

Dividing Military Retirement and Electing Disability Pay: Protecting Non-Military Spouses

THURSDAY, JANUARY 26, 2023

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

Today's faculty features:

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Dawn M. Laubach, Founder, Laubach Law Office, PLLC, San Antonio, TX

The audio portion of the conference may be accessed via the telephone or by using your computer's speakers. Please refer to the instructions emailed to registrants for additional information. If you have any questions, please contact **Customer Service at 1-800-926-7926 ext. 1.**

Exhibit "A"



DEFENSE FINANCE AND ACCOUNTING SERVICE
GARNISHMENT LAW DIRECTORATE
PO BOX 998002
CLEVELAND, OH 44199-8002

(DFAS-HGA/CL)

Aug 05, 2019
NAME REDACTED
LAST FOUR REDACTED

NAME REDACTED
ADDRESS REDACTED
ADDRESS REDACTED

Dear Sir:

We have received your application for payment of a portion of the retired/retainer pay of the above-named member under the Uniformed Services Former Spouses' Protection Act (10 U.S.C. § 1408). **Your application cannot be approved for the following reason:**

Member retired under 10 U.S.C § 1201 et seq., i.e. "Chapter 61" which governs retirement or separation for physical disability. Member is also receiving Concurrent Retirement Disability Pay (CRDP). The Defense Office of Hearing and Appeals (DOHA) is currently reviewing the issue of whether a former spouse who has applied under the USFSPA should receive a portion of the CRDP payments that a Chapter 61 retiree receives.

DFAS will keep your application on file until DOHA renders a final decision on the issue. Once DOHA issues a final decision, DFAS will review your application and determine your eligibility to receive payments under USFSPA pursuant to the guidance outlined in DOHA's decision.

You must include the member's social security number on all correspondence to this office. If you have any questions, you may contact us through the DFAS WEB page at www.dfas.mil/garnishment.html or call the Customer Service Section at 1-888-332-7411 (DFAS411). However, please note that this office must limit its response to inquiries regarding the status of your case and thus we cannot provide legal guidance in pursuing your case. For legal assistance, please contact your attorney or legal representative.

Sincerely,

[REDACTED]
[REDACTED]
[REDACTED]

HOWELL PROGENY CASES

<u>State</u>	<u>Court</u>	<u>Case</u>	<u>Reasoning</u>
Alabama	Alabama Court of Appeals	Brown v. Brown, 260 So.3d 851 (2018)	TDRL waived for VA Disability
Alabama	Alabama Court of Appeals	Colafrancesco v. Colafrancesco, 2022 Ala. Civ. App. LEXIS 14 (2022)	A "trial court could not even consider a veteran's disability benefits received in lieu of military retirement benefits when awarding alimony." citing <i>Ex Parte Billeck</i> , 777 So.2d 105 (Ala. 2000)
Alaska	Alaska Supreme Court	Jones v. Jones, 2022 Alas. LEXIS 25 (2022)	Servicemember agreed to it, and Howell does not "preclude one spouse from agreeing to indemnify the other as part of a negotiated property settlement"
Alaska	Alaska Supreme Court	Gross v. Wilson, 424 P.3d 390 (2018)	Servicemember agreed to pay 50% of VA disability in 2014;
Alaska	Alaska Supreme Court	Jordan v. Jordan, 480 P.3d 626 (2021)	Superior Court erred in offsetting nondivisible disability pay 'to the dollar and to the penny' in the property division to wife
Arizona	Arizona Court of Appeals	Chaidez v. Grant, 2022 Ariz. App. Lexis 45	
California	California Court of Appeals	In re Marriage of Cassinelli, 20 Cal. App. 5th 1267 (2018)	Trial court ordered alimony to make up for lost retired pay; Appellate court held, "because the judgment dividing the community property was long since final, the trial court could not give [the former spouse] any remedy for the loss of her community property interest in the retired pay."
Colorado	Court of Appeals	In re Marriage of Tozer, 410 P.3d 835 (2017)	"The <i>Howell</i> takeaway is clear. Military retirement disability benefits may not be divided as marital property, and orders crafted under a state court's equitable authority to account for the portion of retirement pay lost due to a veteran's post-decree election of disability benefits are preempted."
Georgia	Court of Appeals	Phillips v. Phillips, 347 Ga. App. 524 (2018)	Note - Court ordered indemnification in July 2015 decree; Husband appealed in June 2017 (delay was order on atty fees)

Indiana	Court of Appeals	Edwards v. Edwards, 132 N.E.3d 391 (2019)	Court previously, in 2015, held servicemember in contempt for not paying 50% of pension when he had waived for CRSC. Servicemember moved to set aside in 2018 based on Howell; Court ruled res judicata (specifically claim preclusion)
Iowa	Iowa Court of Appeals	In re Marriage of Erlandson, 2022 Iowa App. LEXIS 104 (2022) (not yet final)	Trial court retained jurisdiction to modify divorce decree in the event of waiver of military retirement. Appellate Court found that you could not modify property division (res judicata) and not a change in circumstances to warrant modification of alimony
Kansas	Kansas Court of Appeals	In re Babin, 56 Kan App. 2d 709 (2019)	Parties had mediated agreement dividing both retired pay and disability; Servicemember then appealed - Court of Appeals agreed with Servicemember
Maryland	Court of Special Appeals	Hurt v. Jones-Hurt, 233 Md. App. 610 (2017)	"the veteran's ability under federal law to waive retirement pay for disability benefits, at whatever time his disability status might change, overrides (preempts!) any state law agreement he might have made, or state court judgment to which he was a party, relating to his military retirement benefits, and the parties and state court should have factored this possibility when valuing the parties' marital property."
Michigan	Supreme Court of Michigan	Foster v. Foster, 949 N.W.2d 102 (2020)	Agreement for indemnification; Wife later moves to enforce. Court held that the agreement was unenforceable, but remanded on the issue of whether this was an improper collateral attack against the judgment
Minnesota	Minnesota court of appeals	Berberich v. Mattson, 903 N.W.2d 233,	Consent order in 2014 for SM to pay W 40% of "military disability" which is VA payments in this case; W attempted enforcement in 2016, trial ct ordered SM to pay, H appealed; Minnesota court of appeals found it unenforceable in light of Howell and preemption, even if res judicata or contractual agreement

Ohio	10th District of Ohio Court of Appeals	Jennings v. Jennings, 2017-Ohio-8974 (Ct. App.)	SM argued Howell and 38 USC 5301(a)(1) prohibit use of VA disability benefits in determining spousal supp't; COA disagreed saying trial ct. did not err when considering VA disability benefits for income for spousal supp't. Interestingly, SM also argued Ct abused its discretion by awarding attorney fees b/c H was "correct on the law" re VA disability
Nevada	Nevada Court of Appeals	Martin v. Martin, 2021 Nev. App. Unpub. LEXIS 664	Indemnification provision is invalid, even if agreed to
New Mexico	N.M. Supreme Court	Russ v. Russ, 485 P.3d 222 (2021)	<i>Howell</i> applies retroactively (overturned N.M. Court of Appeals court which said that <i>Howell</i> did not apply retroactively)
Tennessee	Tennessee Court of Appeals	Vlach v. Vlach, 556 S.W.3d 219 (2017)	Parties agreed to indemnification; Court of Appeals held no indemnification clause is proper
Texas	Texas Court of Appeals	Rudolph v. Jamieson, 2018 Tex. App. LEXIS 3983 (2018)	"Errors other than lack of jurisdiction, such as 'a court's actio contrary to a statute or statutory equivalent,' merely render the judgment voidable [rather than void] so that it may be 'corrected through the ordinary appellate process.' Having failed to do so, he cannot now collaterally attack the trial court's division of property, even if it is allegedly unlawful."
Virginia	VA Court of Appeals	Yourko v. Yourko, 866 S.E. 2d 588	Note: Servicemember had agreed to indemnification
Washington	WA Court of Appeals	In re Marriage of Weiser, 14 Wn. App. 2d 884 (2020)	Parties divorced in 2011; Agreement had indemnification clause; Wife moved to enforce in 2017; Court enforced the agreement based on res judicata; "Howell only applies to property divisions imposed by the court."
Washington	Washington Court of Appeals	In re Marriage fo Kaufman, 17 Wn. App. 2d 497 (2021)	"Res judicate prevented [husband] from collaterally challenging the validity of the dissolution decree in response to [wife's] motion to enforce."

ETHICAL ETHEL AND THE DISABILITY RETIREMENT

by Mark E. Sullivan*

*Mr. Sullivan is a retired Army Reserve JAG colonel. He practices family law in Raleigh, North Carolina, and is the author of THE MILITARY DIVORCE HANDBOOK (Am. Bar Assn., 3rd Ed. 2019) and many internet resources on military family law issues. A Fellow of the American Academy of Matrimonial Lawyers, Mr. Sullivan has been a board-certified specialist in family law for over 30 years. He works with attorneys nationwide as a consultant on military divorce issues in drafting military pension division orders. He can be reached at 919-832-8507 and at mark.sullivan@ncfamilylaw.com.

The other day I received a call from a desperate attorney in need of help with a military pension division issue. Let's call her "Ethical Ethel." She wanted to know about dividing the pension, accusations of fraud, the requirements of the Rules of Professional Conduct, and... well, why don't we just transcribe here what was said in the conversation?

Ethel: Thanks for picking up the phone, Mark! I'm confounded and confused about this new military divorce case I'm handling, and I thought you'd know the answers.

Mark: That's not likely, Ethel, but I'll try to help you. What seems to be the problem?

Acronyms and Abbreviations

Ethel: The problem? Make that PROBLEMS! Every time I turn around, something new and unexplainable pops up. I'm beginning to wish I'd never taken on this case in the first place. Right now the main issue is understanding what my client, Sergeant Jane Doe, is saying. All the acronyms and abbreviations are so confusing!

Mark: Well, Ethel, I agree with you on that point. Most military divorce and pension division cases are *long on shortened phrases*. You have to know the difference, for example, between PT and PTSD,¹ between TBI and TDY,² in order to have a handle on the issues in the case. Can you tell me a little more about what's troubling you in the Jane Doe case?

Ethel: Well, the attorneys have agreed to divide the military pension with Jane's husband, John, getting 40% of the military retired pay. He's also getting Survivor Benefit Plan coverage, to continue the flow of payments if she dies before him. I asked Jane last week to give me a status report on her retirement paperwork. When Jane called me this morning, she said that her PEB report was finished, the PEBLO had told her she'd be retired in about three months, her military rating was 40% and her VA rating was 100%. What's THAT all about? I feel like my hair's on fire!

A Disability Retirement

Mark: Let's take it slowly, Ethel. I think I can clear up some of the mysteries. The PEB is the Physical Evaluation Board. When a servicemember is getting a disability retirement under Chapter 61 of Title 10, U.S. Code, her case is reviewed

¹ PT stands for physical training, while PTSD is Post-Traumatic Stress Disorder.

² TBI is Traumatic Brain Injury, and TDY is temporary duty.

by a PEB to determine whether she is unfit physically or mentally to perform her duties. If the answer is “yes,” then she is processed for discharge. If, however, her military disability rating is 30% or more or if she has over 20 years of service, she will be retired from the military. The PEB Liaison Officer, or PEBLO, is appointed to guide her through the process.

Percentage Problems

Ethel: I see. What about that *percentage business*? What does that mean?

Mark: When an individual is discharged or retired due to disability, the military assigns him or her a rating, based on the degree to which she or he is unable to perform military duties. In this case, the military rating assigned is 40%.

Ethel: And the VA rating?

Mark: When a servicemember is determined to have a *service-connected disability*, then the Department of Veterans Affairs can pay that individual VA disability compensation, and in this case the rating for Jane Doe is 100%. The difference is due to what’s being measured. Unlike the military rating, which measures inability to do one’s military duties, the VA disability rating measures one’s impairment in regard to obtaining and holding down a civilian job. That’s why they are often different figures, since they measure different things.

Ethel: Let’s talk dollars, Mark. What do these figures mean for my client?

Mark: The VA disability rating means that once she makes the election to receive payments, the disability compensation will be over \$3000 a month, with the exact amount set according to the number of dependents she has.

Ethel: And the “military rating” – what’s that all about?

Mark: When Jane is retired based on disability, it’s called MDRP...

Ethel: ANOTHER one of those abbreviations, Mark!

Mark: Yes, Ethel, you’re right. In this case, the abbreviation stands for military disability retired pay. Jane will receive MDRP that is calculated using two factors: her *percentage of disability* and her *years of service*. The PEBLO will help her calculate the amount of retired pay she would receive, determined on the basis of each of these factors. Whichever amount the servicemember chooses is what her retired pay will be, under 10 U.S.C. § 1401(a).

Ethel: I think I understand, but can you give me an example?

Examples to Illustrate

Mark: Sure. If the client were a colonel with thirty years of service and a 30% military rating, her retired pay would probably be higher using the years-of-service method instead of the percentage of disability method. And if your client were a sergeant with a 90% military rating and only 15 years of service, her retired pay might be higher using the percentage-of-disability method.

Ethel: How do these two methods figure into dividing the military pension?

Mark: Here are the rules, assuming that the client chooses the higher amount in each case:

- If the *percentage-of-disability method* yields the higher amount (let's say \$1,500 a month MDRP, compared to only \$1,000 using the *percentage-of-disability method*), then the disability pension is not subject to division. That's according to 10 U.S.C. § 1408 (a)(4)(A)(iii).
- If, on the other hand, the *years-of-service method* produces the higher number (let's say that's \$1,200 a month MDRP versus only \$900 per month using the *percentage-of-disability method*), then only the *difference* between the two may be divided. In this case, the differential would be \$300 a month as MDRP subject to division.

Strike Out the Settlement?

Ethel: Oh my gosh, Mark – that throws the entire military pension division settlement out the window! The other attorney and I have been operating under the assumption that there would be \$1000 or more of military pension to divide. If the husband got 40%, that would be around \$400 or more each month as his share of the military retired pay of Jane Doe. From what you've told me, he would be receiving 40% of a much smaller amount, or maybe the pension is not divisible at all!

Mark: That's right. Going forward at this point means that the result, which is unforeseeable at present by the other side, will be little or nothing for pension division. The husband will likely walk away empty-handed.

Ethel: But that's my concern, Mark. He won't walk away. He'll raise the roof with his attorney and with the court and with me. The other attorney will say she'll never trust me again, and she might file a grievance! Do I need to call the other attorney right away and report this new development?

Ethical Issues

Mark: Not so fast, Ethel. First of all, do you have your client's consent to reveal the information you just received? If not, you'll need to check with her, since the conversation the two of you had this morning contains privileged information that she conveyed to you. While we can both agree that this is a big, new development that will have a substantial impact on the division of the pension, you should be sure to get her approval before telling the other side. That requirement is found in your state's Rules of Professional Conduct.

Ethel: But what if I don't tell her and the case is settled as we've discussed – 40% of the pension allocated to husband plus SBP coverage? What will happen when he sends his pension paperwork to DFAS?³

³ DFAS, the Defense Finance and Accounting Service, handles division of military retired pay for the Army, Navy, Air Force and Marine Corps. It's located in Cleveland, Ohio. Pension division for the Coast Guard and the

Mark: I can tell you almost verbatim what the reply letter will say, if Jane’s retired pay amount is calculated according to the percentage-of-disability method. The language I find on the DFAS letters that I’ve reviewed always says this: “We cannot honor the enclosed order since the retired pay to be divided is based on disability” or something similar. That means *no pension division*.

Ethel: If that happens, we’ll be reaping the whirlwind, Mark. The other attorney will accuse me of deceiving her. Her client may file a grievance complaint at the state bar against me, and also against her. The husband may even file a malpractice lawsuit against her for incompetence in handling a military pension division matter. I’m sure that she’ll attempt to attack the pension division order and try to get relief from the court.

Mark: Yes, she may attempt to move for an amendment under Rule 59 (if your state has the federal civil procedure rules), or she may attempt to have the court set it aside under Rule 60. Let me ask you this, Ethel – did the other attorney ever submit discovery, asking about the nature of the military retired pay that Jane Doe was to receive?

Ethel: No. And we were never required to make any statement on court forms, such as our Equitable Distribution Inventory, disclosing what type of pension it was and whether it was divisible or not.

Mark: Then in that case, it’s clear that you’ve not led them astray or deceived them with any filings or responses. They should not be able to claim fraud, since that would involve a material misrepresentation of fact that is calculated to deceive. You did no such thing if you did not tell them anything about the pension.

Ethel: I couldn’t tell them, Mark - I didn’t even know about it myself! We both just assumed that there would be *something to divide*.

Conversing with the Client

Mark: Well, at the very least, I think you should have a conversation with Jane about this. I would tell her what you now know about division (or lack of division) of the pension. Ask her to get for you a copy of the letter that she will be receiving from the Army Physical Disability Agency (APDA). The APDA letter will describe for her the two methods of calculation of retired pay and will stated which one yields the higher amount. It will also provide an estimate of her retired pay under both methods.

Ethel: Anything else?

Mark: Yes, tell her that you cannot disclose these facts to the other side unless she approves and authorizes you to tell them. Explain that you anticipate major problems from the other side (as we’ve just discussed) once the husband applies for pension division and his application is rejected because – either in part or

commissioned officers of the Public Health Service and the National Oceanic and Atmospheric Administration is administered by the Coast Guard Pay & Personnel Center in Topeka, Kansas.

completely – the MDRP is not divisible. Tell her of the possible additional legal expenses which may result. Ask her to consider what you’ve said before she decides. In some cases, the client will go ahead and approve telling the other side, just to avoid an expensive court contest later on. And last, one very important point – make a record of what you’re hearing from Jane and advising her to do. That might be very useful down the road when memories (yours and hers) have faded a bit. I usually keep a Client Notes Sheet to remind me of the four items which are recorded in every case: Facts, Issues, Goals and Tasks.

Bottom-Line Bullet Points

Ethel: So what’s the worst that could happen if I provide that disclosure about non-divisible retired pay to the other side?

Mark: Well, I can think of several scenarios which might play out:

- If the court enters the 40% order you described, it will be subject to partial or complete rejection by DFAS; the court lacks the power to divide a military pension amount which is outside the definition of “disposable retired pay.” DFAS will not honor the order, or else it will only garnish 40% of the differential, as we described above, between the *years-of-service* method and the *percentage-of-disability* method. The APDA letter will tell you the facts.
- If the court order contains an indemnification clause (i.e., a paragraph requiring the client to reimburse the husband for any loss he suffers due to disability payments), then you’ll need to move to delete that clause and, if the order is entered without removal, you must appeal the order. An unappealed order means that your client could be compelled to divide the otherwise non-divisible pension through the doctrine of *res judicata*.
- If the other side realizes that most or all of the pension cannot be divided, they may shift the negotiations to spousal support to attempt to obtain the monetary equivalent of a pension division. MDRP is subject to a garnishment order for alimony or spousal support.
- And finally, there should be no impact on the SBP which was allocated to the husband. Even if there is no disposable retire pay left to divide, the order’s terms for Survivor Benefit Plan coverage will still be honored. The former husband will receive 55% of the designated SBP base amount for the rest of his life if Jane Doe dies before he does. The only catch (and *there’s always a catch!*) is that the payment would be suspended if the former spouse remarries before age 55.

Ethel: Whew! That’s a lot to digest, Mark.

Conclusion

Mark: It is, and that’s why good attorneys who handle military divorce cases are ethically required to associate competent co-counsel when the legal issues are complex, the subject matter is difficult, and they need help with the handling of the case. When in doubt, get a “wingman” to assist in translating the terms, writing

the clauses for settlement, preparing the military pension division order, and working with the husband or wife in submitting the paperwork to DFAS. That way, everyone sleeps better at night!



Know What You're Dividing!

We were just about finished with the hour-long Zoom interview when I heard it. It was one of those moments when your ear says to your brain, “What? Hold on – stop everything!”

The military client was telling his local lawyer and me how he expected to retire from the Army in four months. He said he'd know for sure when the PEB report came through.

“PEB... as in *Physical Evaluation Board*?” I asked. He confirmed that's what he meant.

It was now clear – as it definitely had not been in the previous hour – that “John Doe” was not gracefully exiting the Army after 20 years of service at his own choice. Rather, he was being forced out with a disability retirement. And that made all the difference in the world.

Disability Retirement

We'd been discussing what share his wife would receive in the divorce settlement, how to write up the military pension division order (MPDO), how much of the pension would be allocated to her, when payments would start from the retired pay center, and what language and data points were required. But now, with the new information, it became clear that this was not a longevity retirement; he was being “put out to pasture” because he was mentally or physically unfit to continue to serve.

And that meant that there was a good possibility that none of the pension would be divided. When a servicemember gets a disability retirement under Chapter 61 of Title 10, U.S. Code, his retired pay is calculated in two ways, and he always receives the higher amount. The first is retired pay based on his *percentage of disability*. The second method is pay calculated according to his *years of service*. In John's case, if the higher amount was based on percentage of disability, then none of the pension would be divisible. 10 U.S.C. § 1408(a)(4)(A)(iii). If his retired pay was based on years of service, then only the difference between that amount and the percent-of-disability amount would be divisible.

This made a huge difference in the structure and strategy for the case, and the PEB information only came to light in what we thought were the *last five minutes* of the hour's interview. It led us to continue the conversation for almost another hour, ranging over topics such as the duty to disclose information to the wife's attorney, what discovery requests (if any) were served by the other side, the possible role of spousal support in the settlement, grounds for a later motion by the wife to set aside the divorce settlement for fraud, and the Rules of Professional Conduct. The main lesson coming

out of the interview was the importance of *knowing what you're dividing* when the interview involves military pension division.

Retirement from Active Duty

In many cases, John Doe's pension is based on active duty only, and he will receive a "regular retirement" under Chapter 71 of Title 10. When the divorce is after December 23, 2016 and he isn't receiving retired pay at divorce, then the MPDO must contain his years of service and his High-3 pay, both as of the divorce date. Further discussions often involve how to calculate the marital fraction.

If John's "regular retirement" is based on active service as well as time in the National Guard or Reserves, then the discussion may involve calculating the marital fraction according to time, and then again according to retirement points acquired during the marriage; each of the parties will want that resulting percent which most benefits him or her. The time calculation will involve not only active-duty service but also "extra Section 1405 service," that is, additional time attributed to retirement points received for weekend drill.

Non-Regular Retirement and "Pay Status"

If John is to receive a "non-regular retirement" from the National Guard or Reserves under Chapter 1223 of Title 10, then the data points are still required, but the "years of service" is replaced by "retirement points at divorce," and someone has to do that calculation. The marital fraction can be fixed as of the divorce date, or it can be a "formula clause" with marital pension service divided by total pension service (and the latter is unknown when John hasn't stopped drilling). The fraction would look like this:

$$\frac{\text{Marital military service}}{\text{Total military service}}$$

When the denominator is not fixed on the date of separation, filing or divorce, it is represented by "X." And in this situation, military rules for Guard/Reserve retirements require that the fraction be expressed in terms of retirement points, not time.

When John is already in pay status and he's getting monthly pension payments deposited into his bank account, the issue often involves "back payments." If the parties have been separated for, say, two years, then he may owe "Jane Doe" a sum of money for the pension-share payments which he received in the past 24 months and did not share with her. Or he may owe her nothing if he's been making the house payments or paying spousal support from his pension during the interim period.

When It's Disability Retired Pay...

And finally, when John's retired pay is based on disability, the golden key for the pension-division issue is: *Can the pension be divided at all?* If that issue is not spotted during the interview, then the consequences could be serious and substantial for the

spouse or the servicemember down the road when the pension order is entered and sent to the retired pay center. The reply letter sent to Jane Doe will likely say that John's retired pay "cannot be divided since it is based entirely on disability." Jane's attorney might file a motion under Rule 59 to amend or alter the divorce settlement. The motion could be under Rule 60, asking for the settlement to be set aside or vacated. There may be a motion for contempt, and Jane might even file a grievance against John's attorney.

All of this can be avoided if the attorney for Jane or for John is aware of what's being divided. It means that – to start the interview – the responsible attorney needs to ask about the nature of the retired pay that the court will be allocating in divorce. It means, in short, that you need to *know what you're dividing*.

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QUICK TIPS – “Military Disability Retired Pay and Family Law”



1. Explanations of MDRP:

- A disability retirement from the military, pursuant to title 10, chapter 61, is not an elective retirement. It is not a choice of the servicemember (SM). It is a forced retirement, based on a finding that the SM is unfit to perform his duties. It usually results in no divisible retired pay (i.e., no *disposable retired pay* under 10 U.S.C. § 1408(a)(4)), but it is not initiated by the SM. It is the result of a process initiated by the government. It is the individual’s commander who starts the paperwork when there is evidence that the SM is unfit for duty. The commander must proceed with the paperwork and the process, with the goal of an involuntary retirement through placement of the individual on the Permanent Disability Retired List (PDRL). The SM cannot volunteer, choose or elect military disability retired pay (MDRP).
- See Department of Defense Instruction 1332.38, “Physical Disability Evaluations,” November 14, 1996, and Department of Defense Instruction 1332.18, “Disability Evaluation System (DES),” August 8, 2014.
- Disability retirements are governed by chapter 61 of title 10, U.S. Code.
- For case law explanations of military disability retired pay, see Cronin v. United States, 765 F.3d 1331 (Fed. Cir. 2014); Selitsch v. Selitsch, 492 S.W.3d 677 (Tenn. Ct. App. 2015); In re Marriage of Bowen, 168 Wn. App. 581, 279 P.3d 885 (Wn. Ct. App. 2012); In re Marriage of Poland, 264 P.3d 647 (Colo. Ct. App. 2011); Flowers v. Flowers, 578 P. 2d 1006 (Ariz. App. 1978) as modified in Villasenor v. Villasenor, 657 P. 2d 889 (Ariz. App. 1982).
- For text explanations of the military disability retirement and compensation process, see “An Analysis of Military Disability Compensation” by the National Defense Research Institute, <https://www.rand.org/pubs/monographs/MG369.html>; Department of Defense Directive 1332.18 (Nov. 4, 1996)
- Also see the applicable service regulation (e.g., AR 635-40, Personnel Separations: Physical Evaluation for Retention, Retirement, or Separation (Feb. 8, 2006)).

2. Overview of MDRP (from Sullivan, The Military Divorce Handbook (Am. Bar Assn., 3rd Ed. 2019))

- Military disability retired pay is available for those SMs who are sufficiently disabled that they cannot perform their assigned duties.¹ If a SM is found to be unfit to perform the duties of his rank and position because of a mental or physical impairment, then he is placed on the Temporary Disability Retired List, or TDRL. This allows the military to examine him and evaluate his medical situation. If his condition improves, he may be returned to active duty. If it does not, then he has a hearing before a Physical Evaluation Board (PEB) to determine the next step.² Often the PEB will make a recommendation that he be medically retired, which is an involuntary discharge from the military; it is not something that one may obtain by requesting it. It is imposed on the individual. In preparation for retirement, the SM may meet with a liaison officer; this is the PEBLO, or Physical Evaluation Board Liaison Officer. The PEBLO goes over the options with the SM and then writes up an estimate of the retired pay that the SM would receive, using the years-of-service method and the disability rating percentage method.
- The first option is disability severance pay. When a servicemember is found to be unfit for continued duty, with fewer than 20 years of creditable service and a disability rating of less than 30 percent, the member is separated and receives disability severance pay. Years of creditable service are used to determine the payment.³ Disability severance pay is taxable; the only exception is severance pay for those illnesses, injuries, or conditions that are combat-related. When the rating is 30 percent or more, or the individual has at least 20 creditable years of service, then this usually means transfer from the TDRL to the PDRL, or Permanent Disability Retirement List. More information is available at <https://www.dfas.mil>. Search for “Disability Retirement” and “Disability

¹. See Department of Defense Instruction 1332.38, “Physical Disability Evaluations,” November 14, 1996, and Department of Defense Instruction 1332.18, “Disability Evaluation System (DES),” August 8, 2014. Disability retirements are governed by chapter 61 of title 10, U.S. Code.

². 10 U.S.C. §§ 1203, 1208, and 1212.

³. Monthly VA disability compensation may also be available to the SM if it is determined that the disability is service-connected. However, one cannot receive military disability severance pay and VA disability compensation for the same illness, condition, or disability. In this situation, the individual’s VA compensation is withheld until the original amount of disability severance pay is paid back. An exception to this rule was made in section 1646 of the 2008 National Defense Authorization Act. Effective January 28, 2008, no deduction will be made when disability severance pay received by an individual is for a disability that was incurred in the line of duty in a combat zone, or incurred during performance of duty in combat-related operations.

Severance Payment.”⁴

- When Congress originally enacted USFSPA, it excluded from “disposable retired pay” the retired pay of a SM who retired for disability under chapter 61 of title 10, U.S. Code.⁵ This was changed in 1986 so that the *disposable retired pay* for a SM who is entitled to military disability pay under chapter 61 is equal to total monthly retired pay less the amount of retired pay under chapter 61, computed using the percentage of the SM’s disability when he or she was retired.⁶ The amended USFSPA thus excludes that portion of military disability pay under chapter 61 that is determined according to the retiree’s disability percentage rating at the time of retirement.
- A simplified explanation may help to illustrate the process. For the purposes of this example, assume that John Doe is the servicemember, his High-3 amount is \$3,000, he has 20 years of creditable service, and his military disability rating is 40 percent.
 1. The first step is to calculate his normal retired pay based on his years of service, which we will assume for this example to be 2.5 percent times his High-3 pay. In this case, it comes to \$1,500 (20 years × \$3,000 × 2.5 percent).
 2. The next step is to multiply his retired pay base by his disability rating. This is done by multiplying \$3,000 by 40 percent, or \$1,200.
 3. The SM will make a choice of which one to accept, likely deciding to receive the *higher of these two amounts* (\$1,500 per month in military disability retired pay in this example).
- USFSPA makes divisible *only the amount of pay that is the difference between the two preceding amounts*, that is, the difference between \$1,500 and \$1,200. Thus only \$300 is divisible military retired pay.

⁴. A detailed outline on medical disability issues has been published by the U.S. Army Judge Advocate General’s Legal Center and School (TJAGLCS)., can be downloaded by following the steps at footnote 20 in this chapter, substituting “2018 Medical Disability and Veterans Law Outline” in the last step. may be found in the 2018 Medical Disability and Veterans Law Outline (*or current version*)The current version may be found at <https://tjaglcspublic.army.mil/tjaglcs-publications> > Deskbooks and Handbooks. It may also be located by using the following instructions:

Go to <https://tjaglcspublic.army.mil>

Then select “LCS Publications”

Then select “Deskbooks and Handbooks”

Then go to “Administrative and Civil Law”

And then go to “2018 Medical Disability and Veterans Law Outline” or the current version of this outline.

⁵. Bullis v. Bullis, 22 Va. App. 24, 33, 467 S.E.2d 830, 835 (1996).

⁶. 10 U.S.C. § 1408(a)(4)(A)(iii). See also DoDFMR vol. 7b, ch. 3, para. 030102.

Thus, although Mrs. John Doe might be entitled to half of \$1,500 in marital property division in a nondisability case, or \$750 per month as her spousal share of the military pension, a military disability retirement by John would yield her only half of \$300, or \$150 per month, unless she has an “indemnification clause” in the court order or property settlement.⁷ An example of a letter from DFAS explaining the calculation of retired pay using the preceding two methods is at Appendix 8-S.

- There are DFAS fact sheets on disability retirement at <https://www.dfas.mil>. At Chapter 8 of Sullivan, The Military Divorce Handbook, you will find an expert witness report on military disability retired pay and CRDP at Appendix 8-T, and questions for the expert witness on MDRP are at Appendix 8-U. An example of an Army disability retirement order is at Appendix 8-V. A memo as to documents on which the expert relied in a case involving MDRP is at Appendix 8-W.

3. Differences between MDRP and VA disability compensation (from Sullivan, The Military Divorce Handbook (Am. Bar Assn., 3rd Ed. 2019)):

- The Department of Defense compensates individuals in the armed forces who are determined to be “unfit for duty,” that is, unable to perform their military duties, due to mental or physical impairments.
- The VA compensates veterans who have a *service-connected* illness, wound, condition, or disability.⁸
- Military disability retired pay from DoD is a monthly lifetime payment for members unfit for duty who have at least 20 years of military service with any disability rating, or for members who have been given a disability rating of at least 30 percent, according to the VA Schedule for Rating Disability *with any length of service*.
- Payment from the VA is based on impairment in the context of civilian employment. VA compensation is for the average reduction in earning capacity that the individuals are expected to have.
- The VA payments are elective. One has to apply for payment and that choice means there will be a dollar-for-dollar reduction, in general, of

⁷. Note that, while military disability retired pay may be exempt from division under federal law, the retired pay that John Doe receives may be considered as a distributional factor by the court in making an even or unequal division of the parties’ marital or community property. *See, e.g., Lesh v. Lesh*, 809 S.E.2d 890 (N.C. Ct. App. 2018). It may also be considered by the court in determining whether a retiree has the means to comply with payments ordered by the court, even though the pay may not in itself be divisible. *Id.*

⁸. For a description of the VA process, see Brooker, Seamone, & Rogall, *Beyond “T.B.D.”: Understanding VA’s Evaluation of a Former Servicemember’s Benefit Eligibility Following Involuntary or Punitive Discharge from the Armed Forces*, 214 MIL. L. REV. 4, 42–44. The similarities and differences between the military disability retirement and the VA disability rating systems are described in Congressional Research Service Report RL33991, *Disability Evaluation of Military Servicemembers* (Jan. 27, 2010).

retired pay for money received from the VA.

- The military medical disability retirement is mandatory; no choice is involved as to discharge or continued service, although an individual may contest a decision by the PEB and appeal it.

4. Levy or execution on bank accounts funded by non-divisible payments (typically VA disability compensation) - comparable analysis when account is funded by MDRP

- When VA payments to a spouse are placed in an investment account and not used for support of the veteran, they lose their “exempt character,” and the gain which they achieve can be divided as marital property. Goodemote v. Goodmote, 44 A.3d 74 (Pa. Super. Ct. 2012), *citing* Gray v. Gray, 922 P. 2d 615 (Okla. 1996); see also Pfeil v. Pfeil, 115 Wis.2d 502, 341 N.W.2d 699, 702-703 (Wis. Ct. App. 1983) and Bischoff v. Bischoff, 987 S.W. 2d 798 (Ky. App. 1998).
- The rule is that VA benefits remain exempt from assignment under 38 U.S.C. 5301 so long as they are 1) readily available, 2) money-equivalent, and 3) not converted into permanent investments. Bahr v. Bahr, 2000 Kan. App. Unpub. LEXIS 789, *citing* Porter v. Aetna Casualty, 370 U.S. 159, 162 (1962); Stacy v. Stacy, 2020 Mass. App. LEXIS 25 (also see cases cited in Stacy).

4. Argument for unequal division of marital property when military disability retired pay (MDRP) cannot be divided:

- Atkinson v. Chandler, 130 N.C. App. 561, 504 S.E.2d 94 (1998) (Court of Appeals upheld an unequal division in favor of spouse when SM’s pension was not vested and, thus, could not be divided under North Carolina law which, at that time, required vesting for division).
- In an analogous situation, when the wife lost her pension rights because of a federal statute barring retroactive modification of divorce decrees, a Massachusetts decision allowed the trial court to take into consideration the inability to divide the SM’s retired pay in allocating the rest of the property in the marital estate. Bottiggi v. Wall, 54 Mass. App. Ct. 430, 765 N.E.2d 819 (2002).
- Under the same circumstances as set out in the Bottiggi case, the California Court of Appeals approved the use of compensatory alimony to redress the inequity. Olsen v. Olsen, 24 Cal. App. 4th 1702, 30 Cal. Rptr. 2d 306 (1994).

5. Revisiting the property division (text in italics from Sullivan, The Military Divorce Handbook (Am. Bar Assn., 3rd Ed. 2019))

- *Another remedial approach is to have the court revisit the property distribution in light of the retiree’s VA election to re-determine what property*

is allocated to whom. This was approved in *McMahan v. McMahan*,⁹ a Florida case in which the trial judge awarded the wife a share of the husband's disability benefits. The Florida Court of Appeals determined that this violated the Mansell rule but held that, because the husband and wife anticipated when they executed their agreement that it would be honored by the courts, the case would be remanded for reconsideration of the entire equitable distribution scheme.¹⁰

- Reconfiguring the property settlement in light of a VA waiver subsequent to the settlement was the subject of the appeal in *White v. White*, a 2003 North Carolina Court of Appeals case.¹¹ When the ex-husband elected VA disability compensation, thus reducing the former wife's share of the military pension, she filed a motion in the cause to amend or modify the parties' pension division order to adjust her share of the pension that had been reduced due to the ex-husband's actions.
- The Court of Appeals stated that a trial judge has the power to address the ex-wife's issues stated in her motion in the cause, specifically the issue of whether (as a result of the retiree's waiver of part of his retired pay to obtain VA disability compensation) she was entitled to a modification of the pension division order from five years before so as to effectuate the terms of the parties' 1990 property settlement and consent order. That settlement stated that the ex-wife was entitled to one-half of her former husband's retired pay acquired during the marriage.
- The court noted that numerous courts have determined that neither the Supreme Court's decision forbidding indemnification upon divorce in *Mansell v. Mansell*¹² nor the USFSPA prohibits a judge from considering a retiree's disability compensation (which reduces a corresponding amount of retired pay) when configuring the distribution of marital property upon divorce.¹³
- There are, of course, potential problems with revisiting the parties' property division. It may not be so difficult if the distribution of marital property was only, say, a year ago. But what about the situation in the *Howell* case, where the VA election and offset occurred over a decade after the divorce and division of property? In many cases, the assets will be spent or

⁹. *McMahan v. McMahan*, 567 So. 2d 976 (Fla. Dist. Ct. App. 1990).

¹⁰. *Id.* at 979–80; *see also* *Guerrero v. Guerrero*, 362 P.3d 432 (Alaska 2015) (Judge refused to issue military pension division order. The parties (with no attorney on either side) had signed a property division settlement and it was incorporated into the divorce decree. Trial court stated that husband was receiving only military disability retired pay and VA disability compensation, neither one being divisible. Affirmed by Alaska Supreme Court, but property division was reopened because of exceptional circumstances due to the parties' assumption that wife was entitled to some portion of husband's military retirement. Husband retired from the military with no disposable military retired pay.); *White v. White*, 152 N.C. App. 588, 568 S.E.2d 283 (2002), *aff'd*, 357 N.C. 153, 579 S.E.2d 248 (2003); and *Torwich v. Torwich*, 660 A.2d 1214, 282 N.J. Super. 524 (1995).

¹¹. *White v. White*, 152 N.C. App. 588, 568 S.E.2d 283 (2002), *aff'd*, 357 N.C. 153, 579 S.E.2d 248 (2003).

¹². *Mansell v. Mansell*, 490 U.S. 581 (1989).

¹³. *Bishop v. Bishop*, 113 N.C. App. 725, 734; 440 S.E.2d 591 (1994); and *Clauson v. Clauson*, 831 P.2d 1257, 1263 (Ala. 1992).

transformed into other property. The mobile home will have been sold, the bank account closed out, the stock reduced in value, or the investments liquidated to pay off debts. It's a lot easier to talk about redoing the property division than it is to revise the marital property division "in real life" in many cases.

- *In addition, note that the White case involved revising the ex-wife's share of the pension. It did not involve an entire revision of the parties' property division. There are few state court appellate decisions in which there was a partial or complete revision of the property division years after the original allocation. Maybe—with good arguments from creative counsel—there will be some in years to come.*
- The approach of "revisit the property division" was also used in Guerrero v. Guerrero, 362 P.3d 432 (Alas. 2015). In that case, the trial judge refused to issue a military pension division order. The parties (with no attorney on either side) had signed a property division settlement, and it was incorporated into the divorce decree. The judge stated that the ex-husband was receiving only military disability retired pay and VA disability compensation, neither one being divisible. The trial court's decision was affirmed by the Alaska Supreme Court, but property division was reopened because of exceptional circumstances, due to the parties' assumption that the ex-wife was entitled to some portion of military retired pay and that such retired pay would actually exist upon the former husband's retirement from the military. Due to receipt of military disability retired pay, there was no disposable military retired pay.

6. Analysis of a North Carolina MDRP case: Lesh v. Lesh, 257 N.C. App. 471, 809 S.E.2d 890 (N.C. Ct. App. 2018)

- Parties were married in 1989, and they were divorced about 25 years later. In 2016 the court entered an equitable distribution order which granted the former spouse (FS) 75% of the marital estate and ordered Mr. Lesh to pay her about \$32,000 in monthly installments of \$877. Mr. Lesh was a disability retiree. He filed a motion to set aside the order, arguing that the distributive award and the payment order would require him to use his military disability retired pay (MDRP) to make the payments, and that federal law preempted the trial court's ability to require him to do so. The FS filed a contempt motion for nonpayment. Mr. Lesh appealed the court's contempt citation.
- The issues raised by Mr. Lesh, the Court of Appeals stated, straddle two lines of cases from the United States Supreme Court.
 - The first line of cases follow Mansell v. Mansell, 490 U.S. 581, 583, 109 S. Ct. 2023, 104 L. Ed. 2d 675, 681 (1989), which holds that federal law preempts state courts from ordering the division of military disability benefits and the distribution of these benefits to

a veteran's former spouse. Although this case involved VA disability compensation, there is no reason why the reasoning would not apply to MDRP as well.

- The second line of cases involves Rose v. Rose, 481 U.S. 619, 107 S. Ct. 2029, 95 L. Ed. 2d 599 (1987), a case which permits state courts to consider military disability benefits as income for purposes of calculating a veteran's ability to fulfill support obligations.
- The Court stated that our N.C. courts have held that military disability benefits cannot be considered marital property and therefore are not subject to distribution, citing Halstead v. Halstead, 164 N.C. App. 543, 547, 596 S.E.2d 353, 356 (2004) ("Disability benefits should not, either in form or substance, be treated as marital property subject to division upon the dissolution of marriage.") and Bishop v. Bishop, 113 N.C. App. 725, 734, 440 S.E.2d 591, 597 (1994) (holding that defendant's military income based on "service related disability retirement" could not be classified as marital property).
- This does not dispose of the question of whether disability benefits could be considered as *income* for the purpose of determining the ability of a party to pay a distributive award. This analysis starts with the U.S. supreme Court's decision in Rose v. Rose. In that case, the disabled veteran's main source of income was from the VA benefits totaling over \$3,000 a month. He was held in contempt for failure to pay child support to his former wife. His argument was that the state court could not enforce the child support payment due to federal law which exempted veterans' benefit payments from attachment, levy or seizure. He argued that his only means of satisfying his child support obligation was through the use of VA disability benefits, and thus the court was in effect ordering him to make payments in violation of federal law. Rejecting this argument, the Supreme Court concluded that a state court may consider disability benefits as income for the veteran when calculating child support. It found that VA benefits are not provided solely for the support of the veteran, noting that the amount of VA benefit payments depends on the number of dependents which the veteran has.
- The Court was also influenced by the N.C. Supreme Court's decision in Comstock v. Comstock, 240 N.C. App. 304, 771 S.E.2d 602 (2015), which involved the ex-husband's U.S. Trust IRA. The IRA was found to be his separate property, but the trial court included the trust account as "available income" of the ex-husband in determining his ability to pay an equitable distribution distributive award. The Supreme Court rejected the argument of the former husband as to the judge's improper consideration of the trust account as income, stating that:
 - while the IRA was not a marital asset subject to division,

- it was a separate liquid asset, and
- it was available as a financial resource from which the judge could order a distributive award.
- Since the trial court didn't distribute the asset but instead only considered it as a source of income for purposes of distributive payments, the Court in Comstock upheld the distribute award and the manner of payment.
- Thus the Court of Appeals came to the preliminary conclusion that –
 - in an equitable distribution case where the judge is considering the income of a veteran for purposes of deciding on distributive award payments,
 - the court may treat the veteran's military benefits as income from which he can make distributive payments, but
 - the court cannot divide the military disability benefits as marital property.
- The Court of Appeals then considered whether the 2017 decision of the U.S. Supreme Court in Howell v. Howell, 137 S. Ct. 1400, would change that tentative outcome. It found that Howell was not applicable. The argument raised by Mr. Lesh "simply does not involve the type of issue addressed in Howell."
- The Court found that there was no trial court error in holding Mr. Lesh in contempt for failing to make the court-ordered distributive award payments, even if his non-divisible MDRP was the source of funds for the payments.

7. Taxes and military disability retired pay

- The DFAS website states:

TDRL/PDRL Exemption: *If you retired under a disability law (Temporary Disability Retirement List or Permanent Disability Retirement List), your retired pay will be fully non-taxable if your pay is calculated based upon your military (not VA) disability percentage and you meet one of the following conditions:*

**You were in the military or under a contractual obligation to join the military on September 24, 1975, or*

**Your military disability rating is combat-related*

The welcome letter you received from DFAS when you first retired indicates whether your pay is computed using your military percentage of disability or your years of service.

- The Tax Deskbook for 2020, published by the Judge Advocate General's Legal Center and School states:
 - *Gross income does not include pension or annuity payments for personal injuries or sickness resulting from military service where (i) the payment was for a "combat-related injury"; or (ii) the taxpayer would be entitled upon application to receive VA disability compensation. I.R.C. § 104(a)(4), (b)(2)(C)-(D). 1.*
 - *Combat-related injury. An injury that was the direct result of armed conflict, that occurred while engaged in extrahazardous service or under conditions simulating war, or that was caused by an instrumentality of war. I.R.C. § 104(b)(3). 2.*
 - *Pension payments (or any portion thereof) based on years of service are not paid for a disability and thus are presumed taxable. Treas. Reg. § 1.104-1(e). 3.*
 - *Accordingly, to exclude any portion of retirement pay, the taxpayer has the burden to show the pension was for a disability incurred during active service in the military. Campbell v. Comm'r, T.C. Summ. Op. 2014-109, at *15-17 (denying taxpayer's petition to exclude retirement pay from income where he could not establish his entitlement to VA disability compensation); Holt v. Comm'r, T.C. Memo. 1999-348, at *6 (citing Scarce v. Comm'r, 17 T.C. 830, 833 (1951))*

