3 million citizens are on active duty, with members serving in the “drilling” Reserve and National Guard adding about 800,000 more service members.² The relatively small number of service members in this country means that in many communities, attorneys and judges are not familiar with federal laws and military rules and regulations which impact the rights and benefits of service members and their families. To truly “work for the soldier,” family law attorneys must make themselves familiar with the unique components of military family law.

This article will address three new and important changes to the rules of pension division which impact military divorce and

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¹ John J. Pershing, *Stand by the Soldier*, 31 NAT'L GEOGRAPHIC MAG. 459 (June 1917).

² Kim Parker et al., *6 Facts About the U.S. Military and Its Changing Demographics*, PEW RES. CTR. (Apr. 13, 2017), <http://www.pewresearch.org/fact-tank/2017/04/13/6-facts-about-the-u-s-military-and-its-changing-demographics/>.

the Uniformed Services Former Spouses' Protection Act: the "Frozen Benefit Rule," the effect of the U.S. Supreme Court decision in *Howell v. Howell*,³ and the Blended Retirement System (BRS).

I. Overview of Changes

The "Frozen Benefit Rule" is the 2016 amendment to the Uniformed Services Former Spouses' Protection Act which requires every state court order in which a military retirement is being divided as property to freeze the retired pay base and years of service on the date of the decree of divorce, dissolution, annulment, or legal separation. This rule, previously the minority approach amongst the various states, is now the uniform standard for any matters in which individuals are divorced on or after December 23, 2016.

On May 15, 2017, the U.S. Supreme Court announced its unanimous decision in *Howell v. Howell*,⁴ which held that a trial judge may not order a military retiree to indemnify his or her former spouse for reductions in payments from military retirements when the retiree elects to receive disability compensation from the Department of Veterans Affairs (VA). This case has significant impacts on how property should be distributed in the case of disabled veterans and may signal the need to re-evaluate indemnification clauses to protect the spouse regarding other decisions made by military retirees, such as electing the lump sum option under the BRS.

The BRS is the new military retirement system that was implemented on January 1, 2018. The system is designed to ensure that more service members leave the military with retirement savings, as compared to the pre-2018 (legacy) system which requires twenty years of qualifying military service for service members to earn a pension. The BRS consists of both a defined benefit and a defined contribution component. Service members who participate in the BRS will receive a traditional pension, matching to their TSP account (similar to a civilian 401(k)), the opportunity to elect a mid-career retention pay (known as "con-

³ 137 S. Ct. 1400 (2017).

⁴ *Id.*

tinuation pay”), and the choice to receive a portion of their retired pay as a lump sum.

Family law attorneys need to familiarize themselves with the “Frozen Benefit” rule and the BRS to advise their clients now how to divide disposable retired pay in a way that will be equitable given the changing state of the law. In regards to the BRS, of particular concern should be the continuation pay and the lump sum. Each of these pays allows the service member to decide whether he or she wants the pay and if he or she wants installment payments. Family law attorneys will need to draft the divorce decrees or dissolutions of marriage to anticipate all possible options to best protect their clients.

II. Historical Backdrop of the Uniformed Services Former Spouses’ Protection Act

In June 1981, the U.S. Supreme Court decided in *McCarty v. McCarty*⁵ that military retirement benefits were the sole property of individual service members and could not be divided in any regard as marital property in divorce cases. In that case, the Court left open the ability for Congress to enact statutory changes to remedy the injustice of the *McCarty* decision. In a moment of rare lucidity, Congress responded. That response was the Uniformed Services Former Spouses’ Protection Act (USFSPA), which was enacted by Congress in September 1982.⁶ The intent of Congress by enacting USFSPA was to reverse the *McCarty* decision by returning to the states the ability to divide military retired pay in domestic relation matters.

USFSPA was originally intended to be both a procedural scheme for dividing military retirements and a jurisdictional framework as to the authority vested in each state. For instance, USFSPA created the mechanism for direct pay from retired pay centers such as the Defense Finance and Accounting Service (DFAS) as well as established guidance for rules mandating certain benchmarks on how retired pay could be divided. Such benchmarks included the requirement of the ten-year marriage and service overlap for direct pay from the retired pay center (known as “the 10/10 rule”), and the definition of what was divis-

⁵ 453 U.S. 210 (1981).

⁶ 10 U.S.C. § 1408 (2017).

ible (i.e., disposable retired pay, which is the only portion that a state was not preempted from dividing in family law matters). Other components of the USFSPA were the jurisdictional mandates on which a particular state could divide a military retirement, based on domicile, residency (not due to military orders), and consent by the service member. USFSPA also set thresholds including a limit of 50% which a retired pay center could directly pay a former spouse when the pension was divided as property. Congress also revised the retirement rules, so that—depending on when one entered military service, before or after September 8, 1980—the retired pay of a service member would be based on either the final basic pay⁷ or the average monthly basic pay for the highest 36 months of creditable service.⁸

II. If It Is Not Broke, Let's Fix It: The Imposition of the Frozen Benefit Rule

On December 23, 2017, Congress passed The National Defense Authorization Act for Fiscal Year 2017 (NDAA 2017)⁹ which systematically changed the method for dividing military retirements. Previously, Congress had allowed the states to divide such retirements based on the states' particular methods on partitioning retirements, such as the *time rule*. The time rule is based on division of the actual retired pay of the member as of the date of retirement instead of at a frozen moment in time. The time rule formula routinely utilizes a marital fraction with the numerator being the period of marriage concurrent with pension service and the denominator being the total period of pension service.¹⁰ Casting aside the approaches developed and implemented by the state over decades of experience, and ignoring the expertise of the states in deciding how to divide military retired pay, Congress decided to create a uniform and rigid standard for dividing

⁷ 10 U.S.C. § 1406.

⁸ 10 U.S.C. § 1407.

⁹ National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114–328, § 641, 130 Stat. 2000 (2017)

¹⁰ See *In re Hunt*, 909 P.2d 525 (Colo. 1995); *Bangs v. Bangs*, 475 A.2d 1214 (Md. Ct. Spec. App. 1984); *Gemma v. Gemma*, 778 P.2d 429 (Nev. 1989); *Seifert v. Seifert*, 346 S.E.2d 504, 508 (N.C. Ct. App. 1986), *aff'd on other grounds*, 354 S.E.2d 506 (N.C. 1987); *Majauskas v. Majauskas*, 463 N.E.2d 15, 474 N.Y.S.2d 699 (N.Y. 1984).

military retirements in all states based on a hypothetical retirement on the date of divorce, using the service member's "High-3" pay and years of service as of that date. The High-3 is the retired pay calculated by taking the monthly amount that is the average of the service member's highest 36 months of basic pay.¹¹ This change dramatically alters the manner in which most states have been dividing military retirements. Until the passage of the "Frozen Benefit Rule," only Texas, Florida, Tennessee, Oklahoma, and Kentucky had a similar way of dividing military retirements.

While previous discussions were held in Congress regarding the fixing of retired pay at divorce, to ensure that former spouses did not benefit from subsequent years of service or promotions, the actual creation of the "Frozen Benefit Rule" originated with a Congressman in Oklahoma named Lt. Col. Steve Russell. Representative Russell pushed for this legislation based on attempting to mirror what his state did on such matters as well as under the ill-conceived belief that former spouses were unfairly reaping the benefits of military retirements in short-term marriages. In April 2016, he introduced amendments to the House Bill 4909 that included the provisions for the "Frozen Benefit Rule." According to Representative Russell:

Top priority in the NDAA is to support our warriors defending our Republic. We must ensure that the men and women tasked with defending our nation have the tools and support they need to be successful, or we are doing our enemies' job for them. The missions of our warriors are inherently risky, but as a member of the Armed Services Committee, and as a former combat commander, we must mitigate any risk to the accomplishment of their tasks. While not perfect, we are at least providing the tools to them with this authorization.¹²

What Representative Russell did not fully understand is that the rewrite of the definition of disposable retired pay to require a "Frozen Benefit Rule" would have inequitable effects on former spouses. In spite of this and without any hearings, Representative Russell's amendment eventually made its way to the Senate. The bill that eventually became law was introduced in May 2016 in

¹¹ 10 U.S.C. § 1407.

¹² Steve Russell, *FY17 NDAA Passes HASC with 11 Russell Amendments*, <https://russell.house.gov/media-center/press-releases/fy17-ndaa-passes-hasc-11-russell-amendments> (last visited Feb. 19, 2018).

the U.S. Senate and passed the Senate in June 2016 and the House in July 2016. The U.S. House of Representatives issued a conference report on November 30, 2016 to accompany Senate Bill 2943; twenty-three days later, the “Frozen Benefit Rule” took effect when President Barack Obama signed it into law.

The new rule applies to those service members still serving (active-duty, National Guard or Reserves) who are divorced after December 23, 2016. The new definition of *disposable retired pay* is as follows: The amount of basic pay payable to the member for the member’s pay grade and years of service at the time of the court order, as increased by each cost-of-living adjustment that occurs between the court order and the time of the member’s retirement using the adjustment provisions in 10 U.S.C. § 1408. Thus, for all cases in which a still serving service member is not divorced as of December 23, 2016, the division of retired pay is the hypothetical retired pay attributable to the rank and years of service of the military member at the date of divorce. It should be noted that the new law does not affect cases in which a service member is already retired. In those circumstances, the matter is handled as previously ordered since the rank and years of service are fixed at retirement.

The new rule requires that certain information be included in the military pension division order; the data will vary based on the service member’s “pay entry base date” and whether the service member will retire from active duty (a “regular retirement”) or from the National Guard or Reserves (a “non-regular retirement”). Thus, in cases where the service member entered service on or after September 8, 1980, the order must not only provide the fixed amount, percentage, formula, or hypothetical that the former spouse is awarded, it also must state the member’s High-3 amount at the time of divorce (stated in a specified monthly amount), and the member’s years of creditable service at the time of divorce or, in the case of Guard and Reserve members, the total reserve points at divorce. If the court order does not include those specifics, it will be rejected by the retired pay center.

The biggest inequity for former spouses resulting from the “Frozen Benefit Rule” is the potential for a “double discount.” When the benefit to be divided with the former spouse is frozen at the rank and years of service at the time of the divorce but the

remainder of the division is based on years of marital pension service divided by total pension service years, this causes a “double discount.” Prior to the passage of the “Frozen Benefit Rule,” the years of marital pension service were divided by service years only up to the date of divorce in five states. *Douglas v. Douglas*¹³ highlights the issue of the double discount. In *Douglas*, the Texas Court of Appeals proffered that accepting the service member’s contention that the denominator should be total years of service would impermissibly diminish the former spouse’s share acquired during the parties’ marriage.

DFAS, fortunately, has written guidance to the implementation of the “Frozen Benefit Rule” in the Department of Defense Financial Management Regulations, published in June 2017.¹⁴ These regulations set out the guidelines that DFAS utilizes in implementing the changes made under the NDAA 2017, including sample language that could be used when drafting and submitting military pension division orders. The published rules clearly indicate that the “Frozen Benefit” applies at the time of the divorce. The rules give no consideration, however, to the double discount inequities mentioned above, as well as the interplay with how the “Frozen Benefit” component will affect valuations of military retirements. Further, the regulations do address how the date of divorce “Frozen Benefit” relates with the date of valuation for property division, which may be a date (e.g., date of separation) different from the date of divorce. Those remaining issues are left for the state legislatures and state appellate courts to address.

Congress, in realizing that it was not clear as to the wording of the “Frozen Benefit Rule,” enacted amendments in the NDAA 2018 that clear up the language problems found in NDAA 2017. The changes included revising section (a)(4)(B) of 10 U.S.C. § 1408 to reflect that disposable retired pay is based on

¹³ *Douglas v. Douglas*, 454 S.W.3d 591, 595-600 (Tex. App. 2014), citing *Berry v. Berry*, 647 S.W.2d 945, 946-47 (Tex. 1983). See also *Dziamko v. Chuhaj*, 996 A.2d 893, 903 (Md. Ct. Spec. App. 2010) (explanation of results from denominator of marital fraction from a marriage that ends upon divorce versus one that ends upon retirement).

¹⁴ Dep’t of Defense, *Former Spouse Payments from Retired Pay*, 7000.14-R, vol. 7b, ch. 29 (June 2017), http://comptroller.defense.gov/Portals/45/documents/fmr/current/07b/07b_29.pdf.

“the amount of retired pay to which the member would have been entitled using the member’s retired pay base and years of service on the date of the decree of divorce, dissolution, annulment, or legal separation.”¹⁵ On December 12, 2017, President Trump signed those specific statutory changes into law.¹⁶

III. Et Tu, Disability Indemnification?

When it initially defined “disposable retired pay,” Congress specifically excluded any amount received for disability compensation from the Department of Veterans Affairs under Title 38 of the U.S. Code; such amounts are to be subtracted from gross retired pay in arriving at disposable retired pay.¹⁷ VA disability pay (i.e., payment for disability compensation made by the U.S. Department of Veterans Affairs) is often a cause of a reduction in the former spouse’s share of the military pension. This option is always beneficial to the military retiree, since it is non-taxable pay. However, the VA disability compensation is never subject to property division in a divorce because it is excluded from the definition of disposable retired pay. Specifically:

The term “disposable retired pay” means the total monthly retired pay to which a member is entitled less amounts which . . . (B) are deducted from the retired pay of such member as a result of . . . a waiver or retired pay required by law in order to receive compensation under [T]itle 5 or [T]itle 38.¹⁸

The Act further states: “Subject to the limitations of this section, a court may treat disposable retired pay payable to a member . . . either as property solely of the member or as property of the member and his spouse in accordance with the laws of the jurisdiction of such court.”¹⁹

In 1989 in *Mansell v. Mansell*,²⁰ the U.S. Supreme Court held that the USFSPA did not result in a total elimination of federal preemption for what was divisible for military pensions. In

¹⁵ *Nat’l Defense Authorization Act for Fiscal Year 2018*, H.R. REP. NO. 2810, at 350-51 (Conf. Rep.), <http://docs.house.gov/bills/thisweek/20171113/HRPT-115-HR2810.pdf>.

¹⁶ *Nat’l Defense Authorization Act for Fiscal Year 2018*, H.R. 2810, 115th Cong. § 624, <https://www.congress.gov/bill/115th-congress/house-bill/2810/text> (last visited Feb. 19, 2018) .

¹⁷ 10 U.S.C. § 1408 (a)(4).

¹⁸ 10 U.S.C. § 1408 (a)(4).

¹⁹ 10 U.S.C. § 1408 (c)(1).

²⁰ 490 U.S. 581 (1989).

analyzing the precise language of the USFSPA, the Court held that state courts could only divide non-disability military retired pay.

For many years, state courts ruled that the *Mansell* mandate and its prohibition of indemnification only applied to pension division at divorce.²¹ In case after case they found that when a VA waiver occurred after the divorce, the courts were free to order the retiree to reimburse the former spouse for the amount lost due to the dollar-for-dollar reduction in retired pay which comes with a VA disability compensation election.²² That approach ended on May 15, 2017. On that date, the U.S. Supreme Court announced its unanimous decision in *Howell v. Howell*,²³ which held that a trial judge may not order a military retiree to indemnify his or her former spouse for a reduction in military retired pay when the retiree elects to receive disability compensation from the VA, even if it is years or decades after the date of divorce.

The facts surrounding the *Howell* decision involved a 1991 Arizona order that awarded the former spouse 50% of the military retired pay. The service member retired a year later in 1992. In 2005, the military retiree applied for, and received, VA disability compensation for a service-connected injury. That receipt of VA disability compensation resulted in the former spouse's share of the military retirement being reduced. Of course, the retiree elected to receive VA disability since it was both non-taxable and unable to be paid out to the former spouse. The ex-husband objected to being ordered to make restitution, and he battled his

²¹ See also *Selitsch v. Selitsch* 492 S.W.3d 677 (Tenn. Ct. App. 2015)

²² See also *Surratt v. Surratt*, 148 S.W.3d 761 (Ark. Ct. App. 2004); *In re Marriage of Gaddis*, 957 P.2d 1010, 1013 (Ariz. Ct. App. 1997); *Blann v. Blann*, 971 So.2d 135 (Fla. Dist. Ct. App. 2007); *McHugh v. McHugh*, 861 P.2d 113 (Idaho Ct. App. 1993); *In re Marriage of Nielsen*, 792 N.E.2d 844 (Ill. App. Ct. 2003); *Dexter v. Dexter*, 661 A.2d 171 (Md. Ct. Spec. App. 1995); *Krapf v. Krapf*, 771 N.E.2d 819 (Mass. App. Ct. 2002); *Strassner v. Strassner*, 895 S.W.2d 614 (Mo. Ct. App. 1995); *Nelson v. Nelson*, 83 P.3d 889 (Okla. Ct. Civ. App. 2003); *Price v. Price*, 480 S.E.2d 92 (S.C. Ct. App. 1996); *Johnson v. Johnson*, 37 S.W.3d 892 (Tenn. 2001); *Hillyer v. Hillyer*, 59 S.W.3d 118 (Tenn. Ct. App. 2001); *Hisgen v. Hisgen*, 554 N.W.2d 494 (S.D. 1996); *Hadrych v. Hadrych*, 149 P.3d 593 (N.M. Ct. App. 2008); *Owen v. Owen*, 419 S.E.2d 267 (Va. Ct. App. 1992).

²³ 137 S. Ct. 1400.

former wife through the Arizona Court of Appeals and the state supreme court. The matter eventually came before the U.S. Supreme Court pursuant to a writ of certiorari. Of the state courts that have ruled on this, most held that it is unfair and inequitable for retirees – after the property settlement is done – to make a VA disability election that reduces the share or amount of retired pay that the former spouse receives. In providing a brief to the Court, the U.S. Solicitor General viewed the issue as one that should be decided strictly by the governing laws of the state of Arizona. Despite contrary state court opinions and the brief by the U.S. Solicitor General, the U.S. Supreme Court held that pursuant to the USFSPA, a judge may not order repayment to a former spouse of funds which she or he loses because the military retiree has elected to receive VA disability compensation.

The resonating effect was that indemnification, which had previously been allowed as an equitable option for trial courts across some jurisdictions, was effectively ended. The unfortunate implication of the *Howell* decision is that the retiree has sole authority to circumvent the ruling by the trial court in setting what the former spouse will receive, without permission of the judge who initially decided the pension division.

Courts and family law practitioners should be concerned by the *Howell* decision in that it allows parties to litigation to make unilateral decisions, without the approval of the judge or the consent of the former spouse, which essentially defeats the right of a former spouse to receive the amount of retired pay awarded by the court, and which overrules the judge's considered and sometimes delicate balancing of the interests of the parties in the distribution of property. By making a VA election for disability compensation, the retiree effectively circumvents the ruling by the trial court in setting what the former spouse will receive. And all of this is *after* the court has either approved the parties' settlement or else held a trial to make a fair, just, and equitable division of marital or community property, taking into account all of the facts and factors then present.

While not addressed specifically by the *Howell* Court, it is implicit that similar waivers for Combat Related Special Compensation (CRSC) would be subject to the same measures as electing VA disability compensation. Congress also provided Combat Related Special Compensation for service members who

have a disability of at least 10% directly related to the award of the Purple Heart decoration or a disability rated at 10% or higher related to combat, operations, or hazardous duty.²⁴ A retiree cannot receive both combat related disability pay (CRDP) and CRSC at the same time. Moreover, there is no waiver for CRSC. Rather, the election of CRSC causes the dollar-for-dollar waiver which existed before CRDP. That is, requests for indemnification due to former spouse reductions in military retirement funds based on elections for CRSC would also be subject to the ruling in *Howell*.

However, the former spouse may not be left without options. Justice Breyer commented that there is always alimony, as well as the VA waiver, to take into account when valuing the property when he stated “that a family court, when it first determines the value of a family’s assets, remains free to take account of the contingency that some military retirement pay might be waived, or, as the petitioner himself recognizes, take account of reductions in value when it calculates or recalculates the need for spousal support.”²⁵ Thus, there is the possibility of using compensatory spousal support as a possible remedial measure; this has been approved in some jurisdictions and may be available since the prohibitions for indemnification set out in the USFSPA related to *Howell* are for property awards, not spousal support determinations.

Compensatory spousal support was reviewed and approved in *In re Marriage of Jennings*,²⁶ a Washington Supreme Court decision. There the wife was awarded \$813 per month in the property division decree as her share of the husband’s military retirement. The husband’s subsequent VA waiver brought her payments down to only \$136 per month. When this occurred, she filed a motion asking the court to vacate the decree, modify it to provide her with spousal support payments equal to half of her husband’s disability payments, or clarify the decree to require the

²⁴ 10 U.S.C. § 1413a. *See also* DoDFMR, Vol. 7B, Ch. 64.

²⁵ *Howell*, 137 S. Ct. at 1406.

²⁶ *In re Marriage of Jennings*, 980 P.2d 1248 (Wash. 1999); *see also* Longanecker v. Longanecker, 782 So. 2d 406 (Fla. Dist. Ct. App. 2001). *But see In re Marriage of Cassinelli*, 4 Cal. App. 5th 1285, 210 Cal. Rptr. 3d 311 (Cal. Ct. App. 2016) (holding that the trial court could not use spousal support as a replacement for money lost to the former spouse because of a VA waiver).

husband to pay her no less than \$813 per month.²⁷ Based on the “extraordinary circumstances” presented, the court entered an order providing the wife with compensatory spousal support to make up for the loss caused by the VA waiver. The Washington Supreme Court approved the use of “compensatory spousal maintenance” that would not end if the ex-wife remarried.²⁸

A Missouri case, *Strassner v. Strassner*,²⁹ also considered compensatory spousal support, where the court pointed out that the record on appeal did not clearly demonstrate that the pension division and maintenance terms were interdependent; therefore, the issue needed to be remanded to determine what amount of adjusted maintenance was appropriate if these two terms were indeed interdependent. In *Longo v. Longo*, a Nebraska case, the trial court granted the wife an interest in the husband’s future military pension benefits and alimony of \$1 per year, modifiable only upon a potential reduction to the husband’s future military pension because of a future disability offset.³⁰

However, that possibility is state-specific and assumes that spousal support is abundantly available, when in fact, the nuances of a state’s domestic relations law may cause alimony to be limited, unavailable, or otherwise not applicable during the time in which the indemnification would need to occur. This situation may cause state legislatures to address the equities of their spousal support rules and laws to determine whether the court should be able to review and modify spousal support when disability awards eliminate military pensions from the property to be divided.

If the spousal support option is not available, the practitioner should consider revisiting the allocation of property to give the former spouse a greater share of other marital assets. Another remedial approach is to have the court revisit the property distribution in light of the retiree’s VA election to re-deter-

²⁷ *Jennings*, 980 P.2d at 1250-52.

²⁸ *Id.* at 1251. *But see In re Marriage of Perkins v. Perkins*, 26 P.3d 989 (Wash. Ct. App. 2001) (no dollar-for-dollar award of VA amount as alimony; remanded so that VA disability compensation may be considered as a factor, or as income for a determination of alimony; also containing an excellent summary of case law).

²⁹ 895 S.W.2d 614 (Mo. Ct. App. 1995).

³⁰ *Longo v. Longo*, 663 N.W.2d 604 (Neb. 2003).

mine what property is allocated to whom. This was approved in *McMahan v. McMahan*,³¹ a Florida case in which the trial judge awarded the wife a share of the husband's disability benefits. The Florida Court of Appeals determined that this violated the *Mansell* rule, but held that because the husband and wife anticipated when they executed their agreement that it would be honored by the courts, the case would be remanded for reconsideration of the entire equitable distribution scheme.³²

The availability of this option depends on whether the disability determination is known at the time of the property award or, in the event that it is a post-judgment occurrence, whether the jurisdiction allows a second look at prior property division awards. State legislatures should examine the equities of their property division laws to determine if revisits to such provisions should specifically address instances where disability awards eliminate military pensions from the property to be divided.

Finally, for prior division of military retirements as property, the former spouse may at least be able to prevent the retiree from reopening prior indemnification orders using the doctrine of *res judicata*. That affirmative defense typically prevents a subsequent attack on the prior order if no appeal was taken from the order. It is also known as "the law of the case." It seeks to promote judicial economy by barring the litigation of matters that could have been contested previously. In *Mansell*, when the case was remanded back to the state court, the state court ruled that the previously ordered series of payments to the former spouse would not cease. That is, the *Mansell* decision did not have any effect on the order itself based on the state court legal principle

³¹ *McMahan v. McMahan*, 567 So. 2d 976 (Fla. Dist. Ct. App. 1990).

³² *Id.* at 979–80. See also *Guerrero v. Guerrero*, 362 P.3d 432 (Alas. 2015), in which a judge refused to issue a military pension division order. The parties (with no attorney on either side) had signed a property division settlement and it was incorporated into the divorce decree. The trial court stated that the husband was receiving only military disability retired pay and VA disability compensation, neither one being divisible. The case was affirmed by the Alaska Supreme Court, but the property division was reopened because of exceptional circumstances, due to the parties' assumption that the wife was entitled to some portion of the husband's military retirement. The husband retired from the military with no disposable military retired pay. See also *Torwich v. Torwich*, 660 A.2d 1214 (N.J. Super. Ct. 1995); *White v. White*, 568 S.E.2d 283 (N.C. Ct. App. 2002), *aff'd*, 579 S.E.2d 248 (N.C. 2003).

of res judicata. When the service member appealed the issues of res judicata to the U.S. Supreme Court, the Court denied certiorari to hear the matter. Thus, that issue was never addressed by *Mansell*. Congress never amended the USFSPA to specifically address the issue left open in *Mansell*, but state court opinions that followed after *Mansell* demonstrated that the trial courts were unwilling to order payments from disability compensation directly; however, they would allow offsets and payments from other sources as a means to correct the inequity.³³

Using the history of the *Mansell* decision, it is possible that prior decisions before *Howell* as well as indemnification to which the service member consents, could be enforced through res judicata.

In sum, the *Howell* decision has effectively stripped the trial courts of power to correct inequities between division of military retirement in divorce and the reduction of retired pay available for division through the retiree's election of VA disability compensation. Ultimately, the decision provides military retirees with an option to diminish, or in some cases eliminate, the former spouse's marital share of the military retirement.

IV. The Blended Retirement System

The National Defense Authorization Act (NDAA) for Fiscal Year 2013 established the Military Compensation and Retirement Modernization Commission (MCRMC). The Commission made specific recommendations regarding modernizing pay and benefits for the Uniformed Services.³⁴ The first recommendation was an overhaul of the uniformed services retirement system, aimed specifically at helping service members save money earlier in their career and at providing retirement benefits to more service members.

Since World War II, the uniformed services have had a "defined benefit" retirement program; service members must serve a

³³ See also *Evans v. Evans*, 541 A.2d 648 (Md. Ct. Spec. App. 1988) (providing thorough analysis of res judicata, unappealed prior decisions, subject-matter jurisdiction, void and voidable judgments, collateral attack, and related issues).

³⁴ "Uniformed services" means the Army, Navy, Air Force, Marine Corps, and Coast Guard, plus the commissioned corps of the Public Health Service and the National Oceanic and Atmospheric Administration.

minimum of twenty creditable years to vest in the retirement system and become entitled to a pension. The MCRMC recommended a blended system to replace the current system. The blended system would retain a defined benefit pension — but one that is less valuable — and would incorporate a defined contribution component allowing service members to contribute to the Thrift Savings Plan (TSP), a tax-deferred savings account which is similar to a 401(k) plan, gaining additional funds through matching contributions from the government. The advantage of the proposed blended system was that service members would vest in the system after only two years, meaning that service members who do not complete a career in the uniformed services would still be incentivized to contribute to a portable retirement account. The blended system was designed by the MCRMC to be fiscally sustainable while still allowing the uniformed services to attract and retain qualified service members.³⁵

In 2016, Congress passed legislation to implement the proposed changes to the uniformed services retirement system.³⁶ Known as the Blended Retirement System (BRS), the new retirement system took effect on January 1, 2018, as to everyone who entered service on or after that date. Active-duty members entering service on or after January 1, 2006, but before January 1, 2018, and Reserve Component (RC) members with fewer than 4,320 retirement points on December 31, 2017, may choose between opting in to the new system and remaining in the current program (now known as the legacy retirement system). Active duty service members with 12 or more years of service on January 1, 2018, as measured from their Pay Entry Base Date, and RC members with 4,320 points or more on January 1, 2018, will remain “grandfathered” in the legacy system. Those service members who are eligible to opt-in to the BRS must make the decision in calendar year 2018. Anyone may access the on-line training about the BRS through Military OneSource.³⁷

³⁵ The Final Report of the MCRMC can be found at https://www.ngaus.org/sites/default/files/MCRMC%202015_0.pdf.

³⁶ Pub. L. No. 114-92 (Nov. 25, 2015), <https://gpo.gov/fdsys/pkg/PLAW-114publ92/pdf/PLAW-114publ92.pdf>.

³⁷ Military OneSource, www.militaryonesource.mil (last visited Feb. 21, 2018). Additional BRS information including pamphlets and PowerPoint

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To understand the BRS and to compare it to the legacy retirement system, it is important to know about the two uniformed services retirement systems and how they provide retirement security for those in uniform. The legacy retirement system requires service members to complete 20 years of creditable service to become vested in the system, that is, eligible to apply for retirement.³⁸ For active-duty service members, creditable service is 20 calendar years of service. For RC service members, 20 creditable years of service is 20 years during which the service member obtains at least 50 points toward their retirement.³⁹ RC service members (members of the National Guard or Reserves) receive 15 membership points per year for being affiliated with the Ready Reserve, one retirement point for each day that they are on active duty, and one point for each four-hour period of inactive duty service (inactive duty includes “drill periods”). Reserve service members may also obtain points by completing correspondence courses⁴⁰ and performing other duties. Although it may commence earlier, RC retired pay generally begins at age 60.⁴¹

The formula for determining military retired pay is laid out in 10 U.S.C. § 12739. When active-duty service members retire, they receive a monthly pension calculated by multiplying the average of the service member’s highest three years of pay (the retired pay base)⁴² by 2.5% times the years of service (the retired pay multiplier).⁴³ For example, assume that John Doe is an E-7 who served for at least three years as an E-7 and has a total of 21 creditable years. He retires in 2018 and his retired pay base is

presentations suitable for educational presentations can be found at militarypay.defense.gov/BlendedRetirement.

³⁸ 10 U.S.C. § 8911 (officers), § 8914 (enlisted members).

³⁹ 10 U.S.C. § 12731.

⁴⁰ 10 U.S.C. § 12732.

⁴¹ The NDAA 2008 implemented “reduced age retirement eligibility” for service members who perform active duty under certain circumstances. For each aggregate of 90 days (over any two consecutive fiscal years) of qualifying active duty performed after January 28, 2008, the service member will be eligible to receive retired pay 90 days earlier. Section 12731 outlines the age and service requirements to attain a non-regular (Reserve) retirement. 10 U.S.C. § 12731

⁴² 10 U.S.C. § 1407.

⁴³ 10 U.S.C. § 1409.

\$4,550.80 (\$4,423.80 monthly base pay in 2016 + \$4,566.60 monthly base pay in 2017 + \$4,662 monthly base pay in 2018 divided by 3). John's retired pay multiplier is 21 years of service x 2.5 = 52.5%. This means that he would receive retired pay based on 52.5% of his "High-Three" basic pay, or \$2,389.17 per month.⁴⁴

The calculation of RC retired pay is a bit more complicated than that used for a "regular retirement," that is, one from active duty. Assume that Roberta Roe is an E-7 who has served for at least three years as an E-7 and served a total of 21 satisfactory years. She applies for discharge in 2016 and she has a pay rate of \$4,550.80 for her retired pay base (this is obtained using the same calculations as the active duty example above). Her retired pay multiplier is the number of points she earned during her career divided by 360, multiplied by 2.5%. In this case, assume that Roberta earned 365 points during her first year of service—attending recruit training and her Military Occupational Specialty (MOS) school while on active duty—and then she earned the minimum 50 points each year thereafter for 20 years. Accordingly Roberta has 365 + 1,000 points or 1,365 retirement points. The number of points divided by 360 equals 3.79 – this is the equivalent of Roberta's years spent on active duty. This number is then multiplied by 2.5% to get the retired pay multiplier, that is, the percentage of her base pay that will establish the amount of the pension. In this case it is $3.79 \times 2.5 = 9.475\%$. The last step is to determine the monthly pension payment. This is the product of the retired pay base and the retired pay multiplier just established: $\$4,550.80 \times 9.475\% = \431.1883 per month total retired pay.⁴⁵

In comparison, the BRS consists of two components – a defined benefit and a defined contribution component. The defined benefit component is the same as the legacy retirement

⁴⁴ The calculations provided in this article are for illustration purposes and are not intended to represent final retired pay calculations as they would be paid by DFAS.

⁴⁵ If Roberta had applied for transfer to the Retired Reserve, her actual retired pay would be based on the current pay of an E-7 at the time the pension payments started, rather than the payment shown in the text above. Unlike discharged service members, however, she would have been subject to recall to the Reserves or to active duty after her transfer.

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system described above, except that the percentage contained in the retired pay multiplier is 2.0%, rather than 2.5%; thus the election of BRS means the service member has chosen a retirement plan that pays 20% less than if he or she had stayed in the legacy program, and this does not require the consent of a spouse or former spouse. The defined contribution component allows the service member to participate in the TSP with matching contributions from the government. Starting at 60 days of service,⁴⁶ the government will create a TSP account for every service member who participates in the BRS, and begin making automatic contributions at the rate of 1% of the service member’s base pay. Service members will be automatically enrolled in the TSP at the rate of 3% of their base pay; this means that 3% of a member’s base pay will be contributed into their TSP account unless the member exercises the option to increase or reduce this amount. Even if the service member reduces their TSP contribution to zero, the member will still receive the automatic 1% government contribution, as shown below. At two years of service, the government will match member contributions as follows:⁴⁷

| You Contribute | DoD Auto Contribution | DoD Matches | Total |
|-----------------------|------------------------------|--------------------|--------------|
| 0% | 1% | 0% | 1% |
| 1% | 1% | 1% | 3% |
| 2% | 1% | 2% | 5% |
| 3% | 1% | 3% | 7% |
| 4% | 1% | 3.5% | 8.5% |
| 5% | 1% | 4% | 10% |

From two years of service forward, members are vested in the BRS and can keep their DoD automatic contributions and matching amounts if they choose to separate from their uniformed service.

⁴⁶ Service members who “opt-in” to the BRS will receive 1% contributions to TSP and government matching of the contribution amount that they select when they opt-in to the BRS on the first pay period following their opt-in election.

⁴⁷ This matching scheme is the same as that currently offered to federal government civilian employees.

The BRS will also provide service members with mid-career Continuation Pay⁴⁸ between the beginning of the eighth and the start of the twelfth year of service. The timing for the offering of Continuation Pay will be determined by each uniformed service; in 2018, all of the services have agreed to offer Continuation Pay at the start of the twelfth year of service. The amount of Continuation Pay will range from 2.5 to 13 times the amount of monthly base pay for active duty service members and .5 to 6 times the amount of monthly base pay for RC service members. In 2018, the services are offering Continuation Pay at the minimum level, 2.5 percent for active service members and .5 percent for RC service members. Members who accept Continuation Pay will be required to serve for at least an additional three years on active duty or for RC members in the Selected Reserve (that is, those in drilling status). Service members may decline Continuation Pay and continue to serve in the uniformed services. Members who do not complete the three or more years of service required for receipt of Continuation Pay will face pro-rated recoupment.

The final component of the BRS is a provision which allows service members to take a lump-sum payment upon becoming eligible to receive retired pay.⁴⁹ Service members will have the option to elect to receive either 25% or 50% of their monthly pension payments between the date of retired pay eligibility and the age of Social Security payment eligibility when they retire from military service (currently age 67). Service members may choose to receive the lump sum in up to four equal payments. For example, our retiring E-7, John Doe, was to receive \$2,389.17 per month (before taxes). If he chooses to take a 50% lump sum in one payment, the amount of the lump sum would be $\$2,389.17 \times 12 \text{ months} \times 28 \text{ years}$ (the years between retirement and age 67 assuming that John Doe enlisted at age 18 and served for 21 years) = \$802,761.12 divided by 2 (50% lump sum) = \$401,380.56.

The lump sum is adjusted by a “discount rate” which is determined by combining the 10-year average of the Department of the Treasury High-Quality Market Corporate Bond Spot Rate Yield Curve at a 23-year maturity plus an adjustment factor intended to account for unique aspects of the military retirement

⁴⁸ 37 U.S.C. § 356.

⁴⁹ 10 U.S.C. § 1415.

program. The rate is published annually on June 1 and goes into effect on the following January 1; in 2018, the discount rate is 6.99%. Applying the 2018 discount rate to John Doe's lump sum amount reveals the approximate amount that will be discounted: $\$401,380.56 \times 6.99\% = \$28,056.5011$. Additionally, the lump sum calculation will factor in cost of living adjustments. John Doe will receive approximately $\$401,380.56 - \$28,056.5011 = \$373,324.059$.⁵⁰ Until he reaches age 67, John Doe, on top of the lump sum, will also receive half of his monthly pension amount or \$1,194.585. When he reaches age 67, the pension payments will return to the full amount.

Members who wish to elect the lump-sum option will complete the DD Form 2656 and return it to the Retired Pay Center at least 90 days before they are eligible to receive retired pay. A decision to elect the lump sum does not require spousal concurrence.

To compare the legacy and BRS retirement systems, the Department of Defense has developed a BRS calculator, which can be found on the BRS website.⁵¹ The calculator allows the user to input different years of service, terminal ranks, TSP contribution amounts, and to adjust the retirement if the service member elects Continuation Pay and/or the lump sum. The calculator is only an estimation tool and is not a substitute for hiring a professional to help the service member assess the value of a military retirement.

V. Family Law Impacts

The BRS will have a significant impact on family law, particularly during calendar year 2018, when service members will have the option to choose between the BRS and the legacy retirement system. As noted above, service members are able to opt-in to the BRS without the concurrence of their spouses. For service members who have already signed a separation agreement or received a divorce decree, dissolution of marriage, property division judgment, or court-ordered property settlement

⁵⁰ The lump sum received by John Doe is a taxable distribution. It is included in his taxable income for the year in which it is received.

⁵¹ Dep't of Defense, *Uniformed Services Blended Retirement System*, <http://militarypay.defense.gov/BlendedRetirement/> (last visited Feb. 24, 2018).

providing a percentage of retired pay to a former spouse, the choice to opt in to the new retirement system will directly impact the amount of retired pay that the former spouse receives. Service members or military spouses who file for divorce in cases where the service member is eligible to opt-in to the BRS will need to include provisions in their separation agreements and settlements to address how this choice affects the distribution of the marital or community-property share of the service member's military retired pay. The same issues will be present when the case is tried, not settled; the judge will need to be educated on the options and their impact.

Family law attorneys representing the spouse should insert an indemnification clause into the property settlement documents to ensure that, regardless of which retirement system the service member elects, the spouse's interests are protected. The following clause may suffice:

If the servicemember-husband elects to participate in the Blended Retirement System (BRS) in calendar year 2018, this will reduce the percentage in the "retired pay multiplier" under 10 U.S.C. § 1409 from 2.5% to 2.0%, a 20% reduction. The husband will reimburse and indemnify the wife fully for said loss through additional money payments to her upon his retirement or through an increased percentage of the military pension paid to her, pursuant to a further court order which shall be entered to implement this provision. The husband will promptly provide the wife with a copy of any record stating his decision to opt into the BRS. Immediately upon his receipt of any notice or notification regarding acceptance into the BRS, the husband will provide a copy of said record to Jane Doe.

Courts have held that while the service member cannot be stopped from changing the form of military retired pay, for example by electing to receive payments from the Department of Veterans Affairs in lieu of a portion of his military retired pay, the service member can be required to compensate the spouse for any decision that the service member makes that reduces the portion of the retirement benefits that the spouse receives.⁵² The *Howell* case discussed above has made it clear that a service member cannot be required to indemnify a spouse if the service

⁵² See, e.g., *Cunningham v. Cunningham*, 615 S.E.2d 675 (N.C. Ct. App. 2005); *Freeman v. Freeman*, 133 S.W. 3d 277 (Tex. App. 2003); *Jones v. Jones*, No. 0062-15-2, 2016 Va. App. LEXIS 29, 2016 WL 389492 (Va. Ct. App. Feb. 2, 2016).

member accepts VA payments in lieu of retirement payments. Accordingly, any indemnification clause needs to be carefully crafted to address the BRS rather than the general issue of indemnification; essentially the language should provide two different property distributions, one under the legacy system and one under the BRS.

VI. Distributing Assets Under the BRS

The BRS contains three types of pay that are not present in the legacy system: Continuation Pay, TSP matching, and the lump-sum option. Family law attorneys need to address these payments in any proposed property distribution settlement.

Continuation Pay serves two purposes: first, it is a mid-career retention pay designed to ensure the services retain critical personnel, and second, it is a part of a BRS participant's retirement compensation intended to compensate for the lower multiplier of 2.0 used to determine the annuity under the BRS. Service members who accept continuation pay are required to serve a minimum of three additional years in the uniformed services.

The services⁵³ have the ability to offer Continuation Pay tailored like incentive pay (i.e., offering higher amounts to members in critical occupational fields) or to offer Continuation Pay as a pay such that every service member gets the same amount. Due to the flexibility of Continuation Pay, an attorney working on a military divorce case where the service member has not yet accepted Continuation Pay must determine how the service member's branch of service is administering Continuation Pay and what choices the service member is planning to make with regard to the Continuation Pay. Based on how the service offers Continuation Pay, the attorney for the spouse can argue that the Continuation Pay is divisible marital property; the lawyer for the service member can put forth an argument that it is not marital or community property. These arguments are based on the structure and timing of Continuation Pay as well as on relevant state law precedents.

The services will have the ability to customize their Continuation Pay programs by modifying the following factors:

⁵³ The military departments, NOAA, the Public Health Services, and the Coast Guard.

- timing of Continuation Pay: paid between the conclusion of the eighth year of service and beginning of the twelfth year of service (measured from the Pay Entry Base Date);
- the percentage of Continuation Pay offered: between 2.5 and 13 times monthly base pay for active component service members and .5 and 6 times monthly base pay for Reserve members;
- whether to offer the same rate to all service member or to offer different amounts based on occupational skills;
- how much additional obligated service will be required upon acceptance of Continuation Pay – not less than three years.

Additionally, the service member may decide whether to accept a lump sum or up to four equal yearly distributions of Continuation Pay.

Continuation Pay, even installments that have not yet been received by the service member, may be seen as a divisible marital asset if the service member has applied for Continuation Pay. A service member's entitlement to a bonus vests at the time the member obligates himself or herself to further service, in this case by accepting the offer of Continuation Pay. Accordingly, if the service member accepts Continuation Pay prior to filing of the petition for dissolution (or other date for the classification and valuation of marital assets, according to state law), the court may choose to consider Continuation Pay as a marital asset to be divided between the spouses. In *Marcell v. Marcell*,⁵⁴ the Florida appellate court held that a re-enlistment bonus was marital property and that the bonus should be divided between the parties. Mr. Marcell had not yet received the full amount of the bonus because he elected to receive half of the bonus in yearly installment payments over a five-year period. The court held that it did not violate federal law to require Mr. Marcell to pay a portion of his yearly bonus payments to his former spouse.

⁵⁴ 842 So. 2d 945 (Fla. Dist. Ct. App. 2003).

Similarly, in *Boedeker v. Larson*,⁵⁵ the Virginia appellate court determined that Career Status Bonus (CSB) payments⁵⁶ were retirement benefits divisible upon divorce. The basis for the court's decision was the determination that taking the CSB payment compensated a service member now for a reduced amount of retired pay available in the future. Like the CSB payment, the Continuation Pay also serves the purpose of compensating a service member for the reduction in his or her retired pay in the future (i.e., BRS members receive the lower 2.0% in the retired pay multiplier when calculating the annuity portion of the pension). Accordingly, the Continuation Pay can be interpreted to constitute disposable retired pay, thus making it divisible upon divorce.

If the Continuation Pay were paid to the service member prior to the date of classification and valuation (e.g., the filing date in some states), it is unlikely that a court would consider it to be divisible marital property. In *Huffaker v. Huffaker*,⁵⁷ the court found that the service member used his CSB to pay marital debts. Accordingly, the wife was not awarded any property to offset the bonus received by the husband.

It is likely that Continuation Pay will be considered divisible as marital or community property in a separation agreement or divorce decree. But the particular administration of Continuation Pay in the service in question — as well as an informed argument from the attorneys involved in the case — will have an impact on whether the law in a specific state treats the entire amount as “acquired during the marriage” and thus divisible or not.

Sometimes the attorney for the former spouse needs to have an indemnification clause which directly and specifically addresses the above issue, that is, the portion of Continuation Pay which is marital or community property, as well as a provision for

⁵⁵ 605 S.E.2d 764 (Va. Ct. App. 2004).

⁵⁶ CSB gives uniformed service personnel the option to receive a \$30,000 lump sum payment at the 15-year active duty point in return for an agreement to remain on active duty for 20 years and become subject to the REDUX retirement plan (Retired Pay multiplier reduced by one percentage point for each year less than 30 year retirement and lifetime reduction in annual Retired Pay COLA increases).

⁵⁷ 823 N.W.2d 787 (S.D. 2012).

reimbursement to the former spouse. The following clause, appropriately edited, may suffice:

If John Doe, the servicemember-husband, receives Continuation Pay (CP) between the 8th and the 12th year of service, and the 8-12 year time period includes any period of time during the marriage of the parties, then the wife, Jane Doe, will be entitled to receive a pro-rated portion of the CP from the husband, representing the amount of time during the marriage when the CP was earned. This will be calculated as follows: 50% X X Continuation Pay amount. The "Continuation Pay amount" includes the sum of payments if this is taken in more than one installment. The husband shall make the payment to the wife no later than 30 days after the full CP payment, or- if made in installments - after each installment which he receives. As an example, assume that the husband receives \$20,000 as CP at the end of the tenth year of his military service, and the parties were married for 6 of the 10 years. The wife would be entitled to receive 50% X 6/10 X \$20,000 as her pro-rated share of the Continuation Pay. Immediately upon his receipt of any notice or notification regarding CP, John Doe will provide a copy of said record to Jane Doe.

TSP matching funds are divisible marital assets and should be treated by the family law attorney in the same manner as any other retirement investments, to the extent that the money is acquired during the marriage.⁵⁸ A TSP account can be divided by means of a decree of divorce, annulment, legal separation, or a court order or court-approved property settlement agreement incident to a divorce. A Qualified Domestic Relations Order (QDRO) is not used to divide a TSP account; QDROs are used for private or non-ERISA retirement plans, not government programs. To be honored by the TSP, a court order must meet the requirements outlined in the Court Orders and Powers of Attorney publication.⁵⁹

Regarding the lump-sum option, the divorce decree or separation agreement should divide both the annuity payment, generally in accordance with the USFSPA,⁶⁰ and the lump sum between the parties. If the service member elects the lump sum option, the service member's pension will revert to its full

⁵⁸ The service member can determine the value of his or her TSP accounts by visiting the TSP website at <https://www.tsp.gov/tsp/login.html> or by calling TSP at 1-800-TSP-YOU-FRST.

⁵⁹ *Thrift Savings Plan*, <https://www.tsp.gov/LifeEvents/personal/spouse/separation.html> (last visited Mar. 25, 2018).

⁶⁰ 10 U.S.C. § 1408.

amount when the service member reaches age 67, so any agreement or order should divide both the reduced pension amount paid until the member reaches full Social Security retirement age and the full pension amount paid thereafter.

When dividing retirement benefits that include the lump sum, keep in mind that the service member may elect to receive the lump sum in up to four equal payments. The number of payments elected by the service member will have significant tax consequences and may reduce the amount of money available to the spouse at the time of the divorce. Service members can elect the lump sum and the number of payments without spouse or former spouse concurrence.

The retired pay center will pay former spouses their portion of “disposable retired pay,” so long as the amount is set out as a percentage or a fixed dollar amount and the spouse was married to the service member for at least ten years during the service member’s military career. The Defense Finance and Accounting Service has maintained that the lump sum is “disposable retired pay” and is currently developing guidance regarding direct payments of the lump sum to former spouses. This guidance will be included in future updates to the DoDFMR, Volume 7B, Chapter 29, which governs former spouse payments from retired pay.⁶¹ These updates will include how lump sum payments to former spouses will be calculated in light of the “Frozen Benefit Rule.” It is not certain whether a direct payment of a former spouse’s portion of the lump sum will be possible under the BRS; accordingly, attorneys should insert a clause into the divorce decree or dissolution of marriage that allows for a revision of the document’s language in the event that the retired pay center requires specific language to provide direct payments to a qualifying former spouse. Alternatively, the decree or dissolution could order the service member to pay the spouse his or her share of the lump sum directly.

Counsel for the former spouse may believe that it is wise to include an indemnification clause in the settlement which clearly spells out the requirement that the former spouse must receive his or her share of the lump-sum amount. The following clause may be adapted and edited to that end:

⁶¹ See *supra* discussion in text at note 24.

If the servicemember-husband, John Doe, elects as part of the Blended Retirement System to take a part (25% or 50% of his retirement in a discounted lump sum, then -

a. He will cooperate in ensuring that the wife's portion of the lump-sum amount is paid to her as a share of disposable retired pay under 10 U.S.C. § 1408 (a)(4) from the retired pay center, and the wife will submit a court order to the pay center which complies with 10 U.S.C. § 1408 to obtain direct payments to her; or

b. If payment of the wife's portion of the lump-sum amount cannot be made through the retired pay center, then the husband shall promptly make full payment, without adjustment for taxes, to the wife upon his receipt of same.

VII. Reductions to Retired Pay

There are two programs which a retiree can elect that will reduce the amount of disposable retired pay available for division: payments from the Department of Veterans Affairs and the Survivor Benefit Program. Service members who have qualifying combat-related disabilities may apply to DFAS for Combat Related Special Compensation, as discussed above section III. Combat Related Special Compensation allows a veteran to waive retired pay in favor of tax-free compensation from the VA.⁶² If the service member elects the lump sum option under the BRS and Combat Related Special Compensation, the service member will receive the lump sum payment and the Combat Related Special Compensation payment, but the remaining 25 or 50% pension will be reduced each month until the amount withheld from the service member's monthly annuity payments equals the amount received as a lump sum.⁶³

To protect spouses of service members, the uniformed services offer the Survivor Benefit Program. This program allows the spouse to continue receiving 55% of the base amount of the service member's pension if the service member pre-deceases the former spouse. The cost for this death benefit is 6.5% of the base amount for retirees from active duty; Guard and Reserve retirees pay about 10%. The premium is deducted from the service member's pension each month. In accordance with 10 U.S.C. §§ 1447(6)(A) and 1452, as amended by Public Law 115-91, the NDAA 2018, a service member or retiree who elects the lump

⁶² 10 U.S.C. § 1413a.

⁶³ 38 U.S.C. § 5304.

sum option in accordance with 10 U.S.C. § 1415 will be covered at the full base amount of his or her unreduced retired pay without regard to a reduction in retired pay pursuant to the lump sum, unless the member elects (or previously elected, with spousal concurrence if married) to reduce or decline that coverage. If the service member elects to reduce coverage to less than the full base amount, the reduced coverage may be for any whole dollar amount that is greater than \$300 but less than the amount of the unreduced retired pay. Both the Survivor Benefit Program premium and the Combat Related Special Compensation offset will be subtracted from the monthly pension payment.

The above paragraphs demonstrate that there may be substantial reductions in retired pay which is to be shared with the former spouse. In addition to the Survivor Benefit Program premium—which is to provide death protection for the former spouse—the retiree may cause reductions by electing VA disability compensation when the VA rating is less than 50% and by applying for and receiving Combat Related Special Compensation. These amounts are subtractions from gross retired pay in arriving at disposable retired pay, which is what the retired pay center will divide with the former spouse. A further subtraction would occur if the service member elects the lump sum option. The attorney for the former spouse must be aware of these potential reductions and anticipate future problems when drafting a settlement or court order, to protect the client.

VIII. Conclusion

The changes to federal law described in this article have significantly reshaped the military pension division landscape. Attorneys for each party must be alert to the changes which have occurred in a one-year period: the “Frozen Benefit Rule,” re-statement and reinforcement of the immunity of retirees as to indemnification when there is a VA waiver, and multiple impacts on pay and retired pay due to the Blended Retirement System. Lawyers who choose to practice in the area of military pension division must watch out for the many hidden traps that exist. They need to recognize that it is critical to keep abreast of changes to military law to advocate competently and vigorously on behalf of service members and former spouses.

This article provides a starting point for the search for solutions and the examination of indemnification's continued validity in providing needed protections against unilateral changes. When necessary, counsel should ensure that a competent co-counsel or consultant joins the team, so that the member or retiree, spouse or former spouse, obtains qualified and knowledgeable advice on serious, complex and costly decisions involved in dividing the military pension.⁶⁴

⁶⁴ Additional materials can be found in the Silent Partner series of infoletters available on the Military Committee of the American Bar Association's Family Law section webpage at americanbar.org/dch/committee.cfm?com=FL115277.

