

# **HITTING THE JACKPOT IN PENSION CASES: SECRETS TO GETTING THE RETIREMENT SHARE YOUR CLIENT DESERVES**

by

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September 11, 2007

Bally's Las Vegas

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## I. GENERAL INTRODUCTION – DEALING WITH PENSIONS AND RETIREMENT BENEFITS IN DIVORCE CASES

It is at this point a truism that retirement benefits, usually the most valuable asset of a marriage, are divisible upon divorce to at least the degree to which they were accrued during the marriage.<sup>1</sup> As the need to examine retirement benefits has become nearly universal in divorce cases, many fine points regarding division of those benefits has arisen, and distinctions (intentional and otherwise) between and among public and private retirement plans have become apparent.

Over the years that division of such benefits became increasingly common, some of those earning retirement benefits developed strategies by to resist, limit, or prevent the division of the benefits with their soon-to-be-former spouses, who promptly devised counter-strategies. The total amount of information required for a practitioner to successfully advocate the cause of a participant or spouse relating to retirement benefits seems to continuously increase. One text echoes the question asked by many lawyers: “Why are these documents (and the procedure I have to go through to get them accepted) so difficult?”<sup>2</sup>

The answer to that question is beyond the scope of these materials. It is hoped, however, that these materials will be of assistance in identifying a number of both dangers and opportunities, and thus make dealing with retirement benefits in future divorce cases easier for the practitioner, and more valuable for the client.

### A. Why Bother? Duty

There is little excuse today for divorce lawyers failing to deal with pension benefits. Pensions have been recognized as community property for many decades,<sup>3</sup> and that recognition was extended to unvested and unmatured pension benefits long ago.<sup>4</sup> Statutory and case law throughout the country now recognizes pension benefits as marital property with near-uniformity. Rationales for that recognition usually include that the benefits accrued during marriage, that income during marriage was effectively reduced in exchange for the deferred pension benefits, and that the choice was made

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<sup>1</sup> See, e.g., Annotation, *Pension or Retirement Benefits as Subject to Assignment or Division by Court in Settlement of Property Rights Between Spouses*, 94 A.L.R.3d 176; Marshal Willick, *MILITARY RETIREMENT BENEFITS IN DIVORCE* (ABA 1998) at xix-xx.

<sup>2</sup> Gale S. Finley, *ASSIGNING RETIREMENT BENEFITS IN DIVORCE: A PRACTICAL GUIDE TO NEGOTIATING AND DRAFTING QDROS* (ABA Family Law Section 1995). While she was speaking of private retirement plans, the same cry is heard from practitioners forced to negotiate the intricacies of Civil Service, military, or state government retirement plans.

<sup>3</sup> See *LeClert v. LeClert*, 453 P.2d 755 (N.M. 1969); *Busby v. Busby*, 457 S.W.2d 551 (Tex. 1970); *In re Marriage of Fithian*, 10 Cal. 3d 592, 517 P.2d 449 (1974) (recognizing the importance of military retirement benefits as a marital asset).

<sup>4</sup> See *In re Marriage of Brown*, 15 Cal.3d 838, 544 P.2d 561 (Cal. 1976); *Copeland v. Copeland*, 575 P.2d 99 (N.M. 1978); *In re Marriage of Luciano*, 104 Cal. App. 3d 956, 164 Cal. Rptr. 93 (Cal. Ct. App. 1980); *Forrest v. Forrest*, 99 Nev. 602, 668 P.2d 275 (1983).

to forego possible alternative employment which would have paid more in current wages, in order to have the pension.

It is the *far* 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 upon divorce to bring a partition action at a later date to divide those benefits, and the law on the subject still contains some contradictions.<sup>5</sup>

## **B. Why Bother? Liability**

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 or may not be the state of divorce) does not provide a way to correct the omission of assets from the decree, the only mechanism for recovery for a divested spouse could be a malpractice suit against her<sup>6</sup> attorney. The non-uniform and uncertain state of the law governing partition of omitted assets therefore makes it imperative for counsel to seek out and address all pension benefits during the divorce case itself, as a matter of prudent, if not defensive, practice.

Awards against attorneys in such malpractice cases can be significant; the potential liability is the value of the benefit lost to the shortchanged spouse. 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.<sup>7</sup>

In short, paying adequate attention to discerning and addressing retirement benefits is not only advisable, but necessary, for anyone practicing family law.

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<sup>5</sup> The Nevada experience is illustrative. *Cf., e.g., Taylor v. Taylor*, 105 Nev. 384, 775 P.2d 703 (1989) (no right at common law to divide an adjudicated pension) *with Williams v. Waldman*, 108 Nev. 466, 836 P.2d 614 (1992) (parties are tenants in common of all adjudicated assets). In Nevada, at this writing, the conflict remains unresolved, with both lines of cases still existing.

<sup>6</sup> 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. As have other authors in the field, I apologize in advance for the implied sexism, but it is more important, I think, to avoid the confusing verbiage or grammatical errors otherwise necessary to render the text gender-neutral.

<sup>7</sup> See *Smith v. Lewis*, 530 P.2d 589 (Cal. 1975)(\$100,000 malpractice award for failing to list and divide a military reservist retirement); *Cline v. Watkins*, 66 Cal. App. 3d 174, 135 Cal. Rptr. 838 (Ct. App. 1977); *Medrano v. Miller*, 608 S.W.2d 781 (Tex. Civ. App. 1980); *Aloy v. Mash*, 696 P.2d 656 (Cal. 1985); *Bross v. Denny*, 791 S.W.2d 416 (Mo. Ct. App. 1990) (\$108,000 malpractice award where attorney did not know that he could seek division of military retirement after change in the law).

## **II. SUBJECT OVERVIEW**

This portion of the materials, and of this seminar, are *not* intended to be a general overview of division of retirement benefits in divorce. Indeed, it would not be possible in the time allotted to do justice to such a general survey.

Rather, these materials are a smorgasbord of tips and traps culled from materials and experience dealing with the military, Civil Service, and private (ERISA-based) plans, based on the sorts of things that frequently create issues for counsel litigating and drafting orders in pension-related cases, plus some recent developments that not all practitioners have heard about yet.

The following materials start with jurisdictional issues, which are much better addressed at the very beginning of a case. Many attorneys express surprise that even for parties properly before the court, they might have jurisdiction – or not – depending solely on the kind of retirement benefits at issue in the case.

Next, the time rule is explored. It might be thought that something so universally referenced would have easily-understood rules of universal application. But that is not so, and the materials set out the ways in which it is applied from place to place, and when it might not be proper to use it at all, even in States having case law seeming to require it.

The materials then turn to survivorship benefits, easily the most complex, difficult, and pitfall-laden area in dealing with retirement benefits, and some of the things that practitioners can do, and keep in mind, to serve their clients, and reduce their risks of error. Finally, the materials recap the recently-changed world of military disability benefits, with its new acronyms, possibilities, and dangers, and the recent changes to the Servicemembers' Civil Relief Act, and its effect on custody and visitation cases.

## **III. JURISDICTION – THE PENSION-DIVISION BUGABOO THAT CAN RUIN YOUR CASE**

Practitioners should take the time in every retirement case to really consider the question of jurisdiction. Lawyers are used to thinking of jurisdiction as simply two boxes to check relating to the power of the court: subject matter, and personal.

But in the world of retirement divisions, the word has more meanings, encompassing concepts of both place, and time, and even intent. Failure to ensure that the jurisdictional prerequisites of the retirement plan at issue have been satisfied can lead to orders insufficient to accomplish their stated purpose. Once missed, sometimes those errors can be fixed – and sometimes not.

## A. Military Retirement Jurisdiction: Sand Traps Abound

### 1. Quickie Recap of the Military Retirement System

The husband in a California divorce in the mid-1970s had requested that his military retirement benefits be “confirmed” to him as his separate property. In 1977, the California trial court refused, finding that the military retirement benefits were quasi-community property,<sup>8</sup> and therefore ordered the normal “time rule”<sup>9</sup> division of the benefits.

The case was eventually appealed to the United States Supreme Court, which on June 26, 1981, issued its opinion in *McCarty v. McCarty*.<sup>10</sup> The Court 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.<sup>11</sup>

It was, and Congress reacted by enacting the Uniformed Services Former Spouses Protection Act (“USFSPA”) on September 8, 1982.<sup>12</sup> The declared goal of the USFSPA at the time of its passage was to “reverse *McCarty* by returning the retired pay issue to the states.”<sup>13</sup> Later re-interpretations

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<sup>8</sup> Essentially, quasi-community property is a label used by some community property states to describe property acquired outside the state that *would have been* community property if acquired within the state; such states generally divide such property as if it were regular community property.

<sup>9</sup> Some variations in how the time rule (known in some jurisdictions as the “coverture fraction”) is applied are discussed below.

<sup>10</sup> 453 U.S. 210, 101 S. Ct. 2728 (1981).

<sup>11</sup> 453 U.S. at 235-36, 101 S.Ct. at 2743.

<sup>12</sup> 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 (amended every year or two since 1983).

<sup>13</sup> “The purpose of this provision is to place the courts in the same position that they were in on June 26, 1981, the date of the *McCarty* decision, with respect to treatment of nondisability military retired or retainer pay. The provision is intended to remove the federal pre-emption found to exist by the United States Supreme Court and permit State and other courts of competent jurisdiction to apply pertinent State or other laws in determining whether military retired or retainer pay should be divisible [*sic*]. Nothing in this provision requires any division; it leaves that issue up to the courts applying community property, equitable distribution or other principles of marital property determination and distribution. This power is returned to the courts retroactive to June 26, 1981. This retroactive application will at least afford individuals who were divorced (or had decrees modified) during the interim period between June 26, 1981 and the effective date of this legislation the opportunity to return to the courts to take advantage of this provision.” S. Rep. No. 97-502, 97th Cong., 2nd Sess. 15, (1982), reprinted in 1982 U.S.Code Cong. & Ad.News 1596, 1611. See also *Steiner v. Steiner*, 788 So. 2d 771 (Miss. 2001), *opn. on reh’g*.

indicated that this stated declaration of intent might not have totally overruled *McCarty* after all,<sup>14</sup> but in any event treatment of retired pay was again made dependent on the divorce laws of the jurisdictions granting decrees.

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.<sup>15</sup> By fits and starts, every State in the Union eventually permitted military retirement benefits to be divided as property in at least some circumstances.

What is important to this topic is that 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.<sup>16</sup>

The USFSPA set up a federal mechanism for recognizing state-court divisions of military retired pay, including definitions that were prospectively applicable, and rules for interpretation to be followed by the military pay centers in interpreting the law; later, regulations were adopted, and the pay centers were consolidated.<sup>17</sup>

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.<sup>18</sup> Any right to receive payments under the USFSPA is non-transferable; the former spouse may not sell, assign,

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<sup>14</sup> 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.

<sup>15</sup> 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.

<sup>16</sup> 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).

<sup>17</sup> The eventual consolidated center is the Defense Finance and Accounting Service, located in Cleveland; the regulations, which also were amended several times, were found at 32 C.F.R. § 63 until they were (apparently accidentally) deleted by Congress in the post-9/11 legislative rush. Confusion reigned for years, during which DFAS apparently relied primarily on the 1995 proposed regulations. Eventually, DFAS apparently settled on a combination of existing and newly-drafted regulations, set out in the DoD Financial Management Regulations. DoD Regulation 7000.14-R Volumes 1-15, chapter 29 deals with former spouse payments.

<sup>18</sup> 10 U.S.C. § 1408(d)(4).



or transfer his or her rights, or dispose of them by inheritance.<sup>19</sup> 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.

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, issued by a court having personal jurisdiction over both parties under the law of that state, requiring payments to a former spouse for such support.

The statute is more limiting regarding division of retired pay as property, however. The former spouse can apply for direct payment from the military to the former spouse,<sup>20</sup> but the USFSPA limits direct payment to a former spouse to 50% of disposable retired pay for all payments of property division.<sup>21</sup> More than fifty percent of disposable pay may be paid<sup>22</sup> 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.

Some courts have 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).<sup>23</sup> The Department of Defense has concurred in this interpretation.<sup>24</sup>

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<sup>19</sup> 10 U.S.C. § 1408(c)(2).

<sup>20</sup> Application for Former Spouse Payments From Retired Pay, DD Form 2293 (DD-2293). NOTE: This form can be filled out and then printed as an interactive pdf form by going to: <http://www.dtic.mil/whs/directives/infomgt/forms/eforms/dd2293.pdf>.

<sup>21</sup> 10 U.S.C. § 1408(e)(1).

<sup>22</sup> Up to 65% of “remuneration for employment” under the Social Security law, 42 U.S.C. § 659.

<sup>23</sup> See, e.g., *Ex parte Smallwood*, 811 So. 2d 537 (Ala. 2001); *Grier v. Grier*, 731 S.W.2d 931 (Tex. 1987) (USFSPA did not limit the amount of retirement benefits that could be apportioned under Texas community property law, but only the percentage subject to direct payment); *Deliduka v. Deliduka*, 347 N.W.2d 52 (Minn. Ct. App. 1984); see also *Coon v. Coon*, 614 S.E.2d 616 (S.C. 2005) (USFSPA neither confers nor removes subject matter jurisdiction; lower court can address all disposable retired pay); but see *Cline v. Cline*, 90 P.3d 147 (Alaska 2004) (50% limit is jurisdictional); *Knoop v. Knoop*, 542 N.W.2d 114 (N.D. 1996) (indicating in dicta that awards are limited to 50%).

<sup>24</sup> See *A Report to Congress Concerning Federal Former Spouse Protection Laws* (Report to the Committee on Armed Services of the United States Senate and the Committee on Armed Services of the House of Representatives) at 85 (Department of Defense, Sept. 4, 2001), <http://dticaw.dtic.mil/prhome/spouserrev.html> at 76.

## 2. Why “Federal Jurisdiction” is Needed in a Military Case

This is where military cases are different from all other retirement division cases. Congress was concerned that a forum-shopping spouse might go to a state to which the member had a very tenuous connection and force defense of a claim to the benefits at that location.

Accordingly, the USFSPA included special jurisdictional rules that must be satisfied in military cases to get an enforceable order for division of the benefits as property. 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 orders dividing military retirement benefits as property. The 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 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.<sup>25</sup>

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 as to the retirement benefits. The statute effectively creates an additional jurisdictional requirement, which for lack of a better title can be called “federal jurisdiction.”

The essential lesson of this jurisdictional point (for the spouse) is to *never* take a default divorce against an out-of-state military 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.

## 3. How to Get “Federal Jurisdiction”

Of the three grounds, “consent” is often easiest to establish. In most places, making a general appearance as a plaintiff or defendant, or asking for relief in the course of a divorce action, usually constitutes “consent” to trial of the entire action.<sup>26</sup>

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<sup>25</sup> 10 U.S.C. § 1408(c)(4).

<sup>26</sup> There is anecdotal evidence that, sometimes, complaints or motions are crafted for the purpose of provoking a response from the military member spouse seeking affirmative relief that would constitute a general appearance under the laws of the forum State. Once both parties are squarely before the divorce court, requesting relief, it may not be possible for the member to retroactively claim that the retirement benefits should not be addressed.

In a few places, however, cases indicate that a service member may “un-consent” to court jurisdiction over the retirement issue alone.<sup>27</sup> Except in those locations, there generally is not a jurisdictional issue in dealing with the retirement benefits in the divorce action so long as the member is the plaintiff – or a defendant who does not raise the issue.

If the case proceeds in a place where it *is* a problem, or the member-defendant *does* raise the issue, all is not lost to the spouse, although the means of coping with it are cumbersome, often expensive, and require some additional information.

For example, presume the member-spouse is the defendant, served in Nevada, but he expressly refuses consent to the court’s jurisdiction, claims that his presence in Nevada is solely by reason of assignment, and that his State of residence and domicile are elsewhere, say in Florida. The spouse could then file a parallel action in Florida, and serve that action on the member, with the claimed intention of letting the two jurisdictions figure out which action should proceed.

While there are some variations around the country in both the discretion of courts and the role of fault in dividing property, the great majority of States today perform a division of assets in accordance with the property accrued during the marriage, whether described as community property or equitable division. Most member-defendants, faced with the near-certainty of an identical result (at much greater expense, through two divorce actions) will relent and permit litigation of all claims in the court hearing the other property/debt/custody/support issues – almost always, the jurisdiction where he is living.

If the matter proceeds to litigation, the forum State will have to rule on *where* the military member is actually a “resident” and “domiciled.” This can be far harder than it appears, especially since States diverge radically on the meaning of those terms. In some places “residence” is a physical question of location at the time of filing, while “domicile” is that permanent home “to which one returns.” In other places, the meanings are reversed.<sup>28</sup> In *some* States, residence and domicile have the *same* meaning.<sup>29</sup> A service member who has close connections to more than one state will *still*

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<sup>27</sup> 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). These decisions, with enormous illogic, create the very harm that Congress was trying to avoid, 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. Doing so gives an incentive to forum shopping, and causes piecemeal litigation in a multiple venues, leading to an increased chance of inconsistent results. Most ironically, the anti-forum-shopping rules were never necessary in the first place, since no State permits division of property without sufficient minimum contacts to satisfy constitutional concerns. Both the American Bar Association (“ABA”) and the American Academy of Matrimonial Lawyers (“AAML”) adopted position papers urging repeal of this provision of the USFSPA.

<sup>28</sup> Restatement (Second) of Conflict of Laws, § 11, comment k states that for purposes of divorce, residence refers to a domicile where a person actually lives.

<sup>29</sup> It is the opinion of the Nevada Attorney General’s Office that “residency” in this State means the same thing as “domicile.” Op. Nev. Atty. Gen. No. 26 (Mar. 21, 1955).

only have one domicile.<sup>30</sup> If the service member has significantly more connections to one state than another, then the state to which he has closer ties is his domicile.<sup>31</sup>

Practitioners must thus have a clear understanding of the definitions applicable in the forum State (and, if two possible jurisdictions are in contest, the definitions in the *other* State, as well). Then it is a matter of discovery, looking at all the usual indicia, which are briefly discussed here.

Determining the member's "Tax Home" for payroll purposes might be useful (and can be gleaned from the box on the Leave and Earning Statement ["LES"] under "state tax." If the member's claimed tax home is a State that actually charges and collects State income tax, that would be a good indicator of intent to call that place "home" (domicile, in most States).

If the member's "Tax Home" is in some jurisdiction that does not have a State income tax on active duty pay (which is common), so that the member may not even have to file a State tax return, the evidence is less persuasive. Often, when the member's tax home is such a State, further discovery will reveal that the member has little or no other connection with that jurisdiction.

Next, determine the member's "home of record" with the military. According to the Legal Assistance Policy Division of the U.S. Army's Judge Advocate General' Corps states that the "Home of Record" is the state of residence of a member when the member entered the service of the armed forces. This may, or *may not*, be the same as the member's domicile – the place that, when the member eventually goes "home," he will return to. In actuality, "Home of Record" is used solely for the purpose of determining the amount of moving expenses that will be provided to a member and his family upon termination of military service, and sometimes members simply don't get around to changing this notation for many years during active duty service.

Perhaps more useful is the member's DD-2058 form on file with the military, which is the member's "State of Legal Residence Certificate," or legal residency form. Again, questions must be asked about when the form was filed, and why, which may have greater or lesser relevance to traditional notions of residency and domicile.

If the member is of a rank where "dream sheets" regarding preferred postings are available, they should be sought in discovery. If a member lists a jurisdiction as his primary (or only) preferred duty station, a good case could be made that the member's location there is not only "because of military assignment." Find out what his prior postings were, and whether (and how many times) he has returned to the forum after being stationed in some other place.

Find out where the member last voted; registering to vote usually requires an affirmation of either domicile or residency in the jurisdiction in which the vote is to be cast. Again, when the registration to vote was made could be important, as well as how recently it had last been relied upon. For

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<sup>30</sup>R ESTATEMENT § 11, *supra*.

<sup>31</sup>*Id.* at § 20, comment b.

example, if the registration to vote had been made twenty years ago, and the member last voted years before moving to the forum state, the fact might be of little consequence given events since that time.

Similarly, driver's licenses and car registrations may be useful in determinations to remain in a place for at least some period of time.

Some points are obvious, such as how long the member has been in the jurisdiction, and where the member does his banking. Consider asking the question "Where is home?" in deposition, and find out if the member has made any kind of pronouncement of his present or future plans.

Finally, examine whether the member owns property in the jurisdiction. While not legally determinative of anything, the fact of whether a member has chosen to purchase real estate in the forum often is seen as having a strong correlation with whether the member treats the jurisdiction as "home."

Once "federal jurisdiction" is obtained – by appearance, domicile, or residence (for purposes other than military assignment) – the forum court is fully empowered to deal with the retirement benefits as property, as it would any other asset within the jurisdiction of the court. It is good practice to recite the basis for jurisdiction over the service member on the face of the decree or other order dealing with the military retirement benefits.<sup>32</sup>

## **B. ERISA-Governed Retirement Benefits & Post-Death Filings**

In the world of private pensions, the questions to ask to establish the jurisdiction of the court is less a matter of place than of time. For example, most plans require all retirement options to be selected at the time of retirement. In divorce litigation, it is therefore important to know whether the employee has already retired.

If the worker has *not* yet retired, then all options should remain available – whether to divide the retirement interest itself, or just the payment stream, whether a Qualified Joint and Survivor Annuity ("QJSA") is called for, or should be waived, etc. If the retirement is in pay status, however, then many options are probably foreclosed, since it is not possible to change those options under most ERISA-governed plans (the plan having committed to a payment stream calculated to reflect the actuarial projections of the options selected).

For example, in the common situation of a divorce occurring after the worker had retired, and already selected a QJSA, it is no longer possible to divide the retirement *interest*, providing one

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<sup>32</sup> The "standard form," was printed nationally by the ABA in 1995 and has been in use throughout the country since that time. See, e.g., *Janovic v. Janovic*, 814 So. 2d 1096 (Fla. Ct. App. 2002) (noting as "standard language" the form paragraphs created for courts to use in decrees entered after *Mansell* to eliminate any ambiguity). The clause set was first published by the ABA as a guide for drafting attorneys in the form of "Military Retirement Benefit Standard Clauses" in 18 Family Advocate No. 1 (Summer, 1995) (*Family Law Clauses: The Financial Case*) at 30. The current version of the standard clause set is published on our web site, under "Published Works," at <http://willicklawgroup.com/page.asp?id=40>.

pension stream to the worker (as to whom the spouse's continuing life or death would be irrelevant), and another to the spouse (as to whom the worker's continuing life or death would be irrelevant). Rather, counsel would only have the lifetime *benefit stream* to divide, keeping in mind whatever QJSA option was selected at retirement. Some plans, further, override choices, providing for automatic reversion of the spousal interest if she predeceases the member, irrespective of any court orders, and refusing to qualify court orders providing otherwise.

## 1. Can Beneficiary Designations Be Changed Post Retirement?

As a general rule, ERISA preempts any “state law”<sup>33</sup> that “relates to” employee benefit plans.<sup>34</sup> Further, ERISA contains the basic prohibition that a court may not order a plan to provide any benefit not explicitly permitted by its plan documents. ERISA simply does not, however, contain any provision addressing the possibility that a retiree could divorce, his spouse could relinquish her status as beneficiary, the retiree could then remarry, and then seek to have those benefits paid to the intended later spouse (and widow).

As might be expected, this has led to litigation throughout the State and federal courts, in just about as many distinct factual situations as can be thought up regarding the order in which retirement, beneficiary selection, divorce, remarriage, beneficiary change directions, and death, happen to occur. Most such cases seem to take place with the participant in an ERISA-governed retirement plan dies, the plan documents on file name one beneficiary, and some other document (say, a divorce decree) include a waiver of the right of the designated beneficiary to receive the survivor's benefits.

Most State courts and federal circuits have rejected the view that ERISA has some religious precedence over all other laws and rules, and held that it is a law to be considered by the courts like other laws.<sup>35</sup> It is true that *Emard* was earlier in time than the United States Supreme Court decision in *Egelhoff v. Egelhoff*,<sup>36</sup> but as several courts have observed, that decision actually only addressed the intersection of ERISA with a State statute.

The California Court of Appeals echoed the *Emard* reasoning in its post-*Egelhoff* decision in *Araiza-Klier v. Teachers Insurance and Annuity Association*,<sup>37</sup> which imposed an equitable constructive trust on pension plan benefits. The *Araiza* court acknowledged the expansive reading often given to ERISA, but found that as a matter of both logic and law, “the term ‘relate to’ cannot be taken ‘to

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<sup>33</sup> Meaning statute, rule, or order of any state court.

<sup>34</sup> 29 U.S.C. § 1144(a).

<sup>35</sup> See *Emard v. Hughes Aircraft Co.*, 153 F.3d 949 (9<sup>th</sup> Cir. 1998), *cert. denied*, \_\_\_ U.S. \_\_\_ (1999) (State courts may entertain actions such as constructive trusts intended to allow the intentions of parties to govern the payment of ERISA-governed survivor designations).

<sup>36</sup> 532 U.S. 141, 121 S. Ct. 1322, 149 L. Ed. 2d 264 (2001).

<sup>37</sup> 2001 Cal. App. LEXIS 2794 (Ct. App. No. D034967, Nov. 29, 2001) (designated as unpublished).

extend to the furthest stretch of its indeterminacy,’ or else ‘for all practical purposes preemption would never run its course.’”<sup>38</sup>

Indeed, the overwhelming majority of courts addressing the matter, before and after *Egelhoff*, have reached the same conclusion. The line of reasoning goes back at least as far as the Fourth Circuit’s 1996 decision in *Altobelli*,<sup>39</sup> in which the court noted that ERISA does not directly address the issue, and found that ERISA’s anti-alienation provision does not apply to a beneficiary’s waiver of benefits.

Most courts – State and federal – hearing such cases have stated that they should be settled in accordance with “federal common law,” a body of case law developed where ERISA itself does not expressly address the issue before the court and courts are called upon to construct a common law that effectuates the policies underlying ERISA.<sup>40</sup> In so doing, courts may use *state* common law as a basis for federal common law, to the extent that state law is not inconsistent with congressional policy concerns.<sup>41</sup>

Some courts that have been quite strict about enforcing the beneficiary designation on the face of plan documents and requiring that any waivers, to be effective, must specifically refer to the spouse’s rights as a beneficiary in an ERISA plan.<sup>42</sup> A minority of courts have refused to permit waivers of retirement benefits at all, essentially claiming that the documents executed at the time of retirement control no matter *what* the parties agreed to in any later divorce.<sup>43</sup> And still other courts have exalted

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<sup>38</sup> *Id.* at 15 [citations omitted].

<sup>39</sup> See, e.g., *Estate of Altobelli v. IBM*, 77 F.3d 78 (4<sup>th</sup> Cir. 1996) (finding that a woman, who was the default beneficiary of her deceased ex-husband’s employer-provided pension plans, “effectively surrendered her rights” in the pensions in their decree-incorporated marital settlement agreement).

<sup>40</sup> See *Thomason v. Aetna Life Ins. Co.*, 9 F.3d 645 (7<sup>th</sup> Cir. 1993).

<sup>41</sup> *Id.*; see also *Phoenix Mutual Life Ins. Co. v. Adams*, 30 F.3d 554 (4<sup>th</sup> Cir. 1994) (facts showed sufficient performance of acts indicating intention to name successor beneficiary, despite technical absence of formal change of beneficiary; such substantial compliance with technical requirements was sufficient).

<sup>42</sup> See *Fox Valley & Vicinity Constr. Workers Pension Fund v. Brown*, 897 F.2d 275 (7<sup>th</sup> Cir.), *cert. den.*, 498 U.S. 820 (1990); *Lyman Lumber Co. v. Hill*, 877 F.2d 692 (8<sup>th</sup> Cir. 1989).

<sup>43</sup> See, e.g., *Trustees of Iron Workers Local 451 Annuity Fund v. O’Brien*, 937 F. Supp. 346 (D. Del. 1996) (waiver provision in a divorce stipulation purporting to release each party from present and future claims by the other did not operate to waive the wife’s interest as the designated beneficiary of the husband’s ERISA governed pension plan); *McGowan v. NJR Service Corp.*, 423 F.3d 241 (3<sup>d</sup> Cir. 2005) (adopting the minority view that waivers outside the plan documents are not binding on pension plans, while acknowledging that the result was “somewhat strange”); *Smith v. E.I. Dupont de Nemours & Co.*, 402 F. Supp. 519 (D. Del. 2005) (finding it had no choice despite the equities, given the federal circuit within which the court sat).

technicalities to the point of ludicrousness, stating that if the plan documents were not executed – perfectly – to alter beneficiary designations, then the previous designation controlled.<sup>44</sup>

There are also those who reference the internal intricacies of ERISA and try to create artificial distinctions between the legal doctrines applicable to ERISA-governed *welfare* plans from those applicable to ERISA-governed *pension* plans. Most courts have refused to bite at the proposition that mention of the word “ERISA” erases all considerations of other law and equity, and have applied the same principles to all sorts of ERISA-governed benefits.

In *Silber v. Silber*,<sup>45</sup> the Court of Appeals of New York addressed the issue of federal common law, under which a court may recognize the waiver/relinquishment of survivor beneficiary status of *pension plan* benefits upon divorce. The *Silber* court noted that its view was the far majority view, and explicitly rejected any contrary reading of *Hopkins*,<sup>46</sup> instead following the line of authority of *Altobelli*.<sup>47</sup>

Similarly, in *Walsh v. Woods*,<sup>48</sup> the South Carolina Court of Appeals held that the trial court erred in granting judgment for an ex-wife based on ERISA provisions governing “vesting” and “non-alienability,” and should have examined the settlement agreement to determine if the ex-wife had relinquished “all of her interests” in the pension. As in this case, the husband had named his then-current wife as beneficiary upon retirement, and upon divorce she relinquished the benefits. The husband later remarried and wanted the benefits to go to his new spouse.

Substantially identical decisions have come from both State and federal courts. In *Neal v. General Motors Corporation*,<sup>49</sup> the United States Federal District Court for the Western District of North

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<sup>44</sup> See *Lasche v. George W. Lasche Basic Retirement Plan*, 870 F. Supp. 336 (D. S. Fla. 1994), *aff'd*, 111 F.3d 863 (11<sup>th</sup> Cir. 1997). The district court held that a former wife was entitled to the proceeds of a Merrill Lynch retirement plan in the name of her deceased husband, where she signed page five rather than page four of the plan documents for waiver of those survivor’s benefits. The court found that the waiver requirements of ERISA would be “hollow protection” if not conformed to precisely, and thus that she did not “effectively” waive her rights in the plan. This conclusion was in *spite of* the wife’s admitted signature on the waiver documents, and despite the fact that the waiver forms had been signed in accordance with a prenuptial agreement that called for that waiver to be signed. In other words, the court readily acknowledged that its result flew in the face of the parties’ clear and mutual intent, and the reviewing appellate court also thought that form was more important than intent.

<sup>45</sup> 99 N.Y.2d 395, 786 N.E.2d 1263, 757 N.Y.S.2d 227 (2003).

<sup>46</sup> *Hopkins v. AT&T Global Information. Solutions Co.*, 105 F.3d 153 (4<sup>th</sup> Cir. 1997). The case is wildly over-cited by parties seeking to have plan documents control over all other factors, including court orders and express waivers. However, all *Hopkins* *actually* dealt with was a former spouse trying to collect unpaid alimony from an obligor’s subsequent spouse and widow by means of attaching the widow’s survivorship benefits. Since ERISA is structured to favor and protect surviving spouses, the former spouse failed.

<sup>47</sup> *Altobelli v. IBM*, *supra*, 77 F.3d 78 (4<sup>th</sup> Cir. 1996).

<sup>48</sup> 2003 S.C. App. LEXIS 80, filed June 2, 2003.

<sup>49</sup> 2003 U.S. Dist. LEXIS 9944, decided June 11, 2003.



Carolina stated that where a domestic relations order upon divorce calls for waiver/relinquishment, that intent can be placed in a QDRO, is exempt from ERISA's preemption, and has "full force and effect over an ERISA benefit plan," citing 29 U.S.C. § 1056(d)(3)(A).

Particularly detailed was the discussion in *Torres v. Torres*,<sup>50</sup> in which the Hawaii Supreme Court explained at great length how, at least in the Ninth Circuit, there is no such thing as "vesting" of survivorship benefits at the moment of retirement, in **any** person, and why the benefits accorded (or waived) in an earlier divorce decree should be distributed in accordance with such a decree. That court detailed why nothing in *Hopkins*, or any other prior case, could validly be interpreted as leading to any other result.<sup>51</sup>

The Supreme Court of Texas joined all of these cases in finding that federal common law (which it found identical to the Texas law governing waivers and constructive trusts) permitted the beneficiary of an ERISA-governed pension plan to waive or relinquish those benefits, and that such a waiver is to be enforced by way of a QDRO designating a new survivor beneficiary.<sup>52</sup>

The *Keen* decision noted that the rule it adopted was by far the majority rule, in both federal and State courts, and that only one federal circuit (the Sixth) seemed to have a contrary view. Further, the court noted that **many** such decisions were issued after *Egelhoff*, and that *Hopkins* does not lead to any contrary result, citing *Altobelli* and *Fox Valley*.<sup>53</sup> The cases keep coming, and the bulk of recent authority states that waiver of spousal beneficiary status is permitted through the divorce court instruments.<sup>54</sup>

The majority of State and federal courts throughout the country have concluded that it *is* possible to have a valid waiver of a survivorship interest in a divorce decree, despite the naming of the then-

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<sup>50</sup> 60 P.3d 798 (Hawaii 2003).

<sup>51</sup> See, e.g., 60 P.3d at 819-825. Indeed, the *Torres* court went further, finding the entire *Hopkins* opinion to have been weakly reasoned, poorly supported, and unpersuasive. *Id.* at 821-22.

<sup>52</sup> *Keen v. Weaver*, 121 S.W.2d 721 (Tex. 2003). The Texas courts have gone further than most others in directly applying the applicable state law **as** the applicable federal common law. See also *Emmens v. Johnson*, 923 S.W.2d 705 (Tex. Ct. App. 1996).

<sup>53</sup> *Fox Valley and Vicinity Constr. Wkrs. Pension Fund v. Brown.*, 684 F. Supp. 185, 188 (N.D. Ill. 1988), *aff'd*, 897 F.2d 275 (7<sup>th</sup> Cir. 1990). See also *Keeton v. Cherry*, 728 S.W.2d 694, 697 (Mo. Ct. App. 1987); *Brandon v. Travelers Ins. Co.*, 18 F.3d 1321 (5<sup>th</sup> Cir. 1994); *Mohamed v. Kerr*, 53 F.3d 911 (8<sup>th</sup> Cir. 1995); *Manning v. Hayes*, 212 F.3d 866 (5<sup>th</sup> Cir. 2000).

<sup>54</sup> See, e.g., *Guardian Life Insurance Company of America v. Finch*, 395 F.3d 238 (5<sup>th</sup> Cir. 2004) (federal common law governs disputes between an ex-spouse who is an ERISA plan's designated beneficiary and other claimants to the plan's proceeds. The court held that ERISA does **not** preempt a waiver by a named beneficiary of her interest in the plan's proceeds); *Melton v. Melton*, 324 F.3d 941 (7<sup>th</sup> Cir. 2003) (using federal common law to find waiver of spousal interest in ERISA-governed plan, and no pre-emption); *Metropolitan Life Insurance Co. v. Johnson*, 297 F.3d 558 (7<sup>th</sup> Cir. 2002) (same); *Strong v. Omaha Construction Industry Pension Plan*, Neb., No. S-03-1403, June 24, 2005, 2005 WL 1704792 ("under the federal common law, a divorce decree can waive a beneficiary interest in the death benefit of an ERISA-governed pension plan"); *MacInnes v. MacInnes*, 677 N.W. 2d 889 (Mich. App. 2004).

current spouse at the time of retirement. But this area of the law is – at least – “messy.” If there is any way to accomplish it, the plan documents should be changed to specify the intended beneficiary designation.

Where the plan refuses to alter its plan documents in accordance with the divorce decree, a QDRO should be attempted. If *that* fails, there may be no solution but to sue the pension plan, asking a court of competent jurisdiction to accept the designated beneficiary and certify the QDRO as appropriate. In most jurisdictions, that should work.

## 2. Is the QDRO Too Late If the Participant Dies?

Surprisingly, the answer appears to be “no.” It is by *far* the better practice to have all retirement orders – including QDROs – prepared, executed, and filed on the same day as the divorce is entered (nevertheless before someone dies). Where, for whatever reason, that did not happen, the available options may be more limited, or even nonexistent, and the risks of a malpractice action against counsel for whoever did not get the benefits is significant.<sup>55</sup>

If the divorce decree omitted mention of the retirement benefits at all, it has been possible in some cases to obtain a “nunc pro tunc” QDRO entered as of a date preceding the employee’s death, which was ruled not preempted by ERISA, at least where the plan proceeds had not been disbursed, and no competing “alternate payee” was identified in the plan documents.<sup>56</sup> Similarly, in *Hogan v Raytheon*,<sup>57</sup> a post-death QDRO providing survivor’s benefits to the former spouse was allowed, because the plan had been copied with the decree awarding the wife an interest in the plan benefits, and QDRO was sought within 18 months of the employee’s death, even though survivor benefits had not been mentioned in the underlying judgment.

Some federal circuits have expressed a greater inclination to rely upon the divorce courts’ distribution of benefits than have others. In *Directors Guild v. Tise*,<sup>58</sup> the Ninth Circuit held:

Under [ERISA], then, whether an alternate payee has an interest in a participant’s pension plan is a matter decided by a state court according to the state’s domestic relations law. Whether a state court’s order meets the statutory requirements to be a QDRO, and therefore is enforceable against the pension plan, is a matter determined in the first instance by the pension plan administrator, and, if necessary, by a court of competent jurisdiction. See 29 U.S.C. § 1056(d)(3)(H)(i).

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<sup>55</sup> Anecdotal evidence indicates that there is a lot of trial-level litigation in which liability was sought against practitioners who did not properly see to securing survivorship benefits for a spouse. Edwin Schilling, Esq., of Aurora, Colorado, estimates that 90% of his malpractice consultations involve failure to address survivor beneficiary issues. Lawyer’s Weekly USA, Oct. 18, 1999, at 22 (99 LWUSA 956).

<sup>56</sup> *Patton v. Denver Post Corp*, 179 F. Supp. 2d 1232 (2002).

<sup>57</sup> 302 F.3d 854 (8<sup>th</sup> Cir. 2002).

<sup>58</sup> 234 F.3d 415 (9<sup>th</sup> Cir. 2000).

The court therefore found that the child support called for in the divorce decree could be converted into a QDRO *nunc pro tunc* after the death of the participant, finding that there is no requirement in ERISA that a QDRO must be finalized before the benefits become payable. The QDRO provisions of ERISA do not suggest that an alternate payee has no *interest* in plan benefits before a QDRO is obtained – rather, they merely prevent enforcement of that “already-existing interest” until the QDRO is issued and served on the plan.<sup>59</sup>

The reason it is such a risky proposition to submit a QDRO after the death of an employee is that, under ERISA, a former spouse may be treated as a “surviving spouse” only if a QDRO so provides.<sup>60</sup> It is essential that counsel explores former spouse rights under a plan if the employee dies before retirement, and specify those rights in the QDRO. This is particularly important in defined benefit plans that offer no pre-retirement death benefit other than the QPSA. In such plans, if the participant is not married and dies before entering pay status, his or her entire benefit may revert to the plan and be lost.

A case in point is *Samaroo v. Samaroo*.<sup>61</sup> In *Samaroo*, the employee died before retiring. His ex-spouse obtained a *nunc pro tunc* amendment to their divorce decree, providing for benefits under the employee’s QPSA. The Third Circuit held that the amended decree was not a QDRO because, by conferring survivor’s benefits after they had lapsed, it impermissibly increased the plan’s liability.

Although there may be a way to distinguish the facts on this issue from a situation in which the entire retirement is considered a “missed asset,”<sup>62</sup> that distinction is a mighty thin one, and *Samaroo* stands as a warning for counsel to not agree to a termination of marital status until appropriate provision has been made to protect the survivor benefit. An interim QDRO may be used for this purpose if the divorce is to occur before information is available to accurately determine the parties’ respective interests.

At the very least, the underlying court order (i.e., the decree of divorce) should specify the intended beneficiary, and a copy should be sent to the plan to avoid any later allegation that it was not aware of the existence of the spousal interest.

This lesson is illustrated by the more recent Third Circuit case of *Files v. ExxonMobil Pension Plan*,<sup>63</sup> where the parties’ property settlement agreement provided that the wife was awarded half the

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<sup>59</sup> 234 F.3d at 421, citing *In re Gendreau*, 122 F.3d 815, 819 (9<sup>th</sup> Cir. 1997), cert. denied, 523 U.S. 1005, 118 S. Ct. 1187, 140 L. Ed. 2d 318 (1998); see also *Hawkins v. C.I.R.*, 86 F.3d 982 (10<sup>th</sup> Cir. 1996) (when a divorce court makes an award to an alternate payee of an interest in pension plan benefits, that interest immediately becomes the alternate payee’s sole and separate property; a QDRO is merely an enforcement mechanism which may be entered at any later date).

<sup>60</sup> 29 U.S.C. § 1056(d)(3)(F).

<sup>61</sup> 193 F.3d 185 (3d Cir. 1999), cert. denied, 529 U.S. 1062, 120 S. Ct. 1573, 146 L. Ed. 2d 475 (2000).

<sup>62</sup> See, e.g., *Patton v. Denver Post Corp.*, supra, 179 F. Supp. 2d 1232 (2002).

<sup>63</sup> 428 F.3d 478 (3d Cir. 2005).

defined benefit plan, and half the savings plan balance. The lawyer for the spouse sent the PSA to the plan, requesting forms for drafting a QDRO, but the plan only sent the requested information to the employee's counsel, who had not sent them to the spouse's attorney when the employee died.

When the dispute between the former spouse and plan reached the Third Circuit, it found that there is no requirement in ERISA that a plan be notified of the spousal interest prior to the employee's death, in order for the spouse to seek a qualified order. Agreeing with the Ninth Circuit's holding in *Tise*, the court held that a QDRO is merely a mechanism for enforcement of an interest determined in the first instance by a state domestic relations court.<sup>64</sup> Regardless of whether the plan received notice of that separate interest before or after the date the participant died, the former spouse was entitled to seek enforcement of a separate interest in a pension benefit that existed before the participant's death.

The bottom line is that having the QDRO done on the date of divorce is best. If that cannot be done, at least make sure the plan knows full well about the divorce, and is copied with the orders granting the former spouse an interest in the benefits while the QDRO is pursued.

### C. Civil Service Retirement Jurisdiction: One Chance to Do It Right

In divorces where Civil Service benefits are at issue (probably CSRS, for those starting federal service before 1984; FERS for all those thereafter), the jurisdiction of the court to alter survivor beneficiary designations is a gain a matter of time rather than place. Here, however, the question is time in relation to events.

Specifically, the Civil Service rules are rather rigidly set up to expect that all the divorcing, re-marrying, and adjustments to orders will go on while an employee is still in service, *or* that the first order entered after the retirement of the worker deals with all aspects of the retirement and survivorship benefits perfectly.

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 the first order dividing the marital property of the employee or retiree and the former spouse.<sup>65</sup>

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 of an *employee*; *or* (2) the first order dividing the marital property of a *retiree* and former spouse.<sup>66</sup>

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<sup>64</sup> 428 F.3d at 488-490.

<sup>65</sup> 5 C.F.R. § 838.806(a).

<sup>66</sup> 5 C.F.R. § 838.806(b).

How about if there was a first order, but it has been vacated or set aside? Well, the second order is then OK, *unless*: (1) it is issued after the date of retirement or death of the retiree; (2) changes any provision of a former spouse survivor annuity order 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 short version is that any practitioner drafting a COAP<sup>67</sup> for a retired Civil Service worker pretty much has to get it right the first time, because the niceties of altering such an order are horribly complex, and often impossible.

#### **IV. THE “UBIQUITOUS TIME RULE”<sup>68</sup> – MORE FLAVORS THAN YOU MIGHT EXPECT**

The standard “time rule” formula seems simple enough – the spousal share is determined by taking the number of months of service during marriage as a numerator, and the total number of months of service as a denominator, and multiplying the resulting fraction by first one-half (the spousal share) and then by the retirement benefits received.

Yet there are variations around the country in terms of what is counted, and how, leading to very different ultimate results. Courts in different States may not even realize that the “time rule” cases decided elsewhere follow different sets of rules and assumptions.

##### **A. Variations in Final Date of Accrual**

Probably the most obvious variation from place to place is when to stop counting. California, Nevada, and Arizona are three community property states sitting right next to one another, and it is not unusual for cases to involve parties with ties to any two of them. All three claim to apply the time rule to pension divisions, but they do the math differently.

Presume that a couple live together in marriage for ten years before they separate. The parties discuss reconciliation and possible divorce terms, but after six months, it becomes clear that the split is permanent, and one of them files for divorce. The divorce turns out to be a messy, acrimonious matter which proceeds through motions, custody evaluations, returns, etc., for another year and a half, when the parties finally get to trial and are declared divorced. Also presume that the employee spouse accrues a retirement during marriage providing exactly \$1,000 after 20 years.

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<sup>67</sup> “Court Order Acceptable for Processing” – the OPM takes a very dim view of court orders labeled “QDROs.”

<sup>68</sup> With apologies to Honey Kessler Amado, whose work is discussed below, from whom this perfect description was swiped for these materials.

In California, the spousal share ceases to accumulate upon “final separation.”<sup>69</sup> So the math would be 10 (years of marriage) ÷ 20 (years of service) x .5 (spousal share) x \$1,000 (pension payment) = \$250.

Arizona terminates community property accruals, for the most part, on the date of filing and service of a petition for divorce.<sup>70</sup> There, on the same facts, the math would be 10.5 (years of marriage) ÷ 20 (years of service) x .5 (spousal share) x \$1,000 (pension payment) = \$262.50.

Next door in Nevada, community property ceases to accrue on the “date of divorce.”<sup>71</sup> There, the math would be 12 (years of marriage) ÷ 20 (years of service) x .5 (spousal share) x \$1,000 (pension payment) = \$300.

Presumably, other States could have still different rules for measuring when the community or coverture period started or ended. Such variations could lead to significantly different sums collected by the respective spouses over the course of a lifetime.

## **B. Variations in Qualitative/Quantitative Approach to Spousal Shares**

As a matter of law, it is possible to value the spousal share in at least two ways. The majority of States applying the time rule formula seem to view the “community” years of effort *qualitatively* rather than quantitatively, reasoning that the early and later years of total service are equally necessary to the retirement benefits ultimately received.<sup>72</sup>

This view of the time rule essentially provides to the former spouse an ever “smaller slice of a larger pie” by getting a shrinking percentage of a retirement that is increasing in size based upon post-divorce increases in the wage-earner’s salary and years in service.

Some critics complain that such a formula gives the non-employee former spouse an interest in the employee spouse’s post-divorce earnings, at least where the divorce occurs while the employee is still working. They argue that the spousal share should be frozen at the earnings level at divorce; a minority of States, including Texas, have adopted this approach, sometimes in cases that do not

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<sup>69</sup> See, e.g., *Marriage of Bergman*, 168 Cal. App. 3d 742, 214 Cal. Rptr. 661 (Cal. Ct. App. 1985).

<sup>70</sup> Ariz. Rev. Stat. § 25-211 (1998).

<sup>71</sup> See, e.g., *Forrest v. Forrest*, 99 Nev. 602, 606, 668 P.2d 275, 278 (1983). While there is scant published authority for the proposition, this is usually thought to mean the date of the divorce trial.

<sup>72</sup> See, e.g., *Bangs v. Bangs*, 475 A.2d 1214 (Md. App. Ct. 1984); *Gemma v. Gemma*, 105 Nev. 458, 778 P.2d 429 (1989); *In re Hunt*, 909 P.2d 525 (Colo. 1995); *Croley v. Tiede*, \_\_\_ S.W.3d \_\_\_, 2000 WL 1473854 (Tenn. Ct. App., No. M1999-00649-COA-R3-VC, Oct. 5, 2000). Such jurisdictions typically add a hedge; the trial court can reserve jurisdiction to determine, after retirement, whether the benefits proved to be much greater than expected because of extraordinary “effort and achievement” (as opposed to “ordinary promotions and cost of living increases”), in which case the court could recalculate the spousal interest. See, e.g., *Fondi v. Fondi*, 106 Nev. 856, 802 P.2d 1264 (1990).

appear to have contemplated the actual mathematical impact of the decision reached.<sup>73</sup> This minority approach undervalues the spousal interest by giving no compensation for deferred receipt, and also contains a logic problem, at least in a community property analysis, of treating similarly situated persons differently.

Specifically, the majority time rule approach comes closest to providing equity to successive spouses. Two consecutive spouses, during the first and last halves of an employee's career, would be treated equally under the qualitative approach, but very differently under any approach that freezes the spousal share at the level of compensation being received by the employee at the time of divorce.

An example is useful to illustrate this discussion. Presume an employee who worked for exactly 20 years, and was married to wife one for the first ten, and wife two for the next ten, retiring on the day of divorce from wife two. Presume he had started work at \$20,000 per year, and enjoyed 5% raises every year. That would make his historical earnings look like this:

Yearly Salary	Monthly Salary
\$20,000.00	\$1,666.67
\$21,000.00	\$1,750.00
\$22,050.00	\$1,837.50
\$23,152.50	\$1,929.38
\$24,310.13	\$2,025.84
\$25,525.63	\$2,127.14
\$26,801.91	\$2,233.49
\$28,142.01	\$2,345.17
\$29,549.11	\$2,462.43
\$31,026.56	\$2,585.55
\$32,577.89	\$2,714.82
\$34,206.79	\$2,850.57
\$35,917.13	\$2,993.09
\$37,712.98	\$3,142.75
\$39,598.63	\$3,299.89
\$41,578.56	\$3,464.88
\$43,657.49	\$3,638.12
\$45,840.37	\$3,820.03
\$48,132.38	\$4,011.03
\$50,539.00	\$4,211.58

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<sup>73</sup> See, e.g., *Grier v. Grier*, 731 S.W.2d 931 (Tex. 1987).

If this hypothetical employee had a standard longevity retirement (or any other standard defined benefit plan<sup>74</sup>) the above wage history would make his average monthly salary during his last three years' service \$4,014.21, and a normal retirement formula<sup>75</sup> would make his retired pay \$2,007.11.

Under the *qualitative* approach to the time rule embraced by most time rule states, the employee would receive half of this sum himself – \$1,003.55. Each of his former spouses, having been married to him for exactly half the time the pension accrued, would receive half of *that* sum – \$501.78. In other words:

Employee:	\$1,003.55
Wife one (10 years):	\$ 501.78
Wife two (10 years):	\$ 501.78
Total:	\$2,007.11

If the calculations were done in accordance with the position of the critics of the time rule set out above, in a strictly quantitative way, the results would be quite different. Wife one's share of the retirement would be calculated in accordance with rank and grade at the time of her divorce from the employee; in this case, she would get a pension share based the "high three" years at the ten year point, which was \$2,464.38. The formula postulated above would produce a hypothetical retirement of \$616.10. Wife one would receive half of that sum – \$308.05, but not until after the employee's actual retirement, ten years later.

The smaller share going to wife one would leave more for wife two and the employee who, on these facts, would effectively split it as follows:

Employee:	\$1,100.41
Wife one (10 years):	\$ 308.05
Wife two (10 years):	\$ 598.65
Total:	\$2,007.11

Perhaps the clearest expositions of the reasoning behind the two approaches are found in those cases in which a reviewing court splits as to which interpretation is most correct. The Iowa Supreme Court faced such a conflict in the case of *In re Benson*.<sup>76</sup> The trial court had used a time-rule approach,

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<sup>74</sup> Such plans are often funded by employer contributions (although in some plans employees can contribute) and provide certain specified benefits to the employee after retirement, usually for life. Often, the benefit is determined by a formula taking into account the highest salary received and the total number of years worked for the employer (such as a "high-three" or "high five" plan). For example, a plan might pay one-tenth of an employee's average monthly salary over the three years before retirement, multiplied by one-fourth the number of years that the employee worked. A twenty-year employee earning an average of \$2,000 per month during his last years would get \$1,000 per month (i.e., \$2,000 x .1 x 20 x .25). Generally, no lump-sum distributions (other than certain nominal amounts in some plans) can be distributed from such defined benefit plans.

<sup>75</sup> Years of service x 2.5% x high-three average basic pay,

<sup>76</sup> 545 N.W.2d 252 (Iowa 1996).



with the wife's percentage to be applied to the sum the husband actually received, whenever he actually retired.

The appellate court restated the question as being the time of valuation, with the choices being the sum the husband *would have* been able to receive if he had retired at divorce, or the sum payable at retirement. The court acknowledged that the longer the husband worked after divorce, the smaller the wife's portion became. The court accepted the wife's position that to "lock in" the value of the wife's interest to the value at divorce, while delaying payment to actual retirement, prevented the wife from "earning a reasonable return on her interest."

Quoting at length from a law review article analyzing the mathematics of the situation, the court found that acceptance of the husband's argument would have allowed him to collect the entirety of the accumulating "earnings" on the marital property accumulated by both parties. Three judges dissented.<sup>77</sup>

The point of the math is that practitioners must look beyond the mere label applied by the statutory or decisional law of a given State to see what it would actually do for the parties before it. This is particularly true when considering which forum would be most advantageous, in those cases in which a choice is possible.

### C. Variations Regarding Payment Upon Eligibility

Several state courts have held that the interest of a former spouse in retired pay is realized at *vesting*,<sup>78</sup> theoretically entitling the spouse to collect a portion of what the employee *could* get at that time irrespective of whether the employee actually retires.<sup>79</sup> As phrased by the California court in *Luciano*: "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."<sup>80</sup>

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<sup>77</sup> The Iowa court apparently did not even consider the possibility of having the wife's interest begin being paid to her at the employee's first eligibility for retirement, "freezing" it at that point and letting the husband enjoy all accumulations after that time. Presumably, this is because that possibility was not litigated at the trial level. That is the result in most or all community property states, however, and case law has made it clear that a spouse choosing to accept retirement benefits at first eligibility has no interest in any credits accruing thereafter, having made an "irrevocable election." See *In re Harris*, 27 P.3d 656 (Wash. Ct. App. 2001), and the citations set out in the following section.

<sup>78</sup> A "vested" pension is one that, having been earned and accrued, is beyond the power of the issuing authority to withdraw from payment. See *LeClert v. LeClert*, 453 P.2d 755 (N.M. 1969) (exploring definitions of "vestedness" and "maturity" of retired pay).

<sup>79</sup> 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); *Harris v. Harris*, \_\_\_ P.3d \_\_\_ (Wash. Ct. App., No. 45364-5-I, July 30, 2001).

<sup>80</sup> *In re Marriage of Luciano*, *supra*, 164 Cal. Rptr. at 95.

Most of those who advocate the “freeze at divorce” approach discussed above either oppose or ignore the question of whether distribution of the spousal share should be mandated at the time of the participant’s first eligibility for retirement. It is not possible, however, to fully and fairly evaluate the impact of a “freeze at divorce” proposal *without* examining that question as well.<sup>81</sup>

Whether States follow a “payment upon eligibility” or “payment upon retirement” rule is another one of those doctrines which is not at all obvious from the label applied by the individual States, but again is usually hidden in their decisional law. Which way the State goes on this question can have a huge impact on the value of the retirement benefits to each spouse.

#### **D. Should the Time Rule Apply to Defined Contribution Plans?**

Most States that have brought themselves to issuing any guidelines at all for the distribution of pension plans have espoused rules for the division of the case at issue, without limiting language concerning whether different rules might be better applied if the retirement plan was some other *kind* of retirement plan.

Traditionally, most retirement plans have been “defined benefit” plans, but this is changing rapidly in the post-Enron world, as many companies are terminating such plans, in or out of bankruptcy, and converting to “cash plans” or defined contribution plans, at least for all new workers. This is setting up a situation in which the controlling decisional law in many States was developed to distribute an entirely different kind of benefits (defined benefit plans) than will actually be presented in many divorce cases (defined contribution plans).

The disconnect, and this discussion, is fully applicable to the military and Civil Service context, as well as in private retirements, because practitioners now are required to deal not only with the standard defined benefit plan, but also with the Thrift Savings Plan (a defined contribution plan).

The valuation problem for defined contribution plans has not received nearly enough attention in the case law. If the marriage was not completely coextensive with the period of contributions, and there was *any* variation in the relative rate of contribution over time, a standard time-rule analysis to value the spousal share might not be appropriate at all. It would appear to be more precise – i.e., “fairer” – to trace the *actual contributions* to such an account from community and separate sources, and

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<sup>81</sup> I have independently verified the mathematical effects of the various approaches taken by courts. Unless payments to spouses are required at each first eligibility for retirement, regardless of the date of actual retirement, a “rank at divorce” proposal, at least in military cases, would result in a reduction in the value of the spousal share by at least 13%. A second spouse married to an employee for the last couple years of service could actually receive more money after divorce than a first spouse who assisted the employee for most of the military career. There does not appear to be any valid public policy that could be served by causing this result.

attribute interest and dividends over time accordingly.<sup>82</sup> The scant case authority squarely addressing this issue has agreed with that proposition.<sup>83</sup>

Another common error of courts and counsel dividing defined contribution plans is the failure to take into account the time that will pass between the agreement or court proceeding and the physical division of the account. This can be done, easily, by a few words either providing for sharing of the investment gains and losses until actual distribution, or by freezing the spousal share at a specific sum for transfer.

Obviously, either approach could be better – or worse – for either party, depending on how much time passes, and whether the account balance increases or decreases during that time, which could be due to market forces having nothing to do with the parties. But in *either* case, it should be dealt with one way or the other in the decree (preferably) and in any QDRO or other ancillary order dividing the plan benefits (definitely) to avoid what could be considerable litigation as to which possible way to divide benefits was impliedly intended to be done.

The lesson relating to defined contribution plans is thus to consider whether the “usual way” of dividing benefits in a given jurisdiction is the *right* way to divide those particular benefits, and in any event, to be sure to specify with precision what is being divided as of when.

## V. COST ALLOCATIONS RELATING TO SURVIVORSHIP BENEFITS AND COST-SHIFTING POSSIBILITIES

The various different retirement schemes, public and private, have a dizzying array of survivorship vehicles, which range from going into effect automatically unless specific steps are timely taken to

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<sup>82</sup> See Brett R. Turner, *EQUITABLE DISTRIBUTION OF PROPERTY* § 6.10, at 523 (2d ed. Supp. 2004); Amado, *The Ubiquitous Time Rule – A Response: An Argument for the Applicability of Tracing, Not the Time Rule, to Defined Contribution Plans*, 13 Family Law News, Sum. 1990, at 2 (California State Bar, Family Law Section Publication) (arguing that a *tracing* analysis would be superior for defined contribution plans – as opposed to the “time rule” – because it is possible to discover the source of all funds in the account).

<sup>83</sup> See *Tanghe v. Tanghe*, 115 P.3d 567 (Alaska 2005) (citing *In re Marriage of Hester*, 856 P.2d 1048, 1049 (Or. App. 1993) (“When the value of a particular plan is determined by the amount of employee contributions, application of [a coverture fraction] could result in a division of property that is demonstrably inequitable”); *Paulone v. Paulone*, 649 A.2d 691, 693-94 (Pa. Super. 1994) (rejecting the use of the coverture fraction and adopting an accrued benefits test, deemed the “subtraction method,” for the distribution of a defined contribution plan); *Smith v. Smith*, 22 S.W.3d 140, 148-49 (Tex. App. 2000) (finding that it was incorrect to apply a coverture fraction to a defined contribution account); *Mann v. Mann*, 470 S.E.2d 605, 607 n.6 (Va. App. 1996) (“Applying [a coverture] fraction to a defined contribution plan could lead to incongruous results, and such an approach is not generally used”); *Bettinger v. Bettinger*, 396 S.E.2d 709, 718 (W. Va. 1990) (rejecting the use of a discounted present value calculation for division of a defined contribution plan “because no consideration was given to the fact that the fund was earning interest” (quotation marks omitted)).

prevent it,<sup>84</sup> to being lost forever by silence unless very specific steps are timely taken to preserve them.<sup>85</sup>

There are similarly large disparities in how the cost of survivorship benefits is paid. Some retirement plans, like the Civil Service system, allow one party or the other,<sup>86</sup> or both parties together,<sup>87</sup> to bear the cost of the survivorship benefits, so long as they are paid by way of reduction in the monthly retirement payments.<sup>88</sup> Other plans, like those governed by ERISA, give no real choice in the matter; if the benefits are not waived by the spouse, then the sum payable during life is actuarially adjusted to compensate for the cost of the survivorship interest.

Whether a survivorship interest for the non-employee spouse is in place – and who pays for it – has a major impact on the net benefits flowing to each of the parties to a divorce. Where the retirement system permits multiple beneficiaries and allocation of the cost of the survivorship between the parties, it is usually possible to come up with an equitable result by balancing costs, benefits, and risks between the parties.

A much more dangerous situation – for the parties and for counsel – exists where the retirement system at issue has a survivorship and cost-allocation scheme that provides for only a single beneficiary, or does not allow straightforward division of the premium cost. Such plans are common in State and municipal retirement plans, and the same situation exists for the military system, which has a particularly inflexible and one-sided approach that makes the illustration clear.

In every case involving every kind of plan, however, the practitioner should always find out just how survivorship benefits are addressed, and paid for, and consider whether cost-shifting is possible, and if so, appropriate.

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<sup>84</sup> For example, the standard death benefit payable after retirement and after the death of the employee in an ERISA-governed plan is a “qualified joint and survivor annuity,” or (unpronounceably) “QJSA.” *See, e.g.,* Marvin Snyder, *VALUE OF PENSIONS IN DIVORCE* (3d. ed., Panel Publishers 1999), at 22.

<sup>85</sup> In military cases, to initiate a “deemed election” of the Survivor’s Benefit Plan, the former spouse must file a written request with the appropriate Service Secretary requesting that the election be deemed to have been made within one year of the date of the court order. 10 U.S.C. § 1450(f)(3)(B). There are various technical requirements.

<sup>86</sup> 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, defined as the total monthly benefit before deduction of any survivorship premium, and deduct the entire premium from the former spouse’s share.

<sup>87</sup> If the intent is to have the parties both pay part of the premium, the OPM should be directed to divide the “gross” annuity, defined as the total monthly benefit after deduction of any survivorship premium.

<sup>88</sup> 5 C.F.R. § 838.807.

## A. The Military Survivorship System (Survivor's Benefit Plan)

The Survivor's Benefit Plan is funded by contributions taken out of the member's retired pay. For members entering service before March 1, 1990, premiums are the lesser of the amount computed by two tests. First, 2.5% of the first \$572<sup>89</sup> of the base amount, plus 10% of the remaining base amount. Second, 6.5% of the base amount. For members entering service on or after March 1, 1990, SBP premiums are 6.5% of the base amount. Premiums continue indefinitely. Beginning October, 2008, however, SBP premiums stop, with benefits still fully payable, once premiums have been paid for 30 years *and* the member reaches the age of 70.<sup>90</sup>

The maximum amount of the standard SBP annuity for a beneficiary under age 62 or a dependent child is 55 percent of the elected amount of the member's base retired pay<sup>91</sup> as adjusted from time to time for cost of living increases.<sup>92</sup>

Previously, SBP payments were reduced for a beneficiary who aged 62 or older, although an expensive supplement was developed which, if purchased, eliminated the reduction.<sup>93</sup> Continued political pressure resulted in elimination of the Social Security offset, phased in over three and a half years starting in October, 2005, and ending April, 2008.<sup>94</sup> The SSBP premiums were phased out; at the end of the adjustment period, all SBP recipients should receive 55% of the base amount indefinitely, regardless of age.

No matter what any court orders, the military pay center can *only* take the premium "off the top" of the monthly payments of the regular retirement.<sup>95</sup> Unfortunately, and counter-intuitively, that results in the parties each bearing a portion of the survivorship premium in exact proportion to their shares of the retirement itself. In other words, if the retirement is being split 50/50, then the parties share the cost of the SBP premium equally, but if the spouse is entitled to only 25% of the monthly retired pay, then the member effectively pays 75% of the SBP premium.

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<sup>89</sup> Amount effective as of January 1, 2003. It is adjusted annually.

<sup>90</sup> Pub. L. No. 105-261, § 641 \_\_\_ Stat. \_\_\_ (Oct. 17, 1998).

<sup>91</sup> As computed under 10 U.S.C. §§ 1401-1401a.

<sup>92</sup> 10 U.S.C. § 1451(a)(1)(A).

<sup>93</sup> Criticism of the lowering of benefits at age 62 led to the development of a "high option" supplement known as the "Supplemental Survivor Benefit Plan," or SSBP. See Pub. L. No. 101-189, 103 Stat. 1352 (Nov. 29, 1989). Under the supplement program, payment of additional premiums could increase the survivor's benefits by five percent for each SSBP unit purchased. Unlike the SBP itself, which the government theoretically subsidizes to the extent of 40%, the SSBP was designed to be actuarially neutral – i.e., to neither save nor cost the government any money. Thus, the increased coverage came at a significantly increased cost.

<sup>94</sup> Pub. L. No. 108-375 § 644, \_\_\_ Stat. \_\_\_ (2005).

<sup>95</sup> The Department of Defense also asked Congress to change *this* aspect of the SBP program in the *Report to Congress, supra*, requesting that court orders, or stipulations, could specify who was to pay the premium. Congress has not acted.

It *is* possible to effectively cause the member, or the spouse, to bear the full financial burden of the SBP premium, but doing so requires indirectly adjusting the percentage of the monthly lifetime benefits each party receives.

## **B. How to Allocate the SBP Premium in the Military Survivorship System**

If the former spouse dies first, then the member automatically gets back the entirety of the monthly spousal share, for the rest of his life. There are nine basic possibilities, however, as to what the *spouse* should receive in the event that the *member* dies first. Each carries with it a different weighing of equities, rights, and responsibilities.<sup>96</sup>

First, there could be no SBP award to the former spouse. The lifetime benefit stream will be divided as the court indicates, but the parties will be left in an unequal position as to *risk*, because if the member dies, the former spouse gets nothing, but if the former spouse dies, the member gets his share of the benefits, plus hers.

Second, there is the “default” – what would happen if the court deemed the former spouse to be the SBP beneficiary, at the full base amount, but took no steps to alter the ramifications of that election. The spouse would be “over-secured,” to a greater or lesser extent.<sup>97</sup> The smaller the lifetime interest of the former spouse happened to be, the larger the share of the premium that the member would pay.<sup>98</sup> If the member died first, payments to the spouse would increase from \$233.75 to \$550.00. If the spouse died first, payments to the member would increase from \$701.25 to \$1,000.00.

The third scenario would have the former spouse pay the entire SBP premium. Using the same hypothetical facts, reducing the spousal share from 25% to 19.7861% would free the member from

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<sup>96</sup> To make this somewhat easier to visualize, nine flowcharts illustrating the math done at each step of the following nine scenarios are posted under the heading “Exhibits to Death and Related Subjects of Cheer” under “Published Works,” at <http://willicklawgroup.com/page.asp?id=40>. Each presumes the division is done in a state following the “time rule,” and presumes a ten-year marriage during service, out of a 20-year military career, yielding a presumptive spousal share would be 25%. The scenarios presume that the military retired pay is exactly \$1,000.

<sup>97</sup> Since the SBP program pays 55% of the base amount, and the maximum spousal share is 50%, the spouse would receive at least *some* more money in SBP than her lifetime share. If the marriage did not completely overlap the service time, then under any “time rule” formula, the spousal interest would be *less* than 50%. In the hypothetical 10 year marriage out of a 20-year military career, if the SBP was in place at the maximum base amount, then the death of the member would cause a jump in payments to the former spouse from 25% to 55%.

<sup>98</sup> In the hypothetical case where the marriage exactly overlapped the last 10 years of a 20-year career, and the gross retirement was exactly \$1,000, the 6.5% SBP premium would be \$65. After taking it “off the top,” the military pay center would divide the remaining \$935.00 in “disposable retired pay” 75% (\$701.25) to the member, and 25% (\$233.75) to the spouse. The member would effectively pay \$48.75 of the premium, and the spouse would effectively pay \$16.25.

paying any portion of the premium, directly or indirectly.<sup>99</sup> The former spouse is still over-secured, as in the prior scenario, and the parties are still left in an unequal position regarding risks and burdens, since the member still has an entirely free survivorship interest on the spouse's life, and she is paying the entire premium for the survivorship interest on the member's life.

The fourth scenario imposes the SBP premium payment entirely on the member, by increasing the spousal share to 26.7380%.<sup>100</sup> The former spouse remains over-secured, as above. The entire premium falls to the member, who still has the free survivorship on the spouse's life. Shifting the premium in this way is analogous to making a spousal support award.

The fifth scenario presumes that the court wants to "equally divide" the premium, which would be accomplished by decreasing the spousal share to 23.2620%.<sup>101</sup> This requires decreasing the spousal share somewhat from the default, and increasing the member's share somewhat, to cause a sufficient dollar adjustment so that each pays exactly the same amount toward the premium cost that the military will take "off the top." There is some equitable logic in this idea (although it still leaves the former spouse over-secured), in that the possible survivorship that each party might receive is maximized, and they equally share both the cost of the survivorship benefit that the member has on the spouse's life (i.e., none), *and* the cost of the survivorship benefit that the spouse has on the member (the only survivorship benefit that has a cost associated with it).

As discussed above, it *is* possible to restrict the SBP to *only* secure the former spouse's lifetime interest – i.e., to arrange things so that she would get the same amount if the member died that she received while he remained alive. Notably, it is *not* possible to similarly restrict the *member's* interest; no matter what the court does, the member will retain an automatic reversion of all the money paid to the former spouse, if she dies first.<sup>102</sup> In the next four scenarios, then, if the spouse dies first, the member gets the full gross military retirement benefits, but if the member dies first, the spouse continues to get only her share of the benefits.

Scenario six therefore is the same "default" as set out in scenario two, the only difference being that the base amount is lowered, from the entire retirement benefit, to only that portion of which 55%

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<sup>99</sup> The 6.5% SBP premium would still be \$65. After taking it "off the top," the military pay center would divide the remaining \$935 in "disposable retired pay" 80.2139% (\$750) to the member, and 19.7861% (\$185) to the spouse. The member would effectively pay nothing, and the spouse would effectively pay \$65.

<sup>100</sup> Again, the 6.5% SBP premium would be \$65. After taking it "off the top," the military pay center would divide the remaining \$935 in "disposable retired pay" 73.2620% (\$685) to the member, and 26.7380% (\$250) to the spouse. The member would effectively pay \$65, and the spouse would effectively pay nothing.

<sup>101</sup> The 6.5% SBP premium is, of course, still \$65. After taking it "off the top," the military pay center would divide the remaining \$935 in "disposable retired pay" 76.7380% (\$717.50) to the member, and 23.2620% (\$217.50) to the spouse. The member would effectively pay \$32.50, and the spouse would effectively pay \$32.50.

<sup>102</sup> There have been several cases of members taking action to accelerate that reversion by trying to kill former spouses.

would equal the former spouse's lifetime interest, in this hypothetical case, \$454.55.<sup>103</sup> Since the 6.5% premium is reduced to only \$29.55, the member's 75% of the \$970.45 of remaining "disposable retired pay" yields \$727.84, and the spouse's 25% yields \$242.61. The member effectively pays \$22.16 toward the premium cost, and the spouse pays \$7.39.

Scenario seven shifts that reduced SBP premium to the spouse by reducing her percentage of the lifetime benefit.<sup>104</sup>

Scenario eight shifts the reduced premium the other way, to the member, for the same reasons, and to the same effect, as set out in scenario four, but with smaller totals, since the spousal survivorship interest has been reduced.<sup>105</sup>

And in scenario nine, the reduced burden is equally divided between the parties, for the same reasons as set out in scenario five, but without over-securing the former spouse.<sup>106</sup>

Again, if the spouse dies first, the member gets the full gross military retirement benefits, but if the member dies first, the spouse continues to get only her share of the benefits. Note that under 10 U.S.C. § 1408(e)(1), it is not permissible to pay the former spouse more than 50% of the monthly lifetime military retired pay. Thus, if it is intended that the former spouse receive more than about 46 percent, and that the member is to pay the SBP premium, some mechanism other than the shifting set forth above will be needed to effect that end.

### **C. Why It Might Be Appropriate to Re-Allocate the SBP Premium**

The military system does not permit the creation of what, in ERISA-based terms, would be called a "divided interest" to the spouse, but only a "divided payment stream." As detailed in the section immediately above, there is an automatic reversion of the spousal share of those payments to the member, should the spouse die first.

In other words, the member essentially has an automatic, cost-free, survivorship benefit built into the law that automatically restores to him the *full amount of the spouse's share* of the lifetime benefit if she should die before him. No matter what any court might order, if the former spouse dies

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<sup>103</sup> This is because 55% of \$454.55 would be \$250 – the sum awarded to the spouse.

<sup>104</sup> To 22.7163%, so that she receives \$220.45. The member's share, increased to 77.2837%, yields the full \$750 that he would have received if there had been no SBP, and the spouse thus effectively pays the entire \$29.55 SBP premium.

<sup>105</sup> To 25.7613% of the \$970.45 remaining "disposable retired pay" after deduction of the SBP premium, in this scenario, so that she continues to receive \$250. The member's share, decreased to 74.2387%, yields \$720.45, so that he effectively pays the entire \$29.55 SBP premium.

<sup>106</sup> Making the spousal interest 24.2382% yields \$235.22; increasing the member's share to 75.7618% increases his share to \$735.23. Both parties pay \$14.77 (actually, there is an odd penny, which for no good reason I allocated to the former spouse, who pays \$14.78).



first, the member not only continues to get *his* share of the benefits, but he will *also* get *her* share, for as long as he lives.

There is little case law guidance as to what would be an appropriate weighing of risks and burdens, or why. Several courts have ruled that the SBP be kept in effect for protection of the former spouse's interest, using one theory or another, but their reasoning has often been sketchy, or faulty.

One court that did explain why it was ruling as it did was the Colorado Court of Appeals, in *In re Marriage of Payne*.<sup>107</sup> The court held that ordering husband to pay for the wife's SBP gave the wife a right already enjoyed by husband, that is "the right to receive her share of the marital property awarded to her." The court adopted the "default" position for distribution of the premiums (discussed in the previous section), observing that:

The cost of the Survivor Benefit Plan is deducted from the husband-retiree's gross pension income of \$2200 per month before the net remainder is divided between the parties pursuant to the permanent orders. Thus, the expense is shared equally by both parties.<sup>108</sup>

The military member had appealed in *Payne*, claiming that the SBP should be funded solely by the former spouse because it is "a court-created asset for her benefit alone." The appellate court rejected that argument, holding instead that the SBP is "an equitable mechanism selected by the trial court to preserve an existing asset – the wife's interest in the military pension."<sup>109</sup> Several other courts have reached the same conclusion, but most of the decisions so holding did not fully discuss the math involved in the text of their decisions, or explain the policy choices for who should bear what expense.<sup>110</sup>

The courts holding that the SBP should be maintained seem to impliedly realize, but not explicitly state, that the members' survivorship interest in the former spouse's benefits is automatic and free, while the spousal survivorship in the member's benefits requires payment of a premium. None of the decisions goes into detail, comparing what the member or the spouse would actually receive in

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<sup>107</sup> 897 P.2d 888, 889 (Colo. App. 1995).

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> *Harris v. Harris*, 621 N.W.2d 491 (Neb. 2001); *Kramer v. Kramer*, 510 N.W.2d 351, 356 (Neb. Ct. App. 1993) (affirming award of SBP, reasoning that requiring the purchase of an SBP "gives the division of a nondisability military pension more of the attributes of a true property division"); *Smith v. Smith*, 438 S.E.2d 582 (W. Va. 1993) (ordering husband in dissolution action to purchase and pay for SBP for wife to avoid unfairness of wife's receiving nothing if husband predeceases her); *Haydu v. Haydu*, 591 So. 2d 655 (Fla. App. 1991) (trial courts have discretion to order spouse to maintain annuity for former spouse under SBP); *In re Marriage of Bowman*, 734 P.2d 197, 203 (Mont. 1987) (court recognized that "to terminate [wife's] survivor's benefits jeopardizes her 29 year investment in the marital estate"); *Matthews v. Matthews*, 647 A.2d 812 (Md. 1994) (court order requiring party to designate a former spouse as a plan beneficiary does not constitute a transfer of property); *In re Marriage of Lipkin*, 566 N.E.2d 972 (Dist. Ct. App. 1991) (survivor's benefit is a separate and distinct property interest).

the event of the death of the other, or whether the results fit into the theory of equitable or community property and debt division.

Mathematically, the “default” position discussed below distributes the premium debt proportionally to the parties’ respective shares of the benefits taken – *not* equally, as some of the courts say they do.

Having the member bear the entire premium would only appear to be a correct result if the court determined, based on the entirety of the parties’ economic positions, that the result was mandated as a matter of disparity of income. Similarly, it would be improper to have the former spouse bear the entirety of the SBP premiums, at least in those states in which the courts are required to equally distribute marital property and debts, because the benefit being accorded to the member in the event of the spouse’s death is *greater*, and there is no cost to that survivorship interest.

As a matter of logic and math, where the member has a *free* survivorship interest in the spouse’s life, in addition to his own benefits, it seems most appropriate to either have the parties equally divide the premium, or adopt the default position for proportional payments toward that premium.

#### **D. Conclusions Regarding Cost-Shifting**

While the details (and math) can be daunting, the above discussion illustrates how counsel armed with a comprehensive understanding of the workings of a retirement plan can alter the financial impacts of survivorship benefits when the equities of the situation call for it. Some similar sort of adjustment to the “default” is possible in virtually every retirement system, but the practitioner must be fully versed on both how the system will operate without tinkering, and what adjustments are possible.

## **VI. RECENT DEVELOPMENTS IN DISABILITY BENEFITS: NEW MILITARY ALPHABET SOUP OF ACRONYMS<sup>111</sup>**

### **A. Background as to Military Disability Benefits**

Retirement benefits are essentially a form of deferred reward for service, and so are generally divisible upon divorce, while disability benefits are conceptualized as compensation for future lost wages and opportunities because of disabilities suffered, and are thus typically *not* divisible or

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<sup>111</sup> The topic of military disability benefits is simply too complex and nuanced to do the subject justice in the space available in these materials. The discussion here should be taken as an overview only, and those seeking a more complete discussion or list of authorities are encouraged to reference other materials. *See, e.g.,* MILITARY RETIREMENT BENEFITS IN DIVORCE (ABA 1998); Willick, *Protecting the Interests of and Getting Money From People in the Military: What Can and Cannot Be Done* (International Academy of Matrimonial Lawyers, San Diego, California, 2007), posted at <http://willicklawgroup.com/page.asp?id=40>.

attachable. When accepting a disability award requires relinquishing a retirement benefit, the interests of the parties as to the proper characterization of the benefits become instantly polarized.<sup>112</sup>

At any time, a military retiree can apply to the Veteran's Administration to be evaluated for a "service-connected disability." If the evaluation shows such a disability, a rating is given between 10% and 100%, and "compensation" is paid monthly from the VA in accordance with a schedule giving a dollar sum corresponding to each 10% increase, plus certain additional awards for certain serious disabilities. Still further waivers of retired pay for VA disability pay can be given if the retiree has dependents (a spouse or children, or even dependent parents). It makes sense for a retiree to obtain a disability award, even with a dollar-for-dollar reduction in retired pay, because the disability awards are received tax-free.<sup>113</sup>

The USFSPA set up a federal mechanism for recognizing and enforcing state-court divisions of military retired pay, including definitions. One of these was of "disposable retired pay" (the sum that the military pay center could divide between spouses), which was defined as "the total monthly retired pay" minus certain sums, including sums deducted "as a result of a waiver of retired pay required by law in order to receive compensation under title 5 or title 38"<sup>114</sup> or "equal to the amount of retired pay of the member under that chapter computed using the percentage of the member's disability on the date when the member was retired" for a member retired under chapter 61.<sup>115</sup>

In 1986, the California Supreme Court had held in *Casas*<sup>116</sup> that the USFSPA direct payment limitation on state courts was strictly procedural. At least one California case went further, declaring that where the original divorce decree predated *McCarty* (i.e., June 26, 1981), the existence of a disability is simply *irrelevant* to the divorce court's equal division of retirement (and disability) benefits.<sup>117</sup> The 1989 United States Supreme Court decision in *Mansell*<sup>118</sup> made all such prior authority questionable.

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<sup>112</sup> See, e.g., *In re Marriage of Knies*, 979 P.2d 482 (Wash. Ct. App. 1999) (only disability award in excess of amount of retirement benefits otherwise payable are the separate property of the retiree); *Powers v. Powers*, 779 P.2d 91 (Nev. 1989) (disability benefits were divisible property to the extent they included divisible retirement benefits); *In re Marriage of Saslow*, 710 P.2d 346 (Cal. 1985) (disability benefits may be part replacement of earnings and part retirement); *In re Marriage of Anglin*, 759 P.2d 1224 (Wash. Ct. App. 1988) (disability benefits may be part replacement of earnings and part retirement); *In re Marriage of Kosko*, 611 P.2d 104 (Ariz. Ct. App. 1980) (disability benefits may be part retirement and part replacement of earnings).

<sup>113</sup> See 38 U.S.C. § 5301(a); *Absher v. United States*, 9 Cl. Ct. 223 (1985), *aff'd*, 805 F.2d 1025 (Fed. Cir. 1986). Because of that tax incentive, disabled veterans often waive retired pay in favor of disability benefits. See *Mansell*, 490 U.S. at 583-84, 109 S. Ct. at 2026, 104 L. Ed. 2d at 682.

<sup>114</sup> Title 38 governs post-retirement applications for VA disability awards.

<sup>115</sup> 10 U.S.C. § 1041(a)(4)(C)-(D).

<sup>116</sup> *Casas v. Thompson*, 720 P.2d 921 (Cal. 1986), *cert. denied*, 479 U.S. 1012 (1987).

<sup>117</sup> *In re Marriage of Stier*, 178 Cal. App. 3d 42, 223 Cal. Rptr. 599 (1986).

<sup>118</sup> 490 U.S. 581, 109 S. Ct. 2023, 104 L. Ed. 2d 675 (1989).

Many courts hearing such cases when *Mansell* was decided did exactly what the California trial court did in remand in that case, issuing opinions that detailed why they would not allow the inequity of allowing post-divorce status changes by members to partially or completely divest their former spouses, where the original divorce decree had been issued *prior* to the *Mansell* decision.<sup>119</sup>

Between 1981 and 1989, *McCarty*, the USFSPA, and *Mansell* set up the framework within which courts have struggled with issues relating to military retirement benefits and disability benefits, made much more confusing by the retroactive application of each later piece of the structure.

As in other subjects discussed above, the cases fit into a few separate categories, depending on the order and timing of the disability, retirement, and divorce. For the purpose of this discussion, we will focus solely on the category that has produced the bulk of the litigation, and authority in the field – where members waived at least *some* regular, longevity retired pay in favor of VA benefits, *after* the parties to the case divorced.

The problem, in a nutshell, is that when a retiree receives a post-divorce disability award, the “disposable” pay already divided between the member and former spouse is decreased, and money that was supposed to be paid to the former spouse is instead redirected to the retiree, no matter what the divorce court ordered.

From anecdotal evidence, and the reported cases, it happens all the time. The lure for the retired member is huge; not only does he change every affected dollar from taxable retired pay to a dollar of tax-free VA disability pay, but the former spouse effectively contributes a portion of each such dollar, exactly equal to whatever percentage she received of the retirement benefits divided upon divorce, and paid to the retiree out of the money she would otherwise receive every month.

One California court, surveying cases from around the country, held in 1999 that *Mansell* does not apply to post-judgment waivers of retirement pay *at all*, because *Mansell* held only that disability benefits could not be divided “*upon divorce*.”<sup>120</sup>

The decision in that case relied on the earlier decision of *In re Marriage of Daniels*,<sup>121</sup> which held that to whatever degree direct enforcement of a divorce decree might be prevented by application of federal law, the member would receive any sums that had been awarded to the spouse as a *resulting trustee* of her funds, and must pay them over to her. The language quoted was the principle espoused earlier by the California Supreme Court in *Gillmore*<sup>122</sup> – that one party should not be allowed to defeat the other’s interest in retirement benefits “by invoking a condition wholly within his or her control.”

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<sup>119</sup> 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).

<sup>120</sup> *In re Marriage of Krempin*, 83 Cal. Rptr. 2d 134, 70 Cal. App. 4th (Ct. App. 1999).

<sup>121</sup> 186 Cal. App. 3d 1084, 1087 (1986).

<sup>122</sup> *In re Marriage of Gillmore*, 629 P.2d 1 (Cal. 1981), discussed in some detail *infra*.

The *Krempin* 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.”<sup>123</sup> It then added its own conclusion, that: “A review of the out-of-state precedents confirms that this result is nearly universal.”<sup>124</sup>

Anecdotal accounts, however, indicate that some trial 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, or simply by seeing the word “disability” and reacting without any sort of adequate inquiry into what the law is, or why.

Most reviewing courts have either found or simply assumed that *Mansell* is applicable in litigation concerning post-divorce recharacterizations by retirees, and attempted to apply it to resolve the cases before them. Nevertheless, those appellate courts have almost uniformly reached the same ultimate destination as the court in *Krempin*, by means of a longer analysis.

Courts have gone to considerable lengths to protect former spouses from the effects of members’ post-divorce waivers of retired pay for disability pay, when such waivers partially or completely divested the spouses of sums that had already been awarded to them. The theory applied was phrased differently from one court to another, but was essentially that of *constructive trust*. Once a divorce was decreed dividing the “gross” or “total” or “all” military retirement benefits, the money awarded to the former spouse was no longer considered the member’s property to convert. If the member subsequently applied for and received disability benefits, or took any other action to redirect money already ordered paid to the former spouse back to himself, he violated the divorce decree.

## 1. Pre-*Mansell* and Post-*Mansell* Decrees

One portion of the case law is apparently *unanimous*. A comprehensive review of the cases throughout the United States reveals that there is *no* legitimate authority for the proposition that where the divorce decree *preceded* *Mansell*, there can *ever* be a waiver of retired pay by the retiree in favor of VA disability benefits without compensation being required to be paid to the former spouse, dollar for dollar, as to all sums the retiree’s actions caused to be diverted from her back to him.

It would be an error to directly compare *post-Mansell* cases with those concerning divorce decrees issued *prior* to *Mansell*. Courts that have reviewed decrees issued *after* 1989 have often held the language used in the decree to a higher standard of clarity. This is reasonable, since after *Mansell* it would be at least theoretically possible for a divorce court to anticipate the question, and issue an order specifically intending to permit or forbid a post-divorce recharacterization of retirement benefits into disability benefits.

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<sup>123</sup> 83 Cal. Rptr. 2d at 138, quoting from Fenton, *Uniformed Services Former Spouses Protection Act and Veterans’ Disability and Dual Compensation Act Awards* (Feb. 1998 Army Law. 31, 32).

<sup>124</sup> *Id.*

There are attorneys, and some trial level judges, that have tried to hold the language used in *pre-Mansell* divorce decrees to that “higher standard of clarity,” arguing that the language of the USFSPA itself provided adequate “notice” of the issue to the former spouse as of 1982. Since virtually every published decision before *Mansell* had rejected the construction of the language embraced by the majority in *Mansell*, however, that argument has been almost universally rejected by appellate courts as sophistry, or at best a misdirected retroactive application of the *Mansell* holding.<sup>125</sup>

When reviewing the language of divorce decrees issued *after Mansell* (i.e., after 1989), courts (especially in earlier years) sometimes examined the decrees at issue for “safeguard” clauses or “indemnification for reduction” clauses, as necessary indicators of intent to protect spouses from members’ recharacterization of benefits. Where such intent is found, even by implication, the member has been required to reimburse the former spouse for all sums his actions caused to be redirected from the former spouse back to him.<sup>126</sup>

Other courts have expressly found that reimbursement is required, whether or *not* there was any kind of indemnification or safeguard clause in the underlying decree.<sup>127</sup>

The reason for not only permitting, but encouraging the use of such indemnification clauses was explained well by the Minnesota Court of Appeals in *Gatfield*<sup>128</sup>: it basically ensures that the divorce courts are free to enforce the parties’ declared intent as matter of contract law.<sup>129</sup> Any court

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<sup>125</sup> A common tactic used by attorneys seeking to confuse the issues is to cite cases concerning divorce decrees rendered when the member was already drawing disability pay, and so falling squarely within the “explicit prohibition” of *Mansell*. See, e.g., *Lambert v. Lambert*, 395 S.E.2d 207 (Va. Ct. App. 1990). As that court pointed out (and as discussed above), when such a disability award already exists at the time of divorce, the court is to take the cash flow into account when determining an appropriate alimony award to be made to the former spouse who cannot be awarded a portion of that cash flow as property. Citation to such cases in a post-divorce recharacterization case is intellectually dishonest. Illustrating that point, the same court that decided *Lambert* has approved the use of indemnification clauses in post-*Mansell* divorces to compensate a former spouse for any reduction caused by a disability award *after* divorce. See *Owen v. Owen*, 419 S.E.2d 267 (Va. Ct. App. 1992) (affirming an order providing that the spouse was to receive a sum equal to a percentage of the member’s “gross retirement benefits,” and stating that the member’s request to reduce what she was owed due to his later disability claim was “irrational”).

<sup>126</sup> See *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. Ct. App. 1995); *McHugh v. McHugh*, 861 P.2d 113 (Idaho Ct. App. 1993); *Scheidel v. Scheidel*, 4 P.3d 670 (N.M. Ct. App. 2000).

<sup>127</sup> See *McLellan v. McLellan*, 533 S.E.2d 635, 637 & 638 n.1 (Va. Ct. App. 2000); *Longanecker v. Longanecker*, 782 So. 2d 406, 408 (Fla. Ct. App. 2001); *In re Marriage of Nielsen and Magrini*, 792 N.E.2d 844 (Ill. App. Ct. 2003) (indemnification inferred from percentage award to former spouse).

<sup>128</sup> 682 N.W.2d 632 (Minn. Ct. App. 2004).

<sup>129</sup> *Id.*, citing *Krapf v. Krapf*, 786 N.E.2d 318, 326 (Mass. 2003); *Shelton v. Shelton*, 78 P.3d 507, 511 (Nev. 2003); *Hisgen v. Hisgen*, 554 N.W.2d 494, 498 (S.D. 1996). See also *Poullard v. Poullard*, 780 So. 2d 498 (La. Ct. App. 2001) (expressing doubt as to whether the member could ever be entitled to waive sums already awarded to the spouse without compensating her, but finding that it need not reach the question because the parties entered into a property settlement agreement).

reviewing a decree seeking intent to indemnify must be careful to not give retroactive effect to either the USFSPA, or any case interpreting it (i.e., *Mansell*) so as to defeat an existing flow of payments to a former spouse. As stated by various courts over the years, it would “thwart the very title of the Act, the ‘Uniform Services Former Spouses’ Protection Act,’ to construe the law as preventing a spouse from actually receiving a court ordered portion of military retirement benefits.”<sup>130</sup>

In the decade following *Mansell*, the focus shifted from looking for “indemnification” or other language that such recharacterization is *prohibited*, to looking for some language indicating that recharacterization is *permitted*, and requiring reimbursement of the former spouse unless the divorce decree permitted the member to convert the benefits post-divorce.<sup>131</sup> Over that time, a nearly-uniform consensus emerged throughout the country that a retiree simply is not permitted to recharacterize the former spouse’s share of the retirement benefits as his own separate property disability benefits, unless there is some indication *on the face of the divorce decree* that such a post-divorce recharacterization *is* permitted.

Sometimes, this focus is revealed in contempt cases, as in the 1995 Texas Court of Appeals rejection of a retiree’s claim that federal law made him “exempt” from contempt sanction after he waived retired pay in favor of disability benefits.<sup>132</sup> This is one of the cases that have characterized a post-divorce recharacterization of benefits as an improper “collateral attack on a final unappealed divorce decree.”<sup>133</sup>

*Jones* is also in the group of cases explaining that *Mansell* calls on courts to essentially take a snapshot at the time of divorce, when the award to the spouse is made. Any disposable retired that was already waived in favor of disability pay up to that point is not divisible, but any attempt by the

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<sup>130</sup> See *Walentowski v. Walentowski*, 672 P.2d 657 (N.M. 1983).

<sup>131</sup> In one anomalous case, an intermediate court in North Carolina started out with finding (as had the Alaska Supreme Court in *Clauson*, *infra*) that it would be a violation of *Mansell* for a court to simply increase a spouse’s percentage of the military retirement benefits in order to make up for a disability award. *Halstead v. Halstead*, 596 S.E.2d 353 (2004). Unfortunately, the court then concluded that a standard provision indemnifying the former spouse against *future* waivers of retired pay for disability would also be impermissible. This is the only known case so holding, and in view of the weight of authority on the subject leads to an unjust, and unjustifiable, result not required under the relevant law – according to every other court that has opined on the subject. See *Gatfield v. Gatfield*, *supra*.

Obviously, indemnification clauses in the underlying divorce decree instructing a future reviewing court to reach that conclusion are permissible for the same reason that the result (indemnification) is permissible. The *Halstead* opinion is a throwback to the kind of trial court decisions, reversed in several states, that invoked “the spirit of *Mansell*” to require an inequitable result by ethereal means, stretching the *Mansell* opinion from the narrow holding that virtually all courts have found it to be to some kind of broad proscription restricting judicial power to enforce decrees.

<sup>132</sup> *Jones v. Jones*, 900 S.W.2d 786 (Tex. Ct. App. 1995).

<sup>133</sup> 900 S.W.2d at 788. See also *Price v. Price*, 480 S.E.2d 92, 93 (S.C. Ct. App. 1996) (same).

member at *post*-divorce reduction in retired pay by recharacterization is seen as attempting a “de facto modification” of a final property award, which community property law does not permit.<sup>134</sup>

The exceptions and anomalies to this line of cases are few and far between. In 1997, the Kansas Court of Appeals heard and decided *In re Marriage of Pierce*,<sup>135</sup> a “double-divorce” case in which both parties were apparently fully aware of the retiree’s disability at the time of divorce. The court found that the law was so well developed by the time of the divorce that if the spouse had sought to protect against the conversion of retirement to disability benefits, she could easily have done so, explaining that it felt its result was required under Kansas state law statute of limitations. The dissent noted that the result reached was “patently unfair to former spouses.”<sup>136</sup>

*Pierce* is something of an orphan, standing on its own odd facts, and has no following. The only known case to cite it approvingly was subsequently reversed on appeal.<sup>137</sup> All other citations appear to be to note it as an aberration, in decisions holding that a former spouse *must* be compensated for a member’s post-divorce recharacterization of her property.<sup>138</sup>

All other jurisdictions have lined up the national consensus. In 2000, New Mexico verified its 1990 holding in *Toupal, supra*, in *Scheidel*,<sup>139</sup> rejecting a “federal law prohibits enforcement” argument and noting that there is no analytical difference between a member making a new disability application post-divorce, on the one hand, or increasing an award that existed upon divorce, on the other. This court, like many others, reinvented the core concept of *Gillmore*: “one spouse should not be permitted to benefit economically in the division of property from a factor or contingency that could reduce the other spouse’s share, if that factor or contingency is within the first party’s complete control.”<sup>140</sup>

The same result was reached in three cases from Tennessee decided in early 2001, two from that state’s Court of Appeals, and a third from the Tennessee Supreme Court: *Hillyer v. Hillyer*<sup>141</sup>; *Smith*

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<sup>134</sup> These cases are perhaps best explained in, and exemplified by, *In re Gaddis*, 191 Ariz. 467, 957 P.2d 1010 (Ariz. Ct. App. 1997) (waiver of benefits to take civil service income required compensation to former spouse), *cert. denied*, 525 U.S. 826 (1998); *Harris v. Harris*, 991 P.2d 262 (Ariz. Ct. App. 1999).

<sup>135</sup> 982 P.2d 995 (Kan. Ct. App. 1999).

<sup>136</sup> *Id.* at 1000-01 (Green, J., dissenting).

<sup>137</sup> *Johnson v. Johnson*, 1999 Tenn. App. Lexis 625 (Tenn. Ct. App., Sept. 14, 1999), *rev’d*, *Johnson v. Johnson*, 37 S.W.3d 892 (Tenn. 2001).

<sup>138</sup> See *Scheidel, supra*; *Danielson, supra*; *Hillyer, supra*; *Smith, supra*.

<sup>139</sup> *Scheidel v. Scheidel*, 4 P.3d 670 (N.M. Ct. App. 2000).

<sup>140</sup> *Citing for that proposition Irwin v. Irwin*, 121 N.M. 266, 271, 910 P.2d 342, 347 (Ct. App. 1995).

<sup>141</sup> 59 S.W.3d 118 (Tenn. Ct. App. 2001).



*v. Smith*<sup>142</sup>; *Johnson v. Johnson*.<sup>143</sup> All three decisions discussed the *Mansell* holding at length. They started with the legal principles that military retired pay is marital property subject to distribution, and that periodic payments to a spouse are distributions of property rather than alimony. As such, a divorce decree's division of retired pay is final, and when not appealed, is not subject to later modification.

The three Tennessee courts all rejected arguments that recharacterization by the member was silently allowed by orders that did not prohibit (or mention) **disability** pay. They rejected all arguments regarding "implied federal pre-emption." *Hillyer* involved a 1986 divorce decree, while *Johnson* construed a decree issued in 1996; the fact that the decrees at issue were issued after passage of the USFSPA, or *Mansell*, was considered irrelevant.

Other courts hearing these cases have indicated a desire to reach the economic merits, and have not seemed any more impressed with semantics than were the Tennessee courts. For example, in *Janovic v. Janovic*,<sup>144</sup> the member waived a portion of retirement benefits in favor of VA disability benefits less than a year after divorce. The trial court ordered him to pay reimbursement. On appeal, the member claimed that the former spouse was only entitled to a share of "disposable retired pay," and his application for disability had **eliminated** the disposable pay and **created** "disability pay," which he alone was entitled to receive.

The reviewing court affirmed the order requiring reimbursement, rejecting the retiree's argument that ordering reimbursement violated *Mansell*, and stating that it merely enforced the parties' property settlement agreement, rather than dividing disability benefits. Since the case involved a post-*Mansell* divorce, the decree had included an indemnification provision<sup>145</sup> because of the "higher standard of clarity" some courts have required of decrees after *Mansell* to be certain of the divorce court's intent. However, the court noted that such enforcement of the intent at the time of the dissolution was appropriate whether or **not** the original order contained a specific indemnification provision.<sup>146</sup> Finally, the appellate court noted that "[t]he equity of the result reached . . . is undeniable."<sup>147</sup>

In 2001, the Arizona Court of Appeals again dealt with the contract theory, federal law supremacy assertion, and claims of "involuntariness" that appeared in several of the cases discussed above, in

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<sup>142</sup> 2001 Tenn. App. LEXIS 149 (No. M1998-00937-COA-R3-CV, Tenn. Ct. App., March 13, 2001).

<sup>143</sup> 37 S.W.3d 892 (Tenn. 2001).

<sup>144</sup> 814 So. 2d 1096 (Fla. Ct. App. 2002).

<sup>145</sup> The specific language reviewed by the court was the form paragraph I created for courts to use in decrees entered after *Mansell* to eliminate any ambiguity upon appellate review. It was published by the ABA as a guide for drafting attorneys in the form of "Military Retirement Benefit Standard Clauses." See 18 Family Advocate No. 1 (Summer, 1995) (*Family Law Clauses: The Financial Case*) at 30.

<sup>146</sup> 814 So. 2d at 1100, citing *Longanecker v. Longanecker*, *supra*.

<sup>147</sup> 814 So. 2d at 1101.

*Danielson v. Evans*.<sup>148</sup> Because the divorce at issue occurred after *Mansell*, the prevailing former spouse in *Danielson* was held to the “higher standard of clarity” in the underlying decree (discussed above) to protect her interests.

The court nevertheless found no difficulty in turning aside the military member’s attack on the Arizona rule of finality of property distributions, finding the spouse’s rights to the benefits upon divorce just as “vested” as those of the member.<sup>149</sup> The court waded through just about all the kinds of claims made by member’s attempting to redirect to themselves funds already awarded to their former spouses – the “indirect violation” or “spirit of” *Mansell* argument, exemption from community property law by reason of application for a federally-paid disability argument, and the allegation that protecting the spouse would circumvent “Congressional intent” or violate the Supremacy Clause. The court was unimpressed on all counts.<sup>150</sup>

The cases continue to appear, although some states with published authority on the subject are not publishing the follow-up cases, apparently because they were not seen as particularly precedential.<sup>151</sup>

## 2. Alternatives and Analogies: Federal Courts, “Early Outs” and the Role of Alimony

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<sup>148</sup> 36 P.3d 749 (Ariz. Ct. App. 2001).

<sup>149</sup> 36 P.3d at 756. While the Arizona court did not further discuss the matter, a review of military retirement benefits cases will show that retirees and their representative organizations often argue that a retiree’s “entitlement” to collection of the military retirement benefits promised to him upon enlistment is a “vested right” of constitutional dimension. See, e.g., *Fern v. United States*, 15 Cl. Ct. 580 (1988), *aff’d*, 908 F.2d 955 (Fed. Cir. 1990). Those same retirees, and organizations, uniformly assert that a *former spouse* has *no* vested right to anything, no matter what any court might have decreed.

<sup>150</sup> In a footnote, the court found that its conclusions were entirely in line with the savings clause of the USFSPA, which the court found was intended to stop military members from cheating their spouses by post-decree actions. 36 P.3d at 757, n.7.

<sup>151</sup> See *In re Marriage of Harper*, 2000 Wash. App. LEXIS 333 (Wash. Ct. App. 2000) (requiring compensation to wife for sums not paid to her by reason of husband’s post-divorce disability rating increases, because such reduction in payments were “outside the contemplation of the parties” at the time of divorce and so was “fundamentally unfair”); *In re Marriage of Choat*, 2000 Wash. App. LEXIS 1288 (Wash. Ct. App. 2000) (where the parties had been married in 1951, and divorced in 1978, and the member obtained a partial disability award in 1983, but the former spouse did not find out about it until the sums being paid to her dropped suddenly in 1998, when the disability rating was increased, the court held that a final and unappealed pre-*McCarty*, pre-USFSPA divorce decree was immune from any form of collateral attack by either party based upon any subsequent changes in federal statutory or case law, whether or not they divided sums that would be non-divisible in a current divorce because they were disability benefits; because the divorce decree had stated that the wife was to receive a share of the *gross* retired pay, she was entitled to compensation for both all sums the husband had redirected to himself as disability, *and* for the difference between gross and (post-tax) disposable retired pay); *Hubble v. Hubble*, 2002 Va. App. LEXIS 459 (Va. Ct. App. 2002) (affirming lower court order that the former spouse was to receive half of the amount that she would have received if not for the “husband’s unilateral and unauthorized modification,” so as to restore the status quo existing before he elected to replace retirement benefits with disability benefits); *Olvera v. Olvera* (No. 38233, unpublished *Order of Remand*, Oct. 29, 2003) (where former spouse received benefits for many years until the member applied for and received disability, 25 years post-divorce, eliminating the spousal share, member was ordered to make up all sums that his election caused to be diverted from the former spouse to him).

The scant federal authority has led to the same result as the state cases, but by way of different rationales, primarily involving deferral to state courts in domestic relations cases,<sup>152</sup> or squarely addressing and refuting a wide assortment of federal offenses allegedly committed by spouses in state divorce courts.<sup>153</sup>

Many of the courts issuing decisions regarding the Variable Separation Incentive (VSI), Special Separation Benefit (SSB), and “Temporary Early Retirement Authority” (TERA) (all discussed above) specifically analogized to the lines of cases regarding disability matters. The analogies flow both ways, and those cases appear in the disability decisions, as well.

There are multiple roles that alimony might play in disability cases, depending on the order in which events occur. Some courts faced with a post-divorce recharacterization of retirement benefits as disability benefits have simply redistributed other property, or compensated the former spouse by an award of post-divorce alimony.

In *Torwich (Abrom) v. Torwich*,<sup>154</sup> the court found the reduction of payments to the spouse to be an “exceptional and compelling circumstance” allowing redistribution of marital property four years after the divorce, despite the existence of procedural rules normally barring such redistributions of property. 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, so as to prevent the inequity that would occur if a member was permitted to redirect money from the former spouse back to himself, *without* some form of compensation.<sup>155</sup>

In 1999, the Washington state Supreme Court decided *In re Marriage of Jennings*.<sup>156</sup> The court found that a retiree who terminated a stream of payments to a former spouse by electing, post-divorce, to begin taking disability rather than retired pay created such “extraordinary circumstances” that the trial court should take the “justified remedial action” of awarding compensatory spousal support even four years after the divorce in order to “overcome a manifest injustice which was not contemplated by the parties at the time of the 1992 decree.” The court noted the reduced stream of payments to the spouse, and held that:

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<sup>152</sup> *Silva v. Silva*, 680 F. Supp. 1479 (D. Colo. 1988); *White v. White*, 731 F.2d 1440 (9th Cir. 1984) (no federal claim just because federal rights are implicated in a state court proceeding; suit dismissed).

<sup>153</sup> *Fern v. United States*, 15 Cl. Ct. 580 (1988), *aff'd*, 908 F.2d 955 (Fed. Cir. 1990).

<sup>154</sup> 660 A.2d 1214 (N.J. Super. Ct. App. Div. 1995).

<sup>155</sup> *Clauson v. Clauson*, 831 P.2d 1257 (Alaska 1992); *McMahan v. McMahan*, 567 So. 2d 976 (Fla. Ct. App. 1990); *see also White v. White*, 568 S.E.2d 283 (N.C. Ct. App. 2002), *aff'd per curiam*, 579 S.E.2d 248 (N.C. 2003) (remanding so district court could increase the former spouse’s percentage of the remaining disposable retired pay so as to restore to her the dollars converted to disability by the retiree, and finding that “the holding in *Mansell* was actually quite narrow” and had nothing to do with the former spouse’s claim for reimbursement of the diverted sums).

<sup>156</sup> 980 P.2d 1248 (Wash. 1999).

Regardless of the reasons, the result was fundamentally unfair because it deprived Petitioner of her entitlement to one-half of a substantial community asset with her receiving \$677.50 per month less than the amount awarded her by the court. It was therefore appropriate for the trial court, in ruling on the motion by Petitioner for modification or clarification, to devise a formula which would again equitably divide the community assets without requiring the monthly amount payable to Petitioner to be paid direct from the Respondent's military retirement.<sup>157</sup>

The state high court concluded that the result reached by the trial court was “fair and equitable and within its authority.” The court went on to approve prior holdings stating that whenever a retiree has a choice of electing retirement or disability benefits, and chooses the latter, for whatever reason, he “could not by electing to take a disability award rather than a regular retirement eliminate the community interest in the award.”<sup>158</sup>

Other courts have, similarly, found that a court can issue a spousal support award, post-divorce, sufficient to ameliorate the impact on an innocent former spouse whose “economic circumstances have deteriorated through no fault of her own” by reason of the former husband's post-divorce application for disability benefits in lieu of retirement benefits.<sup>159</sup>

Several of the disability cases involved situations where a divorce decree was entered, the member later applied for disability payments, and the former spouse brought a contempt proceeding.

Even where disability payments are considered “exempt,” the U.S. Supreme Court has ruled that a member can be imprisoned on a contempt charge for failing to pay child support, despite his claim that payments could be made only from his VA disability award, which was exempt from execution.<sup>160</sup> The holding has been extended to alimony cases as well, on the basis of the holding in *Rose* that: “It is clear veteran's benefits are not solely for the benefit of the veteran, but for his family as well.”<sup>161</sup>

At least in those cases in which there is a “fallback” clause regarding alimony intertwined with the property award to the spouse, state courts have approved the use of alimony to enforce what is actually a property award. That is why there is such a fallback clause in our standard clause set.

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<sup>157</sup> *Id.* at 1256.

<sup>158</sup> *Marriage of Knies, supra*, 979 P.2d at 486-87, citing *In re Marriage of Kittleson*, 21 Wash. Ct. App. 344, 352, 585 P.2d 167 (1987).

<sup>159</sup> See *Kramer v. Kramer*, 567 N.W.2d 100 (Neb. 1997); *Clauson v. Clauson*, 831 P.2d 1257 (Alaska 1992).

<sup>160</sup> See *Rose v. Rose*, 481 U.S. 619 (1987).

<sup>161</sup> See *In re Marriage of Anderson*, 522 N.W.2d 99 (Iowa Ct. App. 1994) (applying *Rose* to require a disabled veteran to pay alimony **and** child support in a divorce action, even when his only income is veterans' disability and supplemental security income).

For example, in *In re Marriage of McGhee*,<sup>162</sup> the court approved compensation to the former spouse by means of alimony, as set out in the agreement between the parties, when it was imposed by the dissolution court after the member halted the flow of military retirement benefits to former spouse after the *McCarty* decision. The court termed use of such “back-up” clauses to be making the property award “supportified.” Similarly, in deciding *In re Marriage of Sheldon*,<sup>163</sup> the court noted the “close relationship between the amount of a property division and the entitlement, if any, of a spouse to spousal support.” In *In re Marriage of Mastropaolo*,<sup>164</sup> the court “conditionally” reversed an alimony award “on condition” that the court’s affirmance of the retirement division became final.

While some courts have expressed the opinion that an outright award of spousal support in the sum of military retirement benefits lost by reason of a disability election constitutes a violation of *Mansell*,<sup>165</sup> other courts have had no problem with the direct substitution of alimony for the intended property award. In *Austin (Scott) v. Austin*,<sup>166</sup> the court instituted an award of alimony, that had been previously reserved until remarriage, in lieu of the pension share lost because of the member’s transfer to VA disability status. The court gave its approval to alimony continuing after the spouse’s remarriage, where the alimony award is intended to compensate for distribution of a pension earned during marriage, citing *Arnholt v. Arnholt*.<sup>167</sup>

The arrangement can be set up at the time of divorce. In *Waltz v. Waltz*,<sup>168</sup> the Nevada Supreme Court approved a decree which awarded the entire military retirement to the retiree, but ordered him to pay the former spouse, by military allotment, \$200 plus cost of living adjustments on that sum, as “permanent alimony.” The military service had overlapped the parties’ marriage by just less than ten years, precluding direct payment of a property award through the military pay center, and the appellate court found that in the context of the case, the parties’ use of phrase “permanent alimony,” in conjunction with the COLA clause, showed an intent to link it to the military retired pay. Further, the court held that payments to a former spouse do not terminate upon her remarriage when the payments were clearly intended to achieve a property settlement.

Many courts have awarded alimony upon divorce to the spouse, on the basis that the member was enjoying a separate property cash flow from disability benefits applied for before divorce that **would** have been divisible retirement benefits but for the member’s election. Where VA disability exists at the time of divorce, the court cannot divide those benefits, but they “may be considered as a

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<sup>162</sup> 131 Cal. App. 3d 408, 182 Cal. Rptr. 456 (Ct. App. 1982).

<sup>163</sup> 124 Cal. App. 3d 371, 177 Cal. Rptr. 380 (Ct. App. 1981).

<sup>164</sup> 213 Cal. Rptr. 26 (Ct. App. 1985).

<sup>165</sup> See, e.g., *Clauson v. Clauson*, *supra*.

<sup>166</sup> Mich. Ct. App. No. 92-15818 (unpublished intermediate court opinion), *rev. den.*, 546 N.W.2d 255 (Mich. 1996).

<sup>167</sup> 343 N.W.2d 214 (Mich. Ct. App. 1983) (non-military case).

<sup>168</sup> 110 Nev. 605, 877 P.2d 501 (1994).

resource for purposes of determining [one's] ability to pay alimony."<sup>169</sup> Generally, State courts have felt free to make alimony awards where necessary to do substantial justice to the parties in front of them, taking into account the entirety of the actual financial circumstances of the parties.

### 3. A Brief Aside Regarding Disability and the TSP

Since military members are now participants in the TSP program, there are multiple instances in which an attorney noting a disability in a military case should become concerned with the TSP account.

There are lump-sum distribution options from the plan (if \$3,500 or less, the full fund balance is *automatically* distributed at the time of separation from service). More importantly, hardship loans up to \$50,000 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." Presumably, a developing disability would likewise qualify as a "hardship."

The matter is somewhat more complicated, but for now, it is probably sufficient to state that any disability presents an opportunity for a sum of cash, which could be substantial, to disappear during or after the divorce. If the divorce precedes separation from service, it is probably a good idea to get a court order on file just as early as possible either prohibiting any withdrawals, or at least sheltering the sum to which the former spouse is to assert a claim.

### B. Recent Changes Regarding Military Disability Awards

The sheer number of post-divorce recharacterization cases involving disability benefits since *Mansell*<sup>170</sup> makes clear the duty of attorneys (and *especially* the attorneys for the spouses) to anticipate post-divorce status changes and build that anticipation into the decrees they write.

Cautious practitioners ensure that property settlement agreements and divorce decrees are so crafted as to allow a later reviewing court to transcend *any* kind of recharacterization of the benefits addressed, whether anticipated (or even conceived of) at the time of divorce, or not. The tools for doing so are explicit indemnification and constructive trust language, and explicit reservations of jurisdiction, either generally, or to award spousal support, or both.

Ironically, given the enormous amount of litigation regarding disability benefits and military retirement benefits during the past fifteen years or so, it appears that many of the *specific* issues at

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<sup>169</sup> See *Riley v. Riley*, 571 A.2d 1261 (Md. Ct. Spec. App. 1990); *In re Marriage of Howell*, 434 N.W.2d 629, 633 (Iowa 1989).

<sup>170</sup> In *Mansell v. Mansell*, 490 U.S. 581, 109 S. Ct. 2023 (1989), the Court found that the USFSPA 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.

play in those cases will largely disappear from the legal landscape (except, perhaps, as to questions of arrearages).

For many years, members of Congress introduced “concurrent receipt” bills of various sorts seeking to repeal, to a greater or lesser extent, the requirement of waiver of longevity retired pay in order to receive disability pay. Of course, any such program would cost the government the entirety of the additional VA payment, which is why it was resisted so strenuously for so long.

The first “break in the dam” was the modest “combat-related special compensation” or “CRSC,” pay put in the 2003 Defense Authorization Act. It granted an additional payment to two (relatively small)<sup>171</sup> categories of retirees: those with 20 or more years of service who were receiving disability compensation for which they also received a Purple Heart medal; and those with 20 or more years of service who were receiving disability compensation rated at 60% or higher as a result of injuries suffered in combat or “combat-like” training.<sup>172</sup>

The true breakthrough came with the National Defense Authorization Act for Fiscal Year 2004.<sup>173</sup> Two programs were passed in tandem. First, CRSC was expanded to include all combat-related disabilities or operations-related disabilities, from 10% to 100% ratings, effective January 1, 2004, and extended to Guard and Reserve members.

Second, by way of Concurrent Receipt (also called “Concurrent Disability Pay,” or “CDP”),<sup>174</sup> all retirees with 20 years of service and VA disability ratings of 50% or higher, had their retired pay offsets phased out over a ten year period. In other words, the military retired pay previously waived for disability pay would be slowly restored, until the retirees were receiving **both** their full retired pay **and** the VA disability payments.

Specifically, a dollar sum starting at \$100 per month for those with a 50% rating, to \$750 for those with a 100% rating, was restored;<sup>175</sup> the sums were scheduled to increase by an additional 10% each year through 2014, by which time full concurrent receipt will be paid. In 2005, retirees with a 100% disability were accelerated to immediate full concurrent receipt.

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<sup>171</sup> While there were no accurate figures, the estimates in the press commentary were that some five percent of disabled veterans would qualify under the original rules.

<sup>172</sup> Unfortunately, from the spouse’s point of view, the new compensation did **not** provide actual concurrent receipt, which would restore previously-waived retired pay. Instead, it added a **third** category of pay – to the retiree only. The program did nothing to address the problems detailed in this article.

<sup>173</sup> Pub. L. 108-136; 117 Stat. 1392 (Nov. 24, 2003).

<sup>174</sup> In 2004, given yet another name of “Concurrent Retirement and Disability Pay” or “CRDP.”

<sup>175</sup> Those with 50% disability got \$100 more each month, those with 60% got \$125, those with 70% got \$250, those with 80% got \$350, those with 90% got \$500 and those with 100% disability got \$750.

The new category of pay is “subject to collection actions” for alimony, child support, community property divisions, etc., so the net effect in terms of former spouses should be the gradual erasure of the reduction that the spouses experienced when the retirees elected to take disability awards.

Apparently, the pay centers threw out paperwork related to former spouse collections whenever the spousal share was *completely* eliminated, so those former spouses whose payments dropped to zero (because the disability award consumed the entire disposable retired pay) are required to re-apply for payment of benefits.<sup>176</sup> Others should see automatic, incremental restoral of the payment stream ordered in the documents previously submitted to DFAS, as the retired pay is slowly restored.

If and when concurrent receipt has been fully implemented in a given case, totally eliminating the required waiver, a retiree’s application for and receipt of regular VA disability benefits would have *no effect* on a pre-existing division of military retired pay between the retiree and his former spouse; he would just get additional benefits. So, after 2014, spousal suits based on regular VA waiver disability applications should no longer be happening – at least for those with a disability award of 50% or more and who are taking benefits under the CRDP, not CRSC, program. For those with lesser VA disability percentages, the legal issues are identical, but the dollars at stake are (necessarily) lesser.

The law creates an issue like the *McCarty*-gap cases or the (prior) Civil Service dual-compensation laws – the legal dispute affects fewer and fewer people over time, to a lesser and lesser degree, which will eventually (presuming it is expanded to cover the 10% to 50% disability cases) render the entire body of case law applicable to indemnification of spouses for disability awards to members mere fodder for footnotes or to be raised only for analogy to other, current disputes.

In any event, for the short term, there remains the question of arrearages, consisting of sums of retired pay that retirees waived and personally collected in the form of disability pay to the exclusion of the former spouse. As to those cases, all of the above factors remain relevant. The legislation did not contain any authority for DFAS to issue retroactive payments.

Presumably, all the normal rules regarding arrearages still exist (including the illogical, and apparently accidental rule that arrearages in retired pay cannot be collected from retired pay). Those with arrearages in child support or alimony, however, could initiate a withholding order that includes a payment toward the arrearage.

However, if the military member had a combat-related disability award, and so took CRSC rather than CRDP (which in some circumstances could lead to higher monthly payments), all the waiver-for-disability case law remains applicable. The reason is that, to receive the CRSC, a member must waive military retired pay, and *that* category of pay, like VA benefits, are not divisible. So while

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<sup>176</sup> A former spouse for whom DFAS has a complete application on file, but who has not received any payments due to the retiree’s being 100 percent disabled, is required to send a written request with a current payment address, to restart payments, to DFAS, either by fax to (216) 522-6960; or by mail to DFAS-GAG/CL, P.O. Box 998002, Cleveland OH 44199-8002. DFAS suggested including the retiree’s name and social security number for proper routing. For those former spouses for whom DFAS no longer has an application on file, re-application for benefits under the USFSPA is required to restart payments.



those members will be getting substantially more money each month, their former spouses will see nothing, and will presumably have to continue suing in divorce court for indirect compensation.

### C. Status of Compensation-to-Spouse-for-Disability-Waiver Cases

Several commentators and researchers have reviewed the cases nationally, reaching the conclusion that post-divorce recharacterization of retired pay as disability benefits just is not permitted without compensation to the former spouse.<sup>177</sup>

In many cases, the post-divorce disability award sought and awarded to the retiree was not allowed to block the spouse's right to continued payments under the terms of the decree. Even if *Mansell* *does* have to be considered in post-divorce recharacterization cases, courts have mandated that former spouses must be compensated, by awards of other property, or alimony, or (most commonly) dollar-for-dollar compensation of all amounts that would have been paid but for the recharacterization.

Further, in the years since *Mansell*, reviewing courts have gone from examination of the decree to see if there was a specific savings clause by which the spousal share could *survive* the retiree's recharacterization, to examining the underlying decree for a specific provision permitting the retiree to retroactively reduce the award to the former spouse.

In the absence of a provision explicitly permitting a retiree to recharacterize retired pay as disability pay and so divert money awarded to his former spouse back to himself, the retiree is required to reimburse the former spouse for all sums diverted, according to the highest courts to consider the question in Arizona, California, Florida, Idaho, Illinois, Iowa, Kansas,<sup>178</sup> Louisiana, Maryland, Massachusetts, Minnesota, Missouri, Nevada, New Jersey, New Mexico, North Carolina, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington and Wisconsin.<sup>179</sup> Two others, Alaska and Nebraska (and at least one Washington State court), while not requiring direct compensation, have indicated that other property should be distributed, or post-divorce alimony should be awarded, to compensate the former spouse in such situations.

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<sup>177</sup> See, e.g., Fenton, *Uniformed Services Former Spouses' Protection Act and Veterans' Disability and Dual Compensation Act Awards*, Army Law., Feb. 1998, 31, 33 (noting a "'growing trend'" among courts to ensure that former spouses' property interests are protected in the event of a future VA disability award to the service member, and that such is the majority view in this country); Mary J. Bradley, *Calling for a Truce on the Military Divorce Battlefield: A Proposal to Amend the USFSPA*, 168 Military. L. Rev. 40, 49 (June 2001) (noting in part the rationale that "military spouses contribute to the effectiveness of the military community while at the same time forgoing the opportunity to have careers and their own retirement").

<sup>178</sup> As discussed in detail above, Kansas is somewhat conflicted, requiring full compensation in *MacMeeken v. MacMeeken*, 117 B.R. 642 (1990) (Bankr. D. Kan. 1990), but permitting an aberration in one case in *In re Marriage of Pierce*, 982 P.2d 995 (Kan. Ct. App. 1999).

<sup>179</sup> The case law in Wisconsin predates *Mansell*. See *Loveland v. Loveland*, 433 N.W.2d 625 (Wisc. Ct. App. 1988).

In other words, the overwhelming weight of authority indicates that it makes no difference *how*, or *why* the retiree diverts money to himself that had been awarded to the former spouse in a final, unappealed decree; his act of doing so is a violation of the *Decree* every month he takes and keeps sums awarded to the former spouse, and requires an order of reimbursement.

Depending on the letters used in the alphabet soup, enforcing the divorce decree's allocation of retirement benefits to the spouse may – or may not – require litigation.

## VII. THE SERVICEMEMBERS CIVIL RELIEF ACT OF 2003

In 1940, the United States enacted the “Soldiers’ and Sailors’ Civil Relief Act” to provide that those serving in World War II would have protections against default judgments, exorbitant interest rates, and the ability to stay ongoing civil court cases while they were on duty. The law was substantially revised in 1991 after the Gulf War, and then scrapped entirely in December, 2003, in favor of the replacement “Servicemembers Civil Relief Act” (SCRA).<sup>180</sup>

Contrary to belief in some circles, the SCRA does affect divorce, custody, and paternity cases, but it only applies if the opposing party is on active duty.<sup>181</sup> If the member is on active duty, but has not made an appearance, the court *may* stay the proceedings for at least 90 days on application of counsel or the court's own motion – *if* the court determines that there might be a defense which cannot be presented in the absence of the member, or if the member has not been contacted and it can't be determine if a meritorious defense exists.<sup>182</sup>

When the member *does* have notice, the court may grant the stay anyway if the member requests it. That minimum 90-day stay becomes mandatory if the request includes four items, with no formality requirement:<sup>183</sup>

- a letter or other communication that says how the member's military duties materially affect his ability to appear.
- a statement of when the member *will* be available.
- a communication from the member's commanding officer, stating that the member's military duties prevent his appearance.
- A statement from the commanding officer that military leave cannot be granted at that time.

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<sup>180</sup> 50 U.S.C. § 501 *et seq.* (Dec. 19, 2003).

<sup>181</sup> The Department of Defense (“DoD”) is required to verify this, one way or the other, if contacted at Defense Manpower Data Center, 1600 Wilson Blvd., Ste. 400, Attn: Military Verification, Arlington, VA 22209-2593; (Ph) 703-696-6762 (or -5790); (fax) 703-696-4156. They also have a website, <https://www.dmhc.osd.mil/scra>. A name and Social Security number will be needed.

<sup>182</sup> 50 U.S.C. App. § 521(d).

<sup>183</sup> 50 U.S.C. App. § 522.

Notably, the federal law provides that such a stay request does *not* constitute the making of a general appearance and does not waive or relinquish *any* defenses otherwise available, whether substantive or procedural.<sup>184</sup>

In that original request, or later, the member can ask for a further stay, providing the same information; however, such further stay is discretionary, and depends on the court's finding that the ability of the member to prosecute or defend is "materially affected" by his or her active duty service,<sup>185</sup> but it should last only until the end of the "military necessity" which required the stay – usually until leave is available in good faith and with due diligence.<sup>186</sup>

If the court declines to allow a stay of proceedings, it is required to appoint counsel to represent the member,<sup>187</sup> but the SCRA is silent as to the duties of the appointed attorney, or how such a lawyer should get paid, if at all.

Where a defendant has not made an appearance in an action, a default judgment (for temporary or permanent orders) may only be obtained upon affidavit stating that the person against whom default is requested is *not* in the military.<sup>188</sup> If it appears that a person against whom default is sought *is* a member of the armed services, default may not be entered against the member until the court appoints an attorney for the member, who is then charged with the duty to "not waive any defense" until the member is located.<sup>189</sup>

A default against the member is voidable – apparently forever – if the court did not appoint an attorney for the member before entering the order. The act grants a member the ability to reopen and set aside a default, or even prevent execution on a judgment, by applying to the court that entered the order within 90 days of leaving military service, if the member can demonstrate that military service prejudiced the member's ability to defend, and that there was a meritorious defense.<sup>190</sup> A

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<sup>184</sup> 50 U.S.C. App. § 522(c).

<sup>185</sup> 50 U.S.C. App. § 522 (d)(2).

<sup>186</sup> Members seeking stays for the entirety of their careers have been denied any stay at all. *See Ensley v. Carter*, 538 S.E.2d 98 (Ga. Ct. App. 2000); *Palo v. Palo*, 299 N.W.2d 577 (S.D. 1980) (case proceeded to judgment in absence of member where court found unwillingness, rather than inability, to attend the proceedings). Servicemembers accrue 30 days of leave each year, at the rate of 2.5 days per month. But they still may not be able to leave particular training or duty postings for various periods of time.

<sup>187</sup> 50 U.S.C. App. § 522(d)(2).

<sup>188</sup> 50 U.S.C. App. § 521.

<sup>189</sup> 50 U.S.C. App. § 521(b)(2).

<sup>190</sup> *See Davidson v. Gen. Fin. Corp.*, 295 F. Supp. 878 (N.D. Ga. 1968); *Bell v. Niven*, 35 S.E.2d 182 (N.C. 1945); 50 U.S.C. App. § 524.

period of military service apparently tolls all statutes of limitations for the duration of military service.<sup>191</sup>

The policy considerations of the SCRA pretty much directly collide with federal and state policies requiring the expedited process of child custody and support orders. The components of active duty military pay and how to figure child support are necessarily State-specific, and beyond the scope of these materials.

Since military pay tables are readily discoverable, in print or even on the Internet,<sup>192</sup> the ability of the member to appear may not be relevant to a child support determination, although there could be exceptions.<sup>193</sup> So it may be possible to defeat claims for an SCRA stay of child support proceedings. It is also possible to get support in advance of a formal court order. Each branch of the military service has its own rules regarding support of family members in the *absence* of a court order, and the rules govern both child support and spousal support (alimony).

The Air Force “expects” that its members will support their families, and will recoup BAH<sup>194</sup> payments if it concludes that the member is receiving the “with-dependent” rate but not supporting dependents, but basically pushes the matter to the civilian courts.<sup>195</sup> The Marine Corps is more specific, requiring its members to provide the greater of a specific sum per dependent or a specified percentage of the BAH and certain other benefits.<sup>196</sup> The Navy has its own chart of percentages,<sup>197</sup> as does the Coast Guard.<sup>198</sup> The Army has an extensive, complex regulation governing the support of dependents in the absence of agreement or a court order.<sup>199</sup>

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<sup>191</sup> 50 U.S.C. App. § 526 (the period of military service shall not be included in computing any limitation period for filing suit, either by or against any person in military service; this also includes suit by or against the heirs, executors, administrators, or assigns of the member, when the claim accrues before or during the period of service).

<sup>192</sup> Start with <http://www.dod.mil/dfas>, and follow the links.

<sup>193</sup> See *Smith v. Davis*, 364 S.E.2d 156 (N.C. Ct. App. 1988) (support order set aside on the basis of affidavit from member that he had not been paid in several months and was unable to comply with the order).

<sup>194</sup> Basic Allowance for Housing.

<sup>195</sup> A.F. 36-2906 ¶ 3.1.2.

<sup>196</sup> U.S. Marine Corps Order P5800.16a, MARINE CORPS MANUAL FOR LEGAL ADMINISTRATION ch. 15 (Dependent Support and Paternity) § 15001 (2003).

<sup>197</sup> U.S. Dep’t of Navy, NAVAL MILITARY PERSONNEL MANUAL art. 1754-030 (Support of Family Members) ¶ 4 (Aug. 22, 2002).

<sup>198</sup> U.S. Dep’t of Homeland Security, U.S. COAST GUARD COMMANDANT INSTR. M1000.6A, ch. 8M (Supporting Dependents) (May 3, 2001).

<sup>199</sup> AR 608-99.

In light of the family support regulations, often a letter to the commanding officer of the member can initiate at least some support payments pending issuance of a court order. Once an order is obtained, support may be enforced by way of garnishment.<sup>200</sup> Accrued arrears may also be recovered if they are specified in the order.<sup>201</sup> An “involuntary allotment” can be initiated by an “authorized person” by sending the support order to the DFAS – but such an “authorized person” must be a District Attorney or other person with Title IV-D enforcement authority, not a private attorney.<sup>202</sup>

Normally, when parents live in different places, child support is set in accordance with the law of the residence of the obligor.<sup>203</sup> But a military member may have an anomalous status under the Uniform Interstate Family Support Act; if the member maintains his residence or domicile elsewhere than where he is stationed, that State might maintain exclusive modification jurisdiction, and the law of that State might control child support awards and modifications.<sup>204</sup>

The public-policy disconnect is even more visible where the SCRA meets matters of child custody. Matters involving active-duty military personnel and custody proceedings are inherently problematic.

Where the military member is the custodial parent, there is authority indicating that the member can use the SCRA to stave off change-of-custody or contempt proceedings, even where the non-military parent is thus deprived of contact with the subject child for months, or even years.<sup>205</sup> Denial of contact has, however, been deemed important when it is the member making that assertion, requesting a stay of proceedings under the SCRA when the non-military spouse is the child’s custodian.<sup>206</sup>

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<sup>200</sup> See 42 U.S.C. §§ 659-662.

<sup>201</sup> See 5 C.F.R. Part 581.

<sup>202</sup> See 32 C.F.R. § 54.3(a).

<sup>203</sup> See *Vaile v. District Court*, 118 Nev. 262, 44 P.3d 506 (2002) (“Simply because a court might order one party to pay child support to another in the exercise of its personal jurisdiction over the parties does not permit the court to extend its jurisdiction to the subject matters of child custody and visitation.” 118 Nev. at 275, 44 P.3d at 515); see also *Kulko v. California*, 436 U.S. 84, 91-92, 56 L. Ed. 2d 132, 98 S. Ct. 1690 (1978) (where a defendant is subject to a state’s jurisdiction, his rights in the matters ancillary to divorce may be determined by its courts); Prof. John J. Sampson, “UIFSA: Ten Years of Progress in Interstate Child Support Enforcement” (Legal Education Institute National CLE Conference on Family Law, Aspen, Colorado, 2003) at 184.

<sup>204</sup> *Amezquita v. Archuleta*, 101 Cal. App. 4<sup>th</sup> 1415; 124 Cal. Rptr. 2d 887 (Ct. App. 2002) (finding that New Mexico retained exclusive child support modification jurisdiction over member who had been stationed in California for five years).

<sup>205</sup> See, e.g., *Kline v. Kline*, 455 N.E.2d 407 (Ind. Ct. App. 1983); *Coburn v. Coburn*, 412 So. 2d 947 (Fla. Dist. Ct. App. 1982).

<sup>206</sup> See, e.g., *Williams v. Williams*, 552 So. 2d 531 (La. Ct. App. 1989).

It is difficult to generalize. Courts have focused on the apparent tactics of the non-military spouse,<sup>207</sup> or on the apparent bad-faith conduct of the member<sup>208</sup> in reaching their decisions. The cases are – necessarily – very fact-specific.

As a theoretical matter, tactical filing of an SCRA request would apparently prevent a court from making a preliminary custody order, leaving no order in place for custody of a child for months at a time. Courts put in such situations have generally erred on protecting children,<sup>209</sup> but the statutory conflict is obvious.

Some courts have refused to permit the member to effectively transfer non-reviewable custody to a third party while staying the non-military parent's access to the courts for child custody.<sup>210</sup> In other contexts, courts have been much less sympathetic to arguments based on the parental preference doctrine.<sup>211</sup>

And the law is even more inclined to err in favor of the member in disputes relating to visitation and the substitution of third parties for the member's usual time. In Illinois, since World War II, the courts have decided that the SSCRA permitted granting fit relatives (at least grandparents) to exercise the child visitation previously enjoyed by a deployed military member.<sup>212</sup> Other states have similar case law.<sup>213</sup>

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<sup>207</sup> *Chaffey v. Chaffey*, 382 P.2d 365, 31 Cal. Rptr. 325 (Cal. 1963) (reversing trial court order changing custody where the non-custodian served a restraining order the day before a remote deployment, which put the member in an “impossible situation” of disobeying either the court order or his military orders). The court apparently did not consider viable the option that the member could have obeyed both, leaving the children with his former spouse while deploying, and seeking a restoral of custody when his military duties permitted.

<sup>208</sup> *Hibbard v. Hibbard*, 431 N.W.2d 637 (Neb. 1988) (member's long-standing violation of orders in denying visitation to former spouse substantiated denial of stay and granting of change of custody motion, where facts indicated that he could have participated in court action if he had wished to do so).

<sup>209</sup> See, e.g., *Ex Parte K.N.L.*, 872 So. 2d 868 (Ala. Civ. App. 2003) (refusing stay to member who placed child with new spouse immediately before deploying overseas and filing a stay motion, holding that the other parent's rights also merited protection, and that members should not be permitted to use the law enacted for their protection as “a vehicle of oppression or abuse” to deprive the other parent of custody).

<sup>210</sup> *Lebo v. Lebo*, 886 So. 2d 491 (La. Ct. App. 2004).

<sup>211</sup> See, e.g., *Rayman v. Rayman*, 47 P.3d 413 (Kan. 2002) (in post-divorce context, leaving children in custody of step-mother while father went on unaccompanied tour to Korea).

<sup>212</sup> *Solomon v. Solomon*, 49 N.E.2d 807 (Ill. App. 1943); *IRMO Sullivan*, 795 N.E.2d 392 (Ill. App. 2003).

<sup>213</sup> See *McQuinn v. McQuinn*, 866 So. 2d 570 (Ala. Civ. pp. 2003) (permitting member to designate any member of his extended family while he was absent on active duty, and barring the non-military parent's right to interfere, at least where her complaints were made “without any particular reason”); *Webb v. Webb*, \_\_\_ P.3d \_\_\_, 2006 IDAHO LEXIS 152 (Idaho Opinion No. 106, Nov. 29, 2006) (approving delegation of visitation rights thru power of attorney to member's parents while member was deployed).

Some states have made such results a matter of statute. In Texas, Family Code Title 5, § 153.3161 explicitly permits a military member to designate a “stand-in” to take the member’s place for parenting time scheduled for a time during which the member is deployed outside the U.S.; but § 156.105 describes such deployment as a “material and substantial change of circumstances sufficient to justify modification of an existing court order.”

In Kentucky, the legislature decided in 2006 that any custodial change premised on member’s deployment or activation is only a temporary order which “reverts” to the prior order upon return of the member; the Kentucky Supreme Court apparently approves of the statute.<sup>214</sup> Louisiana has enacted a “compensatory visitation” statute.<sup>215</sup> California prohibits use of military activation and deployment out of state from being used against a member in a custody or visitation case.<sup>216</sup>

North Carolina went further than any other State in 2007 when it passed fairly sweeping legislation designed to “protect servicemembers.”<sup>217</sup> The new law allows expedited hearings upon the request of a servicemember, lets a court use electronic testimony when the servicemember is unavailable, allows a court to delegate the visitation rights of the servicemember to another family member, and requires that any temporary custody order entered upon a member’s deployment end within ten days of the member’s return, and that his or her absence due to deployment may not be used against the servicemember in a change of custody hearing.

The spate of State statutory enactments appear rooted in the patriotic fervor attendant to the U.S. wars in Afghanistan and Iraq, and the huge number of people affected by the rounds of deployments and activation of Reserve and Guard units. But such enactments take the focus off of the *child* involved in such cases, in apparent contradiction of the judicial policy that in making custody determinations, the court’s sole consideration is the best interest of the child,<sup>218</sup> which provides “the polestar for judicial decision.”<sup>219</sup>

For example, suppose parents divorced while a child was an infant, and had joint custody, but the military parent was subsequently deployed for a year or two, and then returned. A court required to indulge the fiction that the absence of that parent “may not be used against the servicemember” would be required to restore joint custody of an infant to a parent who would be a complete stranger to the child, irrespective of the child’s best interest.

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<sup>214</sup> See *Crouch v. Crouch*, 201 S.W.3d 463 (Ky. 2006) (discussing in part KRS 403.340(5)).

<sup>215</sup> LA R.S. 9:348 “Loss of visitation due to military service; compensatory visitation.”

<sup>216</sup> Cal. Fam. Code § 3047 (“A party’s absence, relocation, or failure to comply with custody and visitation orders shall not, by itself, be sufficient to justify a modification of a custody or visitation order if the reason for the absence, relocation, or failure to comply is the party’s activation to military service and deployment out of state”).

<sup>217</sup> North Carolina House Bill 1634 (S.L. 2007-175).

<sup>218</sup> See *Ellis v. Carucci*, 123 Nev. Adv. Op. No. 18 (June 28, 2007).

<sup>219</sup> *Schwartz v. Schwartz*, 107 Nev. 378, 382, 812 P.2d 1268, 1272 (1991).

Notwithstanding the protections for members, courts have been less than indulgent of attempts to use the SCRA as a tactical weapon. In *Lenser v. Lenser*,<sup>220</sup> the parties had separated, but did not yet have a custody order; the child was primarily living with the non-military spouse, but visiting briefly with the member. The Arkansas Supreme Court was unimpressed by the attempt of the member to transfer custody to the child's grandmother by dropping her off there and seeking a stay.

The trial court entered a temporary custody order in favor of the other parent, but stayed the remainder of the case, over the objection of the member and the grandmother, who argued that the stay was "automatic" and prevented entry of a temporary custody order. The Supreme Court of Arkansas held that an SCRA stay does not "freeze" a case, leaving it in limbo indefinitely and allowing no authority for the trial court to act. Rather, the court found that a trial court could properly entertain the issue of temporary custody, even if the stay was in place when the issue was considered, on the basis that a child's life cannot be put in "suspended animation" awaiting the member's return. For the same reason, the trial court was able to consider issues such as support.<sup>221</sup>

The availability of military Family Care Plans, which are required by military regulations to designate guardians for a child, also may not generally be used offensively, to cut off the right of a natural parent to seek or obtain temporary custody, at least until the member returns from deployment.<sup>222</sup>

There are mechanisms for dealing with members who legitimately have custody of dependent children outside the United States, but fail or refuse to return the children to the U.S. pursuant to a court order.<sup>223</sup> The various services have their own implementations of the directive, but the purpose and effect is to obtain compliance with court orders requiring the return to the United States of minor children who are the subject of court orders regarding custody or visitation.<sup>224</sup>

In some circumstances, such as where both parties have resided overseas for a substantial period of time, or the children were born in a foreign country, the best route to obtaining a legitimate order for custody might be through the courts of the foreign country. The Uniform Child Custody Jurisdiction

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<sup>220</sup> 2004 Ark. LEXIS 490 (Ark. Sept. 16, 2004).

<sup>221</sup> *Id.*, citing *Jelks v. Jelks*, 207 Ark. 475, 181 S.W.2d 235 (1944) (in which the court stayed the divorce proceeding at the member's request, but granted maintenance to the spouse pending trial).

<sup>222</sup> See, e.g., *Diffin v. Towne*, 3 Misc. 3d 1107A, 2004 N.Y. Misc. LEXIS 622 (May 21, 2004, unpublished) (a stay of proceedings is simply intended as a shield to protect servicemembers, not as a sword with which to deprive others of their rights); *In re Marriage of Grantham*, 698 N.W.2d 140 (Iowa 2005) (similarly, granting application of a stay under the SCRA but allowing placement or temporary custody of the child on an interim basis).

<sup>223</sup> DoD Instruction 5525.09 (Feb. 10, 2006); 32 C.F.R. Part 146.

<sup>224</sup> See also the International Parental Kidnapping Crime Act of 1993, 18 U.S.C. § 1204. Matters pertaining to "The Convention on the Civil Aspects of International Child Abduction, done at the Hague on 25 Oct. 1980" [commonly referred to as "the Hague Convention"], and its implementing legislation, the International Child Abduction Remedies Act ("ICARA"), 42 U.S.C. §§ 11601-11610, are beyond the scope of these materials.



and Enforcement Act recognizes many foreign countries as “States,”<sup>225</sup> and such orders may generally be registered and enforced in the United States.

## VIII. CONCLUSIONS

It is hard to reach meaningful “conclusions” in materials intended for a smorgasbord of tips and traps and updates relating to pension cases. 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 lawyers to learn all aspects of relevant retirement plans, and to develop appropriate valuations for those assets, with thoughtful written contingencies for all matters that could vary, including tax, survivorship, and related issues. Only then can counsel intelligently negotiate – or litigate – their clients’ interests in such benefits.

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<sup>225</sup> Basically, when the law of that country provide reasonable notice, the law in that country is substantially similar to the UCCJEA, and there is opportunity to be heard afforded to all affected persons. *See, e.g., Dorrity v. Dorrity*, 695 So. 2d 411 (Fla. Dist. Ct. App. 1997) (Germany was the proper venue to grant a custody order where the child had been born there, and mother and child had lived in Florida only six weeks before returning to Germany).