Dividing Military Retired Pay: Disability Payments and the Puzzle of the Parachute Pension

by
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I. Introduction

A. *Jane's Dilemma*

"It's a mystery to me!" exclaimed Jane Green to her lawyer. "My monthly share of Jack's military pension – that's my ex-husband – keeps jumping up and down, like a parachute in high winds. What's going on?!"

Her lawyer was just as puzzled. Jack had retired in January 2008, and the parties separated in March of that year. Shortly afterward, the court had entered a decree of legal separation, ordering Jack to pay Jane 50 percent of his pension, which came out to about $1,000 net per month. Usually a pension represents a source of continuous and stable income for the retirement years.

But the bank records Jane brought in told a different story. They showed the following monthly payments from Jack and – after garnishment began – from the Defense Finance and Accounting Service (DFAS)[1]:

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1 DFAS is the retired pay center for the Army, Navy, Air Force, Marine Corps and the National Guard and Reserves. Although there is a separate center for the Coast Guard, as well as for the commissioned corps of the Public Health Service and the National Oceanographic and Atmospheric Administration, DFAS will be used in this article, not only for the sake of brevity, but also because most uniformed services retired pay comes from DFAS.

2008	
January-April	$2,000 (net, shared between the parties)
May-July	$1,000 (paid to Jane by Jack directly)
July-October	$1,000 (DFAS garnishment of pension)
October	$780
November	$812

2009	
January-February	$872
March-August	$790
September-December	$960

2010	
January-May	$960
June-December	$1,060

2011	
January	$1,060
February onwards	-0-

This article will first describe the retired pay system of the armed forces and the relationship of disability compensation to pension payments. It will then examine the use of indemnification by agreement or court order in ameliorating the harsh impact of unilateral VA waivers on the pension share of the former spouse. Finally, it will analyze the new breed of disability pay waiver cases, those involving Combat-Related Special Compensation, comparing the results to the existing VA waiver cases and recommending settlement strategies.

B. *Military Retired Pay*

Those who have served in the uniformed services may receive retired pay after at least twenty years of active service.[2] The amount of longevity retired pay is based upon the number of

[2] While most servicemembers retire at between twenty and thirty years of service, some may stay on active duty for a total of forty years. The John Warner National Defense Authorization Act for FY2007 authorized the extension of military service to forty years. Pub. L. No. 109-364, § 601, 120 Stat. 2083

years served and, for most retirees today, on the average of the highest three consecutive years of pay.[3] Retired pay begins immediately for those who retire from active duty; for Guard and Reserve retirements, retired pay starts at age sixty in general.

The division of military retired pay at divorce with a spouse or former spouse is a crucial issue in most cases. Frequent moves, called "change of station" for military personnel, make stable and long-term employment by spouses very difficult. Few marital partners of military members can attain "career status" with an employer and acquire a substantial retirement account or pension plan. These moves and "the special pressures placed on the military spouse as a homemaker make it extremely difficult to pursue a career affording economic security, job skills and pension protection."[4]

The share of the former spouse[5] in a divorce case is determined by the law of marital or community property under state rules, although there is a federal overlay which must be understood. The usual share is 50 percent of the marital portion of the pension. The value of the military pension is ordinarily quite large, since military members can retire with as little as twenty years of service.[6]

To see how military pension division at divorce works, and how the amount of pension payments varies in certain cases, it is important to understand the nature and origin of the court's powers to distribute military retired pay. The ability of a state judge to divide military retirement benefits as community or

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(2006). A servicemember who retires with forty years of service would receive 100 percent of base pay as retired pay.

[3] For detailed information on retirement from active duty military service, *see* CHARLES A. HENNING, CONG. RESEARCH SERV., RL 34751, MILITARY RETIREMENT: BACKGROUND AND RECENT DEVELOPMENTS (2008). For additional information concerning Guard and Reserve retirement and service issues *see* LAWRENCE KAPP, CONG. RESEARCH SERV., RL30802, RESERVE COMPONENT PERSONNEL ISSUES: QUESTIONS AND ANSWERS (2010).

[4] S. REP. NO. 97-502 (1982), *reprinted in* 1982 U.S.C.C.A.N. 1596, 1601; *see also* Mansell v. Mansell, 490 U.S. 581, 594 (1989).

[5] Throughout this article, the former servicemember – the military retiree – will be referred to generally as male. The non-military marital partner will be referred to as the former spouse and as female. This is statistically true in almost every case reported.

[6] *See* Cunningham v. Cunningham, 615 S.E.2d 675, 679 (N.C. Ct. App. 2005).

marital property in a dissolution or divorce case has been the subject of several U.S. Supreme Court decisions. In 1981, the Court held in *McCarty v. McCarty*[7] that federal law precludes a state divorce court from dividing military retirement benefits.

The next year, Congress passed the Uniformed Services Former Spouses' Protection Act (USFSPA or "the Act") in response to this decision.[8] The Act allowed state courts to treat "disposable retired or retainer pay . . . 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."[9] USFSPA was enacted on February 1, 1983, and it applied to disposable retired pay payable after June 25, 1981, which was the date of the *McCarty* decision, and to decrees entered after that date.[10]

C. *Military Disabilities and the Pension*

The rigors of military service may result in illness, wounds, injuries, and other disabilities – both mental and physical – for the servicemember. Disability pay is a complicated issue. An individual who has served in the military can take advantage of two different systems for disability benefits.

Military disability retired pay is available for certain members who are sufficiently disabled that they cannot perform their assigned duties. If a servicemember has sufficient creditable military service, then he is placed on the "disability retired list" and begins to draw disability retired pay.[11]

Another system of disability benefits is administered by the Department of Veterans Affairs (VA). Instead of measuring the ability of the member to perform military duties, the VA disability compensation system measures the extent of disability and its effect on employability.[12] It is intended to cover injuries or dis-

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7 McCarty v. McCarty, 453 U.S. 210, 223 (1981).

8 10 U.S.C. § 1408.

9 Uniformed Services Former Spouses Protection Act, Pub. L. No. 97-252, 96 Stat. 730, 731 (1982) (codified as amended at 10 U.S.C. § 1408(c)(1) (1994)).

10 *Id*. at 737, § 1006; *see also* Mansell v. Mansell, 490 U.S. at 588 n.7.

11 *See generally* 10 U.S.C., Chapter 61.

12 Captain Eva M. Novak, *The Army Physical Disability System*, 112 MIL. L. REV. 273, 283 (1986) ("The VA rating reflects the degree of disability of a veteran returning to the civilian sector and reflects the extent of disability for civilian employment.").

eases that happened while on active duty, or were made worse by active service. Such conditions may be mental or physical, ranging from a sore knee due to routine physical training stateside to feelings of fear and anxiety from work as a combat medic in a combat zone.

The condition does not have to be combat-related, only "service-connected."[13] This means that it occurred while the servicemember or retiree was serving on active duty (assuming that it was not caused by his own misconduct).

Disability ratings range from 0 percent to 100 percent. The veteran who has a 0 percent rating has a service-connected condition; however, it does not interfere with his everyday work and living routine. On the other hand, one who has a 100 percent disability rating has one or more disabilities which interfere significantly with his work and lifestyle.

Having a disability does not mean that the individual cannot work. Most veterans who have a disability rating continue to work; there is no prohibition in statutes or regulations regarding continued employment.[14]

When the extent of a service-connected disability is not so great as to qualify our hypothetical retiree, Jack Green, for retirement with military disability retired pay, or if the disability occurs or is detected after retirement, he might elect to receive monthly payments from the VA. This occurs after a physical evaluation process in which he is assigned a disability rating for a condition (or combination of conditions) that is diagnosed and determined to be "service-connected."

Retirees have been able to receive disability benefits under Title 38 of the U.S. Code by waiving the same amount of retired pay.[15] Almost all retirees who could make this election have

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13 38 U.S.C. § 101(16) ("The term "service-connected" means, with respect to disability or death, that such disability was incurred or aggravated, or that the death resulted from a disability incurred or aggravated, in line of duty in the active military, naval, or air service.").

14 Only if a veteran were rated by the VA as "unemployable" would he run into difficulties in obtaining or continuing employment.

15 38 U.S.C. §§ 5304-5305. Until 2004, as is explained below, the "VA waiver" meant the same thing as the amount of the VA disability compensation received. If the Department of Veterans Affairs paid a retiree $400 a month as VA disability pay, then he was required to waive the same amount of retired pay, and his Retiree Account Statement, DD Form 7220, would show an entry

done so. The reason is that this option offers two distinct benefits for the servicemember who is contemplating a divorce.

First, this option results in a net increase in pay since the VA portion of monthly compensation is tax-free.[16] Thus, if Jack Green's pension (without disability) were $2,000 per month and his disability were evaluated as equivalent to $400 per month in VA disability pay, then he could waive $400 of his military pension to receive the $400 from the VA tax-free. His monthly payments still total $2,000, but only $1,600 is subject to taxes if he makes this choice. And, as will be shown below, only the taxable portion ("disposable retired pay") is subject to division with his ex-wife, Jane Green. This is shown in the following table:

Table 1

No Disability Waiver, Equal Division of Monthly Pension of $2,000		
	RETIREE	**FORMER SPOUSE**
Share for each party upon divorce	$1,000	$1,000
Taxes (assume total federal + state = 20%)	$200	$200
Total payment to each after tax	$800	$800
Disability Waiver, Equal Division of Monthly Pension of $2,000		
VA disability pay of $400. VA waiver =	($400)	
Disposable retired pay ($2,000-400)	$1,600	
Share *of the pension* for each party upon divorce	$800	$800
Taxes (assume total federal + state = 20%)	$160	$160
Net pension division after taxes	$640	$640
VA payment to RETIREE	$400	
Total payment to each after tax	$1,040	$640

VA disability pay (i.e., payment for disability compensation made by the U.S. Department of Veterans Affairs) is the usual cause of a reduction in the former spouse's share of the military

for "VA waiver" in the monthly amount of $400. While this is still true today for those with disability ratings of less than 50 percent, it does not apply if the individual has a rating of 50 percent or above. The advent of Concurrent Retirement and Disability Pay (CRDP) means that the "VA waiver" is a much smaller number, due to the restoration of waived retired pay. "VA waiver" is no longer synonymous with "VA disability compensation received."

16 38 U.S.C. § 5301(a).

pension. Taking this option is always beneficial to the military retiree, since it yields an increase in net income because of the non-taxable aspect of VA disability pay. However, the reduction of retired pay caused by this election frequently means increased litigation in divorce court since the VA disability compensation is not divisible as military retired pay. The VA disability compensation is not subject to division as property upon divorce because it is excluded from the definition of disposable retired pay under USFSPA. The Act specifies that:

> 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.[17]

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.[18]

In 1989, the U.S. Supreme Court examined the issue of division of military retired pay and the waiver of this benefit in favor of VA disability compensation. The case was *Mansell v. Mansell*.[19] There the Court held that USFSPA "does not grant state courts the power to treat as property divisible upon divorce military retirement pay that has been waived to receive veterans' disability benefits."[20]

Thus USFSPA and federal case law clearly state that disability benefits are not subject to distribution to a former spouse in divorce. Only that portion of retirement pension that constitutes a true longevity pension, rather than disability, can be considered a marital asset subject to distribution.

However it is taken, the VA compensation election usually wreaks havoc when the retiree's pension is subject to a garnishment order for part of "disposable retired pay" in favor of a former spouse due to separation or divorce. As soon as the election takes place at DFAS, the former spouse usually sees her share of

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17 10 U.S.C. § 1408 (a)(4).

18 10 U.S.C. § 1408 (c)(1).

19 Mansell v. Mansell, 490 U.S. 581 (1989).

20 *Id.* at 594-95.

divisible retired pay decrease, sometimes substantially. It may even disappear. The election is made solely by the retiree, and the consent of the spouse or former spouse plays no role in the decision, whether the parties are happily married or acrimoniously divorcing (or divorced). Nor is the judge's authorization required. Especially when the former spouse is counting on the continued receipt of a stable, predictable amount of divided military retired pay, the retiree's election of VA disability pay, in conjunction with an equivalent amount of money being removed from the retired pay that is subject to division upon divorce, can be catastrophic.

Resolving the riddle of rebounding pension payments is difficult and time-consuming. Often the client inquiry is marked with a sense of urgency. When the payments to Jane Green drop deeply (or stop abruptly), there may be immediate problems in making the mortgage payment, meeting the rent or paying the car loan. In addition, there is no notice from DFAS to Jane when her pension share drops. She is left to guess why the payments vary from month to month. Her letters, e-mails or telephone calls to DFAS will usually be met with stone-walling; disclosure of personal information by the federal government is limited due to Privacy Act[21] requirements. How to obtain the necessary information from DFAS (by consent and by court order) is shown at Appendix 1 at the end of this article. Also, Appendix 4 provides additional explanation as to the cause of the fluctuations encountered by Jane as shown on the second page of this article.

D. *Wrong, Rights and Remedy*

Since the *Mansell* decision, the waiver of military retired pay in favor of VA disability benefits has been a constant source of disputes and litigation between military retirees and former spouses, since such a waiver reduces the share or amount of the former spouse while paying the retiree additional funds tax-free. There is a clear trend among the states to protect the financial share of the former spouse from unilateral post-decree waivers.

The general approach of courts when confronted with a VA waiver that results in reduction of the former spouse's pension amount is to determine the wrong done and, in doing so, to rec-

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21 5 U.S.C. §§ 552, 552a.

ognize the rights involved. The final step is to pronounce a remedy.

The "wrong" is the decrease in payments to the former spouse coupled with the increase in money going to the military retiree and caused by the actions of the retiree. If the pension payments decreased for some neutral reason, such as inflation, or if there were an equal chance of the decrease affecting both of the parties, far fewer court would find rights violated and remedies in order. The problem with the VA waiver in these cases is that it is always an instance of "self-dealing" that benefits the retiree while it harms the former spouse and is initiated by the unilateral and voluntary choice of the retiree.[22] It is the retiree who decides on the rules, never the joint election of the parties, and that decision causes harm to the former spouse by reducing her monthly pension share payments or, in some cases, eliminating them.

Rights belong to both partners. As to the former military member, courts are quick to recognize that a retiree has the right to a form of compensation commensurate with his disabilities, whether payable from the Department of Veterans Affairs as VA disability compensation pursuant to Title 38, or from the Department of Defense as military disability retired pay.[23] No court has or would successfully bar a retiree from making such an election or require the retiree to change an election, due to the Supremacy Clause. Congress has given these rights to veterans, and no state can stand in the way of their exercise.

On the part of the former spouse, however, there are equally strong rights. These include the right to a stable and consistent source of payments as part of property division, whether by agreement or court order, the right to receive a share of the longevity retired pay of the retiree as contemplated at the time of the divorce or property settlement, and the right to freedom from interference by the unilateral and voluntary acts of the retiree that result in the diminution of her share. Courts facing this colli-

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22 The election is unilateral in that the former spouse does not consent to the change; were she to do so, she would be barred by estoppel from later complaining about the result. It is voluntary in that the retiree must file a waiver when eligible for retirement and also VA compensation. 38 U.S.C. § 5305.

23 Or even, as explained below, as Combat-Related Special Compensation under 10 U.S.C. § 1413a.

sion of rights conclude almost universally that the retiree has a right to exercise his election for disability payments, but that he may not in so doing cause harm to the former spouse and damage or destroy her rights. As stated by the New Mexico Court of Appeals, "[O]ne spouse should not be permitted to benefit economically in the division of property from a factor or contingency that could reduce the other spouse's share, if that factor or contingency is within the first party's complete control."[24] To allow one party, after the pronouncement of the divorce judgment (or negotiation and execution of the parties' property settlement), to reduce unilaterally the other party's award of retirement benefits would be inequitable. A deal is a deal.

E. *Remedies*

The last step in the process is to determine what remedy will best effectuate the above reconciliation of rights. Courts have used several different remedial approaches in reported decisions involving VA waivers. The remedy often depends on whether the underlying instrument contains reimbursement language, and whether it is the divorce decree or an incorporated property settlement.

For example, some of the cases deal with judgments which state that the military retiree will do nothing to reduce the former spouse's share of the pension, and will reimburse her if there is any such reduction.[25] The courts usually implement an indemnification requirement in such a case, so that the former spouse receives what she originally bargained for as to a share of the military pension. In these cases, the source of the funds may even be the disability pay itself, since general indemnification clauses do not state what funds must be used. They simply state that the retiree must "make up" the difference between what the parties initially agreed to and what the former spouse is currently receiving. The retiree therefore is free to reimburse the former spouse with any income or assets at his disposal. Thus there is no

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24 Scheidel v. Scheidel, 4 P.3d 670, 673 (N.M. Ct. App. 2000).

25 *E.g.,* Abernethy v. Fishkin, 699 So. 2d 235 (Fla.1997); *In re* Marriage of Strassner, 895 S.W.2d 614 (Mo. Ct. App.1995); Kramer v. Kramer, 567 N.W.2d 100 (Neb. 1997); Hisgen v. Hisgen, 554 N.W.2d 494 (S.D. 1996); Owen v. Owen, 419 S.E.2d 267 (Va. Ct. App. 1992); *In re* Marriage of Jennings, 958 P.2d 358 (Wash. Ct. App. 1998), *rev'd on other grounds*, 980 P.2d 1248 (Wash. 1999).

implicit division of the disability benefits in contravention of *Mansell v. Mansell*.[26]

In a growing number of cases, the courts reach the same result even in the absence of an express indemnity agreement.[27] In *White v. White*,[28] the former spouse appealed the denial of her motion for relief when the ex-husband waived military retired pay for VA disability compensation. The North Carolina Court of Appeals reversed the trial court and remanded the case for "reconfiguration" of the percentage award, to allow the former spouse to retrieve what money she had lost through the VA waiver. A similar remedy, the readjustment of the former spouse's share, is found in an Idaho case. The Idaho Court of Appeals in *McHugh v. McHugh*[29] was confronted with a case in which the parties had agreed that the pension payments to the former spouse would not be modified other than COLAs (cost-of-living adjustments). Then the military retiree waived a portion of his retired pay in favor of disability pay. The court approved the trial judge's decision to increase the former spouse's percentage of the remaining retirement to maintain her original level of payments.[30]

In *Price v. Price*,[31] the servicemember agreed to remain directly responsible for paying to the former spouse a percentage of his "gross monthly military retirement pay." This amount was his total retired pay before any reduction for disability pay. The court held that the military spouse "could not unilaterally de-

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26 *See, e.g.,* Abernethy v. Fishkin, 699 So. 2d 235, 240 (1997) ("Most significantly though, the indemnification provision achieved both of these purposes without requiring that the indemnification funds come from disability benefits. . . . Abernethy could pay Fishkin with any other available assets and, consequently, we conclude the final judgment did not violate *Mansell*.").

27 Blann v. Blann, 971 So. 2d 135 (Fla. Dist. Ct. App. 2007); Padot v. Padot, 891 So. 2d 1079, 1081-84 (Fla. Dist. Ct. App. 2004); Janovic v. Janovic, 814 So. 2d 1096 (Fla. Dist. Ct. App. 2002); Longanecker v. Longanecker, 782 So. 2d 406 (Fla. Dist. Ct. App. 2001); Bienvenue v. Bienvenue, 72 P.3d 531 (Haw. Ct. App. 2003); Blythe v. Blythe, No. 03CA8, 2004 WL 237958 (Ohio Ct. App. Feb. 4, 2004); Nelson v. Nelson, 83 P.3d 889 (Okla. Civ. App. 2003); Hillyer v. Hillyer, 59 S.W.3d 118 (Tenn. Ct. App. 2001).

28 White v. White, 568 S.E.2d 283 (N.C. Ct. App. 2002), *aff'd*, 579 S.E.2d 248 (N.C. 2003).

29 McHugh v. McHugh, 861 P.2d 113 (Idaho Ct. App. 1993).

30 *Id.* at 115.

31 Price v. Price, 480 S.E.2d 92 (S.C. Ct. App.1996).

prive [the non-military spouse] of the property granted to her pursuant to the Agreement" by waiving a portion of his retirement pay to increase his disability benefits.[32] The court found that the retiree spouse had "breached his obligations" under the agreement and should not be allowed to profit "from his own wrong."[33] Similarly, in *Dexter v. Dexter*,[34] the Maryland Court of Special Appeals used a breach of contract theory to award the non-military spouse past sums waived by the military spouse to obtain disability benefits. A California case, *In re Marriage of Krempin*,[35] utilized a resulting trust theory to achieve the intended result.

A number of appellate courts have examined the waiver of retirement pay and resulting reduction in the pension payment to the non-military spouse and determined that this represented changed circumstances. In such a situation, some courts have permitted the trial judge to reassess spousal support payments or to reallocate the division of marital property.[36]

Numerous states have addressed the post-decree VA waiver situation. The large majority of states allow a judge to use equitable remedies to prevent a retiree from effecting a unilateral reduction of military retired pay granted to the other spouse in the settlement or divorce decree.[37] The claim of the military retiree

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32 *Id*. at 93.

33 *Id.* at 94.

34 Dexter v. Dexter, 661 A.2d 171 (Md. Ct. Spec. App. 1995). *See also* Allen v. Allen, 941 A.2d 510 (Md. 2008) (husband agreed to pay wife share of his retirement benefits; later he elected to receive disability severance pay in lieu of retirement; court held that he was under obligation to bring contractual promises to fruition, and that wife must be compensated for the payment for which she had bargained.).

35 *In re* Marriage of Krempin, 70 Cal. App. 4th 1008, 83 Cal. Rptr. 2d 134 (1999).

36 *E.g.,* Clauson v. Clauson, 831 P.2d 1257 (Alaska 1992); McMahan v. McMahan, 567 So. 2d 976 (Fla. Dist. Ct. App. 1990); Kramer v. Kramer, 567 N.W.2d 100 (Neb. 1997); Torwich v. Torwich, 660 A.2d 1214 (N.J. Super. Ct. App. Div. 1995); *In re* Marriage of Jennings, 958 P.2d 358 (Wash. Ct. App. 1998).

37 See, *e.g., In re* Marriage of Nielsen and Magrini, 792 N.E.2d 844 (Ill. App. Ct. 2003), (helding that "a party's vested interest in a military pension cannot be unilaterally diminished by an act of a military spouse" and the military retiree's waiver of retired pay for disability compensation "unilaterally diminished [the former wife's] interest [and] constitute[d] an impermissible

that he is somehow protected by USFSPA and the *Mansell* decision in his post-divorce election of VA benefits, and the resulting loss to the former spouse, should fail in most jurisdictions.[38]

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modification of a division of marital property."). The case was remanded for a determination of whether the ex-husband was able to fulfill his obligation to the ex-wife with assets other than his disability benefits. *Id*. at 849-50. In *Johnson v. Johnson*, 37 S.W.3d 892, 897-98 (Tenn. 2001), the Tennessee Supreme Court held that when a property settlement divides a military retiree's pension, his or her former spouse has a vested interest in the awarded portion of those benefits which cannot be reduced unilaterally by the retiree. In *Hadrych v. Hadrych*, 149 P.3d 593 (N.M. Ct. App. 2007), *cert. denied*, 152 P.3d 150 (N.M. 2007), the court stated that the former wife's interest in the pension was established by the divorce decree, and her interest was unconditional. The only fair and reasonable interpretation of the divorce decree is was that she was entitled to half of the pension, and she expected to receive this. By contrast, the argument of husband that he could cut his wife's pension benefits and avoid the purpose of the decree was not a reasonable interpretation of the final divorce decree. One may not unilaterally reduce the benefits established for the other party under a final decree or an agreement.

38 The court is likely to respond as the Colorado Court of Appeals did in a 2006 case:

> Many jurisdictions have recognized that the USFSPA does not limit the equitable authority of a state court to grant relief to the nonemployee spouse when military retirement pay previously divided in a dissolution action is converted to disability pay. *See In re* Marriage of Lodeski, . . . 107 P.3d [1097] at 1101 [(Colo. App. 2004)]; *see also Clauson v. Clauson,* 831 P.2d 1257 (Alaska 1992) (courts need not ignore economic consequences of military retiree's choice to waive retirement pay to receive disability); *Danielson v. Evans,* 201 Ariz. 401, 36 P.3d 749, 755 (Ct. App. 2001) (citing with approval *In re* Marriage of Gaddis, 191 Ariz. 467, 957 P.2d 1010 (Ct. App. 1997), (nothing in USFSPA suggests that court's final award of an interest in retirement pay must be altered when military retiree obtains postdecree civil service employment); *Surratt v. Surratt,* 85 Ark. App. 267, 148 S.W.3d 761, 767 (2004) (settlement agreement awarded wife vested property interest in her share of the military retirement benefits that husband could not unilaterally eliminate by waiving those benefits to receive disability benefits); *Janovic v. Janovic,* 814 So. 2d 1096, 1097 (Fla. Dist. Ct. App. 2002) (*Mansell* not violated because order does not distribute disability benefits, nor will husband be required to use such benefits to satisfy the enforcement order); *Black v. Black,* 2004 ME 21, 842 A.2d 1280, 1284-85 (Me. 2004) (USFSPA does not limit authority of state court to grant postjudgment relief when military retirement pay previously divided is converted to disability pay, so long as the relief awarded does not itself attempt to divide disability pay as marital property); *Krapf v. Krapf,* 439 Mass. 97, 786 N.E.2d 318, 325 (2003) (court of equity will

II. Congressional Developments Since 2003

Dollar-for-dollar waiver was the situation until 2004. Then two new actors appeared on the scene. In 2003, Congress passed legislation taking effect January 1, 2004, to allow concurrent receipt of both forms of payments – retired pay and disability benefits – for certain eligible retirees. The restoration of retired pay is known as Concurrent Retirement and Disability Pay (CRDP).[39]

Also beginning in 2003, Congress made a new form of special compensation available to a limited number of retirees. The benefits and definitions were expanded substantially in 2004. Called Combat-Related Special Compensation (CRSC),[40] these payments may now, under the 2004 revised rules, be made to those retirees with a disability of at least 10 percent directly related to the award of the Purple Heart decoration, or else a combat-related disability rated at least 10 percent (such as hazardous duty or training for combat), as is explained below.

Both of these have a substantial effect on the division of military retired pay. Both are complex and misunderstood – if not unknown – by civilian practitioners as well as many judge advocates.

A. *Concurrent Retirement and Disability Pay (CRDP)*

For those who have at least twenty years of qualifying military service and a VA disability rating of at least 50 percent, CRDP authorizes a ten-year phased elimination of the VA off-

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not sanction voluntary action by the husband that amounts to an evasion of the spirit of the bargain reached with the wife); *Johnson v. Johnson,* 37 S.W.3d 892, 897-98 (Tenn. 2001) (USFSPA not violated by preventing husband from taking action to frustrate wife's receipt of her vested interest in his military retirement benefits).

In re Marriage of Warkocz, 141 P.3d 926, 929-30 (Colo. App. 2006). The Alaska Supreme Court offered a similar statement in *Clauson v. Clauson*, "Neither the USFSPA nor prior Supreme Court decisions require our courts to completely ignore the economic consequences of a military retiree's decision to waive retirement pay in order to collect disability pay." Clauson v. Clauson, 831 P.2d 1257, 1263 (Alaska 1992).

39 10 U.S.C. § 1414.

40 10 U.S.C. § 1413a. The CRSC regulations are at Chapter 63, Volume 7B of the Department of Defense Financial Management Regulations (DoDFMR), effective May 31, 2006, Sections 6301-6310.

set.[41] Put in positive terms, this means – unless the disability rating is 100 percent – a ten-year period at the end of which the retiree will retrieve every dollar of the waived retired pay that he exchanged for VA disability compensation. The disability does *not* have to be combat-related. CRDP is the return of waived pension payments, so it has the attributes of those pension payments. It is taxable compensation, and it is automatic. No application is needed. It also is divisible with a former spouse under a military pension division order.

The eligible retiree will see his retirement pay increase each year until the phase-in period is complete in 2014, when the retiree will be receiving an additional amount that is equal to the amount of retired pay waived. The period of phase-in began in 2004, with the following initial amounts provided in 2004 as additional military retired pay in each month's retiree payment[42]:

Table 2

Disability % Rating	2004 Amount
100%	$750
90%	$500
80%	$350
70%	$250
60%	$125
50%	$100

Note that the phase-in is "front-loaded," not just 10 percent a year over ten years. In 2005, the individual received the amount shown above plus 10 percent of the difference between his remaining retired pay waiver and the amount shown above for 2004. In 2006 he received the amount paid in 2005, plus 20 percent of the difference between his remaining retired pay waiver and the 2004 amount shown above. CRDP increases the same way until full restoration in 2014.[43] Those retiring after 2004 but before 2014 receive a larger initial monthly increment of

41 The regulations for CRDP are found at Concurrent Retirement and Disability Payment (CRDP), Dep't of Defense Fin. Mgmt. Regulation, DoD 7000.14R, vol. 7B, ch. 64 (Sept. 2010).

42 10 U.S.C. §1414(c).

43 *Id.*

CRDP than shown in the table above, due to the schedule of additional amounts paid between 2004 and retirement. The restoration, as of 2011, is at about the 98 percent rate. Thus Table 1, for a case involving a 50 percent disability rating, might look like this as revised after CRDP:

Table 3

No Disability Waiver, Equal Division of Monthly Pension of $2,000		
	RETIREE	**FORMER SPOUSE**
Share for each party upon divorce	$1,000	$1,000
Taxes (assume total federal + state = 20%)	$200	$200
Total payment to each after tax	$800	$800
Disability Waiver, Equal Division of Monthly Pension of $2,000		
VA disability pay of $400. VA waiver =	($10)	
Disposable retired pay ($2,000-10)	$1,990	
Share *of the pension* for each party upon divorce	$995	$995
Taxes (assume total federal + state=20%)	$199	$199
Net pension division after taxes	$796	$796
VA payment to RETIREE	$400	
Total payment to each after tax	$1,196	$796

While the amounts at the bottom of each column are still not equal, the reduction that the former spouse suffers is only $4 a month, which will disappear in 2014, and the only substantial reason for the inequality at the bottom line is the additional VA disability pay which the veteran receives, over and above virtually all of his retired pay.

B. *Combat-Related Special Compensation (CRSC) Benefits*

Combat-Related Special Compensation is a benefit provided by Congress under Title 10 of the U.S. Code. It is available for those veterans who have a combat-related disability of at least 10 percent under certain conditions.[44] A disability is considered to be combat-related if it is attributable to an injury for which the servicemember was awarded the Purple Heart. A disability is also considered combat-related if it was incurred –

44 *See* 10 U.S.C. § 1413a.

a. as a direct result of armed conflict;
b. while engaged in hazardous service;
c. in the performance of duty under conditions simulating war; or
d. through an instrumentality of war.[45]

As examples, these conditions include injury or illness resulting from actual combat, simulations of war (e.g., gas mask training, field training exercises, direct-fire training and "confidence courses"), hazardous duty such as diving or parachuting, and instrumentalities of war (e.g., tanks, artillery, machine guns, military aircraft).[46] Since "combat-related" is service-specific, the application is sent to the retiree's branch of service, not to the Department of Defense.

CRSC is not longevity retired pay; it is an additional form of compensation for certain members of the armed forces. The statute states that "[p]ayments under this section are not retired pay."[47] Thus, CRSC payments are not divisible as marital or community property upon divorce.

The CRSC rates come from the VA tables and increase with the number of a retiree's dependents (spouse, spouse and child, etc.). Thus, to use 2010 rates, a 30 percent disability rating for an individual with no dependents is $376 a month. The no-dependents rate for a 40 percent disability rating is $541 per month. The amount for a veteran with a spouse and child is $453 if the rating is 30 percent and $644 for 40 percent. It goes up to a total of $2,932 for a veteran with a spouse and a child if the rating is 100 percent, and each additional child under age 18 adds $75 to the total.

C. *Additional Aspects of CRSC*

Once a CRSC application is approved, DFAS does the calculations and the decision-making for the retiree. A person who is qualified for CRDP and who is also qualified for CRSC may elect to receive CRDP or CRSC, but not both.[48] Election of

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45 10 U.S.C. § 1413a(e).

46 These conditions are defined at section 6302 of the CRSC regulations in the DoDFMR. There is further general information on CRSC at *www.hrc.army.mil/site/crsc/*.

47 10 U.S.C. § 1413(g).

48 10 U.S.C.S. §§ 1414(d)(1), 1413a(f).

CRSC stops the payment of CRDP that an individual is receiving. The potential hardships for former spouses due to CRSC elections are remarkable. CRSC is, in effect, like hitting the "RESET button." It automatically reverses the situation back to pre-CRDP days. Since CRDP is wiped out, the individual is now receiving a lower amount of retired pay (due to the dollar-for-dollar waiver requirement), he is still receiving VA disability compensation, and he is also receiving CRSC. The CRSC payment will be equal to the VA compensation if the VA disabilities are all combat-related; it will be less if some of the disabilities are not related to combat.

DFAS automatically makes the election for whichever payment – CRDP or CRSC – is most financially advantageous, in that it yields the highest cash flow. DFAS does not take into account that the retiree may have a property division garnishment in effect. If CRDP yields a larger amount, then that is what DFAS will choose. This means that, for example, if CRSC in a particular case were $500 and CRDP for the same year were $501, then DFAS would choose CRDP for the retiree, even though the CRDP is taxable and subject to a garnishment division with the ex-spouse.

A CRSC payment is retroactive to the date of filing of the VA claim or of the enabling legislation (the 2003 law for limited conditions or the 2004 expansion, for the conditions listed above), whichever is later. Retroactivity will cause problems for both parties. If the retiree has been getting CRDP and elects CRSC, there will be a one-time retroactive payment to him or her, and the money received under CRDP for that same period covered by the CRSC retroactive payment will be taken back. The CRDP pay-back will be subtracted from the retroactive CRSC payment that he receives.

If the retiree's former spouse has been receiving a share of the pension as property division, the share paid from CRDP must also be collected back from her or him. There are two possible results.

First, if the CRSC election results in *no further pension garnishment payments* to the former spouse, then DFAS will initiate a debt collection action against her, since there would no longer

be any continuing pension garnishment payments from which to deduct the CRDP "overpayments."[49]

On the other hand, if the CRSC election does not remove all the pension share garnishment, then the former spouse will still be subject to a collection action by DFAS. DFAS will recoup the "overpaid" funds from her, resulting in decreased future payments until the indebtedness is fully paid.

III. CRSC Final Points and Charts

Several final points about CRSC are worth mentioning. Unlike CRDP, which gradually increases over the years 2004 to 2014, there is no phase-in period for CRSC. Those retirees who are eligible will receive full CRSC payments as soon as their applications are approved, in addition to whatever VA disability compensation and unwaived retired pay they had been receiving.

While the statute states that CRSC is not retired pay,[50] thus making it exempt from pension division that would otherwise be authorized under USFSPA, there is no exemption in the statute for support. Thus CRSC is available for support determinations and for garnishment for alimony and child support.[51]

There is a maximum amount for CRSC. The CRSC payment cannot exceed the amount of the military retired pay waived for VA disability compensation.[52] In addition, unlike ordinary retired pay (including CRDP), CRSC is non-taxable; it is disability compensation, not retired pay.[53] Finally, the statute is not limited to those who retired from active duty. It includes Guard and Reserve personnel who have at least twenty qualifying years for retirement purposes.

A simplified way of understanding all of this information about comparisons is found on the following table:

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49 The former spouse may petition for waiver of the indebtedness. This is done on DD Form 2789, "Waiver/Remission of Indebtedness Application."

50 10 USC 1413a (g).

51 Combat-Related Special Compensation, Dep't of Defense Fin. Mgmt. Regulation, Vol. 7B, ch. 63, § 630104 (Nov. 2010).

52 10 USC 1413a (b)(2).

53 Combat-Related Special Compensation, Dep't of Defense Fin. Mgmt. Regulation, Vol. 7B, ch. 63, § 630105 (Nov. 2010).

Table 4

CRDP and CRSC – A Comparison	CRDP	CRSC
Type of disability required	Service-connected	Combat-related
Considered longevity retired pay	Yes	No
Divisible as property	Yes	No
Minimum disability rating required	50%	10%
Taxable	Yes	No
Phase-in	Yes*	No
Retroactive payment	No	Yes†
Increases with number of dependents	No	Yes‡
Available for support determinations, garnishments	Yes	Yes
Survivor benefit available	No	No

*Except for 100% disability cases
†Payment is retroactive to the date of filing of the VA claim.
‡If CRSC rating is 40% or more.

A. *CRDP and CRSC – the Election*

Eligible retirees can elect either CRDP or CRSC.[54] The election may be made once a year during the January open season.[55] This means that Jack Green can alternate annually between CRDP and CRSC.

If Jack alternated annually between the two forms of payment, Jane would receive her share of the pension (which includes CRDP) in one year, and then be told by DFAS that no CRDP funds were available in the next year, when Jack switched over to CRSC. And in the following year, Jack could change back to CRDP. The divisible pension would go up, then down, and then back up again. A summary of the changes that caused the variations in Jack Green's pension payments to Jane Green are shown at Appendix 4 to this article.

IV. CRDP – Not a New Entitlement

A recent case illustrates some of the confusion over what CRDP is. In the case of *Youngblood v. Youngblood*,[56] the Flor-

54 10 U.S.C. § 1414(d)(1).
55 *Id.* at § 1414(d)(2).
56 Youngblood v. Youngblood, 959 So. 2d 416 (Fla. Dist. Ct. App. 2007).

ida Court of Appeals reviewed a trial court contempt ruling involving CRDP. The retiree was receiving VA disability pay of $2,366 monthly; after the VA waiver, his military pension was $100 per month. The court order dividing the pension and awarding alimony provided that the wife would receive one-half of the husband's military retirement pay as marital property, and one-half of his VA waiver as permanent periodic alimony, for a total of $1,233 per month. This was done so that the former spouse would receive her full share of the retiree's military retirement as if no VA waiver had been taken.

Note that the alimony was expressed as a function of the *VA waiver* – not in terms of the VA disability pay itself. That was the problem at the heart of the case. Several years after the divorce and pension division, CRDP was enacted. The retiree began to receive increased military retired pay, beginning with the initial payment in 2004 of $750 per month (since the CRDP was merely restoration of retired pay). Commensurate with that increase of $750, the amount of the VA waiver dropped by that same amount, and so did the amount paid to the former spouse as alimony.

The ex-wife continued to receive the same aggregate amount each month, $1,233. A larger share of it was "pension division" than prior to the advent of CRDP. Still, she brought an action for contempt, claiming that the retiree should have to pay her one-half of the original retirement amount, one-half of the new CRDP amount *and* one-half of the original VA waiver.

The Court of Appeals reversed the trial court's order that found the retiree to be in contempt for failure to pay the additional amount of one-half of the CRDP, or $375 per month, to the former spouse and also ordered payment of arrears. In effect, the Court of Appeals found that the original order to pay one-half of the husband's military retired pay and one-half of his VA waiver only required payment of the same amount as was paid to the ex-wife ($1,233 per month) after CRDP was initiated. This is because the retired pay increased by the same amount as the VA waiver decreased.

The Court of Appeals reached a sound conclusion by classifying CRDP as a restoration of retirement benefits, rather than being an entirely new benefit. The ex-wife was not entitled to a share of CRDP, since it was contained within the disposable re-

tired pay in which she was sharing. To require a portion of CRDP would be double-dipping for her. The outcome stands for the proposition that the non-military former spouse should not automatically reap pro-rata rewards from a newly enacted benefit (or, perhaps more appropriately, by a congressionally approved restoration of a benefit previously denied) that the retiree receives, when that benefit is simply a new title for the restoration of a portion of waived retired pay.

V. Texas Tackles CRSC

CRSC presents a new problem for the courts since it is an entirely new benefit rather than a restoration of an existing but waived benefit (as with CRDP). Accordingly, in cases where the retiree elects CRSC and this reduces or eliminates the pension share for the former spouse, the litigation has centered on (a) the nature of the benefit itself (disability versus retirement); (b) whether state law allows for the division of CRSC as a disability benefit; and (c) whether the remedy of indemnification applies, as with VA waivers.

Texas was the first state to review CRSC in a pair of decisions, *Sharp v. Sharp*[57] and *Jackson v. Jackson.*[58] The former spouse did not fare well in either ruling.

In *Sharp*, the divorce decree from 1990 awarded the former spouse

> Fifty Percent (50%) of the monthly amount of the United States Air Force disposable retired or retainer pay to be paid as a result of [the retiree's] service in the United States Air Force, and Fifty Percent (50%) of all increases in the United States Air Force disposable retirement or retainer pay due to cost of living or other reasons, if, as, and when received.[59]

The retiree, a Vietnam veteran, had a 100 percent disability rating from the VA.[60] In 2007, he applied for and began receiving CRSC, which effectively reduced the ex-wife's share of his military pension.[61] She in turn filed a motion for enforcement and clarification, and further asked that he be held in contempt for

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57 Sharp v. Sharp, 314 S.W.3d 22 (Tex. App. 2009).

58 Jackson v. Jackson, 319 S.W.3d 76 (Tex. App. 2010).

59 *Sharp*, 314 S.W.3d at 22.

60 *Id.* at 23.

61 *Id.*

failure to pay her share of the military retired pay. She did not object to the fact that CRSC was paid in lieu of retirement pay, but she argued that the retiree should be required to reimburse her for the substitution of non-divisible VA payments for divisible CRDP. The trial court denied her motion and she appealed.

The Texas Court of Appeals analogized this case to the facts and results in a 2009 Texas Supreme Court decision, *Hagen v. Hagen.*[62] The only substantive difference was that, in *Hagen*, the benefit being sought by the former spouse was the retiree's VA disability pay, rather than CRSC. The *Hagen* court decided that, because the divorce decree did not award the ex-wife any amounts "calculated on" the gross or total retired pay before deductions, she was only entitled to part of the retired pay, and the retiree's pension did not include VA disability benefits.

The Court of Appeals in *Sharp* used similar reasoning in affirming the trial court's decision. Giving deference to the precise wording of the divorce decree and declining to expand its scope beyond what was necessary, the court noted that the divorce decree did not mention benefits other than "disposable retired or retainer pay" as divisible property. It was not written in terms of total retired pay or "gross retirement benefits. Thus the court chose to divide exactly what the trial judge selected for division, "disposable retired pay." The Court of Appeals pointed out that the federal statute states that CSRC is not "retired pay."[63] Because CRSC is not retirement pay, the divorce decree at issue did not divide CRSC that was or might become payable to the ex-wife. The appellate court concluded that the trial court properly denied the appellant's motions.

Sharp stands for the proposition that – when the decree is phrased as division of "disposable retired pay" or when the decree is silent as to indemnification – there is no implied obligation to reimburse a former spouse for reductions in retired pay due to a CRSC election. Similar situations, at least in Texas, will work against the non-military former spouse unless the drafting of the divorce decree or pension division order is very precise and advantageous to the former spouse's position. Such drafting means that either the former spouse is given a share of total or

62 Hagen v. Hagen, 282 S.W.3d 899 (Tex. 2009).

63 10 U.S.C. § 1413a(g).

gross retired pay, or else she is entitled to indemnification if the actions of the retiree effect a reduction for her.

In April 2010, the Texas Court of Appeals issued another CRSC decision in *Jackson v. Jackson*,[64] again ruling in favor of the military retiree in a case having a fact pattern similar to that of *Sharp.* Once again, the benefit to be divided was described as the retiree's "disposable retired or retainer pay." However, in this case a provision in the divorce decree appointed the retiree as the trustee for the benefit of the former spouse with respect to her interest in his retired or retainer pay.

The parties were divorced in 1994 and the appellant was awarded 39.58 percent of the retiree's Army disposable retired or retainer pay. The language of that pension division clause was nearly identical to the relevant provisions of the *Sharp* decree; however this decree also included the following clause:

> IT IS FURTHER ORDERED AND DECREED that LUGENE JACKSON is appointed trustee for the benefit of JACQUELINE JACKSON to the extent of JACQUELINE JACKSON'S interest in the United States Army disposable retired or retainer pay paid as a result of LUGENE JACKSON'S service in the United States Army, and LUGENE JACKSON is ORDERED to pay to JACQUELINE JACKSON her interest in that pay each month as it is received by LUGENE JACKSON and in no event later than the fifth day of each month in which LUGENE JACKSON receives that retirement pay beginning the fifth day of June, 1994. This paragraph applies to the extent that the Secretary of the Army or his designee fails to pay directly to JACQUELINE JACKSON her monthly entitlement as awarded in this decree, or any portion of that monthly entitlement.[65]

In 1999, the retiree received a 100 percent disability rating from the VA. Upon electing to receive VA disability pay, he waived an equivalent portion of his retired pay, which effectively eliminated any payments of retired pay to the former spouse. In 2004, when CRDP became available, the retiree began receiving payments, which increased his retired pay and the portion shared with the former spouse. Later that year, however, the retiree applied for and began receiving CRSC; the election of CRSC eliminated CRDP, since one cannot receive both.[66] This effectively cut the appellant off entirely from any payments from DFAS,

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64 319 S.W.3d at 77.

65 *Id.*

66 10 U.S.C.S. §§ 1414(d)(1), 1413a(f).

and it is this change – the election of CRSC in lieu of CRDP – that the former spouse alleged was wrongful conduct.

The former spouse filed her motion for enforcement of the original pension division order shortly thereafter, asserting that the retiree had a fiduciary duty to pay her an equivalent amount of what she was entitled to under the original decree, but this time based on his receipt of CRSC. Not surprisingly in light of *Sharp*, the trial court denied the ex-wife's motion, finding that the retiree was under no obligation to pay any specific amount or requiring him to indemnify his former spouse for any election that he might make that would reduce the amount she received from his retirement pay.

At the time of the former spouse's filing, the *Hagen* and *Sharp* cases had not yet been decided, so her motions were novel and untested in Texas. Even with those decisions, however, *Jackson* is still unique in that it addresses the issues of, first, whether a retiree can elect CRSC in lieu of CRDP, and second, whether a clause that imposes a fiduciary duty on the retiree with respect to his former wife's share of the retirement pay inherently precludes him from making such an election. The court of appeals rejected both of those propositions.

The appellate court reiterated the conclusion from *Sharp* that CRSC was not divisible. It noted that the decree divided only "disposable retired or retainer pay," and that these words of art are specifically defined by federal law, concluding that a state court is "precluded from dividing pay that was excluded from that definition."[67] In resolving the two issues mentioned above, the court of appeals effectively reviewed them in the aggregate. It stated that the "nature of the [fiduciary duty created by the trust provision] must be determined by the language used in the decree."[68] It went on to find that the retiree never actually incurred any obligations as a trustee because he never held any funds on behalf of the former spouse (DFAS paid her directly) and because his obligations only pertained to pay received as a result of his service, not for his disability.[69] Effectively, the court nullified the former spouse's argument regarding a fiduciary duty not to elect CRSC in lieu of CRDP. It found that without a

67 319 S.W.3d at 78.

68 *Id.*

69 *Id.*

clause in the decree prohibiting the retiree from making any election that waived disposable retired pay, there was no duty not to do so, and accordingly, no fiduciary duty under the trust provision would be interpreted as implying such a duty. The court succinctly stated:

> The divorce decree in the instant case awarded Jacqueline a percentage of Lugene's "disposable retired military pay." At the time the decree was signed, federal law had developed such that "disposable retired military pay" was defined by federal statute. Lugene was appointed trustee over Jacqueline's interest in "disposable retired military pay" that was actually paid as a result of Lugene's service. Since Lugene was never in receipt of any of Jacqueline's interest in disposable retired pay that was paid, he did not breach any fiduciary duty.[70]

Thus, in a series of related decisions, the Texas courts have essentially established a number of guiding precedents: First, CRSC (like VA disability pay) is not retired pay that is subject to division. Second, unless otherwise set forth in a division order (through division of gross retired pay or inclusion of an indemnification clause), the retiree is not prohibited from electing CRSC in lieu of CRDP, even if such election reduces the amount of retired pay that a former spouse receives. Third, even a fiduciary obligation set forth in a division order that only pertains generally to retired or retainer pay will not impose an obligation on the retiree restricting his or her ability to make such elections. Finally, courts will not imply any automatic indemnification to the former spouse in the foregoing scenarios without more explicit language in the division orders. At least in Texas, the appellate courts will likely interpret military pension division orders narrowly. In the absence of explicit provisions in the relevant provisions of those orders – for division of total or gross retirement, or for indemnification – they will not likely order an expansion of a non-military former spouse's interest in the retiree's retirement benefits or restitution for an amount lost due to the actions of the retiree.

A. *What Was Done; What Went Wrong*

The root problem in *Jackson* was not improper interpretation or analysis by the appellate court, but rather incorrect construction by the drafters of the settlement document. The

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70 *Id*. at 82.

trusteeship clause was flawed. It basically stated that the husband was to be the trustee for the wife's interest in the *disposable retired pay*; the husband was ordered to pay wife her interest in that pay each month as it was received by husband . . . *if* DFAS failed to pay wife her entitlement. Put even more simply: *If DFAS doesn't pay the wife and instead pays the husband, then he has a duty to pay her.*

Why was this clause ineffective? First of all, it picked the wrong target. *Disposable retired pay* (DRP) is the wrong thing to focus on when representing the former spouse. DRP is total or gross retired pay less VA waiver and the SBP premium. In other words, it is what is left after subtraction of amounts waived due to disability. Such a clause sets the sights too low. Counsel for the former spouse should concentrate on division of the total retired pay (less SBP premium, if that has been elected for her).

Second, it picked the wrong duty. It created a duty to pay wife only if DFAS did not pay her and instead paid the husband. While this might happen due to a computer error, or in the event that the wife did not tender an acceptable order to DFAS, it was *not the case* here. A proper order was tendered to the Defense Finance and Accounting Service, and DFAS complied. The wife was receiving her payments from DFAS. It's just that they were not what she had bargained for. She had expected to receive 39.58 percent of the husband's retired pay, which is what she received from May 1995 until May 1999, when the husband received a 100 percent VA disability rating, and that wiped out the pension share for the wife.

The defects with the military pension settlement clause could have been avoided. The draftsman for the military pension settlement clause should have *expanded* and *simplified* it. Expansion means referring to *total retired pay* instead of the less expansive *disposable retired pay*. Dividing total retired pay (less, when appropriate, the SBP premium) is always more advantageous to the former spouse, especially since DFAS will construe *any* pension division clause as meaning division of DRP.

Simplification means skipping the high-tone language about appointing the husband as trustee for the wife's interest in disposable retired pay. To keep it simple means to say only two things: first, the husband has a duty not to take any action that results in a pension share reduction for wife; and second, the hus-

band has a duty to reimburse her for any such reduction. Drafting a pension protection clause is really that simple.

Assembled properly, the pension protection clause would read something like this, when there is SBP coverage for the former spouse:

> *Wife shall receive 39.58 percent of the husband's total military retired pay less the SBP premium. Husband will take no action that results in a reduction of wife's share or amount of the pension, and he will reimburse her for any such reduction.*

B. *Louisiana Follows Suit*

In another recent case involving CRSC that parallels the ruling in *Sharp*, the Louisiana Court of Appeals in 2010 issued an opinion in *Brouillette v. Brouillette*,[71] affirming the trial court's ruling that because CRSC is disability pay and not a retired pay; the result was that a post-divorce Community Property Settlement Agreement (essentially, that state's equivalent of a property settlement agreement) providing for the division of the military retiree's retired pay would not be interpreted to include an implied division of the retiree's CRSC benefits.

In *Brouillette*, the parties divorced in 1986 and signed a Community Property Settlement Agreement under which, the former spouse would receive 47 percent of the retiree's military retirement benefits. Later, the retiree became eligible for and received CRSC. This eliminated any retirement payments to the former spouse.

The former spouse filed a motion for enforcement of the Community Property Settlement Agreement. The retiree filed a motion to dismiss claiming *res judicata*, which was granted by the trial court, and the former spouse appealed. The court of appeals, in hearing that first appeal, affirmed the trial court, but remanded for a determination of the intent of the retiree with respect to his retirement assignment when he executed the Community Property Settlement Agreement.[72]

On remand, the trial court found that the retiree had intended to provide to his former spouse 47 percent of the retirement benefits that he received from the U.S. Army and that this amount was not granted in exchange for waiver of future ali-

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71 51 So. 3d 898 (La. Ct. App. 2010).

72 Brouillette v. Brouillette, 18 So. 3d 756 (La. Ct. App. 2009).

mony. The former spouse appealed this ruling, arguing in part that CRSC should have been treated as retirement pay and not disability pay and, presumably, that the retiree's intent in making the election for (or applying for CRSC) was relevant somehow, if that intent was to deprive the former spouse of a portion of the retired pay.

After rejecting the former spouse's argument about treating CRSC as retired pay,[73] the court of appeals dealt with the "intent argument" as a procedural issue – whether the trial court erred in excluding a particular witness' testimony as to the retiree's intent. Yet it still decided against the former spouse. The court did not expressly make a finding with respect to the relevance of the retiree's intent in electing CRSC. Instead, it simply affirmed the trial court's decision to exclude a specific witness's (the retiree's daughter) testimony about the matter of intent.[74]

While *Brouillette* stands for the proposition that CRSC is not divisible because it is in the nature of disability pay and not retired pay, it would not be safe to rely on this case for guidance as to how the court would respond to more diverse fact patterns involving CRSC. Unlike the Texas cases discussed above, the *Brouillette* court directly and unguardedly addressed only the principal issue of whether CRSC was retired pay, leaving other matters, such as the relevance of the intent of the retiree in making his election and even the determination of CRSC's classification as disability pay, subject to various qualifications and trial court findings. Although one might conclude a broader impact of this case as favoring the retiree at the expense of the former spouse, prudence would dictate that practitioners avoid such a generalized conclusion, at least for the time being.

In this case, it is worth noting that some of the facts as laid out in the opinion seem to conflict with the statute and practice with respect CRSC. For example, the opinion states that upon

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73 With respect to the classification of CRSC, the court rejected the appellant's argument and cited the federal statute that identifies CRSC as not military retired pay (10 U.S.C. § 1413a(g)). The court stated that federal law is controlling in that determination. *Brouillette*, 18 So.3d at 760-61. The court referenced prior Louisiana case law holding that disability pay is not subject to that state's community property laws and, accordingly, shall not be divisible. *Id*.

74 *Id*.

receipt of CRSC, the retiree no longer received any retirement benefits from the Army[75] and that the appellant stopped receiving any retirement pay once CRSC started.[76] This is not necessarily true. The election of CRSC eliminates CRDP; only if the retiree's pension is entirely CRDP would this above result apply. If the combat-related portion of disability is relatively small and the VA disability pay is for a low rating, then CRDP will be lost, but the rest of the pension will remain.

The other ambiguity is that the opinion states that the ex-husband's retirement pay was being garnished and the former spouse's share was being paid to her by the VA. Retirement pay is paid to retirees and former spouses by DFAS, not by the VA, so this lends some credibility to the possibility that the retiree was actually receiving VA disability pay that was omitted from the facts in the opinion. That may explain these ambiguities in the recited facts but, in any case, the issues addressed by the court remain unaffected. Unfortunately, the court of appeals' opinion in an earlier appeal of this case does not go into sufficient detail on these ambiguities to shed any light on them.[77]

C. *Indiana – Bandini v. Bandini*

In October 2010 the Indiana Court of Appeals took a close look at a post-decree CRSC election in *Bandini v. Bandini*.[78] There the military retiree ("husband") had served 28 years in the Army and Army Reserve. He retired from the Army Reserve in 1995; however, his pension would not start until he turned sixty. After his retirement he was awarded VA benefits in 1997, and he applied for benefits for post-traumatic stress disorder (PTSD) in 2003. He was approved for PTSD benefits in late 2005.

The parties separated in 2004. A year later they reached a property settlement, which was filed and incorporated into the divorce decree. The March 2005 decree stated that the wife

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75 *Id*.

76 *Id*. at 757.

77 *Id*. at 756.

78 Bandini v. Bandini, 935 N.E.2d 253 (Ind. Ct. App. 2010).

would receive "1/2 (50%) of Husband's USAR military retirement/pension plan by QDRO, including survivor benefits."[79]

Upon the husband's attaining age sixty in January, 2008, he began to receive retired pay, and about three months later his former wife began to receive her share, in the amount of about $926 per month from DFAS. But the month before the ex-wife received her first check, the husband applied for Combat-Related Special Compensation. He was approved, and his new benefits reduced the ex-wife's share to about $548 per month, while increasing his nontaxable disability payments from $241 to $1006 monthly. After sending a demand letter to the retiree, the ex-wife's attorney filed a contempt motion in 2009.

The trial court found the husband in contempt for not paying the ex-wife during the two-month period when DFAS was processing the divorce decree for "direct payment" to her. It also found that the retiree had not notified his ex-wife about the CRSC, she did not consent to this change in military retirement benefits, and there was no contemplation of a waiver by the ex-husband of military retired pay, thus reducing the ex-wife's share of the pension. The trial court further found that the agreement was clear that the ex-wife would receive half of her husband's pension that was in place at the time of the decree, and that the husband's actions which changed the monthly amount that the ex-wife would receive resulted in an impermissible modification of the divorce decree, noting that the husband may not reduce unilaterally and voluntarily the ex-wife's share of the pension without her consent. The court declined to find the husband in contempt for electing to receive CRSC, since Congress authorized him to apply for and receive this benefit, and there was a genuine issue of law as to whether he would continue to owe ex-wife one-half of that benefit.

The court entered a judgment for the ex-wife for $11,369.71. This was the difference between half of the husband's gross retired pay and the amounts of retired pay that the ex-wife had received from DFAS. The judge ordered the husband to pay the

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[79] Note that a QDRO, or qualified domestic relations order, applies only to "qualified plans" and not to governmental or military retirement programs. While there is no single name applied to orders that allocate military retired pay, the most common labels used are "military pension division order" and "military retirement benefits order."

ex-wife half of his CRSC benefit within ten days of his receiving it, or else convert his benefits back to CRDP during the next open enrollment.[80]

The court of appeals affirmed in part. It found that the issue at stake involved the interpretation of a property settlement which gave the ex-wife half of the "military retirement/pension plan" of the husband. The settlement agreement contained no definition of the latter term, and the agreement made no reference to disability benefits, although the husband had been awarded VA disability benefits when the agreement was signed. More notably, the agreement made no reference to "disposable retired pay," the talismanic clause used by lawyers and DFAS to describe total retired pay less VA disability waiver. In this context, the court decided that "military retirement/pension plan" should be interpreted to mean the husband's gross retirement pay, before deductions for the SBP premium or VA disability waiver. Thus the judge at trial correctly concluded that the agreement was intended to distribute equally the husband's gross retired pay.[81]

Despite the proper meaning of what was to be divided between the parties, the court of appeals decided that the husband was correct in his argument that the trial judge lacked the power to enforce a division of gross retired pay – even by agreement – insofar as it divides pay that was waived for disability benefits (VA disability compensation or CRSC) awarded at or before the divorce decree, or that was reduced because of the SBP premium for the ex-wife's coverage. Both *Mansell* and *Bandini* dealt with pre-decree VA waivers, and *Mansell* held that the Uniformed

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80 Retirees may switch between CRSC and CRDP every January: "**Annual open season.—** The Secretary concerned shall provide for an annual period (referred to as an "open season") during which a person described in paragraph (1) shall have the right to make an election to change from receipt of special compensation in accordance with section 1413a of this title to receipt of retired pay in accordance with this section, or the reverse, as the case may be." 10 U.S.C. § 1414(d)(2).

81 The Court cited approvingly *Allen v. Allen*, 941 A.2d 510, 516 (Md. Ct. Spec. App. 2008), and *Johnson v. Johnson*, 37 S.W.3d 892, 896-97 (Tenn. 2001), in regard to interpretation of the language as referring to division of gross retired pay, distinguishing *Jackson v. Jackson*, 319 S.W.3d 76 (Tex. App. 2010), which involved a decree that awarded the former spouse a percentage of "disposable retired military pay."

Services Former Spouses' Protection Act does not give "state courts the power to treat as property divisible upon divorce military retirement pay that has been waived to receive veterans disability benefits."[82]

The Court of Appeals also stated that, pursuant to *Mansell*'s interpretation of USFSPA, a state court upon divorce may treat as divisible property only "disposable retired pay," not "total retired pay" (as the agreement in this case provided). Since the SBP premium is also subtracted from total retired pay to arrive at disposable retired pay,[83] it was error not to subtract the premium for SBP from the husband's total retired pay. The parties agreed on survivor benefits in this case, and the amount that was divided between them had to be decreased by the SBP premium pursuant to USFSPA's requirement of only dividing disposable retired pay at divorce.[84]

Thus the Indiana Court of Appeals began the *Bandini* opinion by upholding part of the husband's argument. It held:

> Indiana trial courts lack authority to enforce even an agreed-upon division of property insofar as it divides amounts of gross military retirement pay that were, previously to the decree, waived to receive disability benefits or elected to be deducted from gross pay as SBP costs to benefit the former spouse. Here, the trial court ordered Husband to pay Wife an amount equal to half of his gross retirement pay, prior to any deductions for his VA waiver and SBP costs. This was error because Husband's election to receive VA disability benefits, as well as his election of a SBP annuity of which Wife was the beneficiary, preceded the parties' dissolution decree. We therefore reverse the trial court's judgment insofar as it orders Husband to pay Wife amounts of his gross retirement pay corresponding to half of his (1) VA waiver preceding his election of CRSC benefits, and (2) SBP costs.[85]

The remainder of the *Bandini* decision, however, came down on the wife's side. Having disposed of the issue of a VA waiver executed before the divorce, the court turned its attention to post-decree waivers. It noted that the *Mansell* decision only limited the power of state courts to treat as property divisible *upon*

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82 *Mansell*, 490 U.S. at 594-95.

83 10 U.S.C. § 1408(a)(4)(D).

84 The same result prevailed in *In re* Marriage of Strassner, 895 S.W.2d 614 (Mo. Ct. App. 1995).

85 *Bandini,* 935 N.E.2d at 262.

divorce military retired pay waived for VA disability compensation. The court pointed out a number of state court decisions that, with similar facts, hold that *Mansell* and USFSPA do not preclude a judge from ordering reimbursement for a former spouse when his or her share of retired pay decreases due to a *post-decree* waiver of retired pay by the retiree.[86]

The court therefore held that neither USFSPA nor the *Mansell* decision barred the trial court's use of equitable remedies in ordering compensation to the wife for the loss that she suffered due to the post-decree election of CRSC in March 2008. In fact, the court noted that USFSPA states specifically that it is not intended to be "construed to relieve a member of liability for the payment of . . . other payments required by a court order" on the grounds that payments made out of disposable retired pay have exceeded fifty percent of the member's disposable retired pay."[87] In deciding that the trial court acted properly in ordering compensation for the wife for the post-decree waiver, the court said that "while Husband's election of CRSC was a right provided him by Congress, federal law did not give Husband the authority to simultaneously invoke that right *and* reduce the amounts received by Wife under the terms of the dissolution decree."[88]

In addition, the court pointed to the rule of finality in dissolution decrees. Indiana law bars changing the terms of divorce decrees and settlement agreements, and the parties' agreement also provided that no modification thereof would be valid unless done in writing and signed by the parties. The husband's unilateral actions "upset the delicate balance of property rights in which Wife acquired a vested interest when the agreement was incorporated into the final dissolution decree,"[89] and it violated

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86 The court cited *In re* Marriage of Krempin, 83 Cal. Rptr. 2d 134, 143 (Cal. Ct. App. 1999); *In re* Marriage of Warkocz, 141 P.3d 926, 929-30 (Colo. Ct. App. 2006); *Black v. Black*, 842 A.2d 1280, 1285 (Me. 2004); *Shelton v. Shelton*, 78 P.3d 507, 509-10 (Nev. 2003); *Whitfield v. Whitfield*, 862 A.2d 1187, 1192 (N.J. Super. Ct. App. Div. 2004); *Hadrych v. Hadrych*, 149 P.3d 593, 597 (N.M. Ct. App. 2006); and *Resare v. Resare*, 908 A.2d 1006, 1009-10 (R.I. 2006).

87 10 U.S.C. § 1408(e)(6).

88 *Bandini,* 935 N.E.2d at 263.

89 *Id.*

"strong Indiana policies" as to the finality of marital property divisions.[90]

In conclusion, the court held that a military retiree may not reduce the pension division payments granted at divorce to his or her former spouse by electing, subsequent to the divorce decree, to receive disability benefits instead of military retired pay. The court upheld the judge's order requiring the retiree to compensate his former spouse for the decrease in her share of retired pay due to his CRSC election.[91]

The court declined to require that the husband pay the wife 50 percent of his CRSC or else convert back to CRDP during the next open enrollment period, holding only that the husband was barred from reducing the wife's portion of the retirement. The court also noted that the husband was free to compensate the wife from any source of funds, and that "the trial court's order on remand need not and should not specify his CRSC benefit as the source of this compensation,"[92] presumably since disability benefits are exempt from attachment.[93]

D. *Something Old, Something New*

Hard on the heels of *Bandini*, the Michigan Court of Appeals tackled CRSC in a decision issued five weeks after the Indiana ruling. There were several similarities to the *Bandini* case.

As in *Bandini*, the share of the former spouse ("wife" hereafter) in *Megee v. Carmine*[94] was 50 percent of the pension of the

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90 The court noted several state court decisions which concluded that a vested interest in military retired pay may not be reduced by the retiree's unilateral post-decree waiver of retired pay for disability benefits, citing *Surratt v. Surratt*, 148 S.W.3d 761, 767 (Ark. Ct. App. 2004); *In re Marriage of Nielsen and Magrini*, 792 N.E.2d 844, 849 (Ill. App. Ct. 2003); *Black v. Black*, 842 A.2d 1280, 1286 (Me. 2004); *Hadrych v. Hadrych*, 149 P.3d 593, 598 (N.M. Ct. App. 2006); *Hodge v. Hodge*, 197 P.3d 511, 515-16 (Okla. Civ. App. 2008); and *Johnson v. Johnson*, 37 S.W.3d 892, 897-98 (Tenn. 2001).

91 *Bandini*, 935 N.E.2d at 264.

92 *Id*.

93 38 U.S.C. 5301; the court cited *Griffin v. Griffin*, 872 N.E.2d 653, 658 (Ind. Ct. App. 2007), in which the court found error in the trial judge's order which specified disability payments as the source of funds to be paid to the former spouse.

94 Megee v. Carmine, No. 292207, 2010 Mich. App. LEXIS 2153 (Nov. 16, 2010).

military retiree ("husband"), and the document to effectuate this was labeled a QDRO.[95] The 1989 decree was entered by consent of the parties and without a trial. In 2008 the husband's application for CRSC was approved, partly based on PTSD, and he began to receive Combat-Related Special Compensation. As the husband did in *Bandini*, the husband in *Megee* contended that *Mansell* and federal law provided him protection.

Finally, as in *Bandini*, the court found that the decree intended for the wife to receive half of the husband's pension, irrespective of what elections he chose to make; the judge essentially ordered the husband to turn over one-half of his CRSC payment to the wife.[96] When the husband moved for reconsideration, the judge denied the motion, ruling that "*Mansell* was inapplicable because there the disability benefits were already being received when the judgment of divorce was entered and the instant action entailed a post judgment election of disability benefits and waiver of retired pay."[97]

Unlike the situation in *Bandini*, the decree gave the wife 50 percent of the "disposable retirement or retainer pay of the husband," as opposed to 50 percent of "Husband's USAR military retirement/pension plan by QDRO, including survivor benefits." The decree also made provision for future elections that might harm the former spouse. It contained a statement that prevented the husband from making another benefit election "that would otherwise reduce the monthly pension allotment without the written consent [of defendant]."[98] Also unlike the facts in *Bandini*, the husband's CRSC election wiped out the wife's share of retired pay completely.

E. *Something Different. . .*

The court of appeals in *Megee* started its analysis, after a brief review of the federal statutes covering military retired pay, VA disability compensation, Combat-Related Special Compensation, and Concurrent Retirement and Disability Pay, with an incisive note regarding division of retired pay under USFSPA. The Act allows "disposable retired pay" to be divided, and this is de-

95 *See*, *supra* note 79.

96 *Id.* at *16.

97 *Id.* at *10.

98 *Megee,* No. 292207, 2010 Mich. App. LEXIS 2153, at *1.

fined as total monthly retired pay less certain deductions, chiefly those as a result of a waiver of retired pay under Title 5 or Title 38 (e.g., federal civil service or VA disability compensation).

The husband in *Megee* argued that, "once he became eligible for and selected CRSC by reason of his injuries sustained in service to his country, the disposable retirement pay subject to the QDRO was no longer subject to division."[99] The court of appeals responded by distinguishing between the funding source for CRSC and the VA waiver mentioned as a deduction in USFSPA. While payments of disability compensation are rooted in Title 38, CRSC payments are found in Title 10. The court points out, "[a]s will be explained below in our analysis of *Mansell*, which involved a waiver of retirement pay in favor of Title 38 VA disability benefits, the fact that CRSC is a Title 10 benefit is of some significance."[100]

Next the court examined what the U.S. Supreme Court did in *Mansell v. Mansell.* The Supreme Court was called upon to determine whether a state court could treat as property divisible upon divorce military retired pay that was waived to obtain VA disability benefits. The Supreme Court in that case said that USFSPA authorized state courts the authority to divide military retirement pay as property. However, the definitional section of the Act regarding "disposable retired pay" specifically excluded military retirement pay which was waived to obtain VA disability payments, a benefit found in Title 38. The portion of USFSPA which the Supreme Court quoted and relied upon was the definitional section, 10 U.S.C. 1408(a)(4)(B), which prohibits courts from considering as disposable retired pay amounts waived pursuant to law in order to receive compensation under Title 5 or Title 38. The court pointed out, "Once again, CRSC is compensation received under Title 10, and plaintiff here did not waive his right to retirement pay in order to receive compensation under Title 5 or 38, but rather to receive Title 10 compensation."[101]

The court then went on to state that all of the "envisioned" retired pay of the husband (that to which he was entitled, but which he had waived) could be divided without contravening

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99 *Id*. at *9.

100 *Id*. at *14.

101 *Id*. at *19.

USFSPA or its interpretation as found in the *Mansell* decision. This was because the Supreme Court did not address a waiver *under Title 10* of the U.S. Code in *Mansell*.[102] The court found that there is no bar to ordering the retiree to reimburse his ex-wife in an amount equal to 50 percent of his "envisioned" retirement pay as intended in the divorce judgment, after the retiree made a "unilateral and voluntary post judgment election to waive his retirement pay in favor of disability benefits contrary to the terms of the judgment."[103]

Note that here the court was using *Mansell* and USFSPA as arguments against the military retiree, exactly the opposite of how these authorities are used in virtually all VA waiver cases. Usually it is the military retiree who trots out the Act and the *Mansell* decision to use as barricades against the onslaught of the former spouse; he claims that the statute and the decision fully protect him and his right to make an election for VA payments, even if that reduces the payments to the former spouse. Here the court turned this tactic on its head, ruling that the law allowed the division of waived retired pay, which normally would have been prohibited under USFSPA, since the waiver was incident to receipt of Title 10 compensation (CRSC), not that under Title 5 or Title 38.

Not content with this bold rationale for a decision against the husband's actions, the court next laid out a litany of state court cases that supported the holding in *Megee*, noting that "a number of these cases did not involve judgment language, as is present here, requiring approval from the former spouse before the military spouse could make a different election, and plaintiff

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102 *Id*. at *2. ("[T]he *Mansell* decision actually supports making plaintiff [the husband]. . . pay defendant half of the retirement pay that he would be receiving but for his election to take CRSC. The *Mansell* Court found that waived retirement pay could not be divided as property. . . where the pay had been waived in favor of Title 38 VA disability benefits, given that the definition of "disposable retired pay" in 10 USC 1408(a)(4)(B) excludes. . . amounts waived in order to receive. . . Title 38 compensation. Under the reasoning. . . in *Mansell*, there would be no prohibition. . . against considering for division waived retirement pay under the USFSPA, as we are addressing a waiver of Title 10 CRSC not mentioned in § 1408(a)(4)(B). Thus, all of plaintiff's envisioned yet waived military retirement pay can be divided without offending the USFSPA or *Mansell*.")

103 *Id*.

here consented to the preapproval condition, yet did not honor it."[104]

Each of the dozen decisions cited by the court of appeals found that the retiree's actions were unjustified, that USFSPA and *Mansell* did not bar the courts from providing a remedy for post-judgment waivers of retired pay, and that it was within the powers of the courts to enforce the intended division of the military pension, regardless of waivers and the amount of disposable retired pay.[105] A summary of these cases, as well as others supporting the duty of indemnification (or other theories of reimbursement) can be found at Appendix 2 to this article.

Finally, before issuing its ruling, the Court touched on the two Texas cases involving CRSC and pension waivers which were handed down in 2010, *Sharp v. Sharp*,[106] and *Jackson v. Jackson*.[107] It brushed both of them aside, distinguishing them by stating, "The *Jackson* case like the *Sharp* case was examining the issue from the perspective of dividing and awarding the CRSC funds and not the approach that we and numerous other jurisdictions have chosen."[108] CRSC is clearly not retired pay.[109]

In its conclusion, the court in *Megee* made several forceful points about the problem arising from disability waivers. First of all, the court stated that a military retiree remains financially responsible to reimburse his former spouse in an amount equal to her share of the pension granted in the court order or settlement upon divorce, where the retiree's unilateral and voluntary post judgment election to waive retirement pay in favor of disability benefits is contrary to the terms of the divorce judgment. The court stated that this finds strong support in the case law from other jurisdictions, and this supported the decision of the court to

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104 *Id*. at *23.

105 The court noted that "there are a few cases ruling differently, see, e.g., *In re* Marriage of Pierce, 26 Kan App 2d [sic] 236, 240; 982 P2d 995 (1999) (finding no relief available for ex-wife after former husband waived his military retirement pay in favor of disability benefits), the overwhelming weight of the case law from other jurisdictions supports our resolution of this appeal. By this opinion, Michigan now joins those jurisdictions providing relief to the non-military spouse." *Megee,* No. 292207, 2010 Mich. App. LEXIS 2153, at *34.

106 314 S.W.3d 22 (Tex. App, 2010).

107 *Jackson v. Jackson*, 319 S.W.3d 76 (Tex. App. 2010).

108 *Megee*, 2010 Mich. App. LEXIS 2153 at *11.

109 10 U.S.C. § 1413a(g).

divide "waived" retirement pay to honor the terms and intent of the divorce judgment.

The court noted that it was not stating that a state court has the authority to divide CRSC, nor that the court may order a military retiree to pay the former spouse from CRSC funds. Rather, the funds paid to the former spouse can come from any source that the retiree chooses. Although the retiree may use CRSC funds to pay the former spouse, nothing requires him to do so.

Finally, the court further pointed out that the ordered "replacement" compensation relates to the retiree's pension share, not the disability pay which he is currently receiving. Since the retiree, once the election is made, will no longer actually be receiving the retirement pay, the court (or the parties) should regularly review what the retiree would have been receiving absent the waiver to determine whether any adjustments to the pension share for the former spouse are needed.[110]

Consistent with the *Bandini* decision, the Michigan Court of Appeals upheld the duty of compensation for the former spouse and stated that it was not requiring CRSC to be used for the source of reimbursement funds – any source could be chosen. The focus was on the waived retired pay, rather than on the amount of CRSC, since any amount of CRSC – even one dollar – would eliminate the CRDP which the retiree was receiving. The "review" noted by the court is an examination of what the husband's retired pay would be, but for the waiver. This would require the wife or her attorney to calculate what increases due to COLAs, if any, were occurring each year, thus adjusting upwards the payments of the "envisioned retirement pay" that no longer existed.

F. *Arkansas Weighs In*

Finally, in January 2011, the third appellate decision in four months upholding indemnification was issued by the Arkansas Court of Appeals. The facts in *Provencio v. Leding*[111] were similar to those in *Bandini* and *Megee*, except that the nonmilitary

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110 *Megee*, 2010 Mich. App. LEXIS 2153, at *35-36.

111 Provencio v. Leding, 2011 Ark. App. 53, No. CA10-312, 2011 Ark. App. LEXIS 74 (Ct. App. Jan. 26, 2011).

spouse in this case was awarded *all* of the retiree's military pension in their property settlement agreement. They were married for 21 years, divorcing in 1992. In 2007 the parties signed an agreed order which clarified that the former spouse was not entitled to the ex-husband's disability benefits, and it also provided that the ex-wife would receive all of the military retirement pay.

In 2008 the ex-wife filed a contempt motion, claiming that her former husband had "restructured" his retired pay so that he was receiving entirely disability pay and she was left with no pension amount at all. The ex-husband confirmed this, stating that he was receiving 100 percent VA disability; he asserted that the ex-wife's motion was barred by *res judicata* and collateral estoppel. In essence, he claimed that the 2007 agreed order found that his military disability benefits were not reachable by the ex-wife and that he could not be ordered to compensate her for the loss of her retired pay amounts due to the Uniformed Services Former Spouses' Protection Act.

At trial, the judge ruled in the former wife's favor. Both parties agreed that the disability benefits he received caused the reduction in pension benefits for his ex-wife, and the court found that the retiree had applied for CRSC, that the VA disability pay he received was a result of his affirmative and voluntary act, that he had applied for the benefit, and that he knowingly impacted his future military retirement benefits.

The trial court's ruling was based on an Arkansas decision involving VA disability benefits, *Surratt v. Surratt*.[112] In that opinion, the court held that a non-military spouse has a vested interest in the portion of military retired pay awarded her in a property settlement, and that interest cannot be unilaterally reduced by the actions of the military spouse after the date of the divorce decree. The trial court reasoned that the ex-husband could not subvert the vested right of the ex-wife to receive the payments due to her by intentionally substituting disability compensation for military retired pay, and it ordered him to continue to pay to the former spouse each month the $962.06 that she had been receiving.

The ex-husband asserted that the parties' prior trial court appearance in 2006 over an increase in disability pay which the

112 Surratt v. Surratt, 148 S.W.3d 761 (Ark. Ct. App. 2004).

retiree received, thus reducing the ex-wife's pension share, meant that the ex-wife's enforcement motion was barred due to *res judicata*. The ex-wife's attorney imaginatively argued that this could not be raised in the court of appeals because the retiree had not obtained a ruling on it in the trial court. And the court agreed, ruling against the ex-husband on his claim of *res judicata*.

The second argument of appellant was that the trial court erred in requiring him to pay all his disability and CRSC to his ex-wife, a violation of the ruling in *Mansell*. In denying his claim, the court stated that the judge had not ordered the ex-husband to use his disability benefits to pay the ex-wife; he was to pay her from any resource available to him.

The final argument of the retiree was that *Surratt* was distinguishable because it involved a definite amount awarded to the ex-wife. The court disagreed, stating that the instant case also involved a specific amount - $340 per month at the time of the 2007 agreed order (plus $200 monthly on the arrears), and $962.06 per month at the time of the decision below which was appealed.

Having rejected all three points of the ex-husband's challenge, the court of appeals affirmed the ruling of the trial court. The only flaw in the case is one that was not appealed by the ex-wife, namely, the award of a set dollar amount ($962.06) to her, based on the former husband's retired pay at that time. This meant that the ex-wife was denied any COLAs on the retired pay. Thus she may have missed out on the 5.8 percent COLA awarded military retirees as of January 2009 (the opinion does not state the date of the trial court's ruling). The Michigan Court of Appeals in *Megee* addressed this, requiring adjustments as necessary to the ex-wife's share of the payments from her former husband to reflect possible increases in the retired pay that he would have received. It apparently was not on the radar screen for the trial court in *Provencio*.

VI. Conclusion

While Jane Green's dilemma, as dramatized in the beginning of this article, may seem like an exceptional situation, it is important for attorneys representing servicemembers, retirees or their spouses to understand that fluctuations in pension benefits that this hypothetical client experienced can happen with little ad-

vance warning. Understanding the background and legal history of military pension division is essential to a practitioner, and it is vital, given the rapid pace at which CRDP and CRSC cases are being rendered, that these cases are thoroughly analyzed and used to guide those who draft military pension division orders.

Because of the limited options available after a military pension division order is entered and submitted to DFAS for direct payment, attorneys who draft the order should take into account the "lessons learned" from the recent cases. In particular, drafters should use the "KISS" rule (Keep It Short and Simple). For example, instead of using clauses such as those in *Sharp* and *Jackson* that rely on trusteeship and fiduciary duties to protect a former spouse's interest, use basic provisions such as "If the retiree does anything which results in a reduction of the former spouse's share or amount, then he will reimburse her." If it is absolutely necessary to use trustee provisions to guard against subsequent elections by the retiree, do *not* state that the retiree is the trustee for any money that the former spouse is not paid and that the retiree receives. In the case of CRSC, the retiree does not receive *any* more pension; the pension is evaporated – in part or entirely. Instead, write the clause in terms of the retiree having a duty as trustee for the former spouse to ensure the receipt of her full share or amount under terms of this agreement/order, and requiring the retiree to preserve the former spouse's right to the same, taking no action that would diminish what the former spouse is due to receive.

It is also important to use discovery to get all information needed to determine the retiree's disability payments and current ratings. At a minimum, request documents such as the Retiree Account Statement (RAS) (Form DFAS-CL 7220/148), copies of letters and memoranda from the VA to the retiree, and copies of the retiree's CRSC statements.

Do not rule out the use of alimony in lieu of pension division if your options on indemnification are foreclosed, such as when the servicemember already has VA disability or CRSC benefits when the divorce in entered. In doing so, however, note that alimony usually terminates at the remarriage or, in some states, the cohabitation of the recipient. This is not the case with property division awards, including division of a pension. If the court will allow an award of alimony without these conditions, then counsel

can write it to mirror the results of a pension division award, or to supply the funds to the former spouse that were lost due to the effect of disability payments. If the parties can agree on a settlement which lacks these conditions, then the same result would apply. If there is little retired pay left, it may be necessary to apply for garnishment of VA disability compensation and, when applicable, of CRSC in order to obtain the funds efficiently each month.

If a pension division order is already in effect and a retiree makes a post-division election for disability benefits, be prepared to argue for indemnification even when there is no contractual agreement or explicit court order specifying such a duty. In some jurisdictions the courts will infer an inherent indemnification obligation, such as in the *White* case.[113]

Using the concepts and case law referenced herein, the skilled attorney drafting a military pension division order or settlement document should be able to enhance the pension benefits that his or her client receives and, at the same time, build in some protections that can withstand changes in benefits that the retiree may choose to make long after the divorce is finalized.

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113 White, *supra* note 28.

Appendix 1

Getting Information from DFAS by Consent and Court Order

When requesting personnel records, it is best to obtain consent of the individual concerned. For requesting documents regarding Jack Green's military retired pay, the document signed by Jack Green might look like this:

> *I, Jack Green, SSN _____, hereby consent to the release of all data regarding my retired pay and any reductions to same, for the period January 1, 2011 through December 31, 2011, to Attorney Sam Jones and his paralegal, Ellen Garcia, at 314 Rampart Ave., #22, Louisville, KY 33433.*
>
> *___/s/___*
> *Jack M. Green*
>
> *[notarization]*

However, such free and open disclosure is often impossible in a divorce case. The alternative is an order to DFAS demanding disclosure by a court of competent jurisdiction.[114] This order could be a subpoena, but it still must be signed by a judge, and it is recommended that the records be returnable to the court.

The Department of Defense has established its own regulations, pursuant to the Privacy Act and to DoD Directive 5400.11, and this privacy publication is set out in a regulation entitled "Department of Defense Privacy Program."[115] In general, the necessary directives, publications, administrative instructions, memoranda and forms are at the "DoD Issuances" website: http://www.dtic.mil/whs/directives/. As an agency of DoD, the Defense Finance and Accounting Service is bound by these rules.[116]

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114 5 U.S.C. § 552a(b)(11).

115 DoD 5400.11-R (May 14, 2007).

116 The specific rules that DFAS has promulgated regarding release of information are found at DoD Financial Management Regulation Volume 7B, Chapter 18, "Release of Information," which contains references to the regulations of each of the DoD branches of service. The DoDFMR can be found at: www.defenselink.mil/comptroller/fmr/. Rules for the Coast Guard, an agency of the Department of Homeland Security, are found at the *CG-61 Reference Guide*, published by the USCG Office of Information Management. Located at http://uscg.mil/hq/cg6/cg61/docs/CG61%20Reference%20Guide%20Oct%202007.pdf. Extensive information about release of information from the Coast

Another way of solving the problem of obtaining retired pay information is to simply *ask DFAS.* A little-known notice in the Federal Register makes this possible. Effective July 13, 2000, DFAS announced at 65 FR 43298 that it would disclose this information to a former spouse:

> In addition to those disclosures generally permitted under 5 U.S.C. 552a(b) of the Privacy Act, these records or information contained therein may specifically be disclosed outside the DoD as a routine use pursuant to 5 U.S.C. 552a(b)(3) as follows:
>
> To former spouses, who receive payments under 10 U.S.C. 1408, for purposes of providing information on how their payment was calculated to include what items were deducted from the member's gross pay and the dollar amount for each deduction.

One who is asking for information under this rule should include in the written request full identifying information on the retiree (name and Social Security number), the Social Security number for the former spouse and an authorization for DFAS to provide the information to the attorney for the former spouse. The request might look like this:

> *Defense Finance and Accounting Service*
> *DFAS- Cleveland Center*
> *Records Retrieval (Code HAC)*
> *1240 East 9th Street, Room 2679*
> *Cleveland, OH 44199-2055*
> *Fax 216-522-6530*
>
> *Pursuant to the Privacy Act Routine Use set out at 65 Federal Register 43298, I hereby request that you provide to me information on the current gross retired pay, current deductions and dollar amount for each deduction used in calculating my share of the pension in regard to my former husband, John Q. Doe, SSN 987-77-6543. My former spouse payments were calculated under 10 U.S.C. § 1408. [OPTIONAL: I authorize you to provide this information to my attorney, Lucinda Lopez, Lopez and Pasquale, LLP, 123 Green Street, Apex, NC 27566]*
>
> *___/s/___*
> *Mary P. Doe*
> *SSN 234-56-7899*

The average response time is several weeks.

Guard may be found at the USCG's Freedom of Information & Privacy Act website, http://www.uscg.mil/foia/default.asp.

Appendix 2

VA Waiver / Disability Indemnification Cases

Summary of Selected Cases Supporting Indemnification

1. *Owen v. Owen*, 419 S.E.2d 267 (Va. Ct. App. 1992)

a. The parties entered into a separation agreement giving the wife one-half of the husband's gross retired pay. The agreement also said that the husband shall take no action to defeat the wife's right to share in these benefits, and he shall indemnify her for any breach by him in this regard.

b. After divorce, the husband was awarded VA disability compensation based on 60 percent disability rating.

c. "The question is whether parties may use a property settlement agreement to guarantee a certain level of income by providing for alternative payments to compensate for a reduction in payment level based on a reduction in retirement benefits. We hold that they may." *Id.* at 269.

2. *McHugh v. McHugh*, 861 P.2d 113 (Idaho Ct. App. 1993)

a. The parties reached a settlement in which the wife was to receive a set amount of the husband's military retired pay.

b. When the husband elected to receive disability, the court re-wrote the decree to give the wife a percentage of his new retired pay that equaled the same dollar amount she was awarded previously.

c. The purpose of the later orders was to carry out the terms of the settlement agreement.

3. *Dexter v. Dexter*, 661 A.2d 171 (Md. Ct. Special App. 1995)

a. The parties entered into a consent order giving the wife 47.5 percent of the husband's military pension on a monthly basis when it is paid by the Army.

b. Shortly after the husband retired, he voluntarily waived his rights to the Army retirement benefits, thus terminating and cutting off all of his Army retirement benefits and the wife's as well.

c.

> We hold that . . . [where] . . . the parties entered into an agreement that one spouse will receive a percentage of pension benefits, on a periodic basis, when they become payable, and when they are already payable and being paid, the pensioned party may not hinder the ability of the party's spouse to receive the payments she has bargained for, by voluntarily rejecting, waiving, or terminating the pension benefits.

Id. at 179.

4. *Strassner v. Strassner*, 895 S.W.2d 614 (Mo. Ct. App. 1995)

a. At the time of the decree, the husband had a 60 percent disability rating.

b. The trial court awarded the wife a percentage of the husband's military retired pay and prohibited the husband from taking any action that would reduce the wife's share of his pension benefits - including merging retired pay with other pensions or waiving any portion of retired pay in order to receive increase disability pay. There was an indemnification provision.

c. "The question is whether a trial court's order prohibiting a spouse from waiving retirement benefits in the future or, in the event of breach, requiring the spouse to indemnify the other spouse for such waived benefits is a prohibited division of disability benefits. We hold that it is not." *Id.* at 617.

d. The court of appeals held that the lower court's order protected the wife's right to receive the property she had been allocated, or its value, without specifying an improper source of funds for indemnification.

e. "The distribution of marital property in Missouri constitutes a final order not subject to modification. . . Thus, once it has been divided as part of a final decree, a pension may not be redivided after circumstances have changed.'" *Crowley v. Crowley*, 838 S.W.2d 945, 96 (Mo. App. 1992). In the present case the trial court awarded

> wife a percentage of disposable retired pay as calculated at the time of the decree. Wife's share in husband's pension was finally determined on the date of the decree as to amounts which had not at that time been waived and, thus, the decree did not violate *Mansell* by distributing waived amounts. The trial court finally determined wife's interest in this marital asset.

Strassner, 895 S.W.2d at 618.

f. "Although husband was retired when the parties divorced and he was then receiving military retirement, there was "a threatened contingency," his waiver of retired pay in favor of VA disability compensation, which could risk forfeiture of the award to wife. Where such a contingency exists the judge has broad discretion to design a plan to protect the parties' rights and best interests."

Id.

g. "In making this order, the trial court did not prospectively divide disability benefits, but instead provided a manner of enforcing the property division contained in original decree." *Id.*

5. *Price v. Price*, 480 S.E.2d 92 (S.C. Ct. App. 1996)

a. The parties' separation agreement awarded the wife 34 percent of the husband's gross military retirement.

b. Later, the husband reduced his payments after he waived a portion of his retired pay in favor of disability pay.

c. "We hold Husband breached his obligations under the agreement by unilaterally reducing wife's equitable apportionment of benefits acquired during the marriage. Equity does not permit a party to defeat justice by asserting violation of public policy, statute, or illegality of agreement in order to insulate the party from his own wrong."

Id. at 96.

6. *Johnson v. Johnson*, 37 S.W.3d 892 (Tenn. 2001)

a. The parties had a marital dissolution agreement (MDA) that divided the husband's "military retirement benefits" to give half to the wife.

b. After the final decree was entered, the husband waived a portion of his military retired pay to receive the same amount in non-taxable disability benefits.

c. "We hold that when an MDA 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. That vested interest cannot thereafter be unilaterally diminished by an act of the military spouse. Such an act constitutes an impermissible modification of a division of marital property and a violation of the court decree incorporating the MDA."

Id. at 898.

d. "'All military retirement benefits' is neither defined in the MDA nor a term of art with an established definition. Irrespective of the differing definitions offered by the parties, however, we find that 'all military retirement benefits' is unambiguous as it is used in the MDA. We find that "retirement benefits" has a usual, natural, and ordinary meaning. In the absence of express definition, limitation, or indication to the contrary in the MDA, the term comprehensively references all amounts to which the retiree would ordinarily be entitled as a result of retirement from the military.[3] Accordingly, we hold that under the MDA, Ms. Johnson was entitled to a one-half interest in all amounts Mr. Johnson would ordinarily receive as a result of his retirement from the military."

Id. at 896-97.

i. Footnote 3 –

> Courts in the following jurisdictions have used 'retirement benefits' in a similar sense: *In re Marriage of Gaddis*, 191 Ariz. 467, 957 P.2d 1010 (Ariz. Ct. App. 1997); *In re Marriage of Krempin*, 70 Cal. App. 4th 1008, 83 Cal. Rptr. 2d 134 (Cal. Ct. App. 1999); *In re Marriage of Pierce*, 26 Kan. App. 2d 236, 982

P.2d 995 (Kan. Ct. App. 1999); *Dexter v. Dexter*, 105 Md. App. 678, 661 A.2d 171 (Md. Ct. App. 1995); *In re Marriage of Strassner*, 895 S.W.2d 614 (Mo. Ct. App. 1995); *Owen v. Owen*, 14 Va. App. 623, 419 S.E.2d 267 (Va. Ct. App. 1992).

Id. at 897.

7. *Hillyer v. Hillyer,* 59 S.W.3d 118 (Tenn. Ct. App. 2001)

a. The trial court awarded the wife 40 percent of the husband's gross military retirement benefits.

b. The husband retired shortly after the divorce.

c. Shortly after retirement, the husband became 100 percent disabled causing the wife to lose her share of the husband's retirement.

d. "The case before us differs from *Johnson* in one respect: the Hillyers did not have an marital dissolution agreement. Ms. Hillyer's right to a share of Mr. Hillyer's retirement pay arises from the order of the court entered as part of their divorce proceedings in 1986. The fact that the Hillyers did not have an MDA does not affect the application of *Johnson* to this case.[9] The conclusion reached by the Supreme Court in *Johnson* is based to a large extent on the principle that a distribution of marital property cannot be later modified by one of the parties.[10] This principle applies because the property division became a judgment of the court."

Id. at 122-23.

i. Footnote 9 – "We note that the case relied upon by the Supreme Court, *In re* Marriage of Gaddis, involved a court ordered property division rather than an agreement by the parties. *Gaddis*, [191 Ariz. 467,] 957 P.2d 1010 [(Ariz. Ct. App. 1997)]."

ii. Footnote 11 – "We are unpersuaded by Mr. Hillyer's attempts to characterize the waiver of his retirement pay in exchange for disability benefits as something other than his unilateral act. Having failed to retract the waiver or to otherwise disavow the benefits of

> the substitution of the disability pay, he cannot seek to be relieved of its consequences on the basis he did not 'act.' We note that, pursuant to *38 U.S.C. § 5305*, Husband was only able to receive the disability benefits "upon the filing . . . of a waiver of so much of [his] retired or retirement pay as is equal in amount to such pension or compensation." Further, he has failed to pay his former spouse the money that she stopped receiving directly from the military, certainly a voluntary and unilateral act on his part. In *Johnson*, the Supreme Court distinguished other effects on the amounts received, noting, 'of course, normal fluctuations in the value of military retirement benefits not occasioned by the acts of the parties cannot constitute a unilateral deprivation of a vested interest. *See Gaddis*, 957 P.2d at 1011 (describing fluctuation in military spouse's gross retirement pay). *But cf. [In re* the Marriage of] Pierce, [26 Kan. App. 2d 236,] 982 P.2d [995] at 999 [(1999)] (likening retirement benefits diminished by the unilateral act of military spouse to a marital asset that has simply 'declined in value")." *Johnson*, 37 S.W.3d 892, 898, n.4, 2001 WL 173502 at *4 n.4.
>
> *Id.* at 123.

e. "We hold that at the entry of the divorce decree Ms. Hillyer obtained a vested right to forty per cent (40%) of Mr. Hillyer's 'gross military retirement benefits' and is entitled to enforce that decree." *Id.* at 123.

8. *Krapf v. Krapf,* 771 N.E.2d 819 (Mass. App. Ct. 2002)

a. The parties entered into a separation agreement dividing equally the marital estate.

b. The pension division order granted the wife 50 percent of the husband's disposable retired pay.

c. After retirement in 1997, the husband was awarded a 10 percent disability rating. A year later, his rating was increased to 50 percent. Two years later he was determined to be 100 percent disabled. The monthly pension

share to the wife went from $1,009 in 1997 to $145 in 2000.

d. The court determined that the parties entered into a contract in which they agreed to divide equally their marital estate and not to be anything that would have the effect of destroying or injuring the other party's ability to receive the fruits of their contract.

e. Implicit in this agreement was the covenant of good faith and fair dealing.

f. By waiving his military retirement pay in order to receive VA disability compensation subsequent to the execution of the separation agreement, the husband deprived the wife of her entitlement to 50 percent of his military benefits, and the result was a violation of the covenant of good faith and fair dealing.

g. The judge's order simply enforced the parties' separation agreement to ensure that Wife received her agreed share of the marital estate.

    i. Footnote 3 – To insure that wife receives the amount of husband's military pension that was contemplated in the original divorce judgment or separation agreement where Husband is the subsequent recipient of disability benefits, other jurisdictions have reached the same or a similar result. See *Abernethy v. Fishkin*, 699 So. 2d 235, 239-240 (Fla. 1997); *McHugh v. McHugh*, 124 Idaho 543, 545, 861 P.2d 113 (Ct. App. 1993); *Dexter v. Dexter*, 105 Md. App. 678, 684-686, 661 A.2d 171 (1995); *Strassner v. Strassner*, 895 S.W.2d 614, 616, 618 (Mo. Ct. App. 1995); *Owen v. Owen*, 14 Va. App. 623, 628-629, 419 S.E.2d 267 (1992); *In re Marriage of Jennings*, 138 Wn. 2d 612, 625-627, 980 P.2d 1248 (1999). But see *Clauson v. Clauson*, 831 P.2d 1257, 1262-1263 (Ala. 1992); *In the Matter of the Marriage of Pierce*, 26 Kan. App. 2d 236, 240-242, 982 P.2d 995 (1999).

*Id.*at 823.

9. *Nelson v. Nelson*, 83 P.3d 889 (Okla. Civ. App. 2003)

a. The trial court awarded the wife 12.62 percent of the husband's disposable retired pay.

b. The order also said that if the husband increased his VA benefits, thereby lowering his military retirement, such an election would not alter the wife's right to a monthly sum equal to her share of his disposable retired pay.

c. Where a wife's award of a percentage of disposable retired pay was calculated at the time of the divorce, her share of the pension "was finally determined on the date of the decree as to amounts which had not at that time been waived, and thus, the decree did not violate *Mansell* by distributing waived amounts." *Id.* at 892.

d. The decree provisions regarding the award of retired military pay do not violate 10 U.S.C. 1408. That section deals only with direct pay from the appropriate military finance center and does not forbid payments enforced by other means, including payments made directly by the individual retired service member. The indemnity requirement imposed by the trial court does not violate the rule in *Mansell*.

e. The court of civil appeals stated:

> The courts of several states have. . . taken equitable action to protect former spouses faced with a reduction in payments due to a reduction in military retirement pay. *See* Major Fenton, Uniformed Services Former Spouses' Protection Act and Veterans' Disability and Dual Compensation Act Awards, 1998-FEB Army Law. 31, 32; *Kramer v. Kramer*, 252 Neb. 526, 567 N.W.2d 100, 113 (Neb. 1997) (holding that, although disability benefits cannot be included as part of the marital estate, a court may consider the waiver of retirement pension benefits in favor of disability benefits "in determining whether there has been a material change in circumstances which would justify modification of an alimony award to a former spouse who was previously awarded a fixed

> percentage of the retirement pension benefits"); *In re Marriage of Strassner*, 895 S.W.2d 614 (Mo. Ct. App. 1995) (holding that the trial court acted within its discretionary powers to prohibit a veteran from reducing his retirement pay, or requiring him to indemnify his spouse if he chose to do so); *Abernethy v. Fishkin*, 699 So. 2d 235, 236 (Fla. 1997) (holding that the lower court may enforce a final judgment "which guarantees a steady monthly payment to a former spouse through an indemnification provision providing for alternative payments to compensate for a reduction in non-disability retirement benefits"); *Scheidel v. Scheidel*, 2000 NMCA 59, 129 N.M. 223, 4 P.3d 670 (N.M. 2000) (holding that federal law does not prohibit a marital settlement agreement which provides for indemnification if husband takes voluntary action to reduce wife's share of military retirement benefits as along as the disability benefits are not specified as the source of the payments to wife); and *Johnson v. Johnson*, 37 S.W.3d 892, 894 (Tenn. 2001) (holding that a wife obtained a vested interest in her portion of the retirement benefits as of the date of the divorce decree, and "any act of the military spouse that unilaterally decreases the non-military spouse's vested interest is an impermissible modification of a division of marital property and a violation of the final decree of divorce").

Id. at 892.

10. *In re Marriage of Nielsen and Magrini*, 792 N.E.2d 844 (Ill. App. 2003)

a. The parties entered into a consent order that gave 25 percent of the gross retired pay due to the husband to the wife.

b. The husband went from 10 percent to 60 percent disabled.

c. A party's vested interest in a military pension cannot be unilaterally diminished by an act of a military spouse. The parties clearly intended for the wife to receive a

percentage of the husband's total retired pay and not just his disposable retired pay.

d. The husband certainly had a legal right to receive disability benefits, but his doing so caused a diminution in the amount of his retirement pay that the wife had been receiving.

e. "[A] party's vested interest in a military pension cannot be unilaterally diminished by an act of a military spouse, and we apply this principle to the present case. Here, the parties agreed that Susan [Wife] would receive '25% of the gross retired or retainer pay due Mark [Husband/retiree].' It is clear that the parties intended that Susan would receive a percentage of Mark's total retirement pay and not just his disposable retired or retainer pay. The parties' intent was incorporated into the judgment for dissolution. Mark retired and the judgment for dissolution was implemented. However, Mark thereafter decided to accept an increased amount of disability benefits. This resulted in a reduction of Mark's disposable retired or retainer pay. This accordingly reduced Susan's entitlement. Mark certainly had a legal right to receive disability benefits, but his doing so caused a diminution in the amount of his retirement pay that Susan had been receiving for over three years. Mark's decision frustrated the parties' intent and the trial court's judgment for dissolution. Indeed, to allow Mark to unilaterally diminish Susan's interest in his military pension would constitute an impermissible modification of a division of marital property. As such, we affirm the trial court's order of November 3, 2000, in which it ruled that Susan was entitled to an amount equal to 25 percent of Mark's military pension as it existed on the date he retired. Because the trial court's November 3, 2000, order does not directly assign Mark's military disability pay, it does not offend the United States Supreme Court's ruling in *Mansell*."

Id. at 849.

11. *Surratt v. Surratt*, 148 S.W.3d 761 (Ark. Ct. App. 2004)

a. The parties entered into an agreement that the wife would receive 50 percent of the husband's military retired pay per month as it was at the time of the complaint for divorce. It also stated that the retirement income would not fall below the amount the husband was receiving at the time of filing this suit, even if the husband's disability retirement increases.

b. Because the servicemember is free to satisfy the indemnity obligation with assets other than the disability benefits, there is no division of those benefits in contravention of *Mansell*:

> We believe that there is a sound basis for concluding that, in this case, the payments should be continued. Since *Mansell v. Mansell, supra*, was decided, post-judgment waivers of retirement pay have caused problems for courts across the nation, *see Krempin v. Krempin*, 70 Cal. App. 4th 1008, 83 Cal.Rptr.2d 134 (1999), and there is a growing trend to ensure that former spouses' property interests are protected in the event of a future award of disability benefits to the service member. A majority of state courts, on one theory or another, take equitable action to compensate the former spouse when that spouse's share of the retirement pay is reduced by the other spouse's post-judgment waiver of retirement benefits. In some cases, the contracts contain indemnity provisions, and the courts have given the spouse the benefit of the original bargain or order with respect to retirement pay, even if the service member's disability benefits would be a source of the payments. *Id*.; *see Scheidel v. Scheidel*, 2000 NMCA 59, 129 N.M. 223, 4 P.3d 670 (Ct. App. 2000).

Id. at 766-67.

c. When a settlement agreement 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.

Even in the absence of indemnity provisions, the courts have reached the same result, finding that the service member has breached the agreement and should not be permitted to profit by that breach. In such cases, the following statement is typical:

> The judgment in this case does not divide the defendant's VA disability benefits in contravention of the *Mansell* decision; the judgment merely enforced the defendant's contractual obligation to his former wife, which he may satisfy from any of his resources. Nothing in *10 U.S.C. § 1408* or in the *Mansell* case precludes a veteran from voluntarily entering into a contract whereby he agrees to pay a former spouse a sum of money that may come from the VA disability benefits he receives.

Krapf v. Krapf, 439 Mass. 97, 108, 786 N.E.2d 318, 326 (2003); *accord Abernethy v. Fishkin*, 699 So.2d 235 (Fla. 1997). Generally, such cases hold that, when a settlement agreement 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. *See Johnson v. Johnson*, 37 S.W.3d 892 (Tenn. 2001). That vested interest cannot thereafter be unilaterally diminished by an act of the military spouse. *Id.*; *accord Harris v. Harris*, 195 Ariz. 559, 991 P.2d 262 (Ct. App. 1999); *Dexter v. Dexter*, 105 Md. App. 678, 661 A.2d 171 (1995); *see also Hillyer v. Hillyer*, 59 S.W.3d 118 (Ct. App. Tenn. 2001).

Id. at 767.

12. *Hisgen v. Hisgen*, 554 N.W.2d 494 (S.D. 1996)

a. The parties' agreement simply said that the husband "will instruct" the military to pay to the wife directly her share of his military pension.

b. Then the husband waived retired pay to obtain VA disability compensation.

c. The court held that he had a duty to indemnify the wife for the resulting reduction in her pension share.

d. Both parties knew that the husband was applying for disability benefits, according to the court, and it was most unlikely that they would have intended to give the wife an award that would be almost immediately unenforceable. Where there is no clear provision for indemnification in the settlement document that the parties signed, the court can still find an implied indemnity provision if evidence is presented that they did not intend for the pension share of the spouse or former spouse to be reduced upon a VA waiver by the military retiree.

13. *In re Marriage of Gaddis*, 957 P.2d 1010 (Ariz. Ct. App. 1997)

a. The divorce decree gave the wife 50 percent of the husband's military retirement benefits. It was silent as to indemnification. The husband later obtained civil service employment, which (under the law at that time) required him to waive a portion of his retired pay in order to avoid "dual compensation." Such a waiver is similar to the VA waiver. The wife's entitlement was thereby reduced and she petitioned the trial court.

b. The judge ordered the husband to continue paying the wife the same monthly sum he owed before the waiver. The court of appeals affirmed, reasoning that at the time of divorce, there was no dual compensation offset because the husband had not yet obtained civil service employment. When he later did obtain such employment, the divorce judgment had already established the wife's fixed interest in the military retirement benefits.

c. By voluntarily waiving retirement benefits, the husband deliberately frustrated the judgment for dissolution.

d. The court of appeals stated that that the order need only avoid "specifying an improper source of funds for"

the payments to be in conformity with *Mansell*. *Id.* at 1013.

14. *Blann v. Blann*, 971 So. 2d 135 (Fla. Dist. Ct. App. 2007)

a. When the parties divorced in 2002, their judgment of dissolution, based on a settlement agreement, provided that the wife would receive 42.5 percent of the husband's military retired pay.

b. The court retained jurisdiction to modify and enforce the final judgment as needed.

c. When the husband retired in 2006, he waived part of his pension to receive VA disability compensation.

d. The wife filed a motion for enforcement, but the trial court denied her request stating that there was no authority to enforce the final judgment and indemnify the former wife.

e. The court of appeals disagreed stating

> The United States Supreme Court has held that while states have authority under federal law to divide disposable retired or retainer pay, they do not have the power to treat as divisible property military retirement pay which has been waived to receive veterans' disability benefits. *Mansell v. Mansell*, 490 U.S. 581, 589, 595 (1989). Even if the parties enter into a settlement agreement to divide veterans' disability benefits, such an agreement is unenforceable because it is preempted by federal law. *Abernethy v. Fishkin*, 699 So.2d 235, 239 (Fla. 1997). However, this does not prevent the enforcement of an indemnification provision which provides for alternative payments from non-disability sources to compensate for the reduction in military retirement benefits divided as part of the property settlement agreement. *Id.* at 240.

Id. at 137.

f. However, despite the lack of an express indemnification provision,

> "the trial court may order an equivalent benefit as part of an action to enforce a property settlement agreement if one spouse commits a voluntary act which defeats the intent of the parties. *Padot v. Padot*, 891 So. 2d 1079, 1081-84 (Fla. 2d DCA 2004); *Janovic v. Janovic*, 814 So.2d 1096 (Fla. 1st DCA 2002). See also *Longanecker v. Longanecker*, 782 So.2d 406 (Fla. 2d DCA 2001)."

Id.

g.

> "The former husband correctly notes that neither the mediated settlement agreement nor the consent final judgment contains an indemnification provision or awards a specific dollar amount in retirement benefits. However, this is not fatal to the former wife's enforcement action. In *Janovic*, this court held that the trial court could enforce a consent final judgment by ordering the former husband to indemnify the former wife after the former husband waived a portion of his military retirement pay in favor of veterans' disability benefits even though the final judgment did not contain an indemnification provision or award a specific dollar amount in military retirement benefits."

Id. at 137.

Appendix 3

Wording of the Pension Division Clause – Pitfalls and Problems

Close attention must be given as to how to deal with an actual or, in the case of a servicemember who has not yet retired, a potential waiver of retired pay for VA disability benefits. In examining the problem of VA waivers in military pension division cases, the first issue is the wording in the decree or agreement. Counsel for the former spouse will find that the result is much more likely to be favorable if "longevity retired pay," "gross pension benefit," "total retirement" or similar wording is used. This allows the entire amount of the pension, not just a part of it, to be apportioned between the parties.

The use of the phrase "disposable retired pay" may lead the court – when there is no indemnification clause – to decide that this and only this is what the former spouse is to receive, which can often result in a lower amount for the former spouse. USFSPA says that "disposable retired pay" means total military retired pay less certain deductions. One of these deductions is VA disability compensation.[117] As explained above, with certain VA disability ratings, the acceptance of VA disability compensation must be accompanied by a waiver or an equal amount of retired pay. When there has been, or will be, a VA waiver by the retiree, an award phrased in terms of "50 percent of the retiree's *disposable retired pay*" potentially gives the former spouse 50 percent of a *lower number* (total retired pay less the VA waiver) than what she bargained for.

Yet this phrase, "disposable retired pay," is what many attorneys believe must be the wording for pension division clauses in the realm of military divorce. The basis for this belief is that attorneys who practice occasionally in this area understand that the retired pay center (DFAS and the pay centers for the Coast Guard, Public Health Service and National Oceanographic and Atmospheric Administration) will only divide "disposable retired pay". After all, USFSPA states that

> (d) Payments by Secretary concerned to (or for benefit of) spouse or former spouse.

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117 10 U.S.C. § 1408(a)(4).

> (1) After effective service on the Secretary concerned of a court order. . . with respect to a division of property, specifically providing for the payment of an amount of the *disposable retired pay* from a member to the spouse or a former spouse of the member, the Secretary shall make payments (subject to the limitations of this section) from the *disposable retired pay* of the member to the spouse or former spouse. . . with respect to a division of property, in the amount of *disposable retired pay* specifically provided for in the court order.[118]

In addition, one of the standard reply letters which DFAS sends in response to a pension division order that requires clarification states that the applicant should send back an order "that provides for payment as a . . . percentage of the [retiree's] actual disposable military retired/retainer pay."[119] These instructions, by statute and by letter, appear to mandate that the order state that "disposable retired pay" is what the court is dividing.

This is where the confusion arises. It is true that the uniformed services retired pay centers will only divide disposable retired pay. But that does not mean that the order must be phrased in terms of disposable retired pay. So long as the order is otherwise clear and subject to calculation of a monetary amount, the pension division order can say just about anything regarding the money that is being divided, and it will be accepted. This is because the DFAS regulations state that percentage awards – however they are worded – are construed as a share of "disposable retired pay": "The designated agent will construe all percentage awards (such as a percentage of gross retired pay) as a percentage of disposable retired pay, regardless of the language in the order."[120]

Under this rule, the order for pension division is not required to state the benefit divided as a percentage of DRP. It could be called the "no magic words" rule. The court order may award the former spouse a percentage of the servicemember's retired pay using any one of several phrasings. It can describe the asset being divided as "military retirement benefits." It can

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118 10 U.S.C. § 1408(d)(1) (emphasis added).

119 *See, e.g., Morgan v. Morgan*, 249 S.W.3d 226, 229 (Mo. Ct. App. 2008).

120 Department of Defense Financial Management Regulations, DoD 7000.14-R, Volume 7B, Chapter 29, "Former Spouse Payments from Retired Pay" ¶290601.D. (rev. Feb. 2009). In general, the pay centers for the Coast Guard, Public Health Service and National Oceanographic Atmospheric Administration follow DFAS rules.

use the words "retirement payments" or "pension," or it can refer to "total military retired pay." The decree can be stated in terms of "longevity deferred compensation benefits upon retirement," or it can divide "gross monthly retirement from the Defense Department." With any of these phrasings, DFAS will interpret it as "disposable retired pay" and – so long as the rest of the order is properly worded – it will effect a garnishment of the retiree's pension to pay the former spouse. However, there will be a potential remedy if the member or retiree, after the divorce judgment, elects disability payments which have the effect of reducing disposable retired pay. This is because the division of *gross* or *total* military retirement leaves non-garnishment remedies, such as contempt and indemnification, for the former spouse to use. USFSPA, at section (e), states -

> (6) Nothing in this section shall be construed to relieve a member of liability for the payment of alimony, child support, or other payments required by a court order on the grounds that payments made out of disposable retired pay under this section have been made in the maximum amount permitted under paragraph (1) or subparagraph (B) of paragraph (4). Any such unsatisfied obligation of a member may be enforced by any means available under law other than the means provided under this section in any case in which the maximum amount permitted under paragraph (1) has been paid and under section 459 of the Social Security Act (42 U.S.C. 659) in any case in which the maximum amount permitted under subparagraph (B) of paragraph (4) has been paid.[121]

On the other hand, when the order is drafted in terms of "disposable retired pay," there is a significant danger that – with no other protective language to show what the parties or the court intended, or to require reimbursement if there is a VA waiver – the courts will infer that the former spouse is only to receive a share of disposable retired pay, however low or variable that figure may be due to actions by the retiree in electing disability pay.

All too often, the reported cases show that counsel paid no attention at all to the phrasing of what is to be divided. When the phrasing is general (e.g., "retirement benefits"), the court must interpret what the parties meant (in a separation agreement

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121 10 U.S.C. § 1408(e)(6).

or property settlement) or what the trial judge intended (in a divorce decree or property division judgment).[122]

It is also advisable to state in the order or agreement that the court retains continuing jurisdiction over the issue of property division (to deal with a possible later VA waiver or increase in the VA rating). This lets the court review the case in the future and adjust the retired pay amounts or percentages, or modify the division of other marital property, should the retiree make an election which diminishes the payment to the former spouse.

The indemnification terms should require that there be an adjustment of the former spouse's share to pre-waiver levels by increasing her share of retired pay or through payments from other sources. The baseline should be the date of the settlement or order that first divided retired pay. This is useful in that it clearly establishes the court's intent if a review hearing is held, especially if a different judge is assigned at this later stage of the proceeding. Such a clause might state:

> The court retains continuing jurisdiction to modify the pension division payments or the property division specified herein if the husband should waive military retired pay for an equivalent amount of VA disability compensation and this action reduces the wife's share or amount of his retired pay as set out herein. This retention of jurisdiction is to allow the court to adjust the wife's share or amount to the pre-waiver level or to require payments or property transfers from the husband that would otherwise adjust the equities between the parties so as to carry out the intent of the court in this order.

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122 When confronted with such broad phrasing, counsel for the former spouse should point to the comment of the Tennessee Supreme Court in 2001, that the general meaning of "retirement benefits" is all amounts to which the retiree would ordinarily be entitled as a result of retirement from the military. Johnson v. Johnson, 37 S.W.3d 892, 897 (Tenn. 2001).

> Courts in the following jurisdictions have used 'retirement benefits' in a similar sense: *In re Marriage of Gaddis, 191 Ariz. 467, 957 P.2d 1010 (Ariz. Ct. App. 1997); In re Marriage of Krempin*, 70 Cal. App. 4th 1008, 83 Cal. Rptr. 2d 134 (Cal. Ct. App. 1999); *In re Marriage of Pierce*, 26 Kan. App. 2d 236, 982 P.2d 995 (Kan. Ct. App. 1999); *Dexter v. Dexter*, 105 Md. App. 678, 661 A.2d 171 (Md. Ct. App. 1995); *In re Marriage of Strassner*, 895 S.W.2d 614 (Mo. Ct. App. 1995); *Owen v. Owen*, 14 Va. App. 623, 419 S.E.2d 267 (Va. Ct. App. 1992).

Id. at n.3.

An example of indemnification language is found in *Owen v. Owen*, a Virginia Court of Appeals case.[123] In that case, the parties' agreement contained an indemnification clause which specified the level of payments that the ex-wife would receive, "one-half of the husband's gross military retirement pay based on twenty-five years of service, including cost-of-living increases."[124] The agreement clause also stated that the husband would take no action to reduce this monthly payment and that he guaranteed this and agreed to indemnify the former wife against any breach and to hold her harmless. Since it did not specify the source of indemnification payments, the court of appeals held that this did not violate USFSPA and *Mansell v. Mansell*.

The court recognized the danger in allowing a potential waiver of military retired pay in favor of VA disability compensation after the final decree, stating:

> If we adopted the husband's interpretation of the guarantee language, the guarantee would be rendered virtually meaningless, due to potentially large-scale conversion of retirement benefits to disability benefits. Conceivably, husband's disability payments could eliminate completely the wife's benefits. Such a result is irrational and does not comport with the clear intent expressed by the language of the PSA [property settlement agreement].[125]

Then the court stated: "We hold that federal law does not prevent a husband and wife from entering into an agreement to provide a set level of payments, the amount of which is determined by considering disability benefits as well as retirement benefits."[126]

There are several basic building blocks for drafting a clause that protects the nonmilitary spouse from the reduction of her expected pension division payments through the election of VA disability compensation and the concurrent waiver of retired pay. First, such a clause should include a straightforward statement of the facts and the parties' intentions regarding what amount the nonmilitary spouse anticipates receiving, based on the circumstances existing at the time the agreement is executed. The clause need not, however, specify a set dollar amount; it simply needs to

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123 Owen v. Owen, 419 S.E.2d 267 (Va. Ct. App. 1992).

124 *Id* at 269.

125 *Id.* at 270.

126 *Id.*.

state what the former spouse expects, in dollars or in regard to calculation of the sum (that is, her one-half of the marital share of a pension based solely on longevity). If there is Survivor Benefit Plan coverage, which is a deduction from gross pay before arriving at disposable retired pay, then that should be stated as well.

The indemnification clause should require that the military member or retiree reimburse the nonmilitary spouse if he breaches the above terms. The more specific the remedy that is provided is, the better. A definite result is preferable to reserving the issue and reopening the case later on for revised property division. Consider using a clause that provides replacement alimony or mandates direct payments by the retiree of the full anticipated amount if DFAS falls short in its payments to the former spouse.

An example of such a protective provision might be:

> The parties agree that the wife shall have a set level of payments to guarantee regular and predictable income to her. That level is defined as [*here state the existing facts and specifically what is anticipated, such as "The husband's longevity retired pay will be about $3,000 a month, and the wife expects to receive one-half of that times 18 years of marriage during military service divided by 24 years of military service" OR "The husband's retired pay is currently $2,800 per month, his VA disability pay is $800 per month, and the husband and wife agree that the wife expects to receive an amount equivalent to 40 percent of $2,000 each month."*] The husband will reimburse and indemnify the wife as to her full share of the military pension. If the husband takes any action that reduces the amount or share that the wife shall receive, such as waiving retired pay in favor of VA disability compensation, receipt of severance pay, a bonus or early-out payments, then he shall pay her directly the amount by which her share or amount is reduced as nonmodifiable spousal support which does not terminate upon her remarriage or cohabitation [*OR as additional property division payments*].

Appendix 4

Pension Payment Variations in the Jane and Jack Green Case

Here is a summary of the ups and downs of the payments from Jack Green's military pension, and the reasons for each variance:

Year/Month	Amount	Source/Reason/Event
2008-Jan	$2,000	Jack's retirement (net, shared between the parties)
Mar		Date of parties' separation
May	$1,000	Decree of legal separation, ordering Jane's pension share = 50% (paid to Jane by Jack directly). Jane gets $1000
Aug	$1,000	Garnishment payments from DFAS begin; still $1,000/mo. to Jane
Oct	$790	Jack gets 30% disability rating from VA; $2,000-$421 VA waiver=$1579 DRP*; this leaves $790 for Jane
Nov	$812	Divorce granted; Jack loses "spouse" and his VA disability pay decreases to retiree "alone"-$2000-$376=$1,624; $812 for Jane's share
2009-Jan	$872	5.8% COLA. $2120 total pension-$376 VA waiver = $1744; $872 for Jane's share
Mar	$790	40% VA rating. $2120 pension-$541 VA waiver= $1579; Jane's share= $790
Sept	$960	VA awards Jack 70% VA disability rating=$1228; est. $200 VA waiver; $2120-200=$1920; Jane's share=$960
2010-Jun	$1,060	Jack receives 100% VA disability rating; fully paid VA plus 100% CRDP; Jane's share is half of $2120, or $1060
2011-Jan	$1,060	No COLA for 2011; payments remain the same
2011-Feb	-0-	CRSC election (Jack took this in January 2011 open season) – this cancels CRDP, gives Jack his entire VA disability pay plus CRSC amount. Jane gets nothing.

*Disposable Retired Pay

The reason for these fluctuations may be found in the ebb and flow of VA payment amounts to the retiree. When VA pay goes up, retired pay recedes. This is much more pronounced when the VA rating is less than 50 percent (since this zone involves a dollar-for-dollar setoff against the pension). Reasons for rises and drops in VA payments include changes in marital status or number of dependents, as well as the number assigned for a disability percentage. When the latter is 50 percent or above, CRDP applies and the "VA waiver" subject to fluctuations is much smaller. CRSC, of course, obliterates the entire restoration scheme under CRDP, resulting in a return to the *status quo ante*; all VA payments are subject to a one-for-one setoff against retired pay, just as existed before the remedial legislation involving CRDP took effect January 1, 2004.[127]

[127] The potential for changes in CRDP amounts is captured in the following comment in the regulations: "Restored retired pay computed under CRDP will be determined monthly. The values that determine the amount of retired pay to be restored are dynamic and may change from one month to another depending on a number of factors that cause retired pay and VA disability compensation payments to change. Therefore, CRDP will be recomputed for any month of the phase-in period [2004-2014] in which changes to retired pay or VA disability compensation occur." Concurrent Retirement and Disability Payment (CRDP), Dep't of Defense Fin. Mgmt. Regulation, DoD 7000.14R, vol. 7B, ch.64, § 640402.A (Sept. 2010).