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Issues in North Carolina Family Law

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I. Domestic Violence

a. Applying the Servicemembers Civil Relief Act (SCRA), 50 USC App. 521

i. Summary of Section 521:

This section applies to all civil proceedings in which a defendant has not made an appearance. Before a court can enter any kind of order or judgment – whether temporary or final – the court must require plaintiff to file an affidavit indicating whether or not defendant is in the military. If defendant is in the military, the court cannot enter an order until the court appoints a lawyer for defendant. The lawyer can request, or the court can enter without a request, a stay of proceedings for a minimum of 90 days. The stay must be granted if requested by the attorney and the court determines that defendant may have a meritorious defense to the claim against him that cannot be presented without the presence of the defendant, or if the attorney has been unable to locate defendant or otherwise determine if a meritorious defense exists.

ii. Can the ex parte DVPO be issued without the affidavit and appointment of counsel?

Affidavit: I have found no case law addressing this point. An ex parte order clearly is a temporary order and the SCRA specifically requires that the Affidavit be filed before any temporary order is entered. Also, our appellate court has noted on a number of occasions that DVPOs have significant collateral consequences – often must greater than any other type of civil judgment – on a defendant, so the need for protection for military personnel is particularly important in these cases. These two points together indicate that it would be good practice to

obtain the affidavit from plaintiff when it is possible to do so. However, it can be argued that section 521 of the SCRA applies only when a defendant has a right to make an appearance but has not done so. Because the domestic violence statute authorizes emergency protection before a defendant has any right to make an appearance, arguably these SCRA requirements are not intended to apply at this stage of a proceeding.

Appointed counsel: Again, I found no case law in other states on this issue. The explicit language of the SCRA requires that an attorney be appointed before any temporary or final order or judgment is entered. Obviously, the attorney appointed for defendant has no right to be present at or to be notified of the ex parte proceeding. So, as with the affidavit, it would be a good practice to, where possible, appoint the lawyer at the time the ex parte order is entered. In that case, the lawyer can appear at the return hearing. Appointment at the ex parte stage may help avoid an additional continuance that will be required if counsel is not appointed until the return hearing. On the other hand, again as with the affidavit discussed above, it is at least arguable that the SCRA provisions are not intended to apply to a stage of a proceeding at which defendant has no right to be present.

iii. If the stay is granted to a servicemember, can the court enter a DVPO?

The SCRA does not define 'stay' but it seems to clearly mean that the court cannot enter a final adjudication of the DV claim. That means the final "one-year" DVPO should not be entered while the stay is in effect. However, it is not clear that a stay means the court has no authority to act in any way. For example, G.S 1-75.12, which allows a court to issue a "stay" of a proceeding when a case involving the same parties and the same subject matter also is pending in another state, provides that after entering the stay, the trial court maintains jurisdiction to "modify the stay order or take such actions as the interest of justice require." This indicates that a stay does not by definition mean the court necessarily loses all jurisdiction to act. In addition, courts in other states have allowed the entry of temporary orders to protect children while the stay is in place, holding that a stay does not mean a court loses all jurisdiction. *See e.g., Lenser v. McGowan*, 191 SW3rd 506 (Arkansas 2010)("the stay of the Civil Relief Act does not freeze a case in permanent limbo and leave a … court without authority to act at all;" entry of a temporary custody order upheld because child's life is not "in suspended animation" until servicemember returns). The same reasoning may support entry of a temporary emergency DVPO.

iv. Can attorney fees be ordered?

While the SCRA requires appointment of counsel, it contains no provision indicating whether attorney fees can be ordered. The normal rule in NC is that attorney fees cannot be ordered by a court unless specifically authorized by statute. *Davis v. Kelly*, 147 NC App 102 (2001).

Chapter 50B contains contradictory language about attorney fees.

> GS 50B-2(a) states: "In compliance with the federal Violence Against Women Act, no court costs or attorney fees shall be assessed for the filing, issuance, registration, or service of a protective order or petition for a protection order or witness subpoena, except as provided in GS 1A-1, Rule 11."
>
> GS 50B-3(a)(10) states that a protective order may: "award attorney fees to either party."
>
> There is no case law to date addressing the court's ability to award attorney fees in Chapter 50B cases.
>
> There is a recent unpublished opinion from a court in Connecticut, *Wells Fargo v. Pederson*, 58 Conn. L. Rptr. 124 (2014), where the court decided that the role of an appointed attorney in a SCRA case is similar to that of a GAL. Because Connecticut law allows GAL fees to be assessed as part of court costs – as does NC law, see GS 7A-305(d)(7) - the Connecticut court held that the trial court had authority to order either party or both to pay the attorney fees.

v. <u>If the SCRA provisions are not followed, is the DVPO void?</u>

Failure to follow the requirements of section 521 clearly is legal error. *See Harris v. Harris*, 922 NE2d 626 (Indiana 2010)(judgment reversed on appeal and remanded for new trial). However, cases in other states indicate that orders and judgments entered without the SCRA protections are not void and not automatically subject to being set aside upon motion by the servicemember. *See e.g In re KB*, 298 SW3rd 691 (2009)(failure to follow procedures makes order voidable not void); *Krumme v. Krumme*, 636 P2d 814 (1981)(same under old version of act).

Section 521(g) allows the court to set aside a judgment entered when a servicemember made no appearance in an action but only if the servicemen requests that the judgment be set aside no later than 90 days after his/her release from military service and can show he/she:

(A) Was materially affected by reason of military service in making a defense to the action; and
(B) Has a meritorious defense to the civil action.

If the servicemember cannot meet this burden, the order or judgment is valid and enforceable regardless of whether the court complied with section 521 requirements or not.

b. "Catch-all" Relief Provision.

i. GS 50B-3(a)(13): "A protective order may … include any additional prohibitions or requirements the court deems necessary to protect any party or any minor child."

ii. *State v. Elder*, 368 NC 70 (2015): Because all of the specifically enumerated remedies in GS 50B-3(a) either prohibit or require action by a party, the catch-all provision can be used only to order prohibitions or requirements directed at the parties.

iii. Can it be used to prohibit possession or require surrender of firearms?

GS 50B-3(a)(11) states a protective order may: "Prohibit a party from *purchasing* a firearm for a time fixed in the order."

GS 50B-3.1(a) provides that when the trial court finds one of the listed factors, defendant must be ordered to surrender all weapons to law enforcement.

In *Stancill v. Stancill*, 773 SE2d 890 (NC App June 16, 2015), the court of appeals reversed an order to surrender weapons because the trial court failed to check a box beside one of the GS 50B-3.1(a) findings of fact on the DVPO form. According to the court, the trial court erred in ordering surrender without finding at least one of these factors. That opinion does not say whether the trial court used the catch-all provision as support.

In the court of appeals decision in *State v. Elder* (reviewed and modified by the Supreme Court in 368 NC 70 (2015)), the court indicated that because Chapter 50B specifically regulates firearms in GS 50B-3(a)(11) and in GS 50B-3.1, trial courts cannot use the catch-all provision to address firearms. However, the Supreme Court did not adopt that same interpretation of the catch-all provision. See section b.ii. above.

The issue arises when a trial judge wants to prohibit possession or require surrender of weapons when there is no evidence of the factors listed in GS 50B-3.1. Because the statute addresses firearms explicitly, rules of statutory construction seem to indicate trial court authority is limited to ordering no purchase of firearms in any DVPO and ordering surrender only when the GS 50B-3.1 factors are present. See *In re Cornblum*, 220 NC App 100 (2012)("where one of two statutes might apply to the same situation, the statute which deals more directly and specifically with the situation controls over the statute of more general applicability."). An alternative interpretation is

that GS 50B-3.1 specifies when a trial court *must* order surrender but the catch-all gives the trial court discretion to make additional orders relating to possession of firearms in the trial court's discretion.

c. Renewal

i. GS 50B-3(b): "Protective orders entered pursuant to this Chapter shall be for a fixed period of time not to exceed one year. The court may renew a protective order for a fixed period of time not to exceed two years, including an order that has been previously renewed, upon a motion by the aggrieved party filed before the expiration of the current order . . . . The court may renew a protective order for good cause. The commission of an act as defined in G.S. 50B-1(a) by the defendant after entry of the current order is not required for an order to be renewed. . . ."

ii. Limit on Number?

While not addressing the issue directly, the recent case of *Comstock v. Comstock*, NC App (November 17, 2015), appears to support the view that protective orders can be renewed indefinitely. The DVPO in that case had been renewed three times; initially effective September 8, 2010, the order on appeal was set to expire October 14, 2016.

In *Comstock*, the court held that while a plaintiff must be a resident of NC at the time of filing the initial complaint for a DVPO pursuant to Chapter 50B, the plaintiff is not required to reside in NC at the time of the request for renewal of the order.

iii. Can terms be changed?

The statute does not address this issue; it simply provides that a court can "renew" the DVPO for good cause. There also is no case law on point in NC.

Trial judges often are asked to modify provisions dealing with possession of a residence, car or other property or to add/delete restrictions based on circumstances at the time of renewal.

Black's Law Dictionary defines 'renewal' as: "The act of renewing or reviving. The substitution of a new grant, engagement, or right, in place of one which has expired, of the same character and on the same terms and conditions as before; as, the renewal of a note, a lease, a patent." This definition indicates renew means to keep the same terms.

However, GS 50B-3 provides broad relief available for "a protective order," and GS 50B-1(c) provides that the term "protective order" includes *any* order entered pursuant to Chapter 50B.

iv. Violation after expiration but while motion to renew pending.

GS 50B-4.1 provides that violation of a valid protective order is a Class A1 misdemeanor, and GS 50B-4 provides that any order entered pursuant to Chapter 50B can be enforced by contempt.

But what if the violation occurs after the motion to renew is filed, after the term of the DVPO expires but before the court grants the motion to renew? Is there a violation punishable by contempt or as a crime?

GS 50B-3(b) provides that protective orders must be "for a fixed period of time." Initial orders cannot exceed one year and renewed orders cannot exceed two years. This means the statute requires that a DVPO have a specific termination date.

A motion to renew must be *filed* before the expiration of the current order. GS 50B-3(b). However, the statute does not provide that the renewed order must be *entered* before the expiration of the existing order. It is not uncommon for the motion to renew to be filed very shortly before the expiration date of the DVPO.

The statute does not provide for the extension of an order when a motion to renew is pending.

To maintain protection for a victim of domestic violence, can the trial court enter an ex parte or emergency order while motion to renew is pending? *See* GS 50B-2(b)("a party may move the court for emergency relief if he or she believes there is a danger of serious and immediate injury to himself or herself or a minor child."; GS 50B-2(c)(1)("Prior to hearing, if it clearly appears to the court from specific facts shown, that there is a danger of acts of domestic violence against the aggrieved party or a minor child, the court may enter orders as it deems necessary to protect…").

II. Children and Same-Sex Couples

a. Parentage

Married same-sex couples can adopt children to become parents. See GS 48-2-301 (spouse must join petition for adoption following relinquishment or TPR); and GS 48-4-101 (step-parent adoption).

In North Carolina, the only way to become a parent and enjoy the legal status of a parent is through biology or adoption. *Heatzig v. MacLean*, 191 NC App 451 (2008); *Estroff v. Chatterjee*, 190 NC App 61 (2008).

North Carolina has not recognized the common law doctrine of de facto parentage or parent by estoppel and the court of appeals has declined to do so. *Heatzig; Chatterjee.*

Birth Certificates

GS 130A-101(e): If the mother was married at the time of either conception or birth, or between conception and birth, the name of the husband shall be entered on the certificate as the father of the child…".

Birth certificates may raise a rebuttable presumption of paternity in some circumstances. *See In re: JKC*, 218 NC App 22 (2012). *But cf Gunter, unpublished*, 746 SE2d 22 (2013)(no presumption when name placed in certificate pursuant to GS 130A-101(e)).

Presumption does not establish parentage – the presumption can be rebutted with blood tests

b. Custody

A biological or adoptive parent has a constitutional right to exclusive care, custody and control of his/her child. *Price v. Howard*, 346 NC 68 (1997); *Boseman v. Jarrell*, 364 NC 537 (2010).

Same-sex partner cannot be granted custodial rights unless parent has waived her/his constitutional right to custody. *Boseman v. Jarrell*, 364 NC 537 (2010); *Mason v. Dwinnell*, 190 NC App 209 (2008); *Estroff v. Chatterjee*, 190 NC App 61 (2008).

Even if parent has waived constitutional right to custody, a non-parent spouse or partner can acquire only custodial rights, not parental rights. *Heatzig v. MacLean*, 191 NC App 451 (2008).

Issue: Can court grant custodial rights to non-parent when parties are living together?

The court held in *Baumann-Chacon v. Baumann*, 212 NC App 137 (2011), that there is nothing in Chapter 50 that prohibits a parent from seeking custody while living together with the other parent, at least when one parent is expressing an intention to leave the marital residence as soon as the custody issue is settled. *But see Harper v. Harper*, 50 NC App 394 (1981)(indicating there is no justiciable issue regarding custody when parties live together).

Does *Baumann* really mean parties can ask a court to decide custody at any point in time while parents/parties live together????

III. Equitable Distribution

a. QDRO Issues

i. Can a QDRO be entered by the court when no ED has been filed?

It's not at all uncommon. Parties sign a separation agreement addressing all property issues and agreeing that a QDRO or two will be entered by the court to divide the retirement account(s). Obviously, a party cannot simply hand a QDRO to a judge to sign when no action has been filed. What must be filed to give the court jurisdiction to enter a valid division order? Must it be an ED claim?

What is a QDRO?

For ERISA plans a QRDO is a "judgment, decree, or order (including approval of a property settlement agreement) which relates to the provision of child support, alimony payments, or marital property rights to a spouse, former spouse, child or other dependent of a participant, and **is made pursuant to State domestic relations law.**" 29 USC sec. 1056(d)(3)(B)(ii); Internal Revenue Code sec. 414(p)(1)(B).

This means the division order must be entered in an action brought "pursuant to State domestic relations law." When does State domestic relations law allow North Carolina judges to enter property division orders?

NC Claims that Authorize Property Division

Clearly the court can enter the division order when an ED claim has been filed. To be a valid ED order, the claim must be filed before the entry of a judgment of absolute divorce. GS 50-11(e). So when parties are able to resolve all of their issues by separation agreement, an ED claim can be filed for the limited purpose of giving the court jurisdiction to enter the QDRO, as long as the

claim is filed before divorce is granted. If the parties consent, the court can enter whatever consent order is necessary to accomplish the division of the pension. If the parties do not consent, the court can determine the equitable distribution of the retirement account in accordance with ED law. *See Hamby v. Hamby, 143 NC App 635 (2001)*(agreement controlled classification and distribution of some assets but court could classify and distribute those not covered by the agreement by application of the ED statute).

Because the North Carolina State Employees Retirement Plan only can be divided "in connection with a court-ordered equitable distribution", G.S. 135-9, this seems to be the only way to divide that specific government plan.

However, in *Gilmore v. Garner*, 157 NC App 664 (2003), the court of appeals upheld the entry of a QDRO by a trial court entered as part of an order requiring specific performance of a separation agreement. In that case, the separation agreement provided for the division of the pension. When ex-husband disagreed with ex-wife over the meaning of the separation agreement, wife filed action alleging breach of the contract and requesting specific performance. The trial court decided in favor of wife and entered the QDRO. The court of appeals affirmed. That case did not involve a claim for equitable distribution but obviously a claim for breach of a separation agreement is a claim made pursuant to State domestic relations law.

In addition, North Carolina law allows separation agreements to be incorporated into judgments of absolute divorce. Most if not all separation agreements involve property division and incorporated agreements are treated as court orders for all purposes. *See Walters v. Walters*, 307 NC 381 (1983). No ED claim is required. A property division made in an incorporated agreement clearly would be an order entered pursuant to State domestic relations law.

What about a motion in the cause in a divorce action after a divorce judgment has been entered?

I have not been able to identify a cause of action for property division that can be made by motion in the cause in a divorce action after the entry of the judgment of absolute divorce. An ED claim cannot be asserted at that point and at least to date, we have no case law indicating a property settlement agreement can be incorporated at any time after the entry of the divorce judgment. A breach of separation agreement claim must be filed as a separate proceeding.

Yet it is common for parties to file a request for entry of a QDRO in divorce cases long after the entry of the divorce judgment. If the QDRO is signed by the court, is it a valid order? Is it a division made pursuant to State domestic relations law?

In Whitworth v. Whitworth, 222 NC App 771 (2012), the court reminded us that a court has no subject matter jurisdiction to act in a case after the final resolution of all pending claims "absent an appropriate post-trial motion." As there is no "appropriate post-trial motion" for property division, it appears the court has no jurisdiction to enter a QDRO or other division order.

We're not limited to an ED claim

So while an ED claim will work and probably is the best way to go about obtaining a QDRO, a breach of contract claim or a request for incorporation of an agreement into a divorce judgment both also give the court authority to enter the division order. But it is best to avoid trying to enter a QDRO by motion in the cause after divorce.

ii. Can a QDRO be entered more than 10 years after entry of ED judgment?

An equitable distribution judgment was entered 11 years ago. The order states plaintiff is entitled to a percentage of defendant's retirement pay when defendant begins to receive it. The judgment also states that plaintiff's counsel will draft a QDRO. Now it is time for defendant to retire but no one ever drafted a QDRO. Is there a problem? Can the court enter one now?

Of course the first thought is the statute of limitations. Does GS 1-47 – the 10-year limitation period for "actions upon judgments " – prohibit a court from entering the QDRO?

We do not an appellate opinion that answers this question, but I don't think the statute of limitation bars entry of the QDRO. I can't see how a statute of limitations could bar a party from recovering payments not yet due and owing. Also, I don't think a QDRO is an "action upon a judgment"; rather it is the means of completing the ED judgment by accomplishing the actual division of the marital interest in the retirement account.

Here is why I think that is true.

What is a QDRO?

QDRO is not a term defined in state law. However, state law does define – sort of – a "DRO".

The equitable distribution statute provides that absent consent of both parties to another method of distribution, there are only two ways a vested retirement account can be distributed:

> By giving the account to one party and awarding a larger portion of other assets to the other; or
>
> By "appropriate **domestic relations order** as a prorated portion of the benefits" paid to the recipient spouse if and when that spouse begins to receive the retirement funds (a "DRO").

If the account is not vested, a DRO is the only option absent consent of the parties.

GS 50-20.1.

So a DRO appears to be an order entered in a domestic relations case which provides for the distribution of a retirement plan by requiring that a prorated portion of funds be distributed as those funds are received in the future.

ERISA

Federal law does define QDRO. ERISA – the Employment Retirement Income Security Act, codified at 29 USC section 1001 et. seq., (ERISA) – regulates all ERISA-qualified retirement plans, which include most private, **nongovernmental** plans. These plans generally are protected from creditors by the broad anti-alienation provision in the federal statute. However, a state court can divide an ERISA plan if it enters a "Qualified Domestic Relations Order" (QDRO).

ERISA defines 'domestic relations order' as:

Any judgment, decree, or order (including approval of a property settlement agreement) which relates to the provision of child support, alimony payments, or marital property rights to a spouse, former spouse, child or other dependent of a participant, and is made pursuant to a State domestic relations law.

29 USC sec. 1056(d)(3)(B)(ii).

In addition, the order must contain:

- The name and address of the parties;
- The amount to be paid to the alternate payee;
- The number of payments; and
- The name of the plan.

29 USC sec. 1056(d)(3)(C).

A domestic relations order becomes 'qualified' when it is accepted by a plan administrator. Once a DRO is qualified (i.e., becomes a QDRO), the plan will pay benefits directly to the alternative payee. 29 USC sec. 1056(d)(3)(B)(i). If the DRO is not qualified, the retirement benefits are not divided.

Are QDROs required?

So both DROs and QDROs are the means of effectuating the division of a retirement account. GS 50-20.1 requires a DRO for all retirement plans and ERISA requires a QDRO for ERISA plans. So yes, we must have them to divide a plan. But there is no requirement that the DRO or the QRDO actually be a document separate from the ED judgment itself; the ED judgment may contain all the necessary information to be the DRO or QDRO.

A QDRO generally is prepared as an order separate from the ED judgment because plan administrators prefer it when deciding whether to qualify a DRO. However, federal law does not actually require a separate order. The division can be accomplished in the ED judgment if all the requirements for the QDRO are met. See US Department of Labor Frequently Asked Questions About QDROs.

Patterson by and through Jordan v. Patterson, 137 NC App 653 (2000), held that a non-ERISA plan – a governmental retirement plan – actually was distributed at the time the ED judgment

was entered because the ED judgment itself clearly provided that the non-participant party was entitled to receive a percentage of amounts received by the other upon retirement. No separate order was required to accomplishment this division, even though the court also acknowledged that a separate "QRDO" could be entered 5 years after the entry of the ED judgment to help "effectuate" the future division of the plan if requested by a party.

Back to our scenario……

So it could be that a separate DRO/QRDO is not necessary at all in our scenario if everything required for distribution is in the judgment itself.

If the information is not in the judgment, the DRO/QDRO is necessary to complete the ED. While it may be appropriate to consider latches under some circumstances where a party actually can show some prejudice resulting from the delay in entry of the division order – see discussion about laches in *Patterson* – the 10-year statute of limitation in GS 1-47 applies only to an "action upon a judgment." It seems clear that a DRO/QDRO is not an "action upon a judgment." Rather, it is a part of the ED judgment – the means of completing the judgment – and there is no statute placing a specific time limit on the ability of a court to complete this work.

But the 10-year limitation period could become an issue. The ED judgment will be enforceable as the retirement account payments become due and owing. It seems obvious that the 10-year statute of limitations will apply to bar recovery of any individual payment more than 10 years after it becomes due. *See Pruitt v. Pruitt*, 94 NC App 713 (1989)(10-year statute of limitations applies to child support order and begins to run when each payment becomes due rather than at time order requiring the future payments was entered).

iii. Can a QDRO be corrected/modified after entered?

Rule 60(a):

Rule 60(a) can be used to correct a clerical mistake in a DRO or QDRO. The key is determining when a mistake is clerical and when it is more substantive.

Okay to use Rule 60(a) to change QDRO to require wife to pay all fees and penalties associated with the lump sum transfer of money from husband's retirement account where original order did not address the fees and penalties. *Lee v. Lee*, 167 NC App 250 (2004). Other QDROs entered in

the case included the fees and penalties provision, making it obvious the exclusion was a result of an "oversight or omission".

Cf. Morris v. Gray, 181 NC App 552 (2007) where court of appeals held trial court erred in entering a new QDRO when original employer declared bankruptcy and new entity became administrator of plan. Appellate court said trial court could have considered motion pursuant to Rule 59 or 60 but it did not.

Rule 60(b)

The court of appeals has held that a Rule 60(b) motion cannot be used to amend a QDRO because while Rule 60(b) allows a party to seek relief from a judgment, it does not authorize a court to amend a judgment. *White v. White*, 152 NC App 588 (2002).*But cf. Harris v. Harris*, 162 NC App 511 (2004)(modification of QDRO to reflect agreement originally entered between the parties).

Rule 60(b) is the appropriate rule for attacking the validity of a QDRO on the basis of a lack of subject matter jurisdiction. *Hillard v.Hillard,* 733 SE2d 176 (NC App 2012).

Motion in the Cause to Amend QDRO

Generally, the trial court has no subject matter jurisdiction to act in a case after final resolution of all pending claims. *See Whitworth v. Whitworth,* 222 NC App 771 (2012).

While postjudgment motions allowed by the Rules of Civil Procedure are available in ED cases as in all other civil cases, there is no authorization of continuing jurisdiction after final resolution of the case, as there usually is in custody and support actions where court has statutory authority to modify judgments based on changed circumstances. *Whitworth.*

However, courts always retain jurisdiction to enforce judgments. *Whitworth, citing Wildcat v. Smith*, 69 NC App 1 (1984).

In *White v, White*, 152 NC App 588 (2002), the court held that the trial court had jurisdiction to consider a motion in the cause filed by party seeking to amend a DRO originally entered approximately 11 years earlier to divide a military pension. According to the court in *White*, the federal law regarding division of military pensions (10 USC sec. 1408(d)) expressly contemplates that military pension division orders may be modified. In addition, the original trial court order had expressly stated that the division order "shall remain in effect until further orders

of the court." Because the amendment in the *White* case was based on fact that after entry of the original DRO, husband elected to waive his military retirement in order to receive military disability thereby significantly reducing former wife's share of his monthly payment, the motion in the cause may be considered a method of enforcing the original ED judgment which ordered that wife receive "one-half of the [former husband's] pension accumulated during the marriage."

Conversion of Military Pension to Disability Payments

The federal Uniformed Services Former Spouses Protection Act, 10 USCA 1408, authorizes the distribution of a service member's military retirement benefits but does not allow state courts to distribute military disability payments. *Mansell v. Mansell*, 490 US 581 (1989).

Generally, a retired service member cannot receive both retirement benefits and disability payments. Instead, retirees can receive disability only to the extent they waive receipt of retirement pay. This waiver can occur at any time – before or after a trial court has entered a DRO distributing military retirement – and the election is at the will of the service member, once the service member qualifies for disability. Service members often prefer disability pay over retired pay because disability pay is not taxable income to the service member as is retirement pay. A former spouse's share of retirement pay will diminish as the retirement pay diminishes. *See Mansell; White.*

Concurrent Pay. Beginning in 2004, federal law allows some retirees to receive both retirement and disability pay. 10 USC sec. 1414. *See* discussion and citations in Mark Sullivan and Gene Brentley Tanner, *Military Pension Division and Disability: The Hillard Case*, Family Forum, Vol. 33, No. 3, March 2013. The 2004 provisions have been phased in over a 10-year period and by 2014, military retirees eligible for concurrent pay will receive their total retirement pay and their total disability pay.

Concurrent pay is available only to military retirees with at least a 50% disability rating and who had 20 years of service prior to retirement. All other retirees will remain subject to the dollar-for-dollar waiver rules.

Also beginning in 2004, Congress created a new form of disability pay for service members called Combat-Related Special Compensation Benefits. This form of disability pay is not subject to the Concurrent pay provisions and will be subject to the dollar-for-dollar waiver requirements. *See* Sullivan, *id.* This means that if a service member elects to receive Combat-Related Special Compensation Benefits, payments made to a former spouse pursuant to a DRO will be reduced or eliminated.

Summary of NC law based on cases described below:

In an original ED judgment, trial court cannot distribute military disability pay but can consider military disability pay as a distribution factor. Trial court cannot give dollar-for-dollar credit on an unequal division of remaining retirement funds or other assets to account for or offset the disability conversion.

In original ED judgment, trial court cannot prohibit military spouse from converting retirement to disability in the future.

After judgment, a court can amend a DRO to effectuate terms of original division of assets.

An issue not addressed directly yet by NC cases: *Mansell* points out that while courts cannot order distribution of disability pay, federal law does not prohibit a military spouse from contracting away their disability benefits. *See White*, footnote 1 (citing California case indicating trial courts have authority to enforce such contracts without violating federal law).

Cases upon which summary above is based.

White v, White, 152 NC App 588 (2002), *aff'd per curiam,* 357 NC 153 (2003).

Trial court erred when it concluded it had no authority to consider amending a DRO dividing military pension to increase former spouse's share of retirement pay where, subsequent to entry of DRO, military retiree elected to receive disability pay.

Court of appeals referred to amendment as a mechanism to "effectuate" terms of original consent order wherein parties agreed wife was entitled to one-half of the pension benefits acquired during the marriage.

According to the court in *White*, nothing in *Mansell* or the Uniformed Services Former Spouses Protection Act prohibits a state trial court from considering federal disability payments when configuring a division of marital assets or from awarding a larger percentage of retirement pay when the military spouse elects, after entry of court order dividing retirement pay, to receive disability pay instead of retirement pay.

Halstead v. Halstead, 164 NC App 543 (2004).

Federal law prohibits a trial court – when entering the original ED judgment – from increasing wife's share of husband's military retirement pay based solely on fact that husband had elected to receive disability pay in lieu of some of his retirement pay.

Fact that spouse received military disability pay can be considered as a distribution factor but trial court cannot "circumvent" federal prohibition on distribution of disability pay by ordering a dollar-for-dollar increase in amount of retirement pay ordered to former spouse to reflect amount converted to disability.

Federal law also prohibits trial court from ordering military spouse to pay former spouse directly any amount later lost by former spouse due to future election by military spouse to receive disability in place of retirement funds.

Williams v. Williams, unpublished, 167 NC App 373 (2004)

Former wife brought action to enforce provisions of DRO after former husband's military pay was converted to disability pay for a period of time. Wife sought recovery of amounts she would have received had retirement pay not been reduced. Trial court decided DRO provided only that she would receive 50% retirement pay and that she had received 50% of retirement pay.

Court of appeals upheld trial court, holding that *Halstead* controlled the outcome of the case despite the fact that the DRO in this case was entered with the consent of the parties.

While a court can consider the receipt of military disability as a distribution factor, a court may not "circumvent" federal law by increasing the former spouse's share of retirement based solely on the former spouse's decision to convert retirement to disability.

Wife also argued trial court erred when it refused to amend the DRO, as the trial court had done in *White v. White*, to provide her a larger share of pension to replace the share converted to disability. The court of appeals distinguished *White* by saying only that, while the trial court in White declined to amend the DRO due to a conclusion that the court had no authority to amend

the DRO, the trial court in this case declined to amend due to a conclusion that wife was not entitled to an amendment.

Cunningham v. Cunningham, 171 NC App 550 (2005)

Trial court order providing that "defendant shall not take any steps designed to diminish or in any way reduce the amount of disposable retired or retainer pay that he is entitled to receive by virtue of his military service to the end that the plaintiff's portion of his retirement is reduced" was inappropriate in light of *Halstead.*

On remand, trial court was ordered to "revise the ED order so as to avoid foreclosing defendant's right to forego pension payments in favor of disability payments if he becomes so eligible."

Hillard v. Hillard, 733 SE2d 176 (NC App 2012).

ED judgment entered in 1994 providing wife would receive one-half of husband's military retirement benefits that accumulated during the marriage.

Judgment amended in 2008 by consent to provide wife entitled to 50% of husband's military retirement points.

Judgment amended a second time in 2010 to provide husband would pay wife directly the amount of retirement pay that would have gone to wife had husband not elected to receive disability pay (Combat-Related Special Compensation).

Husband filed Rule 60(b) asking trial court to set aside second amendment on basis that trial court had no subject matter jurisdiction to enter an order in violation of federal law.

Court of appeals affirmed trial court order denying the Rule 60(b) motion.

Court of appeals held that this case is analogous to *White* and held that the trial court consent order was intended to protect wife's interest in the retirement benefits she was awarded in the original 1994 order. The amended order neither required husband to pay wife a portion of his disability pay nor classified the disability pay as marital property.

2010 order upheld because it "merely required plaintiff to compensate his former spouse according to the agreed terms in the previous consent orders and it did not specify the requisite source of payment." Court noted that "funds may come from any source that plaintiff chooses."

Court of appeals cited as "persuasive authority" the case of *McGee v. Carmine*, 290 Mich.App. 551 (2010), holding that a military spouse remains responsible for compensating his or her former spouse in an amount equal to the share of retirement pay ordered as part of a property division pursuant to a divorce judgment when a military spouse makes a voluntary post-judgment election to waive retirement pay in favor of disability benefits.