

SILENT PARTNER

MDRP and CRDP: A Sea Change

*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 and the North Carolina State Bar's military committee. 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, and other aspects of military divorce. Just go to www.nclamp.gov > For Lawyers (the website of the military committee, N.C. State Bar).*

Introduction

Is military disability retired pay divisible in divorce? Is Concurrent Disability and Retired Pay divisible? A recent administrative ruling by the Department of Defense sheds new light on dividing CRDP when there is a disability retirement and a divorce. Let's see what the new rule is.

Disability Retirement and Divorce

When a servicemember (SM) is found unfit to continue serving, he or she is separated with a disability discharge.¹ A military disability rating of 30% or more, or the completion of at least 20 years of service, means that the SM's separation comes with retired pay, often called MDRP, or military disability retired pay. By and large, MDRP is not divisible as property at divorce.² If the disability retiree elects to receive VA disability compensation, that money is also non-divisible.

The receipt of VA disability pay means that the retiree must waive an equal amount of retired pay.³ This is called the "VA waiver." This offset is remedied, however, by a statutory payment called Concurrent Disability and Retired Pay, or CRDP.⁴ CRDP restores the amount of waived retired pay.⁵ For example, if John Doe receives \$2000 in MDRP monthly and he elects to get \$1200 per month VA disability compensation,⁶ then he must waive \$1200 of his retired pay; the amount waived, however, is made up by CRDP. Thus, he receives his full \$2000 each month as well as the \$1200 from the Department of Veterans Affairs.

Division of CRDP: From Canon to Canard

¹ Disability retirement for those retiring from active duty is covered at Chapter 61 of Title 10, U.S. Code.

² For an explanation of MDRP and divorce, see *Q&A – Military Disability Retired Pay*, a [Silent Partner](http://www.nclamp.gov) infoletter at www.nclamp.gov > Publications.

³ 38 U.S.C. 5304-5305.

⁴ 10 U.S.C. 1414. The amount of CRDP paid is found on the second page of the disability retiree's RAS, or Retiree Account Statement.

⁵ For an explanation of CRDP and the VA waiver, see the [Silent Partner](http://www.nclamp.gov) titled *Military Pension Division: The "Evil Twins" - CRDP and CRSC* at the same website shown at Note 2.

⁶ The servicemember can elect VA disability compensation; it is not automatic. CRDP is automatic, once the VA election is made and the VA rating is 50% or greater, with the Department of Veterans Affairs notifying the retired pay center of this. The only exception to the automatic receipt of CRDP is when an eligible retiree chooses to receive Combat-Related Special Compensation (CRSC) pursuant to 10 U.S.C. § 1413a, since the receipt of CRSC terminates CRDP.

It has long been an assumption of military divorce practitioners that CRDP paid in connection with MDRP could not be divided. The reasoning behind this canon was that CRDP was simply the return of waived retired pay and, since the waived retired pay was non-divisible (in most cases), so was the CRDP which restored it.

In a typical case, Jane Doe (the non-military spouse or former spouse) had few options to deal with the loss of a major marital asset, the military pension of her soon-to-be-ex. She might negotiate spousal support payments from John, since alimony is not property division and the garnishment of alimony is allowed in a disability retirement case. She might negotiate for a greater share of other marital or community property. Or she might just write it off.

A new decision by a little-known administrative tribunal within the Defense Department has changed all of that. It's a major change which makes the former assumption (non-divisibility) into a canard, i.e., an unfounded rumor or story.

The CAB Decision

On March 1, 2022, the Claims Appeals Board (CAB) rendered a Reconsideration Decision in Claims Case No. 2016-CL-091608.3. The case holds that the Uniformed Services Former Spouses' Protection Act (USFSPA) allows CRDP paid to a disability retiree *to be divided* as property in a divorce case, since it is the payment of longevity retired pay (not the restoration of disability retired pay). The essence of the CAB ruling is in the second-last paragraph of the opinion:

In this case, the member retired under Chapter 61 and subsequently became entitled to receive CDRP. The restoration of his retired pay under the statute authorizing CRDP, 10 U.S.C. § 1414, is subject to division under the USFSPA. CRDP is a restoration of retired pay based on longevity, which is 20 years of service. It is divisible under the USFSPA. The USFSPA is consistent with the CRDP statute and the implementing regulations contained in Chapter 64 of Volume 7B of the DoDFMR [Department of Defense Financial Management Regulation]. Any contrary interpretation would provide the member with an entitlement or benefit that was not explicitly authorized by Congress.⁷

Impact of the Decision: On the Government, On the Parties

What is the impact of this decision on the retired pay centers?⁸ It will be enormous. The decision notes that the Defense Finance and Accounting Service, which lost the case before the initial administrative hearing officer, appealed, and lost again, has been

⁷ To find the CAB decision, go to the webpage of the Defense Office of Hearings and Appeals, Claims Division: <https://doha.ogc.osd.mil/Claims-Division/DOHA-Claims-Appeals-Board-Decisions/2022-DOHA-Claims-Appeals-Board-Decisions/>. Click on this decision: [2016-CL-091608.3.pdf](https://doha.ogc.osd.mil/Claims-Division/DOHA-Claims-Appeals-Board-Decisions/2022-DOHA-Claims-Appeals-Board-Decisions/2016-CL-091608.3.pdf).

⁸ The retired pay center for the Army, Navy, Air Force and Marine Corps, as well as the National Guard and the Reserves, is the Defense Finance and Accounting Service, or DFAS. For the Coast Guard and the officer corps of the Public Health Service and the National Oceanic and Atmospheric Administration, retired pay is administered by the Coast Guard Pay and Personnel Center.

applying this policy for 13 years in over 20,000 cases involving divorce and disability retirees.

What does this decision mean for the former spouse, Jane Doe? When there was no alternative settlement benefit that Jane received, she may want to ask the court for a military pension division order to divide the CRDP. If Jane is already receiving alimony as a substitute for pension division, she may want to “let sleeping dogs lie,” since the spousal support payments she’s getting are tax-free under the Tax Cuts and Jobs Act (TC&JA).

There’s an impact as well for the retiree, John Doe, if he is paying alimony in lieu of pension division. The TC&JA makes his spousal support payments non-deductible; the garnishment payments of pension division, however, are excludable from John’s taxable income, so (in his words) “That’s a tax deduction!” He may want to ask his lawyer about “revisiting” the alimony settlement to try to convert it into pension division.

It is important that both parties and their attorneys know about the divisibility of CRDP in the disability retirement case when the divorce is in the process of negotiations and settlement.⁹ The former spouse needs to know that there is a benefit which may be divided and that she needn’t push for an alimony award as a substitute for pension division. The retiree needs to know that payments may be made through a garnishment from the retired pay center in appropriate cases,¹⁰ and these payments will be excluded from his income at tax time, unlike alimony payments. A flow chart showing all of this is on the next page.

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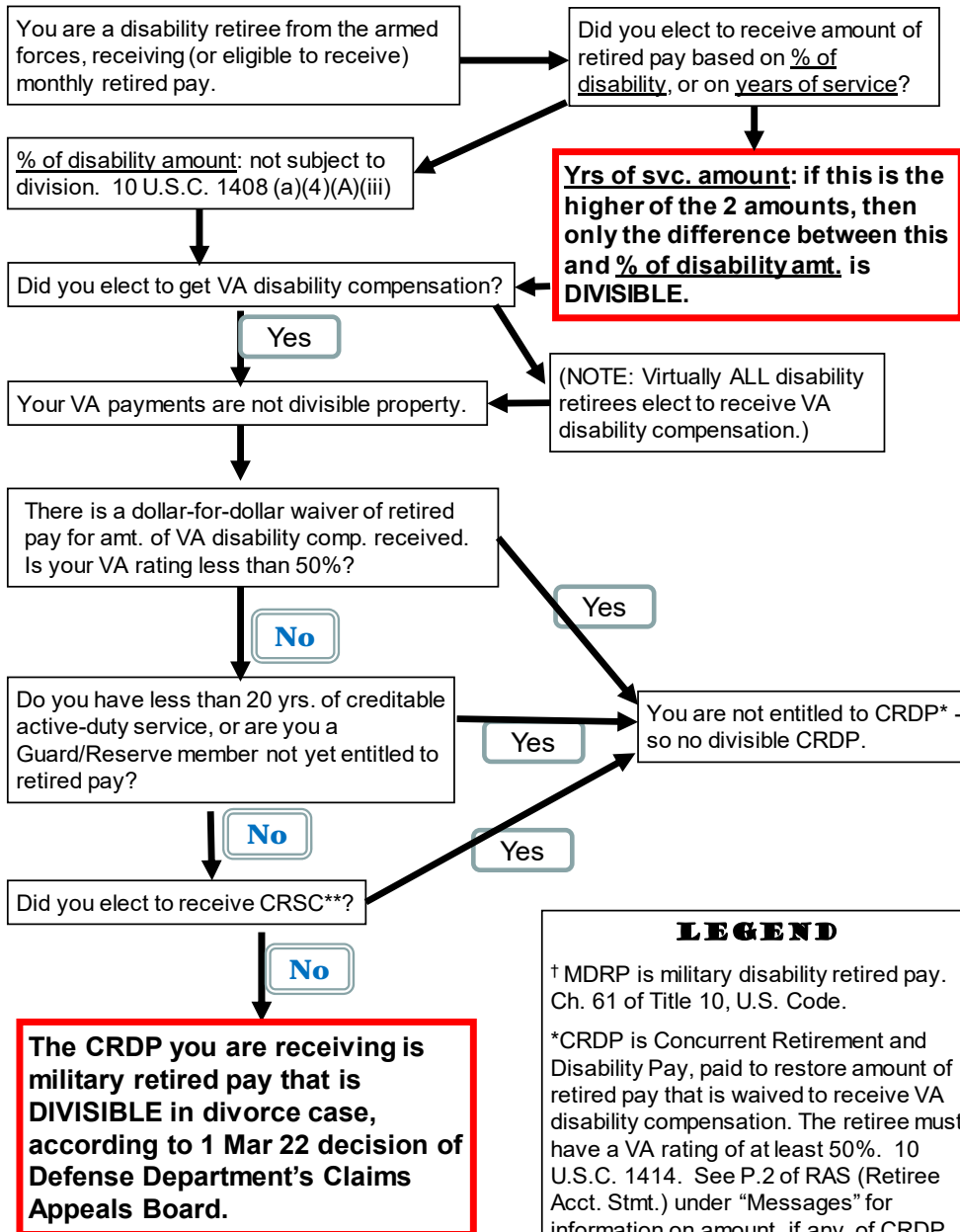
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⁹ As mentioned in Note 4 above, the place to find information about the CRDP amount is on page two of the RAS (Retiree Account Statement). To ascertain whether the SM received a disability separation, check the individual’s retirement orders and also the DD Form 214 or “Report of Separation.” For DoD retirees, the letter sent at retirement from DFAS to the SM stating how his or her retired pay was calculated also contains information about disability retired pay and how it was calculated.

¹⁰ Division of military retired pay through a garnishment requires an overlap of at least 10 years of marriage and 10 years of military service. 10 U.S.C. 1408 (d)(2).

CRDP* & MDRP† – Divisible in Divorce?



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† MDRP is military disability retired pay. Ch. 61 of Title 10, U.S. Code.

*CRDP is Concurrent Retirement and Disability Pay, paid to restore amount of retired pay that is waived to receive VA disability compensation. The retiree must have a VA rating of at least 50%. 10 U.S.C. 1414. See P.2 of RAS (Retiree Acct. Stmt.) under "Messages" for information on amount, if any, of CRDP.

**CRSC is Combat-Related Special Compensation, a tax-free benefit that is not divisible property. 10 U.S.C. 1413a.