DISABILITY BENEFITS AND "CONCURRENT RECEIPT"

I. INTRODUCTION

For well over a hundred years, the United States government steadfastly refused to allow retired military members to draw both regular retired pay and disability pay, instead requiring the member to waive retired pay, dollar for dollar, for all disability pay received. That has finally changed, with significant repercussions for divorce cases.

Military retirement benefits are a form of deferred compensation, and are usually the most valuable asset of a military marriage. They are divisible in all states. Disability benefits are compensation for future lost wages and opportunities, and are usually not divisible or attachable. When disability benefits must be taken in replacement of retirement benefits, the spouses have directly conflicting interests.

This article addresses only the situation where the disability award follows the divorce.[1] It provides the basic history and conflicts involved in military disability cases before describing what has changed and discussing what this means for litigation of military-related cases from this time forward.

II. OVERVIEW OF DISABILITY BENEFITS IN THE MILITARY RETIREMENT SYSTEM

A full history of the evolution of military retirement benefits law is beyond the scope of this article,[2] but a thumbnail sketch is useful to place events in relative date order.

On June 26, 1981, the United States Supreme Court issued its decision in *McCarty v. McCarty*,[3] holding that federal law preempted a state court from dividing military retired pay, and that federal law identified retired pay as a personal entitlement of the retiree, to which the retiree's former spouse had no claim. That decision put in motion a series of changes in the law greatly altering the rights and obligations of military members and their spouses, which continue to this day.

Very quickly (in Congressional terms), bills were introduced and debated, and in September, 1982,

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[1] Where they occur in the reverse of that order, the divorce court can usually take the separate property income stream into account in fashioning a fair overall distribution of assets and support obligations. *See Riley v. Riley*, 571 A.2d 1261 (Md. Ct. Spec. App. 1990); *In re Marriage of Howell*, 434 N.W.2d 629, 633 (Iowa 1989).

[2] Those looking for a more complete explanation are referred to Annotation, *Pension or Retirement Benefits as Subject to Assignment or Division by Court in Settlement of Property Rights Between Spouses*, 94 A.L.R.3d 176; M. Willick, MILITARY RETIREMENT BENEFITS IN DIVORCE (ABA 1998); http://www.willicklawgroup.com (There is an extensive discussion of military retirement benefits generally and disability benefits specifically in the "Divorcing the Military and Severing the Civil Service" and "Death, Disability, and Related Topics of Cheer" articles set out under "Published Works").

[3] 453 U.S. 210, 101 S. Ct. 2728, 69 L. Ed. 2d 589 (1981).

Congress enacted the Uniformed Services Former Spouses Protection Act, or "USFSPA," 10 U.S.C. § 1408, to "reverse *McCarty* by returning the retired pay issue to the states." The USFSPA does not give the spouse of a service member any right under federal law to claim a share of the service member's retired pay; it was an enabling statute that allowed state courts to divide military retirement income according to their own state laws after June 26, 1981, the same way that they had prior to that date.[4]

At any time, a military retiree can apply to the Veteran's Administration to be evaluated for a "service-connected disability." If the evaluation shows such a disability, a rating is given between 10% and 100%, and "compensation" is paid monthly from the VA in accordance with a schedule giving a dollar sum corresponding to each 10% increase, plus certain additional awards for certain serious disabilities. Still further waivers of retired pay for VA disability pay can be given if the retiree has dependents (a spouse or children, or even dependent parents). It makes sense for a retiree to obtain a disability award, even with a dollar-for-dollar reduction in retired pay, because the disability awards are received tax-free.[5]

The USFSPA set up a federal mechanism for recognizing and enforcing state-court divisions of military retired pay, including definitions. One of these was of "disposable retired pay" (the sum that the military pay center could divide between spouses), which was defined as "the total monthly retired pay" minus certain sums, including sums deducted "as a result of a waiver of retired pay required by law in order to receive compensation under title 5 or title 38"[6] or "equal to the amount of retired pay of the member under that chapter computed using the percentage of the member's disability on the date when the member was retired" for a member retired under chapter 61.[7]

The USFSPA also included a savings clause, however, intended to prevent misapplication of the law to subvert existing divorce court orders, and providing that even if payments could not be made from disposable military retired pay, "Any such unsatisfied obligation of a member may be enforced by any means available under law . . . ."[8]

In 1989, the United States Supreme Court accepted a divorce case out of California, and issued a decision in *Mansell v. Mansell*.[9] The basic holding of the case was to declare that military ***disability*** awards were not divisible community property.

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[4] *Mansell v. Mansell*, 490 U.S. 581, 584-85, 109 S. Ct. 2023 (1989).

[5] *See* 38 U.S.C. § 5301(a); *Absher v. United States*, 9 Cl. Ct. 223 (1985), *aff'd*, 805 F.2d 1025 (Fed. Cir. 1986). Because of that tax incentive, disabled veterans often waive retired pay in favor of disability benefits. *See Mansell*, 490 U.S. at 583-84, 109 S. Ct. at 2026, 104 L. Ed. 2d at 682.

[6] Title 38 governs post-retirement applications for VA disability awards.

[7] 10 U.S.C. § 1041(a)(4)(C)-(D).

[8] 10 U.S.C. § 1408(e)(6).

[9] 490 U.S. 581, 109 S. Ct. 2023, 104 L. Ed. 2d 675 (1989).

In a flurry of opinions immediately following the federal pronouncement, several courts issued opinions detailing why they would not allow the inequity of allowing post-divorce status changes by members to partially or completely divest their former spouses, where the original divorce decree had been issued ***prior*** to the *Mansell* decision.[10] While this conclusion seems to be universal,[11] the situation is more complex for divorce decrees issued after 1989.[12]

III. CASES AND TRENDS

In a nutshell, when a military retiree receives a post-divorce disability award, the "disposable" pay already divided between the member and former spouse is decreased, and money that was supposed to be paid to the former spouse is instead redirected to the retiree, no matter what the divorce court ordered. This can happen long after the divorce.

1. Recharacterization is Generally Not Permitted

One California court, surveying cases from around the country, held that *Mansell* does not apply to post-judgment waivers of retirement pay ***at all***, because *Mansell* held only that disability benefits could not be divided "***upon divorce***."[13] The court ordered that the former spouse be compensated for all reductions in the sums awarded at divorce. Citing a pre-*Mansell* case from California,[14] the decision held that to whatever degree direct enforcement of a divorce decree might be prevented by application of federal law, the member would receive any sums that had been awarded to the spouse as a ***resulting trustee*** of her funds, and must pay them over to her.

Most reviewing courts, however, have either found or simply assumed that *Mansell* is applicable in litigation concerning post-divorce recharacterizations by retirees, and attempted to apply it. Nevertheless, those appellate courts have almost uniformly reached the same conclusions as the court in *Krempin*, by other means.

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[10] *See Toupal v. Toupal*, 790 P.2d 1055 (N.M. 1990); *Berry v. Berry*, 786 S.W.2d 672 (Tex. 1990); *Maxwell v. Maxwell*, 796 P.2d 403 (Utah App. 1990); *MacMeeken v. MacMeeken*, 117 B.R. 642 (1990) (Bankr. D. Kan. 1990).

[11] A comprehensive review of the cases throughout the United States reveals that there is essentially no legitimate authority for the proposition that where a divorce decree preceded *Mansell*, there can ***ever*** be a waiver of retired pay by the retiree in favor of VA disability benefits without compensation being required to be paid to the former spouse, dollar for dollar, as to all sums the retiree's actions caused to be diverted from her back to him.

[12] It would be an error to directly compare ***post***-*Mansell* cases with those concerning divorce decrees issued ***prior*** to *Mansell*. Courts that have reviewed decrees issued ***after*** 1989 have often held the language used in the decree to a higher standard of clarity. This is reasonable, since after *Mansell* it would be at least theoretically possible for a divorce court to anticipate the question, and issue an order specifically intending to permit or forbid a post-divorce recharacterization of retirement benefits into disability benefits.

[13] *In re Marriage of Krempin*, 83 Cal. Rptr. 2d 134, 70 Cal. App. 4th (Ct. App. 1999).

[14] *In re Marriage of Daniels*, 186 Cal. App. 3d 1084, 1087 (1986).

The theory applied was phrased differently from one court to another, but was essentially that of ***constructive trust***. Once a divorce divided the military retirement benefits, the money awarded to the former spouse was no longer considered the member's property to convert. If the member subsequently applied for and received disability benefits, or took any other action to redirect money already ordered paid to the former spouse back to himself, he violated the divorce decree.

The cases echo the more general proposition, applied in other retirement benefits cases, that: "An employee spouse cannot defeat the nonemployee spouse's interest in retirement benefits by invoking a condition wholly within his or her control."[15] Whenever a disability award is claimed ***after*** the division of property in the divorce, it reduces the spousal share that the divorce court has already ordered belongs to the former spouse, in violation of that principle.

All community property state courts,[16] and virtually all others addressing the issue, have concluded that any such retroactive reallocation of money requires compensation to the spouse. Some courts have expressed the matter as addressing an "impermissible collateral attack on the divorce decree itself."[17]

Some courts examining post-*Mansell* (i.e., after 1989) decrees have looked for "safeguard" or "indemnification for reduction" clauses, as necessary indicators of intent to protect spouses from members' recharacterization of benefits. Where such intent is found, even by implication, the member has been required to reimburse the former spouse for all sums his actions caused to be redirected from the former spouse back to him.[18] Some courts have strongly encouraged the use of such clauses, since it makes the analysis essentially one of contract.[19]

Other courts have expressly found that reimbursement is required, whether or ***not*** there was any kind

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[15] *Gemma v. Gemma*, 105 Nev. 458, 463-64, 778 P.2d 429 (1989), approving holdings and reasoning of *In re Marriage of Gillmore*, 629 P.2d 1 (Cal. 1981), and *In re Marriage of Luciano*, 164 Cal. Rptr. 93 (Ct. App. 1980).

[16] The case law in Wisconsin, however, predates *Mansell*. *See Loveland v. Loveland*, 433 N.W.2d 625 (Wisc. Ct. App. 1988).

[17] *See*, *e.g.*, *Price v. Price*, 480 S.E.2d 92, 93 (S.C. Ct. App. 1996); *Jones v. Jones*, 900 S.W.2d 786 (Tex. Ct. App. 1995).

[18] *See In re Strassner*, 895 S.W.2d 614 (Mo. Ct. App. 1995); *see also Owen v. Owen*, 419 S.E.2d 267 (Va. Ct. App. 1992); *McHugh v. McHugh*, 861 P.2d 113 (Idaho Ct. App. 1993); *Dexter v. Dexter*, 661 A.2d 171 (Md. Ct. App. 1995); *Abernathy v. Fishkin*, 699 So. 2d 235 (Fla. 1997); *Scheidel v. Scheidel*, 4 P.3d 670 (N.M. Ct. App. 2000).

[19] *Gatfield v. Gatfield*, ___ N.W.2d ___ (No. F500366, Minn. Ct. App., July 6, 2004). *See also Krapf v. Krapf*, 786 N.E.2d 318, 326 (Mass. 2003) (no prohibition in federal law to any such contract to divide VA disability benefits); *Shelton v. Shelton*, 78 P.3d 507, 511 (Nev. 2003) (same); *Hisgen v. Hisgen*, 554 N.W.2d 494, 498 (S.D. 1996) (same); *Poullard v. Poullard*, 780 So. 2d 498 (La. Ct. App. 2001) (expressing doubt as to whether the member could ever be entitled to waive sums already awarded to the spouse without compensating her, but finding that it need not reach the question because the parties entered into a property settlement agreement).

of indemnification or safeguard clause in the underlying decree.[20]

In performing reviews regarding indemnification intent, most courts have been careful to not give retroactive effect to either the USFSPA, or any case interpreting it (i.e., *Mansell*) so as to defeat an existing flow of payments to a former spouse. As stated by various courts over the years, it would "thwart the very title of the Act, the 'Uniform Services Former Spouses' Protection Act,' to construe the law as preventing a spouse from actually receiving a court ordered portion of military retirement benefits."[21]

It took more than a decade since *Mansell*, but a nearly uniform consensus has emerged throughout the country that a retiree simply is not permitted to recharacterize the former spouse's share of the retirement benefits as his own separate property disability benefits, unless there is some indication ***on the face of the divorce decree*** that such a post-divorce recharacterization ***is*** permitted.

In other words, the focus has shifted from looking for "indemnification" or other language that such recharacterization is ***prohibited***, to looking for some language indicating that recharacterization is ***permitted***. Courts almost always require reimbursement of the former spouse unless the divorce decree permitted the member to convert the benefits post-divorce.[22] Sometimes, the issue is reached by way of contempt actions taken against the recharacterizing spouse.[23] There is only one known

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[20] *See McLellan v. McLellan*, 533 S.E.2d 635, 637 & 638 n.1 (Va. Ct. App. 2000); *Longanecker v. Longanecker*, 782 So. 2d 406, 408 (Fla. Ct. App. 2001); *Janovic v. Janovic*, 814 So. 2d 1096 (Fla. Ct. App. 2002); *In re Marriage of Nielsen and Magrini*, 792 N.E.2d 844 (Ill. App. Ct. 2003) (indemnification inferred from percentage award to former spouse). The specific language reviewed by the court in *Janovic* was the form paragraph I created for courts to use in decrees entered after *Mansell* to eliminate any ambiguity upon appellate review. It was published by the ABA as a guide for drafting attorneys in the form of "Military Retirement Benefit Standard Clauses." *See* 18 Family Advocate No. 1 (Summer, 1995) (*Family Law Clauses: The Financial Case*) at 30. An updated version of the clause set is set out separately.

[21] *See Walentowski v. Walentowski*, 672 P.2d 657 (N.M. 1983).

[22] In one anomalous case, an intermediate court in North Carolina started out with finding (as had the Alaska Supreme Court in *Clauson*, *infra*) that it would be a violation of *Mansell* for a court to simply increase a spouse's percentage of the military retirement benefits in order to make up for a disability award. *Halstead v. Halstead*, ___ S.E.2d ___ (No. COA03-1020, N.C. Ct. App., June 1, 2004). Unfortunately, the court then concluded that a standard provision indemnifying the former spouse against ***future*** waivers of retired pay for disability would also be impermissible. This is the only known case so holding, and in view of the weight of authority on the subject leads to an unjust, and unjustifiable, result not required under the relevant law – according to every other court that has opined on the subject. *See Gatfield v. Gatfield*, *supra*.

Obviously, indemnification clauses in the underlying divorce decree instructing a future reviewing court to reach that conclusion ***are*** permissible, for the same reason that the result (indemnification) is permissible. The *Halstead* opinion is a throwback to the kind of trial court decisions, reversed in several states, that invoked "the spirit of Mansell" to require an inequitable result by ethereal means, stretching the *Mansell* opinion from the narrow holding that virtually all courts have found it to be to some kind of broad proscription restricting judicial power to enforce decrees.

[23] *See*, *e.g.*, *Jones v. Jones*, *supra*, 900 S.W.2d 786 (Tex. Ct. App. 1995).

exception.[24]

Most courts find that *Mansell* calls on them to essentially take a snapshot at the time of divorce, when the award to the spouse is made. Any disposable retired that was already waived in favor of disability pay up to that point is not divisible, but no ***post***-divorce recharacterization of sums already awarded to the spouse are permitted. This includes cases where there was ***some*** disability in place at the time of divorce, but the member seeks to increase the disability award after divorce.[25]

The holdings are nearly identical, using nearly identical language, whether or not the court is in a community property state.[26] Decrees containing any variation of a "final award," or a "vested right" to a portion of property, or perhaps even "sole and separate property," are taken in the modern cases as setting up a vested right by the former spouse to a continuing flow of a given level of benefits that cannot be reduced by any action of the retiree, including the retiree's post-divorce waiver of the benefits in seeking VA disability benefits.

Some courts faced with a post-divorce recharacterization of retirement benefits as disability benefits, post-divorce, have simply redistributed other property, or compensated the former spouse by an award of post-divorce alimony.[27]

Several commentators and researchers have reviewed the cases nationally, reaching the conclusion

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[24] *In re Marriage of Pierce*, 982 P.2d 995 (Kan. Ct. App. 1999) was a "double-divorce" case in which both parties were apparently fully aware of the retiree's disability at the time of divorce. The reviewing court indicated its frustration that it had almost no factual record before it from which to say who did, or knew, what, when. The Court found, in passing, that the law was so well developed by the time of the divorce that if the spouse had sought to protect against the conversion of retirement to disability benefits, she could easily have done so., and found its decision necessary as a matter of state law. *Pierce* is an orphan, standing on its own odd facts, and has no following. The only known case to cite it approvingly was subsequently reversed on appeal. *Johnson v. Johnson*, 1999 Tenn. App. Lexis 625 (Tenn. Ct. App., Sept. 14, 1999), *rev'd*, *Johnson v. Johnson*, 37 S.W.3d 892 (Tenn. 2001). All other citations appear to be to note it as an aberration, in decisions holding that a former spouse ***must*** be compensated for a member's recharacterization of her property. *See Scheidel*, *infra*; *Danielson*, *infra*; *Hillyer*, *infra*; *Smith*, *infra*.

[25] *See*, *e.g.*, *Scheidel v. Scheidel*, 4 P.3d 670 (N.M. Ct. App. 2000).

[26] *See Danielson v. Evans*, 36 P.3d 749 (Ariz. Ct. App. 2001); *Hillyer v. Hillyer* 59 S.W.3d 118 (Tenn. Ct. App. 2001); *Smith v. Smith*, 2001 Tenn. App. LEXIS 149 (No. M1998-00937-COA-R3-CV, Tenn. Ct. App., March 13, 2001); *Johnson v. Johnson*, 37 S.W.3d 892 (Tenn. 2001).

[27] *See In re Marriage of Jennings*, 980 P.2d 1248 (Wash. 1999); *Kramer v. Kramer*, 567 N.W.2d 100 (Neb. 1997); *Torwich (Abrom) v. Torwich*, 660 A.2d 1214 (N.J. Super. Ct. App. Div. 1995); *Clauson v. Clauson*, 831 P.2d 1257 (Alaska 1992); *McMahan v. McMahan*, 567 So. 2d 976 (Fla. Ct. App. 1990); *see also White v. White*, 568 S.E.2d 283 (N.C. Ct. App. 2002), *aff'd per curiam*, 579 S.E.2d 248 (N.C. 2003) (remanding so district court could increase the former spouse's percentage of the remaining disposable retired pay so as to restore to her the dollars converted to disability by the retiree, and finding that "the holding in *Mansell* was actually quite narrow" and had nothing to do with the former spouse's claim for reimbursement of the diverted sums).

that post-divorce recharacterization of retired pay as disability benefits just is not permitted.[28] Even if *Mansell* ***does*** have to be considered in post-divorce recharacterization cases, courts have pretty uniformly mandated that former spouses must be compensated, by awards of other property, or alimony, or (most commonly) dollar-for-dollar compensation of all amounts that would have been paid but for the recharacterization.

In the absence of a provision explicitly permitting a retiree to recharacterize retired pay as disability pay and so divert money awarded to his former spouse back to himself, the retiree is required to reimburse the former spouse for all sums diverted, according to the highest courts to consider the question in Arizona, California, Florida, Idaho, Illinois, Iowa, Kansas,[29] Louisiana, Maryland, Massachusetts, Minnesota, Missouri, Nevada, New Jersey, New Mexico, North Carolina, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, and Washington. Two others, Alaska and Nebraska (and at least one Washington State court), while not requiring direct compensation, have indicated that other property should be distributed, or post-divorce alimony should be awarded, to compensate the former spouse in such situations. The few federal courts to address the question have reached the same conclusion.[30]

In other words, the overwhelming weight of authority indicates that it makes no difference ***how***, or ***why*** the retiree diverts money to himself that had been awarded to the former spouse in a final, unappealed decree; his act of doing so is a violation of the *Decree* every month he takes and keeps sums awarded to the former spouse, and requires an order of reimbursement.

2. The Analogous Cases Involving "Early Outs"

The Variable Separation Incentive (VSI), Special Separation Benefit (SSB), and "Temporary Early Retirement Authority" (TERA) are addressed in a separate article, and so are not discussed here. However, it is worth mentioning that many of the courts issuing decisions regarding those programs specifically analogized to the lines of cases regarding disability matters. It seems reasonable that if the disability cases are considered sufficiently analogous to be raised and used in deciding the

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[28] *See*, *e.g.*, Fenton, *Uniformed Services Former Spouses' Protection Act and Veterans' Disability and Dual Compensation Act Awards*, Army Law., Feb. 1998, 31, 33 (noting a "'growing trend'" among courts to ensure that former spouses' property interests are protected in the event of a future VA disability award to the service member, and that such is the majority view in this country); Mary J. Bradley, *Calling for a Truce on the Military Divorce Battlefield: A Proposal to Amend the USFSPA*, 168 Mil. L. Rev. 40, 49 (June 2001) (noting in part the rationale that "military spouses contribute to the effectiveness of the military community while at the same time forgoing the opportunity to have careers and their own retirement").

[29] As discussed in detail above, Kansas is somewhat conflicted, requiring full compensation in *MacMeeken v. MacMeeken*, 117 B.R. 642 (1990) (Bankr. D. Kan. 1990), but permitting an aberration in one case in *In re Marriage of Pierce*, 982 P.2d 995 (Kan. Ct. App. 1999).

[30] *Silva v. Silva*, 680 F. Supp. 1479 (D. Colo. 1988); *White v. White*, 731 F.2d 1440 (9th Cir. 1984) (no federal claim just because federal rights are implicated in a state court proceeding; suit dismissed); *Fern v. United States*, 15 Cl. Ct. 580 (1988), *aff'd*, 908 F.2d 955 (Fed. Cir. 1990) (refuting wide assortment of federal offenses allegedly committed by spouses in state divorce courts in consolidated action brought by former military service members).

VSI/SSB cases, then the reverse is also true. If nothing else, these cases are additional authority for the proposition that it makes no difference how or why the member reduces a divorce court's award to a former spouse – the fact that he does so mandates that compensation be provided.

3. Concurrent Receipt; this Entire Issue Is Destined to "Go Away"

The sheer number of post-divorce recharacterization cases involving disability benefits since *Mansell* makes clear the duty of attorneys (and ***especially*** the attorneys for the spouses) to anticipate post-divorce status changes and build that anticipation into the decrees they write. The cautious practitioner will ensure that property settlement agreements and divorce decrees are so crafted as to allow a later reviewing court to transcend ***any*** kind of recharacterization of the benefits addressed, whether anticipated (or even conceived of) at the time of divorce, or not.

The tools for doing so are explicit indemnification and constructive trust language, and explicit reservations of jurisdiction, either generally, or to award spousal support, or both.

Notwithstanding that general proposition, and the enormous amount of litigation on this subject over the past fifteen years or so, it appears that the ***specific*** issues explored above will largely disappear from the legal landscape (except, perhaps, as to questions of arrearages).

For many years, members of Congress introduced "concurrent receipt" bills of various sorts seeking to repeal, to a greater or lesser extent, the requirement of waiver of longevity retired pay in order to receive disability pay. Of course, any such program would cost the government the entirety of the additional VA payment, which is why it was resisted so strenuously for so long.

The first "break in the dam" was the modest "combat-related special compensation" or "CRSC," pay put in the 2003 Defense Authorization Act. It granted an additional payment to two (relatively small)[31] categories of retirees: those with 20 or more years of service who were receiving disability compensation for which they also received a Purple Heart medal; and those with 20 or more years of service who were receiving disability compensation rated at 60% or higher as a result of injuries suffered in combat or "combat-like" training.[32]

The true breakthrough came with the National Defense Authorization Act for Fiscal Year 2004.[33] Two programs were passed in tandem. First, CRSC was expanded to include all combat-related disabilities or operations-related disabilities, from 10% to 100% ratings, effective January 1, 2004, and extended to Guard and Reserve members.

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[31] While there were no accurate figures, the estimates in the press commentary were that some five percent of disabled veterans would qualify under the original rules.

[32] Unfortunately, from the spouse's point of view, the new compensation did ***not*** provide actual concurrent receipt, which would restore previously-waived retired pay. Instead, it added a ***third*** category of pay – to the retiree only. The program did nothing to address the problems detailed in this article.

[33] Pub. L. 108-136; 117 Stat. 1392 (Nov. 24, 2003).

Second, by way of Concurrent Receipt (also called "Concurrent Disability Pay," or "CDP"),[34] all retirees with 20 years of service and VA disability ratings of 50% or higher, had their retired pay offsets phased out over a ten year period. In other words, the military retired pay previously waived for disability pay would be slowly restored, until the retirees were receiving ***both*** their full retired pay ***and*** the VA disability payments.

Specifically, a dollar sum starting at $100.00 per month for those with a 50% rating, to $750.00 for those with a 100% rating, was restored;[35] the sums are scheduled to increase by an additional 10% each year through 2014, by which time full concurrent receipt will be paid. In 2005, retirees with a 100% disability were accelerated to immediate full concurrent receipt.

The new category of pay is "subject to collection actions" for alimony, child support, community property divisions, etc., so the net effect in terms of former spouses should be the gradual erasure of the reduction that the spouses experienced when the retirees elected to take disability awards.

Apparently, the pay centers threw out paperwork related to former spouse collections whenever the spousal share was ***completely*** eliminated, so for those former spouses whose payments dropped to zero (because the disability award consumed the entire disposable retired pay) are required to re-apply for payment of benefits.[36] Others should see automatic, incremental restoral of the payment stream ordered in the documents previously submitted to DFAS, as the retired pay is slowly restored.

If and when concurrent receipt has been fully implemented, totally eliminating the required waiver, a retiree's application for and receipt of VA disability benefits would have ***no effect*** on a pre-existing division of military retired pay between the retiree and his former spouse; he would just get additional benefits. So, after 2014, the sort of cases described above should no longer be happening – at least for those with a disability award of 50% or more; for the rest, the legal issues are identical, but the dollars at stake are (necessarily) lesser.

The law creates an issue like the *McCarty*-gap cases or the (prior law) Civil Service dual-compensation laws – the legal dispute affects fewer and fewer people over time, to a lesser and lesser degree, which will eventually (presuming it is expanded to cover the 10% to 50% disability cases) render the entire above body of case law to fodder for footnotes or to be raised only for analogy to other, current disputes.

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[34] In 2004, given yet another name of "Concurrent Retirement and Disability Pay" or "CRDP."

[35] Those with 50% disability get $100 more each month, those with 60% get $125, those with 70% get $250, those with 80% get $350, those with 90% get $500 and those with 100% disability get $750. In 2005, retirees with a 100% disability were accelerated to immediate full concurrent receipt.

[36] A former spouse for whom DFAS has a complete application on file, but who has not received any payments due to the retiree's being 100 percent disabled, is required to send a written request with a current payment address, to restart payments, to DFAS, either by fax to (216) 522-6960; or by mail to DFAS-GAG/CL, P.O. Box 998002, Cleveland OH 44199-8002. DFAS suggested including the retiree's name and social security number for proper routing. For those former spouses for whom DFAS no longer has an application on file, re-application for benefits under the USFSPA is required to restart payments.

In any event, for the short term, there remains the question of arrearages, consisting of sums of retired pay that retirees waived and personally collected in the form of disability pay to the exclusion of the former spouse. As to those cases, all of the above factors remain relevant. The legislation did not contain any authority for DFAS to issue retroactive payments.

Presumably, all the normal rules regarding arrearages still exist (including the illogical, and apparently accidental rule that arrearages in retired pay cannot be collected from retired pay). Those with arrearages in child support or alimony, however, could initiate a withholding order that includes a payment toward the arrearage.

IV. CONCLUSION

In military cases, it is absolutely required for attorneys in the era after *Mansell* to anticipate the possibility of post-divorce recharacterizations of the retirement benefits that have been divided, specifically including the possibility that the retiree might waive some or all of the retirement benefits in favor of VA disability benefits. Potentially devastating effects to the former spouse can be avoided by relatively simple expressions of intent, reservations of jurisdiction to award alimony or otherwise compensate the spouse, and expressions creating constructive trusts.

The lawyers must be aware of the possibilities, and deal with each of the contingencies at the time of court involvement. Only such foresight can preclude the possibility of long, expensive, and uncertain litigation from looming over the parties for the remainder of their joint lives.