

Military Disability Pay: It's not marital property but it is income

In an opinion issued yesterday, the NC Court of Appeals reaffirmed that while military disability pay cannot be distributed by a court in equitable distribution, it is income that can be considered when the trial court is looking for a source of payment for a distributive award. [Lesh v. Lesh, NC App \(Jan. 16, 2018\)](#). In reaching this decision, the court rejected the argument that this rule was changed by the recent decision by the US Supreme Court in [Howell v. Howell, 137 S. Ct. 1400 \(2017\)](#), wherein the Court reiterated that federal law prohibits the distribution of military disability in equitable distribution.

[Lesh](#) and [Howell](#) present a good opportunity to review the law regarding military disability pay in domestic relations cases.

Military Disability Pay Cannot be Distributed in ED

The federal Uniformed Services Former Spouses' Protection Act authorizes states to treat veterans' "disposable retired pay" as property divisible upon divorce, [10 U. S. C. §1408](#), but the definition of disposable retired pay does not include disability benefits. Therefore, federal law prohibits the distribution of military disability benefits in equitable distribution proceedings. *Mansell v. Mansell*, 490 US 581 (1989). Military disability pay is the separate property of the veteran. [Lesh](#); *Hillard v. Hillard*, 223 N.C. App. 20 (2012); *Halstead v. Holstead*, 164 NC App 543 (2004); *Bishop v. Bishop*, 113 NC App 725 (1994).

Retirement Can Be Converted to Disability and There's Not Much A Trial Court Can Do About It

Unless a retired service member qualifies for concurrent pay pursuant to [10 U.S.C. § 1414\(a\)\(1\)](#) (most retirees with at least 20 years qualifying service and a service-related disability of at least 50%), a service member cannot receive both disability pay and retirement pay. This means that many service members must waive retirement pay in order to receive disability pay. Many disabled service members decide to "convert" their retirement pay to disability pay when they become eligible to do so because disability pay is not taxed and cannot be distributed in divorce proceedings.

A service member can waive retirement for disability at any point in time after a service member becomes entitled to receive disability pay. If the conversion occurs before a court enters an order for equitable distribution, the court can consider the disability payments as a distributional factor but cannot give dollar-for-dollar "credit" in distribution to make up for any retirement pay lost due to conversion to disability. *Halstead v. Halstead*, 164 N.C. App. 543(2004).

A service member retains the right to convert retirement to disability even after a state court has awarded a portion of the member's retirement pay to the member's former spouse in an equitable distribution judgment. When this conversion occurs, the amount of retirement pay received by the former spouse of the service member generally is reduced. A trial court may not prohibit a service member from converting retirement pay to disability in the future. *Cunningham v. Cunningham*, 171 N.C. App. 550, 558 (2005).

However, North Carolina appellate courts as well as appellate courts in other states have held that federal law does not restrict the ability of a state court to enforce a judgment dividing military retirement pay entered before a service member converted the retirement pay to disability pay. Therefore, amendments to retirement distribution orders made by trial courts to "effectuate" the terms of the original court order have been upheld. In *White v. White*, 152 N.C. App. 588 (2002), the court of appeals held that the trial court had authority to hear wife's motion to amend a qualified domestic relations order (QDRO) to seek an increase in her share of husband's remaining retired pay to offset the amount of retirement waived by the serviceman. And, in *Hillard v. Hillard*, 223 N.C. App. 20, 24 (2012), the court of appeals affirmed the trial court's decision to amend the ED order after the service member waived retired pay to receive disability pay to require the service member to pay wife "the portion of his retirement required by the previous order." According to the court of appeals, this order did not impermissibly distribute disability pay, as the service member could fund payments from source of his choice.

The recent decision by the US Supreme Court in *Howell v. Howell* rejected this reasoning by state courts and effectively overruled both *White* and *Hillard*.

[Howell v. Howell](#)

An Arizona trial court awarded Sandra Howell 50% of John Howell's future Air Force retirement pay, which she began to receive when John retired the following year. About 13 years later, John elected to waive about \$250 of his retirement pay per month in order to receive that amount in disability pay. This election resulted in a reduction in the value of Sandra's 50% share of his retirement pay. Sandra petitioned the Arizona court to enforce the original divorce decree and restore the value of her share of John's total retirement pay. The state court held that the original divorce decree gave Sandra a vested interest in the pre-waiver amount of John's retirement pay and ordered John to ensure that she receive her full 50% without regard for the disability waiver. The Arizona Supreme Court affirmed, holding that federal law did not pre-empt the family court's order.

The Supreme Court reversed and held that a state court may not order a veteran to indemnify a divorced spouse for the reduction in the value of the divorced spouse's portion of the veteran's retirement pay caused by the veteran's waiver of retirement pay to receive disability benefits. The Court held that federal law completely prohibits states courts from treating waived military retirement pay as divisible property because the waived retirement becomes disability pay. The fact

that the waiver occurred after entry of the division order and the state court was attempting to “indemnify” or “reimburse” Sandra for the “vested right” she received when the division order was entered did not change the basic nature of the trial court order. According to the Court, a state court cannot “vest [a right in a party] which [that court] lack(s) the authority to give.”

The Court explained that since there is nothing a state court can do to prohibit the conversion or to compensate the non-military spouse after a conversion, the contingency of a conversion is something a state court should consider when valuing the retirement account in the property distribution proceeding. In addition, the court suggested that the loss to the non-military spouse resulting from a conversion may be the basis for a reconsideration of alimony.

But Disability Pay is Income

In [Lesh](#), the trial court classified husband’s military disability pay as separate property but considered the disability pay as a source of income available to husband to pay a distributive award. Husband argued on appeal that this judgment violated [Howell](#) because it effectively required him to “reimburse” or “indemnify” wife for the retirement she lost when he accepted the disability pay.

The court of appeals disagreed, pointing to another decision by the US Supreme Court. In *Rose v. Rose*, 481 US 619 (1987), the Court explained that the fact that disability pay must be classified as separate property does not mean that it is not income to the receiving party and held that a veteran’s disability income could be considered as a source of income from which he could pay his child support obligation. According to the Court, there is nothing in federal law indicating “that a veteran’s disability benefits are provided solely for that veteran’s support.” See also *Comstock v. Comstock*, 240 NC App 304 (2015)(U.S. Trust IRA was separate property due to federal law but was a liquid asset the court could consider as a source of payment of a distributive award); and *Halstead v. Halstead*, 164 N.C. App. 543(2004)(military disability pay is separate property that can be considered as a distribution factor in ED proceeding).