

# ATTACHMENT 1

Order of the Supreme Court of Virginia  
Denying Petition for Rehearing,

December 10, 2024

**VIRGINIA:**

*In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Tuesday the 10th day of December, 2024.*

WILLIAM R. LOTT,

APPELLANT,

against      Record No. 240218  
                    Court of Appeals No. 1322-22-1

MARIA R. LOTT,

APPELLEE.

UPON A PETITION FOR REHEARING

On consideration of the petition of the appellant to set aside the judgment rendered herein on October 29, 2024, and grant a rehearing thereof, the prayer of the said petition is denied.

A Copy,

Teste:

Muriel-Theresa Pitney, Clerk

By:



Deputy Clerk

# ATTACHMENT 2

Order of the Supreme Court of Virginia  
Refusing Petition for Appeal,

October 29, 2024

**VIRGINIA:**

*In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Tuesday the 29th day of October, 2024.*

WILLIAM R. LOTT,

APPELLANT,

against

Record No. 240218  
Court of Appeals No. 1322-22-1

MARIA R. LOTT,

APPELLEE.

FROM THE COURT OF APPEALS OF VIRGINIA

Upon review of the record in this case and consideration of the argument submitted in support of the granting of an appeal, the Court is of the opinion there is no reversible error in the judgment complained of. Accordingly, the Court refuses the petition for appeal.

A Copy,

Teste:

Muriel-Theresa Pitney, Clerk

By:



Deputy Clerk

# ATTACHMENT 3

Opinion of the Court of Appeals of Virginia,

December 12, 2023

## COURT OF APPEALS OF VIRGINIA

Present: Judges Malveaux, Ortiz and Friedman  
Argued at Norfolk, Virginia

WILLIAM R. LOTT

v. Record No. 1322-22-1

MARIA V. LOTT

MEMORANDUM OPINION\* BY  
JUDGE DANIEL E. ORTIZ  
DECEMBER 12, 2023

FROM THE CIRCUIT COURT OF THE CITY OF NEWPORT NEWS  
Gary A. Mills, Judge

Katherine D. Currin (Morris, Crawford & Currin, P.C., on briefs), for  
appellant.

Jessica R. Casey (Casey Legal, P.C., on brief), for appellee.

The trial court's award of payments representing wife's portion of husband's military retirement pay was proper under the indemnification clause of the Lotts' property settlement agreement. Because at the time of the final order the Supreme Court had yet to affirm the enforceability of indemnification clauses in relation to military retirement pay, the trial judge devised its award of disability pay based on a complicated parsing of the type of pay at issue. That consideration is not necessary in light of the Supreme Court's decision in *Yourko v. Yourko*, \_\_\_ Va. \_\_\_ (Mar. 30, 2023) (*Yourko II*), *rev'g Yourko v. Yourko*, 74 Va. App. 80 (2021) (*Yourko I*).

Even still, because the amount awarded to wife representing husband's disability pay was proper under the indemnification clause, we hold that the trial court did not err, and thus partially affirm the trial court's treatment of husband's disability pay under the right-for-a-different-

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\* This opinion is not designated for publication. *See* Code § 17.1-413(A).

reason doctrine. Because wife’s assignment of cross-error as to the exact amount was not timely filed in accordance with Rule 5A:25(d), we decline to consider it. Finally, we find that the trial court erred when it decided the amount of spousal support owed without a hearing on the issue, in violation of Rule 4:15, and remand for further proceedings as to the spousal support arrearages.

## BACKGROUND

William Lott (“husband”) and Maria Lott (“wife”) married in 1996 and separated with the intent to terminate their marriage in 2013. Before and during the marriage, husband was an active-duty member of the United States Navy, serving for just over twenty years before his honorable discharge in 2014. Husband was determined to have a service-connected disability and retired under Chapter 61.<sup>1</sup>

In September 2014, the parties entered into a property settlement agreement (“PSA”), under which wife was entitled to 41% of husband’s “disposable military retirement pay.”<sup>2</sup> The PSA further stated:

If the [h]usband is allowed to waive any portion of his retired pay in order to receive disability pay, then the [w]ife’s portion of the [h]usband’s disposable retired pay shall be computed based on the amount that the [h]usband was to receive before any such waiver was allowed or occurred. The [h]usband shall pay to the [w]ife directly any sums necessary in order that the [w]ife will not suffer any reduction in the amount due to her as a result of the [h]usband’s waiver in order to receive disability pay.

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<sup>1</sup> Retired military service members may be eligible to receive disability-related retirement pay based on injuries sustained during their service, based on statutory criteria laid out in 10 U.S.C. §§ 1201-1202. This status and associated benefits are colloquially referred to as “Chapter 61 retirement.”

<sup>2</sup> Both the PSA and legal authorities use “retirement pay” and “retired pay” interchangeably. Throughout this opinion, we use the term “retirement pay,” unless quoting another source or referring to “disposable retired pay” as a statutory term of art.

The trial court entered a final decree of divorce and a military pension division order (“MPDO”) in December 2016. The MPDO referenced the PSA and awarded wife “forty-one percent (41%) of the value of [husband’s] military pension benefits.”

Husband began receiving military retirement benefits on January 1, 2015. At that time, he elected to waive a portion of his retirement pay in order to receive tax-exempt disability pay for which he was eligible. Though the distribution of the remaining retirement pay is not at issue here, the parties dispute the proper classification of the disability pay and thus whether distribution of the payments to wife would violate federal law. *See Howell v. Howell*, 581 U.S. 214, 215, 221-23 (2017) (holding that a court could not order a veteran to indemnify their former spouse for the reduction in retirement pay associated with a waiver).

In September 2019, husband filed a motion to establish arrears and/or credits, challenging the sums that wife had received as her share of his disability pay. He claimed that as a result of his overpayment of his military retirement benefits, he had actually paid off all of his spousal support and attorney fees arrearages and was owed approximately \$5,000. In response, wife filed a motion to show cause arguing that husband had not paid her the sums owed for military retirement and attorney fees.<sup>3</sup> Wife later filed another motion to show cause which included an alleged failure to pay \$11,400 of spousal support as well.<sup>4</sup>

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<sup>3</sup> Wife had previously filed two similar motions alleging failure to pay spousal support, military benefits, and arrearages on attorney fees, as well as addressing various miscellaneous disputes. Neither of those earlier motions are at issue here.

<sup>4</sup> The trial court transcript from August 27, 2021, suggests that wife’s failure to include spousal support in her initial motion was in error. As a combined result of wife’s late filing and husband’s insistence that his overpayment of retirement benefits would more than compensate for any arrearages in spousal support, the court’s interlocutory order did not discuss spousal support, and subsequent hearings consistently delayed any discussion of the exact amount owed in spousal support. Wife’s filing on June 13, 2022, suggested that past-due spousal support as of that date had increased to \$13,200.



Over the course of two years, the court held multiple hearings and entertained several rounds of briefing from the parties to determine the appropriate classification and division of the disability pay here. On July 12, 2021, the court issued an interlocutory order, finding that husband's disability pay was divisible and *Howell* did not apply. In a July 6, 2022 hearing, the court orally indicated a likely ruling for husband on the disability pay issue and continued the hearing until October 12, 2022, primarily to allow the parties to reach agreement on whether wife would repay husband for her alleged overpayment since the time of the divorce decree. Counsel also asserted the need to discuss spousal support arrearages in the next hearing.

On August 5, 2022, the court issued a final order harmonizing the relevant federal statutes and regulations and parsing husband's retirement pay accordingly. The court ultimately found that most of husband's pay was "disposable retired pay" under 10 U.S.C. § 1408(a)(4) and therefore subject to division. The court awarded wife payments of \$841.41 per month, over husband's objection.<sup>5</sup> The court also found that husband owed wife \$11,400 in spousal support but declined to hold him in contempt for nonpayment. The court cancelled the October 12 hearing on the issue of spousal support owed, instead including all issues in its August order. This appeal followed.

## ANALYSIS

### I. Legal Context

The complexity of the issues presented in the matter compel us to review the ever-evolving legal landscape in this arena. We begin with an overview of the existing federal

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<sup>5</sup> Specifically, the court found that husband was receiving \$2,195 of concurrent retirement and disability pay ("CRDP") each month, all of which qualified as divisible "disposable retired pay" rather than disability pay, but that his disposable retired pay should be reduced by \$142.77 to account for his survivor benefits coverage ("SBP"). The court thus declared that wife was entitled to 41% of \$2,052.23, or \$841.41 per month.

statutes and the relevant cases interpreting them. Federal law provides for multiple sources of payment to military veterans upon their retirement. *See, e.g.*, 10 U.S.C. § 8327 (retirement benefits received after at least 20 years of service); 10 U.S.C. §§ 1201-1202 (disability pay); 10 U.S.C. § 1414 (concurrent retired and disability pay). In certain cases, a disabled veteran may elect to waive a portion of their retirement pay and instead receive the same amount of disability pay, which is exempt from federal, state, and local income taxes. *Mansell v. Mansell*, 490 U.S. 581, 583-84 (1989). The Uniformed Services Former Spouses' Protection Act ("the Act") allows courts to divide veterans' "disposable retired" pay in divorce cases. *See id.* at 584-85. Shortly after the Act's passage, the United States Supreme Court noted that: "'Disposable retired . . . pay' is defined as 'the total monthly retired or retainer pay to which a military member is entitled,' minus certain deductions. Among the amounts required to be deducted from total pay are any amounts waived in order to receive disability benefits." *Id.* at 584-85 (quoting 10 U.S.C. § 1408(a)(4)). Thus, upon divorce, a court may order the division of a veteran's retirement pay but not their disability pay.

In *Howell*, the Court further held that a court could not perform an end-run around the Act's requirements by ordering a veteran to indemnify their ex-spouse for any reduction in the ex-spouse's portion of the veteran's retirement pay because of a waiver. *See Howell*, 581 U.S. at 222. The Court did not address whether parties could independently agree to an indemnification provision in a property settlement agreement or other contract. *See Yourko II*, \_\_\_ Va. at \_\_\_.

While the Lotts' case was pending before the trial court, a similar case, *Yourko v. Yourko*, wound its way through the Virginia court system. *See Yourko I*, 74 Va. App. 80, *rev'd*, *Yourko II*, \_\_\_ Va. \_\_\_. In *Yourko I*, this Court held that court enforcement of an indemnification clause that had the practical effect of dividing disability retirement pay was pre-empted by federal law. *See Yourko I*, 74 Va. App. at 96-101. The trial court's final order relied on the holding in *Yourko*

*I* to explicitly rule out any practical effect of the indemnification clause in this case. However, earlier this year, the Supreme Court reversed that holding, finding that courts can enforce indemnification clauses related to military disability pay, if they stem from the parties' voluntary agreement. *See Yourko II*, \_\_\_ Va. at \_\_\_. Accordingly, we revisit the significance of the indemnification provision here, apply the guidance set forth in *Yourko II*, and find that the provision applies to resolve husband's claims as to assignments of error one through four.

## II. Indemnification Clause Enforceability

"[W]e review the trial court's statutory interpretations and legal conclusions *de novo*." *Chaney v. Karabaic-Chaney*, 71 Va. App. 431, 434 (2020) (alteration in original) (quoting *Navas v. Navas*, 43 Va. App. 484, 487 (2004)). Similarly, we review the trial court's interpretation of the PSA *de novo*. *Price v. Peek*, 72 Va. App. 640, 646 (2020).

We find that the trial court reached the right result as to the amount due to wife, but base our holding on alternative grounds—that the indemnification clause in the Lotts' PSA should be enforced. Under the right-result-different-reason principle, an appellate court "do[es] not hesitate, in a proper case, where the correct conclusion has been reached but [a different] reason [is] given, to sustain the result [on an alternative] ground." *Vandyke v. Commonwealth*, 71 Va. App. 723, 731 (2020) (alterations in original) (quoting *Banks v. Commonwealth*, 280 Va. 612, 617 (2010)). A court must establish two conditions before applying this "right-result-different-reason" approach. *Id.* at 731-32. First, the court "must show that all evidence necessary to that alternate ground was before the trial court. . . . If additional factual findings would be necessary to support the alternative ground for decision, the doctrine may not be applied." *Id.* at 732. Second, the evidence necessary "must have been undisputed." *Id.*

The right-result-different-reason doctrine applies here because our analysis turns entirely on the legal question of the enforceability of the indemnification clause in the Lotts' PSA. The

existence and contents of the PSA, including the indemnification clause, are not in dispute; the parties dispute only their legal significance. Further, the trial court made factual findings about the amount and type of husband's military retirement benefits. No other factual findings are required here.

The indemnification clause in the Lotts' PSA is legally enforceable and provides for the outcome in this case. In *Yourko II*, the Supreme Court determined that "federal law does not bar courts from upholding [indemnification] agreements or from enforcing indemnification provisions that may be included to ensure that payments are maintained as intended by the parties." *Yourko II*, \_\_\_ Va. at \_\_\_. The Court noted that although Congress intended to shelter veterans' disability pay from division upon divorce, "neither Congress nor the United States Supreme Court has ever placed any limits on how a veteran can use this personal entitlement once it has been received." *Id.* at \_\_\_. Rather, indemnification clauses within property settlement agreements should be given the same treatment as contracts in general, notwithstanding the unique relationship of the contracting parties. *Id.* at \_\_\_.

Here, the Lotts' PSA first provides that wife would receive 41% of husband's "disposable military retirement pay." The PSA then provides that husband must indemnify wife should he elect to waive his retirement pay in favor of disability pay: "If the [h]usband is allowed to waive any portion of his retired pay in order to receive disability pay, then the [w]ife's portion of the [h]usband's disposable retired pay shall be computed based on the amount that the [h]usband was to receive before any such waiver . . . occurred." The agreement further requires that husband pay wife directly any amount necessary to maintain her payment levels as if he had not elected disability pay. There is no suggestion that the PSA was anything less than a privately negotiated agreement. Unlike in *Howell*, in which a court was imposing an indemnification agreement upon the parties contrary to federal law, this is simply a private contract, determining

how the parties are to distribute husband's disability pay after it is received. *See Howell*, 581 U.S. at 219, 222-23. We thus hold that the indemnification clause here is enforceable.

Under the indemnification clause, husband must pay wife any amount she would have received as retirement pay but which she does not receive because of his waiver and election of disability pay. The PSA describes that baseline amount as 41% of husband's "disposable military retirement pay." The trial court found that, as of the time of its order, husband was receiving \$2,195 per month of concurrent retirement and disability pay ("CRDP"), which, absent husband's waiver, would have been treated as retirement pay. Because the indemnity clause requires husband to reimburse wife for any reduction in his retirement pay as a result of his waiver, the specific statutory treatment of the CRDP at issue, discussed at length by the trial court, is not relevant. The indemnity clause requires husband to pay wife the value of 41% of the CRDP payments because whether the CRDP is retirement pay or disability pay under the statute, wife would have received that portion of the payments absent husband's waiver.

From the CRDP, the court subtracted \$142.77 of survivor benefits coverage ("SBP") to reach \$2,052.33 of disposable retired pay. In her assignment of cross-error, wife asserts that the trial court erred in requiring her to pay for husband's survivor benefit plan when she was no longer listed as a beneficiary. Thus, she argues, the court erred in deducting the SBP from husband's disposable retired pay. But wife's assignment of cross-error was not timely filed in accordance with Rule 5A:25(d), and as such, we will not consider it.<sup>6</sup> *See Blue Ridge Poultry & Egg Co. v. Clark*, 211 Va. 139, 141 (1970) (refusing to consider an assignment of cross-error that was not timely filed in accordance with the rule). We thus rely on the trial court's factual

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<sup>6</sup> While ordinarily wife's claims would be treated separately, we address them here, as they are necessary to understanding the proper amount of payments due under the indemnification clause.

findings and calculations, which establish that husband's disposable retirement pay is \$2,052.33 per month. Wife is thus eligible under the PSA for 41% of \$2,052.33, or \$841.41 per month.

Though the trial court reached its conclusion without considering the indemnification clause, noting this Court's previous holding in *Yourko I*, the court nonetheless determined that husband owed wife the same amount after parsing the federal statutes and case law on military benefits. Because we hold that the indemnification clause is enforceable and applies here, we decline to address whether the trial court accurately interpreted and applied federal law in categorizing husband's retirement benefits. *See Commonwealth v. White*, 293 Va. 411, 419 (2017) (“[T]he doctrine of judicial restraint dictates that we decide cases ‘on the best and narrowest grounds available.’” (quoting *Commonwealth v. Swann*, 290 Va. 194, 196 (2015))). We therefore affirm the value of the trial court's award of payments to wife, albeit for a different reason than that reached by the trial court.

We note that because the trial court found the payments at issue to be “divisible and distributable CRDP under 10 U.S.C. § 1408,” the trial court's order may have been enforceable by direct payments from the federal agency. *See* 10 U.S.C. § 1408(d). The trial court also provided that husband was to supplement the agency's payments, as needed, to ensure that wife received the full value owed her under the PSA. Because we rest our holding on the alternative grounds that the indemnification clause requires such payments by husband regardless of the classification of the military benefits, on remand the trial court should amend its order to require husband to make the payments directly to wife, rather than via agency withholding.

### III. Spousal Support Arrearages

Finally, husband alleges that the trial court denied him due process and violated Rule 4:15 when it ruled on wife's motions to show cause without providing a hearing on the amount

of spousal support owed.<sup>7</sup> At the hearing on July 6, 2022, the trial court heard arguments on the military pay issues, indicated orally that it would rule in favor of husband, and continued the hearing until October 12, 2022, directing the parties to confer over whether wife would refund husband the amount he allegedly overpaid her for military benefits. At the July 6 hearing, wife's counsel asserted several times that the court also needed to address the show cause motion related to spousal support. Though the court did not directly respond to counsel's assertions, it implicitly postponed such discussion until the October hearing. Despite the court's oral indications that it would find for husband on the issue of military pay, the court's final order on August 5, 2022, found that husband in fact owed wife approximately \$841.41 each month in retirement pay, as discussed above. The trial court also found that husband owed wife \$11,400 in spousal support under the original divorce decree and declined to find husband in contempt. The trial court then cancelled the scheduled hearing. In its cancellation letter, the court asserted that "it previously had heard argument regarding the issue of the Show Cause, prior to the interlocutory order of July 12, 2021," yet at that time the issue of spousal support was not properly before the court and the record shows that the trial court declined to address the amount of arrearages due.<sup>8</sup>

Rule 4:15(d) provides that, except in limited cases, a trial court "will hear oral argument on a motion" at the request of any party.<sup>9</sup> *See also N. Va. Real Estate, Inc. v. Martins*, 283 Va.

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<sup>7</sup> This claim constitutes husband's assignment of error five. We also note here that husband withdrew his appeal as to assignment of error six in his opening brief.

<sup>8</sup> It appears that the relevant hearing in fact occurred on August 27, 2021, after the interlocutory order finding in wife's favor had been issued.

<sup>9</sup> The rule limits oral argument "on a motion for reconsideration or any motion in any case where a pro se incarcerated person is counsel of record" unless requested by the court. Rule 4:15(d). Neither exception is applicable here.

86, 119 (2012). Though a court may postpone a hearing in order to ensure fairness and allow for the filing of written briefs or limit the length of oral argument, a court may not altogether dispense with oral argument if requested by a party. *See* Rule 4:15(d). In this case, where the record includes no meaningful discussion of the amount of spousal support arrearages even over the course of multiple hearings and where both parties believed the issue was to be discussed in the October hearing, the trial court erred in ruling on the amount owed without holding a hearing on the issue. Further, given that the trial court’s finding establishes husband’s obligations, the violation of which may subject him to civil contempt, we cannot say that such error was harmless. *See* Code § 8.01-678. The absence of any hearing at all on the amount owed precludes us from finding that “the parties have had a fair trial on the merits and substantial justice has been reached.” *Id.* As a result, we reverse the trial court’s decision establishing the amount of spousal support arrearages owed and remand for a hearing on the issue, as requested by both parties before the court’s August 5, 2022 order.<sup>10</sup>

#### CONCLUSION

The trial court’s award of \$841.41 of husband’s military retirement benefits equal the amount that wife would have received absent husband’s waiver of his retirement pay. Thus, under the indemnification clause of the Lotts’ PSA, wife should receive \$841.41. Although the trial court reached the amount through different analysis, we affirm in part the trial court’s award under the right-result-different-reason doctrine and remand for the trial court to enter an order requiring husband to make these monthly payments. As to assignment of error five, we remand for the trial court to hold a hearing on the amount of spousal support arrearages due. Further,

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<sup>10</sup> Because we find that Rule 4:15(d) requires a hearing in this case, we decline to reach husband’s related due process claims. *See White*, 293 Va. at 419 (discussing judicial constraint).



because wife's assignment of cross-error was not timely filed, we do not consider it and make no ruling on it here.

*Affirmed in part, reversed in part, and remanded in part.*

# ATTACHMENT 4

Opinion of the Circuit Court of Newport  
News, Virginia,

July 12, 2021

## [Lott v. Lott](#)

Circuit Court of the City of Newport News, Virginia

July 12, 2021, Decided

Case Nos.: CL1403206V-04/CL1903206V-99

### Reporter

2021 Va. Cir. LEXIS 184 \*

MARIA V. LOTT, Plaintiff, v. WILLIAM R. LOTT, Defendant.

**Subsequent History:** Judgment entered by, Costs and fees proceeding at [Lott v. Lott, 2022 Va. Cir. LEXIS 109 \(Va. Cir. Ct., Aug. 5, 2022\)](#)

### Core Terms

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military retirement pay, parties, disability pay, Disability, military, service member, property settlement agreement, divorce, waived, retired pay, veteran, disability benefits, retirement benefits, federal law, military retirement, divorce decree, former spouse, state court, community property, disposable retired, attorney's fees, retirement pay, retirement, reduction, trial court, state law, indemnification, disposable

### Case Summary

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#### Overview

**HOLDINGS:** [1]-The parties agree that plaintiff was entitled to 41 percent of defendant's disposable military retirement pay pursuant to their property settlement agreement. Defendant was receiving Concurrent Retirement and Disability Pay (CRDP), which was considered military retirement pay and not disability pay pursuant to [10 U.S.C.S. § 1414](#).

CRDP is clearly divisible with a former spouse as military retirement pay. The court found that defendant was not receiving disability pay and his CRDP was divisible pursuant to the property settlement agreement.

### Outcome

Court determined amount of disposable military retirement pay defendant was required to pay plaintiff.

### LexisNexis® Headnotes

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Family  
Law > ... > Classification > Retirement Benefits > Military Benefits

Military & Veterans  
Law > Servicemembers > Administrative Discharge

Military & Veterans  
Law > Servicemembers > Retirement

Military & Veterans Law > ... > General Benefits > Compensation for Service Connected Death & Disability > Pensions

Military & Veterans  
Law > Servicemembers > Allowances &

Pay

**[HN1](#) Retirement Benefits, Military Benefits**

Service members who have served in the Armed Forces for a specific amount of time, usually at least 20 years, are eligible to receive retired pay at retirement. The amount the individual receives depends on rank and years served. 10 U.S.C.S. § 7311 (Army Retirement Benefits); 10 U.S.C.S. § 8323 (Navy and Marine Retirement Benefits); 10 U.S.C.S. § 9311 (Air Force and Space Force Retirement Benefits). Service members who have become disabled because of serving in the military are eligible for disability pay. 38 U.S.C.S. § 1114 (wartime disability); 38 U.S.C.S. § 1134 (peacetime disability). In order to prevent double dipping, a military retiree may receive disability benefits only to the extent that the service member waives a corresponding amount of the service member's military retirement pay. 38 U.S.C.S. § 5305.

Family Law > ... > Property  
Distribution > Characterization > Community Property

Military & Veterans  
Law > Servicemembers > Families

Family  
Law > ... > Classification > Retirement Benefits > Military Benefits

Family Law > ... > Property  
Distribution > Classification > Personal Injury Awards

Military & Veterans  
Law > Servicemembers > Retirement

**[HN2](#) Characterization, Community Property**

Congress enacted the Former Spouses' Protection Act, allowing state courts to use disposable retired pay or retainer pay as community property in a divorce. 10 U.S.C.S. § 1408. A court may treat disposable retired pay payable to a member either as property solely of the member or as property of the member and his spouse in accordance with the law of the jurisdiction of such court. 10 U.S.C.S. § 1408(c)(1). In Virginia, military retirement pay is considered marital property if it was earned while the couple was married. Va. Code Ann. § 20-107.3 (G)(1) (2019). Disposable retired pay is defined as the total monthly retired pay to which a member is entitled, minus some deductions. 10 U.S.C.S. § 1408(a)(4)(A). One of the deductions specifically listed is disability pay.

Family Law > ... > Property  
Distribution > Classification > Disability Benefits

Military & Veterans  
Law > Servicemembers > Families

Family  
Law > ... > Classification > Retirement Benefits > Military Benefits

Military & Veterans  
Law > Servicemembers > Retirement

Family Law > ... > Property  
Distribution > Equitable  
Distribution > Property Settlements

**[HN3](#) Classification, Disability Benefits**

The Virginia Court of Appeals specifically addressed the issue of whether parties may use a property settlement agreement to guarantee a certain level of income by providing for alternative payments to compensate for a reduction in payment level

based on a reduction in retirement benefits. The court held that such an arrangement does not offend the federal prohibition against a direct assignment of military disability pay by property settlement agreement, and federal law does not prevent a husband and wife from entering into an agreement to provide a set level of payment, the amount of which is determined by considering disability benefits as well as retirement benefits. Since 1992, this has been the law in Virginia.

Family Law > ... > Property  
Distribution > Characterization > Community Property

Military & Veterans  
Law > Servicemembers > Families

Real Property Law > ... > Present  
Estates > Marital Estates > Community Property

Family  
Law > ... > Classification > Retirement Benefits > Military Benefits

Military & Veterans  
Law > Servicemembers > Retirement

[HN4](#) **Characterization, Community Property**

Federal law completely preempts the States from treating waived military retirement pay as divisible community property.

Family  
Law > ... > Classification > Retirement Benefits > Military Benefits

Military & Veterans  
Law > Servicemembers > Retirement

[HN5](#) **Retirement Benefits, Military Benefits**

State courts cannot vest that which (under governing federal law) they lack the authority to give. The basic reasons for believing that Congress intended to exempt military retirement pay from state community property law apply a fortiori to disability pay. And those reasons apply with equal force to a veteran's post-divorce waiver to receive disability benefits to which he or she has become entitled. In other words, Congress intended that disability pay reach the veteran and no one else.

Family  
Law > ... > Classification > Retirement Benefits > Military Benefits

Military & Veterans  
Law > Servicemembers > Families

Military & Veterans  
Law > Servicemembers > Retirement

Military & Veterans Law > ... > General Benefits > Compensation for Service Connected Death & Disability > Pensions

[HN6](#) **Retirement Benefits, Military Benefits**

Trial courts remain free to take account of the contingency that some military retirement pay might be waived, or, take account of reductions in value when it calculates or recalculates the need for spousal support. 10 U.S.C.S. § 1408(e)(6).

Family  
Law > ... > Classification > Retirement Benefits > Military Benefits

Military & Veterans  
 Law > Servicemembers > Allowances & Pay

Military & Veterans  
 Law > Servicemembers > Retirement

Military & Veterans Law > ... > General Benefits > Compensation for Service Connected Death & Disability > Pensions

Military & Veterans  
 Law > Veterans > Department of Veterans Affairs

[HN7](#)  **Retirement Benefits, Military Benefits**

In order to apply the Howell v. Howell standard, courts must first classify what type of pay the service member is receiving according to federal law — VA Disability Compensation, Combat Related Special Compensation (CRSC), or Concurrent Retirement and Disability Pay (CRDP). Each of these pays have very diverse outcomes for military divorces. VA Disability Compensation is a tax-free monetary benefit paid to Veterans with disabilities that are the result of disease or injury incurred or aggravated during active military service. This type of compensation is disability pay. The other types of pay, CRSC and CRDP, were created by Congress to allow eligible military retirees to receive monthly entitlements in addition to retired pay. CRSC is a special compensation for combat-related disabilities and is not retired pay. 10 U.S.C.S. § 1413a(g). On the other hand, CRDP is for service-related disabilities and is a restoration of retired pay, subject to division with a former spouse. 10 U.S.C.S. § 1414.

Constitutional Law > Supremacy Clause > Federal Preemption

[HN8](#)  **Supremacy Clause, Federal Preemption**

Historically, state law controls domestic relations issues. However, Congress occasionally wades into these tumultuous waters. Whether federal law pre-empts state law is a question of law and reviewed de novo. Pre-emption may be either express or implied, and is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose. Even when Congress has stopped short of totally displacing state law in a specific area, state law is nevertheless preempted to the extent that it actually conflicts with federal law. Such a conflict arises when compliance with both federal and state regulations is a physical impossibility, or when state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. The relative importance to the State of its own law is not material when there is a conflict with a valid federal law, for the Framers of our Constitution provided that the federal law must prevail.

Family Law > ... > Property Distribution > Characterization > Community Property

Military & Veterans  
 Law > Servicemembers > Families

Family  
 Law > ... > Classification > Retirement Benefits > Military Benefits

Military & Veterans  
 Law > Servicemembers > Retirement

Military & Veterans Law > ... > General Benefits > Compensation for Service Connected Death & Disability > Pensions

## [HN9](#) [↓] **Characterization, Community Property**

A State may treat veterans' disposable retired pay as divisible property, i.e., community property divisible upon divorce. But the new Uniformed Services Former Spouses' Protection Act expressly excluded from its definition of disposable retired pay amounts deducted from that pay as a result of a waiver required by law in order to receive disability benefits. Thus, the Act provided a precise and limited grant of the power to divide federal military retirement pay. It did not grant the States the authority to treat total retired pay as community property. Rather, Congress excluded from its grant of authority the disability-related waived portion of military retirement pay. Hence, in respect to the waived portion of retirement pay, *McCarty v. McCarty*, with its rule of federal preemption, still applies. However, a court must first classify what type of pay a service member is receiving according to federal law: VA Disability Compensation, Combat Related Special Compensation (CRSC), or Concurrent Retirement and Disability Pay (CRDP). CRSC and CRDP were created by Congress to allow eligible military retirees to receive monthly entitlements in addition to retired pay. CRDP is for service-related disabilities and is not disability pay. Rather, it is a restoration of retired pay, subject to division with a former spouse. 10 U.S.C.S. § 1414.

Family Law > ... > Property  
Distribution > Classification > Disability  
Benefits

Military & Veterans  
Law > Servicemembers > Families

Family  
Law > ... > Classification > Retirement

Benefits > Military Benefits

Military & Veterans  
Law > Servicemembers > Retirement

Military & Veterans Law > ... > General  
Benefits > Compensation for Service  
Connected Death & Disability > Pensions

## [HN10](#) [↓] **Classification, Disability Benefits**

Concurrent Retirement and Disability Pay (CRDP) is considered military retirement pay and not disability pay pursuant to 10 U.S.C.S. § 1414. CRDP is clearly divisible with a former spouse as military retirement pay.

Civil Procedure > Appeals > Standards of  
Review > Abuse of Discretion

Family Law > Marital Termination &  
Spousal Support > Costs & Attorney Fees

Civil Procedure > Judicial  
Officers > Judges > Discretionary Powers

Family Law > Marital Termination &  
Spousal Support > Dissolution &  
Divorce > Procedures

## [HN11](#) [↓] **Standards of Review, Abuse of Discretion**

It is well established that an award of attorney's fees in divorce proceeding is a matter submitted to the trial court's sound discretion and is reviewable on appeal only for an abuse of discretion.

**Judges:** [\*1] Gary A. Mills, Judge.

**Opinion by:** Gary A. Mills

## **Opinion**

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## INTERLOCUTORY

### OPINION and ORDER

THIS matter came before the Court on Plaintiffs Motion to Show Cause and Defendant's Motion to Establish Arrears and/or Credits. Since these issues have been before this Court for over a year and contained very nuanced areas of law, the Court will give a history of the proceedings.

#### **I. Procedural History**

The Court first heard oral arguments on these matters on January 14, 2020. At this hearing, Defendant raised the issue of his military retirement payments as agreed in the parties' property settlement agreement ("PSA") in light of the United States Supreme Court case [\*Howell v. Howell\*, 137 S. Ct. 1400, 197 L. Ed. 2d 781 \(2017\)](#). The Court requested both sides to brief the issue. The Court held additional oral arguments on March 12, 2020, where the Court discussed at length with both parties the implications of *Howell*. After the March 12, 2020-hearing, the Court was ready to rule on the issue. However, Plaintiff requested that the Court stay the ruling in order to do further research, discovery, and search for an expert to inform the Court how the Defense Finance Accounting Services ("DFAS") calculates disability pay and retirement pay for military service members.

Around this same time, [\*2] COVID-19 and the pandemic began in the United States. On March 12, 2020, Governor Northam declared a State of Emergency in Virginia.<sup>1</sup> Additionally,

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<sup>1</sup>Press Release, Ralph Northam, Governor of Virginia, Governor Northam Declares State of Emergency, Outlines Additional Measures to Combat COVID-19 (March 12, 2020),

the Virginia Supreme Court issued a Declaration of Judicial Emergency on March 16, 2020.<sup>2</sup> Due to the pandemic and counsel's request, the Court delayed ruling on these matters. The Court received various letters from both parties over the course of the following months, updating the Court on research and discovery. The Court also heard various discovery motions for these issues during the interim months. On April 6, 2021, Plaintiff filed a Supplemental Brief in Support and Rule to Show Cause. The Court, by letter dated April 14, 2021, requested the parties to schedule a hearing by April 30, 2021, or the Court would rule on the issue. The parties requested a hearing. On June 22, 2021, the Court heard additional oral arguments from both parties about the status of the case and the law.

At the March 12, 2020-hearing, the Court originally thought *Howell* would dramatically alter Virginia precedent and the outcome of this case. However, after more research, discovery, and the June 22, 2021-hearing, the Court believes this case is not governed by [\*3] *Howell* and will explain why in the following pages.

#### **II. Legal Background**

[\*HN1\*](#)<sup>[↑]</sup> Service members who have served in the Armed Forces for a specific amount of time, usually at least twenty years, are eligible to receive retired pay at retirement. The amount the individual receives depends on rank and years served. [\*10 U.S.C. § 7311\*](#)

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<https://www.governor.virginia.gov/newsroom/all-releases/2020/march/headline-853537-en.html> (last visited July 9, 2021).

<sup>2</sup>Order from the Supreme Court of Virginia, In Re: Order Declaring a Judicial Emergency in Response to COVID-19 Emergency (March 16, 2020), [http://www.courts.state.va.us/news/items/covid/2020\\_0317\\_supreme\\_court\\_of\\_virginia.pdf](http://www.courts.state.va.us/news/items/covid/2020_0317_supreme_court_of_virginia.pdf) (last visited July 9, 2021).



(Army Retirement Benefits); [10 U.S.C. § 8323](#) (Navy and Marine Retirement Benefits); [10 U.S.C. § 9311](#) (Air Force and Space Force Retirement Benefits). Service members who have become disabled because of serving in the military are eligible for disability pay. [38 U.S.C. § 1114](#) (wartime disability); [38 U.S.C. § 1134](#) (peacetime disability). "In order to prevent double dipping, a military retiree may receive disability benefits only to the extent that [the service member] waives a corresponding amount of [the service member's] military retirement pay." [Mansell v. Mansell, 490 U.S. 581, 583, 109 S. Ct. 2023, 104 L. Ed. 2d 675 \(1989\); 38 U.S.C. § 5305.](#)<sup>3</sup>

The United States Supreme Court first addressed military retirement pay in [McCarty v. McCarty, 453 U.S. 210, 101 S. Ct. 2728, 69 L. Ed. 2d 589 \(1981\)](#). In that case, the United States Supreme Court held "that the federal statutes then governing military retirement pay prevented state courts from treating military retirement pay as community property" in a divorce. [Mansell, 490 U.S. at 584](#). They reasoned that Congress seemed to intend for military retirement pay to "reach the veteran and no one else," [\*4] but they acknowledged that Congress could change the statutory framework with legislation. *Id.*

[HN2](#)<sup>[↑]</sup> In response to *McCarty*, Congress enacted the [Former Spouses' Protection Act \(FSPA\)](#), allowing state courts to use "disposable retired pay" or "retainer pay" as community property in a divorce.<sup>4</sup>[Mansell, 490](#)

<sup>3</sup>For example, if a service member was receiving \$1800 in retirement pay and was found to be disabled at some point and qualified for \$500 in disability pay, the service member would waive \$500 of his or her retirement pay and receive \$1300 in retirement pay and \$500 in disability pay. The total would still be \$1800.

<sup>4</sup>The Former Spouses' Protection Act is now known as the [Uniformed Services Former Spouses' Protection Act \(USFSPA\)](#). It is located at [10 U.S.C. § 1408](#).

[U.S. at 584; 10 U.S.C. § 1408](#). "[A] court may treat disposable retired pay payable to a member . . . either as property solely of the member or as property of the member and his spouse in accordance with the law of the jurisdiction of such court."<sup>5</sup> [10 U.S.C. § 1408 \(c\)\(1\)](#). In Virginia, military retirement pay is considered marital property if it was earned while the couple was married. [Va. Code Ann. § 20-107.3 \(G\)\(1\)](#) (2019).

The United States Supreme Court then addressed in *Mansell* the question of "whether state courts, consistent with the federal Uniformed Services Former Spouses' Protection Act, (internal citation omitted), may treat as property divisible upon divorce military retirement pay waived by the retiree in order to receive veterans' disability benefits." [Mansell, 490 U.S. at 583](#). The Court held "that the Former Spouses' Protection Act 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." [Id. at 594-95](#). Justice O'Connor in her dissent [\*5] adequately opined, "The harsh reality of this holding is that former spouses . . . can, without their consent, be denied a fair share of their ex-spouse's military retirement pay simply because he elects to increase his after-tax income by converting a portion of that pay into disability benefits." [Id. at 595](#) (O'Connor, J., dissenting).

Based upon the holding in *Mansell*, many states began making distinctions between when a court ordered the military retirement to be divided as marital divisible property versus when the parties agreed to the division in a property settlement agreement, particularly

<sup>5</sup>"Disposable retired pay" is defined as "the total monthly retired pay to which a member is entitled," minus some deductions. [10 U.S.C. § 1408\(a\)\(4\)\(A\)](#). One of the deductions specifically listed is disability pay. *Id.*

when the parties used a guarantee or indemnification clause within the property settlement agreement. Virginia was one of these states. [Owen v. Owen, 14 Va. App. 623, 419 S.E.2d 267, 8 Va. Law Rep. 3441 \(1992\)](#); [McLellan v. McLellan, 33 Va. App. 376, 533 S.E.2d 635 \(2000\)](#).

In *Owen*, [HN3](#)<sup>↑</sup> the Virginia Court of Appeals specifically addressed the issue of "whether parties may use a property settlement agreement to guarantee a certain level of income by providing for alternative payments to compensate for a reduction in payment level based on a reduction in retirement benefits." [14 Va. App. at 626, 419 S.E.2d at 269](#). The Court held that "[s]uch an arrangement does not offend the federal prohibition against a direct assignment of military disability pay by property settlement agreement," [\[\\*6\]](#) *id.*, and held "that federal law does not prevent a husband and wife from entering into an agreement to provide a set level of payment, the amount of which is determined by considering disability benefits as well as retirement benefits," [id. at 628, 419 S.E.2d at 270](#). Since 1992, this has been the law in Virginia.

However, in 2017, the United States Supreme Court revisited the issue of division of military retirement pay after a veteran waived a portion of retirement pay in order to collect service-related disability pay. In *Howell v. Howell*, the parties divorced while the service member was still serving in the Air Force. [137 S. Ct. at 1404](#). Anticipating his future retirement, the trial court treated the service member's future retirement pay as community property. The trial court ordered him to pay 50% of his military retirement to his former spouse. *Id.* Several years after the service member had been receiving retirement pay, the Department of Veterans Affairs found the service member to be 20% disabled. He chose to waive the

retirement amount for his disability amount, which effectively lowered the amount of retirement pay he received each month and, thus, lowered his payment to his former spouse. *Id.* The former spouse asked [\[\\*7\]](#) the trial court to enforce the original decree, requiring the service member to "reimburse" or "restore" to her the original amount. The trial court held "that the original divorce decree had given Sandra a 'vested' interest in the prewaiver amount of that pay" and ordered the service member to pay the original amount, despite the reduction due to the disability pay. *Id.* On appeal, the Arizona Supreme Court affirmed the trial court's decision, relying on the fact that the service member had obtained a waiver for disability pay after the trial court's original order had been entered. *Id.*

The United States Supreme Court, however, disagreed. Justice Breyer, writing for a de facto unanimous court, found that the holding in *Mansell* still applied.<sup>6</sup> [HN4](#)<sup>↑</sup> "[F]ederal law completely pre-empts the States from treating waived military retirement pay as divisible community property." [Howell, 137 S. Ct. at 1405](#). The Court pointed out that several other state courts had focused on when the waiver had occurred.<sup>7</sup> However, the Court called this distinction only a "temporal difference." *Id.*

[T]he temporal difference highlights only that John's military retirement pay at the time it came to Sandra was subject to later

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<sup>6</sup> Justice Gorsuch took no part in the consideration or decision of the case. Oral arguments were held on March 20, 2017. Justice Gorsuch took his oath of office on April 10, 2017, and the *Howell* opinion was decided on May 15, 2017.

<sup>7</sup> The following cases were mentioned in the *Howell* case as decisions which showed state courts coming to different conclusions: [Glover v. Ranney, 314 P.3d 535 \(Alaska 2013\)](#); [Krapf v. Krapf, 439 Mass. 97, 786 N.E.2d 318 \(2003\)](#); [Johnson v. Johnson, 37 S.W.3d 892 \(Tenn. 2001\)](#); [Mallard v. Burkart, 95 So.3d 1264 \(Miss. 2012\)](#); and [Youngbluth v. Youngbluth, 188 Vt. 53, 6 A.3d 677 \(2010\)](#).

reduction (should [\*8] John exercise a waiver to receive disability benefits to which he is entitled). The state court did not extinguish (and most likely would not have had the legal power to extinguish) that future contingency. The existence of that contingency meant that the value of Sandra's share of military retirement pay was possibly worth less—perhaps less than Sandra and others thought—at the time of the divorce. So too is an ownership interest in property (say, A's property interest in Blackacre) worth less if it is subject to defeasance or termination upon the occurrence of a later event (say, B's death). (citation omitted).

*Id.* The Court further stated that the former spouse's interest in the military retirement pay was "at most, contingent, . . . ." [Id. at 1406](#). Additionally, the Court indicated that requiring an individual to "reimburse" or "indemnify" a party due to the disability election rather than outright demand a party to pay the military retirement is "semantic and nothing more." *Id.* [HN5](#) [↑] "State courts cannot 'vest' that which (under governing federal law) they lack the authority to give." [Id. at 1405](#).

The basic reasons *McCarthy* gave for believing that Congress intended to exempt military retirement pay from state [\*9] community property law apply a *fortiori* to disability pay. (citation omitted). And those reasons apply with equal force to a veteran's postdivorce waiver to receive disability benefits to which he or she has become entitled.

*Id.* In other words, Congress intended that disability pay reach the veteran and no one else.

The Court acknowledged the "hardship that congressional pre-emption can sometimes work on divorcing spouses." [Id. at 1406](#).

However, it expressed that [HN6](#) [↑] trial courts "remain[] free to take account of the contingency that some military retirement pay might be waived, or, . . . take account of reductions in value when it calculates or recalculates the need for spousal support." *Id.* (citing [Rose v. Rose, 481 U.S. 619, 630-34, and n. 6, 107 S. Ct. 2029, 95 L.Ed.2d 599 \(1987\); 10 U.S.C. §1408\(e\)\(6\)](#)).

Since *Howell*, states have been grappling with its influence. As many states have acknowledged, the United States Supreme Court did not explicitly deal with the issue of guarantee or indemnification clauses in property settlement agreements, nor did it explicitly address the issue of res judicata. However, states have taken the "indemnify" and "vested interest" language in *Howell* and have applied it to bargained-for terms of guarantee clauses and indemnification clauses in property settlement [\*10] agreements. See [Vlach v. Vlach, 556 S.W.3d 219, 224-25 \(Tenn. Ct. App. 2017\)](#) ("[I]n *Howell*, the Supreme Court held that both the vested interest approach and the reimbursement or indemnification approach were impermissible."); [Mattson v. Mattson, 903 N.W.2d 233, 241 \(Minn. Ct. App. 2017\)](#) ("*Howell* effectively overruled cases relying on the sanctity of contract to escape federal preemption.").

[HN7](#) [↑] In order to apply the *Howell* standard, courts must first classify what type of pay the service member is receiving according to federal law — VA Disability Compensation, Combat Related Special Compensation ("CRSC"), or Concurrent Retirement and Disability Pay ("CRDP"). Each of these pays have very diverse outcomes for military divorces. VA Disability Compensation "is a tax-free monetary benefit paid to Veterans with disabilities that are the result of disease or injury incurred or aggravated during active

military service.<sup>8</sup> This type of compensation is disability pay.<sup>9</sup> The other types of pay, CRSC and CRDP, were "created by Congress to allow eligible military retirees to receive monthly entitlements in addition to retired pay."<sup>10</sup> CRSC is a special compensation for combat-related disabilities and is not retired pay. [10 U.S.C. § 1413a\(g\)](#) ("Payments under this section are not retired pay."). On the other hand, CRDP is for service-related disabilities [\*11] and is a restoration of retired pay, subject to division with a former spouse. [10 U.S.C. § 1414.](#)<sup>11</sup>

### III. Factual Background

Maria Lott ("Plaintiff") and William Lott ("Defendant") were lawfully married on December 31, 1996, in Newport News, Virginia. Final Divorce Decree, 1. They had one child together, William E. Lott, born April

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<sup>8</sup> *Compensation*, U.S. Dep't of Veteran Affairs, <https://www.benefits.va.gov/compensation/> (last visited July 9, 2021). More information about this compensation can be found at [38 U.S.C. § 1101 et seq.](#)

<sup>9</sup> *Disability Entitlements*, Defense Finance and Accounting Service, <https://www.dfas.mil/RetiredMilitary/disabilityNA-Waiver-and-Retired-Pay-CRDP-CRSC/> (last visited July 9, 2021).

<sup>10</sup> *Disability Entitlements*, Defense Finance and Accounting Service, [Disability Entitlements, https://www.dfas.mil/RetiredMilitary/disability/payment/](https://www.dfas.mil/RetiredMilitary/disability/payment/) (last visited July 9, 2021).

<sup>11</sup> *Disability Entitlements*, Defense Finance and Accounting Service, <https://www.dfas.mil/RetiredMilitary/disability/comparison/> (last visited July 9, 2021).

*Military Pension Division: The "Evil Twins" — CRDP and CRSC*, American Bar Association, [https://www.americanbar.org/content/dam/aba/administrative/family\\_law/committees/military/mpd\\_crdp\\_cpsc.pdf](https://www.americanbar.org/content/dam/aba/administrative/family_law/committees/military/mpd_crdp_cpsc.pdf) (last visited July 9, 2021). The Court found this secondary source from the ABA to be extremely helpful in explaining the difference between CRDP and CRSC.

23, 1998. *Id.* During their marriage, Defendant was a member of the United States Navy, entering active duty on December 12, 1994, and receiving an honorable discharge on December 31, 2014.<sup>12</sup> On or about May 1, 2013, the parties separated with the intent to terminate the marriage. Final Divorce Decree, 2.

On September 27, 2014, the parties entered into a property settlement agreement ("PSA"). PSA, 11. One of the terms of the PSA included Defendant's military retirement. *Id.* at 4-6. According to the PSA, Plaintiff was entitled to 41% of Defendant's disposable military retirement pay. *Id.* at 4-5.

Within this PSA, various paragraphs under a section entitled "Retirement Benefits" reinforced the idea of indemnification or reimbursement. For example, [\*12]

Husband hereby guarantees to the wife that he shall not take any action, by V.A. waiver or otherwise, so as to defeat or reduce the Wife's right to the fractional interest in monthly retirement benefits set forth herein. The Husband further covenants and agrees to indemnify and hold the Wife harmless in the event of such action. . . .

If the Husband is allowed to waive any portion of his retired pay in order to receive disability pay, then the Wife's portion of the Husband's disposable retired pay shall be computed based on the amount that the Husband was to receive before any such waiver was allowed or occurred. The Husband shall pay to the Wife directly any sums necessary in order that the Wife will not suffer any reduction in the amount due her as a result of the Husband's waiver in

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<sup>12</sup>Letter from Cheryl J. Rawls, Assistant Deputy Under Secretary for Field Operations, Dep't of Veterans Affairs, to Bill R. Lott (February 24, 2020) (on file with court).



order to receive disability pay; and if the amount DFAS pays to the Wife directly is reduced by any liens, garnishments, or attachments as a result of the Husband's financial obligations to third parties, the Husband shall pay the difference directly to the Wife. The Husband shall not merge his military retirement into any other form of retirement if this in any way reduces or delays the Wife's share of [\*13] his disposable retired pay.

PSA, 5-6.

This PSA was "incorporated, ratified, and confirmed, but not merged" into a Final Divorce Decree A Vinculo Matrimonii on December 1, 2016. Final Divorce Decree, 2, 9. This Court entered a Military Pension Division Order on December 7, 2016, further establishing the parties' responsibilities and interests in such military retirement benefits. Military Pension Div. Order, 4-10. The parties agreed that Defendant owed Plaintiff \$778.00/month for her forty-one (41%) portion of Defendant's military retirement pay. October 14, 2016 Order, 3.

At some point, the military determined that Defendant was disabled, and Defendant began receiving service-related disability pay, which according to a letter from DFAS is Concurrent Retirement Disability Pay ("CRDP"),<sup>13</sup> Defendant proffered that he did not voluntarily elect to receive the pay.<sup>14</sup> After

<sup>13</sup> Letter from D.J. Cloud-Steele, Paralegal Specialist, Defense Finance and Accounting Services, to Bill R. Lott (June 26, 2019) (on file with Court as part of the record).

<sup>14</sup> At the March 12, 2020-hearing, both parties proffered the percentage of Defendant's disability and when the waiver occurred. However, neither party could agree on the amount of disability nor when the waiver occurred. According to one exhibit the Court received, Defendant is 40% disabled. Summary of Retired Pay Account from Retired Pay Department to Bill R. Lott 1 (January 20, 2015) (on file with Court). However, at the March 12, 2020-hearing, Defendant claimed to be 100% disabled.

all the deductions, DFAS determined that Defendant's disposable pay was \$428.00.<sup>15</sup> Based upon this amount, Plaintiff had been receiving \$175.48, forty-one percent of \$428.00. <sup>16</sup> Due to the Court Order requiring \$778.00/month, Defendant had been supplementing the amount each month with a check for the difference.

In June 2019, Plaintiff [\*14] filed a Show Cause against Defendant for arrears of various support payments and failure to comply with the Final Divorce Decree. At the hearing for the Show Cause, Defendant paid Plaintiff a lump sum of \$4,586.35 for the arrears. At that hearing, Defendant did not make any arguments about *Howell* and its application to this case.

On October 3, 2019, Defendant filed a Motion to Establish Arrears and/or Credits. On October 28, 2019, Plaintiff filed another Show Cause against Defendant for arrears and violating this Court's Final Divorce Decree. The Court heard oral arguments on these motions on January 14, 2020, and Defendant raised the issue of the military retirement payments in light of *Howell* for the first time.

#### IV. Legal Standard

[HN8](#)<sup>↑</sup> Historically, state law controls domestic relations issues. [Hisquierdo v. Hisquierdo, 439 U.S. 572, 581, 99 S. Ct. 802, 59 L. Ed. 2d 1 \(1979\)](#). However, Congress occasionally wades into these tumultuous waters. Whether federal law pre-empts state law is a question of law and reviewed de novo.

<sup>15</sup> Letter from D.J. Cloud-Steele, Paralegal Specialist, Defense Finance and Accounting Service (June 26, 2019) (on file with Court).

<sup>16</sup> Since Plaintiff and Defendant had been married for over 10 years, DFAS has been sending the payments directly to Plaintiff per the requirements of the statute. [10 U.S.C. § 1408](#).

[Maretta v. Hillman, 283 Va. 34, 40, 722 S.E.2d 32, 34 \(2012\).](#)

Pre-emption may be either express or implied, and is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose. (internal quotation marks and citation omitted). Even when [\*15] Congress has stopped short of totally displacing state law in a specific area, state law is nevertheless preempted to the extent that it actually conflicts with federal law. Such a conflict arises when compliance with both federal and state regulations is a physical impossibility, or when state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. (internal citation marks and citation omitted).

[Maretta, 283 Va. at 40.](#) "[T]he relative importance to the State of its own law is not material when there is a conflict with a valid federal law, for the Framers of our Constitution provided that the federal law must prevail." [Ridgway v. Ridgway, 454 U.S. 46, 54, 102 S. Ct. 49, 70 L. Ed. 2d 39 \(1981\)](#) (internal quotation marks and citation omitted).

[HN9](#) [↑] "Congress wrote that a State may treat veterans' disposable retired pay' as divisible property, i.e., community property divisible upon divorce." [Howell, 137 S. Ct. at 1403](#) (citing [10 U.S.C. § 1408\(c\)\(1\)](#)). "But the new Act expressly excluded from its definition of 'disposable retired pay' amounts deducted from that pay 'as a result of a waiver . . . required by law in order to receive' disability benefits." *Id.* (citing [10 U.S.C. § 1408\(a\)\(4\)\(A\)\(iii\)](#)). Thus, the

Act provided a "precise and limited" grant of the power to divide federal military retirement pay. (citation omitted). [\*16] It

did not "grant" the States "the authority to treat total retired pay as community property." (citation omitted). Rather, Congress excluded from its grant of authority the disability-related waived portion of military retirement pay. Hence, in respect to the waived portion of retirement pay, *McCarty*, with its rule of federal pre-emption, still applies. (citation omitted).

[Howell, 137 S.Ct. at 1404.](#)

However, as previously stated, a court must first classify what type of pay a service member is receiving according to federal law: VA Disability Compensation, CRSC, or CRDP. CRSC and CRDP were "created by Congress to allow eligible military retirees to receive monthly entitlements in addition to retired pay."<sup>17</sup> CRDP is for service-related disabilities and is not disability pay. Rather, it is a restoration of retired pay, subject to division with a former spouse. [10 U.S.C. § 1414](#).<sup>18</sup>

## V. Analysis

### **Property Settlement Agreement**

In this case, the parties agree that Plaintiff is entitled to 41% of Defendant's disposable military retirement pay pursuant to the PSA. According to the letter the parties submitted to the Court from DFAS, Defendant is receiving [HN10](#) [↑] CRDP, which is considered military retirement [\*17] pay and not disability pay

<sup>17</sup> *Disability Entitlements*, Defense Finance and Accounting Service, <https://www.dfas.mil/RetiredMilitary/disability/payment/> (last visited July 9, 2021).

<sup>18</sup> *Disability Entitlements*, Defense Finance and Accounting Service, <https://www.dfas.mil/RetiredMilitary/disability/comparison/> (last visited July 9, 2021).

pursuant to [10 U.S.C. § 1414](#).<sup>19</sup> CRDP is clearly divisible with a former spouse as military retirement pay. Thus, the Court finds that Defendant is not receiving disability pay and *Howell* does not control this case. Defendant's CRDP is divisible pursuant to the property settlement agreement.

The issue then becomes how much CRDP is Defendant receiving in order for the parties to determine how much of Defendant's disposable military retirement pay Plaintiff is entitled to receive. Plaintiffs counsel submitted an exhibit, stating the amount she believes her client is owed. Defense counsel requested time to review the exhibit and conduct his own investigation. According to the American Bar Association document *Military Pension Division: The "Evil Twins" — CRDP and CRSC*, the parties have the ability to request that information and are given an address and contact information within DFAS. At the June 22, 2021-hearing, the Court gave the information to the parties in order for the parties to contact DFAS and obtain the information needed in order to submit a number to the court. If the parties cannot agree on a number, the parties have selected August 27, 2021, to hold an evidentiary [\*18] hearing to determine the correct amount.

## VI. Other Issues Presented to the Court

### ***Attorney's Fees for these Proceedings***

A second issue presented to the Court was the issue of attorney's fees. The PSA does have provisions regarding attorney's fees.

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<sup>19</sup> Exhibit A in Plaintiff's Supplement Brief shows that Defendant is not receiving a VA Waiver on his Retiree Account Statement. Furthermore, the Message Section states that Defendant's CRDP amount is \$2,195.00.

[HN11](#)[↑] "It is well established that an award of attorney's fees in divorce proceeding is a matter submitted to the trial court's sound discretion and is reviewable on appeal only for an abuse of discretion." [Alphin v. Alphin, 15 Va. App. 395, 406, 424 S.E.2d 572, 578, 9 Va. Law Rep. 624 \(1992\)](#) (internal quotation marks and citations omitted). The Court reserves its ruling on attorney's fees until a final order has been entered for these matters.

## VII. Conclusion

Based upon the above reasons, the Court

- 1) holds that this case is not governed by *Howell*;
- 2) finds that Defendant is required to pay 41% of his disposable military retirement pay to Plaintiff;
- 3) finds that the parties will present to the Court the correct amount Defendant owes to Plaintiff by Friday, August 27, 2021, or an evidentiary hearing will be held on that date to determine the correct amount;
- 4) orders that the parties present the Court with a hearing notebook by Friday, August 13, 2020, if the parties proceed with an evidentiary hearing. The notebooks should contain sections [\*19] addressing contested payments, uncontested payments, and all support documents. If a party does not have evidence about a particular payment within the hearing notebook, that party will be preclude from submitting evidence on that issue;
- 5) orders Defendant to pay a lump sum of \$10,000 to Plaintiff within 10 days from the day this order is entered; and
- 6) reserves ruling on the issue of attorney's fees.

The Clerk is **DIRECTED** to mail attested copies of this order to all interested parties.

**ENTERED this 12 day of July, 2021.**

**/s/ Gary A. Mills**

**Gary A. Mills, Judge**

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End of Document



# ATTACHMENT 5

Petitioner's Redacted Benefits and Status  
Summary Letter from the Department of  
Veterans Affairs,

February 24, 2025



## DEPARTMENT OF VETERANS AFFAIRS

February 24, 2025

Bill Ronald Lott  
[REDACTED]

In Reply Refer to:  
[REDACTED]

Dear Mr. Lott:

This letter is a summary of benefits you currently receive from the Department of Veterans Affairs (VA). We are providing this letter to disabled Veterans to use in applying for benefits such as state or local property or vehicle tax relief, civil service preference, to obtain housing entitlements, free or reduced state park annual memberships, or any other program or entitlement in which verification of VA benefits is required. Please safeguard this important document. This letter is considered an official record of your VA entitlement.

Our records contain the following information:

### Personal Claim Information

Your VA claim number is: [REDACTED]

You are the Veteran.

### Military Information

Your most recent, verified periods of service (up to three) include:

Branch of Service	Character of Service	Entered Active Duty	Released/Discharged
Navy	Honorable	December 12, 1994	December 31, 2014

(There may be additional periods of service not listed above.)

### VA Benefit Information

You have one or more service-connected disabilities:	Yes
Your combined service-connected evaluation is:	100%
You are considered to be totally and permanently disabled due solely to your service-connected disabilities:	Yes
The effective date of when you became totally and permanently disabled due to your service-connected disabilities:	April 25, 2017

You should contact your state or local office of Veterans' affairs for information on any tax, license, or fee-related

benefits for which you may be eligible. State offices of Veterans' affairs are available at <http://www.va.gov/statedva.htm>.

## How You Can Contact Us

- If you need general information about benefits and eligibility, please visit us at <https://www.ebenefits.va.gov> or <http://www.va.gov>.
- Call us at 1-800-827-1000. If you use a Telecommunications Device for the Deaf (TDD), the number is 1-800-829-4833.
- Ask a question on the Internet at <https://www.va.gov/contact-us>.

Sincerely Yours,

**Regional Office Director**

