

## MDRP and CRDP: A Sea Change

By Mark E. Sullivan<sup>2</sup>

### 5.1—Division of Military Benefits Upon Divorce

#### **Q: Is military disability retired pay divisible in divorce? Is Concurrent Retired and Disability Pay divisible?**

**A:** A recent administrative ruling by the Department of Defense sheds new light on dividing Concurrent Retirement and Disability Pay (CRDP) when there is a disability retirement and a divorce. This article will explore what the new rule is.

#### **Disability Retirement and Divorce**

When a service member (SM) is found unfit to continue serving, he or she is separated with a disability discharge.<sup>3</sup> A military disability rating of 30% or more, or the completion of at least 20 years of service, means that the SM's separation comes with retired pay, often called MDRP, or military disability retired pay. By and large, MDRP is not divisible as property at divorce.<sup>4</sup> If the disability retiree elects to receive disability compensation from the Department of Veterans Affairs (VA), that money is also non-divisible.

The receipt of VA disability pay means that the retiree must waive an equal amount of retired pay.<sup>5</sup> This is called the "VA Waiver." This offset is remedied, however, by a statutory payment

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<sup>1</sup>We invite the reader's attention to [www.roa.org/lawcenter](http://www.roa.org/lawcenter). You will find more than 2,000 "Law Review" articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA), the Servicemembers Civil Relief Act (SCRA), the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA), the Uniformed Services Former Spouses' Protection Act (USFSPA), and other laws that are especially pertinent to those who serve our country in uniform. You will also find a detailed Subject Index, to facilitate finding articles about specific topics. The Reserve Officers Association, now doing business as the Reserve Organization of America (ROA), initiated this column in 1997.

<sup>2</sup>Mr. Sullivan is a retired Army Reserve JAG Colonel and a life member of the Reserve Organization of America. He practices family law in Raleigh, NC, and is the author of *THE MILITARY DIVORCE HANDBOOK* (Am. Bar Assn., 3rd Ed. 2019). A Fellow of the American Academy of Matrimonial Lawyers, Mr. Sullivan has been a board-certified specialist in family law for over 30 years. He consults with lawyers nationwide on military divorce issues and in drafting military pension division orders. He can be reached at [mark.sullivan@ncfamilylaw.com](mailto:mark.sullivan@ncfamilylaw.com) and 919-832-8507.

<sup>3</sup>Disability retirement for those retiring from active duty is covered at Chapter 61 of Title 10, U.S. Code.

<sup>4</sup>See *Q&A – Military Disability Retired Pay*, LEGAL ASSISTANCE FOR MILITARY PERSONNEL; SILENT PARTNERS, <https://www.nclamp.gov/media/730645/qa-military-disability-retired-pay.pdf> (last visited Mar. 28, 2022) (explains CRDP and the VA Waiver).

<sup>5</sup>10 U.S.C. §§ 5304—05.

called Concurrent Retirement and Disability Pay, or CRDP.<sup>6</sup> CRDP restores the amount of waived retired pay.<sup>7</sup> For example, if John Doe receives \$2,000 in MDRP monthly and he elects to get \$1,200 per month in VA disability compensation,<sup>8</sup> then he must waive \$1,200 of his retired pay; the amount waived, however, is made up by CRDP. Thus, he receives his full \$2,000 each month as well as the \$1,200 from the Department of Veterans Affairs.

### **Division of CRDP: From Canon to Canard**

It has long been an assumption of military divorce practitioners that CRDP paid in connection with MDRP could not be divided. The reasoning behind this canon was that CRDP was simply the return of waived retired pay and, since the waived retired pay was non-divisible (in most cases), so was the CRDP.

In a typical case, Jane Doe (the non-military spouse or former spouse) had few options to deal with the loss of a major marital asset, the military pension of her soon-to-be-ex. She might negotiate spousal support payments from John, since alimony is not property division, and the garnishment of alimony is not barred in a disability retirement case. She might negotiate for a greater share of other marital or community property. Or she might just write it off.

A new decision by a little-known administrative tribunal within the Defense Department has changed all of that. It's a major change that makes the former assumption (non-divisibility) into a canard, i.e., an unfounded rumor or story.

### **The CAB Decision**

On March 1, 2022, the Claims Appeals Board (CAB) rendered a Reconsideration Decision in Claims Case No. 2016-CL-091608.3. The case holds that the Uniformed Services Former Spouses' Protection Act (USFSPA) allows CRDP paid to a disability retiree to be divided as property in a divorce case since it is the payment of longevity retired pay (not the restoration of disability retired pay). The essence of the CAB ruling is in the second-to-last paragraph of the opinion:

In this case, the member retired under Chapter 61 and subsequently became entitled to receive CRDP. The restoration of his retired pay under the statute

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<sup>6</sup> 10 U.S.C. § 1414. The amount of CRDP paid is found on the second page of the disability retiree's RAS, or Retiree Account Statement.

<sup>7</sup>See *Military Pension Division: The "Evil Twins" – CRDP and CRSC*, LEGAL ASSISTANCE FOR MILITARY PERSONNEL; SILENT PARTNERS, <https://www.nclamp.gov/media/425647/s-pension.pdf> (last visited Mar. 28, 2022).

<sup>8</sup>The servicemember can elect VA disability compensation; it is not automatic. CRDP is automatic, once the VA election is made and the VA rating is 50% or greater, with the Department of Veterans Affairs notifying the retired pay center of this. The only exception to the automatic receipt of CRDP is when an eligible retiree chooses to receive Combat-Related Special Compensation (CRSC) pursuant to 10 U.S.C. § 1413a, since the receipt of CRSC terminates CRDP.

authorizing CRDP, 10 U.S.C. § 1414, is subject to division under the USFSPA. CRDP is a restoration of retired pay based on longevity, which is 20 years of service. It is divisible under the USFSPA. The USFSPA is consistent with the CRDP statute and the implementing regulations contained in Chapter 64 of Volume 7B of the DoDFMR [Department of Defense Financial Management Regulation]. Any contrary interpretation would provide the member with an entitlement or benefit that was not explicitly authorized by Congress.<sup>9</sup>

### **Impact of the Decision: On the Parties, On the Government**

What is the impact of this decision on the retired pay centers?<sup>10</sup> It will be enormous. The decision notes that the Defense Finance and Accounting Service, which lost the case before the initial administrative hearing officer, appealed, and lost again, has been applying this policy for 13 years in over 20,000 cases involving divorce and disability retirees.

What does this decision mean for the former spouse, Jane Doe? When there was no alternative settlement benefit that Jane received, she may have wanted to ask the court for a military pension division order to divide the CRDP. If Jane is already receiving alimony as a substitute for pension division, she may want to “let sleeping dogs lie” since the spousal support payments she’s getting are tax-free under the Tax Cuts and Jobs Act (TC&JA).

There’s an impact as well for the retiree, John Doe, if he is paying alimony in lieu of pension division. The TC&JA makes his spousal support payments non-deductible; the garnishment payments of pension division, however, are excludable from John’s taxable income, so (in his words) “That’s a tax deduction!” He may want to ask his lawyer about “revisiting” the alimony settlement to try to convert it into pension division.

It is important that both parties and their attorneys know about the divisibility of CRDP in the disability retirement case when the divorce is in the process of negotiations and settlement.<sup>11</sup> The former spouse needs to know that there is a benefit that may be divided and that she needn’t push for an alimony award as a substitute for pension division. The retiree needs to know that payments may be made through a garnishment from the retired pay center in

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<sup>9</sup>Claims Appeals Board Reconsideration Decision, Claims Case No. 2016-CL-091608.3, 7 (Mar. 1, 2022), <https://doha.ogc.osd.mil/Claims-Division/DOHA-Claims-Appeals-Board-Decisions/2022-DOHA-Claims-Appeals-Board-Decisions/FileId/168697/>.

<sup>10</sup>The retired pay center for the Army, Air Force, and Marine Corps, as well as the National Guard and the Reserves, is the Defense Finance and Accounting Service, or DFAS. For the Coast Guard and the officer corps of the Public Health Service and the National Oceanic and Atmospheric Administration, retired pay is administered by the Coast Guard Pay and Personnel Center.

<sup>11</sup>The place to find information about the CRDP amount is on page two of the RAS (Retiree Account Statement). To ascertain whether the SM received a disability separation, check the individual’s retirement orders and also the DD Form 214 or “Report of Separation.” For DoD retirees, the letter sent at retirement from DFAS to the SM stating how his or her retired pay was calculated also contains information about disability retired pay and how it was calculated.

appropriate cases, and these payments will be excluded from his income at tax time, unlike alimony payments.<sup>12</sup>

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<sup>12</sup>Division of military retired pay through a garnishment requires an overlap of at least 10 years of marriage and 10 years of military service. 10 U.S.C. § 1408(d)(2).

<sup>13</sup>Congress recently established the United States Space Force as the 8<sup>th</sup> uniformed service.

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