DISABILITY, DEATH

and

RELATED TOPICS OF CHEER

PART TWO – DISABILITY[1]

by

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I. INTRODUCTION

It is at this point a truism that retirement benefits, usually the most valuable asset of a marriage, are divisible upon divorce to at least the degree to which they were accrued during the marriage.[2] As retirement benefits have become ubiquitous in divorce, many fine points regarding their division have arisen, along with a range of strategies by those earning the retirement benefits to resist, limit, or prevent the division of the benefits with their soon-to-be-former spouses.

One of the flash points for conflict between divorcing parties regarding retirement benefits has been the situation in which the employee has taken a disability benefit, either in addition to or in replacement of retirement benefits that would otherwise have accrued due to service performed during the marriage. The reason for the conflict is that while the retirement benefits are or would be divisible, disability benefits are typically not divisible or attachable. When the latter is substituted for the former, the interests of the parties as to the proper characterization of the benefits become instantly polarized.

The reason for the disparate treatment of retirement and disability benefits stems from the different purposes those benefits are intended to serve. Retirement benefits are essentially a form of deferred reward for service,[3] whereas disability benefits are compensation for future lost wages and opportunities because of disabilities suffered. Retirement benefits almost always take into account the employee's age or time in service, whereas disability benefits are often codified according to a schedule of severity or otherwise focused on the injury suffered, rather than the benefits accrued.

Theoretically, a disability award is separately payable to an employee irrespective of whether regular retirement benefits have been accrued and are therefore divisible with a spouse. If this theory was fully applied, a claim of disability would have no impact on a longevity retirement, and the former spouse would have no interest in the disability award. In practice, however, the acceptance of disability benefits often

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[2] *See*, *e.g.*, 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) at xix-xx.

[3] This includes military retirement benefits. Certain interest groups, seeking a rationalization by which to avoid the division of military retirement benefits accrued during marriage, state that the benefits should be seen as "reduced benefits for reduced present services," and thus post-divorce earnings, which should not be divided as property. The primary argument usually referenced is that monthly military retired pay is taxed as regular income; of course, the monthly benefits paid by ***all*** non-contributory defined benefit retirement plans (of which the military system is a normal example) are taxed as regular income. *See* Internal Revenue Code §§ 72, 402(a)(1); OFFICE OF THE ACTUARY, DEP'T OF DEFENSE, FY 2002 DOD STATISTICAL REPORT ON THE MILITARY RETIREMENT SYSTEM, Appendix "A" at A-2 (2003) ["FY 2002 REPORT"] (describing the military retirement system as "a funded, noncontributory defined benefit plan"). Arguments that any retirement benefits earned during marriage should not be treated as marital property are specious.

requires the full or partial relinquishment of accrued retirement benefits, leaving the characterization of those benefits a critical question determining whether or not the benefits will be divided between the spouses.[4]

Unfortunately, the topic of disability benefits is often not even mentioned in otherwise comprehensive texts dealing with various forms of retirement benefits; where they ***are*** mentioned, the discussion is often fleeting. These materials are intended to address the issues that come into play when disability benefits are received by an employee spouse, in addition to or in replacement of retirement benefits.

The vast majority of litigation addressing these questions has occurred in cases concerning military retirement benefits, probably because of the lack of adequate statutory protections for former spouses in the military retirement system, as compared with other retirement schemes. That system will therefore be the first focus of this paper.

II. DISABILITY BENEFITS IN THE MILITARY RETIREMENT SYSTEM

While a full discourse on the evolution of military retirement benefits law is beyond the scope of this paper, 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*,[5], 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

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[4] *See Kimmey v. Kimmey*, 2001 Ohio 2305, 2001 Ohio App. LEXIS 4839 (Oct. 31, 2001) (disability benefits are not marital property unless they are accepted in lieu of old-age retirement pay); *In re Marriage of Knies*, 979 P.2d 482 (Wash. Ct. App. 1999) (only disability award in excess of amount of retirement benefits otherwise payable are the separate property of the retiree); *In re Marriage of Nuss*, 828 P.2d 627 (Wash. Ct. App. 1992) (same; where a spouse has elected to receive disability in lieu of retirement benefits, only the amount of disability received over and above what would have been received as retirement benefits is considered that spouse's separate property); *Powers v. Powers*, 779 P.2d 91 (Nev. 1989) (disability benefits were divisible property to the extent they included divisible retirement benefits); *In re Marriage of Saslow*, 710 P.2d 346 (Cal. 1985) (disability benefits may be part replacement of earnings and part retirement); *In re Marriage of Kittleson*, 585 P.2d 167 (Wash. Ct. App. 1978) (disability benefits may be partial compensation for injury and part retirement); *In re Marriage of Anglin*, 759 P.2d 1224 (Wash. Ct. App. 1988) (disability benefits may be part replacement of earnings and part retirement); *In re Marriage of Kosko*, 611 P.2d 104 (Ariz. Ct. App. 1980) (disability benefits may be part retirement and part replacement of earnings).

[5] 453 U.S. 210, 101 S. Ct. 2728, 69 L. Ed. 2d 589 (1981).

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, 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."[6]

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.[7]

The USFSPA set up a federal mechanism for recognizing and enforcing state-court divisions of military retired pay, including definitions that were prospectively applicable, and rules for interpretation to be followed by the military pay centers in interpreting the law; later, regulations were adopted, and the pay centers were consolidated.[8] One of the definitions established by the statute was of "disposable retired pay" (the sum that the military pay center could divide between spouses), as "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 forfeitures of retired pay ordered by a court-martial or as a result of a

[6] "The purpose of this provision is to place the courts in the same position that they were in on June 26, 1981, the date of the *McCarty* decision, with respect to treatment of nondisability military retired or retainer pay. The provision is intended to remove the federal pre-emption found to exist by the United States Supreme Court and permit State and other courts of competent jurisdiction to apply pertinent State or other laws in determining whether military retired or retainer pay should be divisable [*sic*]. Nothing in this provision requires any division; it leaves that issue up to the courts applying community property, equitable distribution or other principles of marital property determination and distribution. This power is returned to the courts retroactive to June 26, 1981. This retroactive application will at least afford individuals who were divorced (or had decrees modified) during the interim period between June 26, 1981 and the effective date of this legislation the opportunity to return to the courts to take advantage of this provision." S. Rep. No. 97-502, 97th Cong., 2nd Sess. 15, (1982), *reprinted in* 1982 U.S.Code Cong. & Ad.News 1596, 1611. *See Steiner v. Steiner*, 788 So. 2d 771 (Miss. 2001), *opn. on reh'g*.

[7] *Mansell v. Mansell*, 490 U.S. 581, 584-85, 109 S. Ct. 2023 (1989); *see also Brown v. Brown*, 574 So. 2d 688, 690 (Miss. 1990) (states may treat military retirement pensions as personal property subject to state property laws).

[8] The eventual consolidated center is the Defense Finance and Accounting Service, located in Cleveland; the regulations, which also were amended several times, were found at 32 C.F.R. § 63 until they were (apparently accidentally) deleted by Congress in the post-9/11 legislative rush. DFAS is still applying those regulations, however, pending final passage of adequate replacement regulations.

> waiver of retired pay required by law in order to receive compensation under title 5 or title 38;
>
> (C) in the case of a member entitled to retired pay under chapter 61 of this title [10 U.S.C. §§ 1201 *et seq*.], are 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 (or the date on which the member's name was placed on the temporary disability retired list); . . . .[9]

The USFSPA also has included a savings clause since its original passage, intended to prevent misapplication of the law to subvert existing divorce court orders:

> 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.[10]

In the years first following passage of the USFSPA, most courts considered the disposable pay language in the act to be a limitation only on the amount that the pay centers could directly pay out to a spouse, and not a limitation of any kind on state courts, which divided the gross (total) value of ***all*** assets before them, including retirement benefits.[11] Those cases held that (1) *McCarty* was not to be construed as acting retroactively; and (2) 10 U.S.C. § 1408(c)(1) did not limit state courts to

[9] 10 U.S.C. § 1041(a)(4).

[10] 10 U.S.C. § 1408(e)(6) (emphasis added).

[11] *See*, *e.g.*, *Casas v. Thompson*, 228 Cal. Rptr. 33, 720 P.2d 921 (Cal. 1986), *cert. denied*, 479 U.S. 1012 (1987). One Texas court approved a trial court's 1995 insertion of the word "gross" in construing and enforcing its 1979 decree dividing military retirement benefits; the court found the rephrasing to be merely "reiterating" what was ordered in 1979, and added the home-spun explanation that:

> though an ancient proverb attributes to lawyers the ability to change white to black, we cannot do so. A directive that X is awarded "a one-third ownership interest in an apple pie" does not mean a one-third of the pie remaining after the government or anyone else takes a bite from it.

Matter of Marriage of Reinauer, 946 S.W.2d 853, *opn. on reh'g*, n.2 (Tex. Ct. App. 1997).

prospective division of ***disposable*** retired pay, but was merely a procedural direct payment limitation on the state courts' division of ***gross*** benefits.[12]

Indeed, at least one California case has gone further, and stated that where the original divorce decree predates *McCarty* (i.e., June 26, 1981), the existence of a disability is simply ***irrelevant*** to an attempted equal division of retirement benefits.[13]

In 1989, the United States Supreme Court accepted a divorce case out of California, and issued a decision in *Mansell v. Mansell*.[14] The basic holding of the case was to declare that military disability awards were not divisible community property, although the Court also held that "domestic relations are preeminently matters of state law," and that there should be no finding of federal preemption absent evidence that such a result is "positively required by direct enactment."[15]

Mr. Mansell had applied for and received disability benefits before the Mansells divorced. The parties had stipulated in their divorce (before *McCarty* and before the USFSPA) to divide the gross sum of benefits, including both retired pay and disability pay, which were already in pay status. After Congress enacted the USFSPA, Mr. Mansell returned to court seeking to modify the Judgment of Divorce to exclude the disability portion of the retired pay from division with his ex-spouse.[16]

The state court held that it could divide the disability portion of his pay. The U.S. Supreme Court majority reversed, however, holding that a state court may divide only ***non***-disability military retired pay.[17] The dissent echoed the same conclusions

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[12] The *Casas* court found the member's argument in favor finding such a limitation "illogical," because it necessarily permitted members to take actions altering their tax status, which would have the effect of reducing the community property share payable to former spouses. Further, the court considered the USFSPA a complete repudiation of the *McCarty* holding, and considered the limiting language of the federal act to be merely procedural limitations upon garnishment. The court focused upon that portion of the legislative history that declared Congress's intent to "restore the law to what it was," and noted that previous California law had called for division of the entirety of military retirement, as it did with all other retirement benefits. 720 P.2d at 928 & n.33, 930 & n.10 (quoting 1982 U.S.C.C.A.N. 1599).

[13] *In re Marriage of Stier*, 178 Cal. App. 3d 42, 223 Cal. Rptr. 599 (1986).

[14] 490 U.S. 581, 109 S. Ct. 2023, 104 L. Ed. 2d 675 (1989).

[15] 490 U.S. at 587, 109 S. Ct. at 2028, quoting *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 581, 99 S. Ct. 802, 808, 59 L. Ed. 2d 1 (1979) (quoting *Wetmore v. Markoe*, 196 U.S. 68, 77, 25 S. Ct. 172, 176, 49 L. Ed. 390 (1904)).

[16] *Mansell*, 490 U.S. at 586.

[17] *Id*. at 594-95.

reached earlier by the California Supreme Court in *Casas v. Thompson*, *supra* – that the gross sum of retirement benefits was available to the state divorce court for division.[18]

Ultimately, the matter was remanded to state court, which ruled that the previously-ordered flow of payments from the member to the spouse, put into place prior to the appellate *Mansell* decision, was *res judicata* and could not be terminated.[19] In other words, the bottom line was that the United States Supreme Court opinion had ***no effect*** on the pre-existing order to divide the entirety of retirement and disability payments in the final, un-appealed divorce decree in the *Mansell* case.

Many other courts immediately followed suit, issuing opinions that detailed 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.[20]

Thus, *McCarty*, the USFSPA, and *Mansell* set up the framework within which courts have struggled with issues relating to military retirement benefits and disability benefits. Ultimately, any disability claim increases the money flowing to the retiree at the expense of the former spouse, even to the point of eliminating the spousal share entirely. The cases fit into a few separate categories.

A. Disability Taken While on Active Duty Before Retirement Eligibility and Before Divorce

In some ways, this is the easiest type of case. At least, it seems to have the fewest traps for the unwary. Where a military member becomes disabled while on active duty, and before reaching eligibility for a normal, longevity retirement, his

[18] Justice O'Connor, joined in a dissent by Justice Blackmun, argued that the term "disposable retired pay" only limited a state court's ability to ***garnish*** retired pay – not the court's authority to divide that pay. *Id*. at 594-604. Both the dissent and the majority in *Mansell* concluded that the savings clause clarified that the federal direct payment mechanism does not replace state court authority to divide and garnish property through other mechanisms.

[19] *In re Marriage of Mansell*, 265 Cal. Rptr. 227 (Ct. App. 1989), *on remand from* 490 U.S. 581, 109 S. Ct. 2023 (1989).

[20] *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).

disposition depends on the degree and apparent permanence of the disability incurred.[21]

If the disability is perceived as temporary, the member is placed on a temporary disability retired list, and re-evaluated at least every 18 months. The member receives temporary disability pay, with a minimum benefit of 50% of basic pay. This can go on for up to five years, at the end of which the member may be retired for permanent disability (if the disability is rated as being at least 30%, or if at that point the member has achieved 20 years of service), or returned to active duty, or separated from service. A member who is separated without being eligible for disability retired pay is awarded severance pay, calculated at the rate of two months of basic pay for each year of service time accrued, up to a maximum sum equal to two years of basic pay.

If the disability is considered permanent, at the initial evaluation or during a re-evaluation period as discussed above, the member is eligible for disability retired pay if he is either at least 30% disabled, or has accrued 20 years of creditable service.

The amount of pay is determined by two alternative formulas. First, the retired pay corresponding to the rank of the member is multiplied by the percentage of the disability. Second, the retired pay corresponding to the rank of the member is multiplied by 2.5% and multiplied again by the years of creditable service accrued. The greater number is used, with a minimum of 30% of basic pay, and a maximum of 75%.

The benefits are taxable, in part – to the extent the benefits received exceed the first calculation in the preceding paragraph. If the disability is deemed "combat-related," however, it is not taxable. Additionally, a member receiving taxable disability pay can usually waive its receipt in favor of tax-free VA disability compensation (explained below), dollar for dollar.

After *Mansell*, the thought was expressed that ***any*** disability award existing on the date of divorce simply could not be considered by a divorce court – the same way some courts have held themselves unable to consider the existence of Social Security benefits in weighing property awards.

In practice, however, this quickly proved to not be entirely true. Military disability pay may be considered as a factor in awarding to the former spouse a disproportionate amount of marital property, or otherwise as a factor relating to the future income, and thus the "economic circumstances" of parties, in property and

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[21] For all of the following, the disability cannot have been caused by any intentional misconduct or willful neglect, or have been incurred during any "unauthorized absence."

alimony analyses.[22] Courts have also enforced parties' agreements to divide pay that included disability pay.[23]

Thus, disability benefits in pay status prior to retirement eligibility, and prior to divorce, do not tend to show up in the reported cases, except indirectly. Since the disability pay is considered outside the scope of "disposable pay," most courts are apparently considering the benefits to be the separate property of the members, and simply taking the benefit stream into account when determining the distribution of other assets and the total resources available for the payment of alimony.

B. Retirement for Disability After Longevity Retirement Eligibility and Before Divorce

As set out above, 10 U.S.C. § 1408(a)(4)(C) (as it was amended effective November 14, 1986) provides that if a military members retires for disability, disposable pay is reduced by the sum paid to the member for the disability itself (computed in accordance with the "percentage of disability" method discussed above).[24]

This can give rise to a "hybrid" situation, where the divorce court has before it ***both*** some disposable retired pay and some disability pay. The analysis is still relatively straightforward from the divorce practitioner's point of view.

Any sums paid to the member for disability as of the date of divorce are treated as a separate property income stream. ***Those*** sums are taken into account (in the division of other assets and in considering resources for alimony) the same way that benefits would be if there was no eligibility for regular retired pay. Any sums payable as longevity retired pay are treated, as discussed below, the same way that any other retirement benefits accrued during marriage would be treated.[25] Cases involving disability benefits in pay status prior to divorce appear intermittently in the reported case law, but only where the member has sought to increase the disability percentage post-divorce.

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[22] *See*, *e.g.*, *In re Kraft*, 832 P.2d 871 (Wash. 1992) (citing many other cases); *In re Brown*, 892 P.2d 572 (Mont. 1995). *See also* cases cited in the alimony discussion, *infra*.

[23] *See*, *e.g.*, *Hisgen v. Hisgen*, 554 N.W.2d 494 (S.D. 1996); *Owen v. Owen*, 419 S.E.2d 267 (Va. Ct. App. 1992); *Shelton v. Shelton*, 119 Nev. ___, 78 P.3d 507 (Nev. 2003), *cert. denied*, 124 S. Ct. 1716 (2004).

[24] *See* Pub. L. No. 99-661, § 641, 100 Stat. 3885 (1986).

[25] *See*, *e.g.*, *Wright v. Wright*, 594 So. 2d 1139 (La. Ct. App. 1992) (where, apparently, member took disability retirement prior to divorce court order, former spouse could obtain order for percentage of disposable pay received, but not disability pay received, by member).

The Arizona cases are illustrative. In deciding *In re Gaddis*,[26] the court reviewed a former spouse's request for reimbursement of sums lost when the retired member went to work for the federal Civil Service and (under the then-applicable, now-repealed, "dual compensation" law) had waived a large portion of the total military retirement benefits otherwise payable, which reduced the spousal share of those benefits proportionately.

The *Gaddis* court held that "'Arizona law does not permit, and federal law does not require,' reduction of a former spouse's decreed interest in military retirement benefits based on the retired veteran's post-dissolution waiver of those benefits in order to receive civil service compensation."[27] It therefore upheld the trial court's order that compelled the retiree to pay "the original, actual value" of the former spouse's interest in the retirement benefits.[28] The court found no violation of federal law because the trial court had only ordered compensation to the former spouse, and did not specifically "divide a portion of retirement pay that had been waived due to civil service employment at the time of the decree."[29] The court distinguished *Mansell* because the dissolution decree there had "awarded the wife a community property interest in the portion of retirement pay the husband already had waived to receive disability benefits and thus directly conflicted with the requirements of 10 U.S.C. §§ 1408(a)(4)(B) and 1408(c)."[30]

Two years later, a different Arizona intermediate appellate court considered *Harris v. Harris*,[31] in which the divorce decree awarded the former spouse "one-half of [the member's] Military Retirement, not including [the member's] disability payment."[32] The member's disability rating was sixty percent at that time, but after the divorce, he obtained additional ratings that ultimately "transformed all of [his] non-disability retirement pay into disability benefits."[33] Applying the reasoning in *Gaddis*, the court in *Harris* concluded that federal law did not preclude the wife from seeking "the

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[26] *In re Gaddis*, 191 Ariz. 467, 957 P.2d 1010 (Ariz. Ct. App. 1997), *cert. denied*, 525 U.S. 826 (1998).

[27] 191 Ariz. at 469, 957 P.2d at 1012.

[28] 191 Ariz. at 468, 957 P.2d at 1011.

[29] 191 Ariz. at 470, 957 P.2d at 1013.

[30] *Id*.

[31] 991 P.2d 262 (Ariz. Ct. App. 1999).

[32] 195 Ariz. 559, ¶2, 991 P.2d 262, ¶2 (alteration in original).

[33] *Id.* at ¶7.

value of the non-disability retirement [pay]" she had been awarded in the prior dissolution decree, without reduction for retired pay the husband waived post-decree in order to receive additional disability benefits.[34]

The lesson of these cases is that courts can distinguish a separate property disability award existing on the date of divorce from a ***post***-divorce recharacterization of community property retirement benefits as disability benefits. This is true even when the retirement benefit income stream at the time of divorce contained a component of each kind of benefit. Other cases dealing with post-divorce increases in existing disability awards are discussed below.

C. Waiver of Longevity Retirement Benefits in Favor of Disability Benefits After Retirement, and Before Divorce

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).

Compensable disabilities are supposed to consist solely of "disease or injury incurred in or aggravated during active duty" or active or inactive duty for training, and "in the line of duty," and any discharge or release from service must have been for "other than dishonorable conditions." Anecdotal accounts indicate widespread abuse of the VA evaluation system, resulting in "service-connected disability" awards for the natural injuries and illnesses of aging, or from accidents having nothing to do with military service.[35]

As set out above, 10 U.S.C. § 1408(a)(4)(B) provides that disposable retired pay is reduced, dollar for dollar, to match the amount of any "waiver of retired pay required

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[34] *Id.* at ¶¶ 5, 13.

[35] The current system was created by the "Career Compensation Act of 1949" because the ***prior*** disability retirement system received extensive allegations of "unfairness, inequity, and inefficiency" in the years following World War II. FY 2002 REPORT, Appendix "B" at B-4 (2001). The Department of Defense Office of the Actuary indicates that there were about 1.7 million retirees drawing non-disability retired pay, and about 200,000 drawing disability pay, as of September 30, 2001.

by law in order to receive compensation under . . . title 38 (governing post-retirement applications for VA disability awards). All such awards are received tax-free.[36]

Whenever a military member takes a regular, longevity retirement, and then applies for and receives VA disability benefits prior to the time the parties happen to divorce, there will be at least some VA disability retired pay. If the disability compensation is not as large (or larger) than the entire regular retired pay, there will ***also*** be some "disposable retired pay."

This fact pattern, however, does not appear much in the reported cases, apparently for the same reason the situations discussed above do not seem overly problematic – so long as the disability award is a known quantity at the time of divorce, it is possible for the divorce court to take the benefit stream into account when determining questions relating to division of property and payment of alimony. At least the situation is being handled sufficiently at the trial court level that there does not appear to be much call for appellate resolutions.

Additionally, as full concurrent receipt (discussed below) is phased in, this will become virtually a non-issue, except that the member will have a separate property income stream that might be considered by a court making determinations about property division and alimony.

D. Waiver of Longevity Retirement Benefits in Favor of Disability Benefits After Retirement, and After Divorce

This classification, like that in the preceding section, involves members who waived at least ***some*** regular, longevity retired pay in favor of VA benefits. The only difference is that the waiver examined by the courts in these cases occurred ***after*** the parties to the case divorced.

This is the situation that has given rise to nearly ***all*** litigation in the field of military retirement benefits and disability awards. The problem, in a nutshell, is that when a 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.

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[36] *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.

From anecdotal evidence, and the reported cases, it happens all the time. The lure for the retired member is huge; not only does he change every affected dollar from taxable retired pay to a dollar of tax-free VA disability pay, but the former spouse effectively contributes a portion of each such dollar, exactly equal to whatever percentage she received of the retirement benefits divided upon divorce, and paid to the retiree out of the money she would otherwise receive every month.

Costly litigation is raging in such cases, often between long-divorced former spouses, throughout the country. Certain trends are quite clear, but the expense to both sides is usually enormous, and the former spouses, who usually prevail, are almost never made whole from the expenses of the litigation. As with the other categories of cases, these should (eventually) disappear once full concurrent receipt has been in place for awhile.

1. *Mansell* May Not Apply to Post-Divorce Cases at All

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***."[37] The court ordered that the former spouse be compensated for all reductions in the sums awarded at divorce, carefully explaining why it saw no conflict with federal law:

> There is no such "direct" conflict when the waiver of retirement pay occurs *after the judgment* and new payments are ordered to enforce what had been a proper division of marital property, even if the payments account for the military spouse's receipt of new benefits or pay which could not have been divided in the first instance. . . .[*Mansell* distinguishable if judgment did not divide disability.] The order need only avoid "'specifying an improper source of funds'" for the payments. . . . *Mansell* does not apply to post-judgment waivers of retirement pay because it held only that disability benefits could not be divided "*upon divorce." (Mansell v. Mansell, supra*, 490 U.S. at pp. 583, 595 [italics added].)[38]

The *Krempin* decision noted the "continued relevance" of at least one pre-*Mansell* case from California, quoting from *In re Marriage of Daniels*.[39] That 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

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

[38] 83 Cal. Rptr. 2d at 138 (emphasis in original text).

[39] 186 Cal. App. 3d 1084, 1087 (1986).

awarded to the spouse as a ***resulting trustee*** of her funds, and must pay them over to her. The language quoted was the principle espoused earlier by the California Supreme Court in *Gillmore*[40] – and adopted in Nevada in *Gemma*[41] – that one party should not be allowed to defeat the other's interest in retirement benefits "by invoking a condition wholly within his or her control,"[42] and the state court expressed confidence that the federal courts, if asked, would rule similarly.[43]

The court's reasoning, and holding, echoed that of the Arizona appellate court in *Gaddis*, *supra*. Since these cases always involve ***post***-divorce awards of VA disability benefits, the court reasoned that *Mansell* is simply inapplicable to the weighing of equities involved in a post-divorce conversion case, which is resolved in accordance with traditional community property law. Other courts have echoed similar reasoning, in different words.[44]

The court approvingly quoted the conclusion reached in a law review article: "'A majority of state courts,' on one theory or another, 'take equitable action to compensate the former spouse' when that spouse's share of retirement pay is reduced

[40] *In re Marriage of Gillmore*, 629 P.2d 1 (Cal. 1981), discussed in some detail *infra*.

[41] *Gemma v. Gemma*, 105 Nev. 458, 778 P.2d 429 (1989).

[42] *See In re Gillmore*, discussed *infra*.

[43] "So far as we are aware the federal courts recognize the resulting trust doctrine in appropriate circumstances, and we are confident they would find it appropriate here to further the congressional intent to protect spouses of service personnel that is manifest in [the USFSPA]. . . . Under [the USFSPA], at the time the military spouse becomes eligible for longevity retirement the nonmilitary spouse's right to share in the retirement benefits becomes fully recognized, and it was the specific purpose of [the USFSPA] to recognize and protect the rights of military spouses. We are confident federal law would not be interpreted to permit one spouse at his or her election to defeat the other spouse's fully recognized rights any more than California law does." *In re Marriage of Daniels, supra,* 186 Cal. App. 3d at 1092-1093.

[44] *See* discussion in *White v. White*, *infra*, 568 S.E.2d 283 (N.C. Ct. App. 2002), *aff'd per curiam*, 579 S.E.2d 248 (N.C. 2003), in which the South Carolina court of appeals found the holding of *Mansell* to be narrow, and inapplicable to spouse-reimbursement claims. Similarly, in *Jones v. Jones*, *infra*, 900 S.W.2d 786 (Tex. Ct. App. 1995), the court found that the proscription of *Mansell* – that the USFSPA "does not grant state courts the power to treat as property divisible upon divorce military retired pay that has been waived to receive veterans' disability payments" – meant exactly what it said, and neither more nor less than it said.

by the other's post-judgment waiver."[45] It then added its own conclusion, that: "A review of the out-of-state precedents confirms that this result is nearly universal."[46]

Anecdotal accounts, however, indicate that some trial courts continue to be misled into ruling to the contrary, based upon an overly-expansive reading of *Mansell* and misplaced concerns about violating the Supremacy Clause, or simply by seeing the word "disability" and reacting without any sort of adequate inquiry into what the law is, or why.

Most reviewing courts have either found or simply assumed that *Mansell* is applicable in litigation concerning post-divorce recharacterizations by retirees, and attempted to apply it to resolve the cases before them. Nevertheless, those appellate courts have almost uniformly reached the same conclusions as the court in *Krempin*, by other means, and it is to those decisions that this review next turns. It is worth noting before doing so, however, that if the *Krempin* court's reading of *Mansell* is correct, nearly all of those detailed examinations were simply unnecessary.

2. Even if *Mansell* Does Apply to Post-Divorce Cases, Recharacterization is Generally Not Permitted

Courts have gone to considerable lengths to protect former spouses from the effects of members' post-divorce waivers of retired pay for disability pay, when such waivers partially or completely divested the spouses of sums that had already been awarded to them. As noted above, in *Mansell* itself, and a flurry of cases immediately thereafter, courts refused to allow any post-divorce action taken by the member to affect the pre-existing division of dollars between the parties.[47]

The theory applied was phrased differently from one court to another, but was essentially that of ***constructive trust***. Once a divorce was decreed dividing the "gross" or "total" or "all" 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.

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[45] 83 Cal. Rptr. 2d at 138, quoting from Fenton, *Uniformed Services Former Spouses Protection Act and Veterans' Disability and Dual Compensation Act Awards* (Feb. 1998 Army Law. 31, 32).

[46] *Id*.

[47] *See In re Marriage of Mansell*, *supra*; *Toupal v. Toupal*, *supra*; *Berry v. Berry*, *supra*; *Maxwell v. Maxwell*, *supra*; *MacMeeken v. MacMeeken*, *supra*.

The case law is apparently ***unanimous***. A comprehensive review of the cases throughout the United States reveals that there is essentially no legitimate authority for the proposition that where the 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.

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."[48] 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. As detailed below, ***all*** community property states,[49] and virtually every decision of every court that has ever addressed the issue, have concluded that any such retroactive transfer of money from the former spouse to the member is a violation of law for which compensation to the former spouse must be ordered.

Some reviewing courts have simply focused on the reduction in money that had been ordered paid to the spouse as an impermissible collateral attack on the divorce decree itself. In *Price v. Price*,[50] the South Carolina court held that once a divorce decree was final and unappealed, the husband was not allowed to "unilaterally deprive Wife of the property granted to her" by choosing to reduce the flow of payments based on a claim of federal pre-emption under *Mansell*.

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.

There are attorneys, and some trial level judges, that have tried to hold the language used in ***pre***-*Mansell* divorce decrees to that "higher standard of clarity," arguing that

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[48] *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).

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

[50] 480 S.E.2d 92, 93 (S.C. Ct. App. 1996).

the language of the USFSPA itself provided adequate "notice" of the issue to the former spouse as of 1982. Since virtually every published decision before *Mansell* had rejected the construction of the language embraced by the majority in *Mansell*, however, that argument has been almost universally rejected by appellate courts as sophistry, or at best a misdirected retroactive application of the *Mansell* holding.[51]

When reviewing the language of divorce decrees issued ***after*** *Mansell* (i.e., after 1989), courts have sometimes examined the decrees at issue for "safeguard" clauses 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.[52]

Other courts have expressly found that reimbursement is required, whether or ***not*** there was any kind of indemnification or safeguard clause in the underlying decree.[53]

The reason for not only permitting, but encouraging the use of such indemnification clauses was explained well by the Minnesota Court of Appeals in *Gatfield v. Gatfield*[54]:

> Neither the Supreme Court's holding in Mansell nor the Uniformed Services Former Spouses Protection Act precludes a veteran from

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[51] A common tactic used by attorneys seeking to confuse the issues is to cite cases concerning divorce decrees rendered when the member was already drawing disability pay, and so falling squarely within the "explicit prohibition" of *Mansell*. *See*, *e.g.*, *Lambert v. Lambert*, 395 S.E.2d 207 (Va. Ct. App. 1990). As that court pointed out (and as discussed above), when such a disability award already exists at the time of divorce, the court is to take the cash flow into account when determining an appropriate alimony award to be made to the former spouse who cannot be awarded a portion of that cash flow as property. Citation to such cases in a post-divorce recharacterization case is intellectually dishonest. Illustrating that point, the same court that decided *Lambert* has approved the use of indemnification clauses in post-*Mansell* divorces to compensate a former spouse for any reduction caused by a disability award ***after*** divorce. *See Owen v. Owen*, 419 S.E.2d 267 (Va. Ct. App. 1992) (affirming an order providing that the spouse was to receive a sum equal to a percentage of the member's "gross retirement benefits," and stating that the member's request to reduce what she was owed due to his later disability claim was "irrational").

[52] *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); *Dexter v. Dexter*, 661 A.2d 171 (Md. Ct. App. 1995); *McHugh v. McHugh*, 861 P.2d 113 (Idaho Ct. App. 1993) *Scheidel v. Scheidel*, 4 P.3d 670 (N.M. Ct. App. 2000).

[53] *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); *In re Marriage of Nielsen and Magrini*, 792 N.E.2d 844 (Ill. App. Ct. 2003) (indemnification inferred from percentage award to former spouse).

[54] ___ N.W.2d ___ (No. F500366, Minn. Ct. App., July 6, 2004).

> voluntarily entering into a contract whereby he or she agrees not to waive retirement pay in favor of disability benefits and to indemnify a former spouse for any loss the spouse might incur should the veteran choose to waive any portion of retirement pay. See, e.g., Krapf v. Krapf, 786 N.E.2d 318, 326 (Mass. 2003) ("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."); Shelton v. Shelton, 78 P.3d 507, 511 (Nev. 2003) (holding states are not precluded from applying contract law, even when military disability benefits are involved); Hisgen v. Hisgen, 554 N.W.2d 494, 498 (S.D. 1996) (holding trial court could order husband to pay wife part of disability pay based on parties' divorce settlement agreement).

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."[55]

It has taken over 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***, and requiring reimbursement of the former spouse unless the divorce decree permitted the member to convert the benefits

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

post-divorce.[56] The more recent cases tend to have more comprehensive analyses, and therefore deserve more detailed examinations.

In 1995, the Texas Court of Appeals had the opportunity to examine a case in which the retiree waived a portion of retired pay already granted to the former spouse, thus transferring the money from her receipt to his, in *Jones v. Jones*.[57] The retiree claimed that under federal law, he was "exempt" from contempt sanction by reason of his waiver of retired pay in favor of disability benefits.

The court disagreed, and the wife collected from the husband all sums called for by the decree but which he had sought to re-characterize as disability. The court held that the husband's attempt to reduce the value of the wife's interest in the military retired pay by accepting a 40% disability rating at the time of retirement (post-divorce) constituted an improper "collateral attack on a final unappealed divorce decree."[58]

The court saw the proscription of *Mansell* – that the USFSPA "does not grant state courts the power to treat as property divisible upon divorce military retired pay that has been waived to receive veterans' disability payments" – to mean exactly what it said, and neither more nor less than it said. The court concluded that *Mansell* calls on courts 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. When a member seeks a ***post***-divorce reduction in retired pay, however, his efforts at recharacterization are seen as attempting a "de

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[56] 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.

[57] 900 S.W.2d 786 (Tex. Ct. App. 1995).

[58] 900 S.W.2d at 788.

facto modification" of a final property award, which community property law does not permit.

The same approach was used, and the same result was reached, by the Arizona courts deciding *In re Gaddis*, *supra*, and *In re Harris*, *supra*, in 1997 and 1999. Those courts went to great pains to emphasize that statutes authorizing reductions in military pay benefitting the member (i.e., waivers of retired pay for disability pay) only bar compensation to the spouse if those reductions in retired pay existed when the award to the former spouse was made.

The same year that *Harris* was decided in Arizona, the Kansas Court of Appeals heard and decided *In re Marriage of Pierce*,[59] 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.[60]

Ultimately, in a divided opinion, a majority of the intermediate appellate court upheld the use of a one-year statute of limitations to prevent the former wife from seeking modification of a property settlement involving military retired pay, acknowledging that its ruling was clearly at variance from the majority of opinions in the subject area, but was required by Kansas state law.[61] The dissent noted that the result reached was "patently unfair to former spouses."[62]

Pierce is something of 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.[63] 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.[64]

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[59] 982 P.2d 995 (Kan. Ct. App. 1999).

[60] 982 P.2d at 999. Specifically, the court found that "Priscilla had every ability at the time of the divorce to protect herself from the situation with which we now deal. She failed to do so."

[61] *Id*. at 1000.

[62] *Id*. at 1000-01 (Green, J., dissenting).

[63] *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).

[64] *See Scheidel*, *infra*; *Danielson*, *infra*; *Hillyer*, *infra*; *Smith*, *infra*.

In 2000, New Mexico verified its 1990 holding in *Toupal*, *supra*, in *Scheidel v. Scheidel*.[65] The former spouse successfully pursued arrears from a retiree who reduced the stream of payments to her from his military retirement benefits by increasing a pre-existing disability award.[66] The Court rejected the argument that somehow "federal law prohibits enforcement" of the divorce decree[67]:

> In reliance upon Mansell, Husband contends that the trial court's order, which requires him to compensate Wife for the reduction in benefits that she suffered as a result of the increase in his disability rating, amounts to an impermissible distribution of disability benefits to Wife. We disagree.
>
> Courts in a number of other states have addressed post-judgment waivers of retirement pay in circumstances similar to those presented here. In recognition of the fact that Mansell merely prohibits state courts from ordering the division of the military spouse's disability pay, several courts have determined that nothing in Mansell or in the USFSPA prohibits them from enforcing indemnity provisions designed to guarantee a minimum monthly income to the non-military spouse. See, e.g., Abernathy v. Fishkin, 699 So. 2d 235, 239-40 (Fla. 1997); In re Marriage of Strassner, 895 S.W.2d 614, 617-18 (Mo. Ct. App. 1995); Owen v. Owen, 14 Va. App. 623, 419 S.E.2d 267, 269-71 (Va. Ct. App. 1992).
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> . . . .
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> We find these cases persuasive. Not only is the rationale analytically sound, but the result is equitable. As this Court has previously noted, one 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. See Irwin v. Irwin, 121 N.M. 266, 271, 910 P.2d 342, 347 (Ct. App. 1995).[68]

Finally, the *Scheidel* court held:

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[65] 4 P.3d 670 (N.M. Ct. App. 2000).

[66] A number of courts have noted, as the court did here, that there is no analytical difference between making a new disability application post-divorce, on the one hand, and increasing an award that existed upon divorce, on the other. In both situations, the member's post-divorce action redirects money awarded to the spouse on divorce to the member.

[67] The underlying divorce in *Scheidel* was entered ***post***-*Mansell*, so the court there had to deal with the indemnification language that is relevant for post-, but not pre-, *Mansell* divorces.

[68] While in slightly different words, the holding cited was analytically identical to that of the California Supreme Court in *Gillmore*, *supra*, and the Nevada Supreme Court in *Gemma*, *supra*.

> In light of the fact that Husband's increased disability rating has inured to his financial benefit, effectively creating additional income to him at Wife's sole expense, we do not hesitate to suggest that Husband may be required to shuffle assets or rearrange his finances in order to facilitate the satisfaction of his indemnity obligations to Wife.

The same result was reached in three cases from Tennessee decided in early 2001, two from that state's Court of Appeals, and a third from the Tennessee Supreme Court: *Hillyer v. Hillyer*[69]; *Smith v. Smith*[70]; *Johnson v. Johnson*.[71]

All three decision discussed the *Mansell* holding at length. They started with the legal principles that military retired pay is marital property subject to distribution, and that periodic payments to a spouse are distributions of property rather than alimony. As such, a divorce decree's division of retired pay is final, and when not appealed, is not subject to later modification.

The three Tennessee courts all rejected the argument that the divorce court order dividing retired pay could not be enforced because it did not mention ***disability*** pay, and that once the retiree converted retired pay into disability pay post-divorce, retired pay just "wasn't there" for the court to address. Turning to the language in the order before it, the court in *Johnson* held:

> "all military retirement benefits" is unambiguous . . . . 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. 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.[72]

Therefore, 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 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.

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[69] 59 S.W.3d 118 (Tenn. Ct. App. 2001).

[70] 2001 Tenn. App. LEXIS 149 (No. M1998-00937-COA-R3-CV, Tenn. Ct. App., March 13, 2001).

[71] 37 S.W.3d 892 (Tenn. 2001).

[72] 37 S.W.3d at 896-97.

The two intermediate appellate court opinions quoted verbatim the core of the *Johnson* holding:

> Once Ms. Johnson obtained a vested interest in Mr. Johnson's "retirement benefits," Mr. Johnson was prohibited from taking any action to frustrate Ms. Johnson's receipt of her vested interest. "Nothing in the [USFSPA] suggests that a court's final award of a community property interest must [or may] be altered when the military retiree obtains [disability benefits]." *Gaddis*, 957 P.2d at 1013. Mr. Johnson's failure to compensate Ms. Johnson to the extent of her vested interest in his retirement benefits constituted a unilateral modification of the MDA and the divorce decree in violation of *Towner*.[73]

Approaching the question of federal preemption and the Supremacy Clause head-on, the Tennessee Supreme Court rebuffed the position that *Mansell* compelled any different result:

> In so holding, we are undeterred by the United States Supreme Court's ruling in *Mansell v. Mansell* [citation deleted]. *Mansell* held that the USFSPA "does not grant state courts the power to treat as property divisible upon divorce military retired pay that has been waived to receive veterans' disability benefits." *Id*. at 594-95. The trial court's decree did not divide Mr. Johnson's disability benefits in violation of Mansell.
>
> Immediately following Mr. Johnson's retirement, Ms. Johnson received $1,446.00 per month of Mr. Johnson's $2,892.00 per month retirement pay. Neither party has contended that this amount did not accurately represent one half of the amounts to which Mr. Johnson would ordinarily be entitled as a result of his retirement from the military. Thus Ms. Johnson's vested interest in half of Mr. Johnson's "retirement benefits" entitles her to monthly payments of $1,446.00.
>
> Accordingly, this case shall be remanded to the trial court for further proceedings as may be necessary to enforce its decree to provide Ms. Johnson with the agreed upon monthly payment of $1,446.00. On remand, the trial court shall give effect to its decree without dividing Mr. Johnson's disability pay.[74]

In language echoing that of the California Supreme Court years earlier in *Casas v. Thompson*, *supra*, the Tennessee courts universally took the USFSPA's prohibition of division of disability pay as simply "limiting the trial court's ability to order direct

[73] *Towner v. Towner*, 858 S.W.2d 888 (Tenn. 1993).

[74] 37 S.W.3d at 898.

payments . . . from the payor of [the] benefits, which we understand to be the Veterans Administration."[75]

Hillyer involved a 1986 divorce decree, while *Johnson* construed a decree issued in 1996; the fact that the decrees at issue were issued after passage of the USFSPA, or *Mansell*, was considered irrelevant.

The Tennessee courts squarely addressed, and rejected, the proposition that a retiree might in any way be entitled to turn the former spouse's property into his property years after divorce.[76] The courts were also unimpressed with the retirees' claims that their applications for waiver of retired pay to get disability pay were not "voluntary" or the result of the retirees' unilateral acts.[77]

Other courts hearing these cases have indicated a desire to reach the economic merits, and have not seemed any more impressed with semantics than were the Tennessee courts. For example, in *Janovic v. Janovic*,[78] the member left the Navy and waived a portion of his retirement benefits in favor of receiving VA disability benefits less than a year after divorce. The trial court ordered him to pay reimbursement. On appeal, the member claimed that the former spouse was only entitled to a share of "disposable retired pay," and his application for disability had ***eliminated*** the disposable pay and ***created*** "disability pay," which he alone was entitled to receive.

The reviewing court affirmed the order requiring reimbursement, rejecting the retiree's argument that ordering reimbursement violated *Mansell*, and stating that it merely enforced the parties' property settlement agreement rather than dividing disability benefits. Since the case involved a post-*Mansell* divorce, the decree had

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[75] *See Hillyer*, 59 S.W.3d, Slip Opn. at 15-16.

[76] *See Johnson*, 37 S.W.3d at 896-97.

[77] *See Hillyer*, 59 S.W.3d, Slip Opn. at 14, n.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. . . ."

[78] 814 So. 2d 1096 (Fla. Ct. App. 2002).

included an indemnification provision[79] because of the "higher standard of clarity" some courts have required of decrees after *Mansell* to be certain of the divorce court's intent. However, the court noted that such enforcement of the intent at the time of the dissolution was appropriate whether or ***not*** the original order contained a specific indemnification provision.[80] Finally, the appellate court noted that "[t]he equity of the result reached . . . is undeniable."[81]

Other courts have also used what amounts to a "contract" analysis to reach the same conclusion – that, regardless of how the issue might otherwise be resolved, where the parties stipulated that the spouse would receive a portion of the unreduced military retirement benefits, any action taken by the member to reduce the spousal share thereafter requires compensation to the spouse.[82]

Similarly, in *Krapf v. Krapf*,[83] the parties had divorced in 1985, dividing the future military retirement benefits expected to be paid to the member. In 1994, the member retired and began drawing retired pay, but in 1997 he applied for and received a partial disability award, which he increased through 2000, greatly reducing the stream of monthly payments to the former spouse. The member refused to compensate the former spouse for the sums he redirected to himself.

On appeal, the court confirmed that the husband's action "was a breach of . . . the covenant of good faith and fair dealing," which the court held encompassed the duty "not to do anything that would have the effect of destroying or injuring the other party's ability to receive the fruits" of the divorce orders.[84] The husband was ordered to compensate the wife for all sums she would have received if he had not taken the disability award.

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[79] The specific language reviewed by the court 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.

[80] 814 So. 2d at 1100, *citing Longanecker v. Longanecker*, *supra*.

[81] 814 So. 2d at 1101.

[82] *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; *Shelton v. Shelton*, *supra*; *Gatfield v. Gatfield*, *supra*; *Hisgen v. Hisgen*, *supra*.

[83] 771 N.E.2d 819 (Mass. App. Ct. 2002).

[84] *Id*. at 821-22.

In 2001, the Arizona Court of Appeals again dealt with these issues, in *Danielson v. Evans*.[85] Because the divorce at issue occurred after *Mansell*, the prevailing former spouse in *Danielson* was held to the "higher standard of clarity" in the underlying decree (discussed above) to protect her interests. The court nevertheless found no difficulty in turning aside the military member's attack on the Arizona rule of finality of property distributions:

> According to Evans [the member], *Gaddis* and *Harris* rest on "fallacies" about "vested" rights and "unilateral" or "voluntary" choices that do not apply here. For example, he contends Danielson's [the spouse's] interest in his retirement benefits was "vested" only "in the sense that no one else [could] claim a right to them." That interest, he asserts, neither entitled Danielson to a fixed, lifetime benefit nor guaranteed that his "disposable retired pay" would not change. Rather, Evans argues, the value of Danielson's interest in his retirement benefits was "contingent" on future circumstances, including his "suffering the disabling consequences of a service related injury" after the dissolution and after his retirement.
>
> The problem with that argument is that neither the record nor the law supports it. The dissolution decree and post-decree order did not condition Danielson's interest in the military retirement benefits on anything, let alone on Evans's unforeseen future disability ratings and corresponding waivers of retired pay. . . . the trial court did not find, and implicitly rejected, any condition subsequent that could reduce or otherwise affect Danielson's decreed interest in the retirement benefits. In short, her interest was no less "vested" than the interests of the non-military former spouses in *Gaddis* and *Harris*. *See Johnson v. Johnson*, 37 S.W.3d 892, 894, 897 (Tenn. 2001) (holding that when parties' marital dissolution agreement "divides military retirement benefits, the non-military spouse obtains a vested interest in his or her portion of those benefits as of the date of the court's decree" and that such "vested interest cannot thereafter be unilaterally diminished by an act of the military spouse").[86]

Going over the facts of *Gaddis* and *Harris* in detail, the *Danielson* court rejected the argument that enforcement of the decree by ordering a member to restore to a former

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[85] 36 P.3d 749 (Ariz. Ct. App. 2001).

[86] 36 P.3d at 756. While the Arizona court did not further discuss the matter, a review of military retirement benefits cases will show that retirees and their representative organizations often argue that a retiree's "entitlement" to collection of the military retirement benefits promised to him upon enlistment is a "vested right" of constitutional dimension. *See*, *e.g.*, *Fern v. United States*, 15 Cl. Ct. 580 (1988), *aff'd*, 908 F.2d 955 (Fed. Cir. 1990). Those same retirees, and organizations, uniformly assert that a ***former spouse*** has ***no*** vested right to anything, no matter what any court might have decreed.

spouse the sums he redirected after divorce from her to himself would constitute some "indirect" violation of *Mansell* by ordering a division of veteran's benefits.[87]

The court rejected the argument that the retiree's decision to apply for disability benefits somehow exempted him from application of the community property rules against retroactive redistributions of property awarded in a final, unappealed decree. The court further rejected the argument that any order directing the member to make up for retired pay waived in order to receive disability benefits would circumvent "Congressional intent" or violate the Supremacy Clause. The court noted that the order appealed from did not divide a portion of retirement pay that had been waived in favor of the VA benefits:

> Evans also contends that, unlike the husband in *Gaddis* who voluntarily obtained civil service employment, he did not voluntarily choose to "suffer[] from a service related disability." Of course that may be true, and Evans certainly had the right to apply for and obtain nontaxable VA disability benefits in lieu of retired pay. But Evans concedes he unilaterally and voluntarily applied for the disability benefits, without notice to Danielson and without any suggestion in the dissolution proceedings that he might do so. *See Harris*, 195 Ariz. 559, ¶13, 991 P.2d 262, ¶13. *See also Scheidel v. Scheidel*, 2000 NMCA 59, 4 P.3d 670, 675, 129 N.M. 223 (N.M. App. 2000) (affirming trial court's determination that husband's post-dissolution "application for an increased disability rating was voluntary, and in furtherance of his own financial interests"). At any rate, the nature, extent, and enforceability of Danielson's interest in the retirement benefits do not hinge on the voluntariness of Evans's post-dissolution actions in the disability process.
>
> In sum, *Gaddis* and *Harris* pose major obstacles to the arguments advanced by Evans . . . . the fundamental principles recognized and applied in *Gaddis* and *Harris* apply here and undermine Evans's position. . . . Accepting Evans's position would require us to either overrule *Gaddis* and reject *Harris* or distinguish them on grounds that are insignificant and unpersuasive. We are not inclined to do so.[88]

In a footnote to the text quoted above, the court found that its conclusion was entirely in line with the savings clause of the USFSPA, which the court found was intended to stop military members from cheating their spouses by post-decree actions:

> As we noted in *Gaddis*, our decision there conformed to prior Arizona law. 191 Ariz. at 469, 957 P.2d at 1012, *citing In re Marriage of Crawford*, 180

[87] 36 P.3d at 755-56.

[88] 36 P.3d at 756-57.

> Ariz. 324, 327, 884 P.2d 210, 213 (App. 1994)("[A] community interest in military retirement benefits cannot be transformed into separate property by one spouse's electing to forego a portion of retirement pay in exchange for disability benefits"); *McNeel v. McNeel*, 169 Ariz. 213, 215, 818 P.2d 198, 200 (App. 1991)(rejecting husband's attempt "to transform retirement benefits constituting community property to disability benefits constituting separate property"). *See also Perras v. Perras*, 151 Ariz. 201, 726 P.2d 617 (App. 1986) (to same effect). The results in *Gaddis, Harris*, and this case also appear consistent with the Act's savings clause. 10 U.S.C. § 1408(e)(6) ("Nothing in this section shall be construed to relieve a member of liability for . . . 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 [§ 1408(e)(1) or (e)(4)(B)]").[89]

As discussed in the Introduction, Nevada joined the rest of the community property states in requiring reimbursement to the spouse when the member recharacterizes retired pay as disability pay post-divorce, in a pair of cases issued on October 29, 2003, only one of which was published. In *Shelton v. Shelton*,[90] the Nevada Supreme Court followed a "contracts" approach that has been applied in Virginia and Louisiana, in deciding that a military retiree "cannot escape his contractual obligation by voluntarily choosing to forfeit his retirement pay," and that the former spouse was therefore entitled to continue receiving what she would have received but for the waiver of retirement for disability pay.

The Court interpreted the parties' ambiguous and contradictory settlement agreement so as to yield "a fair and reasonable result, as opposed to a harsh and unfair result," noting that the husband appeared to have ample other assets than his military retired pay with which to satisfy his payment obligation, and that even if he did not, federal law was no bar to enforcement of his agreement to use his disability payments to satisfy his obligation. Thus, the Nevada court appeared to rely upon a number of the theories expressed in other states – *res judicata*, contract, and indemnification, in reaching the same result reached elsewhere.

The same day, the Court issued a decision in *Olvera v. Olvera* (No. 38233, Oct. 29, 2003), by way of an unpublished *Order of Remand*.[91] The divorce decree required payments to the former spouse, who received them for many years until the member

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[89] 36 P.3d at 757, n.7.

[90] 119 Nev. ___, 78 P.3d 507 (Nev. 2003), *cert. denied*, 124 S. Ct. 1716 (2004).

[91] This decision, therefore, cannot be cited as authority under SCR 123. This is unfortunate, because *Olvera* involved a much more common factual situation than *Shelton*, and therefore would have been more useful as precedent.

elected to receive disability benefits, 25 years post-divorce, eliminating the spousal share. Reversing the district court, the Court ordered the member to make up all sums that his election caused to be diverted from the former spouse to him.

The cases continue to appear, although some states with published authority on the subject are not publishing the follow-up cases, apparently because they broke no new ground and were therefore not precedential.[92]

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.

In *Torwich (Abrom) v. Torwich*,[93] the court found the reduction of payments to the spouse to be an "exceptional and compelling circumstance" allowing redistribution of marital property four years after the divorce, despite the existence of procedural rules normally barring such redistributions of property. This case has been relied upon for the proposition that *Mansell* permits "other adjustments to be made" to take into account the reduction in a spousal share from the disability claim of a member, so as to prevent the inequity that would occur if a member was permitted to redirect money from the former spouse back to himself, ***without*** some form of compensation.[94]

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[92] *See In re Marriage of Harper*, 2000 Wash. App. LEXIS 333 (Wash. Ct. App. 2000) (requiring compensation to wife for sums not paid to her by reason of husband's post-divorce disability rating increases, because such reduction in payments were "outside the contemplation of the parties" at the time of divorce and so was "fundamentally unfair"); *In re Marriage of Choat*, 2000 Wash. App. LEXIS 1288 (Wash. Ct. App. 2000) (where the parties had been married in 1951, and divorced in 1978, and the member obtained a partial disability award in 1983, but the former spouse did not find out about it until the sums being paid to her dropped suddenly in 1998, when the disability rating was increased, the court held that a final and unappealed pre-*McCarty*, pre-USFSPA divorce decree was immune from any form of collateral attack by either party based upon any subsequent changes in federal statutory or case law, whether or not they divided sums that would be non-divisible in a current divorce because they were disability benefits; because the divorce decree had stated that the wife was to receive a share of the ***gross*** retired pay, she was entitled to compensation for both all sums the husband had redirected to himself as disability, ***and*** for the difference between gross and (post-tax) disposable retired pay); *Hubble v. Hubble*, 2002 Va. App. LEXIS 459 (Va. Ct. App. 2002) (affirming lower court order that the former spouse was to receive half of the amount that she would have received if not for the "husband's unilateral and unauthorized modification," so as to restore the status quo existing before he elected to replace retirement benefits with disability benefits).

[93] 660 A.2d 1214 (N.J. Super. Ct. App. Div. 1995).

[94] *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

In 1999, the Washington state Supreme Court decided *In re Marriage of Jennings*.[95] The court found that a retiree who terminated a stream of payments to a former spouse by electing, post-divorce, to begin taking disability rather than retired pay created such "extraordinary circumstances" that the trial court should take the "justified remedial action" of awarding compensatory spousal support even four years after the divorce in order to "overcome a manifest injustice which was not contemplated by the parties at the time of the 1992 decree." The court noted the reduced stream of payments to the spouse, and held that:

> Regardless of the reasons, the result was fundamentally unfair because it deprived Petitioner of her entitlement to one-half of a substantial community asset with her receiving $677.50 per month less than the amount awarded her by the court. It was therefore appropriate for the trial court, in ruling on the motion by Petitioner for modification or clarification, to devise a formula which would again equitably divide the community assets without requiring the monthly amount payable to Petitioner to be paid direct from the Respondent's military retirement.[96]

The state high court concluded that the result reached by the trial court was "fair and equitable and within its authority." The court went on to approve prior holdings stating that whenever a retiree has a choice of electing retirement or disability benefits, and chooses the latter, for whatever reason, he "could not by electing to take a disability award rather than a regular retirement eliminate the community interest in the award."[97]

Other courts have, similarly, found that a court can issue a spousal support award, post-divorce, sufficient to ameliorate the impact on an innocent former spouse whose "economic circumstances have deteriorated through no fault of her own" by reason of the former husband's post-divorce application for disability benefits in lieu of retirement benefits.[98]

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nothing to do with the former spouse's claim for reimbursement of the diverted sums).

[95] 980 P.2d 1248 (Wash. 1999).

[96] *Id*. at 1256.

[97] *Marriage of Knies*, *supra*, 979 P.2d at 486-87, *citing In re Marriage of Kittleson*, 21 Wash. Ct. App. 344, 352, 585 P.2d 167 (1987).

[98] *See Kramer v. Kramer*, 567 N.W.2d 100 (Neb. 1997); *Clauson v. Clauson*, 831 P.2d 1257 (Alaska 1992).

Several commentators and researchers have reviewed the cases nationally, reaching the conclusion that post-divorce recharacterization of retired pay as disability benefits just is not permitted.[99]

In the cases cited above, and others, the post-divorce disability award sought and awarded to the retiree was not allowed to block the spouse's right to continued payments under the terms of the decree. Even if *Mansell* ***does*** have to be considered in post-divorce recharacterization cases, courts have 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.

Further, in the years since *Mansell*, reviewing courts have gone from examination of the decree to see if there was a specific savings clause by which the spousal share could ***survive*** the retiree's recharacterization, to examining the underlying decree for a specific provision permitting the retiree to retroactively reduce the award to the former spouse.

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,[100] 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.

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

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[99] *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 Military. 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").

[100] 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).

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.

3. The Federal Courts Have Reached the Same Conclusion

The federal courts have reached the same conclusion as to finality of property judgments, but through application of their own precedent and principles. For example, in *Silva v. Silva*,[101] the appellate court upheld the dismissal of an action by a member seeking to strike down an unappealed state court division of disability retired pay. The member stopped making payments long after a divorce, the former spouse sued for arrearages, and the member argued that the divorce court's order was "void and unenforceable" under 10 U.S.C. § 1408(a)(4) because his "pay from the United States Air Force is due to his medical disability and is not retirement pay subject to disposition by state court order."

The federal court rejected that argument, finding that if the retiree objected to the award to the former spouse, he had the obligation to appeal the state court judgment awarding it at the time it was entered. The federal court refused to prevent the Colorado courts from enforcing the New Mexico judgment reducing arrears to judgment.[102] *See also White v. White*[103] (no federal claim just because federal rights are implicated in a state court proceeding; suit dismissed); *Fern v. United States*[104] (refuting wide assortment of federal offenses allegedly committed by spouses in state divorce courts in consolidated action brought by former military service members).

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[101] 680 F. Supp. 1479 (D. Colo. 1988).

[102] The reluctance of the federal courts to prevent enforcement of divorce court orders is a mainstay of law, both federal and state, and has been so since the founding of the republic. In *Stumpf v. Stumpf*, 249 Ga. 759, 294 S.E.2d 488 (1982), the court noted that

> federal courts rarely impinge on state domestic relations law. . . . State family and family-property law must do "major damage" to "clear and substantial" federal interest before the Supremacy Clause will demand that state law be overridden . . . . The pertinent questions are whether the right as asserted conflicts with the express terms of federal law and whether its consequences sufficiently injure the objectives of the federal program to require nonrecognition.

Id., *quoting from McCarty v. McCarty,* 453 U.S. at 220.

[103] 731 F.2d 1440 (9th Cir. 1984).

[104] 15 Cl. Ct. 580 (1988), *aff'd*, 908 F.2d 955 (Fed. Cir. 1990).

4. The Analogous Cases Involving "Early Outs"

The legislation and case law regarding the Variable Separation Incentive (VSI), Special Separation Benefit (SSB), "Temporary Early Retirement Authority" (TERA) are addressed separately in the seminar materials, 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 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.

5. The Role of Alimony When Disability Benefits are in Issue

Where VA disability exists at the time of divorce, a court cannot divide those benefits, but they "may be considered as a resource for purposes of determining [one's] ability to pay alimony."[105] There are many similar cases so holding (some cited *supra* in these materials).

Even where disability payments are considered "exempt," the U.S. Supreme Court has ruled that a member can be imprisoned on a contempt charge for failing to pay child support, despite his claim that payments could be made only from his VA disability award, which was exempt from execution.[106] The holding has been extended to alimony cases as well, on the basis of the holding in *Rose* that: "It is clear veteran's benefits are not solely for the benefit of the veteran, but for his family as well."[107]

At least in those cases in which there is a "fallback" clause regarding alimony intertwined with the property award to the spouse, state courts have approved the use of alimony to enforce what is actually a property award. That is why there is such a fallback clause in our standard clause set.

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[105] *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).

[106] *See Rose v. Rose*, 481 U.S. 619 (1987).

[107] *See In re Marriage of Anderson*, 522 N.W.2d 99 (Iowa Ct. App. 1994) (applying *Rose* to require a disabled veteran to pay alimony ***and*** child support in a divorce action, even when his only income is veterans' disability and supplemental security income).

For example, in *In re Marriage of McGhee*,[108] the court approved compensation to the former spouse by means of alimony, as set out in the agreement between the parties, when it was imposed by the dissolution court after the member halted the flow of military retirement benefits to former spouse after the *McCarty* decision. The court termed use of such "back-up" clauses to be making the property award "supportified." Similarly, in deciding *In re Marriage of Sheldon*,[109] the court noted the "close relationship between the amount of a property division and the entitlement, if any, of a spouse to spousal support." In *In re Marriage of Mastropaolo*,[110] the court "conditionally" reversed an alimony award "on condition" that the court's affirmance of the retirement division became final.

While some courts have expressed the opinion that an outright award of spousal support in the sum of military retirement benefits lost by reason of a disability election constitutes a violation of *Mansell*,[111] the substitution of alimony for the intended property award has been quite direct in other cases. In *Austin (Scott) v. Austin*,[112] the court instituted an award of alimony, that had been previously reserved until remarriage, in lieu of the pension share lost because of the member's transfer to VA disability status. The court gave its approval to alimony continuing after the spouse's remarriage, where the alimony award is intended to compensate for distribution of a pension earned during marriage, citing *Arnholt v. Arnholt*.[113]

Similarly, in *Waltz v. Waltz*,[114] the Nevada Supreme Court approved a decree which awarded the entire military retirement to the retiree, but ordered him to pay the former spouse, by military allotment, $200.00 plus cost of living adjustments on that sum, as "permanent alimony." The military service had overlapped the parties' marriage by just less than ten years, precluding direct payment of a property award through the military pay center, and the appellate court found that in the context of the case, the parties' use of phrase "permanent alimony," in conjunction with the COLA clause, showed an intent to link it to the military retired pay. Further, the

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[108] 131 Cal. App. 3d 408, 182 Cal. Rptr. 456 (Ct. App. 1982).

[109] 124 Cal. App. 3d 371, 177 Cal. Rptr. 380 (Ct. App. 1981).

[110] 213 Cal. Rptr. 26 (Ct. App. 1985).

[111] *See*, *e.g.*, *Clauson v. Clauson*, *supra*.

[112] Mich. Ct. App. No. 92-15818 (unpublished intermediate court opinion), *rev. den.*, 546 N.W.2d 255 (Mich. 1996).

[113] 343 N.W.2d 214 (Mich. Ct. App. 1983) (non-military case).

[114] 110 Nev. 605, 877 P.2d 501 (1994).

court held that payments to a former spouse do not terminate upon her remarriage when the payments were clearly intended to achieve a property settlement.

The bottom line to these cases, and others, is that state courts have felt free to impose an alimony award where necessary to do substantial justice to the parties in front of them, taking into account the entirety of their actual financial circumstances in constructing court orders.

These cases provide a "flip side" to the cases reviewed *supra*, in which courts awarded former spouses alimony awards to make up for members' post-divorce recharacterization of retired pay as disability pay. Collectively, the two sets of cases indicate that courts are more and more willing to substitute alimony for property, or vice versa, as necessary to achieve equity, secure orders, or prevent unjust enrichment.

6. 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 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).

There has been a bar to simultaneous receipt of both retired pay and disability pay in laws going back to 1890. 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)[115] 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.

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 – so that the member got his share of whatever was left of the regular retired pay, ***plus*** the VA disability pay that was substituted for the waived retired pay, ***plus*** the new "special compensation." The former spouse received nothing, so the program did nothing to address the problems detailed in these materials.

The true breakthrough came with the National Defense Authorization Act for Fiscal Year 2004.[116] Two programs were passed in tandem. First, CRSC was changed was expanded to include all combat-related disabilities or operations-related disabilities, from 10% to 100% ratings, effective January 1, 2004.

Second, by way of Concurrent Receipt (also called "Concurrent Disability Pay," or "CDP"), 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;[117] the sums are scheduled to increase by an additional 10% each year through 2014, by which time full concurrent receipt will be paid. 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 retiree elected to take a disability award.

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[115] 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.

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

[117] 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.

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.[118] 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.

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.

III. DISABILITY BENEFITS IN THE NEVADA STATE PERS (PUBLIC EMPLOYEES RETIREMENT SYSTEM)

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[118] 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.

There is an allowance for monthly payments to be made from either a general employee's fund, or a special police and fire-fighter's fund, to disabled employees.[119] To be eligible, an employee must have five or more years of service credits, and become totally unable to perform his current job or any comparable job "because of injury or mental or physical illness of a permanent nature."[120]

Additionally, the employee must satisfy the following: his condition must be such that he is to be terminated because of the disability; he must be currently employed by a participating public employer at the time of application; he must be able to prove that the disability renders him unable to perform the duties of his present position and any other position he has held in the prior year; he files a notarized application fir disability retirement; his employer files an "official statement" certifying the member's employment record, job description, work evaluations, record of disability and absences caused by the disability; and the member's immediate supervisor files an "official statement" regarding the effect of the disability on the member's ability to work and any alternative jobs that the member could perform.[121]

A disability retirement is calculated the same way that a longevity retirement is calculated, except that there is no reduction for not having attained retirement age.[122] Apparently, there is a measure of discretion, as PERS can "approve or deny" a completed application, under a statute that does not list precise criteria.[123]

Members who are police officers or fire-fighters can retirement on the accelerated police/fire schedule despite taking a disability retirement, so long as they had at least five years of service credit, has been approved for disability retirement, and in lieu of taking that retirement, takes another position with the public employer for which he previously worked, remains continuously employed until reaching the advanced retirement eligibility, and pays contributions at a rate actuarially determined for the police/fire retirement plan.[124]

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[119] NRS 286.031.

[120] NRS 286.620.

[121] NRS 286.620(1)(a)-(f).

[122] NRS 286.620(2). Additionally, any collateral source benefits for the same disability are deducted from the sum payable.

[123] NRS 286.630(3).

[124] NRS 286.510(3).

IV. DISABILITY BENEFITS IN THE CSRS/FERS (FEDERAL CIVIL SERVICE) RETIREMENT SYSTEM

In marked contrast to the excruciating history of disability claims regarding military retirement, the current Civil Service system has provisions for dealing with such claims built right into its controlling regulations.

By way of quick recap, there has been a civil service in the United States since 1883, mostly administered by the Office of Personnel Management ("OPM"), but also including individuals working for agencies including the Postal Service, the Foreign Service, and the FBI. A retirement system has been in place in some form since 1920, which is the date from which the "old" system ("Civil Service Retirement System," or "CSRS") for those who began service before January 1, 1984, can be traced.

The retirement system is essentially a defined benefit plan, which takes into account years of service and highest salary in determining a monthly sum to be paid to an employee from the date of retirement until death.

Decade by decade, the law governing federal civilian employees changed and expanded, until the entire system was altered for incoming employees in a "new" system ("Federal Employees' Retirement System," or "FERS"), for those who began service on or after January 1, 1984.[125] The most obvious difference between them is that participants in CSRS do not participate in the social security program, while those in FERS do participate. The new system also created a defined contribution retirement account called the "Thrift Savings Plan" ("TSP"), which is briefly discussed below.

The two statutory schemes have independent code sections, and while they are generally similar, there are some differences, including their treatment of disability-based retirement.

In 1992, sweeping changes were made to the regulations governing division of Civil Service retirement benefits, making obsolete virtually every prior reference on the subject.[126]

The new regulations addressed the employee annuity (the pension), refunds of employee contributions, and survivor's benefits, but not the thrift plan, which was

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[125] *See* 5 U.S.C. §§ 8331, 8401; Pub. L. 99-335 (1986).

[126] *See* Court Orders Affecting Retirement Benefits, 57 Fed. Regulation. 33,570 (July 29, 1992) (codified at 5 C.F.R. Parts 831 *et seq*.)

set up to work like a 401(k), is administered separately, and is briefly discussed below.

A. Waivers Taken Before Eligibility for Retirement

The Office of Personnel Management (OPM) publishes a handbook for attorneys who are drafting retirement orders for CSRS or FERS retirement benefits.[127] Anyone drafting such orders should obtain it. The handbook includes a model paragraph (¶ 311) for addressing the situation in which a former spouse is to be awarded a portion of the retirement benefits (termed by OPM the "earned annuity") but the retiree's actual retirement is taken by way of disability benefits (which OPM terms "where the actual annuity is based on disability").

Even that level of effort is apparently not required under the "new" system. Under FERS, 5 U.S.C. § 8452 provides a formula for recomputation of disability annuities at age 62 to approximate an earned annuity. Therefore, the Handbook recommends that in order to award a portion of the "earned" benefit under FERS, the practitioner should add the introductory phrase, "'Starting when the [employee] reaches age 62,' to the paragraph describing how to compute the amount."

For CSRS cases, the practitioner can designate that in the event of a disability retirement, the spousal share is to be computed according to what the employee annuity would have been based on only the employee's actual service. The practitioner can choose the effective age of the employee at which the spouse's hypothetical benefits go into pay status. Apparently, at that time, the former spouse receives the benefit of all COLA increases accorded to the employee from the time of his disability retirement until the date he reached eligibility for regular, deferred age and service retirement benefits.[128]

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[127] *A Handbook for Attorneys on Court-ordered Retirement, Health Benefits, and Life Insurance Under the Civil Service Retirement System, Federal Employees Retirement System, Federal Employees Health Benefits Program, and Federal Employees Group Life Insurance Program* (United States Office of Personnel Management, Retirement and Insurance Group, rev. ed. July, 1997) (hereafter, *Handbook*). The *Handbook* can be obtained from the Government Printing Office, Superintendent of Documents, P.O. Box 371954, Pittsburgh, PA 15250-7954; its current printing is identified as "RI 83-116," and it includes all clauses on computer disk. The text and clauses can also be accessed, printed, or downloaded from the Internet, from http://www.opm.gov/retire/html/library/other.html.

[128] *Vagg v. Office of Personnel Management*, 1 F.3d 1208 (Fed. Cir. 1993).

The model paragraph provided by the Handbook is:

> [Employee] is (or will be) eligible for retirement benefits under the Civil Service Retirement System based on employment with the United State's Government. Starting when [employee] reaches age 62, [former spouse] is entitled to a prorata share of [employee]'s [insert "gross," "net," or self-only] monthly annuity under the Civil Service Retirement System, where monthly annuity means the amount of [employee]'s monthly annuity computed as though [employee] had retired on an immediate, nondisability annuity on the commencing date of [employee]'s annuity based on disability. In computing the amount of the immediate annuity, the United States Office of Personnel Management will deem [employee] to have been age 62 at the time that [employee] retired on disability. The marriage began on [insert date]. The United States Office of Personnel Management is directed to pay [former spouse]'s share directly to [former spouse].

In states (such as California and Nevada) that follow the rule that spouses are entitled to begin receiving payments at the time the employee spouse becomes eligible to retire, the proposed language would create a variance from state law for the limited class of people who are involved with disability-related retirement benefits. We use a modified version of the model language for those states, as follows:

> *Possible Retirement for Disability*
>
> Should the Employee take a disability retirement, the Former Spouse is entitled, as of the date that the Employee would have become eligible to retire without early-retirement penalty if he had continued working, to the percentage established by the above formula of the Employee's gross monthly annuity under the [FERS or CSRS], where monthly annuity means the amount of the Employee's monthly annuity computed as though the Employee had retired on an immediate, nondisability annuity on the commencing date of the Employee's annuity based on disability. In computing the amount of the immediate annuity, the United States Office of Personnel Management will deem the Employee to have been age 62 at the time that he retired on disability.

Since the civil service system does not suffer from the weakness of the military retirement system – in that post-divorce elections by the employee do not retroactively reduce awards made to the former spouse – there are fewer dangers relating to the possibility of post-divorce disability awards.

One relatively subtle exposure is to the loss of any proposed (or ordered) "insurable interest" category survivor annuity. By way of background, there are two types of

survivor annuities, under sections 8341(h) and 8445 of title 5.[129] The former is the default "former spouse" survivor annuity usually at issue in civil service cases. It is more robust in almost all ways, but is subject to the remarriage-before-age-55 termination discussed above. The latter is an "insurable interest" survivor annuity, and it is not so restricted, but it costs more.

Further, the latter type has various restrictions: it may only be taken by a retiree at the time of retirement, who is in good health and not retiring for disability. Therefore, if the parties divorce while the employee remains in active service, and the divorce decree contemplates an insurable interest survivorship award, it might not be available, as a matter of law, if the employee takes a disability retirement when he actually retires.

As with the military cases, it is difficult to foresee every possible change in circumstance that could result in a partial or total failure of a court order to achieve the objectives planned when it was written. We therefore use a reservation of jurisdiction clause in all civil service orders as well:

> *Employee not to Interfere with Former Spouse's Rights*
>
> If the Employee takes any action, or fails to acts, or makes any choice or election, or by inaction fails to make any choice or election, that prevents, decreases, or limits the payment to the Former Spouse of the benefits assigned to the Former Spouse by this *Order* (by continuation of service beyond eligibility for regular retirement, application for or award of disability compensation, combination of benefits with any other retired pay, waiver for any reason, including as a result of other federal service, or in any other way), the Employee shall make payments to the Former Spouse directly in an amount sufficient to neutralize, as to the Former Spouse, the effects of the action taken by the Employee. In the event any payment assigned to the Former Spouse by this *Order* is paid to or received by Employee, Employee shall be deemed to have received such payments in constructive trust for the benefit of Former Spouse and shall immediately pay the same to Former Spouse.

[129] 5 C.F.R. § 838.912.

B. Waivers Taken After Eligibility for Retirement

Perhaps ironically, there have been situations in which the now-repealed "dual receipt" rules[130] resulted in a former spouse receiving a share of military retirement benefits from which she had otherwise been barred. In one post-*McCarty* gap case, brought under a state window statute, the court "traced" the spousal share of the military service, even though the member had been awarded all of the interest in the retirement in a divorce during the *McCarty* gap, ***and*** had subsequently obtained a 100% VA disability rating, since he waived all of those awards in order to roll his military service into a later (divisible) Civil Service retirement.[131]

This approach, known as the "source of the benefit" method, would be repeated in later years by courts trying to decide whether former spouses had an interest in SSB or VSI benefits. The reasoning is that if one spouse derives an economic benefit attributable to services performed during the marriage, and there is not a specific legal prohibition on sharing that benefit with the former spouse, then the benefit should be divided in accordance with normal marital property law.

Notably, Congress itself appears to have adopted the reasoning of this theory in the amendments to the USFSPA that went into effect in 1997 (for both CSRS and FERS retirements, but only as to waivers made on or after January 1, 1997). Under those rules, if a military member waives military retired pay in order to take a Civil Service retirement, the former spouse must be paid what she would have received from the military in order for the waiver to be accepted by the Office of Personnel Management.[132]

The *Handbook* includes a model paragraph entitled "Protecting a former spouse entitled to military retired pay" (¶ 111). It reads:

> Using the following paragraph will protect the former spouse interest in military retired pay in the event that the employee waives the military retired pay to allow crediting the military service under CSRS or FERS. The paragraph should only be used if the former spouse is awarded a portion of the military retired pay. "If [Employee] waives military retired pay to credit military service under the Civil Service Retirement System, [insert language for computing the former spouse's share from 200 series

[130] Prohibiting a civil service employee from receiving the full amount of military retired pay under some circumstances.

[131] *Leatherman v. Leatherman*, 122 Idaho 247, 833 P.2d 105 (Idaho 1992).

[132] *See* Pub. L. 104-201, Div. A, Title VI, Subtitle D, § 637, 110 Stat. 2579 (Sept. 23, 1996).

of this appendix]. The United States Office of Personnel Management is directed to pay [former spouse]'s share directly to [former spouse].

C. Brief Aside Regarding the TSP

A "Thrift Savings Plan" ("TSP") was created by the 1986 statute creating FERS, and first accepted contributions on April 1, 1987. The TSP is a defined contribution type of plan for federal employees; FERS employees get matching federal contributions up to a certain level. While the program is open to CSRS employees, there are no matching contributions for them. There are a variety of funds in which the employee can choose to invest, including the "Government Securities Investment" or "G" fund, the "Common Stock Index Investment" or "C" fund, and the "Fixed Income Index Investment" or "F" fund.

The TSP is expressly excluded by the regulations governing the CSRS and FERS retirement benefits.[133] It is administered by a Board entirely separate from the OPM (the Federal Retirement Thrift Investment Board),[134] which has its own governing statutory sections and regulations.[135] The TSP is a cash plan like a 401(k). For that reason, a disability in and of itself has no impact on accrued sums in a TSP account.

Although the agency administering the TSP has proven more flexible than either the military or the OPM, its regulations did spawn yet another acronym for a court order dividing benefits – "RBCO," for "Retirement Benefits Court Order," and the TSP Board has its own finance center.[136]

Withdrawal of TSP funds by a participant is limited to those separating from service, but practitioners should note that there are lump-sum distribution options from the plan (if $3,500.00 or less, the full fund balance is ***automatically*** distributed at the time of separation from service). More importantly, hardship loans up to $50,000.00 are available against the plan balance, and a specific category of hardship for loan

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[133] 5 C.F.R. § 838.101(d).

[134] The Thrift Savings Plan is ***not*** addressed in the clause set provided by Office of Personnel Management. The practitioner must find out whether a Civil Service employee is or has been a participant in the Thrift Savings Plan, and if so whether any funds have been withdrawn or borrowed from the plan. Those wishing further information on the Thrift Savings Plan can call the administering agency (Federal Retirement Thrift Investment Board) in Washington, D.C., at (202) 942-1600.

[135] 5 U.S.C. § 8435(d)(1)-(2), 8467; 5 C.F.R. Part 1653, Subpart A.

[136] Thrift Savings Plan Service Office, National Finance Center, P.O. Box 61500, new Orleans, LA 70161-1500.

purposes is "unpaid legal costs associated with a separation or divorce." Presumably, a developing disability would likewise qualify as a "hardship."

The matter is somewhat more complicated, however. No spouse's rights attach unless the sum of the TSP account is greater than $3,500.00. If so, then married FERS participants ***cannot*** borrow against the account without the spouse's written consent, while CSRS participants ***can*** do so, with the TSP simply sending "notification" to the spouse of the loan.

The Federal Retirement Thrift Investment Board will, however, honor "most" court orders restricting distribution (such as preliminary injunctions prohibiting withdrawals) or safeguarding funds for other purposes (such as child support or alimony awards). Thus, there could be some element in divorce cases of a "race to the courthouse," with the spouse trying to get a restraining order on file and served on the TSP before the employee can withdraw the funds. Obviously, if the employee empties out the TSP prior to the divorce, that fact should be discovered and taken into account during the litigation.

The lesson relating to disability matters is that if the divorce precedes separation from service, it is probably a good idea to get a court order on file just as early as possible either prohibiting any withdrawals, or at least sheltering the sum to which the former spouse is to assert a claim.

No QDRO is required for a TSP distribution; the TSP will honor any order that expressly relates to the TSP account of the participant, has a clearly determinable entitlement to be paid, and provides for payment to some person other than the TSP participant. Note that this includes payments directly to the attorney for the former spouse.

V. DISABILITY BENEFITS IN PRIVATE (ERISA-GOVERNED) RETIREMENT PLANS

There is little or no on-point law relating to interspousal conflicts relating to disability claims and private (ERISA-governed) retirement benefits. Presumably, this is because any disability benefits are matters of contract on individual plans.

Apparently, retirement for disability has no effect on defined contribution plans, or IRAs, or 401(k) plans, for the same reason it does not affect TSP accounts. The same cautions regarding "hardship" withdrawals and loans apply, however.

As to defined benefit (i.e., "pension") plans, where there are any disability benefits at all, they appear to be only early-payment triggers, usually in a reduced amount

from the regular longevity retirement, and terminating upon eligibility for regular retired pay. Presumably, the cost of such benefits where they exist is factored into the plan as part of either the employer's or employee's contributions.

VI. CONCLUSION

Retirement benefits in divorce cases are ubiquitous. Disability claims, and benefits, are possible, before or after divorce, in nearly every case. At least 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.

As to other retirement plans, the possibility of disability retirement should be anticipated in PERS and civil service cases, and dealt with by way of language appropriate to the retirement system, and the law of the state concerned, to ensure the intent of the court order is carried into effect.

For all IRA, 401(k), TSP, and other "cash" accounts, disabilities should be considered as possible reasons for encumbering or even eliminating those assets, and safeguards appropriate to the case put into place. There appear to be far fewer risks, or necessary preventive steps, in the world of private retirement benefits, ERISA, and QDROs – at least unless a specific plan creates an issue.

Any time there is a living retiree who could possibly alter benefits payable to the other spouse by electing a form of disability benefits, the lawyers involved 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.

EXHIBIT 1

2004 VA Disability Compensation Rate charts (effective 12/1/2003)

Monthly Rates of Compensation:

10%	$106
20%	$205
30%	$316
40%	$454
50%	$646
60%	$817
70%	$1,029
80%	$1,195
90%	$1,344
100%	$2,239

Additional Allowances for Dependents (if more than 30% disabled; apply disability percentage in fraction over 100% to yield dollar sum)

Spouse and no children	$127
Spouse and one child	$219
Spouse and two children	$284
Spouse and three children	$349
Additional children, each	$65
No spouse, but one child	$86
No spouse but two children	$151
No spouse but three children	$216
Additional children, each	$65
OR, for a child over 18, in school	$202
Dependent parent (one)	$103
Dependent parent (two)	$206

Additionally, there are additional payments for total disability, or loss of use of hands, feet, eyes, etc., ranging from $82 to $3,907 per month.

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