DIVORCING THE MILITARY

and

SEVERING THE CIVIL SERVICE:

A VERY SHORT COURSE ON HOW TO ATTACK AND HOW TO DEFEND

by

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BIOGRAPHY

Mr. Willick is the principal of a firm in Las Vegas and practices exclusively in the field of family law. In addition to a full-time practice, he writes and lectures extensively on domestic relations and legal technology issues. Mr. Willick is an elected Fellow of both the American Academy of Matrimonial Lawyers and the International Academy of Matrimonial Lawyers, and is licensed to practice in Nevada and California (inactive). He chaired the Nevada State Bar Family Law Section from 1995 to 1997, and is rated "A/V" in the Martindale-Hubbell Legal Directory, which has placed him in the Bar Register of Preeminent Lawyers.

In addition to litigating trial and appellate cases in Nevada, Mr. Willick has participated in hundreds of divorce and pension cases in the trial and appellate courts of about forty other states, and in the drafting of various state and federal statutes in the areas of pensions, divorce, and property division. He has chaired several Committees of the American Bar Association Family Law Section, is a member of that ABA Section's Legislative Lobbying Task Force, and has repeatedly represented the entire ABA in congressional hearings on military pension matters. He has served on many committees, boards, and commissions of the American Academy of Matrimonial Lawyers, the State Bar of Nevada and its Family Law Section, and other organizations, and is called upon to testify from time to time as an expert witness.

Mr. Willick received his B.A. from the University of Nevada at Las Vegas in 1979, with honors, and his J.D. from Georgetown University Law Center in Washington, D.C., in 1982. Before entering private practice, Mr. Willick served on the Central Legal Staff of the Nevada Supreme Court for two years.

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A. Why Bother? Duty and Liability

Many practitioners fail to pay sufficient attention to military retirement benefits when evaluating the community or other property available for distribution upon divorce. This is a mistake; more and more often, retirement benefits are marriages' most valuable assets, often exceeding the value of all other assets combined – including the equity in any marital residence. This is particularly true in military marriages, in which frequent moves are the norm.[1]

There is little excuse today for divorce lawyers failing to deal with pension benefits. Pensions were recognized as community property over 20 years ago, and recognition was extended to unvested and unmatured pensions shortly thereafter. Statutory and case law throughout the country now recognizes pension benefits as marital property. Rationales for that recognition usually include that benefits accrued during marriage, present income was deferred during marriage in exchange for the pension benefits, and that the choice was made to forego possible alternative employment which would have paid more in current wages, in order to have the pension.

It is better practice to deal with pensions during the divorce itself, instead of deferring the matter to be dealt with "later." Some states do not clearly permit a spouse who does *not* receive a portion of pension benefits to bring a partition action at a later date to divide those benefits. *See, e.g.*, *Taylor v. Taylor*, 105 Nev. 384, 775 P.2d 703 (1989) (no right at common law to divide an unadjudicated pension); *but see Williams v. Waldman*, 108 Nev. 466, 836 P.2d 614 (1992) (parties are tenants in common of unadjudicated assets).

While partition ***might*** be available to a shortchanged former spouse after divorce, that expectation is not much to rely upon. If the law of the relevant state (which may not be the state of divorce, as explained below) does not provide a way to correct the omission of assets from the decree, the only mechanism for recovery for a divested spouse be a malpractice suit against her[2] attorney. The non-uniform and uncertain

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[1] For the purpose of illustrating the impact of failing to allocate retirement benefits in divorces, an exhibit is enclosed summarizing the values involved in the first 14 "omitted military retirement" cases I handled in 1988. As shown by that Exhibit, the former spouses had missed out on average distributions (up to 1988) of some $200,000.00, and were *not* receiving any portion of the average $1,800.00 per month.

[2] Theoretically, either spouse could perpetrate such fraud by omission upon the other, but virtually all known cases involved women seeking portions of their ex-husbands' pensions. Presumably, this is because, historically, more husbands than wives had careers that generated pensions.

state of the law governing partition of omitted assets therefore makes it imperative for counsel to seek out pension benefits during the pendency of a divorce as a matter of defensive practice.

Awards against attorneys in these cases can be significant. It has been made clear that any attorney practicing divorce law is charged with knowing about the existence, value, and mechanics of dividing any retirement benefits that might exist. *See Aloy v. Mash*, 696 P.2d 656 (Cal. 1985); *Bross v. Denny*, 791 S.W.2d 416 (Mo. Ct. App. 1990) ($108,000.00 malpractice award against trial attorney for not knowing that he could seek division of military retirement after change in the law).

The potential liability is the value of the benefit lost to the shortchanged spouse. An increased degree of attention to ferreting out possible concealed assets, including retirement benefits, is not only advisable, but necessary.

B. A Brief History of Military Retirement Benefits in Divorce Litigation

Before June, 1981, the treatment of military retirement benefits upon divorce varied widely from state to state. Many courts in the 1960s and 1970s did not acknowledge such benefits as property, characterizing them as either the sole property of the individual in which they were titled or "mere expectancies." Spouses were seldom awarded an interest in military retirement benefits, as such, upon divorce.

In those cases in which there *was* such an award, no procedural mechanism existed for the enforcement of the interest, leaving spouses to rely upon general state court remedies (*e.g.*, contempt) for enforcement of judgments.

The landmark California case recognizing the importance of military retirement benefits as a marital asset was *In re Marriage of Fithian*, 10 Cal. 3d 592, 517 P.2d 449 (1974). Pension decisions, at first, addressed benefits which were vested at the time of divorce. Eventually, divisibility was extended to non-vested and unmatured retirement benefits as well. *See In re Marriage of Brown*, 15 Cal.3d 838, 544 P.2d 561 (Cal. 1976); *In re Marriage of Luciano*, 104 Cal. App. 3d 956, 164 Cal. Rptr. 93 (Cal. Ct. App. 1980).

The 1970s saw the law of property division throughout the country evolve toward "equitable distribution." The national legal community developed a consciousness of the importance of retirement benefits, resulting in a larger number of military retirements being considered – directly or indirectly – in property settlements and divorce decrees. Still, there was no enforcement mechanism, and in 1980 the treatment of military retirement benefits still varied widely.

On June 26, 1981, the United States Supreme Court focused the debate by issuing its opinion in *McCarty v. McCarty*, 453 U.S. 210, 101 S. Ct. 2728 (1981). The husband in a California divorce had requested that his military retirement benefits be "confirmed" as his separate property. In 1977, the California trial court had found that the military retirement benefits were quasi-community property,[3] and therefore ordered the normal "time rule"[4] division of the retirement benefits.

The case was eventually appealed to the United States Supreme Court, which determined that state community property laws conflicted with the federal military retirement scheme, and thus were impliedly pre-empted by federal law.

The majority held that the apparent congressional intent was to make military retirement benefits a "personal entitlement" and thus the sole property of individual service members, so the benefits could not be considered as community property in a California divorce. The Court invited Congress to change the statutory scheme if divisibility of retired pay was desired, stating: "We recognize that the plight of an ex-spouse of a retired service member is often a serious one," and noting that:

> Congress may will decide, as it has in the Civil Service and Foreign Service contexts, that more protection should be afforded a former spouse of a retired service member. This decision, however, is for Congress alone. . . . in no area has the Court accorded Congress greater deference than in the conduct and control of military affairs.

453 U.S. at 235-36, 101 S.Ct. at 2743.

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[3] Essentially, quasi-community property is a label used by community property states to describe property acquired outside the state that *would have been* community property if acquired within the state; such states divide such property as if it were regular community property.

[4] The nearly universal formula in which a spousal share of a retirement benefit is calculated as one-half multiplied by a fraction, the numerator of which is the time of marriage during service, and the denominator of which is the total service time.

II. THE UNIFORMED SERVICES FORMER SPOUSES PROTECTION ACT, 10 U.S.C. § 1408

Congress reacted by enacting the Uniformed Services Former Spouses Protection Act (the USFSPA) on September 8, 1982.[5] The USFSPA legislatively overruled *McCarty* (at least in part[6]) and again made treatment of retired pay dependent on the divorce laws of the jurisdictions granting decrees. By fits and starts, every state in the union has permitted military retirement benefits to be divided as property, at least in certain circumstances.

The USFSPA is both jurisdictional and procedural; it both permits the state courts to distribute military retirement to former spouses, and provides a method for enforcement of these orders through the military pay center. The USFSPA itself does not give former spouses an automatic *entitlement* to any portion of members' pay. Only state laws can provide for division of military retirement pay in a divorce, or provide that alimony or child support are to be paid from military retired pay. Rights granted by state law are limited by federal law, even if state law does not so provide, and even if the courts of the states do not see any such limitations.[7]

A former spouse's right to a portion of retired pay as property terminates upon the death of the member or the former spouse; the court order can also provide for an earlier termination.[8] Any right to receive payments under the USFSPA is non-transferable; the former spouse may not sell, assign, or transfer his or her rights, or

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[5] Also commonly known as the "Federal Uniformed Services Former Spouses Protection Act," or FUSFSPA, or as "the Former Spouses Act," or in some references simply as "the Act." 10 U.S.C. § 1408; Pub. L. No. 97-252, 96 Stat. 730 (Sept. 8, 1982), amended by Pub. L. No. 98-94, 97 Stat. 653 (Sept. 24, 1983), Pub. L. No. 98-525, 98 Stat. 2545 (Oct. 19, 1984), Pub. L. 98-525, 99 Stat. 677 (Nov. 8, 1985), Pub. L. No. 99-661, 100 Stat. 3885 (Nov. 14, 1986), Pub. L. No. 101-510, § 555, 104 Stat. 1485, 1569 (Nov. 5, 1990), Pub. L. No. 102-190, § 1061(a)(7), 105 Stat. 1472 (Dec. 5, 1991), Pub. L. No. 102-484, § 653(a), 106 Stat. 2426 (Oct. 23, 1992), Pub. L. No. 103-160, § 555(a), (b), § 1182(a)(2), 107 Stat. 1666, 1771 (Nov. 30, 1993), Pub. L. No. 104-106, § 1501(c)(16), 110 Stat. 499 (Feb. 10, 1996), Pub. L. No. 104-193, §§ 362(c), 363(c)(1)-(3), 110 Stat. 2246, 2249 (Aug. 22, 1996), Pub. L. No. 104-201, § 636, 110 Stat. 2579 (Sept. 23, 1996).

[6] In *Mansell v. Mansell*, 490 U.S. 581, 109 S. Ct. 2023 (1989), the Court found that the Act did not ***totally*** repudiate the pre-emption found by the Court to exist in *McCarty*; Congress' failure to alter the language of the Act so as to alter this finding, when it next amended the Act in 1990, has been read by some to imply congressional consent that at least some partial pre-emption was intended to remain after passage of the Act.

[7] *See Mansell v. Mansell*, 490 U.S. 581, 109 S. Ct. 2023 (1989), criticizing conclusions reached in *Casas v. Thompson*, 720 P.2d 921 (Cal. 1986), *cert. denied*, 479 U.S. 1012 (1987).

[8] 10 U.S.C. § 1408(d)(4).

dispose thereof by inheritance.[9] To obtain benefits extending beyond a member's death, the former spouse must obtain designation as the beneficiary of the Survivor's Benefit Plan (discussed below), which has its own technical requirements.

A. The *McCarty* gap: Chaos in Wonderland

There was a twenty month "gap" between the *McCarty* decision and the congressional enactment. The USFSPA was expressly made retroactive to the start of the gap period, but the language used left some room for interpretation.[10] Some states, such as Washington, found the federal law sufficient to allow their courts to address those persons who had been divorced during the gap under common law and statutory procedures.[11] In those states, motions could be brought to divide the retirement benefits if they had been omitted, or to divide the benefits if they had been awarded solely to the member while *McCarty* was the law of the land.

Courts in other states, such as California and Idaho, ruled that no common law remedy existed for such persons. These rulings led to passage of "window" statutes specifically permitting those divorced during the gap a limited time to relitigate the division or non-division of the retirement benefits.[12] Nevada passed the first such statute, which expired after only six months, in 1983. Illinois enacted the most recent window period, which closed in January, 1989.

Some states, such as Texas, which found the USFSPA inadequate by itself to allow the re-opening of gap cases, never passed legislation permitting those divorced during the gap to bring their decrees into conformity with those divorced before *McCarty* or after the USFSPA. Divorces during the gap that gave 100 percent of the

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[9] 10 U.S.C. § 1408(c)(2).

[10] The effective date section of the original enactment, Section 1006, read in part as follows:

> (a) The amendments made by this title shall take effect on the first day of the first month which begins more than one hundred and twenty days after the date of the enactment of this title.
>
> (b) Subsection (d) of section 1408 of title 10, United States Code, as added by section 1002(a), shall apply only with respect to payments of retired or retainer pay for periods beginning on or after the effective date of this title, but without regard to the date of any court order. However, in the case of a court order that became final before June 26, 1981, payments under such subsection may only be made in accordance with such order as in effect on such date and without regard to any subsequent modifications.

[11] *See, e.g., In re Marriage of Parks*, 48 Wash. App. 166, 737 P.2d 1316 (Wash. Ct. App. 1987).

[12] *See, e.g., In re Marriage of Barnes*, 43 Cal. 3d 1371, 743 P.2d 915 (Cal. 1987).

retirement benefits to the member because of *McCarty* remain unalterable in such states for lack of a mechanism through which to litigate them.[13]

As time passes, and the number of living persons with *McCarty*-gap divorces decreases, it becomes ever less likely that additional states will pass window statutes.

B. Definitions, Changes, Key Concepts, and Notable Points

The full history of the several amendments to the Act , and all the nooks and crannies of litigation under it, are beyond the scope of this seminar. A few points likely to come up in cases, however, should be noted.

1. Overview of Sums Payable Under the USFSPA

The primary purpose of the USFSPA was to define state court jurisdiction to consider and use military retired pay in fixing the property and support rights of the parties to a divorce, dissolution, annulment, or legal separation.[14]

Federal law allows former spouses to collect up to fifty percent of disposable retired pay otherwise payable to retired military service members (65% when certain arrears are being garnished in addition to present payments). Military retirement benefits can be treated as property to be divided between the parties, or as a source of payment of child or spousal support, or both.

All that is necessary to use military retirement benefits as a source for child support or spousal support payments is proper service on the military pay center of a certified court order requiring payments to a former spouse for such support. The application form is included as an Exhibit to these materials.

Divisions of the retirement benefits as property are more restricted, and are subject to all of the jurisdictional and other limitations built into the USFSPA. Divisions of retired pay as property may be made by percentage or dollar sum. Cost-of-living adjustments (COLAs) apply only when dividing the retirement benefits by percentage, so if a dollar sum is used, inflation will greatly reduce the intended award over time.

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[13] *See, e.g., Allison v. Allison*, 700 S.W.2d 915 (Tex. 1985).

[14] Legislative History, Pub. L. No. 97-252; S. Rep. No. 97-502. The Report noted that as of June 26, 1981, case decisions in "virtually all" community property states, and in many of those employing equitable distribution principles, permitted military retired pay to be considered marital property subject to division. In only the two "title" states, Mississippi and West Virginia, were pensions considered upon divorce the exclusive property of the party in whose name the asset was titled. Since that time, both of those states have adopted equitable distribution schemes.

The statute limits direct payment to a former spouse to 50% of disposable retired pay for all payments of property division. 10 U.S.C. § 1408(e)(1). More than fifty percent of disposable pay may be paid (up to 65% of "remuneration for employment" under the Social Security law, 42 U.S.C. § 659) if there is a garnishment for arrears in child or spousal support, or in payments of money as property ***other than*** for a division of retired pay. In other words (and counter-intuitively), about the only part of arrearages arising from a divorce judgment that ***cannot*** be satisfied by garnishment from retired pay is arrearages ***in*** retired pay.

At least one state supreme court has ruled that the 50% limitation is a ***payment*** limitation only, so that trial courts may award more than that amount – up to 100% of the retired pay – to the former spouse, but the pay center can only pay 50%, leaving the spouse to collect the remainder from the military member by other means (such as normal state court contempt proceedings if not paid). *Ex parte Smallwood*, ___ So. 2d ___, 2001 Ala. LEXIS 268 (Ala., July 13, 2001) (Http://pub.bna.com/fl/1000343.htm).

2. The Absolute Necessity of Obtaining "Federal Jurisdiction"

Special jurisdictional rules must be followed in military cases to get an enforceable order for division of the benefits as property. The provisions were enacted because Congress was concerned that forum-shopping spouses might go to a state to which the member had a very tenuous connection and force defense of a claim to the benefits at such a location.

These rules do not restrict alimony or child support orders, which will be honored if the state court had personal and subject matter jurisdiction under its own law. In ***other*** public and private plans, ***any*** state court judgment valid under the laws of the state where it was entered is generally enforceable to divide retirement benefits; this is not true for military retirement benefits divided as property.

In a military case, an order dividing retired pay as the property of the member and the former spouse will only be honored by the military if the issuing court exercised personal jurisdiction over the member by reason of: (1) residence in the territorial jurisdiction of the court (other than by military assignment); (2) domicile in the territorial jurisdiction of the court; or (3) consent to the jurisdiction of the court.[15]

These limitations override state long-arm rules, and must be satisfied in ***addition*** to any state law jurisdictional requirements. Cases lacking such jurisdiction can go forward, but they will not result in enforceable orders. The statute effectively creates

[15] 10 U.S.C. § 1408(c)(4).

an additional jurisdictional requirement, which for lack of a better title can be called "federal jurisdiction."

In most places, making a general appearance usually constitutes "consent" to trial of the entire action, but a few cases indicates that a service member may "un-consent" to court jurisdiction over the retirement issue alone. *See Tucker v. Tucker*, 277 Cal. Rptr. 403 (Ct. App. 1991) (San Diego County, California); *Wagner v. Wagner*, 768 A.2d 1112 (Pa. 2001) (finding that 10 U.S.C. § 1408(c)(4) refers to ***personal*** jurisdiction); *Booker v. Booker*, 833 P.2d 734 (Colo. 1992).

The essential lesson of this jurisdictional point (for the spouse) is to ***never*** take a default divorce against an out-of-state military service member if seeking to divide the retirement benefits. The resulting judgment will not be enforceable; if valid jurisdiction under both state and federal law cannot be achieved, then the action may have to be dismissed and re-filed in the state in which the military member resides.

The jurisdictional caution is even more applicable in partition cases. According to most courts that have ruled on the question, the jurisdictional test is to be applied in the ***present*** (i.e., when the current action is commenced) as opposed to considering what jurisdiction was established during the original divorce. Oddly, the federal courts have been willing to permit state-court long-arm jurisdiction where the states themselves find they cannot exercise it. *See, e.g.,Tarvin v. Tarvin*, 187 Cal. App. 3d 56, 232 Cal. Rptr. 13 (Cal. Ct. App. 1986); *Kovacich v. Kovacich*, 705 S.W.2d 281 (Tex. Ct. App. 1986); *Messner v. District Court*, 104 Nev. 759, 766 P.2d 1320 (1988); *contra*, *Lewis v. Lewis*, 695 F. Supp. 1089 (D. Nev. 1988); *Delrie v. Harris*, 962 F. Supp. 931 (D.W. La. 1997).

The anti-forum-shopping rules were never really necessary, since no state permits division of property without sufficient minimum contacts to satisfy constitutional concerns. Unfortunately, especially in cases such as *Tucker*, the jurisdictional limitations are producing exactly the harm they were intended to prevent, but in reverse – they provide a means for manipulation of otherwise adequate jurisdiction as a tactical weapon to prevent the proper court from hearing all aspects of a case that it should decide.

3. **Disposable Retired Pay**

As of February 4, 1991, the definition of "disposable pay" was altered to eliminate the deduction of income taxes from gross retired pay in figuring the sum that could be divided. The change ***only*** affected divorces final on or after February 4. All prior cases continue to be governed by the older rules (i.e., the sum payable under divisions of disposable pay as previously defined stay in effect). It is hard to overstate the importance of this change to the lifetime payments to individuals.

For each divorce case prior to February 4, 1991, the military pay center withheld taxes from the gross retired pay, divided the post-tax amount between the member and the spouse pursuant to court order, and sent a check to each. At the end of each year, the member was eligible to claim a tax credit for amounts withheld on sums ultimately paid to the former spouse, and the former spouse owed a tax liability for any amounts received.

The "bottom line" of this procedure was to always pay more actual money to the member, and less to the former spouse, than was shown on the face of a simple percentage division of the retirement benefits. Most courts were unaware that the payments ordered were being skewed by the phrasing of the Act and the tax code. Many former spouses, not receiving a Form 1099 or W-2P, thought the money they received was "tax free," not realizing that it was ***their*** responsibility to account for, and pay taxes on, all sums they received. *See Eatinger v. Committee.*, TC Memo 1990-310. Many members did not realize that they had a yearly tax credit coming, or how to calculate it.

The new law, codified in revisions to 10 U.S.C. § 1408(a)(4), addressed all of those problems. Taxes are no longer taken "off the top" before the retirement benefits are divided between spouses. Both spouses are now sent a W-2P reflecting what they received during the year (thus allowing for reasonable tax planning), and courts are permitted to divide what is essentially the gross sums of benefits, as they intend.

In previous practice, it was necessary to define the sum of retired pay going to the spouse as an exact percentage or sum of dollars without reference to a formula, even if some component (for example, the total number of years of service for a member still in service) was not known at the time of divorce. The military pay center typically required the spouse to go back to court after divorce to obtain a "clarifying order" formally setting out a percentage that could have easily been calculated using figures completely available to the pay center.

Effective April 1, 1995, the revised regulations [16] set out at 32 C.F.R. § 63.6 allowed attorneys to use formulas in enforceable orders under certain circumstances. It is now possible for a pre-retirement divorce decree specifying that the denominator in a time-rule calculation equals the total service time, and have the military honor the order upon retirement. The regulations are attached as an Exhibit.

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[16] Technically, they were never approved, but they have been followed since April, 1995, anyway. In the years after 1995, newer "proposed regulations" were issued that apparently did away with the 1995 revisions, but that might have been inadvertent, and formula orders are apparently still being honored.

4. The "Ten Year Rule"

The so-called "ten year" limitation is much misunderstood. A court order that divides military retired pay as property may only be ***directly paid*** from the military pay center to the former spouse if the parties were married for at least ten years during which the member performed at least ten years of creditable military service. 10 U.S.C. § 1408(d)(2); 32 C.F.R. § 63.6(a)(1)-(2). This is often called the "20/10/10" rule, for "years of service needed to reach retirement/years of marriage of the parties/years of overlap between service and marriage."

If the marriage overlapped service by less than ten years, the right still existed, but the spouse had to obtain the monthly payments from the retired member rather than the military pay center.

The 20/10/10 rule is ***not*** a limitation upon the subject matter jurisdiction of the state courts.[17] Its practical effect is sometimes the same as a legal bar, however, which is one reason the ABA position (for over a decade) has been that the provision should be repealed.[18] A former spouse in possession of an order that does not satisfy the rule must rely on whatever state law enforcement mechanisms are available, which may or may not be of any use.

There are a couple of work-arounds for this trap. If the former spouse's interest is small, the present value of that interest could be determined and offset against other marital property or cash to be paid off. If the interest is larger, the situation is more difficult, since the parties would probably not have sufficient assets to permit an

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[17] The statute itself contains a provision making it clear that payment limitations do not affect the underlying obligation, which may be enforced by any other means available:

> Nothing in this section shall be construed to relieve a member of liability for the payment of alimony, child support, or other payments required by a court order on the grounds that payments made out of disposable retired pay under this section have been made in the maximum amount permitted under paragraph (1) or subparagraph (B) of paragraph (4). ***Any such unsatisfied obligation of a member may be enforced by any means available under law*** other than the means provided under this section in any case in which the maximum amount permitted under paragraph (1) has been paid and under section 459 of the Social Security Act (42 U.S.C. 659) in any case in which the maximum amount permitted under subparagraph (B) of paragraph (4) has been paid.

10 U.S.C. § 1408(e)(6) (emphasis added).

[18] Even the 2001 Report on the USFSPA by the Department of Defense concluded that the rule serves no useful purpose and should be eliminated. *See* Department of Defense, A REPORT TO CONGRESS CONCERNING FEDERAL FORMER SPOUSE PROTECTION LAWS (undated, 2001).

offset.[19] The options available to a former spouse's attorney seeking an enforceable order are then reduced to seeking a stipulation to secure that interest (which might require bargaining a reduced payment) or attempting to persuade the court to impose an irrevocable alimony obligation. Both options have drawbacks.

In a nine year overlap case, the former spouse has a putative 22.5% interest (i.e., 9 ÷ 20 x ½). Some courts, seeking to make their awards enforceable, will characterize the property award as alimony upon request.

Where the court will not do so, the attorney for the spouse has something of a dilemma. Most courts permit almost any stipulated settlement reached during "arm's-length" negotiations, however, and it might be in the interests of both the member and the former spouse, given the certain costs and uncertain results of trial, to trade a few percentage points of value for a stipulated award of irrevocable alimony (or secured stream of payments characterized in some other way).

Such a deal provides an award to the former spouse of irrevocable, unmodifiable alimony in an amount ***measured by*** the military retirement benefits, in exchange for a waiver by the former spouse of any property interest in the retirement benefits themselves. Payments can then be made by the pay center. There is no reason that cost of living adjustments, etc., cannot be included in such an award, and there is no difference to the tax impact.

The down-side to such an arrangement for the former spouse is risk – some members have sought court orders revoking such bargained-for "irrevocable" awards, usually based on the changed circumstances of one party or the other. Even when the former spouse prevails, there is a substantial expense. *See Waltz v. Waltz*, 110 Nev. 605, 877 P.2d 501 (1994).

If a non-alimony resolution is desired, it is difficult in most cases to come up with sufficient security with which such a lifetime stream of payments can be secured. This is a problem in jurisdictions which have formal or informal barriers to establishment of alimony awards. And, of course, all the risks associated with bankruptcy are a factor when the spouse exchanges a pension share for anything else.

These work-arounds to the ten-year rule are also somewhat philosophically awkward, in that they attempt to satisfy the underlying purpose of the USFSPA by circumventing one of its limitations. It is possible that courts squarely addressing the practices recommended here gave differing opinions of their permissibility. Another

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[19] In a hypothetical nine-year overlap case involving a staff sergeant, the present value of the former spouse's putative share is over $20,000.00. Such a sum is typically outside the realm of possible trade-offs or pay-offs for individuals so situated.

trip to the United States Supreme Court (or a congressional revisiting of the issue) is necessary to eliminate the problem in the future.

5. Disability Claims and Early Retirement by Members

There are two forms of disability awards, under chapters 38 and 61 of the United States Code, distinguishable by whether they are granted at or after retirement, by whether or not the Veteran's Administration ("VA") is involved, and whether the benefits are taxable. The same percentage rating has different dollar values from one to the other.

Retired pay, including retired pay payable by reason of a disability discharge, is taxable.[20] If, upon evaluation from the VA, a disability rating for a service-connected disability is given, the member is entitled to claim a tax-free monthly sum corresponding to the percentage of disability. To do so, the member must waive a portion of retired pay equal to the sum paid by the VA.

Both military retired pay received for disability, and military retired pay waived in favor of VA benefits are excluded from the definition of "disposable" pay that may be split with a former spouse in accordance with a court order. Ultimately, any disability claim increases the money flowing to the retiree at the expense of the former spouse, even to the point of eliminating the spousal share entirely. *See Mansell v. Mansell*, 490 U.S. 581, 109 S. Ct. 2023 (1989).

After *Mansell*, some thought that any disability award ***existing on the date of divorce*** simply could not be considered by a divorce court, but this is not entirely true. Military disability pay may be considered as a factor in awarding to the former spouse a disproportionate amount of marital property, or otherwise as a factor relating to the future income, and thus the "economic circumstances" of parties, in property and alimony analyses. *In re Kraft*, 832 P.2d 871 (Wash. 1992) (citing many other cases); *In re Brown*, 892 P.2d 572 (Mont. 1995). Courts have enforced parties' agreements to divide pay attributable to known disabilities. *Hisgen v. Hisgen*, 554 N.W.2d 494 (S.D. 1996).

When the disability is claimed ***after the divorce***, it may reduce the spousal share, unless precautions are taken. Courts have gone to considerable lengths to protect former spouses from such post-divorce status changes by members that partially or completely divested the spouses. On remand in *Mansell* itself, the court refused to allow the appellate ruling to affect the pre-existing division of dollars between the parties. *In re Marriage of Mansell*, 265 Cal. Rptr. 227 (Ct. App. 1989), *on remand*

[20] In a disability retirement, only a portion of pay is taxable (the sum of accrued non-disability retirement in excess of the base pay multiplied by the rated percent of disability).

from 490 U.S. 581, 109 S. Ct. 2023 (1989). This logic was followed by other courts examining pre-*Mansell* divorces. *See Toupal v. Toupal*, 790 P.2d 1055 (N.M. 1990); *Berry v. Berry*, 786 S.W.2d 672 (Tex. 1990); *Maxwell v. Maxwell*, 796 P.2d 403 (Utah App. 1990); *MacMeeken v. MacMeeken*, 117 B.R. 642 (1990) (Bankr. D. Kan. 1990).

In post-*Mansell* divorces, the same result has sometimes resulted from different logic. "Safeguard" clauses and "indemnification for reduction" clauses are permissible, and have the result of protecting spouses from the members' unilateral recharacterization of benefits. The theory is essentially that of constructive trust; once the divorce goes through, the retirement money is considered no longer the member's property to convert. *See Johnson v. Johnson*, 37 S.W.3d 892 (Tenn. 2001); *In Re Marriage of Harris*, 991 P.2d 262 (Ariz. 1999); *In re Strassner*, 895 S.W.2d 614 (Mo. Ct. App. 1995); *see also Owen v. Owen*, 419 S.E.2d 267 (Va. Ct. App. 1992); *Dexter v. Dexter*, 661 A.2d 171 (Md. App. 1995); *McHugh v. McHugh*, 861 P.2d 113 (Idaho Ct. App. 1993).

Some courts have simply redistributed other property. In *Torwich (Abrom) v. Torwich*, 660 A.2d 1214 (N.J. Super. Ct. App. Div. 1995), the court found the reduction of payments to the spouse to be an "exceptional and compelling circumstance" allowing redistribution of property four years after the divorce. This case has been relied upon, for the proposition that *Mansell* permits "other adjustments to be made" to take into account the reduction in a spousal share from the disability claim of a member. *Clauson v. Clauson*, 831 P.2d 1257 (Alaska 1992); *McMahan v. McMahan*, 567 So. 2d 976 (Florida Ct. App. 1990).

One court, surveying cases from around the country, noted that *Mansell* does not apply to post-judgment waivers of retirement pay because it held only that disability benefits could not be divided "***upon divorce***." *In re Marriage of Krempin*, 83 Cal. Rptr. 2d 134, 70 Cal. App. 4th (Ct. App. 1999). The court approvingly quoted the conclusion reached in a law review article: "'A majority of state courts,' on one theory or another, 'take equitable action to compensate the former spouse' when that spouse's share of retirement pay is reduced by the other's post-judgment waiver." *Id*., quoting from Fenton, *Uniformed Services Former Spouses Protection Act and Veterans' Disability and Dual Compensation Act Awards* (Feb. 1998 Army Law. 31, 32).

The California court then added its own conclusion, that: "A review of the out-of-state precedents confirms that this result is nearly universal." *Krempin*, *supra*. Anecdotal accounts, however, indicate that some courts continue to be misled into ruling to the contrary, based upon an overly-expansive reading of *Mansell* and misplaced concerns about violating the Supremacy Clause.

Regarding a related question, a spouse can generally receive a share of any ***early retirement*** taken by a member under the Variable Separation Incentive (VSI) or Special Separation Benefit (SSB) or the early (15-19 year) retirement program known as the "Temporary Early Retirement Authority" (TERA).[21] The first two programs were offered to members in "selected job specialties" who had accrued between six and twenty years of service. Some were required to serve in Reserve units, as well, after leaving active duty. The early retirement option for members with more than 15 but fewer than 20 years of service is similar to "regular" military retirement, except that the sum paid contains an actuarial penalty. All three of these programs have been repeatedly re-authorized by Congress, although they were supposed to expire after the military "draw-down" of the 1990s.

Generally, the benefits are generally considered as divisible as the retirements that were given up to receive those "early out" benefits, despite the lack (for SSB and VSI) of any federal mechanism for direct payment to the former spouse. *In re McElroy*, 905 P.2d 1016 (Colo. Ct. App. 1995) (SSB); *In re Shevlin*, 903 P.2d 1227 (Colo. Ct. App. 1995) (VSI); *In re Heupel*, 936 P.2d 561 (Colo. 1997). Other courts throughout the country have used similar language or reasoning to reach the same results regarding both programs. *See Kulscar v. Kulscar*, 896 P.2d 1206 (Okla. Ct. App. 1995) (SSB divisible in place of military retirement divided in divorce, refusing to "allow[] one party to retain all the compensation for unilaterally altering a retirement plan asset in which the other party has a court-decreed interest"); *In re Crawford*, 884 P.2d 210 (Ariz. Ct. App. 1994); *Marsh v. Wallace*, 924 S.W.2d 423 (Tex. Ct. App. 1996); *Abernathy v. Fishkin*, 638 So. 2d 160 (Fla. Ct. App. 1994) (VSI); *Blair v. Blair*, 894 P.2d 958 (Mont. 1995); *Fisher v. Fisher*, 462 S.E.2d 303 (S.C. Ct. App. 1995) (VSI); *Lykins v. Lykins*, 34 S.W.3d 816 (Ky. Ct. App. 2000).

Very few courts have reached the opposite result. *See McLure v. McLure*, 647 N.E.2d 832 (Ohio Ct. App. 1994). Others have reached that opposite result, just to be reversed on appeal or upon narrow findings of special circumstances. *See Kelson v. Kelson*, 647 So.2d 959 (Fla. Ct. App. 1994) (VSI held not divisible in split opinion); *overruled*, 675 So. 2d 1370 (Fla. 1996); *Baer v. Baer*, 657 So.2d 899 (Fla. Ct. App. 1995) (where service member given ultimatum to accept VSI or be immediately involuntarily terminated, VSI payments were severance pay rather than retirement pay, and not divisible); *In re Kuzmiak*, 222 Cal. Rptr. 644 (Ct. App. 1986) (pre-SSB/VSI case; separation pay received upon involuntary discharge pre-empted state court division).

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[21] TERA was established in 1993, Pub. L. No. 103-160, Div. A, Title V, Subtitle E, § 555(a), (b), Title XI, Subtitle H, § 1182(a)(2), 107 Stat. 1666, 1771 (Nov. 30, 1993), and repeatedly extended. The 1999 defense authorization act extended it to September 30, 2001.

The cautious practitioner will ensure that the property settlement agreement or divorce decree is crafted with sufficient demonstrations of intent (and reservations of jurisdiction, if necessary) that a later reviewing court would be able to transcend recharacterization of the benefits addressed. The form provided with these materials is intended to provide a statement of such intent.

The bottom line to these cases is that it is incumbent upon the attorneys, especially the attorney for the spouse, to anticipate post-divorce status changes and build that anticipation into the decree.

6. Late Retirement by Members; the "smaller slice of the larger pie" fallacy

As a general proposition, spouses should try to begin receiving payments as soon as possible once the right to do so accrues. Military retired pay is not like a defined contribution plan with a specific balance;[22] it is a like a defined benefit plan in that it provides a stream of payments that can be tapped for a present spousal share, but which has no mechanism for collecting property payments once they are missed. In other words, any arrears in military retirement benefits payments must be collected from the member directly; the military will not garnish for such arrearages.

Several courts have held that the spouse may collect the spousal portion of the retirement at ***eligibility*** for retirement, whether or not the member actually retires. *See In re Marriage of Luciano*, 164 Cal. Rptr. 93 (Ct. App. 1980); *In re Marriage of Gillmore*, 629 P.2d 1 (Cal. 1981); *In re Marriage of Scott*, 202 Cal. Rptr. 716 (Ct. App. 1984); *Gemma v. Gemma*, 105 Nev. 458, 778 P.2d 429 (1989); *Koelsch v. Koelsch*, 713 P.2d 1234 (Ariz. 1986); *Ruggles v. Ruggles*, 860 P.2d 182 (N.M. 1993); *Balderson v. Balderson*, 896 P.2d 956 (Idaho 1994); *Blake v. Blake*, 807 P.2d 1211 (Colo. Ct. App. 1990).

The theory is that the former spouse should be able to decide when benefits that are due and payable to the spouse will actually commence – that "The employee spouse cannot by election defeat the nonemployee spouse's interest in the community property by relying on a condition within the employee spouse's control." *In re Marriage of Luciano*, 164 Cal. Rptr. 93, 95 (Ct. App. 1980). A spouse making such an election should also receive the imputed cost of living adjustments that ***would have*** accrued if the member had retired, but the former spouse would ***not*** share in any actual later increases in rank, or benefit from additional years in service.

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[22] This has been changed slightly, as military members may after 2001 participate in the Thrift Savings Plan (TSP), and thus have both a defined contribution plan ***and*** a defined benefit kind of plan.

The California cases made it clear that a spouse has to make an "irrevocable election" whether begin receiving the spousal share of the retirement benefits upon maturity, or to wait until the wage-earner actually retires, thus enjoying a "smaller piece of a larger pie" by getting a shrinking percentage of a retirement based upon post-divorce increases in the wage-earner's salary and years in service.

Except in the extremely rare circumstance in which extraordinary changes in rank are anticipated, it would almost always be a mistake for a spouse to defer collection past first eligibility. When a member chooses to continue service after 20 years, if the spouse defers receipt of a share of the retirement until actual retirement, the ultimate collection by the spouse is typically decreased, actuarially.[23]

In other words, the dollars per month that the spouse would eventually collect only increases very slightly and slowly, and in the meantime, the spouse is **NOT** receiving the entire spousal interest accumulated up to that time. Given the realities of finite life expectancies, the spouse would usually not live long enough to realize any benefit to waiting for collection. This is even more certain when the time value of money is added to the calculation (i.e., investment/interest/present value calculations).

This discussion is even more critical in the minority of states, such as Texas, that restrict the spousal share to the rank and grade at divorce, instead of using the classic time-rule formula. In those states, the spouse's failure to obtain a flow of payments at the member's first eligibility would result in a tremendous devaluation of the spousal share.

As with the disability and early out possibilities, the bottom line is to anticipate and provide for post-divorce changes of status.

7. Partition Actions

Many states permit former spouses to return to court for partition of assets not disposed of in the original divorce proceeding, typically as "tenants in common" of the omitted assets. *See, e.g., Henn v. Henn*, 605 P.2d 10 (Cal. 1980). The February 4, 1991, amendments to the Act put into place certain other changes, among them a prohibition on partition actions (for omitted pensions) if the underlying divorce decree was dated prior to June 25, 1981, and did not divide the pension or reserve jurisdiction to do so. The amendment had ***no effect*** on pre-*McCarty* divorces which ***did*** divide military retirement benefits, or on partition judgments which addressed divorces finalized ***on or after*** June 25, 1981.

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[23] I have estimated the difference in lifetime collection difference for the spouse at about 13%. This approximate ratio holds true across ranks.

Partition actions, to be enforceable, must be brought with both sufficient "federal jurisdiction" under 10 U.S.C. § 1408 and adequate state court jurisdiction. When the partition action is brought in a different state than the one which granted the divorce, some courts have applied the partition law of the former matrimonial domicile, *see Kirby v. Mellenger*, 830 F.2d 176 (11th Cir. 1987), while others have elected to use the law of the forum where the suit is heard. *See Fransen v. Fransen*, 190 Cal. Rptr. 885 (Ct. App. 1983). The USFSPA now only allows partition (or any other post-divorce order affecting the retirement benefits) if the issuing court has proper federal jurisdiction over both the member and the former spouse. *See* 10 U.S.C. § 1408(d).

It was thought on passage of the 1991 amendments that the "no partition" bar was pretty complete. Some courts, however, have elected to disregard it, holding that the underlying state law of their state constituted a ***built-in*** "reservation of jurisdiction" to divide any omitted asset, including military retirement benefits, but the line-drawing can be pretty fine.

The Texas cases provide a good example. If the original decree contained a residuary clause stating that un-mentioned property belonged to the non-member former spouse, then she could get her share of benefits silently omitted from decree. *Buys v. Buys*, 924 S.W.2d 369 (Tex. 1996). At least one intermediate appellate court held that the same result followed from total silence of the decree ***without*** a residuary clause, since Texas statutory law held that undivided assets were "held" by the parties as tenants in common. *Lee v. Walton*, 888 S.W.2d 604 (Tex. Ct. App. 1994), *cert. denied*, 516 U.S. 870 (1995).

Other courts, however, have found the "automatic" reservation provisions of similar state laws insufficient (in the absence of a clause in the decree stating something that could be interpreted as "treating" the un-mentioned asset) to overcome the congressional ban on partition cases relating to such decrees. *See Curtis v. Curtis*, 9 Cal. Rptr. 2d 145 (Ct. App. 1992); *Hennessy v. Duryea*, 955 P.2d 683 (N.M. Ct. App. 1998).

As a strategic point, any former spouse facing a challenge from the member to the jurisdiction of the Court to divide a retirement on jurisdictional grounds (as with the *Tucker* case discussed above) would probably be well-served by a contemporaneous partition action in the jurisdiction of the member's residence. Both sides would then be faced with an equivalent waste of time and resources (reasons cited by the dissent in *Wagner v. Wagner*, *supra*, for why the majority's reading of the statute was illogical), and might result in a stipulation to resolve the entire case in one jurisdiction, as would have been most reasonable in the first place.

8. **Bankruptcy**

A member declaring bankruptcy does not lose the right to receive future retired pay based upon prior or future military service. In cases decided prior to enactment of the USFSPA, an order to pay a portion of retired pay to a former spouse (or a sum of money in lieu of such a portion) was often considered a "debt" dischargeable in bankruptcy rather than a property interest. Since enactment of the USFSPA, courts have generally held awards to former spouses of a portion of military retired pay to be non-dischargeable.

The law regarding the member's filing of a bankruptcy petition ***during*** the divorce (before the former spouse's interest is ruled upon by the divorce court) is not well developed, and the results are uncertain. More is known about the effect of a member's filing a bankruptcy petition ***after*** a divorce court has ruled that a former spouse is entitled to a portion of the retired pay.

The Fifth Circuit has simply held that an award to a former spouse of a portion of the retired pay as property made it her separate property from that day forward, leaving no "debt" to be discharged or otherwise addressed by the bankruptcy court. *See In re Chandler*, 805 F.2d 555 (5th Cir. 1986), *cert. denied*, 481 U.S. 1049 (1987). The Ninth and Eighth Circuits have generally agreed with this principal, although their opinions diverge on the question of arrearages.

Probably the most widely cited case is *In re Teichman*, 774 F.2d 1395 (9th Cir. 1985), in which the Ninth Circuit confirmed the non-dischargeability of the former spouse's future interest in payments to her of military retired pay to be paid after the date of the bankruptcy petition. By split decision, however, the court termed amounts previously paid to the member (despite the divorce court order awarding those sums to the former spouse) as a "debt" to her that could be discharged. Thus, the member was able to retain all sums that he ***should*** have previously paid to the former spouse under the state court order (i.e., the arrearages).

Five years later, the Eighth Circuit in *Bush v. Taylor*, 912 F.2d 989, *vacating* 893 F.2d 962 (8th Cir. 1990), concurred as to the non-dischargeability of the former spouse's future interest in payments to the former spouse, but held that any sums paid to the member and kept rather than being paid to the former spouse were retained by the member wrongfully, and he remained liable despite the bankruptcy for the full amount of payments that should have, but were not, made to the former spouse. The bankruptcy thus had no impact on the former spouse's rights.

The Seventh Circuit reached much the same result, but only by means of the tenuous finding that military retirement benefits are not part of the bankrupt estate because post-petition services are required of the member, making the benefits post-petition

wages. *See Matter of Haynes*, 679 F.2d 718 (7th Cir.); *cert. denied*, 459 U.S. 970 (1982).

Various lower bankruptcy courts have issued opinions along the same lines.[24] Where divorce counsel had the foresight to include language indicating that any sums paid to the member that should, under the decree, have been paid to the former spouse would be considered subject to an express trust, the courts have enforced it as a non-dischargeable debt.[25] Some courts have "saved" the allocation to the former spouse only by finding it to be, at root, "in the nature of" some form of alimony or maintenance.[26]

This is not to say that the case law has uniformly favored former spouses. Where counsel for the former spouse was not sufficiently careful in drafting the language of the decree, where the funds paid to the former spouse were not a portion of the retired pay but a sum meant to compensate the former spouse for her interest therein, and where no argument could be successfully made that the funds were necessary for the support of the former spouse, the former spouse's interest has sometimes been found to be dischargeable. *See In re Neely*, 59 Bankr. Rep. 189 (B. Ct., D. S.D. 1986); *In the Matter of Heck*, 53 Bankr. Rep. 402 (B. Ct., S.D. Ohio 1985) (non-military case).

It is possible for a former spouse to contest the discharge in bankruptcy of an obligation to remit to the former spouse a portion of retired pay, by attacking it as a "fraud while acting in a fiduciary capacity" or a tortious "debt for willful and malicious injury." *See* 11 U.S.C. § 523(a)(4), (6). Litigation in bankruptcy court may cause that court to carry into effect the divorce court's orders. *See In re Thomas*, 47 Bankr. Rep. 27 (B. Ct., S.D. Cal. 1984); *In re Wood*, 96 Bankr. Rep. 993 (9th Cir., B.A.P., 1988) (non-military case). At least one court has held a designation of the former spouse as the Survivor's Benefit Plan beneficiary was a non-dischargeable transfer and not a "debt" subject to discharge in bankruptcy. *See In re Anderson*, 1988 WL 122983 (Bankr. N.D. Iowa 1988).

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[24] *See In re Hall*, 51 B.R. 1002 (Bankr. S.D. Ga. 1985). For cases holding generally that the former spouse's share of a retirement interest was such that the debtor retained no interest, *see*, *e.g., In re Stolp*, 116 B.R. 131 (Bankr. W.D. Wis. 1990); *In re Farrow*, 116 B.R. 131 (Bankr. M.D. Ga. 1990). For cases following the constructive trust reasoning, *see*, *e.g.*, *In re Sommerville*, 122 B.R. 446 (Bankr. M.D. Ala. 1990).

[25] *See In re Dahlin*, 94 B.R. 79 (Bankr. E.D. Va. 1988); *see also In re Eichelberger*, 100 B.R. 861 (Bankr. S.D. Tex. 1989). One text cautions that the result would have been different in a Chapter 13 bankruptcy, in which since debts for breach of fiduciary duties are dischargeable. *See* H. Sommer & M. McGarity, Collier Family Law and the Bankruptcy Code (L. King ed. 1991), at ¶ 6.05[8], n.132.

[26] *See Love v. Love*, 116 B.R. 267 (Bankr. D. Kan. 1990); *In re Anderson*, 21 B.R. 335 (Bankr. S.D. Cal. 1982); *Erspan v. Badgett*, 647 F.2d 550 (5th Cir. 1981); *In re Corrigan*, 93 B.R. 81 (Bankr. E.D. Va. 1988).

Not all bankruptcy courts are blind to the damage caused to equity by uncritical application of traditional bankruptcy principles to the domestic relations field. One bankruptcy court has commented:

> We are increasingly troubled by the trend of parties to leave divorce court with an agreement that settles property and alimony matters, only to immediately walk down the street to the federal courthouse and attempt to relitigate those issues. Such actions call into question the good faith of the parties and their counsel and raise thorny issues of comity and finality of judgments, to say nothing of attempting to make the bankruptcy court into some type of appellate divorce court. We do not think Congress intended this result when it enacted § 523(a)(5). While we recognize that certain marital debts and obligations are and should be dischargeable, we do not believe that § 523(a)(5) gives one spouse carte blanche to retain marital property at the other spouse's expense.

McGraw v. McGraw (In re McGraw), 176 B.R. 149 (Bankr. S.D. Ohio 1994) (finding that divorce decree made member husband the constructive trustee of all military retirement benefits intended by that decree to be paid to spouse).

Bankruptcy poses many problems in this area. When a member chooses to try to defeat the divorce court's order in bankruptcy court, the only guarantee is greater expenses for both parties and further litigation.

American Bar Association committee recommendations to Congress to make division of retirement benefits non-dischargeable were apparently responsible in part for enactment of the subsection (a)(15) exceptions to discharge, but a detailed exploration of those provisions is beyond the scope of these materials. It need only be said that in light of the continuing evolution of bankruptcy law, spouses now have at least a somewhat better shot at preventing discharge of arrearages in military retirement benefits, as well as saving future payments, even if the property division is treated ***as*** a property division.

C. **Major Cases**

Certain cases are worth examining more closely, as they give insight into the rationale underlying similar (or contrary) cases in the field.

1. ***Casas*; California divides gross, not net**

Casas v. Thompson, 228 Cal. Rptr. 33, 720 P.2d 921 (Cal. 1986), *cert. denied*, 479 U.S. 1012 (1987), was a clear restatement of the law regarding military retirement benefits division as it had evolved in California prior to 1988, which was followed by several other states. It was a partition case ten years after entry of a divorce decree

that had not mentioned the retirement. Ultimately, she spouse was granted partition of the omitted retirement from the date she filed her petition, but no arrears. The Court of Appeals affirmed with a few modifications not important here. *Casas v. Thompson*, 217 Cal. Rptr. 471 (Cal. Ct. App. 1985).

The California Supreme Court adopted the Court of Appeals decision, with a few changes, as its own. It held that the 1974 case law permitting division of military retirement benefits could be retroactively applied, that actions to partition omitted assets were explicitly permitted under California law, and that *McCarty* was not to be construed as acting retroactively.

The court found it "illogical" to limit the spousal share to a portion of ***disposable*** retired pay, and considered the USFSPA a complete repudiation of the *McCarty* holding. The court focused upon the legislative history that declared Congress' intent to "restore the law to what it was," and noted that previous California law had called for division of the entirety of military retirement, as it did with all other retirement benefits. While *Casas* was widely cited and largely followed elsewhere, not all aspects of the decision had a long life.

2. ***Fern*; members lose argument of government taking**

Fern v. United States, 15 Cl. Ct. 580 (1988), *aff'd*, 908 F.2d 955 (Fed. Cir. 1990), was an unusual one in this field, as the defendant was not a former spouse but the United States itself. The suit sought to have the USFSPA declared invalid to the extent that it entitled the government to reduce the retired pay flowing to the members themselves; in other words, the members contended that irrespective of any award to any former spouse, the full sum of retired pay should be paid to the members. It alleged unconstitutional "taking" of property in violation of the Fifth Amendment, an unconstitutional impairment of their individual contracts with the United States (by which they alone were to receive the entirety of their retirement benefits), and that spousal awards under the USFSPA were due process violations.

The court addressed the constitutional challenges head on, and found that there was no constitutional issue in state court division of military retired pay under the USFSPA.

The court rejected the members' "equal protection" attacks on partition of pensions omitted from the initial decrees of some of the plaintiffs, recounting the retirees' "odysseys through the state and federal courts challenging state court decrees dividing their retirement pay" and noting that the retirees "were unable, as a final matter, to convince any of these courts that division of their retirement pay was unconstitutional or legally improper." The court found that partition of military retirement benefits is precisely the sort of "economic adjustments to promote the

common good" that legislatures properly perform, and that any retroactive effect of USFSPA is curative, accomplishes a rational purpose, is entitled to be liberally construed, is shielded from constitutional attack, and served public policy. It rejected the contract clause and due process arguments as well.

3. *Mansell*; disposable pay is all the states may address

Mansell v. Mansell, 490 U.S. 581, 109 S. Ct. 2023 (1989), discussed at length above, held that the Act did ***not*** constitute a total repudiation of the pre-emption found by the Court to exist in *McCarty*. Congress did nothing to alter this finding when it next amended the Act in 1990. Thus, *Mansell* is often read to stand for the proposition that the subject matter jurisdiction of the state divorce courts is limited to division of the disposable retired pay of members. This may be less important than was thought at the time, however, since courts have widely expressed a willingness to consider the impact of disability or other retired pay ***not*** considered disposable retired pay, when dividing assets between spouses.

III. VALUATION OF MILITARY RETIREMENT BENEFITS

A. How Much Money is Really Involved Here?

The Department of Defense Office of the Actuary publishes "lump sum equivalency" charts for military retirements, using military-specific mortality tables, and including a much-ignored disclaimer that its figures "should not be used for property settlements."[27] The current figures are attached as an Exhibit to these materials.

The Actuary also produces disability and non-disability retirement life expectancy tables, from which a good estimate of present value for a military retirement can be independently calculated. A convenient annual source for much of this information is the annual "Retired Military Almanac" (Uniformed Services Almanac, Inc., P.O. Box 4144, Falls Church, VA 22044; (703) 532-1631).

Arriving at a "hard number" for the value of military retirement benefits is not, however, that simple. There are three different non-disability benefit formulas within the military retirement system. The first group is composed of members who entered service before September 8, 1980, the second consists of those who entered between that date and July 31, 1986, and the third is for those who entered service on or after August 1, 1986.

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[27] The actuary's calculations are not as hypothetical as indicated in the disclaimer; the practitioner must merely be careful to compare the realities of the case at hand with the assumptions used for the chart. The closer the facts are, the more accurate the numbers are, and vice-versa.

Members who entered service before September 8, 1980, have retired pay equal to terminal basic pay times a multiplier. The multiplier is equal to 2.5 percent times years of service, but is limited to 75 percent. Thus, retired pay equals 50 percent of terminal basic pay after 20 years of service.

Members who first entered service between September 8, 1980, and July 31, 1986, must use the highest 3 years of basic pay rather than terminal basic pay. This has the effect of lowering retired pay for members whose pay increased at any time during their three most highly compensated years of service.

The third group is made up of members who entered service on or after August 1, 1986. In 1986, Congress had arranged to provide retirement benefits to those members that were lowered in two different ways.

First, their retirement benefits multiplier was reduced by one percentage point for each full year less than 30 years of service.[28] Under this plan, at age 62, the reduction is removed and the retired pay multiplier is restored to 2.5% per year, yielding the same percentage payable under the earlier system.[29]

Second, each year the COLA for such members is less than for other retirees (Consumer Price Index adjustment minus one percent). However, at age 62, the retiree's monthly income is recomputed to supply the sum that ***would have been paid*** if the full COLA had been applied every year from retirement to age 62, which at that moment becomes prospectively payable, as if there had not been reductions during those intervening years.[30] After that "restoral," however, the reduction returns with each COLA after age 62 for life.

In 1999, Congress again changed the rules,[31] modifying what had become known as the "REDUX" plan to provide for an irrevocable choice of retirement plans to be made by members who entered service after July 31, 1986, at their 15th year of

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[28] For example, at 20 years, instead of receiving 50% of basic pay (2½% per year x 20 = 50%), the calculation would be 2½% per year x 20 = 50% **- 10** (years less than 30 years served as of retirement), or 40%. The final subtraction decreases by one for each year beyond 20 served, so that as of 30 years of service, the calculation is 2½% per year x 30 = 75% - 0 (the same 75% that it would have been under the older system).

[29] Pub. L. No. 99-348 (July 1, 1986). *See* FY 1996 Report at 1.

[30] Thus, at the time such members turn 62, their monthly retired pay becomes the same sum as it would have been if they had been in the class of members who first entered service between September 8, 1980, and July 31, 1986.

[31] In Pub. L. No. 106-65, 113 Stat. 512 (October 5, 1999) the National Defense Authorization Act of 2000.

service. Such members are given the choice of taking the same "High-3" retirement paid to those who entered service between September 8, 1980, and July 31, 1986, ***or*** to take the lowered REDUX benefits described above, ***plus*** a one-time lump-sum "Career Status Bonus" (CSB) of $30,000.00 payable at the 15-year mark.[32] After the 1999 change, this option became known as the CSB/REDUX option.

The Defense Authorization acts for 2000 and 2001 authorized military members to begin participating in the same Thrift Savings Plan that has been in effect for civil service employees since 1987,[33] but the military has chosen to call its accounts "UNISERV" accounts.

As noted above, there are early retirement options. The discussion below basically concerns "regular" retirement, although most of it also applies to those cases in which a member takes a 15 to 20 year TERA retirement.

State statutes and cases express different preferences for the possible "cash out/exchange" and "if/as/when" division methods of allocating retirement benefits.

B. **Present Value; A Bird in the Hand**

Among the reasons for wishing to "trade off" the retirement benefits for other assets are certainty, finality, and the lack of future entanglements obtained by reaching final settlement. This approach is only possible, irrespective of judicial preferences, when there are sufficient "other assets" from which to pay off the spousal share. Enlisted members, at least, usually do not accumulate sufficient cash or tangible property during military service.

A down side to this method of valuation is that it requires estimating, or flatly guessing, what the future will hold for the parties. It is thus likely that one of the parties will be shortchanged. For example, any estimation of present value takes into account the time value of money, by which a present value is always less than the amount that would otherwise be paid to an individual over a period of time. Expert witnesses frequently disagree strongly about the proper variables to apply, such as the correct interest rate to be used.

For a divorce occurring while a member is still on active duty, there are even more variables. First is the uncertainty that the member will retire at all – when a member is years from eligibility for retirement, it seems little more than guesswork to evaluate the member's odds of actually retiring. The precise length of service cannot be

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[32] It has to be proportionally repaid if the member terminates service before 20 years.

[33] The attributes of the civilian program are discussed below.

known – economic conditions, the defense budget, and world crises all could change the date of separation of a member by several years. Likewise, it is usually impossible to know the rank that such an active duty member will achieve. Each of these factors affects the "present value" assigned to the spousal share.

Where a trade-off of the spousal retirement share is contemplated in a contested case, each party must usually hire an actuarial expert. Such an expert must become familiar with the military retirement system, and perhaps change certain assumptions applicable in other cases. For example, the military has its own set of mortality tables, set out by officers and enlisted members, and by disability and non-disability retirements. At least for non-disability retirements, there is a significant reduction in death rates for military members, boosting present values. Adopting the Actuary's valuations would require accepting its presumption of annual COLA increases, inflation assumptions, and its allowance of high likelihood that the government will make the payments, which leads to an assumed interest rate of only 3 percent. This greatly increases the present value.

An attorney wishing to personally estimate present values can purchase computer programs that do the math involved quite quickly.[34] Such programs often allow the user to plug in the assumptions to be used, such as life expectancy, presumed interest rate, etc. In any event, attorneys handling these cases in states that allow or require trading the present value of the retirement benefit must become well versed in all aspects of valuation, interest rate assumptions, and other factors involved. Failure to do so invites disaster at settlement or in court.

C. **If/As/When; a monthly annuity**

A division of the benefit "in-kind," also called an "if, as, and when" division, may be the ***preferable*** form of dividing retirement benefits. It has the advantages of fully and fairly dividing the actual benefit received without speculation as to actuarial valuation, inflation, life expectancies, etc. Preferred or not, such a division may be necessary if the "present value" of the retirement is so large that there is no other asset that could be traded for the spousal share.

On the other hand, such a distribution increases the possibility of later court fights over enforcement or interpretation of the original order for division.[35] It gives each

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[34] One such program is "Legal Math-Pac," Custom Legal Software Corporation, 3867 Paseo del Prado, Boulder, CO 80301 (303) 443-2634.

[35] The evolving interpretation of the phrase "disposable retired pay" has given rise to many such cases. If the parties were divorced in 1985, should the phrase be interpreted to mean what the Court said it meant in *Mansell* four years later, or what Congress re-defined it to mean in 1991? Should the court attempt to divine the intention of the parties at the time of divorce? If so, how could this be

of the parties a stake in the other's life – if the former spouse predeceases the member, the member's retired pay goes up by whatever sum the former spouse had been receiving, and if the member dies first, the spousal share stops unless survivor's benefits have been provided for in the order.

Most states approving in-kind divisions have adopted the "time rule," under which the spousal share is defined as a formula. A fraction is set up, in which the numerator is the months or years of marriage during service, and the denominator is the months or years of total service. The fraction is multiplied by the retirement being divided, and half of that number is the spousal share.[36]

Precise language is very important in an in-kind division case. It is not enough to merely recite that the former spouse should receive, *e.g.*, "forty percent of the retired pay." Especially for the former spouse (for whom a mistake is more likely to result in partial or total loss of benefits), it is necessary to consider all of the things that can go wrong, at the time of divorce or later.

For example, drafting counsel must ensure that the facts make the former spouse eligible for direct collection – which requires satisfaction of the jurisdictional factors, and that the military service of the member overlapped the marriage to the spouse by at least ten years. Whether there is or could be early or late retirement, or a disability or post-retirement civil service employment, etc., all should be dealt with explicitly in the order. Whether the measuring point for the retirement should be the rank and grade at the time of divorce, or at actual retirement, should be addressed. The model language attached below contains clauses to deal with all these contingencies.

The attorney for the member could argue that the chance of the member retiring at all is so speculative that the court should defer the issue until the facts are known, enter an "if, as, and when" order, or refuse to assign any value to the benefits at all.[37]

If a future in-kind distribution of the retirement benefits is made, the same level of attention to detail should be given as if the distribution was immediate. Failure to do so enhances the chances of further litigation upon the member's eligibility. The simple failure of attorneys to think about deferred retirement issues at the time of divorce is probably the principal cause of post-divorce pension litigation.

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accomplished if they each had a different view of the meaning?

[36] *See*, *e.g.*, *In re Marriage of Gillmore*, 174 Cal. Rptr. 493, 629 P.2d 1 (Cal. 1981); *In re Marriage of Luciano*, 164 Cal. Rptr. 93, 104 Cal. App. 3d 956 (Cal. Ct. App. 1980); *Fondi v. Fondi*, 106 Nev. 856, 802 P.2d 1264 (1990).

[37] Indeed, this is essentially the reasoning of those few remaining states that still refuse to divide the value of unvested retirement benefits at divorce.

Some courts are loathe to engage in any of the speculation set out above, and so tend to just enter "wait and see" orders, reserving jurisdiction to enter an order regarding the retirement benefits until the member is eligible for retirement (or actually retires). Such a non-resolution avoids all of these difficulties, but has its own down-side, in terms of the making it certain that there will be later legal expenses, jurisdictional complications if one or both parties relocate, and the emotional cost of not achieving closure on an issue of primary importance.

D. **Coping With COLAs**

Cost of living adjustments seem to provide great difficulty to many practitioners and judges, and even to many actuaries. They are a valuation factor, however, that must be taken into account in dividing military retirement benefits. Simply put, a cost of living adjustment ("COLA") is an increase in the sum of a retirement intended to fully or partly offset the effect of inflationary or other changes in the cost of living.

The need for such adjustments is obvious. In January, 1972, the government's Consumer Price Index for all urban consumers (CPI-U) was 123.2, meaning that by comparison with the base year of 1967, it took an extra $23.20 to have the same purchasing power that $100.00 had commanded.[38] Put another way, dollars were worth only 81¢. By January, 1992, the CPI-U was 413.8, meaning that it took an extra $313.80 to gain the purchasing power of the original $100.00, or that each dollar was now worth only 24¢. If there had been no cost of living adjustments, a $1,000.00 per month retirement starting in 1972 would only be paying the equivalent value of $240.00 per month in 1992. Inflation has continued, cumulatively, since that time.

Over the years, Congress has made numerous changes in the method of COLA computations. This has resulted in persons with identical ranks and lengths of service being paid different sums of retired pay depending upon their dates of retirement.

Even greater differences between similarly situated individuals are in store. For those members who entered service on or after August 1, 1986, and opted to take the REDUX plan, only ***partial*** COLAs will accrue. COLAs will be 1% less than the annual change in the CPI.[39] A "one-time restoral" will go to such recipients at age 62 (bringing payments to the level they would have reached if the full COLA had been awarded over the years), but thereafter, only the partial COLAs will accrue.

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[38] Bureau of Labor Statistics, U.S. Department of Labor.

[39] Office of the Actuary, Dep't of Defense, FY 1996 DOD Statistical Report on the Military Retirement System 1, 5 (1997).

The net effect of this change appears to be to make military retirement benefits somewhat less valuable for those who will retire after August 1, 2006.[40]

There is no federal rule requiring either that a former spouse ***must*** be awarded future COLAs, or that they should ***not*** accrue. The pay center attempts to recognize the intention of court orders, using various assumptions.

If a decree simply recites that the military retirement is split by percentage, the military pay centers will ***presume*** that future COLAs are to be divided in the same proportion as the sum originally payable. If the former spouse is awarded ⅓ of the retired pay, for example, then ⅓ of the COLAs will also be paid to the former spouse. The presumption is reversed if the decree simply awards a specific sum of dollars to the former spouse; the dollars payable to the former spouse will remain constant irrespective of the subsequent increase by COLA of the retirement.

Of course, the better practice is to specify whether COLAs are payable to the former spouse and, if so, in what amount. While this clearly show the court's intention at the time of divorce (and thus makes any post-divorce enforcement or clarification motion easier to win), it does not necessarily mean the court's intentions will be carried out, if contrary to the pay center's presumptive rules.

Practitioners must resist the urge to phrase an award as a sum of dollars plus a future percentage of increases. The military pay center will refuse to enforce the COLA provisions of awards phrased in that way, requiring the former spouse to return to court upon the granting of each subsequent COLA in order to get the dollar sum adjusted to reflect the new amount payable (or adjust the award to a percentage).

The attorney for the former spouse should try to provide for the court's continuing jurisdiction to enforce its award by means of post-divorce order. Virtually all of the things that could happen after divorce to change the expectations of the parties as to payments will work to the disadvantage of the former spouse, so it is that party who must make it as simple as possible to get back into court to correct later problems.

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[40] Practitioners who will have actuarial expert witnesses projecting retirements past that date should ensure that the reduction is considered as part of the experts' assumptions.

IV. OTHER MILITARY BENEFITS TO CONSIDER

A. Survivor's Benefits

Probably the most overlooked (and most dangerous to overlook) aspect of a military retirement case is the Survivor Benefit Plan ("SBP"). It was created in 1972 to provide a monthly annuity to certain spouses and dependents of retired members. Members entitled to retired pay are eligible to participate in the SBP. 10 U.S.C. § 1448(a)(1)(A). Some members retired ***before*** 1972 are also participants in the SBP, since Congress has provided a number of "open seasons" during which non-participants could join the program or increase their level of participation.

In 1982, SBP coverage was extended to former spouses (at the election of the members). 10 U.S.C. § 1448(a)(1)(A). In 1983, members already retired were permitted to cover their former spouses during an open enrollment. As of 1984, court orders noting a voluntary election by a member to make a former spouse the SBP beneficiary were made enforceable. In 1985, the cost of former spouse coverage was made identical to present spouse coverage, and coverage for children by a former spouse was made possible. In 1986, state courts were allowed to ***order*** that former spouses be members' beneficiaries.

Premiums are paid from the monthly retirement benefits payable during a member's life. While orders that the member or former spouse will pay the premiums will be ignored, it is possible to indirectly allocate the burden of those premiums between the parties by adjusting the percentages of the retirement benefits paid to each party.

The benefit, however, is ***not*** divisible between a current and former spouse, or between two former spouses. The spouse can be named SBP beneficiary even where he or she has little or no time-rule percentage of the retired pay itself. *See Matthews v. Matthews*, 647 A.2d 812 (Md. 1994).

If the very stringent service requirements for electing an SBP beneficiary are not precisely followed, the benefit is lost regardless of the court order. ***This is a severe malpractice trap***. The former spouse has ***exactly*** one year from the date of the divorce decree within which to serve the deemed election notice on the proper office of the military pay center.

In many cases, intended beneficiary spouses have returned to court to get an order to re-start the one-year deemed election period. If the original court order did ***not*** provide for an allocation of the SBP, a return to court and resulting new order will be honored, but if the original decree ***did*** allocate the SBP, the later order will have no effect. This makes no logical sense, but it is the current interpretation. *See* Comp.

Gen. B-244101 (*In re: Driggers*, Aug. 3, 1992); 71 Comp. Gen. 475 (1992); 71 Comp. Gen. 478 (1992).

B. **Medical Benefits**

Another thing to watch closely in military cases is the time restrictions for former spouse qualification for ancillary benefits (medical, etc.) For full benefits, the member must have served twenty years, the marriage must have lasted twenty years, and the service and marriage must have overlapped by twenty years (the "20/20/20" rule). *See* 10 U.S.C. § 1072(2)(F) and (G). "20/20/15" former spouses divorced before April 1, 1985, are also eligible for lifetime medical benefits. Lesser benefits are available for "20/20/15" spouses divorced after that date.

A special insurance program is available for former military spouses married at least one year, but the terms and restrictions vary according to the same three factors. In an appropriate case, deferring the divorce could prove to be in the parties' mutual best interest (for example, where the spouse has to have a major medical procedure, covered under military insurance, but not otherwise, and there is no other insurance available post-divorce).

The medical benefits available to qualified spouses are for treatment at uniformed services medical facilities, and benefits under programs that have undergone a variety of name changes, from CHAMPUS ("Civilian Health and Medical Program of the Uniformed Services") to "US-VIP," to "TRICARE." The specifics of coverage have changed over the years, sometimes rapidly, and are beyond the scope of this seminar.

It is irrelevant whether the divorce decree specifies any such benefit, or whether the parties contemplated the benefit. Like Social Security, medical benefits for former spouses who fulfill the legislative criteria have a statutory entitlement separate from the rights and obligations accruing to the member. They cost the member nothing.

There are restrictions to the right of former spouses who are eligible for medical benefits as "20/20/20" or "20/20/15" former spouses:

- The former spouse must not remarry. Eligibility for health benefits ceases upon remarriage and is ***not*** regained even if the subsequent marriage terminates.

- The former spouse must not be covered by an employer-sponsored health care plan. If there is such a plan, however, and coverage thereunder is terminated (voluntarily or otherwise), eligibility for benefits is restored.

- The former spouse must not yet be age 65. Upon eligibility for Medicare (Part A), CHAMPUS eligibility ends. Some continuing benefits for former spouses may be available under the "TRICARE-for-life" program effective October 1, 2001.

V. **RESERVISTS**

Since 1948, reservists have had a retirement system of their own. The big difference for reservists is that both service and age elements must be satisfied; the reservist must accumulate 20 years of creditable service, ***and*** must reach the age of 60.

To be entitled to a "year" of creditable service, the reservist must obtain at least 50 "retirement points." A point is awarded for each day of active service, or for full-time service while performing annual active duty for training or attending required training. A point is awarded for each drill performed adequately, or for each three hours of military correspondence or extension courses that are successfully completed. There are various other ways of acquiring points. A maximum of 365 points may be earned each year. Any year in which the 50-point minimum is not reached does not count toward retirement, although the points earned in such years eventually factor into the retired pay paid.

It is possible to mix and match. A member of the regular services may complete the 20 years necessary for retirement by entering the reserves, as long as the last eight years are reserve service. Reserve service can also be rolled into a regular retirement.

Figuring reserve retirement pay is complex. The total retirement points earned is divided by 360 to yield "years of service" for retired pay purposes. That figure is multiplied by 2½ percent; the resulting percentage is multiplied by the active duty basic pay payable to an active duty member with the same grade and number of years creditable for retirement. As with active duty members, there is a future distinction between reservist retirees depending on the date they entered service. For members who first entered service before September 8, 1980, the figure for "base pay" in the above calculation is the active duty basic pay in effect for the retiree's grade and years of service in effect ***when the retired pay begins***. For members who first served after September 8, 1980, "base pay" is the ***average*** basic pay for the member's grade in the last three years that the member served.

Practitioners therefore must be careful in all reservist cases; they should be wary in a case involving reserve component service of any calculations that presuppose the typical "years of marriage divided by years of service" formula. Since point accumulation might have been intermittent, significantly different spousal percentages could be obtained by the two methods of figuring. Note that the

amended regulations in 32 C.F.R. § 63.6 specifically directs dividing reservists retirements by points accrued during marriage rather than duty time during marriage.

Special care is required for reservists who entered service after September 8, 1980, since the formula for figuring their retirement will be altered. If the retirement at issue involves both reserve and active-duty service, the practitioner must be especially careful to allocate the components properly (i.e., points for reserve time, and time for the active-duty period).

VI. ACTIVE DUTY PAY COMPONENTS

Most simply, basic pay increases with increased rank and with length of service. A table showing the current pay schedule is set out as an Exhibit to these materials.

Practitioners involved with cases in which the member remains on active duty must consider many factors other than the member's base pay. It is ***not*** possible to know actual levels of compensation for a member just by rank; much more specific information about that member's situation, including assignment, field, living situation, and dependents, is necessary to actually determine a member's pay.

In addition to basic pay, members may receive a Basic Allowance for Housing (BAH), Basic Allowance for Subsistence (BAS), and certain miscellaneous other allowances or forms of special pay. For reasons that are not entirely clear, some state court judges have failed to include these components of regular compensation in the military "salary" of members when deciding spousal support, or even child support. There is no justification for treating these benefits as anything other than income to the member, just as you would include both salary and bonus, or wages plus commissions, for a salesman, or the value of the company car and expense account for an executive; they are just part of the compensation package.

In fact, because some of the benefits beyond basic pay are non-taxable, and some benefits are provided that would otherwise be costs taken out of civilian paychecks, military pay is worth somewhat ***more*** than its face dollar value. Accordingly, there is an adjusted civilian equivalency, known as Regular Military Compensation (RMC), which the military itself uses for determining the actual value of the "salary" paid to members at each grade, combining basic pay, basic allowance for subsistence and the basic allowance for housing, along with the tax advantage from untaxed allowances. A copy of the RMC chart is attached as an Exhibit to these materials, but further discussion of them is beyond the scope of this seminar.

A. **BAH**

In January, 1998, the armed services began a six-year phase-in of a new housing allowance system called the Basic Allowance for Housing (BAH), a single monthly payment meant to replace the prior separate payments of Variable Housing Allowance (VHA) and Basic Allowance for Quarters (BAQ). The services had been receiving complaints for some time that the old housing allowance system was unable to keep up with housing costs, causing members to pay too much in out-of-pocket costs.

BAH is based on rental costs by pay grade, dependency status (with dependents or without dependents), and location, and is supposed to provide members with housing compensation based on comparable civilian costs of housing. Civilian comparability considers both salary and location. During the multi-year phase-in period, anyone who had larger benefits under the old BAQ/VHA system retained the benefit levels previously enjoyed, so long as their "status" remained unchanged (location, rank, etc.) Increases in allowances in the new system are tied to the growth of housing costs, thus protecting members from erosion of benefits.

The BAH rates for 1998 were based largely on the VHA housing census conducted in 1997, but increasingly shifted to the numbers produced by the new data and methodology. The BAH for a given pay grade and dependency status in a specific geographic location is the difference between the local average monthly cost of housing for that pay grade and dependency status and a percentage between 15% and 20% of the nationwide average monthly cost of housing for that pay grade.

The military predicted that by the end of the phase-in, the plan should result in increases in housing allowances in high cost housing areas, decreases in housing allowances in medium to low cost housing areas, increases in housing allowance for many enlisted grades, and decreases in housing allowances for many officer grades.

B. **BAS**

The Basic Allowance for Subsistence (BAS) is a tax-free addition to take-home military pay intended to compensate military personnel when on leave or authorized to mess separately, when rations in kind are not available, or when assigned to duty under emergency conditions when no government rations are available, varying by "enlisted" or "officer" rank.

The amounts involved in a BAS adjustment are fairly small, and will not make a significant difference to most determinations of support payable based on income. The military began to phase in a new BAS system in 1998, intended to correct pay inequities between enlisted service members and to link future changes in BAS to an

"appropriate and credible" food cost index. Generally, the changes were expected to increase the level of the subsistence allowance for enlisted personnel receiving subsistence in kind and no BAS. The new BAS program ties changes in the subsistence allowance to a U.S. Department of Agriculture (USDA) index reflecting "the true cost of food."

C. Miscellaneous allowances and special pay provisions

There are many other allowances that might be involved in a given case, including uniform and civilian clothing allowances, family separation and overseas housing and station allowances, dislocation, travel, and transportation allowances, etc. Again, counsel should look for whether there are additional income sources to consider.

Bonuses are frequently payable for enlistment and re-enlistment, or for special proficiency, or as separation pay or readjustment or severance pay. There are additional bonuses for members who are trained in particularly valuable fields, making it more important to the services to retain them. Counsel should make themselves aware if during a case the member has recently received such a bonus, or is about to do so.

There are a host of special pay classes, which generate additional income to members who perform certain duties based on rank and years of service. These include flight pay, sea pay, special assignment pay, hazardous duty pay, and hostile fire/imminent danger pay. Information specific to the member must be acquired to determine which, if any, of these special pay classes may be involved in a particular case.

The simplest and most straightforward way to obtain information is to review a member's Leave and Earnings Statement, which lists gross pay, all special pay and allowances, what amounts are taxable, any allotments being paid, and the net pay remaining. With an information release signed by the member, a printout of historical information showing the same information can be requested at any military installation, or from DFAS.

VII. TAX NOTES AS TO MILITARY RETIREMENT BENEFITS

When military retired pay is used as a source for child support or alimony payments, the usual tax consequences remain true (i.e., child support is non-deductible to the payor and non-taxable to the recipient, whereas alimony is deductible to the payor and taxable to the recipient).

Non-disability retired pay is treated as wages and is subject to federal income tax withholding. IRC § 3401. The division of military retired pay as property is not a

taxable event. There was significant confusion in prior years; eventually, the Tax Court ruled that a community property share of the retirement to the former spouse, whether received from the government or the member, was income to the former spouse. *Eatinger v. Commr*., 1990 T.C. Memo No. 310 (June 20, 1990). This was consistent with the position evolved within the IRS that classified payments of military retirement benefits as not qualifying under section 1041. *See* IRS Letter Ruling 8813023.

Since the 1989 decision of the United States Supreme Court in *Mansell* and the 1990 amendments to the USFSPA, it has seemed increasingly clear that the intent of Congress was for the former spouse to bear all responsibility for taxes on sums paid to the spouse, while the member is responsible for all taxes on the amounts actually paid to the member.

This is of course the logical result, and what most judges thought had been happening all along. There appears to be a political reason it took ten years for the statute to be altered to produce that result.

Before the effective date of the 1990 amendments (February 4, 1991), amounts deducted for payment to a former spouse were still considered wages of the retired member for withholding purposes. Treas. Reg. §31.3401(a)-(1)(b)(5). The member had income withheld on the entire gross amount, the resulting "disposable" pay was divided, and the member was entitled to a refund of taxes withheld on amounts paid to the former spouse. The former spouse then owed full taxes whatever she received. Any percentage divisions of retirement benefits under the former law increased property distribution to the member and reduced them to the former spouse as a matter of course.[41]

The amounts withheld were based on the member's pay period and exemptions. This led to widespread anecdotal accounts of abuse by members, who manipulated their tax status so as to maximize withholding and minimize disposable income available for division with former spouses. There has been an administrative ruling from the Comptroller General prohibiting this practice since 1984, but enforcement of the

[41] Reports by the General Accounting Office and Congressional Research Service in 1984 and 1989 found that court orders purporting to divide military retirement benefits on a "50/50" basis actually effected a split of "55.4%/44.6%" to "58.4%/41.6%" – always in favor of the former military member – after the impact of tax withholdings was considered. CRS Report For Congress: "Military Benefits for Former Spouses: Legislation and Policy Issues," March 20, 1989.

prohibition was uneven, since the pay centers had no uniform policy on how to handle accusations of such manipulation.[42]

Eventually, the pay center developed internal reviews, requiring that in calculating the amount of disposable retired pay subject to apportionment with a former spouse, the deductions of federal income tax withholdings from gross retired pay may not be fixed at a percentage rate exceeding the member's projected effective tax rate (i.e., the ratio of the member's anticipated total income tax to his anticipated total gross income from all sources). *In re Krone*, Comptroller General's Decision No. B-271052, August 6, 1996, at 3-4.

For divisions of retired pay as property pursuant to decrees entered on or after February 4, 1991, the tax consequences are much simpler, and much more similar to those in other retirement systems. Portions of a member's retired pay awarded to a former spouse explicitly "may not be treated as amounts received as retired pay for service in the uniformed services." 10 U.S.C. § 1408(c)(2). Therefore, there is no withholding of taxes (before division of retired pay) on amounts paid to a former spouse when the divorce occurred after February 4, 1991.

The former spouse is taxed on Survivor's Benefit Plan payments as he or she would be for other payments from an annuity. 26 U.S.C. § 72. The payments to the former spouse are taxable income.

VIII. THE CIVIL SERVICE RETIREMENT SYSTEM

There are many aspects of the civil service retirement system, which has just about as many nooks and crannies as the military system, although as a general proposition it is less bizarre to those familiar with private (ERISA-based) retirement systems. These materials will look at the civil service retirement system in its own right, and then examine the interplay between military and civil service retirements.

A. Introduction to the federal civil service retirement system

There has been a civil service in the United States since 1883, mostly administered by the Office of Personnel Management ("OPM"), but also including individuals

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[42] Matter of: Uniformed Services Former Spouses Protection Act, April 25, 1984 (*In re Flynn*), 63 Comp. Gen. 322 (1984) (Comptroller General's Decision No. B-213895, April 25, 1984). A retired Air Force Colonel had nearly all his retired pay withheld for federal income taxes, thus reducing the sums available as "disposable pay" for division with his former spouse. The ruling found that practice impermissible, and withholding for purposes of figuring "disposable pay" was limited to amounts necessary to cover the retired pay itself and amounts for which the member "presents evidence of a tax obligation which supports such withholding."

working for agencies including the Postal service, the Foreign Service, and the FBI. A retirement system has been in place in some form since 1920, which is the date from which the "old" system ("Civil Service Retirement System," or "CSRS") for those who began service before January 1, 1984, can be traced.

The retirement system is essentially a defined benefit plan, which takes into account years of service and highest salary in determining a monthly sum to be paid to an employee from the date of retirement until death.

Decade by decade, the law governing federal civilian employees changed and expanded, until the entire system was altered for incoming employees in a "new" system ("Federal Employees' Retirement System," or "FERS"), for those who began service on or after January 1, 1984. *See* 5 U.S.C. §§ 8331, 8401; Pub. L. 99-335 (1986). The most obvious difference between them is that participants in CSRS do not participate in the social security program, while those in FERS do participate. The new system also created a defined contribution retirement account called the "Thrift Savings Plan" ("TSP"), which is discussed below. Both systems provide a survivor annuity election, which is automatic for current spouses at retirement unless both spouses "opt out."

The two statutory schemes have independent code sections, but generally what is provided by one is provided by the other. A former spouse seeking benefits must have been married to an employee for at least nine months to receive benefits. The former spouse's payments of a portion of the retirement benefits end when the retiree dies.

In 1992, sweeping changes were made to the regulations governing division of Civil Service retirement benefits, making virtually every prior reference on the subject out of date, and potentially dangerous to clients if relied upon.[43] *See* Court Orders Affecting Retirement Benefits, 57 Fed. Reg. 33,570 (July 29, 1992) (codified at 5 C.F.R. Parts 831 *et seq*.

The new regulations addressed the employee annuity (the pension), refunds of employee contributions, and survivor's benefits, but not the thrift plan, which was set up to work like a 401(k), is administered separately, and is discussed below.

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[43] Not everything became more difficult under the regulations after 1992, however. Previously, in too many cases, the OPM had taken the position that mistakes could not be fixed, irrespective of equity or hardship. In *Newman v. Love*, 962 F.2d 1008 (Fed. Cir. 1992), the court held that OPM was not prohibited from honoring a court order for a survivor annuity, if the order was the ***first*** order addressing marital property issues, even if the order is issued after the retirement of the employee.

The OPM publishes a guide book for attorneys who are drafting retirement orders for CSRS or FERS retirement benefits.[44] Anyone drafting such orders should obtain it.

Information may be obtained about an employee's FERS or CSRS benefits by sending a subpoena signed by a judge (not a clerk), or a release signed by the employee, to OPM's information office.[45]

B. Terminology used in the federal civil service retirement system

The new OPM regulations created a largely-different lexicon for use in retirement orders. In the form originally proposed by the Office of Personnel Management ("OPM"), the regulations even provided any order submitted that contained the ***title*** "QDRO" or "Qualified Domestic Relations Order" would have been summarily ruled unenforceable, even if otherwise technically perfect. The OPM reasoning was that use of that term would indicate that the courts and attorneys did ***not*** know that ERISA was inapplicable to federal retirement plans, and so the orders were presumed defective.

The ABA Federal Pensions Committee of the Family Law Section commented that this seemed a bit harsh, and eventually OPM changed the regulations so that OPM will enforce a technically proper order even if it contains QDRO language, so long as all the correct terminology for a "COAP" ("Court Order Acceptable for Processing") is recited. 5 C.F.R. § 838.803; *see Handbook* at 4-5. It is better practice, however, not to push the issue, and simply never use the terms "QDRO," "Alternate Payee," or other ERISA-type language in such an order. The OPM wants the Orders submitted to them to be called "COAPs" only, and it will save much irritation all around to simply do as they ask.

The OPM even assigned new meanings to words long used elsewhere to mean something else. For example, in OPM-ese, the term "accrue" does ***not*** refer to the accumulation of benefits by virtue of employment. To OPM, "accrue" means the commencement of payments under the retirement plan. "Employee annuity" means

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[44] *A Handbook for Attorneys on Court-ordered Retirement, Health Benefits, and Life Insurance Under the Civil Service Retirement System, Federal Employees Retirement System, Federal Employees Health Benefits Program, and Federal Employees Group Life Insurance Program* (United States Office of Personnel Management, Retirement and Insurance Group, rev. ed. July, 1997) (hereafter, *Handbook*). The *Handbook* can be obtained from the Government Printing Office, Superintendent of Documents, P.O. Box 371954, Pittsburgh, PA 15250-7954; its current printing is identified as "RI 83-116," and it includes all clauses on computer disk. The text and clauses can also be accessed, printed, or downloaded from the Internet, from http://www.opm.gov/retire/html/library/other.html.

[45] Associate Director for Retirement and Insurance, U.S. Office of Personnel Management, Post Office Box 16, Washington, D.C. 20044-0016.

recurring payments to a retiree, not the account itself. "Former Spouse Survivor Annuity" means either the payments to the spouse (***out of*** the employee annuity), or the employee death benefit under FERS, when paid to a former spouse after the employee's death.

In other words, a practitioner's use of words to mean what the practitioner always thought they meant (even if that is what they mean to everyone else) could invalidate an order submitted to OPM; great care is warranted.

A COAP must specifically state that OPM is to pay the money directly to the former spouse. Any reference to a "Self-only Annuity" contradicts any attempt to insert a survivor annuity, since OPM considers that term to be what others might call the "gross" annuity – in other words, all there is. The "gross" annuity is the total "self-only" annuity ***less*** the premium for survivor's benefits. The "net" annuity is the gross annuity, less premiums for Medicare, life, and health insurance, and tax withholdings.

C. **Benefits payable under the federal civil service retirement system**

The *Handbook* specifies that any COAP should provide three separate orders, dealing with each of the three types of benefits addressed in the regulations: the lifetime benefits ("employee annuity"), the potential refund of employee contributions, and death benefits ("former spouse survivor annuity," which are addressed below in the following section). *Id*. at 5-6. If an order is submitted using the words "retirement accounts" or "retirement fund" as the thing to be divided, OPM will interpret the order as going to contributions only and will ***not*** divide the annuity. *See* 5 C.F.R. § 838.612. Attempts to stipulate to modifications without a formal order will be ignored. 5 C.F.R. § 838.135.

An order may provide that any sum up to all of the monthly benefits be paid to the former spouse. If the order does not specify, the OPM will presume that any percentage or fraction payable to the spouse is from the gross annuity (i.e., after deduction for the survivorship premium). 5 C.F.R. § 838.306. Amendments to court orders altering the payments due to a former spouse will be honored, prospectively, but specific instructions have to be given if OPM is asked to make up for a prior under- or over-payment. 5 C.F.R. § 838.225.

Care should be taken in the definition of what is to be divided, with pains taken to note the subtle differences in OPM definitions of terms. For example, under the regulations (specifically, § 838.623(c)), using the phrase "creditable service" tells OPM to calculate the spousal share to ***include*** accrued, unused sick leave in addition to actual time in service. Using the phrase "total service" or "service performed," however, tells the OPM to ***not*** include unused sick leave in the calculation.

The regulations allow the spouse to be awarded a percentage, fraction, formula, fixed dollar sum certain, or "prorata share"[46] of whatever benefits (self-only, gross, or net) are being divided. Apparently, unlike with military orders, it is ***possible*** to issue a "dollars plus percentage of COLAs" form of order as long as everything is clearly spelled out, but OPM will ***presume*** that an order for a percentage or fraction is supposed to include COLAs, while a dollar sum certain award is not. 5 C.F.R. § 838.622; *cf*. 32 C.F.R. § 63.6(c)(8).

In direct contradiction to the military presumption, an order including both a formula or percentage ***and*** a dollar sum certain will be presumed to have included the dollar sum only as an estimate of the initial payment, so that the formula or percentage controls. 5 C.F.R. § 838.624. Such an order, if presented to the military pay center, would result in payment of only the dollar sum without COLAs until a clarifying order stating otherwise was obtained from the issuing court.

The former spouse can be awarded a portion of any refund to be made of employee contributions, or (if the former spouse is awarded a portion of the annuity itself), any such refund may be barred. 5 C.F.R. § 838.401.

One interesting conundrum is created by the OPM rule that an order purporting to provide for payments of a spousal share upon eligibility for retirement ("earliest retirement date" in the land of QDROs) will be rejected as "non-complying." Since such a provision is essentially mandated by the law of several states, but forbidden by OPM regulations, some clever draftsmanship is required; probably the best thing is to mandate direct payments from the employee ***until*** retirement (of course that is where the money would really have to come from anyway), and from OPM thereafter.[47]

It is apparently possible to have an "interim COAP" provide for payments to a court while matters are being worked out, with an amended COAP submitted when the court issues its final order. The COAP may ***not*** specify that payments continue for the lifetime of the former spouse (since the benefits terminate at the death of the employee, and only ***survivor's*** benefits (to the former spouse) would be available after that date).

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[46] Defined as "one-half of the fraction whose numerator is the number of months of Federal civilian and military service that the employee performed during the marriage and whose denominator is the total number of months of Federal civilian and military service performed by the employee." 5 C.F.R. § 838.621(a).

[47] The *Handbook* specifically cited the allowance of payment upon eligibility orders, which can be enforced by ERISA-governed retirement plans, as one of the things making civil service benefits distinct, and why OPM refuses to honor orders calling themselves QDROs. *Id*. at 5.

One fascinating attribute of the civil service system is what happens if the ***former spouse*** predeceases the member: the former spouse's share of the retirement benefits revert automatically to the retiree ***unless*** the court order provides otherwise. Instead of that automatic reversion, the court ***can*** provide that the money is paid: (1) into court (presumably for further distribution upon further court order); (2) to "an officer of the court acting as a fiduciary"; (3) to the estate of the former spouse; or (4) to one or more of the retiree's children. 5 C.F.R. § 838.237. Thus, it is possible to create a heritable asset for the former spouse.

A COAP may be used as a resource for payment of accrued arrearages. The COAP must specify how much is to be paid, so as to obtain accrued arrears, interest on the arrears, and interest on the declining balance of arrears until paid. An amortization schedule must be done so that the order can reference how much will be due and when it will be due (OPM will not do the calculations for you). Note that if payment of a lump sum is ordered, and there is no specific order to direct the entire monthly retirement payment to the former spouse, OPM will only make payments against that lump sum up to half of the gross payment, and will not allow modification for interest. Again, if such is the situation, perform the amortization scheduling ahead of time, and make the lump sum in an amount that contemplates interest.

Applications for benefits under FERS or CSRS should be sent to the OPM at one of two addresses, depending on whether it is being sent by mail[48] or by "process servers, express carriers, or other forms of handcarried delivery."[49]

D. Death benefits in the civil service retirement system

5 U.S.C. § 8341(h)(1) provides that a former spouse of a deceased member of CSRS is entitled to a survivor's annuity if provided in the terms of a decree of divorce or annulment or court-approved property settlement agreement incident to such a decree. Similar language is repeated for the former spouses of FERS members in 5 U.S.C. § 8445.

After divorce, to remain eligible for survivorship benefits while the retiree is still living, the former spouse must not remarry before age 55. 5 C.F.R. § 838.732(a). There does not appear to be any such remarriage limitation "if the employee dies before the former spouse remarries before age 55." 5 C.F.R. § 838.732(b). The former spouse is required to promise, in applying for survivorship benefits, to be

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[48] Office of Personnel Management, Retirement and Insurance Group, P.O. Box 17, Washington, DC 20044-0017.

[49] Court-ordered Benefits Section, Allotment Branch, Retirement and Insurance Group, Office of Personnel Management, 1900 E Street, N.W., Washington, DC.

personally liable for any overpayments resulting from the spouse's remarriage before age 55. 5 U.S.C. § 838.721(b)(1)(vi)(C).

It should be noted that cost of living adjustments are applied to survivor annuities, which makes it slightly more complicated to determine present values. *See* 5 C.F.R. § 838.735. Court orders which concern marriages ending on or after May 7, 1985, are acceptable for processing under the regulations. 5 C.F.R. § 838.802(a). Also acceptable for processing are orders awarding survivor annuities in divorces prior to that date, if the retiree was receiving a reduced annuity to benefit that spouse on May 7, 1985. 5 C.F.R. § 838.802(b).

The OPM considers it bad form to state that the former spouse's share of the annuity "continues after the death of the retiree" (since the benefits terminate at the death of the employee, and only ***survivor's*** benefits would be available after that date). In fact, use of such a phrase makes the order "not a court order acceptable for processing." 5 C.F.R. § 838.803(b). Practitioners are advised to refrain from so stating, instead making lifetime benefit payments and survivor annuities quite distinct. Which retirement system is at issue ***must*** appear in the COAP.

If the order uses a formula, then all data necessary for applying the formula must either appear on the face of the court order, or from "normal OPM files." 5 C.F.R. § 838.805. In other words, OPM will look up some data – such as the total number of months of creditable service performed by a retiree, to fill in the denominator of a time rule formulation. Note that references to statutes, or case law, are unacceptable in formulas. 5 C.F.R. § 838.805(c).

Amendments to orders are possible, but ***not*** if they are issued after the date of retirement or death of the employee and they modify or replace first order dividing the marital property of the employee or retiree and the former spouse. 5 C.F.R. § 838.806(a).

In fact, any order that awards, increases, reduces, or eliminates a former spouse survivor annuity, or explains, interprets, or clarifies any such order, ***must*** be: (1) issued prior to retirement or death; ***or*** (2) the first order dividing the marital property. 5 C.F.R. § 838.806(b).

How about if there was a first order, but it has been vacated or set aside? Well, it is OK, but ***not*** if: (1) it is issued after the date of retirement or death of the retiree; (2) changes any provision of a former spouse survivor annuity that was vacated, etc., and (3) ***either*** it is effective prior to its date of issuance, ***or*** the retiree and former spouse do not compensate OPM for any uncollected costs relating to the vacated, etc., order.

The regulations clearly require that the cost of a survivor annuity be paid by reduction in the monthly retirement payments. 5 C.F.R. § 838.807. Unlike the military system, however, it is relatively easy to have the beneficiary pay the cost of the survivorship premiums if that result is intended. If the intent is to have the parties both pay part of the premium, the OPM should be directed to pay the premium from the entire annuity, and divide the "gross" annuity,[50] and if the intent is to have the former spouse only pay the premium, then the OPM should be directed to divide the "self only" annuity,[51] and deduct the entire premium from the former spouse's share.

There are two types of survivor annuities, under sections 8341(h) and 8445 of title 5, United States Code. 5 C.F.R. § 838.912. The former is the default "former spouse" survivor annuity, but is subject to the remarriage-before-age-55 termination discussed above. The latter is an "insurable interest" survivor annuity, and it is not so restricted, but it costs more.

Further, the latter type has various restrictions: it may only be taken by a retiree at the time of retirement, who is in good health and not retiring for disability; it is not enforceable by OPM; on the face of the regulations, it is stated that such an annuity can be canceled at a later date to provide a survivor annuity for a "spouse acquired after retirement." 5 C.F.R. § 838.912(c)(2). The same regulation goes on to state those situations in which it might be used: if the spouse expects to remarry before age 55, if the employee expects to remarry a younger second spouse before retirement, or if another former spouse already has a normal former spouse survivor annuity. The regulation adds, however, that "the court will have to provide its own remedy if the retiree is not eligible for or does not make the election" since "OPM cannot enforce the court order."

If no amount of the survivor annuity is stated, then the maximum possible sum (55% of the employee annuity under CSRS; 50% under FERS) is selected. However, if the employee is a FERS participant with at least 18 months of creditable service, but less than 10 years, the only death benefit payable to the former spouse is the "basic death benefit as defined in § 843.602" and no other survivor annuity. 5 C.F.R. § 838.921.

One very important distinction from the military survivorship system is that a participant can have ***multiple*** beneficiaries (although, of course, no more than the maximum survivor's benefit can be paid out among however many beneficiaries are named). The survivor annuity can be divided "pro rata," in which case each former spouse receiving a "pro rata" share will receive a portion of the survivor annuity in accordance with the time rule. 5 C.F.R. § 838.922(a). Unless cost of living

[50] Defined as the total monthly benefit after deduction of any survivorship premium.

[51] Defined as the total monthly benefit before deduction of any survivorship premium.

adjustments are expressly ordered to ***not*** apply to a survivor annuity, they will apply. 5 C.F.R. § 838.923.

The regulations specifically contemplate an award of the maximum possible survivor annuity, award of a pre-divorce survivor annuity (for those that retired and selected a survivorship interest of less than the maximum, and wish it to continue post-divorce), a prorata share, fixed monthly amount (with or without cost of living adjustments), a percentage or fraction of the employee annuity, an award based on a stated formula, and an award of a percentage, fraction, or formula applied to the maximum survivor annuity. *See* Model Paragraphs 701-12, 721-22 set out in the *Handbook*. These should be sufficient to take care of most possibilities.

E. A brief aside about health benefits under the federal civil service retirement system

Federal employment carries with it coverage for health insurance. 5 U.S.C. § 8905. Coverage requires prompt application. Within 60 days of the divorce, the spouse must apply for continuation of "FEHB" ("Federal Employees Health Benefits"). The spouse must have been covered under FEHB for at least one day in the preceding 18 months, and must receive a portion of the retiree's annuity under a valid COAP. If the former spouse is awarded only a survivor annuity, the health insurance does not go into effect until the survivor's annuity payments begin.

The spouse loses eligibility to continue with the insurance if the spouse remarries prior to age 55.

Spouses ineligible for any of the benefits specified above qualify for a COBRA-like program of carry-over coverage for 3 years. 5 U.S.C. § 8905(a).

F. A brief aside about FEGLI

Until recently, there was no formal way to affect "FEGLI" ("Federal Employees' Group Life Insurance") benefits, since employees had the right to change beneficiaries at will, even in spite of a court order not to do so. While that remains true, a mechanism has been provided to ensure that a former spouse can be made the beneficiary of FEGLI insurance proceeds, after October 3, 1994. *See* Pub. L. 103-336; 5 C.F.R. § 874.

Specifically, the law now provides for OPM recognition of an irrevocable assignment of the coverage of the employee's life (and, with it, the power to name a beneficiary and prevent cancellation of the insurance). Note, however, that the employee must sign the form (OPM Form RI 76-10), and the *Handbook* casually notes:

> It should be noted that the law does not authorize the Office of Personnel Management (OPM) to enforce or comply with the provisions of a court order directing OPM or a Federal employee or former employee to assign FEGLI coverage. The law merely allows the Federal employee or former employee to make an assignment of FEGLI coverage, if he or she so chooses. It is the responsibility of the court-designated assignee to ensure that the order is enforced.

Id. at 124. In other words, to get the signature on the form, it may be necessary to use whatever state-court contempt or other processes are available.

IX. INTERACTIONS BETWEEN MILITARY AND CIVIL SERVICE RETIREMENTS

These materials will look at the interplay between military and civil service retirements, where a service member leaves military service and begins a second career in the civil service.

A. Effects on military retirement benefits from civil service employment

The "dual receipt" prohibition in federal law was long a source of troubling inequities in military retirement benefits cases, and led to a large number of "dual comp" cases involving waiver of military retirement benefits. Those inequities were (apparently) solved when Congress repealed the "dual compensation" law, effective October 1, 1999. Pub. L. 106-65, § 651(a)(1), 113 Stat. 664. Most of this section is therefore of primarily historical interest, or for purpose of analogies drawn to other areas still litigated (such as disability offsets).

The full history of the dual compensation rules are beyond the scope of these materials. 5 U.S.C. § 5532(b); 10 U.S.C. § 1408(a)(4)(B). The short version is that military retired pay was reduced for members who retired from the military and began work for the federal government. Obviously, any reduction in the amount of retired pay payable to a member affected the spousal interest as well. Courts did not appear to follow any clear theoretical model.

Two Texas cases primarily distinguished what a court (in Texas, anyway) should do when faced with a current divorce proceeding, on the one hand, versus a contempt enforcement proceeding, on the other. A North Dakota case focused on the necessity, in a contempt proceeding, for the underlying decree to specify just what it is that the former spouse was to receive. Finally, a case from Arizona represented a maturing of the analysis on this point.

In Texas, a court found that the trial court could neither divide the retired pay waived for VA benefits, nor divide the sums waived under the dual compensation law, in an attempt to comply with the United States Supreme Court's directives in *Mansell*. *Gallegos v. Gallegos*, 788 S.W.2d 158 (Tex. Ct. App. 1990).

The same court later ruled, however, that the same result could be reached indirectly, by way of a contempt action against a husband for non-payment of a portion of military retirement benefits which he claimed were exempt by reason of his waiver of retired pay in favor of disability benefits. *Jones v. Jones*, 900 S.W.2d 786 (Tex. Ct. App. 1995). In that case, the wife was ultimately allowed to collect from the husband all sums called for by the decree but which he had sought to recharacterize as disability. The Texas court sided with the clear majority of courts in so holding.

In *Knoop v. Knoop*, 542 N.W.2d 114 (N.D. 1996), the North Dakota appellate court attempted to steer a course allowing the former spouse to collect the sums intended while claiming to respect the dual-compensation restrictions. *See also Vitko v. Vitko*, 524 N.W.2d 102 (N.D. 1994) (*Mansell* is to be "construed narrowly to allow trial courts to consider parties' ultimate economic circumstances in dividing their marital property").

The Arizona Court of Appeals was more direct in *In re Gaddis*, 957 P.2d 1010 (Ariz. Ct. App. 1997), when it held that divorce courts were only required to find reductions in military pay benefitting the member to bar compensation to the spouse if those reductions in retired pay existed ***when the award to the former spouse was made***. The court saw the proscription of *Mansell* – that the USFSPA "does not grant state courts the power to treat as property divisible upon divorce military retired pay that has been waived to receive veterans' disability payments" – as a call to essentially take a snapshot when the award to the spouse is made. If sums of disposable retired pay had been waived up to that point, they were not divisible. Where a member sought a post-divorce reduction in retired pay, however, his efforts at re-characterization were seen as attempting a "de facto modification" of a final property award, which state law did not permit. *See also Crawford v. Crawford*, 884 P.2d 210 (Ariz. Ct. App. 1994) (same result in SSB case).[52]

The "bottom line" to these cases is that actual division of the retired pay at divorce was limited to disposable pay, with any shortfall to the spouse to be compensated by other means, but once an award was made, in post-decree enforcement, the spouse

[52] The court in *In re Gaddis*, 957 P.2d 1010 (Ariz. Ct. App. 1997) specifically quoted and analogized to *In re Marriage of Strassner*, 895 S.W.2d 614 (Mo. Ct. App. 1995), which is discussed in the section addressing disability benefits. The Arizona court held that in this situation, like that one, the spousal interest had been "finally determined" on the date of the decree, and enforcing that order in the face of a post-decree recharacterization by the member did not violate *Mansell*.

could be compensated for any action taken by the member that lowered sums payable to the spouse.

This provides a nice "bright line" for practitioners, and highlights the cautions expressed in these materials. First, if there has been any waiver of divisible benefits by a member, counsel for the spouse should consider whether an alimony or other award to compensate the spouse is appropriate. Second, counsel for the spouse must safeguard any award made to allow for compensation in the event the member attempts to reduce the benefits by post-divorce recharacterization.

B. Military retirement benefits component of a civil service retirement

Perhaps ironically, there have been situations in which the dual receipt rules resulted in former spouses receiving shares of military retirement benefits from which they otherwise would have been barred. In one post-*McCarty* gap case, brought under a state window statute, the court "traced" the spousal share of the military service, even though the member had been awarded all of the interest in the retirement in a divorce during the *McCarty* gap, ***and*** had subsequently obtained a 100% VA disability rating, since he waived all of those awards in order to roll his military service into a later (divisible) Civil Service retirement. *Leatherman v. Leatherman*, 122 Idaho 247, 833 P.2d 105 (Idaho 1992).

This approach, known as the "source of the benefit" method, would be repeated in later years by courts trying to decide whether former spouses had an interest in SSB or VSI benefits. The reasoning is that if one spouse derives an economic benefit attributable to services performed during the marriage, and there is not a specific legal prohibition on sharing that benefit with the former spouse, then the benefit should be divided in accordance with normal marital property law.

Notably, Congress itself appears to have adopted the reasoning of this theory in the amendments to the USFSPA that went into effect in 1997 (for both CSRS and FERS retirements, but only as to waivers made on or after January 1, 1997). Under those rules, if a military member waives military retired pay in order to take a Civil Service retirement, the former spouse must be paid what she would have received from the military in order for the waiver to be accepted by the Office of Personnel Management. *See* Pub. L. 104-201, Div. A, Title VI, Subtitle D, § 637, 110 Stat. 2579 (Sept. 23, 1996).

The *Handbook* includes a model paragraph entitled "Protecting a former spouse entitled to military retired pay" (paragraph 111). It reads:

> Using the following paragraph will protect the former spouse interest in military retired pay in the event that the employee waives the military retired pay

to allow crediting the military service under CSRS or FERS. The paragraph should only be used if the former spouse is awarded a portion of the military retired pay. "If [Employee] waives military retired pay to credit military service under the Civil Service Retirement System, [insert language for computing the former spouse's share from 200 series of this appendix.]. The United States Office of Personnel Management is directed to pay [former spouse]'s share directly to [former spouse].

Where a post-military Civil Service career seems likely, allocation of the retirement benefits from that service should probably be explicitly set out. Where (as in most cases) it is only one possibility among many, the standard form clauses set out at the end of these materials (allowing for issuance of a further order tracing the military retired pay and entry of a further order) are probably adequate.

X. THE THRIFT SAVINGS PLAN

A "Thrift Savings Plan" was created by the 1986 statute creating FERS, and first accepted contributions on April 1, 1987. The TSP is a defined contribution type of plan for federal employees; FERS employees get matching federal contributions up to a certain level. While the program is open to CSRS employees, there are no matching contributions for them. There are a variety of funds in which the employee can choose to invest, including the "Government Securities Investment" or "G" fund, the "Common Stock Index Investment" or "C" fund, and the "Fixed Income Index Investment" or "F" fund.

The Thrift Savings Plan ("TSP") is expressly excluded by the regulations governing the CSRS and FERS retirement benefits. 5 C.F.R. § 838.101(d). It is administered by a Board entirely separate from the OPM (the Federal Retirement Thrift Investment Board),[53] which has its own governing statutory sections and regulations.[54] There are no "survivorship" benefits, *per se*, for TSP accounts, as it is a cash plan like a 401(k).

Although the agency administering the TSP has proven more flexible than either the military or the OPM, its regulations did spawn yet another acronym for a court order

[53] The Thrift Savings Plan is *not* addressed in the clause set provided by Office of Personnel Management. The practitioner must find out whether a Civil Service employee is or has been a participant in the Thrift Savings Plan, and if so whether any funds have been withdrawn or borrowed from the plan. Those wishing further information on the Thrift Savings Plan can call the administering agency (Federal Retirement Thrift Investment Board) in Washington, D.C., at (202) 942-1600.

[54] 5 U.S.C. § 8435(d)(1)-(2), 8467; 5 C.F.R. Part 1653, Subpart A.

dividing benefits – "RBCO," for "Retirement Benefits Court Order," and the TSP Board has its own finance center.[55]

Withdrawal of TSP funds by a participant is limited to those separating from service, but practitioners should note that there are lump-sum distribution options from the plan (if $3,500.00 or less, the full fund balance is ***automatically*** distributed at the time of separation). More importantly, hardship loans up to $50,000.00 are available against the plan balance, and a specific category of hardship for loan purposes is "unpaid legal costs associated with a separation or divorce."

The matter is somewhat more complicated, however. No spouse's rights attach unless the sum of the TSP account is greater than $3,500.00. If so, then married FERS participants ***cannot*** borrow against the account without the spouse's written consent, while CSRS participants ***can*** do so, with the TSP simply sending "notification" to the spouse of the loan.

The Federal Retirement Thrift Investment Board will, however, honor "most" court orders restricting distribution (such as preliminary injunctions prohibiting withdrawals) or safeguarding funds for other purposes (such as child support or alimony awards). Thus, there could be some element in divorce cases of a "race to the courthouse," with the spouse trying to get a restraining order on file and served on the TSP before the employee can withdraw the funds. Obviously, if the employee empties out the TSP prior to the divorce, that fact should be discovered and taken into account during the litigation.

No QDRO is required for a TSP distribution; the TSP will honor any order that expressly relates to the TSP account of the participant, has a clearly determinable entitlement to be paid, and provides for payment to some person other than the TSP participant. Note that this includes payments directly to the attorney for the former spouse.

The TSP may be paid out in a number of ways, but married FERS employees must obtain spousal consent to take the money in any form other than "joint and survivor." CSRS employees may take the money any way they please, and the spouse is notified of the choice by the TSP. Loans can be taken out by the retiree against the Plan account, unless a court order prohibits it. It can be tapped by court order for payment of spousal support or child support.

Attorneys drafting TSP orders should note that plan balances are always calculated on the last day of the month. A spousal share may be rolled over to an IRA or other

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[55] Thrift Savings Plan Service Office, National Finance Center, P.O. Box 61500, new Orleans, LA 70161-1500.

eligible plan, in which case no taxes are withheld. Otherwise, the spouse is taxed on the distribution, and 20% is withheld. If the money is paid to a third party, such as a child (or, presumably, the spouse's attorney), the ***participant*** is stuck with the amount of the distribution as part of gross income for that year, and 10% is withheld. These rules provide a way of shifting the tax burden of funds to be withdrawn and used to pay the spouse's attorney, just by changing the payee of the withdrawal.

The attorney for a spouse seeking a portion of a TSP account should specify that the award is to be paid along with interest and earnings on that award. If such language ***is*** in the order, the spouse will receive the same accumulations attributable to the spousal share that the participant receives as to the account; if such language is ***not*** included in the order, the spouse will receive no accumulations, interest, or earnings on the defined share through the date of distribution. A court order may also specify an interest rate to be applied to a distribution from a given date.

The TSP will also honor post-decree orders, which it refers to as "amendatory court orders," but which presumably included *nunc pro tunc* amendments to decrees and partition judgments relating to omitted assets.

XI. **CONCLUSION**

Military and civil service retirement benefits are so central to any divorce involving those assets that practitioners cannot afford to ***not*** know a great deal of the detail required to provide for their adequate disposition. It has become increasingly important for domestic relations practitioners to learn all aspects of relevant retirement plans, and to develop appropriate valuations for those assets, with thoughtful written contingencies for tax, survivorship, and related issues. Only then can counsel intelligently negotiate – or litigate – their clients' interests in such retirement benefits.

TABLE OF EXHIBITS

1. Summary of First 14 Omitted Military Retirement Cases

2. 2001 Military retirement benefits lump sum equivalency table

3. Checklist for Military Retirement Benefits Cases

4. Decree of Divorce clauses for division of military retirement benefits

5. 2001 Retirement Pay and Involuntary Separation Pay Charts

6. 2001 Active Duty Pay Charts

7. Uniformed Services Former Spouses Protection Act, 10 U.S.C. § 1408 (with amendments through 1997)

8. 32 C.F.R. § 63.6 (proposed, but enforced, as of 1995)

9. Application for Former Spouse Payments From Retired Pay, DD Form 2293

10. 2001 Regular Military Compensation Table

11. "Old" Disposable Pay Distribution Chart

12. "New" Disposable Pay Distribution Chart

13. OPM website page showing publications

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