

SILENT PARTNER

MILITARY PENSION DIVISION: THE ‘EVIL TWINS’ – CRDP AND CRSC

*Introduction: **SILENT PARTNER** is a lawyer-to-lawyer resource for military legal assistance attorneys and civilian lawyers, published by the Military Committee of the American Bar Association’s Family Law Section. Please send any comments, corrections and suggestions to the address at the end of this Silent Partner. There are many **SILENT PARTNER** infoletters on military pension division, the survivor Benefit Plan and other aspects of military divorce. Just go to www.abanet.org/family/military (the website of the above committee) or www.nclamp.gov (the website of the military committee, N.C. State Bar).*

Introduction

The waiver of military retired pay in exchange for VA disability compensation is covered in *Military Pension Division: The Servicemember's Strategy*. In a nutshell, here’s how the system used to work for retirees.

Veterans who have one or more service-connected disabilities, wounds, illnesses or conditions can apply to the VA (Department of Veterans Affairs) for tax-free disability compensation. Until 2004, the law allowed retirees to elect tax-free disability compensation from the VA only if they gave up the same amount of retired pay. Taking this dollar-for-dollar reduction was always beneficial to the military retiree, since it yielded a net increase in income because of the non-taxable aspect of disability compensation.

However it is taken, this election would usually wreak havoc when the retiree’s pension is subject to a garnishment order for part of “disposable retired pay” in favor of a former spouse. As soon as the election took place at the retired pay center (Defense Finance and Accounting Service for Army, Navy, Air Force and Marine Corps), the former spouse would see her share of disposable retired pay decrease, sometimes substantially. For example, assume that John Doe retired from the Army and he had disposable retired pay (without disability) of \$1,500 per month. If his service-connected disability were evaluated as equivalent to \$1,000 per month in VA payments, he could waive the same amount of taxable longevity pension in order to receive this amount tax-free. His monthly benefit would still total \$1,500, but only \$500 of this would be subject to taxes.

In addition, only this \$500 which remains of his military pension would be subject to division with Mary Doe, his ex-wife. The Uniformed Services Former Spouses’ Protection Act (USFSPA), found at 10 U.S.C. §1408, excludes VA disability compensation from the definition of “disposable retired pay.” So if the military pension division order had given Mary 40% of John’s disposable retired pay, her pre-waiver share would have been \$600 a month (40% X \$1,500). But her post-waiver amount would be only \$200 (40% X \$500). Especially when rent or mortgage payments depend on the continued receipt of a stable, predictable amount of divided military retired pay, such a VA waiver by the military retiree can be catastrophic.

Congressional Developments Since 2003 – Back to the Beginning

In 2003, Congress passed legislation taking effect January 1, 2004 to allow concurrent receipt of both forms of payments – retired pay and disability benefits – for certain eligible retirees. The restoration of retired pay is known as Concurrent Retirement and Disability Pay (CRDP). It is found at 10 U.S.C.

§1414. The implementing rules are found at Chapter 64, Volume 7B of the DoDFMR (Department of Defense Financial Management Regulation). The Coast Guard, which is also subject to USFSPA for pension division, usually uses the DFAS rules in dividing pensions.

Also beginning in 2003, Congress made a new form of special compensation available to a limited number of retirees. The benefits and definitions were expanded substantially in 2004. Called Combat-Related Special Compensation (CRSC), these payments may now, under the 2004 revised rules, be made to those retirees with a disability of at least 10% directly related to the award of the Purple Heart decoration, or else a combat-related disability rated at least 10% (such as hazardous duty or training for combat). CRSC is found at 10 U.S.C. §1413a, and the CRSC rules are in Chapter 63, Volume 7B of the DoDFMR.

Both of these affect the division of military retired pay. Both are complex and misunderstood – if not unknown – by civilian practitioners as well as many judge advocates. Let’s see how they work.

CRDP Explained

For those who have at least 20 years of qualifying military service and a VA disability rating of at least 50%, CRDP means that full retired pay accompanies full VA payments. There is no reduction for VA payments (although there was initially a ten-year phased elimination of the VA offset, ending 12/31/2013). Put in positive terms, this means that the retiree will get every dollar of retired pay that was formerly waived for VA disability compensation. The disability does *not* have to be combat-related. CRDP is the return of waived pension payments, so it has the attributes of those pension payments. It is taxable compensation. It also is divisible with a former spouse under a military pension division order.

Verifying Receipt of CRDP

How will you know if John Doe is getting CRDP? Since John is an Army retiree, his retired pay statement is from DFAS. Just read the comment at the “MESSAGE SECTION” on page 2 of his Retiree Account Statement (RAS), Form DFAS-CL 7220/148 (see ATCH 1 at the end of this Silent Partner for an example). It will look like this:

MESSAGE SECTION
BASED ON INFORMATION RECEIVED FROM THE VA, YOUR CRDP AMOUNT IS \$_____.

The RAS is posted at a secure website for uniformed services retirees (the website is <https://mypay.dfas.mil> for those paid through DFAS) each month. If the retiree will not voluntarily produce the RAS, counsel may resort to formal discovery procedures if the matter is in litigation. DFAS will honor a request for documents so long as it is in the form of a court order or a subpoena signed by a judge. Send the order or subpoena, with the individual’s full name and Social Security Number (SSN), to:

Defense Finance and Accounting Service
DFAS- Cleveland Center
Records Retrieval (Code HAC)
1240 East 9th Street, Room 2679
Cleveland, OH 44199-2055
Fax 216-522-6530

There is no requirement that the subpoena or order be sent by certified mail, although that is recommended. An example of the RAS extract is at ATCH 2.

Don't Take "NO" for an Answer

Sometimes the attorney for the retiree will disavow any knowledge of the existence of an RAS, or the retiree will claim that it was lost, misplaced, or "floated away in that big flood last month." As noted above, all Defense Department retirees are eligible for a free "myPay" account at the DFAS website (<https://mypay.dfas.mil>). There is a link to "myPay" right on the initial webpage of DFAS, www.dfas.mil with instructions on how to create an account. Once the account is set up, all John Doe needs to do to obtain his current RAS is to enter his "LogIn ID" and password, go to the screen marked "Your Military Retiree Pay Account," and select "Retiree Account Statement (RAS)." The late Mike McCarthy of Phoenix, a retired Air Force Reserve brigadier general, used to brag that he could usually get a court to order both attorneys and the retiree to use a computer *right there in the courtroom* to access the current or past RAS from the myPay website.

When in Doubt, ASK!

Another method of finding out the retiree's deductions is to ask DFAS. A little-known notice in the Federal Register makes this possible. Effective July 13, 2000, DFAS announced at 65 FR 43298 that it would disclose this information to a former spouse (FS):

In addition to those disclosures generally permitted under 5 U.S.C. 552a(b) of the Privacy Act, these records or information contained therein may specifically be disclosed outside the DoD as a routine use pursuant to 5 U.S.C. 552a(b)(3) as follows:

To former spouses, who receive payments under 10 U.S.C. 1408, for purposes of providing information on how their payment was calculated to include what items were deducted from the member's gross pay and the dollar amount for each deduction.

While it may be difficult to obtain sometimes if the person at DFAS responding to the written request is a newly hired GS-6 employee who doesn't know about this rule, diligence and courtesy will get the former spouse through to someone in authority who will be able to assist. Be sure to include in the written request from the FS full identifying information on the retiree (name and SSN), the SSN for the former spouse and – if appropriate – an authorization for DFAS to provide the information to the attorney for the FS. The request might look like this:

*Defense Finance and Accounting Service
DFAS- Cleveland Center
Records Retrieval (Code HAC)
1240 East 9th Street, Room 2679
Cleveland, OH 44199-2055
Fax 216-522-6530*

Pursuant to the Privacy Act Routine Use set out at 65 Fed Register 43298, I hereby request that you provide to me information on the current gross retired pay, current deductions and dollar amount for each deduction used in calculating my share of the pension in regard to my former husband, John Q. Doe, SSN 987-77-6543. My former spouse payments were calculated under 10 USC 1408. [OPTIONAL: I authorize you to provide this information to my attorney, Lucinda Lopez, Lopez and Pasquale, LLP, 123 Green Street, Apex, NC 27566]

*_____/s/_____
Mary P. Doe
SSN 234-56-7899*

The average response time is several weeks. To check on the status of a request, call 216-522-5046 and be sure to have the retiree's SSN available. The expected answer, when it arrives, will usually look like the letter at ATCH 3 at the end of this Silent Partner.

A Few More Rules

CRDP includes those who were retired with military disability retired pay (Chapter 61 of Title 10, U.S. Code) and also Guard/Reserve members with 20 or more "good years" toward retirement. CRDP cannot exceed gross retired pay.

Mary Doe, the former spouse, should have been receiving payments of pension division from the retired pay center, in this case, (DFAS), since her ex-husband's disability rating was less than 100% and he was still receiving *some* retired pay. In this situation, no new application is needed since her pension division order is "in the system" at DFAS. She should now be receiving increased pension payments from DFAS due to the increased pension that John Doe is now receiving. A new application for garnishment of retired pay (with DFAS, this is DD Form 2293) will be needed if Mary had been receiving *nothing* since the VA disability pay wiped out completely the retired pay.

Garnishment for pension division through the retired pay center is only for current pension payments. There is no authority for DFAS to garnish for pension division arrears.

CRDP will go a long way toward fixing the unfairness of unilateral changes in military pension division orders by retirees who, after the divorce, obtain VA disability compensation and thus reduce the share of the former spouse. It will not, however, eliminate the problem entirely. Since it exempts those individuals whose disability rating is less than 50%, the problem will remain to some extent and may be addressed by means of the other tools and options covered in *Military Pension Division: The Spouse's Strategy*.

CRSC Explained

Combat-Related Special Compensation (CRSC) is a benefit provided by Congress for those who have a combat-related disability of at least 10% under certain conditions. A disability is considered to be combat-related under 10 U.S.C. §1413a (e) if it –

- (1) is attributable to an injury for which the member was awarded the Purple Heart; or
- (2) was incurred (as determined under criteria prescribed by the Secretary of Defense)—
 - (A) as a direct result of armed conflict; or
 - (B) while engaged in hazardous service; or
 - (C) in the performance of duty under conditions simulating war; or
 - (D) through an instrumentality of war.

These qualifications include, by way of example, injury or illness resulting from actual combat, simulations of war (e.g., gas mask training, field training exercises, direct-fire training and "confidence courses"), hazardous duty such as diving or parachuting, and instrumentalities of war (e.g., tanks, artillery, machine guns, military helicopters or planes). These conditions are defined in the CRSC regulations in the DoDFMR. There is further general information on CRSC at the Army Human Resources Command website, www.hrc.army.mil. Just type "CRSC" into the Search field. Since "combat-related" is service-specific, the application is sent to the retiree's branch of service, not to the Department of Defense.

CRSC is not longevity retired pay; it is an additional form of compensation for certain members of the armed forces. 10 U.S.C. §1413a (g) states that "[p]ayments under this section are not retired pay."

Thus payments are not divisible as property. They are, however, subject to garnishment for family support.

The CRSC rates are based on the VA tables, and they increase with the number of a retiree's dependents (spouse, spouse and child, etc.). Thus, to use a March 2014 example, the rate for a 10% disability, no dependents, is about \$131 a month. The no-dependents rate for a 20% disability rating is about \$259 per month. The amount goes up to a total of about \$3,390 for spouse, child and two parents (100% disability rating), and each additional child brings additional funds depending on his or her age.

CRSC Twists and Turns

Once a CRSC application is approved, the retired pay center (usually DFAS) does the calculations and the decision-making for the retiree. Since one cannot receive both CRDP and CRSC, DFAS automatically makes the election for whichever is most financially advantageous, in that it yields the highest net cash flow. DFAS doesn't take into account that the retiree may have a property division garnishment in effect. If CRDP is more favorable in gross dollars, then that is what's chosen. This means, for example, that if CRSC in a particular case were \$500 and CRDP for the same year were \$501, then CRDP would be chosen for the retiree, even though CRDP is taxable and subject to a garnishment division with the ex-spouse.

The potential hardships for former spouses due to CRSC elections are remarkable. Using 2006 dollars, Mike McCarthy liked to use these as teaching points:

First example: Assume an Air Force tech sergeant with 20 years of creditable service; 100% VA disability rating, all of it combat-related, and the former spouse is to receive 43% of the disposable retired pay as property division. He receives \$2,979 VA disability compensation and waives ALL of his \$1,299 gross military retired pay. In return, he receives \$1,299 in CRSC payments. Thus he gets \$4,278 per month tax-free. His ex-wife gets her share, 43%, of the pension, but the pension at this point is ZERO. She gets nothing; she has lost \$558 per month.

Another scenario? Sure. Assume same facts except that the CRSC disability rating is 40%. The retiree gets \$2,979 VA disability compensation but he must waive all of his \$1,299 pension, and he gets \$1,191 CRSC. Thus he gets \$4,170 per month tax-free; while the ex-wife still gets NIL from disposable retired pay – there is none.

As a further illustration of this, assume a full colonel with 100% VA and 100% CRSC disability rating, with a 43% award to former spouse. His military pension is \$6,630 before VA waiver of \$2,979, so his real "disposable" pension is \$3,651. He also gets the maximum amount of CRSC, \$2,979. His former wife gets 43% of only \$3,651, which equals \$1,570, rather than 43% of the gross \$6,630, or \$2,850. She loses \$1,280. He gets the balance of the pension (\$2,081), plus the two disability benefits (\$5,958) for a total of \$8,039.

CRSC payments are retroactive. The individual is entitled to CRSC back to the date of filing of the VA claim or of the enabling legislation, January 1, 2003, whichever is later. This retroactivity will cause problems for both parties. If John Doe has been getting CRDP and elects CRSC, there will be a one-time retroactive payment to him, and the money received under CRDP for that same period covered by the CRSC retroactive payment will be taken back. The CRDP pay-back will be subtracted from the retroactive CRSC payment that he receives. That means that taxable income for prior years – duly reported on federal and state tax returns – has been taken back from the taxpayer, resulting in problems for his tax preparer on how to treat this.

But what about the former spouse? If the retiree's former spouse has been receiving a share of the pension as property division, the share paid from CRDP must also be collected back from her. There are two possible results.

First, if the CRSC election results in *no further pension garnishment payments* to the former spouse, then DFAS will initiate a debt collection action against her or him, since there would no longer be any continuing pension garnishment payments from which to deduct the CRDP payments made to her. The former spouse may petition for a waiver of the indebtedness. This is done on DD Form 2789, "Waiver/Remission of Indebtedness Application." The mailing instructions are on the form.

On the other hand, if the CRSC election does not remove all the pension share garnishment, then the former spouse will still be subject to a collection action by DFAS. DFAS will recoup the "overpaid" funds from her, resulting in decreased future payments until the indebtedness is fully paid; this is ordinarily done over a 36-month period. An example of an actual client's overpayment letter (with names and identifying information changed) is at ATCH 4 at the end of this **Silent Partner**. This former spouse may also petition for waiver of this indebtedness.

CRSC Final Points

Here are some final points about CRSC:

- The CRSC payment cannot exceed the amount of the military retired pay waived for VA disability compensation.
- Unlike ordinary retired pay (including CRDP), CRSC is non-taxable – it is disability compensation, not retired pay.
- CRSC is available for support determinations and for garnishment for alimony and child support. This is also true of CRDP.
- The statute includes Guard and Reserve personnel who have at least 20 qualifying years for retirement purposes.
- It also includes those who are retired for disability ("military disability retired pay") under Chapter 61 of Title 10, U.S. Code.

Bumps in the Road and CRDP-CRSC Chart

Note that the CRSC amount is not always the same as the VA amount. The VA disability rating is based on those wounds, conditions or illnesses which are service-connected, whereas the combat-related conditions may be a subset of the VA-rated disabilities. A servicemember could be rated at 60% by the VA, and yet receive only 10% or 20% as his rating from the CRSC board, since only some of his disabilities are combat-related.

In addition, those who receive MDRP (military disability retired pay) face a potential reduction if they've obtained retired pay based on the percentage of their disability. As set out in a June 3, 2008 memorandum of the Undersecretary of Defense for Personnel and Readiness, the CRSC reduction for these MDRP recipients will be the amount, if any, by which their pay exceeds what they would have been paid for years of service. For an explanation of MDRP and longevity retired pay, see the SILENT PARTNER, "Military Pension Division: The Servicemember's Strategy." The rules for CRSC, found at Chapter 63 of the DoDFMR, also explain this more fully.

An example may make these two paragraphs above easier to understand. If John Doe retires for longevity after 20+ years of service and receives a VA rating of 60%, then he may elect to receive VA disability compensation of \$X, and this doesn't reduce his retired pay since he's "in the CRDP zone," that is, he has a disability rating of 50% or greater, so he receives CRDP to replace the retired pay that would otherwise be waived due to receipt of VA disability pay. If he applies for CRSC, which will wipe out his

CRDP and result in a reduction of his retired pay (since he's back to the old rule of dollar-for-dollar waiver of retired pay when getting VA pay), he will receive a "double payment" (that is, payment of the same amount twice) if his CRSC rating is the same as his VA rating. Put another way, this would mean that all of his VA conditions are combat-related. He would get less in CRSC if only some of the VA conditions were related to combat.

If John, on the other hand, were a recipient of MDRP (that is, he was retired because he was found to be unfit for duty due to physical or mental disability), then his retired pay would be based on the higher of two amounts – his retired pay calculated according to years of service, and his retired pay calculated according to his percentage of disability. If his MDRP is calculated according to the percentage of disability (which would normally be the case if he had relatively few years of service), then his CRSC will be reduced by the amount by which his retired pay actually received exceeds his retired pay as calculated according to his years of service. Thus if at the time of evaluation and pension determination, John's years of service yielded MDRP of \$2,000, and his percentage of disability yielded MDRP of \$3,000, then he would be paid the \$3,000 (since by law the Defense Department must pay him the higher of the two amounts). But any CRSC which he might receive in the future would be reduced by \$1,000, which is the difference between the years-of-service retired pay calculation and the percentage-of-disability calculation. And if John had also applied for VA disability compensation, which is normal in these cases, the amount of the VA pay would be higher than the amount of CRSC, even if all of the VA conditions were combat-related, since there is no reduction for VA payments as there is for CRSC under these circumstances.

A simplified comparison between CRDP and CRSC is shown on this chart:

CRDP and CRSC – A Comparison	CRDP	CRSC
Type of disability required	Service-connected	Combat-related
Considered longevity retired pay	Yes	No
Divisible as property	Yes	No
Minimum disability rating required	50%	10%
Taxable	Yes	No
Retroactive payment	No	Yes†
Increases with number of dependents	No	Yes‡
Available for support determinations, garnishments	Yes	Yes

†Payment is retroactive to the date of filing of the VA claim.

‡If CRSC rating is 40% or more.

CRDP and CRSC – the Election

Eligible retirees can elect either CRDP or CRSC, under 10 U.S.C. §1414 (d)(1). The election may be made once a year during the January open season, pursuant to 10 U.S.C. §1414(d)(2). This means that John Doe can alternate between CRDP and CRSC yearly. The "open season" is usually in January of each year.

Conceivably – if John Doe alternated annually between the two forms of payment – Mary could get her share of the CRDP in 2013, then be told by DFAS that no CRDP funds were available in 2014 when John switched over to CRSC. Then in 2015 he could change back to CRDP.

DFAS advises that it is treating the initial election of CRSC as a termination of former spouse payments if there is no other disposable pay available for the former spouse. This requires a new DD

Form 2293 (but not the entire set of original documents submitted with the original application). Thus if John later switched back to CRDP, Mary would have to reapply to re-start the payments. DFAS does not say how Mary would know of this switch, since it will not independently inform her of the change. And John certainly won't tell her!

If, however, John still had disposable retired pay available after his CRSC election, Mary would continue to receive her share (at a reduced rate). If he later switched back to CRDP, the payment to Mary would increase automatically.

CRDP and CRSC – Procedures, Pay Notice

Here is an overview of how the VA, CRDP, and CRSC procedures work. John Doe retires from the Army. He is divorced and the property division order requires him to pay Mary Doe, his ex-wife, 50% of his disposable retired pay (DRP). After retirement, he goes to the nearest VA hospital for a physical evaluation. Several months after the physical (it could be up to a year, depending on backlogs), he gets a *findings and ratings letter* from VA. This correspondence states that he is rated X% disabled, due to hearing loss, back problems, and carpal tunnel syndrome. All of these disabilities are determined to be *service-connected*, but the back problem stems from a parachute jumping accident, and the hearing loss came from a career of being in airplanes for airborne operations. X represents a figure greater than 50% in this example.

The letter informs him that the X% disability rating qualifies him for non-taxable VA disability compensation of \$800 a month. To elect this, he must waive the same amount of his retired pay, as outlined above, if the rating is less than 50%; there is no waiver if the rating is 50% or more.

John Applies for CRSC

Some time after he gets his VA letter, John decides to apply for CRSC. First of all, he gets out his VA *findings and ratings letter*, and he looks for types of disabilities which will qualify for CRSC. These would be disabilities incurred as direct result of armed conflict, hazardous duty, an instrumentality of war, or conditions simulating war.

Since applications are service-specific, John sends in his application form, DD Form 2860, to the Army. The entire process is retiree-driven. He must apply to be considered for CRSC; it is not automatic, like CRDP. A board will decide his case, and he sends in copies of his physicals, his medical records (active duty military, VA and private health care provider), plus statements from him and, if available, from witnesses or experts.

Several months later he receives a letter from the Army. It contains findings regarding his claims as to combat-related injuries or disabilities (e.g., "Of your X% service-connected disability rating, Y% is combat-related and qualifies for CRSC.").

DFAS Makes the Choice

Soon after the letter confirming his CRSC eligibility, John's CRSC payments begin. The CRSC payments come from the VA disability tables, and the amounts vary according to the number of dependents that one has. As mentioned above, DFAS makes the choice for John – CRSC or CRDP – based on which one yields the larger total gross payment. Thus if the CRSC amount is \$800 per month (as against a present total CRDP payment \$900 monthly), DFAS will leave the CRDP payment unchanged, regardless of the fact that the \$900 is taxable and divisible with his ex-wife). John can change this election annually in the January open season if he wishes. If DFAS chooses CRDP, then there will be no change on John's RAS. The comment at the MESSAGE section on page 2 remains the same as before.

If, however, CRSC payments were \$1,000 per month, then this is better financially for him (in the eyes of DFAS) and DFAS will select that option, issuing her a CRSC Monthly Statement. An example of a CRSC statement, not tied to this scenario, is as follows:

CRSC Pay Statement		
STATEMENT EFFECTIVE DATE APR 21, 2013	PAYMENT DATE MAY 01, 2013	SSN 123-45-6789
RETIREE'S NAME AND ADDRESS		HOW TO CONTACT US
PLEASE REMEMBER TO NOTIFY DFAS OF YOUR ADDRESS CHANGES [NAME APPEARS HERE] 123 GREEN STREET APEX, NC 27511-1234 PAYMENT ADDRESS DIRECT DEPOSIT		DEFENSE FINANCE AND ACCOUNTING SERVICE US MILITARY RETIRED PAY PO BOX 7130 LONDON, KY 40742-7130 COMMERCIAL (216) 522-6398 TOLL-FREE 1-800-472-7098 TOLL-FREE FAX 1-800-469-6559 myPay https://myPay.dfas.mil 1-877-363-3677
PAYMENT INFORMATION		ENTITLEMENT INFORMATION
CRSC Payment	377.00	Retired Pay Before Deductions
CRSC Debt Deduction	0	Retired Pay Offset by DVA Compensation
CRSC Garnishment Deduction	0	CRSC Debt Balance
CRSC Net Pay	377.00	Branch of Military Service
		Garnishment Being Withheld
		AIR FORCE NO
THE DVA OR YOUR BRANCH OF SERVICE PROVIDED THE FOLLOWING		
CRSC SPECIAL MONTHLY COMPENSATION CODE	00	
UNEMPLOYABLE	NO	
DVA DISABILITY %	50	
COMBAT RELATED DISABILITY %	30	
PURPLE HEART %	00	
CRSC START DATE	JAN 01, 2012	
SPECIAL MONTHLY COMPENSATION START DATE		
REMARKS		
This is your monthly CRSC statement. Please refer to myPay frequently asked questions for additional information about CRSC and this statement.		

The new CRSC statement will be posted on-line. John Doe, our Army retiree, can access it through the secure DFAS website, <https://mypay.dfas.mil>.

DFAS will also issue John a new RAS. It will contain new retired pay figures, and the amount for retired pay will be reduced from the previous month's amount because CRDP will have disappeared. The comment in the MESSAGE SECTION on page 2 also will be gone, as shown below:

MESSAGE SECTION

Sherlock Holmes at Work

This absence of the CRDP message is the key to understanding when CRSC is present. Suppose that Mary's attorney discovers that there is a large VA waiver shown on John Doe's RAS. In this case, "large" would be over \$800, since \$822 is the rate (as of 12/1/13) for a veteran with no dependents who has a 50% VA disability rating. In the absence of a CRSC statement, Mary's attorney can perform some deductive reasoning and, even without the help of Dr. Watson, can still make an educated guess as to John's receipt of CRSC. All the attorney needs to do is look at the MESSAGE SECTION on the RAS. "No message" combined with a large VA waiver means that:

- A) John has a VA-rated disability
- B) He made the election to receive VA disability pay
- C) While this would ordinarily mean that he would have to waive part of his pension, the advent of CRDP means that he is entitled to his pension and his VA payment for VA ratings of 50% or more
- D) That, in turn, would mean “no VA waiver” shown on the RAS (as of 1/1/14)
- E) When there IS a VA waiver, it must mean that we’re back to the “old days” of dollar-for-dollar waiver of pension money for VA money, which means there is no payment of CRDP, which in turn means that John has been approved for CRSC, which is the only way to wipe out CRDP.

In such a case, Mary’s attorney can be a sleuth and figure out what John’s VA rating actually is (without even seeing his VA findings-and-rating letter in her possession). All she has to do is to find the amount of the VA waiver and then locate that number on the VA disability compensation tables (easily found by typing “VA disability compensation tables” into any internet search engine).

The Impact of a “CRSC Attack”

To understand some of the consequences of the CRSC election, remember that John cannot get CRDP if he is receiving CRSC at the same time. This does not mean a dollar-for-dollar waiver of CRDP for CRSC. It means he cannot receive *any* CRDP if he receives even \$1 of CRSC.

So the payments for John go up, while those for his ex-wife will go down. In fact, Mary Doe will see even more bad news due to CRSC and retroactivity. Since John has received CRDP back to the date of his VA election, which has been shared through DFAS with Mary for months (or years) before John is accepted for CRSC, DFAS now must take back all of the prior CRDP payments, and this means collection from Mary as well. So Mary will see an even larger reduction in her pension division checks. DFAS will collect these CRDP payments back over a 36-month period.

The consequence for John is that he will have to check with his CPA or tax preparer about an adjustment on the current tax returns that he files, since he will want to report an adjustment for the “pay-back” for CRDP. The current year’s CRDP income and pay-back will be adjusted in the Form 1099 that he receives; this portion of his reported income for the current year will just be zeroed out, since he received it but then paid it back in the current year. His only reportable income for the current year would be his unreduced remaining monthly pension share. He will also need to ask if he should amend his prior years’ tax returns.

Why “The Evil Twins”?

As we have seen, the new CRSC benefit can have a significant and devastating impact on CRDP payments. The receipt of even \$1 of CRSC wipes out any CRDP payments, without notice to the former spouse. Furthermore, John can elect to alternate between CRSC and CRDP once a year, a whipsaw tactic that will totally confuse and exhaust Mary and her lawyer.

Practical Pointers – Attorney for the Non-Military Spouse

First of all, it is essential that the non-military spouse (and, for that matter, the SM/retiree) obtain an attorney who knows this area of the law. As shown above, booby traps and pitfalls are everywhere. The spouse should either obtain a lawyer who knows the area from past experience or, if possible, hire an attorney who is a Guard or Reserve JAG officer, a former JAG officer or a retired JAG officer. Jackey D. Nichols, the former Chief of the Claims Division, Office of the Staff Judge Advocate, Ft. Dix, NJ, says, “One of the biggest tragedies I see is when a client going through a divorce picks an attorney based on price vs. one who knows all the unique issues associated with a military couple's divorce.” If the current divorce attorney doesn’t know the law, he or she should certainly associate co-counsel for this particular piece of the divorce case. Since there are several different court interpretations in this complex area – and

sometimes *no* judicial precedent at all – it is recommended that counsel research the laws of the jurisdiction involved as to the impact of retirement pay amounts waived because of these choices outlined above.

Next, the lawyer representing the servicemember’s spouse must recognize that he or she can’t predict much of anything before the SM’s retirement. You could ask whether the SM is an active-duty trooper or a member of the Guard or Reserve. Since most of the creditable service of Guard/Reserve personnel is made up of weekend drill and two weeks of annual training, or “summer camp,” you could predict that these Reserve Component SMs are less likely to suffer from disabling conditions arising from combat, hazardous duty or other qualifying causes. But remember that even Guard and Reserve members could be injured in the operation of a plane, helicopter or weapons system, which would likely qualify for CRSC, while on a regularly scheduled field exercise or during a six-month mobilization in the Middle East.

If you are representing the spouse of an active-duty SM, you can make some educated guesses as to whether there might be a combat-related disability or injury by assessing whether the SM might be a “Front-Line Felicia” or a “Backfill Bill.” Is the servicemember a paratrooper or a Ranger, or perhaps a garrison trooper who sits at a desk all day?

Be sure to consider the job assignment or military occupational specialty as well as the unit to which Felicia or Bill belongs. If Felicia is a supply sergeant, does that mean she’s unlikely to suffer combat-related injury from her military service? Suppose she is, during training missions, also a jumpmaster in charge of parachute drops from the aircraft. Just because Bill is a Navy nurse doesn’t mean that he’s in the clear. What if his assignment is with Navy Seal Team 6, jumping out of helicopters and swimming to the objective?

Be sure to ask lots of questions of your client. Does the military spouse presently demonstrate any injuries or disabilities? Has he been in the hospital for anything related to military service? What is the state of his health?

If you are trying to negotiate a settlement, draft your settlement document with an indemnification clause. Be sure that you include language that states that the military spouse will repay your client any moneys that are removed from her share of total pay (other than the SBP premium) in arriving at Disposable Retired Pay due to any action of the retiree. Such an indemnification clause might read:

The military retired pay of respondent shall be apportioned between the parties, with the petitioner receiving 39.375% of same, without regard to any reductions or setoffs due to disability compensation or any other reason (except the premium for her coverage under the Survivor Benefit Plan). If the respondent shall do anything – actively or passively – to reduce the share of amount of petitioner, then he shall indemnify and reimburse her for any such loss, including associated costs, expenses, interest, attorney’s fees and consequential damages.

On the other hand, the military member might be wary of “indemnification language” or division of the gross retired pay, in which case a weaker set of words might be useful or necessary if they will – under state law – provide sufficient protection for the nonmilitary party:

Petitioner shall receive 39.375% of respondent’s retired pay, which is at present based solely on 22 years of creditable service without any reductions (except the premium for her coverage under the Survivor Benefit Plan). The respondent shall do nothing to reduce petitioner’s share or interfere with her receipt of same.

This clause attempts to identify the number of years of service as the sole measure of determining respondent’s compensation in retirement. Even better would be a sentence which attempts to forecast the

likely longevity retired pay of the respondent so that the judge would have a benchmark to use in case the member does something in the future to diminish the share of the spouse. Ideally, the settlement agreement would also have a general violation clause, which is standard in most marital settlement agreements, stating that any breach of the agreement by a party entitles the other to payment of damages, costs, expenses and attorney's fees.

If the member is already retired, try this for the "strong language" clause:

Respondent is currently receiving gross military retired pay of \$2,000 a month, with a deduction of \$130 for SBP premium to cover his former spouse. If the respondent does anything to reduce the share or amount of petitioner as to his retired pay, then he will immediately indemnify and reimburse her for any such loss, including associated costs, expenses, attorney's fees and consequential damages.

If a more diluted form of language is needed for the second sentence in the above paragraph, try this:

The respondent will do nothing to reduce petitioner's share or interfere with her receipt of same.

Another possibility is to hold alimony open. Consider reserving the issue of alimony or setting alimony at \$1 per year, to allow the court to make an adjustment in this area if the anticipated share of retired pay is diminished by the retiree's actions in electing CRSC over CRDP.

If the case goes to trial, make sure you draft the court order or are allowed input. The decree should, if possible, specify that the SM/retiree will indemnify the former spouse if he does anything to reduce her share, along the lines of the above "agreement language." If your state law and cases do not allow this, or if the judge refuses this language, try to have the following inserted in the decree:

The parties shall comply with the terms of this order in good faith, and they will do nothing to interfere with the terms provided by the court herein.

Breach of the good faith requirement, by election of CRSC, would allow the court to impose sanctions, assess damages, use the contempt power, or apply other remedies in favor of the wronged spouse.

Practical Pointers – Attorney for the Servicemember/Retiree

There are only two things that the attorney for the SM or retiree should say. The first is: "Do the right thing." This means treating the former spouse fairly and not destroying the returning share of retired pay (CRDP) which she should be receiving, or else reimbursing the FS for the cost of the CRSC which is paid to the retiree. CRDP is the means of reconciling accounts for servicemembers and spouses in light of the VA disability compensation and the retired pay waiver. CRDP means everyone gets treated fairly, retirees get paid disability on top of retired pay, and former spouses receive their share of a pension that formerly was diminished because of the waiver. Leaving that intact is one option for the retiree. CRSC compensation is also fair. Sharing the CRSC payment, which involves tax-free disability funds, is another fair way to resolve the problem.

The second piece of advice would be, "Get out your checkbook." This means that there will be, in all likelihood, a long, hard fight over the issue of CRDP if CRSC is elected. Since CRSC destroys CRDP, the retiree should expect to see serious litigation over this. As in the area of VA disability and the retired pay waiver, many cases will wind up in the appellate courts. And, predictably, most courts will follow the trail blazed by VA disability litigation, holding that a retiree cannot unilaterally reduce the former spouse's share or amount of returning retired pay (CRDP) by selecting CRSC. The remedies will vary – indemnification, damages, compensatory alimony, or complete revision of the property division. The result will be the same in most state courts. They will side with the former spouse and the prior judgment, decree or agreement, especially if it contains an indemnification clause.

Resources

Mark E. Sullivan, *The Military Divorce Handbook* (ABA Family Law Section, 2nd Ed. 2011), Chapter 8, “Pension and Property Division.”

Mark E. Sullivan and Charles R. Raphun, “Dividing Military Retired Pay: Disability Payments and the Puzzle of the Parachute Pension,” Journal of the American Academy of Matrimonial Lawyers, 2011, Vol. 24, No. 1

Cases: *Sharp v. Sharp*, 314 S.W.3d 22 (Tex. App. 2009); *Jackson v. Jackson*, 319 S.W.3d 76 (Tex. App. 2010); *Brouillette v. Brouillette*, 51 So. 3d 898 (La. Ct. App. 2010); *Bandini v. Bandini*, 935 N.E.2d 253 (Ind. Ct. App. 2010); *Megee v. Carmine*, 290 Mich. App. 551, 802 N.W.2d 669 (2010); *Provencio v. Leding*, 2011 Ark. App. 53, No. CA10-312, 2011 Ark. App. LEXIS 74; and *Hillard v. Hillard*, 733 S.E. 2d 176 (N.C. App. 2012).

(Rev. 9/11/14)

* * *

This **SILENT PARTNER** was prepared by COL Mark E. Sullivan (USAR, Ret.). For revisions, comments or corrections, contact Mr. Sullivan, 5511 Capital Center Drive #320, Raleigh, N.C. 27606 [919-832-8507] or at mark.sullivan@ncfamilylaw.com.

(Note: Four attachments follow this page)

ATCH 1

RETIREE ACCOUNT STATEMENT					
STATEMENT EFFECTIVE DATE DEC 16, 2005		NEW PAY DUE AS OF FEB 01, 2006		SSN 123 - 45 - 6789	
PLEASE REMEMBER TO NOTIFY DFAS IF YOUR ADDRESS CHANGES Major John Q. Doe, USAF (Ret.) 123 Green St Apex, NC 27511-1234				DFAS-CL POINTS OF CONTACT	
				DEFENSE FINANCE AND ACCOUNTING SERVICE US MILITARY RETIREMENT PAY PO BOX 7130 LONDON KY 40742-7130 COMMERCIAL (216) 522-5955 TOLL FREE 1-800-321-1080 TOLL FREE FAX 1-800-469-6559 myPAY https://myPay.dfas.mil 1-877-363-3677	
PAY ITEM DESCRIPTION					
ITEM	OLD	NEW	ITEM	OLD	NEW
GROSS PAY	2,746.00	2,746.00	FTW	191.31	209.05
VA WAIVER	591.30	473.04	ALLOTMENTS/BONDS	40.00	40.00
SBP COSTS	179.28	179.28			
TAXABLE INCOME	1,975.42	2,093.68			
			NET PAY	1,744.11	1,844.63
PAYMENT ADDRESS			YEAR TO DATE SUMMARY (FOR INFORMATION ONLY)		
DIRECT DEPOSIT			TAXABLE INCOME:		1,975.42
			FEDERAL INCOME TAX WITHHELD:		191.31
TAXES					
FEDERAL WITHHOLDING STATUS:			SINGLE		
TOTAL EXEMPTIONS:			.01		
FEDERAL INCOME TAX WITHHELD:			209.05		
SURVIVOR BENEFIT PLAN (SBP) COVERAGE					
SBP COVERAGE TYPE:	SPOUSE AND CHILD(REN)		ANNUITY BASE AMOUNT:	2750.50	
SPOUSE COST:	176.78		55% ANNUITY AMOUNT:	1,512.77	
CHILD COST:	50		40% ANNUITY AMOUNT:	1,100.20	
			SPOUSE DOB:	12 DEC 1945	
			CHILD DOB:	13 MAR 1996	
<p>THE ANNUITY PAYABLE IS 55% OF YOUR ANNUITY BASE AMOUNT UNTIL YOUR SPOUSE REACHES AGE 62. AT AGE 62, THE ANNUITY MAY BE REDUCED DUE TO SOCIAL SECURITY OFFSET, OR UNDER THE TWO-TIER FORMULA. THAT REDUCTION MAY RESULT IN AN ANNUITY THAT RANGES BETWEEN 40% (\$1100.20) AND 55% (1512.77) OF THE ANNUITY BASE AMOUNT. THE COMBINATION OF THE SBP ANNUITY AND THE SOCIAL SECURITY BENEFITS WILL PROVIDE TOTAL PAYMENTS FROM DFAS AND THE SOCIAL SECURITY ADMINISTRATION OF AT LEAST 55% OF YOUR BASE AMOUNT. THE ACTUAL ANNUITY PAYABLE IS DEPENDENT ON FACTORS IN EFFECT WHEN THE ANNUITY IS ESTABLISHED.</p>					

DFAS-CL 7220/148 (Rev 03-01)

RETIRED SERVICEMAN FAMILY PROTECTION PLAN (RSFPP) COVERAGE					
RSFPP COVERAGE TYPE	ANNUITY PAYABLE	RSFPP COST			
ALLOTMENTS AND BONDS					
ALLOTMENT TYPE	PAYEE	AMOUNT	BOND FACE VALUE	SERIES	DEDUCTION
INSURANCE	VGLI	40.00			
TAX LEVY DEDUCTIONS					
DATE OF LEVY	MONTHLY AMOUNT	BALANCE			
GARNISHMENT DEDUCTIONS					
PAYEE	GARNISHMENT AMOUNT	COMPLETION DATE			
FORMER SPOUSE PROTECTION ACT DEDUCTIONS					
PAYEE	AMOUNT				
MISCELLANEOUS DEBTS					
DEBT TYPE	MONTHLY DEDUCTION	PRINCIPAL AMOUNT	INTEREST AMOUNT	ACCUMULATED INTEREST	DEBT BALANCE
ARREARS OF PAY BENEFICIARY INFORMATION					
YOU HAVE ELECTED ORDER OF PRECEDENCE.. THE FOLLOWING BENEFICIARIES ARE ON RECORD:					
NAME	SHARE	RELATIONSHIP			
JANE P. DOE	.00	WIFE			
MESSAGE SECTION					
BASED ON INFORMATION RECEIVED FROM THE VA, YOUR CRDP AMOUNT IS \$283.96.					

DFAS-CL 7220/148 (Rev 03-01)



DEFENSE FINANCE AND ACCOUNTING SERVICE
CLEVELAND CENTER
 P. O. BOX 7130
 LONDON, KY 40741-7130

This letter is in response to your request for information from the retired pay account of the member listed below.

MAJ John Q. Doe, USAF (Retired)

Social Security Number 123-45-6789

Payment Year	2006											
Payment Date	1-Jan	1-Feb	1-Mar	1-Apr	1-May	1-June	1-Jul	1-Aug	1-Sep	1-Oct	1-Nov	1-Dec
Gross Pay	\$0.00	\$0.00	\$0.00	\$0.00	\$2,593.00	\$2,593.00	\$2,593.00	\$2,593.00	\$2,593.00	\$2,593.00	\$2,593.00	\$2,593.00
Misc. Credit	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00
FCE/DC Deduction												
FCE Pay Cap												
VA Waiver	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$83.00
Taxable Income	\$0.00	\$0.00	\$0.00	\$0.00	\$2,415.37	\$2,415.37	\$2,415.37	\$2,415.37	\$2,415.37	\$2,415.37	\$2,415.37	\$2,332.37
FITW	\$0.00	\$0.00	\$0.00	\$0.00	\$201.05	\$201.05	\$201.05	\$201.05	\$201.05	\$201.05	\$201.05	\$188.60
Add'l FITW	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00
SITW	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00
Withholding Stats	0	0	0	0	0	0	0	0	0	0	0	0
Allotments	\$0.00	\$0.00	\$0.00	\$0.00	\$1,600.00	\$1,600.00	\$600.00	\$1,600.00	\$1,600.00	\$1,600.00	\$1,600.00	\$1,600.00
SBP	\$0.00	\$0.00	\$0.00	\$0.00	\$177.63	\$177.63	\$177.63	\$177.63	\$177.63	\$177.63	\$177.63	\$177.63
RSFPP	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00
Tax Levy	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00
Garnishment	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00
Former Spouse	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00
Misc. Deduction	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$600.00	\$600.00	\$100.00
Retired Pay Deduction	\$0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Net Pay	\$0.00	\$0.00	\$0.00	\$0.00	\$614.32	\$614.32	\$614.32	\$614.32	\$614.32	\$14.32	\$14.32	\$443.77

Comments: _____

Sincerely,

Retired and Annuity Pay Operations

ATCH 3



DEFENSE FINANCE AND ACCOUNTING SERVICE

1240 East Ninth Street
Cleveland, Ohio 44199

(DFAS-DCC/CL)

November 20, 2013

Lucinda Lopez, Esquire
Lopez and Pasquale, LLP
123 Green Street
Apex, NC 27566

Dear Ms. Lopez:

This letter acknowledges the request made by your client, Mary P. Doe, under the Routine Use published in the Federal Register for a calculation of her payment under the Uniformed Services Former Spouse's Protection Act from the military retired pay account of MSG John Q. Doe, USAF (Retired).

The monthly Former Spouse payment is calculated as follows:

Gross Pay	\$1,838.00
Less VA Waiver	<u>-673.92</u>
Disposable Pay	\$1,164.08
Award	<u> x 43%</u>
Former Spouse Pmt:	\$ 500.55

These documents contain Personal Data covered by the Privacy Act of 1974. Please ensure this information is protected from unauthorized access and/or disclosure.

If I can be of further assistance, you may contact me at the above address.

Sincerely,

Mickey L. Brown
Freedom of Information Act/Privacy Act
Office of Corporate Communications and
Legislative Liaison

ATCH 4



DEFENSE FINANCE AND ACCOUNTING SERVICE
Retired and Annuity Pay

4197
December 28, 2013

Mr. Jack Green
123 Main Street
Apex, NC 12345

Dear Mr. Green,

A review of your former spouse pay account indicates that you have been overpaid in the amount of \$5170.74.

According to our pay records, you have been overpaid in the amount of \$5170.74 from May 1, 2013 through October 31, 2013 @ \$861.79 per month x 6 months. Your former spouse portion of the retiree's Concurrent Disability Pay is being recouped for the payment of Combat Related Special Compensation retroactive through the same period. We will be deducting \$143.63 per month until the debt is fully recovered.

If you have already paid this debt or believe it is invalid, please contact Defense Finance and Accounting Service, U.S. Military Retirement Pay, at the address indicated at the close of this correspondence. Under 37 U.S. Code 1007(c) you have the opportunity (1) to either inspect and copy or to request and receive a copy of government records related to the debt and (2) for review of the decision related to the debt.

Collection action on this total debt amount of \$5170.74, will begin with your payment dated January 1, 2014 at a monthly rate of \$143.63 and will continue until the total amount as shown above is collected in full. You will receive a Former Spouse Account Statement showing the reduction in your monthly entitlement amount.

If this method of repayment will create a financial hardship, forward the Defense Finance and Accounting Service, U.S. Military Retirement Pay, at the address indicated at the close of this correspondence, a request for a more lenient repayment plan, specifying the amount you wish to be deducted each month. Please note that the total debt is \$5170.74 cannot take longer than 36 months total to collect.

In certain circumstances, the law provides for partial or full waiver of debts which result from erroneous payments. You may request an application for waiver by contacting the Defense and Finance Accounting Service, U.S. Military Retirement Pay, at the address indicated at the close of this correspondence.

However, submission of a waiver application does not automatically guarantee forgiveness of your debt or suspend the requirement to continue collection action. If you choose to apply for a waiver, you **must** enclose a copy of this correspondence with your application.

We are interested in working with you to resolve this debt. Should you have any further questions or requests to any of the above, please contact me at Defense Finance and Accounting Service; U.S. Military Retirement Pay; P. O. Box 7130; London, KY 40742-7130; or call toll free 1-800-321-1080, commercial (216) 204-2404.

Sincerely,

Louis Roe, Military Pay Technician
Retired and Annuity Pay