

# BUTTERFIELD SCHECHTER LLP

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## SPECIAL ALERT

### IMPORTANT UPDATE REGARDING DIVISION OF MILITARY RETIREMENT BENEFITS *By: Corey F. Schechter*

In a recently issued ruling with significant implications for uniformed service members and their former spouses, the United States Supreme Court unanimously (with Justice Gorsuch taking no part in the consideration or decision of the case) held on May 15, 2017, in *Howell v. Howell*, 581 U.S. \_\_\_\_ (2017), that a military veteran cannot be required to indemnify (or reimburse) a former spouse who receives a reduced amount of the veteran's retirement pay resulting from the veteran's election to waive a portion of their military retirement pay in order to receive nontaxable disability benefits from the federal government in lieu of military retirement pay.

#### ***Military Retirement Pay vs. Disability Pay***

Veterans who have retired from the Armed Services are generally entitled to receive military retirement pay. A veteran is also generally entitled to receive disability pay from the federal government upon a finding of a service-connected disability. However, to prevent "double-dipping," a veteran found to have a service-connected disability must have their military retirement pay offset by their award of disability pay.

Due to the fact military retirement pay is taxable as ordinary income when received, while disability pay received from the federal government is not, a veteran found to have a service-connected disability often waives a portion of their military retirement pay to receive disability pay instead.

#### ***Legislative and Case Law History Regarding Division of Military Retirement Pay***

In *McCarty v. McCarty*, 453 U.S. 210 (1981), the U.S. Supreme Court held that states could not treat military retirement pay as community property subject to division upon divorce.

The Legislature responded by passing the Uniformed Services Former Spouses' Protection Act, 10 U.S.C. §1408 ("USFSPA"). Therein, Congress stated that states may treat veterans' "disposable retired pay" as divisible property upon divorce. §1408(c)(1). However, the USFSPA 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 pay. §1408(a)(4)(A)(ii).

The U.S. Supreme Court later interpreted the meaning of the language in the USFSPA in *Mansell v. Mansell*, 490 U.S. 581 (1989), holding that the USFSPA prevented a state from treating a veteran's waived portion of disposable retired pay as community property divisible upon divorce.

The Mansell Court noted that federal law, as construed in *McCarty*, "completely pre-empted the application of state community property law to military retirement pay." *Mansell*, 490 U.S., at 588. It further indicated that Congress could eliminate this pre-emption "by enacting an affirmative grant of authority giving the States the power to treat military retirement pay as community property." *Id.* However, the USFSPA had only done so in a limited manner. The USFSPA authorized a "precise and limited" grant of the power to divide military retirement pay (i.e., disposable retired pay only). The Act did not grant the states "the authority to treat total retired pay as community property." *Id.*, at 589. Rather, Congress excluded from its grant of authority to the states any division of the disability-related waived portion of military retirement pay. See, *supra*, 10 U.S.C. §1408(a)(4)(A)(ii).

#### ***Facts and Procedural History of Howell***

John Howell and Sandra Howell were divorced in Arizona in 1991 while he was still serving in the Armed Forces. Their divorce decree treated John's future military retirement pay as community property and it awarded Sandra "as her sole and separate property fifty percent (50%) of [John's] military retirement when it begins."

John retired from the Armed Services in 1992, at which point he began receiving military retirement pay. Pursuant to their divorce decree, Sandra received half of those payments.

More than a decade after John's retirement, the Department of Veterans Affairs found John to be partially disabled due to a service-connected injury. He subsequently elected to receive disability pay and, as a result, was required to waive a portion of the military retirement pay he shared with Sandra. John's election to waive a portion of his military retirement pay for receipt of disability pay consequently reduced the amount of military retirement pay Sandra was otherwise entitled to receive.

Following the reduction in monthly military retirement pay owed Sandra, she asked the Arizona family court to enforce the original decree and effectively restore the value of her share of John's total retirement pay. The court held that the original divorce decree gave Sandra a "vested" interest in the pre-waiver amount of his military retired pay and ordered John to ensure Sandra received her full 50% of the military retirement pay without regard for the disability pay offset. John appealed the family court's decision.

The Arizona Supreme Court affirmed, finding that the family court permissibly ordered John to "reimburse" (or indemnify) Sandra for "reducing ... her share" of military retirement pay and that it did not (a) "divide" John's waived military retired pay, (b) require John "to rescind" his waiver, or (c) "direct [John] to pay any amount to Sandra from his disability pay." 238 Ariz. 407, 409. The court further found that because John had made his waiver after, rather than before, the family court divided his military retired pay, the U.S. Supreme Court's decision in *Mansell* did not control the case, and thus federal law did not preempt the family court's reimbursement order.

John filed a petition for certiorari which was granted due a split among lower courts on the issue.

### ***The U.S. Supreme Court's Decision in Howell***

Contrary to the finding of the Arizona Supreme Court, the U.S. Supreme Court ruled at the outset that its decision in *Mansell* (i.e., that federal law completely preempts the states from treating waived military retirement pay as divisible community property) was controlling law in the *Howell* case.

The Court went on to explain that the Arizona family court's "reimbursement award to Sandra" was nothing more than "an award of the portion of military retirement pay that John waived in order to obtain disability benefits," which is exactly "the portion that Congress omitted from the [USFSPA's] definition of 'disposable retired pay,' namely, the portion that federal law prohibits state courts from awarding to a divorced veteran's former spouse." *Howell*, 581 U.S., at \_\_\_\_\_. It further noted that "such reimbursement and indemnification orders displace the federal rule and stand as an obstacle to the accomplishment and execution of the purposes and objectives of Congress [and that] [a]ll such orders are thus pre-empted." *Id.*

On that basis, the Court reversed the decision of the Arizona Supreme Court requiring John to reimburse or indemnify Sandra for the difference in military retirement pay she received prior to and after John's waiver.

### ***Practice Tip***

It is worth noting that the U.S. Supreme Court indicated in its decision in *Howell* that "a family court, when it first determines the value of a family's assets, remains 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.* Thus, while a veteran cannot be compelled to indemnify or reimburse their former spouse for a future reduction in military retirement pay to the former spouse caused by the veteran's waiver, counsel and family law courts do have the ability to consider the possibility of a future waiver of military retirement pay by the veteran and divide the assets and set an amount of spousal support accordingly.



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### **For More Information**

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