



# Remember *Mansell*?

## Effect of New DoD Regulations and the Retired Pay Restoration Act on Military Disability Benefits in Nevada

BY RAYMOND S. DIETRICH, ESQ.

**Under *Mansell*, the U.S. Supreme Court deemed military disability benefits off limits and unassignable in divorce. *Mansell v. Mansell*, 490 U.S. 581, 594-595 (1989). Recently, the U.S. Supreme Court affirmed *Mansell*. *Howell v. Howell*, 581 U.S. 214, 220 (2017). Other governmental programs, however, have been able to balance the equities between a disabled military member and a former spouse. Specifically, the Concurrent Retirement and Disability Pay (CRDP) program allows qualifying members to receive concurrent or “double” pay after making a non-combat disability election, and at the same time permitting a former spouse to receive their community share of the CRDP, in lieu of disposable retired pay. The new Department of Defense (DoD) regulations and the Retired Pay Restoration Act, 118 H.R. 303, changes all of that. This article will help you navigate the developments.**

### Background

In 1981, the U.S. Supreme Court held that federal law prohibits states from dividing military disposable retired pay as community property. *McCarty v. McCarty*, 453 U.S. 210, 211-215 (1981). In 1982 and in response to *McCarty*, Congress passed the Uniform Services Former Spouses' Protection Act (USFSPA). 10 U.S.C. §1408, *et seq.* The USFSPA permits the division of military disposable retired pay as community property. §1408(c)(1). But the act expressly excludes *disability* benefits. §1408(a)(4)(A)(ii). To receive *disability* pay, federal law requires a member to give up (or waive) an equivalent amount of disposable retired pay. 38 U.S.C. §5305.

In *Mansell* and relying on the plain meaning of the act, the U.S. Supreme Court held that a state court could not award *disability*

pay. *Mansell* at 589. *Howell* affirmed the holding that Congress expressly excluded *disability* pay from the definition of disposable retired pay. *Howell* at 222. It considered the Arizona Supreme Court's argument to be nothing more than semantics. The Nevada Supreme Court affirmed *Howell*, with one caveat: a Nevada court may still allow a member to indemnify a former spouse of a waiver, if agreed to in a separate settlement agreement or settlement decree. *Martin v. Martin*, 520 P.3d 813, 818 (Nev. 2022). *Howell* is silent on the freedom to contract exception; the USFSPA also contains no contractual prohibitions. *Hammond v. Hammond*, 680 S.W.3d 269, 274 (Tenn. Ct. App. 2023). Moreover, Nevada statute expressly prohibits the assignment of disability pay. N.R.S. § 125.165.

With all of this, seemingly, as settled law, in steps the DoD with their updated Financial Management Regulation. Interestingly, the updated regulation *reclassifies* CRDP. As a result, it allows the Defense Finance Accounting Service (DFAS) to reject orders where CRDP is not expressly assigned.

## Analysis

CRDP is codified at 10 U.S.C. §1414. Importantly, the USFSPA does not exclude CRDP from the definition of disposable retired pay; only *disability* pay is excluded. Therefore, a state court, including Nevada, should consider CRDP as community property and subject to division. That conclusion

is supported by the plain meaning of the USFSPA, the purpose of CRDP, and Nevada's equitable distribution statute.

### ***CRDP is community property and subject to equitable distribution by the court, notwithstanding new DoD regulations and the Retired Pay Restoration Act, 118 H.R. 303.***

In *Mansell* and *Howell*, the U.S. Supreme Court prohibited the assignment of *disability* pay to a former spouse. *Howell* at 221. Currently, there is no statutory prohibition of CRDP. Moreover, the USFSPA only excludes *disability* pay, not CRDP, from the definition of disposable retired pay. 10 U.S.C. §1408(a)(4)(A)(ii). Importantly, CRDP does not provide disability benefits to a member. 10 U.S.C. §1414. Moreover, Nevada's equitable distribution statute calls for

an equitable disposition of community property. N.R.S. §125.150(1)(a). A district court is also required to provide an explanation for any provision relating to a pension or retirement plan. N.R.S. §125.150(1)(c). CRDP is directly related to disposable retired pay. Therefore, a district court must address the disposition of CRDP. A member may qualify for CRDP if the member has a 50 percent or higher disability rating for a qualifying service-related disability. Dietrich, § 18.06[4], *Qualified Domestic Relations Orders ("QDROs"): Strategy and Liability for the Family Law Attorney*, LexisNexis (2023). A disability rating of less than 50 percent will still reduce a former spouse's share of the disposable retired pay, since there will be no CRDP offset available.

### ***DoD Financial Management Regulation 7000.14-R has removed the classification of CRDP as "restored" retired pay.***

The new DoD regulation no longer considers CRDP as "restored" retired pay. Accordingly, and beginning February 2023, DFAS began rejecting military retired pay orders in cases where a

member is also receiving CRDP. DFAS, however, will approve orders that *expressly award* CRDP, as of the date of this writing. The issue is very fluid. Therefore, practitioners should include express CRDP language in the Decree of Divorce or settlement agreement. The settlement agreement should also include, if

possible, indemnification language. Indemnification requires the member to reimburse, or indemnify, the former spouse for any amounts of disposable retired pay waived. The settlement agreement should be a separate agreement and not merged with the Decree of Divorce, to avoid violating *Howell*.

### ***Retired Pay Restoration Act, 118 H.R. 303, if passed, will phase out CRDP over a 10-year period for some members.***

In essence, CRDP allows a member to receive "double" pay for each dollar waived for *disability* pay. In other words, the program allows a member to receive both *disability* pay and CRDP. For divorce purposes, CRDP comes back onto the marital ledger as if no waiver occurred; thus, allowing a former spouse access to the money via a state's marital property

laws. Importantly, CRDP has been a safety net to former spouses since its inception in 2008. Without CRDP, many former spouses would have little recourse. The Combat Related Special Compensation (CRSC) program remains off limits to former spouses and is not affected by the new regulations or amendment.

On January 11, 2023, the U.S. House of Representatives introduced the Retired Pay Restoration Act, 118 H.R. 303. The bill is a proposed amendment to the USFSPA. The amendment will set new parameters for members to elect and qualify for CRDP. Importantly, the amendment will *phase out*, over 10 years, CRDP for members with *disability* ratings of 50 percent to 90 percent. Members with 100 percent *disability* ratings may still qualify for CRDP. As a result of the phase-out, a former spouse may be denied her community share of the member's disposable retired pay if a *disability* rating exists, since there will be no CRDP monies to offset the waiver. According to the amendment's findings, the purpose of CRDP is to *reduce the burden of financial sacrifice* on disabled military retirees. The amendment does not reclassify CRDP as a member's separate property. That means it will be left up to a state court to decide if a *disability* election warrants an equitable response and to what extent. Nevada has yet to determine if CRDP is community or separate property. Ultimately, Nevada must answer this question.

### ***Alimony as a Contingency Plan***

A state court can *plan for the contingencies* of a *disability* waiver. According to *Howell*, a court may do so by *recalculating spousal support*. See *Rose v. Rose*, 481 U.S. 619, 630-634 (1987). In Nevada, a court may award alimony after considering the statutory factors. N.R.S. § 125.150(9). A disability election can be identified in section 9(b) as the "nature and value of the respective property of each spouse." The statute also allows the district court to consider "any other factors the court considers relevant in determining whether to award alimony and the amount of such an award." A future waiver of disposable retired pay that would abrogate the community interest is relevant to an award of alimony. Finally, the Nevada Supreme Court has held that alimony payments may be made in lieu of property settlement. *Waltz v. Waltz*, 110 Nev 605, 609 (1994). Therefore, as part of a contingency plan, a minimum award of \$1 per month should be ordered by the court *in all military cases*; since a disability may occur post-decree. A petition to modify can then be sought if a waiver occurs, causing

CONTINUED ON PAGE 19

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# Remember Mansell?

a change in circumstances. *Davitian-Kostanian v. Kostanian*, 534 P.3d 700, 706 (Nev. 2023). In most cases, the loss of retirement benefits will likely result in a *change in circumstances*.

To mitigate the new DoD regulations and federal law amendment, some action is required, assuming you represent a military spouse. That action includes the following: first, attempt to get indemnification from the member for a waiver of disposable retired pay. The waiver should be in a separate, not merged, settlement agreement to avoid violating *Howell*. Second, expressly award CRDP to the former spouse in the Decree of Divorce and/or settlement agreement. The court order assigning disposable retired pay should always be entered *concurrently with the decree* to avoid risk of loss and prevent nonconformity issues; especially if the Survivor Benefit Plan (SBP) is awarded. In fact, all cases that assign retirement benefits should have the assignment order entered concurrently with the decree. *Henson v. Henson*, 130 Nev. 814, 819 (2014) (quashing a post-decree QDRO that improperly awarded survivor benefits). Third, award a minimum of \$1 for alimony. Then, if a disability waiver occurs, seek modification of the support award. Finally, be proactive—plan for a contingency.

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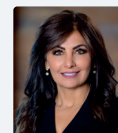
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