Part One | Military Pension Division and Disability: The Hillard Case

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Introduction

The Oct. 2, 2012 Court of Appeals decision, Hillard v. Hillard[1], holds important lessons about military pension division and disability compensation for family law practitioners in North Carolina, which has the third-largest military population in the United States. This article covers the Hillard case at trial and on appeal, as well as the federal laws which affect military pensions and which led to the decision. It forecasts the new breed of disability pay waiver cases, those involving Combat-Related Special Compensation, comparable in analysis and treatment to the existing VA waiver cases. Finally, it addresses the practical impact of these on the family law practitioner in North Carolina and recommends settlement and trial strategies.

Military Retired Pay

The facts and appellate decision in Hillard can best be understood with some background about military pay and disability. As a general rule, military personnel receive retired pay after at least 20 years of active service.[2] The pension is based upon the number of years served and, for most retirees today, on the average of the highest three consecutive years of pay. The pension share of the former spouse (FS) in a divorce case is usually 50 percent of the portion of the pension acquired during the marriage.[3]

Military Disabilities and Retired Pay

Military service may result in physical and mental disabilities for SMs. One who has served in the military can receive payments in the form of disability benefits. Managed by the Department of Veterans Affairs (VA), the system pays disability benefits based on the extent of the disability and its effect on employability.[4] It covers injuries, conditions or diseases which occurred during active duty or were made worse by active service, ranging from a sore knee due to routine physical training stateside to feelings of fear and anxiety from work as a combat medic in a hostile fire zone. The condition doesn't have to be combat-related, only "service-connected."[5] This means that it occurred while the individual was serving on active duty, and that it was not caused by his own misconduct.

Retirees can elect disability benefits under Title 38 of the U.S. Code by waiving the same amount of retired pay.[6] Almost all retirees who can make this election do so. This option offers two benefits for the SM who anticipates filing for divorce.

• First, this election results in a net increase in pay since the VA pay is tax-free.[7] Thus, if John Doe's pension (without disability) were $2,000 per month and his disability were evaluated as equivalent to $400 per month in VA disability compensation, he could choose to waive $400 of

his military pension to receive $400 from the VA tax-free. His monthly payments still total $2,000, but only $1,600 is subject to taxes if he makes this election.

• And only the taxable portion ("disposable retired pay") is subject to division with his ex-wife, Jane Doe. The VA disability compensation is not subject to division as property upon divorce because it is excluded from the definition of disposable retired pay under USFSPA. The Act specifies that:

The term "disposable retired pay" means the total monthly retired pay to which a member is entitled less amounts which . . . (B) are deducted from the retired pay of such member as a result of . . . a waiver of retired pay required by law in order to receive compensation under… title 38.[8]

In 1989, the U.S. Supreme Court examined the issue of division of military retired pay and the waiver of this benefit in favor of VA disability compensation in Mansell v. Mansell.[9] There the court held that USFSPA "does not grant state courts the power to treat as property divisible upon divorce military retirement pay that has been waived to receive veterans' disability benefits."[10]

The reduction of retired pay caused by this election often results in heightened divorce litigation since the VA disability compensation is not divisible as military retired pay. As soon as the election is made and notification is sent to the Defense Finance and Accounting Service (DFAS)[11], the former spouse sees her share of divisible retired pay decrease, sometimes substantially. It may even disappear. The election is made solely by the retiree, and the consent of the spouse or former spouse plays no role in the decision, whether the parties are happily married or acrimoniously divorcing (or divorced). Nor is the judge's authorization required. Especially when the former spouse is counting on the continued receipt of a stable, predictable amount of divided military retired pay, the retiree's election of VA disability pay, in conjunction with an equivalent amount of money being removed from the retired pay that is subject to division upon divorce, can be catastrophic.

Remedies from the Courts

In a growing number of cases, the courts have attempted to remedy the problem of post-decree VA elections.[12] In White v. White[13], the former spouse appealed the denial of her motion for relief when the ex-husband, after their property division, waived military retired pay for VA disability compensation. The North Carolina Court of Appeals reversed the trial court and remanded the case for "reconfiguration" of the percentage award, to allow the former spouse to retrieve what money she had lost through the VA waiver. A similar remedy, the readjustment of the former spouse's share, is found in an Idaho case. The Idaho Court of Appeals in McHugh v. McHugh[14] was confronted with a case in which the parties had agreed that the pension payments to the former spouse would not be modified other than COLAs (cost-of-living adjustments). Then the military retiree waived a portion of his retired pay in favor of disability pay. The court approved the trial judge's decision to increase the former spouse's percentage of the remaining retirement to maintain her original level of payments.[15]

Congressional Developments Since 2003

Dollar-for-dollar waiver was the situation until 2004. In that year, legislation took effect 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).16 Also beginning in 2004, Congress made a new form of special compensation available to a limited number of retirees. Called Combat-Related Special Compensation (CRSC),17 these payments may be made to those retirees with a combat-related condition, as set out below.

Concurrent Retirement and Disability Pay (CRDP)
For those with at least 20 years of service and a VA disability rating of at least 50 percent, CRDP authorizes a 10-year phased elimination of the VA offset, from 2004 to 2014.18 This means the retiree will receive every dollar of the waived retired pay that he exchanged for VA disability compensation by January 2014.

CRDP is the return of waived pension payments, so it has the attributes of those pension payments. It is taxable compensation, and it is automatic. No application is needed. It also is divisible with a former spouse under a military pension division order. John Doe, our eligible retiree, will see his retired pay increase each year until the phase-in period is complete in 2014, when he will be receiving an additional amount that is equal to the amount of retired pay waived.

Combat-Related Special Compensation (CRSC) Benefits
Combat-Related Special Compensation is available for those veterans who have a combat-related disability of at least 10 percent under certain conditions.19 A disability is considered to be combat-related if it is attributable to an injury for which the servicemember was awarded the Purple Heart. A disability is also considered combat-related if it was incurred –

a. as a direct result of armed conflict;

b. while engaged in hazardous service;

c. in the performance of duty under conditions simulating war; or

d. through an instrumentality of war.20

CRSC is not longevity retired pay; it is an additional form of compensation for certain members of the armed forces. The statute states that "[p]ayments under this section are not retired pay."21 Thus, CRSC payments are not divisible as marital or community property upon divorce. The CRSC rates come from the VA tables and increase with the number of a retiree's dependents (spouse, spouse and child, etc.). A person who is qualified for CRDP and who is also qualified for CRSC may elect to receive CRDP or CRSC, but not both.22 Election of CRSC stops the payment of CRDP that an individual is receiving.

The potential hardships for former spouses due to CRSC elections are remarkable. CRSC is, in effect, like hitting the "RESET button." It automatically reverses the situation back to pre-CRDP days. Since CRDP is wiped out, the retiree is now receiving a lower amount of retired pay (due to the dollar-for-dollar waiver requirement), he is still receiving VA disability compensation, and

he is now also receiving CRSC. The CRSC payment will be equal to the VA compensation if the VA disabilities are all combat-related; it will be less if some of the disabilities are not related to combat.
CRSC is non-taxable since it is disability compensation, not retired pay.23 Finally, the statute is not limited to those who retired from active duty. It includes Guard and Reserve personnel who have at least twenty qualifying years for retirement purposes.

A simplified way of understanding all of this information is found on the following table:

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
Phase-in	Yes*	No
Retroactive payment	No	Yes†
Increases with number of dependents	No	Yes‡
Available for support determinations, garnishments	Yes	Yes
Survivor benefit available	No	No

*Except for 100% disability cases
†Payment is retroactive to the date of filing of the VA claim.
‡If CRSC rating is 40% or more.

The Hillard Case at Trial
With this as the backdrop, let's look at what happened in the Hillard case. The initial equitable distribution order was entered in September 1994. The order provided that Charles Hillard's military retirement would be divided so as to give Thi Den Hillard one-half of his retired pay acquired between the date of marriage and the date of separation.

In July of 2008, Ms. Hillard filed a motion to amend the September 1994 order. That order was eventually amended by consent in December 2008. The amended order provided that Ms. Hillard would receive 50 percent of Mr. Hillard's National Guard retirement points, which meant she could receive her 50 percent marital share of the Guard pension at the same time Mr. Hillard started to receive it. Mr. Hillard's Guard service meant that he attained pay status at age 60.

When Mr. Hillard turned 60, Ms. Hillard applied for former spouse payments from the National Guard Pension Fund but her application was denied because the order did not direct the National Guard Pension Fund to make a specific distribution to her. Unwilling to throw in the towel, Ms. Hillard filed a second motion to amend the equitable distribution judgment in July of 2010, which was heard in November 2010.

At some point at or before that hearing, Ms. Hillard learned that her former husband had elected to receive CRSC in lieu of retired pay. The parties entered into another consent order in December 2010 that provided that Mr. Hillard would pay his former wife 31.637 percent of his $1,081 payments that Mr. Hillard would have received but for CRSC election. Afterwards, Mr. Hillard filed a motion for relief under Rule 60(b) which was denied by the trial court. Following that defeat, Mr. Hillard tried his luck at the appellate court level.

Hillard on Appeal

In the Court of Appeals, Mr. Hillard argued that the trial court did not have subject matter jurisdiction over the terms of the December 2010 order since federal law limited the state's ability to divide only disposable retired pay as defined under UFSPA. He claimed that the Halstead decision[24] barred the judge from making disability benefits, either in form or substance, divisible as marital property in an equitable distribution action. That is, under the Halstead decision, the receipt of disability pay is purely the retiree's separate property and the court lacks the power to order re-imbursement.

The Court of Appeals rejected this argument, noting differences between the Hillard case and Halstead decision, in that the trial court in Hillard did not direct the military retiree to pay his former spouse specifically from disability pay. The language in the December 2010 order stated that Mr. Hillard elected to take disability pay (which is not divisible with a former spouse) in lieu of some of his retired pay. Perhaps most significantly, the December 2010 consent order was meant as a clarifying order to protect the original benefit that Ms. Hillard was awarded in the original 1994 order.

The December 2010 order, according to the Court of Appeals, neither required Mr. Hillard to pay his former wife from his disability nor did it classify it as marital property. In fact, the Court of Appeals likened the Hillard order to the White decision,[25] which also dealt with the court providing equity to a former spouse to effectuate and enforce a previous equitable distribution award.

Most importantly, the Court of Appeals took the opportunity to go beyond the facts of the case to provide clarification as to the law in North Carolina pertaining to whether a military retiree remains financially responsible for paying what was previously agreed to or ordered in property division when he makes a voluntary post-judgment election for disability compensation in lieu of regular retired pay. The Court of Appeals effectively, for the first time, allowed an indemnification remedy for any post-judgment disability elections by a military retiree.

In doing this, the court followed the lead of the Michigan Court of Appeals in Megee v. Carmine.[26] It held that a military spouse is liable to the former spouse "in an amount equal to the share of retirement pay ordered to be distributed to the former spouse as part of the divorce judgment's property division when the military spouse makes a unilateral and voluntary post-judgment election to waive the retirement pay in favor of disability benefits contrary to the terms" of the property division.[27] The court further explained that the funds to reimburse the non-military former spouse for that post-judgment loss can come from any source the retiree chooses.

In part two, drafting language to address these issues will be explored. •

End Notes

1. Hillard v. Hillard, 733 S.E. 2d 176 (2012).
2. While most servicemembers retire at between twenty and thirty years of service, some may stay on active duty for a total of forty years. The John Warner National Defense Authorization Act for FY2007 authorized the extension of military service to forty years. Pub. L. No. 109-364, § 601, 120 Stat. 2083 (2006). A servicemember who retires with 40 years of service would receive 100 percent of base pay as retired pay.
3. Seifert v. Seifert, 319 N.C 367, 354 S.E.2d 506 (1987).
4. Captain Eva M. Novak, The Army Physical Disability System, 112 MIL. L. REV. 273, 283 (1986) ("The VA rating reflects the degree of disability of a veteran returning to the civilian sector and reflects the extent of disability for civilian employment.").
5. 38 U.S.C. § 101(16) ("The term "service-connected" means, with respect to disability or death, that such disability was incurred or aggravated, or that the death resulted from a disability incurred or aggravated, in line of duty in the active military, naval, or air service.").
6. 38 U.S.C. §§ 5304-5305. Until 2004, as is explained below, the "VA waiver" meant the same thing as the amount of the VA disability compensation received. If the Department of Veterans Affairs paid a retiree $400 a month as VA disability pay, then he was required to waive the same amount of retired pay, and his Retiree Account Statement, DD Form 7220, would show an entry for "VA waiver" in the monthly amount of $400. While this is still true today for those with disability ratings of less than 50 percent, it does not apply if the individual has a rating of 50 percent or above. The advent of Concurrent Retirement and Disability Pay (CRDP) means that the "VA waiver" is a much smaller number, due to the restoration of waived retired pay. "VA waiver" is no longer synonymous with "VA disability compensation received."
7. 38 U.S.C. § 5301(a).
8. 10 U.S.C. § 1408 (a)(4).
9. Mansell v. Mansell, 490 U.S. 581, 109 S. Ct. 2023, 104 L. Ed. 2d 675, (1989).
10. Id. at 594-95, 109 S. Ct. at 2032, 104 L. Ed. 2d at 689.
11. DFAS is the retired pay center for the Army, Navy, Air Force, Marine Corps and the National Guard and Reserves. Although there is a separate center for the Coast Guard, as well as for the commissioned corps of the Public Health Service and the National Oceanographic and Atmospheric Administration. DFAS will be used in this article, not only for the sake of brevity, but also because most uniformed services retired pay comes from DFAS.
12. Cases which have approved a requirement that the retiree indemnify the former spouse include Blann v. Blann, 971 So. 2d 135 (Fla. Dist. Ct. App. 2007); Padot v. Padot, 891 So. 2d 1079, 1081-84 (Fla. Dist. Ct. App. 2004); Janovic v. Janovic, 814 So. 2d 1096 (Fla. Dist. Ct. App. 2002); Longanecker v. Longanecker, 782 So. 2d 406 (Fla. Dist. Ct. App. 2001); Bienvenue v. Bienvenue, 72 P.3d 531 (Haw. Ct. App. 2003); Blythe v. Blythe, No. 03CA8, 2004 WL 237958 (Ohio Ct. App. Feb. 4, 2004); Nelson v. Nelson, 83 P.3d 889 (Okla. Civ. App. 2003); Hillyer v. Hillyer, 59 S.W.3d 118 (Tenn. Ct. App. 2001).
13. White v. White, 152 N.C. App. 588, 568 S.E.2d 283 (N.C. Ct. App. 2002), aff'd, 579 S.E.2d 248 (N.C. 2003). Note that the N.C. Court of Appeals in 2004 reversed a trial judge's ruling that required the husband to reimburse the wife dollar-for-dollar for any funds she lost from her share of the pension, due to a VA disability waiver. Halstead v. Halstead, 164 N.C. App. 543, 596 S.E.2d 353 (2004).

14. McHugh v. McHugh, 861 P.2d 113 (Idaho Ct. App. 1993).
15. Id. at 115.
16. 10 U.S.C. § 1414.
17. 10 U.S.C. § 1413a. The CRSC regulations are at Chapter 63, Volume 7B of the Department of Defense Financial Management Regulations (DoDFMR), effective May 31, 2006, Sections 6301-6310.
18. The regulations for CRDP are found at Concurrent Retirement and Disability Payment (CRDP), Dep't of Defense Fin. Mgmt. Regulation, DoDFMR, vol. 7B, ch. 64 (Sept. 2010). Details about CRSC may be found in Sullivan and Raphun, Dividing Military Retired Pay: The Puzzle of the Parachute Pension, JOURNAL OF THE AMERICAN ACADEMY OF MATRIMONIAL LAWYERS, Vol. 24, 2011, p. 147, and Sullivan and Darnell, Military Pension Division: The "Evil Twins" – Concurrent Retirement and Disability Pay (CRDP) and Combat Related Special Compensation (CRSC), THE ARMY LAWYER, December 2006, p. 19.
19. See 10 U.S.C. § 1413a.
20. 10 U.S.C. § 1413a(e).
21. 10 U.S.C. § 1413(g).
22. 10 U.S.C.S. §§ 1414(d)(1), 1413a(f).
23. Combat-Related Special Compensation, Dep't of Defense Fin. Mgmt. Regulation, Vol. 7B, ch. 63, § 630105 (Nov. 2010).
24. Supra note 13.
25. Id.
26. Megee v. Carmine, 290 Mich. App. 551, 802 N.W.2d 669 (2010). For cases with similar results, see Bandini v. Bandini, 935 N.E.2d 253 (Ind. Ct. App. 2010) and Provencio v. Leding, 2011 Ark. App. 53, No. CA10-312, 2011 Ark. App. LEXIS 74 (Ct. App. Jan. 26, 2011).
27. Hillard at 180.

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