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## ***MILITARY RETIRED PAY AND CONCURRENT RECEIPT***

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Effective for payments made after January 1, 2004, the law was changed to allow certain military retirees to receive both disability pay from the Department of Veterans Affairs (VA) and their retired pay from the Defense Finance and Accounting Service (DFAS). Effective January 1, 2005, those retirees rated at 100% disabled by the VA will receive their full concurrent receipt retroactive to the beginning of the year, eliminating the remaining 9-year phase-in for full benefits. This change in law will potentially affect payments to some former spouses under the Uniformed Services Former Spouses' Protection Act (USFSPA).

Concurrent Receipt means that qualified military retirees now get both their full military retirement pay and their VA disability compensation. This recently passed law phases out the VA disability offset, which means that military retirees with 20 or more years of creditable service and a 50% VA rated disability or higher, will no longer have their retired pay reduced by the amount of VA disability. The official name for Concurrent Receipt is Concurrent Retirement and Disability Pay (CRDP).

Prior to passage of Public Law 108-136, the National Defense Authorization Act for Fiscal Year 2004 (NDAA), a retiree had to "waive" a portion of his/her retired pay in order to receive disability pay from the VA. Disability pay replaced an equal amount of retired pay. Retirees had two incentives for receiving as much retired pay in the form of disability pay as possible. That's because disability pay is not counted as taxable income for federal income tax purposes and disability pay is not divisible as property in the event of divorce. Now, some former spouses who did not receive military payments because the retiree waived his/her retired pay to collect disability pay from the VA will now be eligible to receive payments directly from the DFAS.

In all cases, the retiree must be rated at least 50 percent disabled by the VA. The military estimates that in excess of 225,000 military retirees meet this criterion required to receive both retired pay and VA disability pay. With the numbers in the Middle East still climbing, it is likely that eligibility for VA disability benefits will also continue to go higher.

Former spouse benefits awarded from cases prior to 2004 will not necessarily be “automatic”. In cases where you and/or your client have completed application Form DD-2293 and the Form is on file with the DFAS, but your client is not receiving payments due to the retiree being 100% disabled, he/she will need to send a written request to start payments. The request should include the retiree’s name and social security number and mailed to:

DFAS-DGG/CL  
P.O. Box 998002  
Cleveland, OH 44199-8002

You may also fax the request to (216) 522-6960.

In cases where the DFAS no longer has an application on file, he/she will need to reapply under USFSPA to begin payments. Form DD-2293 is required. DFAS does not have authority to make retroactive payments to former spouses. In cases where the member is not eligible for retired pay, or where benefits are in pay status but have been reduced by an applicable portion of retired pay, the increase in payments to a former spouse should be automatic.

#### Child Support and Maintenance Orders:

In cases where DFAS has a withholding order on file that was served on or after January 1, 2004, DFAS should have restarted payments based on that order. If an order was served prior to January 1, 2004 and it was rejected because no retired pay funds were available, it is required that the order be re-served to start payments. Child support and maintenance orders can be mailed to the above address or to the above Fax number.

For retirees with disabilities of less than 100% but more than 50%, the law is being phased-in over the next 9 years. Currently, unless the member is 100% disabled, it is not a dollar for dollar offset. For example, a retiree with a VA disability rating of 50% in 2005 is receiving approximately \$153.00 per month in CRDP, in addition to his retired pay. If retired pay was previously reduced, the \$153.00 per month is paid in the form of CRDP and \$153.00 is restored to retired pay. CRDP cannot exceed the amount of retired pay. For a retiree that is deemed 60% disabled by the VA, CRDP payment in 2005 is \$193.00. As the percent of disability increases, so does the dollar amount of CRDP over the next 9 years until the retiree is receiving an equal portion of CRDP to retired pay proportionate with his/her percentage disability. Therefore, the lower the amount of retired pay, the quicker CRDP replaces retired pay. In that regard, few military retired pay/disability pay situations will require the entire 9 year period to replace retired pay in full.

You need to be prepared within your military case and anticipate that a disability waiver may occur *after* the date of divorce, unknowingly reducing the share of retired pay available to the former spouse. If this has happened to any of your clients in the past, as you know it can create an incredible inequitable situation with few remedies available to provide relief. The author has a clear understanding of the problems that exist and a variety of remedies that are simply too voluminous to explain in this article.

## Conclusions:

The USFSPA was enacted in 1982 to permit state courts to divide military retired pay<sup>i</sup> upon divorce, separation or annulment<sup>ii</sup>. Wisconsin's court's authority to divide retired pay is not limited by the length of the marriage. Many family law attorneys believe that retired pay is only divisible if the period of marriage overlapped with military service for 10 years or more (10/10 rule). Wisconsin courts can divide retired pay with fewer than 10 years of overlapping marriage and does so all the time. The 10/10 rule means that the member spouse would have to pay the non-member spouse direct rather than the DFAS making the payments to the non-member spouse if the rule is not met. The rule does not apply to support orders.

The vast majority of military divorces viewed through the experience of the author are largely limited to the retirement benefits being the single largest asset in the marriage. Therefore the probability of finding other marital property equal or greater in value to offset the present value of military retired pay is relatively low. Furthermore, in times of war military divorce rates increase, especially among reservists that are called to duty and officer ranks. According to the military, the number of officer's that divorced in year 2004 was 78% higher than year 2000; the last time such statistics were available. Obviously, in times of war the number of disability cases will also increase substantially relative to peaceful times.

CRDP is a financial windfall to most disabled veterans receiving VA benefits. In short the member's income in proportion to their percentage of disability income just doubled in dollar terms. CRDP could also be an answer to numerous problems that you have encountered in regard to dividing military retired pay or securing support obligations.

Wisconsin has case law that dealt with military retired pay as property<sup>iii</sup> and military disability pay as income<sup>iv</sup>. If you have older cases where disability pay was an issue, you may want to revisit them. There could be situations where the non-member spouse has not been receiving their awarded share of benefits and is now entitled to receive them, but they must reapply. There could also be situations where you have support orders in place, but the amount has been limited under USFSPA. Those support orders could be amended and/or the property division potentially modified<sup>v</sup>.

In any event, you now have an additional source of potential income to deal with in regard to military benefits. The new law should make it much easier to secure an equitable financial settlement that had few remedies in the past.

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<sup>i</sup> Defined as after deductions for retired pay waived for receipt of VA disability pay, after deductions for debts owed to the U.S. government, NS life insurance premiums and the cost of SBP coverage under USFSPA

<sup>ii</sup> See 10 U.S. Code § 1408

<sup>iii</sup> See Thorpe v. Thorpe, 123 Wis. 2d 424, 367 N.W.2d 233 (Ct. App. 1985)  
See Steinke v. Steinke, 126 Wis. 2d 372, 376 N.W.2d 839 (1985)

<sup>iv</sup> See Weberg v. Weberg 158 Wis. 2d 540, 463 N.W.2d 382 (Ct. App. 1990)  
See Cook v. Cook, 208 Wis. 2d 166, 560 N.W.2d 246 (1997)

<sup>v</sup> See Thorpe v. Thorpe, 123 Wis. 2d 424, 367 N.W.2d 233 (Ct. App. 1985)