Protecting the Former Spouses' Share of the Military Pension: Strategic Solutions After *Howell*

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I. Introduction

For many military families, the decision to retire marks the end of decades of shared sacrifice. A service member's career is rarely an individual pursuit; it is a familial undertaking shaped by frequent relocations, unpredictable deployments, and the trailing career constraints placed on the non-military spouse. The policy rationale behind federal protections for military spouses recognizes these unique burdens. Specifically, due to the frequent moves of military members, spouses face additional challenges in establishing traditional careers and are thus limited in their earning capacities. Additionally, as military members are required to be away from home for long periods of time, military spouses must bear a larger share of the homemaker and childcare duties. "Former spouses of service members certainly make greater sacrifices for our country than former spouses of civilians."[1]

The profound interdependence of military marriage is one reason why state courts treat military retired pay as community property upon divorce. Congress ultimately endorsed this principle in the Uniformed Services Former Spouses' Protection Act ("USFSPA"), which authorizes States to classify "disposable

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1 Johnson v. Johnson, 214 P.3d 369, 373 (Alaska 2009) (quoting Brett R. Turner, Equitable Distribution of Property § 6:3, at 21–22 (Thomas Reuters, 3d ed., 2005)).

retired pay" as marital property.[2] However, the USFSPA's definition of disposable retired pay is narrow.[3] It excludes, among other things, amounts waived for disability compensation under Title 38, amounts replaced by Combat-Related Special Compensation ("CRSC"), and Survivor Benefit Plan ("SBP") premiums.[4] In *Mansell v. Mansell*,[5] the U.S. Supreme Court confirmed that States may divide only disposable retired pay and are not authorized "to treat *total* retired pay as community property."[6] These exclusions, rooted in federal disability policy, create significant gaps in protection for former spouses whose economic lives were shaped by the demands of military service.

Military retired pay frequently represents the largest single marital asset accumulated during a long-term military marriage. Its characterization and division are therefore central to achieving equity at dissolution. The problem addressed by this article arises when federal disability compensation schemes operate to reduce, after divorce, the amount of military retired pay previously awarded to a former spouse. When a retired service member elects to receive certain forms of disability compensation, federal law requires a dollar-for-dollar waiver of military retired pay, directly reducing the amount of divisible retired pay.[7] Because the former spouse has no control over this post-divorce election, the economic consequences fall unilaterally on the former spouse.

Historically, this reduction applied uniformly across all military divorce cases involving retired pay waived for disability compensation.[8] Before 2004, any veteran who received disability compensation through the Department of Veterans' Affairs ("VA") was required to waive an equivalent portion of military

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2 *See* 10 U.S.C. § 1408(c)(1).

3 *See id.* at § 1408(a)(4).

4 *See id.* In addition, disposable retired pay does not include specific portions of retired pay owed to members that are entitled to retired pay under Chapter 61.

5 490 U.S. 581 (1989).

6 *Id.* at 589 (emphasis added).

7 *See* 38 U.S.C. § 5305.

8 *See* 38 U.S.C. § 5305. The language "[e]xcept as provided in section 1414 of title 10" was added in 2004. Prior to the enactment of 10 U.S.C. § 1414, all retirees receiving disability compensation were subject to a dollar-for-dollar reduction in their retired pay.

retired pay,[9] and that waived amount permanently reduced the former spouse's share, regardless of disability percentage or combat status. Congress partially altered this landscape with the enactment of Concurrent Retirement and Disability Pay ("CRDP").[10] CRDP restores waived retired pay for retirees with a VA disability rating of fifty percent or higher and who are not receiving CRSC.[11]

As a result, the post-2004 framework divides military retirees into three materially distinct categories. First, retirees with a VA disability rating below fifty percent remain subject to a full VA waiver, resulting in a permanent reduction of divisible retired pay.[12] Second, retirees with a disability rating of fifty percent or higher who receive CRDP experience restoration of the waived retired pay, preserving the former spouse's share.[13] Third, retirees who elect CRSC receive a tax-free special compensation payment in lieu of waived retired pay,[14] but CRSC is statutorily excluded from disposable retired pay and is not divisible as marital property.[15] This third category presents the most severe risk to former spouses, because a unilateral post-divorce CRSC election by the service member can entirely eliminate the stream of retired pay previously awarded to the spouse.

The practical impact of these distinctions is best illustrated numerically. Assume a service member retires with gross monthly retired pay of $5,000 after a long-term marriage, and the divorce decree awards the former spouse fifty percent of the marital share. The former spouse will then receive $2,500 per month. If the retiree later receives a VA disability rating below fifty percent that results in a $1,500 monthly VA benefit, federal law requires a corresponding waiver of $1,500 in retired pay, reducing the divisible retired pay to $3,500. The former spouse's fifty percent share

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9 *Id.*

10 *See* 10 U.S.C. § 1414.

11 *Id.* §§ 1414(a)(1)-(2), (d)(1).

12 *Id.*

13 *Id.*

14 *See* 10 U.S.C. § 1413a. Retirees are eligible if they are receiving retired pay and have at least one combat-related disability. A combat-related disability is a disability that was incurred during armed conflict or hazardous service, "under conditions simulating war," or "through an instrumentality of war." *Id.* § 1413a(e).

15 *Id.* § 1413a(g).

is reduced to $1,750 per month, resulting in a $750 monthly loss. If the retiree instead receives a VA disability rating above fifty percent and qualifies for CRDP, the waived $1,500 is restored to retired pay and the former spouse continues to receive the full $2,500 awarded at divorce. By contrast, if the retiree elects CRSC in full, the $5,000 is replaced with non-divisible CRSC and remains permanently reduced, and the former spouse's share is eliminated. Over time, this reduction compounds into a substantial loss of retirement income for the former spouse, despite no change in the underlying divorce decree.

This article addresses the legal and practical consequences of post-divorce reductions in military retired pay caused by VA waivers, with particular emphasis on CRSC elections. Specifically, it examines the extent to which federal law preempts state courts from remedying those reductions and the narrow circumstances in which former spouses may still protect their awarded interests. This analysis centers on the distinction between judicially imposed remedies, which are prohibited under *Howell v. Howell*,[16] and remedies arising from agreed upon indemnification and judgment enforcement principles.

Part II examines indemnification as a remedial concept and explains why courts lack authority to impose indemnification for waived retired pay following *Howell*. It further surveys jurisdictions that nevertheless permit indemnification when it arises from a voluntary agreement and analyzes enforcement through *res judicata* principles. Additionally, this section clarifies what remedies remain legally viable when a former spouse's share of retired pay is reduced by a VA waiver or CRSC election.

Next, this article addresses cases in which indemnification is unavailable or ineffective and introduces the net present value ("NPV") approach as an alternative means of protecting the former spouse's interest. This approach requires valuing the marital portion of the military pension before the VA waiver takes effect and reallocating that value through property division, offsets, or installment payments rather than through direct garnishment of retired pay. Finally, the article concludes by providing practical guidance for practitioners on valuation timing, expert use, enforcement mechanisms, and strategic considerations necessary to

16 581 U.S. 214 (2017).

safeguard the former spouse's economic interest within the constraints of federal preemption.

II. Remedies and the Limits of Indemnification

Courts confronting post-divorce reduction in military retired pay have long struggled to reconcile equitable property division principles with the limits imposed by federal preemption. Before the Supreme Court's decision in *Howell*,[17] many state courts attempted to mitigate the economic harm caused by VA disability waivers by ordering reimbursement or indemnification to former spouses.[18] These remedies were often framed as enforcement of vested property rights rather than as new divisions of military benefits.[19] Courts reasoned that because a former spouse's share of retired pay was awarded at divorce, a unilateral post-divorce VA waiver should not be permitted to defeat that award.[20]

This approach, however, conflicted with the USFSPA, which grants state courts only limited authority over military retired pay.[21] Although the USFSPA permits states to treat "disposable retired pay" as marital or community property, it expressly excludes amounts waived to receive VA disability compensation.[22] As a result, any judicial effort to restore waived retired pay risks encroaching upon an area Congress deliberately removed from state control.[23] The Supreme Court's decision in *Howell* represents the Court's most direct effort to resolve that tension and delineate the limits of indemnification as a judicial remedy.

A. *Federal Preemption Under* Howell v. Howell

The Supreme Court's analysis in *Howell* begins with the premise that state authority over military retired pay is purely

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17 *Id.*

18 *Id.* at 221–22.

19 *Id.* at 222.

20 *Id.*

21 *See* 10 U.S.C. § 1408(a)(4).

22 *Id.* at § 1408(a)(4)(ii).

23 *Howell*, 581 U.S. at 221 (citing 38 U.S.C. § 5301(a)(1)) (stating "[s]tate courts cannot 'vest' that which (under governing federal law) they lack the authority to give").

statutory.[24] Congress enacted the USFSPA in response to *McCarty v. McCarty*,[25] granting states limited power to divide military retired pay in divorce proceedings.[26] This grant of authority is confined to "disposable retired pay," a term Congress defined to exclude retired pay waived in order to receive VA disability benefits.[27]

In *Howell*, the parties divorced in Arizona, and the decree awarded the former spouse, Sandra, fifty percent of the service member's, John's, military retired pay.[28] At the time of divorce, John had not waived any portion of his retired pay.[29] More than a decade later, John elected to receive VA disability compensation, which required a corresponding waiver of retired pay under federal law.[30] That waiver reduced Sandra's monthly share of retired pay by approximately $125.[31] Sandra sought remedial action, and the trial court ordered John to indemnify her for the reduction by increasing her monthly payment to the amount she had received before the waiver.[32] The Arizona Supreme Court affirmed, reasoning that Sandra's interest in the retired pay vested at divorce and could not be diminished by a unilateral post-divorce election.[33]

The U.S. Supreme Court reversed, and held that state courts "cannot 'vest' that which (under governing federal law) they lack the authority to give."[34] Although a divorce decree may award a percentage of retired pay, the Court explained that the amount ultimately payable remains contingent on future events permitted by federal law, including a lawful VA waiver.[35] The Court rejected the argument that indemnification merely enforces an existing property right, and held that reimbursement and indemnification orders are functionally indistinguishable from direct divisions of retired pay.[36] The Court expressly dismissed semantic distinctions

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24 *Id.* at 215–16.
25 *See* 453 U.S. 210 (1981).
26 Cox v. Cox, 479 U.S. 970 (1986).
27 10 U.S.C.§ 1408(a)(4)(ii).
28 *Howell*, 581 U.S. at 218–19.
29 *Id.* at 219.
30 *Id.*
31 *Id.*
32 *Id.*
33 *Id.* at 219–20.
34 *Id.* at 221 (citing 38 U.S.C. § 5301(a)(1)).
35 *Id.* at 221–22.
36 *Id.* at 222.

between "reimbursement" and "indemnification," concluding that "[r]egardless of their form," such orders "displace the federal rule and stand as an obstacle to the accomplishment and execution of the purposes and objectives of Congress."[37] Because court-ordered indemnification restores to the former spouses the very portion of retired pay Congress excluded from division, such orders are pre-empted under the Supremacy Clause of the U.S. Constitution.[38]

The Supreme Court's decision in *Howell* therefore establishes a bright-line rule that state courts may not order indemnification to offset reductions in retired pay caused by a lawful VA disability waiver.[39] At the same time, *Howell* carefully circumscribes the scope of its holding.[40] State courts remain free, at the time of divorce, to consider the contingency that military retired pay may later be waived.[41] Spousal support determinations may account for changes in income resulting from a VA waiver, provided that support is not used as a substitute for property division.[42] Finally, *Howell* did not involve a contractual agreement between the parties allocating the risk of future waivers, nor did it address the enforceability of indemnification provisions contained in final, un-appealed judgments.[43] Those unresolved questions have driven much of the post-*Howell* litigation in state courts.[44]

In the wake of *Howell*, state courts have consistently interpreted the decision as a categorical prohibition on judicial remedies that function to restore a former spouse's lost share of military retired pay following a VA disability waiver. Courts applying *Howell* have emphasized that the dispositive inquiry is not the label affixed to the remedy, but whether the effect of the order requires the service member to compensate the former spouse for waived retired pay.

The California Court of Appeals decision in *In re Marriage of Cassinelli* illustrates the strict application of *Howell*'s functional approach.[45] In *Cassinelli*, the former spouse's, Janice's, share of the

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37 *Id.*

38 *Id.*

39 *Id.*

40 *Id.*

41 *Id.*

42 *Id.*

43 *Id.* at 220–21.

44 Kristopher J. Hilscher, *Military Pension Division: A Review of Cases Following* Howell v. Howell*,* 36 J. Am. Acad. Matrim. Law. 89, 92 (2023).

45 20 Cal. App. 5th 1267 (2018).

service member's, Robert's, military retired pay was eliminated after Robert elected to receive both VA disability compensation and CRSC.[46] The trial court ordered Robert to pay Janice an equivalent amount in permanent spousal support.[47] Although the trial court characterized the award as support rather than reimbursement for lost property or indemnification, the Court of Appeal reversed, holding that the order impermissibly compensated Janice for the loss of her share of retired pay.[48]

There, the court relied heavily on *Howell*'s rejection of semantic distinctions in holding that the categorization of the trial court's award as "spousal support" did not defeat *Howell*.[49] Because the support award was calculated to match the precise amount of retired pay lost due to the waiver, it functioned as an indemnification or reimbursement order in substance.[50] At the same time, the court carefully distinguished between prohibited compensation and permissible consideration of disability benefits as part of the parties' overall financial circumstances.[51] The court acknowledged that *Howell* does not prohibit state courts from modifying spousal support based on statutory factors, so long as the modification is not used as a substitute for restoring waived retired pay.[52] This distinction underscores *Howell*'s principle that courts may consider the economic consequences of a VA waiver, but may not attempt to neutralize those consequences through dollar-for-dollar replacement.[53]

The Alaska Supreme Court's decision in *Jordan v. Jordan* provides a cautionary example of how courts may err when attempting to balance equity and preemption.[54] In *Jordan*, the trial court awarded the former spouse, Cheryl, approximately fifty-seven

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46 *Id.* at 1271.

47 *Id.* at 1272.

48 *Id.* at 1275.

49 *Id.* at 1274–75.

50 *Id.*

51 *Id.*

52 *Id.* (citing *Howell*, 581 U.S. at 222).

53 *See Howell*, 581 U.S. at 222.

54 480 P.3d 626 (Alaska 2021). *Jordan* does not deal with a VA waiver, but the Alaska Supreme Court specifically noted that this "factual distinction is not material. Whether the disability pay is received concurrently or through waiver, *Howell* preempts divided military disability pay in either form or effect, particularly with a 'dollar-for-dollar' offset." *Id.* at 636.

percent of the marital estate based in part on the service member's, Thomas', receipt of VA disability benefits.[55] Although the Alaska Supreme Court agreed that disability benefits may be considered as part of the parties' overall financial condition, it vacated the property division because the trial court's calculations directly offset non-divisible disability pay dollar-for-dollar.[56] The court held that such an offset violated federal law by accomplishing indirectly what *Howell* expressly forbids.[57]

Jordan illustrates the fine but critical distinction *Howell* requires courts to observe—courts may account for the economic reality created by a VA waiver when evaluating statutory factors for an equitable division of marital assets, but they must not use valuation or offset mechanisms that replicate the effect of dividing disability benefits.[58] Where the remedy tracks the amount of waived retired pay with mathematical precision, it crosses the line into preempted territory.

Read together, these post-*Howell* decisions reflect a consistent judicial understanding of the scope of federal preemption. State courts may not impose indemnification or equivalent remedies that restore a former spouse's lost share of military retired pay following a VA waiver or CRSC election. While *Howell* forecloses court-ordered indemnification, it expressly does not address whether a service member's promise to protect a former spouse's share of retirement benefits may be enforced as a contractual obligation.

B. *Contractual Indemnification by Agreement*

Although *Howell* categorically prohibits courts from imposing indemnification to offset reductions in retired pay caused by VA disability waivers, the decision does not purport to invalidate voluntary agreements in which divorcing spouses allocate the economic risk of such waivers. The Supreme Court's analysis in *Howell* is expressly concerned with the scope of judicial authority under the USFSPA and does not address the enforceability of private contractual obligations undertaken by divorcing spouses. As

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55 *Id.* at 630.
56 *Id.* at 634–38.
57 *Id.* at 636.
58 *Id.* at 636–37.

a result, a distinct doctrinal framework governs cases in which a former spouse seeks enforcement of an indemnification provision expressly contained in a settlement agreement rather than through a judicially crafted remedy.

Post-*Howell* courts addressing contractual indemnification have emphasized that an analysis of federal preemption turns on the nature of the relief ordered, not the underlying military benefits that may have informed the parties' agreement.[59] Where enforcement requires a court to divide, assign, or garnish disability benefits, federal law preempts the remedy.[60] In contrast, where enforcement merely holds a party to a personal obligation voluntarily assumed at divorce, several courts have concluded that federal law poses no barrier.[61] This distinction reflects a fundamental difference between judicial redistribution of federally protected benefits and enforcement of private promises governed by state contract law.[62]

The Supreme Court of Virginia's decision in *Yourko v. Yourko* provides the most comprehensive and explicit articulation of this distinction.[63] In *Yourko*, the parties negotiated a detailed property settlement agreement and corresponding Military Pension Division Order that guaranteed the former spouse, Lee Ann, a fixed monthly payment derived from the service member's, Michael's, military retirement.[64] The agreement included a broad indemnification provision requiring Michael to maintain the agreed payment even if any action, including a waiver for disability compensation, reduced Lee Ann's share.[65] When the Defense Finance and Accounting System ("DFAS") later determined that a substantial portion of Michael's retirement was non-divisible disability pay, Michael argued that enforcement of the indemnification provision violated federal law.[66]

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59 Yourko v. Yourko, 844 S.E.2d 799, 803–04 (Va. 2023).

60 *Howell*, 581 U.S. at 221–22.

61 *See Yourko*, 844 S.E.2d at 805–06; *see also* Martin v. Martin, 520 P.3d 813 (Nev. 2022); Gross v. Wilson, 424 P.3d 390 (Alaska 2018); Jones v. Jones, 505 P.3d 224 (Alaska 2022).

62 *See Yourko*, 844 S.E.2d at 805–06.

63 *Id*.

64 *Id.* at 800–01.

65 *Id.* at 801.

66 *Id.* at 801-02.

The Virginia Supreme Court rejected that argument based upon both the doctrine of federal preemption and basic principles of contract law.[67] The court held that the indemnification provision did not require Michael to use disability benefits as the source of the payments to Lee Ann and did not direct assignment or garnishment of protected funds.[68] Instead, the agreement imposed a personal obligation that could be satisfied from any available income or assets.[69] Because federal law regulates only the divisibility and assignment of military disability benefits, not how a veteran may spend money once received, enforcement of the agreement did not conflict with the USFSPA.[70]

Critically, the *Yourko* court distinguished *Howell* on the ground that *Howell* involved a judicially imposed reimbursement ordered years after divorce, not enforcement of a bargained-for promise.[71] The court ultimately held that

> "[F]ederal law does not prevent a husband and wife from entering into an agreement to provide a set level of payments, the amount of which is determined by considering disability benefits as well as retirement benefits." Along these same lines, federal law does not bar courts from upholding such agreements or from enforcing indemnification provisions that may be included to ensure that payments are maintained as intended by the parties.[72]

The Nevada Supreme Court adopted a similar analytical framework in *Martin v. Martin*.[73] There, the court confronted a post-*Howell* challenge to enforcement of a divorce decree requiring the service member, Erich, to compensate the former spouse, Raina, for reductions in his retirement benefits.[74] Erich argued that enforcement violated federal law by effectively dividing his disability benefits but the Nevada Supreme Court disagreed, holding that *Howell* does not prohibit enforcement of private agreements that were made in consideration of waiver as an economic risk.[75] Like in *Yourko*, the court in *Martin* focused on the

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67 *Id.* at 804.
68 *Id.* at 804–05.
69 *Id.* at 805.
70 *Id.* at 805.
71 *Id.*
72 *Id.* at 805–06 (quoting Owen v. Owen, 14 Va. App. 623, 628 (1992)).
73 520 P.3d 813 (Nev. 2022).
74 *Id.*
75 *Id.* at 816, 818.

distinction between what courts may order and what parties may promise.[76] While acknowledging that federal law limits judicial authority to divide military benefits, the court held that indemnification provisions "may be enforced through contract principles," in part because the service member "may satisfy [their] contractual obligations with whatever monies [they] wish[]," and therefore, enforcement of a contractual obligation does not compel the division of protected benefits.[77]

The Alaska Supreme Court's decisions in *Gross v. Wilson*[78] and *Jones v. Jones*[79] further reinforce the distinction between judicial remedies and private contracts. In *Gross*, the Alaska Supreme Court recognized that *Howell* bars courts from imposing indemnification as a matter of equity but declined to interpret *Howell* as nullifying indemnification provisions incorporated into divorce decrees by agreement.[80] As in *Yourko* and *Martin*, the Alaska Supreme Court similarly treated the obligation at issue in *Gross* as arising from the parties' negotiated settlement rather than from an attempt by the court to divide non-disposable benefits.[81] The court affirmed the trial court's enforcement of the parties' settlement agreement and order granting the former spouse's request for arrearages, holding that "*Howell* does not hold that a state court cannot enforce a property division by ordering a service member who unilaterally stops making payments the service member was legally obligated to make to resume those payments and pay arrearages."[82]

In *Jones*, the Alaska Supreme Court addressed an indemnification provision that expressly allocated the risk of future reductions in military retired pay.[83] There, the parties specifically agreed that the service member, Kendre, would indemnify the

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76 *Id.* at 817–18.

77 *Id.* at 820.

78 424 P.3d 390 (Alaska 2018).

79 505 P.3d 224 (Alaska 2022).

80 *Gross*, 424 P.3d at 401.

81 *Id.*

82 *Id.* The Alaska Supreme Court characterized the relief as enforcement of the parties' divorce decree incorporating their settlement agreement, rather than contractual indemnification, notwithstanding that the settlement agreement itself contained a "reimbursement" provision. The distinction was not material, as the practical effect was the same as in *Yourko* and *Martin*.

83 *Jones*, 505 P.3d at 226.

former spouse, Vieanna, if he took "any action that prevent[ed], decrease[d], or limit[ed] the collection by [Vieanna]" of her share of the military retired pay, "by application for or award of disability compensation, combination of benefits with any other retired pay, [or] waiver for any reason."[84] Kendre ultimately began receiving disability pay in lieu of retired pay and did not indemnify Vieanna, which prompted her to seek relief.[85] The court affirmed enforcement, holding that:

> [a]n indemnity provision . . . [in a] negotiated property settlement agreement is a bargained-for term that takes account of the contingency that some military retirement pay might be waived, which is a proper consideration in arriving at an overall division of marital property. Neither federal law nor [Alaska law] precludes the superior court from enforcing this contract term.[86]

The court based its holding on the same principle as the courts in *Yourko*, *Martin*, and *Gross* did: enforcing the parties' promises to each other does not equate to an impermissible division of disability benefits because the retiree is not required to use their disability benefits to comply with the terms of their promise.[87]

Across jurisdictions, courts enforcing contractual indemnification consistently emphasize source-of-payment neutrality as the critical safeguard against federal preemption. Agreements that guarantee payments without specifying disability benefits as the source avoid conflict with federal law because they do not assign, garnish, or divide federally protected funds. Instead, they operate as personal obligations akin to any other financial commitment arising from divorce and contract law.

These decisions collectively demonstrate that *Howell*'s prohibition on indemnification is limited to court-ordered remedies and does not extend to voluntary agreements allocating economic risk. When parties knowingly bargain for protection against future VA waivers, and when enforcement does not require division or assignment of disability benefits, federal law does not bar enforcement of those promises. The enforceability of such agreements turns

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84 *Id.* at 227 Vieanna initially sought relief from the final order through Rule 60(b); however, the trial court ordered that the agreement's indemnity provision was enforceable and did not need to be set aside.

85 *Id.*

86 *Id.* at 230–31 (internal citations and quotation marks removed).

87 *Id.* at 230.

not on military benefits law, but on ordinary principles of contract interpretation. This distinction provides practical guidance for practitioners representing former spouses in military divorce cases, particularly where post-divorce VA waivers threaten the value of an awarded pension share, and highlights the importance of intentionally drafting indemnification provisions to protect the former spouse's economic interest.

C. *Enforcement of Agreed Remedies Through* Res Judicata

Res judicata is a foundational doctrine of judicial finality that precludes parties from relitigating claims or issues that have already been definitively resolved by a court of competent jurisdiction.[88] In its modern formulation, the doctrine operates as an affirmative defense barring subsequent litigation between the same parties, on the same claim or any other claim arising from the same transaction or series of transactions that could have been raised in the earlier action.[89] The doctrine requires three essential elements: (1) a prior decision on the issue; (2) a final judgment on the merits; and (3) the same parties, or parties standing in privity with the original litigants.[90]

In the family law context, *res judicata* plays an especially critical role. Divorce decrees distribute property, allocate future financial expectations, and allow parties to structure their post-marital lives with a level of certainty. Final property divisions are entitled to significant deference and, once a divorce decree becomes final, it may not be reopened merely because the division later appears legally incorrect, so long as the issuing court possessed jurisdiction over the parties and the subject matter.[91] Finality prevents the disruption of settled property distributions and ensures the preservation of the "surviving family structure."[92]

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88 *Res Judicata*, Black's Law Dictionary (Bryan A. Garner ed., 12th ed. 2024).

89 *Id.*

90 *Id.* (internal citations and quotation marks omitted).

91 *See* Foster v. Foster, 983 N.W.2d 373, 379 (Mich. 2022) (stating "a divorce decree which has become final may not have its property settlement provisions modified except for fraud or for other such causes as any other final decree may be modified.") (quoting Pierson v. Pierson, 88 N.W.2d 500, 504 (1958)).

92 *Id.* at 379-80 (internal citations omitted).

Consider a divorce judgment that becomes final after allocating a former spouse a fixed percentage of "disposable retired pay," and the decree also assigns the retiree the economic risk of any future election that reduces that stream. Years later, the retiree elects a benefit that reduces the divisible retired pay and argues that federal law would have barred the trial court from approving the risk-allocation language in the original decree. Even if the retiree's federal-law argument is correct on the merits, the question for collateral review is different: whether the original judgment is void (and therefore subject to attack at any time) or merely erroneous (and therefore binding absent a timely direct appeal). In most jurisdictions, the latter controls when the divorce court had authority over the parties and the marital estate, because legal error does not strip the court of jurisdiction.[93]

Res judicata operates as a critical enforcement mechanism when a divorce decree incorporates a negotiated indemnification or reimbursement provision addressing future reductions in military retired pay. In the military pension context, this principle has particular significance, as service members frequently attempt to relitigate property divisions after electing disability-related benefits that reduce divisible retired pay.

The Michigan Supreme Court's decision in *Foster v. Foster* (*Foster III*) provides a comprehensive modern framework for applying *res judicata* to agreements involving military retired pay and disability benefits.[94] In *Foster III*, the parties entered a consent judgment of divorce awarding the former spouse, Deborah, fifty percent of Ray's, the service member's, disposable retired pay and included an offset provision requiring Ray to personally compensate her for any reduction caused by a future election of disability benefits, including CRSC.[95] The provision expressly required payment from Ray's own earnings and preserved cost-of-living adjustments that would have accrued absent the waiver.[96]

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93 *Foster*, 983 N.W.2d at 379 ("the doctrine of *res judicata* applies even if the prior judgment rested on an invalid legal principal"); *see also* United Student Aid Funds, Inc. v. Espinosa, 559 U.S. 260, 270 (2010) ("[a] judgment is not void, for example, simply because it is or may have been erroneous.").

94 *Foster*, 983 N.W.2d at 375–85.

95 *Id.* at 376.

96 *Id.* at 376, n.1.

When Ray later elected to receive CRSC in lieu of retired pay, Deborah's monthly share dropped substantially and she sought enforcement through contempt proceedings.[97] Although *Foster III* ultimately rested on principles of *res judicata* and subject-matter jurisdiction, the case reached that conclusion only after an unusually long appellate path that obscured the legal questions presented.[98] The trial court held Ray in contempt and ordered payment of arrearages and attorney's fees.[99] Ray appealed, and the Michigan Court of Appeals affirmed.[100] Ray appealed to the Michigan Supreme Court, and the court vacated the court of appeals' decision and remanded for reconsideration in light of *Howell*.[101] On remand, the court of appeals again affirmed enforcement of the offset provision.[102] Ray appealed a second time, and in *Foster I*,[103] the Michigan Supreme Court resolved the question left unanswered by *Howell*, holding that federal law preempts state courts from enforcing an offset provision to the extent it requires reimbursement for reductions in retired pay caused by a CRSC election.[104] Importantly, however, the court noted that the court of appeals failed to address "the effect of federal preemption on the trial court's subject-matter jurisdiction or defendant's ability to challenge the terms of the consent judgment outside of direct appeal" and remanded the case back to the court of appeals for consideration of that unresolved issue.[105]

On second remand, the court of appeals reversed in *Foster II*, holding that Ray "did not engage in an improper collateral attack on the consent judgment and the trial court lacked subject-matter jurisdiction to enforce the consent judgment with respect to the offset provision due to the principle of federal preemption."[106] Under that rationale, the consent judgment was treated as void rather than merely erroneous.[107]

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97 *Id.* at 376–77.
98 *Id.* at 377–78.
99 *Id.* at 377.
100 *Id.*
101 *Id.* at 377–78.
102 *Id.* at 378.
103 949 N.W.2d 102 (2020).
104 *Foster*, 983 N.W.2d at 378.
105 *Id.* (*quoting Foster I*, 949 N.W.2d at 104).
106 *Id.* at 378 (internal citations omitted).
107 *Id.*

Deborah then sought leave to appeal, and the Michigan Supreme Court granted review to resolve the narrow but consequential question left unresolved after *Foster I*: whether federal preemption under the USFSPA and *Howell* deprives state courts of subject-matter jurisdiction over divorce judgments that divide or account for military retirement and disability benefits.[108] The court answered that question in the negative, holding that federal preemption does not deprive state courts of subject-matter jurisdiction over divorce actions or property division.[109]

Central to the court's reasoning was the distinction between a court's lack of jurisdiction and an erroneous exercise of jurisdiction.[110] A judgment entered by a court with jurisdiction over the parties and the marital estate is not void merely because it misapplies federal law.[111] Such an error renders the judgment voidable on direct appeal, not subject to attack years later.[112] The court cautioned that destroying this distinction would undermine finality in divorce cases and destabilize settled property distributions.[113]

Applying settled *res judicata* principles, the Michigan Supreme Court reaffirmed that final divorce judgments dividing marital property remain binding even if they rest on an invalid or subsequently overruled legal principle.[114] *Res judicata* essentially provides courts with broad authority to enforce their judgments, as "[o]nly judgments entered without personal jurisdiction or subject-matter jurisdiction are void and subject to collateral attack."[115] Because state courts unquestionably have jurisdiction over divorce and property division, the offset provision in *Foster III* constituted, at most, a mistake in the exercise "undoubted jurisdiction."[116]

The court also rejected the argument that federal veterans' benefits statutes confer exclusive federal jurisdiction over disputes

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108 *Id.*

109 *Id.* at 379–83.

110 *Id.* at 380–83.

111 *Id.* at 379 (holding that "the doctrine of *res judicata* applies even if the prior judgment rested on an invalid legal principle.") (internal citations and quotation marks omitted).

112 *Id.* at 382 (citing *In re* Ferranti, 934 N.W.2d 610, 620 (2019)).

113 *Id.* at 380 (internal citations omitted).

114 *Id.* at 379 (citing Colestock v. Colestock, 354 N.W.2d 354, 356 (1984)).

115 *Id.* at 382 (quoting *Ferranti*, 934 N.W.2d at 620).

116 *Id.* at 381-84.

involving the division of military disability benefits in divorce proceedings.[117] While federal law limits the substantive remedies state courts may impose, it does not strip them of authority to adjudicate and enforce divorce judgments.[118] Accordingly, Ray's post-judgment challenge was barred as an improper collateral attack on a final judgment.[119]

For practitioners, *Foster III* highlights that the strongest protection for a former spouse may lie not in post-divorce remedies, but in the finality of the original judgment itself. Ensuring that negotiated indemnification or reimbursement provisions are expressly incorporated into a final decree can shift the battleground from federal preemption to *res judicata*, where service members face significantly higher barriers to post-judgment relief. In post-divorce litigation, practitioners should preserve *res judicata* as an affirmative defense when a service member attempts to collaterally attack a final decree.

III. A Modern Alternative Remedy

After *Howell*, the range of viable remedies available to former spouses whose awarded share of military retired pay is later reduced has narrowed considerably. State courts are no longer permitted to impose new indemnification provisions post-judgment, nor may they infer indemnity obligations into silent decrees.[120] While *Howell* acknowledged the hardship imposed by federal preemption, it made clear that courts lack authority to retroactively cure that harm through judicially imposed reimbursement once a final property division is in place.[121]

In theory, a small number of alternative post-judgment remedies remain available, including reopening a decree for redistribution of marital property or modification of spousal support.[122] Those avenues, however, raise distinct concerns, vary significantly by jurisdiction, and often depend on statutory standards that fall

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117 *Id.*

118 *Id.* at 381-82.

119 *Id.* at 376.

120 Brett R. Turner, Equitable Distribution of Property § 6:10 (Thomas Reuters, 4th ed., 2021).

121 *Id*.

122 *Id*.

outside the scope of this article.[123] Accordingly, this article does not attempt to evaluate those remedies. Instead, it focuses on a single property-based strategy that operates prospectively and within the limits articulated by *Howell*: the net present value ("NPV") approach.

The NPV approach derives from *Howell*'s recognition that courts retain discretion "when [they] first determine[] the value of a family's assets" to account for the contingency that military retired pay may later be waived.[124] While the Supreme Court's articulation of this principle left substantial ambiguity as to its precise application, the Court affirmed that property division at the time of divorce remains the critical moment for protecting a former spouse's economic interest.[125] The NPV approach does not attempt to restore waived retired pay after the fact, but instead values the marital portion of the military pension before any waiver occurs and reallocates that value through a fixed award rather than a percentage-based pension division.

Conceptually, the NPV approach treats the military pension like any other deferred marital asset. Rather than awarding a percentage of future retired pay subject to unilateral reduction, the court determines the present value of the former spouse's marital share and converts that amount into a present value payable through property offsets or structured payments. Because the award is fixed and unconditional on its face, it is not reduced by subsequent elections of disability benefits and is not tied to the continued existence of divisible retired pay.[126]

This approach is not without tradeoffs. A fixed award generally sacrifices future cost-of-living increases and requires careful valuation, predominantly with expert assistance. But by severing the former spouse's entitlement from the pension itself, the NPV approach offers a potential means of preserving economic equity while respecting federal preemption. As one commentator has

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123 *See, e.g.,* Eliza Grace Lynch, *A Change in Military Pension Division: The End of Court-Adjudicated Indemnification*—Howell v. Howell, 44 Mitchell Hamline L. Rev. 1064, 1084-85 (2018) ("although property division is generally fixed and final, a court may have discretion to reopen a division of marital/community property when extraordinary circumstances arise.").

124 Turner, *supra* note 120, at § 6:10 (quoting *Howell*, 581 U.S. at 222).

125 *Id.* at n.29 (quoting *Howell*, 581 U.S. at 222).

126 *Id.*

observed, a monetary award "further removed from division of the pension" is more likely to survive post-*Howell* scrutiny than an award defined as a percentage of retired pay.[127]

Part III therefore examines the NPV approach as a modern alternative remedy that operates before the VA waiver occurs.

A. *Net Present Value as a Pre-Waiver Protective Strategy*

"If military retirement pay is marital property, it need not be actually divided. The court is free to assign it entirely to the owner and award offsetting property to the other spouse."[128] This principle serves as a protective strategy for military spouses because the pension itself is not actually divided. If a court applies the NPV approach, it values the marital portion of the retirement pay, "award[s] the pension interest to the employee spouse," and then offsets the resulting disparity through other means of property division or equalization payments.[129]

A practical comparison illustrates how the NPV approach differs from traditional deferred distribution of military retired pay. For purposes of this example, assume a military pension is determined to be marital property in its entirety. Under the traditional deferred distribution method, the court typically enters a Military Division of Retired Pay Order ("MDRO") directing DFAS to pay each spouse their equitable share directly. If the service member's retired pay is $3,000 per month and the court orders an equal division, each spouse would receive $1,500 per month, paid directly by DFAS, for as long as the pension remains payable. That arrangement preserves cost-of-living adjustments and requires no expert valuation, but it leaves the former spouse's interest contingent on the continued existence of disposable retired pay.

By contrast, under the NPV approach, the pension is not divided for future payment. Instead, an expert values the total present value of the marital portion at the time of divorce. Using the same example, assume the service member is fifty years old

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127 *Id.*

128 *Id.* at § 6:42 (citing Schado v. Schado, 648 So. 2d 1169 (Ala. Civ. App. 1994); Parr v. Parr, 773 S.W.2d 135 (Mo. Ct. App. 1989); Johnson v. Johnson, 652 N.W.2d 315 (N.D. 2002); Matter of Marriage of Maidel, 816 P.2d 1206 (Or. Ct. App. 1991)).

129 *See* Laing v. Laing, 741 P.2d 649, 657 (Alaska 1987) (this case did not involve a military pension, but the principle is nonetheless the same).

and the expert's analysis indicates a life expectancy of age eighty-five. The expert calculates the expected duration of payments and determines the present value of receiving $3,000 per month over that period. The court then awards the pension in its entirety to the service member and offsets the former spouse's marital share through other components of the property division. That offset may take the form of a greater share of non-pension marital assets, a lump-sum equalization payment, or structured installment payments designed to equalize the overall distribution of the marital estate.[130]

Under this structure, the former spouse does not receive monthly payments tied to the pension itself and does not rely on DFAS for enforcement. Instead, the former spouse's entitlement is satisfied through a fixed property award determined at divorce. While the NPV approach requires valuation, it converts a contingent future interest into a defined property right and removes the risk that a post-divorce waiver by the service member will later reduce or eliminate the former spouse's awarded share.[131]

An instructive illustration of a property division using the NPV approach appears in *Brady-Kinsella v. Kinsella*, where the Connecticut Appellate Court affirmed a trial court's decision to award the pension entirely to the employee spouse while equalizing the marital estate through other property.[132] In *Brady-Kinsella*, the trial court determined that former service member Kayleigh's[133] pension constituted marital property subject to equitable distribution, but exercised its discretion to distribute the pension exclusively to her rather than dividing it for future payment.[134] Instead of ordering a deferred distribution of the pension, the trial court used the NPV approach by assigning the pension a present value, awarding it in full to Kayleigh, and awarding Nancy, the former spouse, (1) $125,851 in equalization payments; (2) her own deferred compensation accounts; and (3) the marital vehicles.[135]

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130 Regarding enforcement of installment payments, *see, e.g.,* Kobold v. Kobold, 121 N.E.3d 564, 573-74 (Ind. Ct. App. 2019).

131 Turner, *supra* note 120, at § 6:40.

132 106 A.3d 956 (Conn. App. Ct. 2014).

133 *Id*. at n.1 (at trial, Kayleigh's name was Stephen; she has since transitioned from male to female and will be referred to as Kayleigh herein).

134 *Id.* at 959.

135 *Id.* at 963.

On appeal, Nancy argued that it was inequitable for Kayleigh to retain the entirety of the pension, particularly given the length of the marriage and because the pension was one of the most valuable marital assets.[136] The appellate court rejected that argument, emphasizing that trial courts are not required to divide pensions through future payments and retain broad discretion to assign a pension entirely to one spouse while achieving overall equity through other components of property distribution.[137] In affirming the trial court's order on property division, the appellate court reiterated that financial orders in divorce cases are "entirely interwoven" and must be evaluated as a whole rather than in isolation.[138] Ultimately, the appellate court held that the overall distribution of property fell well within the trial court's broad equitable discretion.[139]

Although *Brady-Kinsella* did not involve a military pension, it illustrates the practical operation of present-value, offset-based distribution and demonstrates how the NPV approach can equitably balance the parties' respective interests. The trial court's method in *Brady-Kinsella* avoided creating a contingent future entitlement tied to the pension itself and instead converted the non-employee spouse's interest into a present property right satisfied through equalization payments. This structure mirrors the protective logic of the NPV approach in military pension cases, where awarding the pension outright to the service member and offsetting the former spouse's share through other marital assets can preserve equity while avoiding the vulnerabilities inherent in deferred distribution.

B. *Practical Considerations for Courts and Practitioners*

While the NPV approach offers a viable means of protecting a former spouse's economic interest in military retired pay, its effectiveness depends on careful execution at the divorce stage. Courts and practitioners must account for timing, valuation costs, payment structure, and enforcement mechanisms to ensure that an NPV-based division both complies with federal law and functions equitably in practice.

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136 *Id.* at 961.
137 *Id.* at 963.
138 *Id.* at 959.
139 *Id.* at 963.

First, the NPV approach must be implemented before any waiver of retired pay occurs. That timing requirement stems directly from federal law: once retired pay is waived in favor of disability benefits, the waived portion no longer constitutes "disposable retired pay" and therefore falls outside the category of marital property subject to division.[140] As a result, if a divorce occurs after retired pay has already been waived, the former spouse cannot rely on the NPV approach to capture the value of the waived portion, because there is no divisible asset to value or reallocate.[141] The NPV approach is therefore only viable when disposable retired pay exists in full at the time of divorce, or when only a portion of the pension has been waived and the remaining disposable retired pay can still serve as the basis for valuation.[142]

In practice, this means the NPV approach is most appropriate where there is a substantial likelihood that a future waiver will occur, even though it has not yet been elected.[143] For example, where a service member is already retired, served in a combat role, and is receiving VA compensation, there is a realistic possibility that the service member may later elect to receive CRSC.[144] CRSC is available only for disabilities that are "combat-related," meaning disabilities that are attributable to armed conflict, hazardous service, an instrumentality of war, or conditions simulating war.[145] Because receipt of CRSC requires a corresponding waiver of an equivalent portion of retired pay, the risk of future reduction is significant in such cases. Similarly, where a retired service member is actively pursuing a VA disability claim, but has not yet received a final rating, the former spouse faces the risk that a future award below fifty percent could require a waiver of disposable retired pay, making pre-waiver valuation particularly important.[146]

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140 *See* 10 U.S.C. § 1408(a)(4)(ii).

141 *See Howell*, 581 U.S. at 222 (any inequities caused by this hypothetical situation may be addressed through an award of spousal support based on principles of equity; although spousal support cannot be awarded as a dollar-for-dollar offset of waived retired pay, courts may consider one spouse's disability benefits as income for the purposes of determining the parties' relative financial circumstances and necessities).

142 *See* Turner, *supra* note 120, at § 6:10.

143 *Id.*

144 *See* 10 U.S.C. § 1413a.

145 *Id.* § 1413a(e).

146 *See* 10 U.S.C. § 1414.

By contrast, where the service member has no combat-related disabilities as defined by statute and no plausible basis for establishing that a current condition resulted from combat, the likelihood of future CRSC eligibility may be remote.[147] In those circumstances, the cost of retaining an expert to perform a present-value calculation may outweigh the protective benefit of converting the pension into a fixed property award. Likewise, if a service member is already rated at or above fifty percent disabled and receives VA compensation without any identified combat-related conditions, the risk calculus may differ unless there is a realistic possibility that the disability rating could later be reduced below the statutory threshold for receipt of CRDP, thereby triggering a waiver requirement.

Because the determinations are highly fact-specific, practitioners must obtain sufficient information through discovery to assess waiver risk before advising a client to pursue the NPV approach. Relevant discovery typically includes the service member's VA decision letters, current disability ratings, pending disability applications, and DD-214 Certificate of Release or Discharge from Active Duty,[148] which together provide critical insight into the nature of the claimed disabilities, combat exposure, service history, and the likelihood of future waivers.

Second, the NPV approach necessarily shifts enforcement away from DFAS and pension-based payments. Unlike deferred distribution, an NPV award is not paid through monthly garnishments or direct payments from DFAS, but instead is satisfied through property offsets or monetary payments ordered as part of the divorce judgment. Federal law authorizes DFAS to make direct payments to a former spouse only when the court order awards a portion of the service member's disposable retired pay as a percentage or fixed dollar amount payable from the pension itself.[149] The very nature of the NPV approach eliminates this possibility because the pension in its entirety is specifically awarded to the service member spouse;

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147 For example, a veteran may have service-connected disabilities but no history of combat deployments, therefore reducing the likelihood that the disabilities will qualify as "combat-related" for purposes of CRSC eligibility.

148 Samantha Mountford, *Mental Illness and Military Discharge Upgrades: American Veterans' Unseen Wounds*, 9 Veterans L. Rev. 84, 85-86 (2023) (noting that the DD-214 "long form also includes the characterization of service, reason for discharge, and a re-enlistment code").

149 *See* 10 U.S.C. § 1408(d)(1).

thus, there is no actual division of the pension.[150] DFAS has no authority to disburse payments that stem from an award of non-pension property, equalization payments, or other monetary awards that are unassociated with disposable retired pay.[151] Accordingly, when a court employs the NPV approach and awards the pension outright to the service member while offsetting the former spouse's interest through other property or equalization payments, DFAS cannot serve as the payment mechanism. Instead, enforcement must occur through traditional collection methods applicable to property judgments, such as electronic fund transfers, allotments, or other direct payment arrangements as ordered by the court.[152]

Third, the structure of the offset requires careful attention to the overall property division. An NPV award may be implemented by awarding the former spouse a greater share of non-pension marital assets rather than dividing the pension itself, but that approach requires courts to carefully distinguish between valuation and division at the time of divorce.[153] When this approach is used, the marital portion of the pension is valued at divorce, the pension itself is awarded to the employee spouse, and the non-employee spouse's interest is satisfied through other marital property.[154]

Courts are not required to divide retirement benefits at all, and may properly award them in full to one spouse.[155] After determining the marital share of a pension, allocation of that share is a pure division-stage inquiry, and a court may award the non-employee spouse a greater share of other marital assets instead of a direct interest in the pension.[156] Indeed, a court may award the non-employee spouse no portion of the pension itself so long as the overall division of marital property remains equitable.[157] Courts have repeatedly affirmed this principle.

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150 TURNER, *supra* note 120, at § 6:10.

151 *See* 10 U.S.C. § 1408(d)(1) (DFAS may also pay former spouse's for spousal support, but spousal support awards in lieu of a division of the pension are outside the scope of this article).

152 *See* TURNER, *supra* note 120, § 6:10 (explaining that present-value awards are enforced as property judgments rather than through pension administrators).

153 *Id.* at § 6:37.

154 *Id.* at § 6:10.

155 *Id.* at § 6:37.

156 *Id.*

157 *Id.*

In *Martin v. Martin*,[158] the Connecticut Appellate Court affirmed a classic NPV offset structure: the trial court awarded the pensions entirely to Francis, the employee spouse, and equalized the marital estate by awarding the former spouse Marie "the total interest in the residence, which was subject to a mortgage."[159] The parties stipulated that Francis' pensions had a NPV of $363,000,[160] and that the marital residence had $172,777 in equity.[161] The trial court ordered Francis to quitclaim his interest in the residence to Marie (who assumed the mortgage and expenses), awarded no spousal support, and confirmed that Francis would retain his pensions free of any claim by Marie.[162]

On appeal, Francis argued that it was inequitable to award Marie 100% of the equity in the residence, effectively challenging the use of the residence as an offset for allowing him to keep the pensions intact.[163] The appellate court affirmed the property division, holding that it was reasonable for the trial court to award Francis the undivided monthly pension income stream while balancing Marie's economic position through an award of the total interest in the encumbered residence, thereby sustaining the offset-based distribution as an equitable whole.[164] The court reasoned that no required formula exists for dividing assets, including pensions, and that the goal of property division is to "unscramble" the parties' ownership interests in a manner that supports equity rather than a rigid blueprint.[165]

Similarly, the Indiana Court of Appeals' decision in *DeSalle v. Gentry*[166] further illustrates how equity may be achieved in this context. In *DeSalle*, the trial court dissolved a twelve-year marriage and divided a complex marital estate consisting primarily of business interests, valuable personal property, and retirement assets.[167] As part of its final decree, the court awarded the employee spouse, Barbara,

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158 920 A.2d 340 (Conn. App. Ct. 2007).

159 *Id.* at 348.

160 *Id.* at 346.

161 *Id.* at 343.

162 *Id.*

163 *Id.* at 344–45.

164 *Id.* at 348.

165 *Id.* at 345 (citing Casey v. Casey, 844 A.2d 250 (Conn. App. Ct. 2004); Lawler v. Lawler, 547 A.2d 89 (Conn. App. Ct. 1988)).

166 818 N.E.2d 40 (Ind. Ct. App. 2004).

167 *Id.* at 43, 45–46.

full ownership of her pension, while allocating other substantial assets and liabilities to the parties in a manner designed to achieve an equitable overall division.[168] On appeal, former spouse Donald challenged the pension award, arguing that it was inequitable to award the pension exclusively to Barbara because he lacked comparable retirement benefits and devoted his labor to the family business rather than accumulating his own pension.[169]

The Indiana Court of Appeals rejected that argument, holding that marital property division must be evaluated as a whole, not item by item, and that trial courts are entitled to allocate particular assets to one spouse precisely because of how other assets and debts are distributed.[170] The court concluded that Donald had been compensated through other components of the property division, and therefore the award of the pension to Barbara did not constitute an abuse of discretion.[171] For purposes of the NPV framework, *DeSalle* confirms that assigning a pension entirely to the employee spouse does not amount to ignoring the other spouse's interest, so long as the court accounts for that interest through offsetting allocations of other property.

These cases collectively demonstrate that awarding a pension outright to the employee spouse while offsetting the non-employee spouse's interest through other marital assets is a well-established and judicially endorsed method of equitable distribution. Importantly, this approach does not ignore the pension or deny the former spouse any interest in it; rather, it recognizes that interest through property awards other than the pension itself.[172]

By resolving the former spouse's interest at the division stage through property offsets, courts avoid the need for post-judgment remedies that *Howell* places beyond the scope of judicial authority, while remaining fully within the traditional bounds of state law and federal preemption. The effectiveness of an NPV-based offset depends on the availability of sufficient non-pension assets.[173] Where such assets are inadequate to absorb the pension's value, courts must look beyond traditional property allocation and

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168 *Id.* at 45–47.
169 *Id.* at 44–45, 48.
170 *Id.* at 45 (citing Fobar v. Vonderahe, 771 N.E.2d 57, 59 (Ind. 2000)).
171 *Id.* at 47.
172 Turner, *supra* note 120, at § 6:37.
173 *Id.* at § 6:10.

consider equalization payments to effectuate an equitable distribution. This raises distinct structural and enforceability concerns.

When an equalization payment is awarded because there is insufficient non-pension property to divide, courts and practitioners must account for the loss of future cost-of-living adjustments. Because an NPV award fixes the former spouse's interest at the time of divorce, future cost of living adjustments ("COLAs") are generally forfeited and must be addressed, if at all, through assumptions built into the valuation rather than through ongoing pension-based adjustments. Under *Howell*, awards that rise or fall in tandem with military retired pay increasingly resemble percentage-based pension divisions and therefore risk the same preemption concerns that render court-ordered indemnification impermissible.[174] An equalization payment that does not fluctuate with the pension is more clearly distinguishable from a division of retired pay and is therefore more likely to withstand scrutiny.[175] Although the pension at issue in *Brady-Kinsella* was not a military pension, the case properly illustrates how a fixed equalization payment, untethered from future pension growth, can be crafted to maximize enforceability.[176]

This approach comes at a cost, since removing the former spouse's interest from the pension also requires relinquishing the actual future increases tied to pension growth.[177] Speculative increases should be accounted for by the expert during the valuation process, but there is no concrete avenue for determining the true value of future COLAs.[178] In effect, protecting the award from future decreases may require giving up future increases as well.[179]

The structure of the award further affects its enforceability if retired pay later decreases or is eliminated entirely. Where an equalization payment is framed as payable from the pension itself, its enforceability becomes uncertain if the pension is later reduced

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174 *Id.*; *see also Howell*, 581 U.S. at 216.

175 Turner, *supra* note 120, at § 6:10.

176 *See Brady-Kinsella*, 106 A.3d at 962–63.

177 *Id.*

178 Turner, *supra* note 120, at § 6:31 ("[t]he ultimate fairness of immediate offset depends heavily upon the accuracy of the actuarial assumptions used to value the benefits—but actuarial assumptions are almost never completely accurate."); *see e.g.,* Mark E. Sullivan & Kristopher J. Hilscher, *Avoiding Mines: What Counsel Should Know When Handling a Military Divorce Case*, 53 Fam. L.Q. 143, 150 (2019).

179 Turner, *supra* note 120, at § 6:10.

to zero, because there is no longer a divisible benefit from which to pay it.[180] By contrast, an award structured as a general equalization payment, unassociated with any specific asset, has a higher chance of survival even if retired pay is eliminated.[181] The more closely an award tracks the pension in form or function, particularly by incorporating COLAs, the more vulnerable it becomes to characterization as a *de facto* pension division subject to federal preemption.[182]

Conversely, an equalization payment paid via lump sum or that remains fixed over time is less susceptible to risk, even though it requires the former spouse to accept the loss of future pension growth.[183] Whether and to what extent courts will enforce different variations of NPV-based awards after *Howell* remains an open question, but existing literature suggests that the further an award is removed from the pension itself, the stronger its prospects for enforcement.[184]

Finally, accurate valuation requires expert involvement and practitioner competency. NPV calculations typically rely on actuarial expertise, including application of the coverture fraction, mortality assumptions, and projected COLAs. Practitioners should expect both the financial cost of expert valuation and the need for substantive education to competently advise clients in military pension cases.

Under the deferred distribution framework, the court need not determine the present value of the pension because the former spouse's interest is expressed as a percentage of the benefit itself, allowing the award to rise and fall with the pension over time. By

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180 *Id.*

181 *Id.*; *see also, e.g.*, Boston v. Boston, [2001] 2 S.C.R. 413, 415 (holding that "the pension-holding spouse must transfer real assets to the payee spouse in order to equalize matrimonial property," when the pension itself is not divided upon divorce); *In re* Marriage of Kimbro, 826 N.W.2d 696, 704 (Iowa 2013) (affirming the trial court's award of an equalization payment to the wife when the husband received $57,000 more in marital assets at property division because "[s]uch disparity leads to inequity, unless the court imposes some form of equalization."); Morrison v. Rubio, 504 P.3d 251, 256-57 (Wyo. 2022) (holding "it is not unusual for courts to require a cash equity payment from one spouse to the other even though there is insufficient cash in the marital estate to cover it," when the paying spouse was awarded a higher value of the parties' marital property).

182 Turner, *supra* note 120, at § 6:10.

183 *Id.*

184 *Id.*

contrast, an NPV-based distribution requires the court to estimate the total value of benefits the service member is expected to receive over a lifetime and reduce it to present value, a process that depends on actuarial assumptions and expert-derived projections rather than known outcomes.[185]

The first step "is to determine the amount of retirement benefits" the service member spouse will receive.[186] When the service member is already retired at the time of divorce, this inquiry is relatively straightforward, since courts may rely on the actual benefit being paid.[187] Greater complexity arises when the service member remains on active duty, because future retired pay must be calculated rather than observed.[188] For an active-duty service member, gross retired pay is determined using two components. The first is the retired base pay, defined as the average of the member's highest thirty-six months of basic pay.[189] The second is the service percentage multiplier, which is calculated by multiplying the total years of creditable service by 2.5%.[190] Gross monthly retired pay is then determined by applying that multiplier to the retired base pay.[191]

By way of illustration, a service member with twenty years of service would have a multiplier of fifty percent. If the average of the highest thirty-six months of basic pay was $5,000 per month, the resulting gross monthly retired pay would be $2,500. When the service member has not yet made the decision to retire, the calculation necessarily depends on assumptions about continued service, future pay increases, and the anticipated retirement date.[192] Those assumptions directly affect the projected benefit and, in turn, the present value assigned to the pension.[193]

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185 *Id.* at § 6:40.

186 *Id.*

187 *Id.* (internal citations omitted).

188 Note that some states disfavor the NPV approach to dividing non-vested pensions; *see, e.g., Laing*, 741 P.2d 649.

189 Defense Finance and Accounting Service, *Estimating Your Retirement Pay*, https://www.dfas.mil/retiredmilitary/plan/estimate (last visited Feb. 15, 2026) (for service members that entered the military prior to September 8, 1980, the retired pay is equivalent to their final basic pay).

190 *Id.*

191 *Id.*

192 Turner, *supra* note 120, at § 6:40.

193 *Id.*

This forward-thinking valuation carries inherent risk—if the court assumes a later retirement date that ultimately does not occur, the projected retired pay may be overstated.[194] Conversely, assuming an earlier retirement may undervalue the benefit.[195] For that reason, when a future retirement date is used in valuation, it must be grounded in evidence rather than speculation, as courts have cautioned that projected retirement assumptions "should be based upon evidence and not upon blind assumptions."[196]

Once the projected amount of retired pay is established, the next step in the NPV analysis is to determine the duration over which those benefits are likely to be paid.[197] Military retired pay is paid from retirement until the service member's death. Accordingly, valuation requires an estimate of how long the service member is expected to live.[198] Courts rely on actuarial life expectancy data to make this determination.[199] That period becomes a critical input in determining the total value of the pension.

This step highlights why NPV valuation is fundamentally different from deferred distribution. Rather than dividing whatever benefits ultimately materialize, the court must translate a future stream of contingent payments into a present-day value. That process necessarily depends on assumptions about longevity and retirement timing, both of which directly influence the total benefit expected to be received. The longer the projected payout period, the greater the present value of the pension, and vice versa.

Next, the expert must account for cost-of-living adjustments by examining historical COLA data and determining an average annual rate of increase. Because military retired pay is generally subject to periodic COLAs, failure to account for those adjustments would materially understate the value of the benefit stream. Using historical data, the expert can estimate a reasonable annual growth rate and apply that increase prospectively to the projected

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194 *Id.*

195 *Id.* (basing the retirement date on the date of valuation is erroneous because it "deprives the marital estate of appreciation earned on the marital interest between the divorce and the date of distribution.").

196 *Id.*

197 *Id.*

198 *Id.*

199 *Id.* ("[t]hrough use of actuarial statistics, it is possible to determine the average life expectancy of any given person.").

pension payments. For example, if retirees have received an average COLA of 2.5% per year over the past twenty years, the expert would incorporate that rate by adjusting the projected benefit upward each year.

Once the future benefit value has been projected, the final step in the NPV analysis is to discount those future payments to their present value.[200] This step converts a series of future pension payments into a single lump-sum value as of the date of divorce. Because the money received in the future is worth less than money received today, each projected payment must be adjusted to reflect the time value of money (the value of investing a lump sum now) before the time value of the pension can be determined.[201] Assume, for example, that the service member's projected gross retired pay has been calculated based on the anticipated retired base pay and years of creditable service at retirement. The court must then determine the NPV of that projected stream of monthly payments by applying a discount rate to reflect the principle that a dollar received in the future does not carry the same value as a dollar received at the time of divorce.[202] Using that rate, each expected monthly payment is reduced to its equivalent value in present dollars, taking into account both the timing and duration of the anticipated benefit, resulting in a single present-value figure that represents the current worth of the service member's future retired pay as of the date of divorce.[203]

After the NPV is fully determined, courts will then determine the marital portion using the coverture fraction, which is the total number of years of service while married, divided by the total number of years of service overall.[204] The marital portion of the pension represents the value subject to division, and under the NPV approach, that value is awarded to the service member spouse in full.

The process of determining the NPV of a pension illustrates, on its own, why expert valuation is required and why the analysis cannot be reliably performed through lay testimony alone.

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200 *Id.*

201 *See* Corporate Finance Institute, *Time Value of Money*, https://corporatefinanceinstitute.com/resources/valuation/time-value-of-money (last visited Feb. 15, 2026).

202 *See id.*; *see also* Turner, *supra* note 120, at § 6:40.

203 *See* Turner, *supra* note 120, at § 6:40.

204 Wiegers v. Richards-Wiegers, 420 P.3d 1180, 1186 (Alaska 2018).

Accurate valuation demands an understanding of actuarial assumptions, economics, and pension mechanics that extend beyond the ordinary knowledge of courts and practitioners. Meaningful advocacy therefore requires practitioners to become competent in the valuation process itself, often through direct collaboration with valuation experts, in order to meaningfully counsel clients in military pension cases.

The NPV approach is not a "plug-and-play" alternative to deferred distribution, but a strategic tool that demands early risk assessment, careful structuring, and expert-driven valuation. Practitioners must evaluate waiver risk at the outset, ensure that sufficient non-pension assets exist to support an offset or ensure that an equalization payment is structured properly, and recognize that enforcement will proceed through traditional property remedies rather than through DFAS. Most critically, effective use of the NPV approach requires close collaboration with qualified valuation experts and a working understanding of military pensions and valuation methods, so practitioners can manage client expectations, make informed strategic choices, and craft property divisions that remain both enforceable and equitable.

IV. Conclusion

Federal law draws a hard line around military disability compensation and the retired pay waived to obtain it. The USFSPA authorizes state courts to divide only "disposable" retired pay, and the Supreme Court's decisions in *Mansell* and *Howell* make clear that courts cannot use indemnification or reimbursement awards to restore a former spouse's lost share of waived retired pay. In the CRSC context, that preemption problem is not theoretical. A post-divorce CRSC election can strip a former spouse of the very income stream the divorce judgment was designed to secure.

But the post-*Howell* landscape is not without remedy. The most durable protection is built at the time of divorce, not after. First, when parties bargain for risk allocation and memorialize it in a settlement agreement, many courts have enforced those promises as ordinary contract obligations so long as enforcement does not assign, garnish, or otherwise target protected benefits as the source of payment. Second, when the bargain is incorporated into a final judgment, *res judicata* may provide an additional layer of

stability by shifting later litigation away from the merits of federal preemption and toward the finality of a decree entered by a court with competent jurisdiction. Together, these doctrines create a narrow but meaningful path for former spouses to preserve the benefit of their bargain within the constraints of federal law.

Where agreement-based indemnification is unavailable, *Howell* points to a critical alternative: address waiver risk at the valuation and division stage. The net present value approach effectuates that alternative. By valuing a marital share of the pension before a waiver occurs and converting that interest into a fixed property award, courts can protect the former spouse's economic stake without ordering any post-judgment "make-whole" payment tied to waived retired pay. Done correctly, NPV-based division awards the service member spouse the entirety of the pension and awards the other a higher percentage of non-pension assets or an equalization payment to ensure an overall equitable distribution. The NPV should only be used when there is a foreseeable risk of future waiver, as it requires additional costs for expert valuation, testimony, and collaboration between the expert and the practitioner.

The practical takeaway for practitioners is straightforward. In a military divorce where disability compensation is present or foreseeable, counsel must treat waiver risk as a core property-division issue. That requires early, targeted discovery of VA ratings and claims status, a realistic assessment of CRDP and CRSC eligibility, and early consultation with valuation experts when an NPV strategy is on the table. If deferred distribution is used, careful drafting matters: parties should expressly address waiver contingencies and, where appropriate, allocate that risk through agreements structured to avoid any "source-of-payment" problem. If NPV is used, the payment structure must be fixed and independent from the pension's future fluctuations to minimize preemption vulnerability, even if that means foregoing future COLAs in exchange for certainty.

Ultimately, the goal of equitable distribution in military divorces remains the same: to fairly allocate the value of a marital asset built through shared sacrifice. Federal preemption limits how state courts can reach that result, especially after *Howell*. But with intentional drafting, informed valuation, and careful strategy, practitioners can still meaningfully protect the former spouses' share of the military pension while staying on the right side of federal law.