

Military Pension Division: The “Evil Twins” – Concurrent Retirement and Disability Pay (CRDP) and Combat Related Special Compensation (CRSC)

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Introduction²

The law concerning waiver of military retired pay in exchange for Department of Veterans Affairs (VA) disability compensation allows a retiree to elect an amount of tax-free disability compensation only if he gives up the same amount of retired pay.³ Taking this option is always beneficial to the military retiree, since it yields an increase in net income because of the non-taxable aspect of VA disability compensation.

This election, however, wreaks havoc when the retiree’s pension is subject to a garnishment order for part of “disposable retired pay” in favor of a former spouse due to separation or divorce. As soon as the election takes place at the Defense Financing and Accounting Service (DFAS), the former spouse usually sees her share of divisible retired pay decrease, sometimes substantially. Thus if the military retiree, John Doe, had disposable retired pay (without disability) of \$1,500 per month and his disability were evaluated as equivalent to \$1,000 per month in VA benefits, he could waive the same amount of taxable longevity pension in order to receive this amount tax-free. His monthly benefit would still total \$1,500, but only \$500 of this would be subject to taxes if he makes this choice.

In addition, only this \$500 remaining from his military pension would be subject to division with Mary Doe, his ex-wife. The Uniformed Services Former Spouses’ Protection Act exempts VA disability compensation from the definition of “disposable retired pay.”⁴ So if the military pension division order had given Mary 40% of John’s disposable retired pay, her pre-waiver share would have been \$600 a month (40% X \$1,500), but her post-waiver amount would be only \$200 (40% X \$500). When rent or mortgage payments depend on the continued receipt of a stable, predictable amount of divided military retired pay, such a VA waiver by the military retiree can be catastrophic.

Congressional Developments Since 2003—Back to the Beginning

In 2003, Congress passed legislation taking effect 1 January 2004 to allow concurrent receipt of both forms of payments—retired pay and disability benefits—for certain eligible retirees. The restoration of retired pay is known as Concurrent Retirement and Disability Pay (CRDP).⁵

Also beginning in 2003, Congress made a new form of special compensation available to a limited number of retirees. The benefits and definitions were expanded substantially in 2004. Called Combat-Related Special Compensation (CRSC), these payments may now, under the 2004 revised rules, be made to those retirees with a disability of at least 10% directly related to the award of the Purple Heart decoration, or else a combat-related disability rated at least 10% (such as hazardous duty or training for combat).⁶ Combat Related Special Compensation regulations are contained in the Defense Financial Management Regulations (DODFMR).⁷

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³ 38 U.S.C. § 3105 (LEXIS 2006).

⁴ 10 U.S.C. § 1408(c)(4)(C).

⁵ 10 U.S.C.S. § 1414 (LEXIS 2006).

⁶ *Id.* § 1413a.

⁷ 6 DEP’T OF DEFENSE, FINANCIAL MANAGEMENT REGULATION secs. 6301-6310 (31 May 2006).

Both of these provisions affect the division of military retired pay. Both are complex and misunderstood—if not unknown—by civilian practitioners as well as many judge advocates. This article examines how they work.

CRDP Explained

For those who have at least twenty years of qualifying military service and a VA disability rating of at least 50%, CRDP authorizes a ten-year phased elimination of the VA offset. Put in positive terms, this means—unless the disability rating is 100%—a ten-year period in which the retiree will gain back every dollar of the waived retired pay that he exchanged for VA disability compensation. The disability does *not* have to be combat-related. Concurrent Retirement and Disability Pay is the return of waived pension payments, so it has the attributes of those pension payments. It is taxable compensation. Concurrent Retirement and Disability Pay also is divisible with a former spouse under a military pension division order.

The eligible retiree will see his retirement pay increase each year until the phase-in period is complete in 2014, when the retiree will be receiving an additional amount that is equal to the amount of retired pay waived. The period of phase-in began in 2004, with the following initial amounts provided in 2004 as additional military retired pay in each month's retiree payment:

Disability % Rating	2004 Amount
100%	\$750
90%	\$500
80%	\$350
70%	\$250
60%	\$125
50%	\$100

Table 1⁸

Note that the phase-in is “front-loaded,” not just 10% a year over ten years. In 2005, the individual receives the amount shown above plus 10% of the difference between his remaining retired pay waiver and the amount shown above for 2004. In 2006 he gets the amount he received in 2005, plus 20% of the difference between his remaining retired pay waiver and the amount shown above for 2004. Payments increase the same way until full restoration in 2014.⁹ Those retiring after 2004 but before 2014 receive a larger initial monthly increment of CRDP than shown in the table above due to the schedule of additional amounts paid between 2004 and retirement.

How Much CRDP? An Example

To illustrate, use the hypothetical facts in our scenario above with John Doe entitled to \$1,500 per month retired pay. Ignore any annual cost-of-living adjustments (COLAs). John has waived \$1,000 of his retired pay due to VA disability compensation. If his disability rating were 60%, here is how his payments would grow:

- In 2003, he was receiving \$500 retired pay and \$1,000 VA disability compensation.
- In 2004, he receives total retired pay of \$625 (\$500 + \$125, the 2004 amount for a 60% disability rating shown above). There is still \$875 remaining in retired pay waiver (\$1,000 - \$125). He still receives \$1,000 in VA compensation.
- In 2005, he receives \$700 in total retired pay. This is made up of \$625, the prior year amount, plus 10% of the difference between \$875, his remaining retired pay waiver amount, and \$125, the 2004 amount shown on the table above. (Let's check: $\$875 - 125 = \750 . $\$750 \times 10\% = \75 . $\$625 + \$75 = \$700$). In addition, he is still receiving his VA payment of \$1,000 a month.
- This process continues onward until full restoration of the waived \$1,000 at 2014.

⁸ 10 U.S.C. § 1414(c).

⁹ *Id.*

Verifying Receipt of CRDP

Concurrent Retirement and Disability Pay increases the pension of the retiree effective January of each year, with the payment arriving on or about 1 February. How will you know if John is receiving CRDP? Read the comment at the "MESSAGE SECTION" on page 2 of his retiree account statement (RAS), Form DFAS-CL 7220/148 (see Attachment 1). The message will appear as follows:

MESSAGE SECTION
BASED ON INFORMATION RECEIVED FROM THE VA, YOUR CRDP AMOUNT IS \$____.

If the individual will not voluntarily produce his RAS, which is usually sent to him by e-mail from DFAS every time there is a change of pay and is also posted on a secure DFAS website (see below), counsel may resort to formal discovery procedures if the matter is in litigation. Defense Finance and Accounting Service will honor a request for documents so long as it is in the form of a court order or a subpoena signed by a judge.

Don't Take "NO" for an Answer

Sometimes the attorney for the retiree will disavow any knowledge of the existence of an RAS, or the retiree will claim that it was lost, misplaced, or "floated away in that big flood last month." You should know that all military retirees are eligible for a free "myPay" account on DFAS website. This secure website is located at <https://mypay.dfas.mil>. Once the retiree has accessed the website, he may obtain his current RAS after he enters his "LogIn ID" and password by going to the screen marked "Your Military Retiree Pay Account" and selecting "Retiree Account Statement (RAS)." Retired Phoenix attorney Mike McCarthy, a retired Air Force Reserve brigadier general, says that he has had some success obtaining a court order requiring both attorneys and the retiree to use a computer to access the current or past RAS from the *myPay* website.

Retirees receive the following e-mail message at the end of each December (a fictitious ending with X's is shown below):

Your electronic W2 for 2005 is available on myPay at <https://mypay.dfas.mil/mypay.aspx?xxxxxXXX~XXXXX>

The Defense Finance and Accounting Service (DFAS) implemented the myPay web-based system in March 2000. myPay delivers pay information and lets you process pay-related transactions timely, safely and securely. The Web-based system reduces the risks of identity theft associated with postal delivery by allowing members to access electronic W-2, LES and other financial information. myPay matches industry standards for the highest level of encryption and security to protect myPay users.

If you do not have a PIN for accessing myPay, you can obtain one via email by clicking on the New PIN button on the myPay website at the web address shown above. A temporary PIN will be emailed to your official email address. If you have any questions concerning myPay, please call our contact center toll free at 1-800-390-2348. If the information posted to your W-2 is incorrect, please contact your servicing pay office or your customer service representative for assistance.

Another method of finding out the retiree's deductions is to ask DFAS through a written request. A little-known notice in the *Federal Register* makes this possible. Effective 13 July 2000, DFAS announced that it would disclose this information to a former spouse:

In addition to those disclosures generally permitted under 5 U.S.C. 552a(b) of the Privacy Act, these records or information contained therein may specifically be disclosed outside the DoD as a routine use pursuant to 5 U.S.C. 552a(b)(3) as follows:

*To former spouses, who receive payments under 10 U.S.C. 1408, for purposes of providing information on how their payment was calculated to include what items were deducted from the member's gross pay and the dollar amount for each deduction.*¹⁰

While the information may be difficult to obtain if the person at DFAS responding to the written request is a newly hired employee or is not familiar with this rule, diligence and courtesy will usually produce results. When drafting the request, on behalf of the former spouse, be sure to include full identifying information on the retiree (name and Social Security number), the Social Security Number of the former spouse and, if appropriate, an authorization for DFAS to provide the information to the former spouse's attorney. Consider, for example, the following request:

To: Defense Finance and Accounting Service, Cleveland Office

Pursuant to the Privacy Act Routine Use set out at 65 Fed Register 43298, I hereby request that you provide to me information on the current gross retired pay, current deductions and dollar amount used in calculating my share of the pension in regard to my former husband, John Q. Doe, SSN 987-77-6543. My former spouse payments were calculated under 10 USC 1408. [OPTIONAL: I authorize you to provide this information to my attorney, Lucinda Lopez, Lopez and Pasquale, LLP, 123 Green Street, Apex, NC 27566]

_____/s/_____
Mary P. Doe
SSN 234-56-7899

A Few More Rules

Concurrent Retirement and Disability Pay includes Chapter 61 medical retirees and Guard or Reserve members with twenty or more "good years" toward retirement. Concurrent Retirement and Disability Pay cannot exceed gross retired pay. The National Defense Authorization Act of 2005 eliminated the nine-year phase-in for full concurrent receipt payments to eligible retirees rated as totally disabled (military disability pay and VA disability pay), as of 1 January 2005.

Mary Doe, the former spouse, should have been receiving payments of pension division from DFAS since her ex-husband's disability rating was less than 100% and he was still receiving *some* retired pay. In this situation, no new application is needed since her pension division order is "in the system" at DFAS. She begins receiving increased pension payments from DFAS due to the increased pension that John Doe is now receiving.

If, however, a former spouse has not been receiving payments because the retiree has a disability rating of 100%, then her attorney should submit the paperwork anew, including the divorce decree, military pension division order, and Department of Defense Form 2293.¹¹ Fax the request to the DFAS at (216) 522-6960 or mail it to DFAS-GAG/CL, PO Box 998002, Cleveland, OH 44199-8002.

Garnishment for pension division through DFAS will be for current retired pay division. There is no authority for the DFAS to garnish for pension division arrears.

Concurrent Retirement and Disability Pay will go a long way toward ameliorating the unfairness of unilateral changes in military pension division orders by retirees who, after the fact, obtain VA disability compensation and reduce the share of the former spouse. Concurrent Retirement and Disability Pay will not, however, eliminate the problem entirely. Since it exempts those individuals whose disability rating is less than 50%, and it puts off full restoration until 2014 in most cases, the problem will remain to some extent.¹²

¹⁰ See 65 Fed. Reg. 43,298 (July 13, 2000).

¹¹ U.S. Dep't of Defense, DD Form 2293, Application for Former Spouse Payments from Retired Pay (Jan. 2002).

¹² Another article in the *Silent Partner* series, *Military Pension Division: The Spouse's Strategy*, addresses tools and options for reducing or eliminating this unfairness.

CRSC Explained

Combat Related Special Compensation is a benefit provided by Congress for servicemembers who have a combat-related disability of at least 10% under certain conditions. The Defense Department estimates that about 200,000 military retirees will be eligible for CRSC.

The disability is considered to be combat-related under 10 U.S.C. §1413a (e) if it—

- (1) is attributable to an injury for which the member was awarded the Purple Heart; or
- (2) was incurred (as determined under criteria prescribed by the Secretary of Defense)—
 - (A) as a direct result of armed conflict;
 - (B) while engaged in hazardous service;
 - (C) in the performance of duty under conditions simulating war; or
 - (D) through an instrumentality of war.¹³

These qualifications include, by way of example, injury or illness resulting from actual combat, simulations of war (e.g., gas mask training, field training exercises, direct-fire training and “confidence courses”), hazardous duty such as diving or parachuting, and instrumentalities of war (e.g., tanks, artillery, machine guns, military planes). These conditions are defined at section 6302 of CRSC regulations in the Department of Defense Financial Management Regulation.¹⁴ Since “combat-related” is service-specific, the application is sent to the retiree’s branch of service, not to the Department of Defense.

Combat Related Special Compensation is not longevity retired pay;¹⁵ it is an additional form of compensation for certain members of the armed forces. Thus, CRSC payments are not divisible as property.

Combat Related Special Compensation rates come from the VA tables and increase with the number of a retiree’s dependents (spouse, spouse and child, etc.). To use a May 2006 example, the rate for a 10% disability, no dependents, is \$112 a month. The no-dependents rate for a 20% disability rating is \$218 per month. The amount goes up to a total of \$2,844 for maximum dependents and a 100% disability rating.

CRSC Twists and Turns

Once a CRSC application is approved, DFAS does the retiree’s calculating and decision-making. Since one cannot receive both CRDP and CRSC, DFAS automatically elects whichever is most financially advantageous, that is, yields the highest net cash flow. Defense Finance and Accounting Service doesn’t take into account that the retiree may have a property division garnishment in effect. If CRDP is more favorable in gross dollars, then that is what DFAS will choose. This means that, for example, if CRSC in a particular case were \$500 and CRDP for the same year were \$501, then DFAS would choose CRDP for the retiree, even though CRDP is taxable and subject to a garnishment division with the ex-spouse.

The potential hardships for former spouses due to CRSC elections are remarkable. Phoenix practitioner Mike McCarthy writes:

First example: Assume an Air Force tech sergeant with 20 years of creditable service; 100% VA disability rating, all of it combat-related, former spouse to receive 43% of the disposable retired pay as property division. He receives \$2,979 VA disability compensation and waives ALL of his \$1,299 gross military retired pay. In return, he receives \$1,299 in CRSC payments. Thus he gets \$4,278 per month tax-free. His ex-wife gets her share, 43%, of the pension, but the pension at this point is ZERO. She gets nothing; she has lost \$558 per month.

¹³ 10 U.S.C.S. §1413a (e) (LEXIS 2006).

¹⁴ 7B DEP’T OF DEFENSE, FINANCIAL MANAGEMENT REGULATION ch. 63, available at http://www.dod.mil/comptroller/fmr/07b/07b_ic_r01_06.pdf (incorporating a new chapter that introduces the CRSC). Additional information on CRSC is available at www.hrc.army.mil/site/crsc/.

¹⁵ *Id.* (stating “[p]ayments under this section are not retired pay”).

Another scenario? Sure. Assume same facts except that the CRSC disability rating is 40%. The retiree gets \$2,979 VA disability compensation but he must waive all of his \$1,299 pension, and he gets \$1,191 CRSC. Thus he gets \$4,170 per month tax-free; while the ex-wife still gets NIL from disposable retired pay – there is none.

As a further illustration of this, assume a full Colonel with 100% VA and 100% CRSC disability rating, with 43% award to former spouse. His military pension is \$ 6,630 before VA waiver of \$2,979, so his real "disposable" pension is \$3,651. He also gets the maximum amount of CRSC, \$2,979. His former wife gets 43% of only \$3,651, which equals \$1,570, rather than 43% of the gross \$6,630, or \$2,850. She loses \$1,280. He gets the balance of the pension (\$2,081), plus the two disability benefits (\$5,958) for a total of \$8,039.¹⁶

There will be “retroactivity problems” for the former spouse. A CRSC payment is retroactive to the date of filing of the VA claim or of the enabling legislation (the 2003 law for limited conditions or the 2004 expansion, for the conditions listed above), whichever is later. If the retiree has been getting CRDP and elects CRSC, there will be a one-time retroactive payment to him, and the money received under CRDP for that same period covered by CRSC retroactive payment will be taken back

For the retiree, CRDP pay-back will be subtracted from the retroactive CRSC payment that he receives. But what about the former spouse? If the retiree’s former spouse has been receiving a share of the pension as property division, the share paid from CRDP must also be collected back from her. If CRSC election results in *no further pension garnishment payments* to the former spouse, then DFAS will initiate a debt collection action against her, since there would no longer be any continuing pension garnishment payments from which to deduct CRDP payments made to her. Conceivably the former spouse could petition for “remission of indebtedness,” which is a waiver of the debt claim by the federal government. If the former spouse is still receiving pension garnishment payments, then the collection action will result in decreased payments to her.

CRSC Final Points and Charts

Here are some final points about CRSC:

- There is no phase-in for CRSC; eligible retirees will receive full CRSC payments plus whatever VA disability compensation and unwaived retired pay they had been receiving.
- Combat-Related Special Compensation payments do not end in 2014, as CRDP payments do.
- The CRSC payment cannot exceed the amount of the military retired pay waived for VA disability compensation.
- Unlike ordinary retired pay (including CRDP), CRSC is non-taxable—it is disability compensation, not retired pay.
- Combat-Related Special Compensation is available for support determinations and for garnishment for alimony and child support. This is also true of CRDP.
- The statute includes Guard and Reserve personnel who have at least twenty qualifying years for retirement purposes.

¹⁶ E-mail from Mike McCarthy, to Mark E. Sullivan (8 Feb. 2006) (on file with author).

Below is a table outlining CRSC compensation rates (without dependents).

Combat related VA Disability Rating	Monthly CRSC
100%	\$2,393
90%	\$1,436
80%	\$1,277
70%	\$1,099
60%	\$873
50%	\$690
40%	\$485
30%	\$337
20%	\$218
10%	\$112

Table 2¹⁷

The following table provides a simplified way of understanding the comparisons between CRDP and CRSC:

CRDP and CRSC – A Comparison	CRDP	CRSC
Type of disability required	Service-connected	Combat-related
Considered longevity retired pay	Yes	No
Divisible as property	Yes	No
Minimum disability rating required	50%	10%
Taxable	Yes	No
Phase-in	Yes*	No
Retroactive payment	No	Yes†
Increases with number of dependents	No	Yes‡
Available for support determinations, garnishments	Yes	Yes
Survivor benefit available	No	No

Table 3

* Except for 100% disability cases

† Payment is retroactive to the date of filing of the VA claim.

‡ If CRSC rating is 40% or more.

CRDP and CRSC—the Election

Eligible retirees can elect either CRDP or CRSC.¹⁸ The election may be made once a year during the January open season.¹⁹ This means that John Doe can alternate between CRDP and the CRSC yearly. Defense Finance Accounting Service guidance in this area provides that:

¹⁷ Military.com, Combat Related Special Compensation, <http://www.military.com/benefits/military-pay/retired-pay/combat-related-special-compensation> (providing a sampling of the value of the CRSC benefit) (last visited 31 Jan. 2007).

¹⁸ 10 U.S.C.S. § 1414 (d)(1) (LEXIS 2006).

¹⁹ *Id.* § 1414(d)(2).

If you are eligible for both CRDP and CRSC you may participate in CRDP/CRSC Open Season. This annual Open Season lets you choose which payment you would prefer to receive (Federal law states that you can receive CRDP or CRSC; not both).

Beginning in late December, eligible retirees will be mailed a CRDP/CRSC Open Season Election Form. You only need to return the form if you want to change from CRDP to CRSC, or vice versa. If you prefer to keep things the way they are, do nothing. The payments you now receive will continue uninterrupted.

To help you make a more informed decision, the form will include a comparison of the amounts to which you would be entitled under CRDP and CRSC as well as information about the collection actions and taxes to which each type of payment is subject.

If you want to change from CRDP to CRSC or vice versa, your form must be received here at DFAS by January 31st. If your form is received after this date it will not be processed and the payments you now receive will continue uninterrupted.

The change in payment will be effective with your payment on the first business day of February. Due to our thirty-day processing timeframe, you may receive your first payment on the first business day of March and a retroactive adjustment for the payment which would have been paid on the first business day of February.

Your election will remain in effect unless you change from CRDP to CRSC or vice versa in a subsequent annual open season.²⁰

Conceivably—if John alternated annually between the two forms of payment—Mary could get her share of CRDP in 2004, then be told by DFAS that no CRDP funds were available in 2005 when John switched over to CRSC. Then in 2006, John could change back to CRDP.

Defense Finance and Accounting Service advises that it is treating the initial election of CRSC as a termination of former spouse payments if there is no other disposable pay available for the former spouse.²¹ This election requires a new DD Form 2293 (but not the entire set of original documents submitted with the original application). Thus if John later switched back to CRDP, Mary would have to reapply to re-start the payments. Defense Finance and Accounting Service does not say how Mary would know of this switch, since it will not independently inform her of the change and John certainly will not tell her! If, however, John still had disposable retired pay available after his CRSC election, Mary would continue to receive her share (at a reduced rate). If he later switched back to CRDP, the payment to Mary would increase automatically.

CRDP and CRSC—A Basic Scenario

Jane Green retires in 2000 from the Army. She is divorced and her property division order requires her to pay Jack, her ex-husband, 50% of her disposable retired pay (DRP). At this point, assuming that she has \$2,000 a month in DRP, the parties would each receive \$1,000 a month.

After she retires, Jane goes to the nearest VA hospital for a physical evaluation. Several months after the physical (it could be up to a year, depending on backlogs), she receives a *findings and ratings letter* from VA. In this correspondence, the VA states that she is rated X% disabled (the disability rating represents a figure greater than 50% in this example), due to hearing loss, back problems, and carpal tunnel syndrome. All of these disabilities are determined to be *service-connected*, but the back problem stems from a parachute jumping accident, and the hearing loss came from a career of being in airplanes for airborne operations. The letter informs Jane that the X% disability rating qualifies her for non-taxable VA disability compensation of \$800 a month. To elect to receive this benefit, she must waive the same amount of her retired pay.

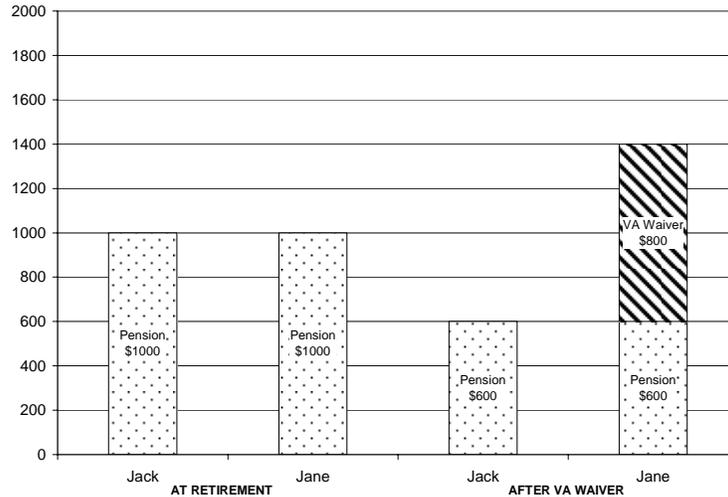
²⁰ CRDP and CRSC, Defense Finance and Accounting Service, www.dod.mil/dfas/retiredpay/concurrentretirementanddisabilitypay/crdpandcrsc.html (last visited Feb. 8, 2007).

²¹ E-mail from Neal W. Nelson, Deputy Assistant General Counsel, Garnishment Operations, Defense Finance and Accounting Service, to Mark E. Sullivan (21 June 2006) (on file with author).

Jane Gets VA Disability Compensation

Jane elects VA disability compensation and agrees to waive \$800 of longevity retired pay. This means that she would have \$800 subtracted from her gross retired pay, leading to a reduction in the amount available for division as a percentage of DRP with her ex-husband. In other words, Jack gets less DRP share due to Jane's election of VA payments. His half share is reduced from \$1,000 a month to \$600 a month, since he now is receiving half of \$1,200 a month (\$2,000 - \$800). Jane receives her share, \$600 a month, plus her untouchable, untaxable VA disability payment of \$800. Note that these calculations and the ones below ignore the annual cost of living allowances (usually between 2% and 3%), which occur with military retired pay, and also the usual deduction for Survivor Benefit Plan premiums.

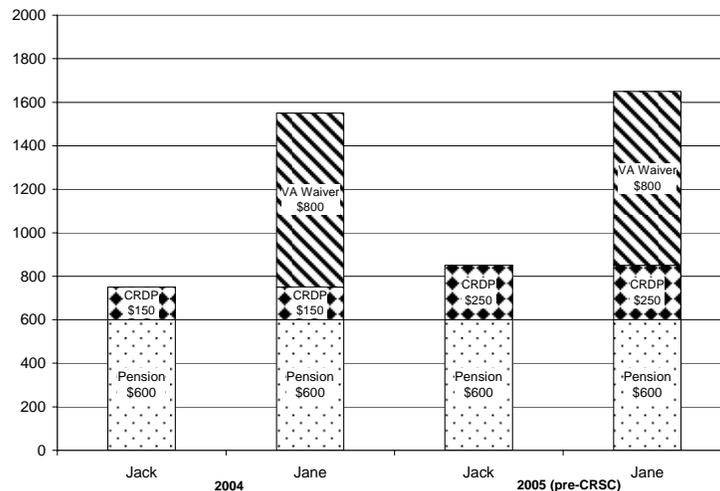
Here is what the payments to the parties look like *before* and *after* the VA disability decision:



Jane Receives CRDP

This situation continues through 2003. In 2004, Jane begins to receive CRDP; this is automatic, and there is no need to apply for it. Assume that the amount for 2004 for X% disability rating is \$300 a month. Jane's 2004 RAS would show that she is receiving DRP of \$750 (original \$600 plus \$150 as half of CRDP) plus her \$800 VA payment, while Jack gets \$750 (\$600 + \$150 CRDP).

In 2005 she begins receiving \$500 (hypothetically) in CRDP, once again raising the DRP available for division with Jack. Now Jane is receiving \$850 in DRP (\$600 + \$250, which is half of CRDP of \$500), plus her \$800 VA payment. Jack is receiving \$850 (\$600 + \$250). Here is what the payments for the parties look like in this period of time:



Jane Applies for CRSC

Jane decides to apply for the CRSC in 2005. First, Jane retrieves her 2004 VA findings and ratings letter, and she looks for types of disabilities that will qualify for the CRSC. These would be disabilities incurred as direct result of armed conflict, hazardous duty, an instrumentality of war, or conditions simulating war.

Since applications are service-specific, Jane sends in her application form, DD Form 2860, to the Army. The entire process is retiree-driven. The retired servicemember must apply to be considered for CRSC; it is not automatic, like CRDP. A board will decide Jane’s case, and she sends in copies of her physicals, medical records (active duty military, VA and private health care provider), personal statements, and, if available, statements of witnesses or experts.

Several months later Jane receives a letter from the Army. The letter outlines the findings regarding her claims as to combat-related injuries or disabilities (e.g., “Of your X% service-connected disability rating, Y% is combat-related and qualifies for CRSC.”).

DFAS Makes the Choice for Jane

Soon after the letter confirming her CRSC eligibility, Jane’s CRSC payments begin. Combat Related Special Compensation payments come from a specific table that states the amounts, and the amounts vary according to the number of the beneficiary’s dependents. As mentioned above, DFAS makes the choice for Jane—CRSC or CRDP—based on whichever one yields the larger total gross payment. If CRSC amount is \$400 per month (as against a present total CRDP payment in this example of \$500 monthly), DFAS will leave CRDP payment unchanged, despite the fact that the \$500 is taxable and divisible with her ex-husband. Jane can change this election annually in the January open season if she wishes. If DFAS chooses CRDP, then there will be no change on Jane’s RAS. The comment at the MESSAGE section on page 2 remains the same as before.

If, however, CRSC payments were \$600 per month, which is better financially for Jane (in the eyes of DFAS), Defense Finance and Accounting Service will select that option, issuing her a CRSC monthly statement. An example of a CRSC statement, not tied to this scenario, is as follows:

CRSC Pay Statement		
STATEMENT EFFECTIVE DATE APR 21, 2006	PAYMENT DATE MAY 01, 2006	SSN 123-45-6789
RETIREE’S NAME AND ADDRESS		HOW TO CONTACT US
PLEASE REMEMBER TO NOTIFY DFAS OF YOUR ADDRESS CHANGES MAJOR JOHN Q. DOE, USAF (RET.) 123 GREEN STREET APEX, NC 27511-1234		DEFENSE FINANCE AND ACCOUNTING SERVICE US MILITARY RETIRED PAY PO BOX 7130 LONDON, KY 40742-7130 COMMERCIAL (216) 522-6398 TOLL-FREE 1-800-472-7098 TOLL-FREE FAX 1-800-469-6559 myPay https://myPay.dfas.mil 1-877-363-3677
PAYMENT ADDRESS DIRECT DEPOSIT		
PAYMENT INFORMATION		ENTITLEMENT INFORMATION
CRSC Payment 377.00		Retired Pay Before Deductions 2,746.00
CRSC Debt Deduction 0		Retired Pay Offset by DVA Compensation 757.00
CRSC Garnishment Deduction 0		CRSC Debt Balance 0
		Branch of Military Service

CRSC Net Pay 377.00	AIR FORCE Garnishment Being Withheld NO
THE DVA OR YOUR BRANCH OF SERVICE PROVIDED THE FOLLOWING	
CRSC SPECIAL MONTHLY COMPENSATION CODE	00
UNEMPLOYABLE	NO
DVA DISABILITY %	50
COMBAT RELATED DISABILITY %	30
PURPLE HEART %	00
CRSC START DATE	JAN 01, 2004
SPECIAL MONTHLY COMPENSATION START DATE	
REMARKS	
This is your monthly CRSC statement. Please refer to myPay frequently asked questions for additional information about CRSC and this statement.	

The new CRSC statement will be issued on-line and will not be sent by mail. A July 2005 notice from DFAS stated the following about CRSC monthly statements:

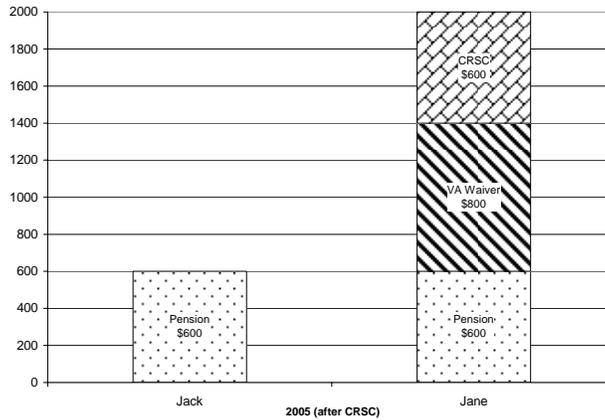
- *DFAS is now implementing the electronic delivery of CRSC account statements; the statements will be available on a monthly basis beginning July 1, 2005 via the online pay account site, [myPay](#).*
- *While retirees may continue to contact the Retired and Annuitant Contact Center by phone at 1-800-321-1080, the statement will likely answer most questions regarding the computation of CRSC payment.*
- *The CRSC monthly statement will only contain information concerning continuing monthly CRSC payments. Details about retroactive payments will be available through [myPay](#) by the end of the 2005. The CRSC monthly statement will only be available through the [myPay](#) Web site at <https://mypay.dfas.mil>.*
- *The Web-based system delivers personal pay information and provides the ability to process pay-related transactions timely, safely and securely for all its members. The online system eliminates the risks associated with hard copy documents by allowing members to access their electronic 1099R, Retiree Account Statement (RAS) and other financial information. myPay security matches existing private industry standards with the highest level of encryption and security designed to prevent member information from being accessed by others on the Internet.*
- *DFAS is confident that providing CRSC statements on myPay will be a useful addition to the information provided to retirees. We remain committed to offering the best service for our retired and annuitant customers. If you don't have a myPay account, call us at 1-800-390-2348 to get a Personal Identification Number (PIN) to access your myPay account on the web.²²*

Defense Finance and Accounting Service will also issue Jane a new RAS. The new RAS will contain new retired pay figures, and the amount for retired pay will be reduced from the previous month's amount because CRDP will have disappeared. The comment in the MESSAGE SECTION on page 2 also will be gone:

MESSAGE SECTION

²² *Retirees to Receive Monthly CRSC Statements*, Defense Finance and Accounting Service, www.dod.mil/dfas/news/releases/2005/05-21.htm (last visited Feb. 14, 2007).

Assume that CRSC payment to Jane is \$600 a month. In this case, the payments to both parties would appear as follows after CRSC election:



The Impact: “A CRSC Attack”

To understand some of the consequences of CRSC election, remember that Jane cannot receive CRDP if she is receiving CRSC. This does not mean a dollar-for-dollar waiver of CRDP for CRSC—Jane cannot receive *any* CRDP if she receives even \$1 of CRSC.

The payments for Jane go up, while those for her ex-husband—after going up by \$250 to \$850 monthly—will go back down. Jane’s ex-husband’s payment will drop to the original 2004 amount (\$600 a month, his half of \$1200 DRP), while Jane will receive \$600 a month (DRP share), \$800 a month (VA), and her CRSC payment. If we assume that her CRSC payment is \$600 a month, Jane’s total is \$2000 a month (\$600 DRP + \$800 VA + \$600 CRSC). Despite the original court order specifying equal shares for both parties, Jack’s total remains \$600!

Jack will see even more bad news due to CRSC retroactivity problem described above. Since Jane has received CRDP beginning in early 2004, which has been shared through DFAS with Jack, DFAS now must take back CRDP payments, and this means collection from Jack as well. Defense Finance and Accounting Service advises that it is collecting these CRDP payments back over a thirty-six-month period.²³

The consequence for Jane is that she will have to check with her certified public accountant or tax preparer about an adjustment on her current (in this scenario, 2005) tax returns, since she will want to report an adjustment for the “pay-back” of 2004’s CRDP. The current year’s CRDP income and pay-back will be adjusted in the Internal Revenue Service Form 1099 that she receives; this portion of her reported income for the current year will just be zeroed out, since she received it but then paid it back in the current year. Her only reportable income for 2005 (our current year in this example) would be her \$600 monthly pension share.

Choice Points for Jane

At the start in some cases, CRSC will be better for the retiree because it will provide him more money. But as we get closer to 2014, CRDP will probably be a better option for many retirees because of the gradual increase in the amount of taxable retired pay, even though taxes will cause a reduction as will any division with a former spouse. In many of these cases, eventually the net CRDP will probably exceed the non-taxable CRSC. The “switch factors” over time are the ten-year phase-in, changes in the taxable income of the retiree, garnishment of military retired pay as pension division with a former spouse, and potential increase or decrease in disability rating.

²³ E-mail from Dennis Disbrow, Contractor, Retired Pay Division, Defense Finance and Accounting Service, to Mark E. Sullivan (20 Feb. 2007) (on file with author)

In Jane's case, however, if CRSC payment were at least \$400 a month, there would be no reason to switch back to CRDP (assuming all the above hypothetical numbers are frozen), since the maximum she would receive back in CRDP is her share of the waived amount (half of \$800, or \$400), which would also be taxable. Combat and Related Special Compensation at \$400 a month is non-taxable. So long as CRSC payment is \$400 a month or more, the choice for her is obvious.

Why "The Evil Twins"?

As we have seen, the new CRSC benefit can have a significant and detrimental impact on CRDP payments. The receipt of even \$1 of CRSC wipes out any CRDP payments, without notice to the former spouse. Thus Jack, after seeing the gradual increase of his payments because of CRDP, may suddenly find these gains wiped out without explanation by CRSC election. While the retiree knows what's happening to *the former spouse's share* of the retired pay, the former spouse has no idea of what's going on with *the retiree's share*. Furthermore, Jane can elect to alternate between CRSC and CRDP once a year, a whipsaw tactic that will totally confuse and exhaust Jack and his lawyer.

Because DFAS treats the initial election of CRSC as ending former spouse payments (if there is no other disposable pay available for the former spouse), Jack would have to reapply to restart his payments if Jane switched back to CRDP when it became more financially advantageous for her to receive CRDP. How would Jack, however, know of her switch? Jane is unlikely to tell him, and DFAS will not independently inform him of the new payment status. Conceivably—if Jane alternated annually between the two forms of payment—Jack could get her share of CRDP in 2004, then be told by DFAS that no CRDP funds were available in 2005 when Jane switched over to CRSC. Then in 2006, she could change back to CRDP without his knowledge of the switch.

Practical Pointers for the Non-Military Spouse's Attorney

The lawyer representing the servicemember's spouse cannot predict much of anything before the servicemember's retirement. You could ask whether the servicemember is an active-duty trooper or a member of the Guard or Reserve. Since most of the creditable service of National Guard or Reserve personnel is made up of weekend drill and two weeks of annual training, or "summer camp," you could predict that these Reserve Component servicemembers are less likely to suffer from disabling conditions arising from combat, hazardous duty or other qualifying causes. But remember that even Guard and Reserve servicemembers could be injured operating a plane, helicopter, or weapons system while on a regularly scheduled field exercise or during a six-month mobilization in the Middle East, which would likely qualify them for CRSC.

If you are representing the spouse of an active-duty servicemember, you can make some educated guesses as to whether there might be a combat-related disability or injury by assessing whether the servicemember might be a "Front-Line Felicia" or a "Backfill Bill." Is the servicemember a paratrooper or a Ranger, or a garrison trooper who sits at a desk all day? Consider the job assignment or military occupational specialty as well as the unit to which the servicemember belongs. If the servicemember is a supply sergeant, does that mean he is unlikely to suffer combat-related injury from his military service? Not necessarily; suppose she is, during training missions, also a jumpmaster in charge of parachute drops from the aircraft. Just because Bill is a Navy nurse doesn't mean that he is in a relatively safe position. What if Bill is assigned to Navy Seal Team 6, jumping out of helicopters and swimming to the objective? Be sure to ask your client many questions: Does the military spouse demonstrate any injuries or disabilities? Has he been in the hospital for anything related to military service? What is the state of his health?

If you are trying to negotiate a settlement, draft your settlement document with an indemnification clause. Be sure that you include language that states that the military spouse will repay your client any moneys that are removed from Disposable Retired Pay due to any action of the retiree. Such an indemnification clause might read as follows:

The military retired pay of respondent shall be apportioned between the parties, with the petitioner receiving 39.375% of same, without regard to any reductions or setoffs due to disability compensation or any other reason except the premium for the Survivor Benefit Plan. If the respondent shall do anything—actively or passively—to reduce the share of amount of petitioner, then he shall indemnify and reimburse her for any such loss, including associated costs, expenses, attorney's fees and consequential damages.

On the other hand, the military servicemember might be wary of "indemnification language" or division of the gross retired pay, in which case a weaker set of words, such as the following, might be useful or necessary, if such words will—under state law—provide sufficient protection for the nonmilitary party:

Petitioner shall receive 39.375% of respondent's retired pay, which is at present based solely on 22 years of creditable service without any reductions. The respondent shall do nothing to reduce petitioner's share of same or interfere with her receipt of same.

This clause attempts to identify the number of years of service as the sole measure of determining respondent's compensation in retirement. Even better would be a sentence that attempts to forecast the likely longevity retired pay of the respondent so that the judge would have a benchmark to use in case the servicemember took actions in the future that diminished the spouse's share. Ideally, the settlement agreement would also have a general breach clause, which is standard in most marital settlement agreements, stating that any breach of the agreement by a party entitles the other to payment of damages, costs, expenses and reasonable (or all) attorney's fees.

If the member is already retired, try using the following for the "strong" language clause:

Respondent is currently receiving gross military retired pay of \$2,000 a month, with deductions of \$130 for SBP premium and \$500 for VA disability waiver. This waived retired pay is currently being reduced by \$239 a month due to his receipt of CRDP (Concurrent Retirement and Disability Pay), which means an increase of disposable retired pay from \$1,370 before CRDP ($\$2,000 - \$130 - \500) to \$1,609 presently ($\$1,370 + \239). The parties anticipate the increase of CRDP until 2014, and these payments shall be treated the same as disposable retired pay, with petitioner receiving the same share of CRDP as of disposable retired pay. If the respondent shall do anything to reduce the share or amount of petitioner as of disposable retired pay, including CRDP, then he shall indemnify and reimburse her for any such loss, including associated costs, expenses, attorney's fees and consequential damages.

If a more diluted form of language is needed, try wording the clause as follows:

Respondent is receiving at present gross military retired pay of \$2,000 a month, with deductions of \$130 for SBP premium and \$500 for VA disability waiver. He is also receiving a payment of \$239 for CRDP (Concurrent Retirement and Disability Pay). The parties anticipate the increase of CRDP until 2014, and these payments shall be treated the same as disposable retired pay, with petitioner receiving the same share of CRDP as of disposable retired pay. The respondent shall do nothing to reduce petitioner's share of same or interfere with her receipt of same.

Another possibility is to hold alimony open. Consider reserving the issue of alimony or setting alimony at \$1 per year, to allow the court to make an adjustment in this area if the anticipated share of retired pay is diminished by the retiree's actions in electing CRSC over CRDP.

If the case goes to trial, make sure you draft the decree or are allowed input. The decree should, if possible, specify that the servicemember or retiree shall indemnify the former spouse if he does anything to reduce her share, along the lines of the above "agreement language." If your state statutory and case law do not allow this, or if the judge refuses this language, try inserting the following language in the decree:

The parties shall comply with the terms of this order and shall exercise good faith in doing nothing to interfere with the terms provided by the court herein.

Breach of the good faith requirement, by election of CRSC, would allow the court to impose sanctions, assess damages, use the contempt power, or apply other remedies in favor of the wronged spouse.

Practical Pointers for the Military Spouse's Attorney

There are only two things that the servicemember retiree's attorney should say. The first is: "Do the right thing." This means treating the former spouse fairly and not destroying the returning share of retired pay (CRDP) that she should be receiving, or else sharing CRSC that is paid to the retiree. Concurrent Retirement and Disability Pay is the means of reconciling accounts for servicemembers and spouses in light of the VA disability compensation and the retired pay waiver. Concurrent Retirement and Disability Pay means everyone gets treated fairly, retirees get paid disability on top of retired pay, and former spouses receive their share of a pension that formerly was diminished because of the waiver. Leaving that balance intact is one option for the retiree. Sharing CRSC, which involved compensation without taxes, is also fair if it does not reduce the share of retired pay to which the former spouse is entitled.

The second piece of advice would be, “Get out your checkbook.” This means that there will be, in all likelihood, a long, hard fight over the issue of CRDP if CRSC is elected. Since CRSC destroys CRDP, the retiree should expect to see serious litigation over this. As in the area of VA disability and the retired pay waiver, many cases will wind up in the appellate courts. And, predictably, most courts will follow the trail blazed by VA disability litigation, holding that a retiree cannot unilaterally reduce the former spouse’s share or amount of returning retired pay (CRDP) by selecting CRSC. The remedies will vary—indemnification, damages, compensatory alimony, or complete revision of the property division. The result, however, will be the same in most state courts. They will side with the former spouse and the prior judgment, decree, or agreement, especially if it contains an indemnification clause.

Resources for the Resourceful Attorney

The following list provided helpful websites when assisting clients with the issues discussed above.

Interim CRSC Regulations: http://www.dod.mil/comptroller/fmr/07b/07b_ic_r01_06.pdf

Computing VA compensation rates: <http://www.vba.va.gov/bln/21/Rates/comp01.htm>

Combined ratings Table (for several disabilities):
http://www.warms.vba.va.gov/regs/38CFR/BOOKC/PART4/S4_25.DOC

Computing CRDP by rate and year:
<http://www.dod.mil/dfas/retiredpay/concurrentretirementanddisabilitypay/crdppaymentrates.html>

CRSC payment rate:
<http://www.military.com/Resources/ResourcesContent/0,13964,38339,00.html#3>

Military Officers Association of America website on CRSC:
https://www.moaa.org/controller.asp?pagename=serv_benefits_pay_crsc

Army Human Resources Command - CRSC overview: <https://www.hrc.army.mil/site/crsc/>

DFAS website on CRDP: <http://www.dod.mil/dfas/retiredpay/concurrentretirementanddisabilitypay.html>.

There are many references to CRSC and CRDP at www.military.com.

Attachment 1

RETIREE ACCOUNT STATEMENT					
STATEMENT EFFECTIVE DATE DEC 16, 2005		NEW PAY DUE AS OF FEB 01, 2006		SSN 123 - 45 - 6789	
PLEASE REMEMBER TO NOTIFY DFAS IF YOUR ADDRESS CHANGES Major John Q. Doe, USAF (Ret.) 123 Green St Apex, NC 27511-1234				DFAS-CL POINTS OF CONTACT	
				DEFENSE FINANCE AND ACCOUNTING SERVICE US MILITARY RETIREMENT PAY PO BOX 7130 LONDON KY 40742-7130 COMMERCIAL (216) 522-5955 TOLL FREE 1-800-321-1080 TOLL FREE FAX 1-800-469-6559 myPAY https://myPay.dfas.mil 1-877-363-3677	
PAY ITEM DESCRIPTION					
ITEM	OLD	NEW	ITEM	OLD	NEW
GROSS PAY	2,746.00	2,746.00	FITW	191.31	209.05
VA WAIVER	591.30	473.04	ALLOTMENTS/BONDS	40.00	40.00
SBP COSTS	179.28	179.28			
TAXABLE INCOME	1,975.42	2,093.68			
			NET PAY	1,744.11	1,844.63
PAYMENT ADDRESS		YEAR TO DATE SUMMARY (FOR INFORMATION ONLY)			
DIRECT DEPOSIT		TAXABLE INCOME:		1,975.42	
		FEDERAL INCOME TAX WITHHELD:		191.31	
TAXES					
FEDERAL WITHHOLDING STATUS:		SINGLE			
TOTAL EXEMPTIONS:		.01			
FEDERAL INCOME TAX WITHHELD:		209.05			
SURVIVOR BENEFIT PLAN (SBP) COVERAGE					
SBP COVERAGE TYPE:	SPOUSE AND CHILD(REN)		ANNUITY BASE AMOUNT:	2,750.50	
SPOUSE COST:	176.78		55% ANNUITY AMOUNT:	1,512.77	
CHILD COST:	50		40% ANNUITY AMOUNT:	1,100.20	
			SPOUSE DOB:	12 DEC 1945	
			CHILD DOB:	13 MAR 1996	
<p>THE ANNUITY PAYABLE IS 55% OF YOUR ANNUITY BASE AMOUNT UNTIL YOUR SPOUSE REACHES AGE 62. AT AGE 62, THE ANNUITY MAY BE REDUCED DUE TO SOCIAL SECURITY OFFSET, OR UNDER THE TWO-TIER FORMULA. THAT REDUCTION MAY RESULT IN AN ANNUITY THAT RANGES BETWEEN 40% (\$1100.20) AND 55% (1512.77) OF THE ANNUITY BASE AMOUNT. THE COMBINATION OF THE SBP ANNUITY AND THE SOCIAL SECURITY BENEFITS WILL PROVIDE TOTAL PAYMENTS FROM DFAS AND THE SOCIAL SECURITY ADMINISTRATION OF AT LEAST 55% OF YOUR BASE AMOUNT. THE ACTUAL ANNUITY PAYABLE IS DEPENDENT ON FACTORS IN EFFECT WHEN THE ANNUITY IS ESTABLISHED.</p>					

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RETIRED SERVICEMAN FAMILY PROTECTION PLAN (RSFPP) COVERAGE					
RSFPP COVERAGE TYPE	ANNUITY PAYABLE			RSFPP COST	
ALLOTMENTS AND BONDS					
ALLOTMENT TYPE	PAYEE	AMOUNT	BOND FACE VALUE	SERIES	DEDUCTION
INSURANCE	VGLI	40.00			
TAX LEVY DEDUCTIONS					
DATE OF LEVY	MONTHLY AMOUNT		BALANCE		
GARNISHMENT DEDUCTIONS					
PAYEE	GARNISHMENT AMOUNT		COMPLETION DATE		
FORMER SPOUSE PROTECTION ACT DEDUCTIONS					
PAYEE	AMOUNT				
MISCELLANEOUS DEBTS					
DEBT TYPE	MONTHLY DEDUCTION	PRINCIPAL AMT	INTEREST AMT	ACCUMULATED INTEREST	DEBT BAL
ARREARS OF PAY BENEFICIARY INFORMATION					
YOU HAVE ELECTED ORDER OF PRECEDENCE. THE FOLLOWING BENEFICIARIES ARE ON RECORD:					
NAME	SHARE		RELATIONSHIP		
JANE P. DOE	.00		WIFE		
MESSAGE SECTION					
BASED ON INFORMATION RECEIVED FROM THE VA, YOUR CRDP AMOUNT IS \$283.96.					

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