

# Practicing Pitfalls: Compensating for VA Setoffs and Waivers in Equitable Distribution of Military Retired Pay

By Peter J. Jankell, Esq.

Military retirees who are less than 50 percent service-connected disabled are required to offset their retiree pay with the amount of Veterans Administration (VA) disability compensation they receive. 10 U.S.C. § 1414; 38 U.S.C. § 5304. This offset reduces the amount of money a former spouse would receive as an equitable distribution of military retired pay in a divorce. Accordingly, it has long been common in separation agreements for divorce cases to contain a provision where the servicemember agrees not to waive any retirement benefits in order to accept VA disability or, in the alternative, to make up the lost differential to their former spouse.

Until the passage of the Uniformed Services Former Spouses' Protection Act (USFSPA), 10 U.S.C. § 1408, state courts were precluded from dividing military retirement in a divorce action as part of equitable distribution. *McCarty v. McCarty*, 453 U.S. 210, 101 S.Ct. 2728, 69 L.Ed.2d 589 (1981). In 1982 Congress responded to the *McCarty* decision by passing the Uniformed Services Former Spouses' Protection Act, 10 U.S.C. § 1408. Congress enabled a state to treat veterans' "disposable retired pay" as property divisible upon divorce. 10 U.S.C. § 1408(c)(1). *Howell v. Howell*, 581 U.S. \_\_\_\_, 137 S.Ct. 1400, 1403, 197 L.Ed.2d 781 (2017). In order to prevent double dipping, military retirees may receive disability benefits rated at less than 50% only to the extent that they waive a corresponding amount of military retirement pay. Because disability benefits are exempt from federal, state, and local taxation, military retirees who waive their retirement pay in favor of disability benefits increase their after-tax income. Not surprisingly, waivers of retirement pay are common. *Mansell v. Mansell*, 490 U.S. 581, 584, 109 S.Ct. 2023, 104 L.Ed.2d 675 (1989). In *Mansell*, the parties entered into a

property settlement which provided, in part, that Major Mansell would pay Mrs. Mansell 50 percent of his total military retirement pay, including that portion of retirement pay waived so that Major Mansell could receive disability benefits. The Court held that the agreement was not enforceable because the Former Spouses' Protection Act does not grant state courts the power to treat as property divisible upon divorce military retirement pay that has been waived to receive veterans' disability benefits. *Id.* 594-595.

A recent United States Supreme Court decision reinforces this position. In *Howell v. Howell*, 581 U.S. \_\_\_\_, 137 S.Ct. 1400, 197 L.Ed.2d 781 (2017), the Court saw nothing in the circumstances that make a reimbursement award to a former spouse any the less an award of the portion of military retirement pay that was waived in order to obtain disability benefits. Congress specifically omitted that portion from the USFSPA's definition of "disposable retired pay." Accordingly federal law prohibits state courts from awarding to a divorced veteran's former spouse the waived portion. *Mansell, supra*, at 589, 109 S.Ct. 2023, *Howell*, 137 S.Ct. at 1405.

The Court in *Howell* went on to say that a state court cannot avoid *Mansell* by describing the family court order as an order requiring the servicemember to "reimburse" or to "indemnify" the former spouse, rather than an order that divides property. The difference is semantic and nothing more. The principal reason the state courts have given for ordering reimbursement or indemnification is that they wish to restore the amount previously awarded as community property, i.e., to restore that portion of retirement pay lost due to the post-divorce waiver. The amount of indemnification mirrors the waived retirement pay, dollar for dollar. Regardless of form, such reimbursement and indemnification orders displace the federal rule and stand as an obstacle to the accomplishment and execution of the purposes and objectives of Congress. All such orders are thus pre-empted. *Howell, supra*, 137 S.Ct. at 1406.

Reading *Mansell* and *Howell* together, it is apparent that any agreement "not to reduce military retirement" or to pursue VA disability is unenforceable. Likewise, any agreement to reimburse the former spouse any amount reduced by

an election of VA disability is also unenforceable. Any attorney who continues to use such wording does so at their own peril.

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