



THE LEGAL EAGLE

VA Disability Compensation and Divorce – Facts and Fallacies

INTRODUCTION: As a service to our legal assistance clients, we have prepared this handout with frequently asked questions on issues involving VA disability compensation and its relation to divorce, family support, garnishment and military pension division. It is, of course, very general in nature since no handout can answer your specific questions. We do ask, however, that you read over these questions and answers carefully in connection with your visit to our legal assistance attorneys so that you may have the fullest information available to help you with your family law problem. Comments, corrections and suggestions regarding this pamphlet should be sent to the address at the end of the last page.

Background. Many military personnel, spouses, former spouses and retirees are victimized by myths and misstatements about VA disability compensation and its effect on money issues in a divorce. Some people claim that benefits from the Department of Veterans Affairs can be divided in a divorce, just like a military pension. Some claim that VA disability pay is “off limits” in calculation of child support and alimony. Even lawyers have a hard time understanding whether – and how – a court can order garnishment of VA payments to accomplish the prompt and full payment of family support ordered by the judge. Those who have served our country in uniform, and those who have accompanied them, are entitled to honest answers. Below are some of the claims, questions, rumors and charges, followed by accurate and straightforward answers.

1. Q. I’ve heard that Congress clearly intended to protect veterans’ benefits from being awarded to anyone other than the veteran who earned those benefits under any circumstances.

A. This myth has been making the rounds recently. Like the stories of Bigfoot, Shangri-La and the Loch Ness Monster, it has a core of “believers.” And like these examples, it’s not true. Congress wrote the law on veterans’ benefits, found at Title 38 of the U.S. Code, with an eye toward exempting VA benefits from most creditors’ claims; ordinary creditors are barred from execution or garnishment of VA payments. But family members are not ordinary creditors. They are, in fact, the subject of special protections in Title 38, both for child support and alimony.

2. Q. But my ex-husband told me that the federal law on “Veterans’ Benefits,” Title 38, U.S. Code, Section 5301 and following provisions, was written by Congress to protect veterans’ benefits from third-party awards under any legal process whatsoever. Is that true?

A. Not at all. The case that lays down the law on this is *Rose v. Rose* (U.S. Supreme Court 1987). There the Court made it clear that 10 U.S.C. Section 5301 (the “anti-attachment clause” in Title 38) does not apply to court orders which require a veteran to support his or her family. VA benefits can and should be considered as income when the judge is deciding how much support a spouse or children need and what a veteran is able to pay.

3. Q. What exactly does the statute say about a third party getting at benefits paid by the Department of Veterans Affairs (VA)?

A. Title 38, U.S. Code, “Veterans’ Benefits,” says at §5301(a)(1) –

Payments of benefits due or to become due under any law administered by the Secretary shall not be assignable except to the extent specifically authorized by law, and such payments made to, or on account of, a beneficiary shall be exempt from taxation, shall be exempt from the claim of creditors, and shall not be liable to attachment, levy, or seizure by

or under any legal or equitable process whatever, either before or after receipt by the beneficiary.

4. Q. Is there a loophole in the law that allows the judge to consider my ex-husband's VA disability compensation as a divisible asset in a divorce?

A. No. Federal law – specifically, the Uniformed Services Former Spouses' Protection Act, found at 10 U.S.C. §1408 – exempts VA disability payments from division upon divorce. It is not an asset which can be divided at divorce as marital or community property.

5. Q. I've heard that state laws do not take precedence over federal law. That means that my VA benefits are immune from any consideration or garnishment in domestic court, right?

A. While part of the statement is correct – that state laws are subordinate to federal laws – the rest of the statement could be called “urban legend.” It's just not so. In general, all sources of income must be considered by the court in determining support, whether the income is taxable or tax-free, whether the source is wages, rents, royalties, VA benefits, military retired pay, Combat-Related Special Compensation, Social Security Disability payments or even an inheritance from your Uncle Louie! And the provisions of Title 38 make it clear that Congress intended that VA benefits may be considered as a source of income for support purposes. Not only are there graduated benefit schedules, based on how many dependents a veteran has, but there is an apportionment procedure to use when a veteran is not discharging his or her responsibility for support. The apportionment procedures are found at 38 U.S.C. § 5307.

6. Q. Is VA compensation tax-exempt? What about military retired pay? Who pays each to the veteran/retiree?

A. VA compensation is tax-exempt, while military retired pay is not. Military retired pay and Combat-Related Special Compensation are paid by the Department of Defense under Title 10, U.S. Code, while veterans' benefits are paid by the Department of Veterans Affairs under Title 38.

7. Q. My husband isn't paying me, and I need to get the court to order a garnishment. Can VA benefits be garnished for child support or alimony?

A. Yes, but only if the individual who is receiving VA benefits has waived military retired pay to obtain the VA payments. This is set out in Title 42 of the U.S. Code, Section 659, and in 5 C.F.R. Part 581.

8. Q. Can VA benefits be considered as a source of income in awarding child support or alimony?

A. Yes, although some states may have cases or statutes which exempt VA disability benefits. In *Rose v. Rose* (1987), the U.S. Supreme Court reviewed a contempt judgment against a veteran whose sole source of income was his VA disability compensation. He had refused to pay \$800 a month in child support, claiming that he was constitutionally allowed to keep these VA benefits for himself. In an extensive review of the statutes and rules governing VA payments, the Court found that “these benefits are not provided to support appellant [the veteran] alone.” It went on to state that:

Veterans' disability benefits compensate for impaired earning capacity, H. R. Rep. No. 96-1155, p.4 (1980), and are intended to "provide reasonable and adequate compensation for disabled veterans *and their families*." S. Rep. No. 98-604, p.24 (1984) (emphasis added). Additional compensation for dependents of disabled veterans is available under 38 U. S. C. ' 315, and in this case totaled \$90 per month for appellant's two children. But the paucity of the benefits available under ' 315 [now 38 U.S.C. 1115] belies any contention that Congress intended these amounts alone to provide for the support of the children of disabled veterans. Moreover, as evidenced by ' 3107(a)(2) [now found at 38 U.S.C. 5307], the provision for apportionment we have already discussed, Congress clearly intended veterans' disability benefits to be used, in part, for the support of veterans' dependents.

The Court noted that “children may rightfully expect to derive support from a portion of their veteran parent's disability benefits.” There can be no doubt that family support is one of the purposes for the VA payments given to a veteran.

The provisions for dependents, found at 38 U.S.C. 1115, are:

Any veteran entitled to compensation at the rates provided in section 1114 of this title, and whose disability is rated not less than 30 percent, shall be entitled to additional compensation for dependents in the following monthly amounts:

(1) If and while rated totally disabled and—

(A) has a spouse but no child, \$150;

(B) has a spouse and one or more children, \$259 plus \$75 for each child in excess of one;

(C) has no spouse but one or more children, \$101 plus \$75 for each child in excess of one;

(D) has a parent dependent upon such veteran for support, then, in addition to the above amounts, \$120 for each parent so dependent;

(E) notwithstanding the other provisions of this paragraph, the monthly payable amount on account of a spouse who is

(i) a patient in a nursing home or

(ii) blind, or so nearly blind or significantly disabled as to need or require the regular aid and attendance of another person, shall be \$286 for a totally disabled veteran and proportionate amounts for partially disabled veterans in accordance with paragraph (2) of this section; and

(F) notwithstanding the other provisions of this paragraph, the monthly amount payable on account of each child who has attained the age of eighteen years and who is pursuing a course of instruction at an approved educational institution shall be \$240 for a totally disabled veteran and proportionate amounts for partially disabled veterans in accordance with paragraph (2) of this section.

9. Q. Are “activist state judges” forcing many disabled veterans going through a divorce to use their veteran’s disability compensation to pay alimony or else face contempt charges and jail if they refuse?

A. The summary of *Rose v. Rose* above is one illustration of how a veteran tried to get out of paying child support and found that every court which reviewed his case upheld the trial judge’s decision that he must support his family and obey the court’s order, even though his only income was his VA payments. The same principle applies to alimony. There is no justification in disobeying a judge whose ruling is based on the well-recognized decision of the U.S. Supreme Court. If you refuse to pay as the judge ordered, you’ll very likely be punished by the court – and that is the way it should be for those who violate the law or disobey court orders.

There’s no way that any reasonable person would consider the U.S. Supreme Court to be composed of “activist judges.” As to state courts... well, let’s take a look –

- The Illinois Court of Appeals in 2005 held in *In re Marriage of Wojcik* that federal law does not preclude a state court from ordering a veteran to pay court-ordered family support obligations from disability benefits.
- The Iowa Court of Appeals held in 1994 in *In re Marriage of Anderson* that “It is clear veterans benefits are not solely for the benefit of the veteran, but for his family as well” in ordering the payment of alimony from the veteran’s sole sources of income, disability payments and Supplemental Security Income. That court wrote that the U.S. Supreme Court in *Rose v. Rose* “again and again in its opinion recognized family support as an important exception [to the anti-garnishment rule for VA benefits] and further recognized family support as child support and alimony.”
- The Supreme Court of Vermont in the 1987 *Repash v. Repash* decision stated that the VA statutes barring attachment of benefits did not apply in a spousal maintenance (alimony) case because a wife seeking support was not a creditor under the statute.

- There are cases from Florida (*Allen v. Allen*, 1994), Mississippi (*Steiner v. Steiner*, 2001), Wisconsin (*In re Marriage of Weberg*, 1990) and numerous other states which uphold the power of state courts to use VA benefits as a source of income in determining family support.

The states (and the U.S. Supreme Court) are virtually unanimous in their rulings on this. It's a real "stretcher" (in Mark Twain's phrasing) to say that all of these courts are all packed with "activist judges."

10. Q. I'm afraid that the judge will tell me that the court cannot go directly to the VA and attach to a veteran's disability compensation. Won't the judge say that the VA cannot give it to anyone but the disabled veteran who earned the benefit in the first place?

A. It looks like some more myths have been making the rounds! A court can go directly to the VA to attach a veteran's disability compensation. This happens all the time when a good lawyer representing the support recipient reads the U.S. Code – specifically 42 U.S. Code 659, which allows this procedure (the garnishment of VA payments) because the individual has waived military retired pay to obtain VA benefits. The VA will give it to anyone to whom the court awards this money when these circumstances are present.

11. Q. I've heard that most veterans cannot find representation, and attorneys turn a blind eye to them. The attorneys know that, if they represent the spouse, they can go after a veteran's disability compensation in a divorce settlement, and their client will win the ability to pay them. Is that true?

A. Not at all. First of all, veterans and spouses have the same problems in finding representation. Divorce cases can be expensive when contested, especially if there are complex issues such as VA disability payments on the table. That costs money, and both husband and wife will need to find the funds to retain a lawyer or else go without representation. Lawyers as a group are not "turning a blind eye" toward veterans or spouses.

Most intelligent attorneys know that VA benefits are "off-limits" as marital or community property upon divorce. These payments cannot be divided as marital assets in the divorce or property division hearing. What's the sense in going after an asset which is exempt from division?

In addition, it's difficult to find a good attorney who would get paid through the promise of future income. You cannot pay bills on promises. You can't pay your office staff on the hope that, at some point in the future, the other side will be required to make payments of alimony or child support. Most lawyers would go broke very quickly if that were the way they did business.

12. Q. Is VA disability considered to be a 'cash cow' in the legal profession? In other words, your ex-spouse and her attorney are both getting a piece of your veteran's benefits, and the judge lets it happen.

A. Not by a long shot! As was pointed out above, neither the former spouse nor the attorney can obtain a portion of VA benefits since they are exempt from distribution as marital or community property upon divorce. While VA benefits can be counted as income for support purposes, they cannot be garnished unless they are paid to a military retiree who has waived part of the pension to get these payments from the VA.

Whether the judge "lets it happen" depends on how the case is handled. If the judge has ruled as set out above, then he or she has acted properly and in accordance with federal and (probably) state law. If the judge has let an erroneous ruling "happen," then the wronged party has the right to appeal that decision or ask the court for reconsideration of the ruling. That's no different from any other case or party – that's what happens in court, and those are the rights of the parties who claim that the judge committed a reversible error in the hearing or trial. Judges sometimes make mistakes or issue incorrect rulings. When that happens, if the wronged party wants to "correct the judge," then he or she will have to take an appeal from the ruling.

13. Q. Is the Secretary of the Department of Veterans Affairs the only person that can attach to a veteran's benefits?

A. No – that's wrong. This issue was litigated in Tennessee in the *Rose* case, and it went all the way up to the U.S. Supreme Court. The Court's ruling in 1987 was: a) the Department of Veterans Affairs has the power to apportion VA payments, b) that power can be exercised if the veteran is not discharging his or her responsibility

for support, and c) most importantly, that doesn't preclude state court judges from granting family support awards based on solely the VA benefits received by a party in the lawsuit. In fact, 42 U.S.C. 659 makes it clear that courts may attach VA benefits through garnishment if the individual has waived military retired pay to receive VA payments.

14. Q. Is it true that these payments are “exempt from taxation... from the claim of creditors, and shall not be liable to attachment, levy or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary”?

A. Yes, except that you forgot the most important part of the statute, 38 U.S.C. § 5301 (a)(1) – the phrase “except to the extent specifically authorized by law.” See the full quote below (with emphasis added):

Payments of benefits due or to become due under any law administered by the Secretary shall not be assignable **except to the extent specifically authorized by law**, and such payments made to, or on account of, a beneficiary shall be exempt from taxation, shall be exempt from the claim of creditors, and shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary.

15. Q. Why does the VA claim that it's not a law enforcement agency, and thus cannot enforce Title 38 in divorce courts?

A. That's because –

a) It's not a law enforcement agency. It's not the Department of Justice, the FBI, the Secret Service or the BATFE (Bureau of Alcohol, Tobacco, Firearms and Explosives). It's just the Department of Veterans Affairs!

-and-

b) It does not have the authority given by Congress, nor the manpower (even if it had the statutory authority) to go into court to intervene whenever a divorce court was considering VA payments in a case involving family support or garnishment. Nobody has that kind of unlimited personnel budget!

16. Q. But I've contacted several members of Congress, only to be told that they do not get involved in civil matters, nor do they interfere with the legal process in state family courts.

A. That's right. They don't. No one – not even state court judges – wants to get involve in messy divorce cases in the courts. Members of Congress have no authority to intervene or to tell judges how to act in these cases. It would be highly unprofessional and certainly illegal for “outside influence” to descend on a state divorce court and push the determination of a certain outcome. This is why we pride ourselves on an independent system of courts and neutral, objective judges – ones who cannot be “gotten to” by those outside the judicial process. Neither the Department of Veterans Affairs nor the members of the Senate and House have any business sticking their noses inside a courtroom or telling a judge what to do.

17. Q. My husband beat me at every turn in my divorce. Is it true, as I was told by several lawyers, that judges cannot be held legally liable for their decisions, and therefore there is no violation of law?

A. No, not at all. Judges are held responsible for their decisions through the process of “appellate review.” This is an appeal to a higher court when a party believes she or he has been wronged because a judge at trial committed a prejudicial error. The higher court can correct the error. Judges are also subject to state codes for judicial conduct. When a judge acts improperly, a complaint may be lodged with the appropriate state agency for disciplining judges. A public reprimand, for example, was issued in January 2015 by the N.C. Supreme Court to a district court judge in *In re Brenda Branch* where the judge had failed to understand, recognize or comply with the Servicemembers Civil Relief Act in a custody case involving a sergeant first class who was in Korea and could not attend the hearing.

18. Q. I need help fast! My ex-husband got VA disability, and now my share of the pension just dropped by several hundred dollars. I can't pay my light bill or my rent. Is he allowed to do that – change the judge's order without getting court permission?

A. When a military retiree elects VA disability compensation, and he or she has a VA rating of less than 50% or else has Combat-Related Special Compensation, this election decreases the share of the military pension which is available for division, known as “disposable retired pay.” When there is a military pension division order which is paid out through the military retired pay center, then that means a drop in the money which the former spouse gets.

Whether the former spouse has a remedy in court depends a lot on the circumstances. You cannot get the judge to require the ex-husband to *indemnify* you (i.e., to pay back or reimburse the money you’ve lost) if there is no prior requirement for indemnification, either in a written agreement or in a prior court order. The U.S. Supreme Court ruled on that issue in *Howell v. Howell*, decided May 15, 2017. So... when there’s NO previous agreement or order requiring indemnification, you cannot get the court to order a pay-back.

If there WAS an agreement or order on this, then there MAY be a chance of obtaining indemnification. But it will require a good lawyer and the time and funds to fight it out in court (and possibly on appeal), since these contingencies were not addressed in the *Howell* decision.

19. Q. The prior court order was entered by agreement; it expressly states that my ex-husband must compensate me for any reduction due to his getting VA payments. The judge signed it. No one appealed it. NOW... my ex-husband says that, even though he’s supposed to pay me back, he doesn’t have enough money to reimburse me since he’s taken VA disability compensation. Is that true?

A. Not by a long shot. All the VA money is tax-free, so he would get even more money in the end by waiving a piece of the pension.

Let’s take an example: Suppose John’s total retired pay is \$1,600 and the court awards Mary, his former wife, 50%, or \$800. Then John obtains a VA disability rating (less than 50%) and elects to receive VA disability compensation, which equals \$600. This means that he waives \$600 of the pension to receive VA payments.

Now the pension-share payment from the retired pay center to Mary is only \$500 a month instead of \$800 (that is, 50% of \$1,000 instead of \$1,600). She’s short by \$300 due to the actions of John in applying for VA payments.

John’s income is now \$500 from the pension and \$600 from VA. If he’s paying taxes at 20% federal, 5% state, then he’s receiving net: \$375 from the pension and \$600 (no taxes) from VA, for a total of \$975, while Mary (if she’s in the same brackets) will only be getting \$375 a month.

If John were to reimburse Mary, then he’d pay to her the missing \$300 each month, which is deductible for him on his taxes, and that only costs him \$225 in his tax brackets. Thus he still has \$750 after taxes, whereas before the VA waiver, he was receiving \$800 taxable each month, or \$600 after-tax income! And Mary has the full amount (\$600 taxable) which the court initially ordered.

20. Q. If I have other questions, what should I do?

A. See a military legal assistance attorney or private attorney as soon as possible. Your lawyer can answer many questions and help you to make a fair and intelligent decision about your choices, options and alternatives. Our legal assistance office stands ready, willing and able to help you in these matters. Be sure to bring along with you to the interview a copy of any documents or court papers that might be helpful to your attorney.

[rev. 7/27/17]

* * *

The LEGAL EAGLE series of client handouts is prepared by Mark E. Sullivan (COL, USAR – Ret.), a family law attorney in Raleigh, N.C. For comments or suggested changes, contact him at Sullivan & Tanner, 5511 Capital Center Drive, Suite 320, Raleigh, NC 27606; mark.sullivan@ncfamilylaw.com; or 919-832-8507.