PROTECTING THE INTERESTS OF AND GETTING MONEY FROM PEOPLE IN THE MILITARY: WHAT CAN AND CAN'T BE DONE

by

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BIOGRAPHY

Mr. Willick is the principal of the Willick Law Group, an A/V rated Family Law firm in Las Vegas, Nevada, and practices in trial and appellate Family Law. He is a Certified Family Law Specialist, a Fellow of both the American and International Academies of Matrimonial Lawyers, and former Chair of the Nevada Bar Family Law Section. He has authored several books and articles on Family Law and retirement benefits issues, and was managing editor of the Nevada Family Law Practice Manual.

In addition to litigating trial and appellate cases in Nevada, Mr. Willick has participated in hundreds of divorce and pension cases in the trial and appellate courts of other states, and in the drafting of various state and federal statutes in the areas of pensions, divorce, and property division. He has chaired several Committees of the American Bar Association Family Law Section, and has repeatedly represented the entire ABA in Congressional hearings on military pension matters. He has served on many committees, boards, and commissions of the ABA, AAML, and Nevada Bar, has served as an alternate judge in various courts, and is called upon to testify from time to time as an expert witness. He serves on the Board of Directors for Clark County Legal Services.

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

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I. INTRODUCTION AND SCOPE: ECONOMIC CLAIMS REGARDING MILITARY PERSONNEL DURING MARRIAGE AND UPON DIVORCE

In the context of international matrimonial law, there are a few additional wrinkles regarding management of income and property, and matters of interim support, during a marriage, but the primary issue in terms of long-term receipt of funds remains matters relating to military retirement benefits.

These materials, therefore, address a few aspects of locating servicemembers, matters of temporary support order, and the Servicemembers Civil Relief Act, but largely focus, even as to preliminary matters such as jurisdiction, on the discussion of retirement benefits, which comprise the bulk of the materials. Since the sole subject of these materials is matrimonial law, questions of collections of commercial debts, etc., are not addressed here, except tangentially. Also, the focus here is on monetary matters, so matters of custody and visitation are given short shrift.

II. PRELIMINARY ISSUES: LOCATION AND SERVICE UPON SERVICEMEMBERS OUTSIDE THE COUNTRY[1]

These are pretty much "one-way" problems, insofar as there seems to be little authority regarding U.S.-based servicemembers attempting to litigate against foreign spouses or former spouses overseas. Rather, the typical problem involves situations where both the member and the spouse are located overseas, or the spouse is States-side, and the member is located at a U.S. installation in some foreign country.

It is possible that a spouse may not even know how to ***find*** a member stationed elsewhere. With a full name and Social Security Number, however, some footwork may be able to track a reassigned member from the last known duty station to a current posting. The Legal Assistance Attorney at the military installation nearest the spouse (or the member's last posting) may be able to provide the necessary information.[2] There is also a Worldwide Military Locator Service[3] for each branch of service, which may help locate a member or

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[1] Much of the information here, and in the next several sections, was derived directly from the excellent and comprehensive treatise by Mark E. Sullivan, THE MILITARY DIVORCE HANDBOOK: A PRACTICAL GUIDE TO REPRESENTING MILITARY PERSONNEL AND THEIR FAMILIES (ABA 2006) with the permission of the author.

[2] A list of worldwide armed forces legal assistance offices is posted at http://assistance.law.af.mil/. Attorney Chaim Steinberger of New York has contributed the practice tip that Army Regulations require that a letter from counsel to a the legal office requires forwarding to the member's command, and has the force of a "command inquiry" requiring a response in a timely fashion, under AR 608-99.

[3] Http://www.defenselink.miq/people_records.html.

forward written documents to a member (some States permit written service in this matter of certain pre- or post-divorce pleadings, notices, or other documents).

Where child support is involved, the federal rules requiring tracking of all federal employees[4] provides a list of designated agents for income and address verification.[5] There are multiple layers of regulations governing service on military personnel.[6]

In all domestic relations cases, traps abound relating to service of process.[7] Where a member is located within the United States, the authorities controlling the installation will normally allow the member the choice of accepting service of process, or not (apparently except the Air Force, which allows process servers on federal installations). Where refused, accommodation is typically made by ordering the member to be at a designated place at a designated time to be served, where that does not interfere with the operation of the military facility, but it would appear that there is significant variation and can be significant delay and difficulty.

Matters are even worse outside the U.S. Where the member refuses to consent to service, all the procedures set out in the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents[8] may come into play; the U.S. has been a signatory since February 10, 1969. As framed by the United States Department of State circular on the topic:

> SERVICE ON U.S. MILITARY PERSONNEL ABROAD: We understand that the general position of the military departments is that the service of civil process on military personnel stationed abroad (or at sea) is not a proper military function. Thus, governing military regulations expressly prohibit commanders from serving civil process upon their personnel unless the individual agrees to accept the process voluntarily. Generally, commanders or other officials in charge when contacted about service of process on an employee will bring the matter to the attention of the individual and will determine whether he or she wishes to accept service voluntarily. If the individual does not desire to accept service, the party requesting such service will be notified and will be advised to follow the procedures prescribed

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[4] Executive order 12953, http://www.worldnetdaily.com/resources/govdocs/eos/eo12953.html.

[5] In Appendix A to 5 C.F.R. § 581, again broken down service by service.

[6] *See, e.g.*, 32 C.F.R. § 720.20 (Service of Process on U.S. military bases and ships for Navy and Marines).

[7] *See* W. Mark C. Weidemaier, *Service of Process and the Military* (North Carolina School of Government, Dec., 2004), at http://www.ncbar.com/home/lamp.htm [click on "other Publications/Resources," and go to "Administration of Justice – Service of Process and the Military"].

[8] Hague Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, 20 U.S.T. 361 T.I.A.S. No. 6638, 658 U.N.T.S. 163, *reprinted in* 28 U.S.C.A., Fed. R. Civ. P. 4; *see also* O.C.G.A. Sec. 9-11-4(f)(3) (essentially, incorporating the Hague Convention for Service Abroad for military personnel).

> or recognized by the laws of the foreign country. In countries party to the Hague Service Convention or Inter-American Service Convention, the foreign Central Authority may attempt to accomplish service under the applicable Convention if the prevailing Status of Forces (SOFA) agreement permits access to the base. Installation commanders may impose reasonable restrictions upon persons who enter their installations to serve process. It may therefore be necessary for the foreign Central Authority to effect service on the individual outside the installation. Some foreign Central Authorities may decline jurisdiction over cases involving U.S. military personnel depending on the SOFA agreement applicable (if any). Likewise, a request for service on U.S. military personnel pursuant to a letter rogatory may prove difficult as the foreign court may decline jurisdiction. It may be necessary to retain the services of a private attorney or other agent to effect service on the individual outside the U.S. military installation. Service by registered mail is also another option. You may wish to consult the Judge Advocate General's office for the appropriate branch of the U.S. military at the Pentagon for further guidance. See also, A Guide to Child Support Enforcement Against Military Personnel, Serving the Soldier, (February 1996), Administrative and Civil Law Department, Legal Assistance Branch, The Judge Advocate General's School, U.S. Army, Charlottesville, VA 22093-1781 and Barber, Soldiers, Sailors and the Law, Family Advocate, ABA Family Law Section, Vol. 9, No. 4, 38, 41 (Spring 1987).[9]

The "bottom line," really, is that where actual physical service is not going to be voluntarily accepted, the practitioner is required to either become completely conversant with the details of the treaty, personally or by hiring another professional or service company, or risk the entire lawsuit being thrown out on a very technical basis. This goes for the individual rules of individual countries, over and beyond the Treaty itself, because many imposed specific conditions when they signed on to the Treaty.[10] On the other hand, many U.S. courts have expressed the thought that if service of a U.S. citizen is adequate under State and federal law, wherever accomplished, they do not consider the views of the country where process is actually served to be of much importance.

There may be other alternatives, such as substituted service at the member's "dwelling ro usual place of abode," or even service by publication or by mail if allowed in the rules of the jurisdiction, but these are very State-specific, and their suitability may very well vary with the circumstances.

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[9] "Service of Legal Documents Abroad" Circular, Dept. of State circular 2003. A bit ironically, it was the research for the article cited in the quote above, written by former ABA Family Law Section Michael Barber, that sparked his interest in the field, ultimately leading to the commissioning of my 1998 textbook on military retirement benefits, and later to Mr. Sullivan's MILITARY HANDBOOK.

[10] *See, e.g., Vorhees v. Fischer & Krecke*, 697 F.2d 574 (4th Cir. 1983) (quashing service against German defendant on ground that Germany has imposed conditions in its accession to the Treaty, including that papers served bear a German translation and that service not be made by direct mail). Mr. Sullivan's book takes a heroic swing at setting out all the ways in which service may have to be accomplished in most of the places that American servicemembers are actually posted – today – at pages 19-93 of his HANDBOOK.

III. 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).[11]

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.[12] 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.[13]

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:[14]

- 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.

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.[15]

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[11] 50 U.S.C. § 501 *et seq.* (Dec. 19, 2003).

[12] 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.dmdc.osd.mil/scra. A name and Social Security number will be needed.

[13] 50 U.S.C. App. § 521(d).

[14] 50 U.S.C. App. § 522.

[15] 50 U.S.C. App. § 522(c).

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,[16] 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.[17]

If the court declines to allow a stay of proceedings, it is required to appoint counsel to represent the member,[18] 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.[19] 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.[20]

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.[21] A period of military service apparently tolls all statutes of limitations for the duration of military service.[22]

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[16] 50 U.S.C. App. § 522 (d)(2).

[17] 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.

[18] 50 U.S.C. App. § 522(d)(2).

[19] 50 U.S.C. App. § 521.

[20] 50 U.S.C. App. § 521(b)(2).

[21] *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.

[22] 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).

IV. CUSTODY, VISITATION AND TEMPORARY SUPPORT ISSUES

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,[23] the ability of the member to appear may not be relevant to a child support determination, although there could be exceptions.[24] 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[25] 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.[26] 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.[27] The Navy has its own chart of percentages,[28] as does the Coast Guard.[29] The Army has an extensive, complex regulation governing the support of dependents in the absence of agreement or a court order.[30]

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

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[23] Start with http://www.dod.mil/dfas, and follow the links.

[24] *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).

[25] Basic Allowance for Housing.

[26] A.F. 36-2906 ¶ 3.1.2.

[27] U.S. Marine Corps Order P5800.16a, MARINE CORPS MANUAL FOR LEGAL ADMINISTRATION ch. 15 (Dependent Support and Paternity) § 15001 (2003).

[28] U.S. Dep't of Navy, NAVAL MILITARY PERSONNEL MANUAL art. 1754-030 (Support of Family Members) ¶ 4 (Aug. 22, 2002).

[29] U.S. Dep't of Homeland Security, U.S. COAST GUARD COMMANDANT INSTR. M1000.6A, ch. 8M (Supporting Dependents) (May 3, 2001).

[30] AR 608-99.

an order is obtained, support may be enforced by way of garnishment.[31] Accrued arrears may also be recovered if they are specified in the order.[32] 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.[33]

Normally, when parents live in different places, child support is set in accordance with the law of the residence of the obligor.[34] 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.[35]

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.[36] 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.[37]

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[31] *See* 42 U.S.C. §§ 659-662.

[32] *See* 5 C.F.R. Part 581.

[33] *See* 32 C.F.R. § 54.3(a).

[34] *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.

[35] *Amezquita v. Archuleta*, 101 Cal. App. 4th 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).

[36] *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).

[37] *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,[38] or on the apparent bad-faith conduct of the member[39] 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,[40] 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.[41] In other contexts, courts have been much less sympathetic to arguments based on the parental preference doctrine.[42]

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.[43] Other states have similar case law.[44]

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[38] *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.

[39] *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).

[40] *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).

[41] *Lebo v. Lebo*, 886 So. 2d 491 (La. Ct. App. 2004).

[42] *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).

[43] *Solomon v. Solomon*, 49 N.E.2d 807 (Ill. App. 1943); *IRMO Sullivan*, 795 N.E.2d 392 (Ill. App. 2003).

[44] *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.[45] Louisiana has enacted a "compensatory visitation" statute.[46] California prohibits use of military activation and deployment out of state from being used against a member in a custody or visitation case.[47]

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*,[48] 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.[49]

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[45] *See Crouch v. Crouch*, 201 S.W.3d 463 (Ky. 2006) (discussing in part KRS 403.340(5)).

[46] LA R.S. 9:348 "Loss of visitation due to military service; compensatory visitation."

[47] 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").

[48] 2004 Ark. LEXIS 490 (Ark. Sept. 16, 2004).

[49] *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).

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.[50]

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.[51] 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.[52]

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 and Enforcement Act recognizes many foreign countries as "States,"[53] and such orders may generally be registered and enforced in the United States.

V. WHY MILITARY RETIREMENT BENEFITS MUST BE ADDRESSED AT THE TIME OF DIVORCE

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

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[50] *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).

[51] DoD Instruction 5525.09 (Feb. 10, 2006); 32 C.F.R. Part 146.

[52] *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.

[53] 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).

the marriage.[54] This is particularly true of military marriages, in which frequent moves are the norm and there is often less opportunity to accumulate large real estate equity.

Statutory and case law throughout the country now recognizes pension benefits as marital property with near uniformity. Stated rationales for that recognition include that the benefits accrued during marriage, that income during marriage was reduced in exchange for the deferred pension benefits, and that the choice was made to forego possible alternative employment which would have paid more in current wages, in order to have the pension.

It is the ***far*** better practice to deal with military retirement benefits during the divorce itself, instead of deferring the matter to be dealt with "later." Some States do not permit a spouse who does ***not*** receive a portion of pension benefits to bring a partition action at a later date to divide those benefits, and parties often relocate after divorce. The jurisdictional rules could require the matter to be resolved in such States.

When partition is unavailable, the only mechanism for recovery for a divested spouse may be a malpractice suit against divorce counsel, in which the potential liability is the value of the benefit lost by the shortchanged spouse. Courts hearing such cases have stated that any attorney practicing divorce law is charged with knowing about the existence, value, and mechanics of dividing any retirement benefits that might exist.[55]

The non-uniform national law governing partition of omitted assets therefore makes it imperative for counsel to address all pension benefits during the divorce case itself, as a matter of prudent, if not defensive, practice.

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[54] *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.

[55] *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); *Martin v. Northwest Washington Legal Services*, 43 Wash. App. 405, 717 P.2d 779 (Wash. Ct. App. 1986) (lawyer and firm found to liable for failure to inquire about, discuss, or seek division of client's husband's military pension in a dissolution case where the attorney was on notice that one of the parties was a member of the Armed Services); *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)

VI. A BRIEF HISTORY OF MILITARY RETIREMENT BENEFITS IN DIVORCE LITIGATION

A. Military Retirement Prehistory; Events until *McCarty*

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

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

As early as 1969, however, some States had declared pension rights to be community property, divisible upon divorce.[56] The tide had clearly turned on this question, at least in the community property states, when the California Supreme Court issued its 1974 opinion in *Fithian*.[57] Pension decisions, at first, addressed benefits which were vested at the time of divorce. Eventually, divisibility was extended to non-vested and unmatured retirement benefits as well.[58]

The 1970s saw the law of property division throughout the country evolve toward "equitable distribution," which increasingly resembled a community property scheme in which divorce courts were to ascertain, and divide, the property acquired by both parties during the marriage. The national legal community developed a consciousness of the importance of retirement benefits, resulting in a larger number of military retirements being considered – directly or indirectly – in property settlements and divorce decrees. Still, there was no enforcement mechanism, and in 1980 the treatment of military retirement benefits still varied widely.

On June 26, 1981, the United States Supreme Court focused the debate by issuing its opinion in *McCarty v. McCarty*.[59] The husband in a California divorce had requested that his military

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[56] *See LeClert v. LeClert*, 453 P.2d 755 (N.M. 1969); *Busby v. Busby*, 457 S.W.2d 551 (Tex. 1970).

[57] *In re Marriage of Fithian*, 10 Cal. 3d 592, 517 P.2d 449 (Cal. 1974) (recognizing the importance of military retirement benefits as a marital asset).

[58] *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 (Nev. 1983).

[59] 453 U.S. 210, 101 S. Ct. 2728 (1981).

retirement benefits be "confirmed" as his separate property. In 1977, the California trial court refused, finding that the military retirement benefits were quasi-community property,[60] and therefore ordered the normal "time rule"[61] division of the benefits.

The case was eventually appealed to the United States Supreme Court, which determined that state community property laws conflicted with the federal military retirement scheme, and thus were impliedly pre-empted by federal law. The majority held that the apparent congressional intent was to make military retirement benefits a "personal entitlement" and thus the sole property of individual service members, so the benefits could not be considered as community property in a California divorce.

The Court invited Congress to change the statutory scheme if divisibility of retired pay was desired, stating: "We recognize that the plight of an ex-spouse of a retired service member is often a serious one," and noting that:

> Congress may will decide, as it has in the Civil Service and Foreign Service contexts, that more protection should be afforded a former spouse of a retired service member. This decision, however, is for Congress alone. . . . in no area has the Court accorded Congress greater deference than in the conduct and control of military affairs.[62]

B. The Uniformed Services Former Spouses Protection Act; 10 U.S.C. § 1408

Congress reacted by enacting the Uniformed Services Former Spouses Protection Act ("USFSPA") on September 8, 1982.[63] The declared goal of the USFSPA, at the time of its

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

[61] Some variations in how the time rule (known in some jurisdictions as the "coverture fraction") is applied are discussed below.

[62] 453 U.S. at 235-36, 101 S.Ct. at 2743.

[63] Also commonly known as the "Federal Uniformed Services Former Spouses Protection Act," or FUSFSPA, or as "the Former Spouses Act," or in some references simply as "the Act." 10 U.S.C. § 1408; Pub. L. No. 97-252, 96 Stat. 730 (Sept. 8, 1982), amended by Pub. L. No. 98-94, 97 Stat. 653 (Sept. 24, 1983), Pub. L. No. 98-525, 98 Stat. 2545 (Oct. 19, 1984), Pub. L. 98-525, 99 Stat. 677 (Nov. 8, 1985), Pub. L. No. 99-661, 100 Stat. 3885 (Nov. 14, 1986), Pub. L. No. 101-510, § 555, 104 Stat. 1485, 1569 (Nov. 5, 1990), Pub. L. No. 102-190, § 1061(a)(7), 105 Stat. 1472 (Dec. 5, 1991), Pub. L. No. 102-484, § 653(a), 106 Stat. 2426 (Oct. 23, 1992), Pub. L. No. 103-160, § 555(a), (b), § 1182(a)(2), 107 Stat. 1666, 1771 (Nov. 30, 1993), Pub. L. No. 104-106, § 1501(c)(16), 110 Stat. 499 (Feb. 10, 1996), Pub. L. No. 104-193, §§ 362(c), 363(c)(1)-(3), 110 Stat. 2246, 2249 (Aug. 22, 1996), Pub. L. No. 104-201, § 636, 110 Stat. 2579 (Sept. 23, 1996); Pub. L. 105–85, div.

passage, was to "reverse *McCarty* by returning the retired pay issue to the states."[64] Later re-interpretations indicated that this stated declaration of intent might not have totally overruled *McCarty* after all,[65] 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.[66] By fits and starts, every State in the Union has permitted military retirement benefits to be divided as property, at least in certain circumstances.

The USFSPA is both jurisdictional and procedural; it both permits the State courts to distribute military retirement to former spouses, and provides a method for enforcement of these orders through the military pay center. The USFSPA itself does not give former spouses an automatic ***entitlement*** to any portion of members' pay. Only State laws can provide for division of military retirement pay in a divorce, or provide that alimony or child

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A, title X, § 1073(a)(24), (25), 111 Stat. 1901 (Nov. 18, 1997); Pub. L. 107–107, div. A, title X, § 1048(c)(9), 115 Stat. 1226 (Dec. 28, 2001); Pub. L. 107–296, title XVII, § 1704(b)(1), 116 Stat. 2314 (Nov. 25, 2002); Pub. L. 108–189, § 2(c), 117 Stat. 2866 (Dec. 19, 2003).

[64] "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 divisable [*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.*

[65] 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.

[66] 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.

support are to be paid from military retired pay.[67] 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.[68]

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,[69] and the pay centers were consolidated.[70]

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.[71] Any right to receive payments under the USFSPA is non-transferable; the former spouse may not sell, assign, or transfer his or her rights, or dispose of them by inheritance.[72] 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

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[67] Military retired pay is simply one additional asset to be distributed in the overall resolution of the property and debts accrued during the marriage. *See, e.g., In re Marriage of Konzen*, 693 P.2d 97 (Wash. Ct. App. 1985) (spouse awarded percentage of military retired pay, even though the entire retirement was separate property, because the overall distribution of community property was equal, and the retired pay was a "liquid asset" used as part of that overall distribution).

[68] *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).

[69] 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.

[70] The eventual consolidated center was the Defense Finance and Accounting Service, located in Cleveland, but the re-assignment process has never ended. DFAS has continued dabbling with out-sourcing, privatization, etc. As of 2006, Army and Air Force military-pay related calls (except for TSP matters) were all routed to an office at Indianapolis.

[71] 10 U.S.C. § 1408(d)(4).

[72] 10 U.S.C. § 1408(c)(2).

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,[73] but the USFSPA limits direct payment to a former spouse to 50% of disposable retired pay for all payments of property division.[74] More than fifty percent of disposable pay may be paid[75] 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).[76] The Department of Defense has concurred in this interpretation.[77]

The USFSPA has included a savings clause since its original passage, intended to prevent misapplication of the law to subvert existing divorce court orders:

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

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[73] 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.

[74] 10 U.S.C. § 1408(e)(1).

[75] Up to 65% of "remuneration for employment" under the Social Security law, 42 U.S.C. § 659.

[76] *See, e.g., Ex parte Smallwood*, 811 So. 2d 537 (Ala. 2001), *cert. denied*, ___ U.S. ___ (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%).

[77] *See A Report to Congress Concerning Federal Former Spouse Protection Laws*, *infra*, at 76.

> paragraph (1) has been paid and under section 459 of the Social Security Act (42 U.S.C. 659) in any case in which the maximum amount permitted under subparagraph (B) of paragraph (4) has been paid.[78]

The USFSPA has been modified many times since 1983. Many of the more notable changes are specifically discussed below, but it can generally be said that survivorship rights for former spouses have been expanded, definitions have generally been changed so that court orders are more likely to result in the intended divisions of benefits, some opportunities for fraud have been limited, and it has been made very difficult to alter pre-1982 divorce decrees in order to treat people divorced before then the same as people divorced after the USFSPA went into effect.

The enforcing regulations were also repeatedly modified. Originally, they required the sum of retired pay to be defined as an exact percentage or sum of dollars without reference to a formula, even if some component (for example, the total number of years of service for a member still in service) was not known at the time of divorce. A post-divorce "clarifying order" was needed to set out a percentage that could have easily been calculated using figures completely available to the pay center.

Effective April 1, 1995, revised regulations[79] allowed use of formulas under certain circumstances, most commonly so a pre-retirement divorce decree could specify that the denominator in a time-rule calculation was to be the total service time.

Comparing the range of possible benefits for spouses, the military system is the most restrictive and limited of ***all*** federal and private retirement systems. For example, it is not possible to (in ERISA terms) create a "separate interest" retirement for the spouse (only the benefit stream can be divided), and payments to the spouse are limited to 50% of "disposable pay" (discussed in more detail below).

C. The *McCarty* gap: Chaos in Wonderland

There was a twenty month "gap" between the *McCarty* decision and the congressional enactment of the USFSPA. The act was expressly made retroactive to the start of the gap

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[78] 10 U.S.C. § 1408(e)(6).

[79] Technically, they were never approved, but they have been followed since April, 1995, anyway. Newer "proposed regulations" after 1995 did not all include the revisions, but the deletions were apparently inadvertent, and formula orders continued to be honored.

period, but the language used left some room for interpretation,[80] which has led to more than 20 years of litigation and conflicting decisions.

Some States, such as Washington, found the USFSPA itself was sufficient authority for their courts to address cases of persons divorced during the gap.[81] In those States, motions could be brought to divide the retirement benefits if they had been omitted, or to divide the benefits if they had been awarded solely to the member while *McCarty* was the law of the land.

Despite the "will at least afford an opportunity" language in the legislative history, however, courts in some other States, such as California and Idaho, ruled that no common law remedy existed for such persons. These rulings led to passage of "window" statutes in some of those States, specifically permitting those divorced during the gap a limited time to relitigate the division or non-division of the retirement benefits.[82] Nevada passed the first such statute, which expired after only six months, in 1983. Illinois enacted the most recent window period, which closed in January, 1989.

Some of the States in the group which found the USFSPA inadequate authority to allow the re-opening of gap cases never passed legislation permitting those divorced during the gap to bring their decrees into conformity with those divorced before *McCarty* or after the USFSPA. The case law of such States, such as Texas, provides that *McCarty*-era divorces giving 100 percent of the retirement benefits to the member could not be revisited.[83] As the number of living persons with *McCarty*-gap divorces dwindles, it becomes ever less likely that additional States will pass window statutes.

D. Major Cases

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

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

(a) The amendments made by this title shall take effect on the first day of the first month which begins more than one hundred and twenty days after the date of the enactment of this title.

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

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

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

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

1. *Casas*; California Divides Gross, Not Net

Casas v. Thompson[84] was a clear restatement of the law regarding military retirement benefits division as it had evolved in California prior to 1988, which was followed by several other States. It was a partition case ten years after entry of a divorce decree that had not mentioned the retirement. Ultimately, the spouse was granted partition of the omitted retirement from the date she filed her petition, but no arrears. The Court of Appeals affirmed with a few modifications not important here.[85]

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

The court found it "illogical" to limit the spousal share to a portion of ***disposable*** retired pay, and considered the USFSPA a complete repudiation of the *McCarty* holding. The court focused upon the legislative history that declared Congress' intent to "restore the law to what it was," and noted that previous California law had called for division of the entirety of military retirement, as it did with all other retirement benefits.

While *Casas* was widely cited and largely followed elsewhere, not all aspects of the decision had a long life, as discussed below. Today, the case is most frequently cited for the proposition that equitable defenses can be raised against a legal claim to arrearages.

2. *Fern*; Members Lose Argument of Government Taking

Fern v. United States[86] was an unusual case in that the defendant was not a former spouse but the United States itself. The suit sought to have the USFSPA declared invalid to the extent that it entitled the government to reduce the retired pay flowing to the members themselves. In other words, the members contended that, irrespective of any award to any former spouse, the full sum of retired pay should be paid to the members. It alleged unconstitutional "taking" of property in violation of the Fifth Amendment, an unconstitutional impairment of contracts with the United States (by which the members contended that they alone were to receive the entirety of their retirement benefits), and that spousal awards under the USFSPA were due process violations.

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[84] 228 Cal. Rptr. 33, 720 P.2d 921 (Cal. 1986), *cert. denied*, 479 U.S. 1012 (1987).

[85] *Casas v. Thompson*, 217 Cal. Rptr. 471 (Cal. Ct. App. 1985).

[86] 15 Cl. Ct. 580 (1988), *aff'd*, 908 F.2d 955 (Fed. Cir. 1990).

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

The court rejected the "equal protection" attack on partition of pensions omitted from the initial decrees of some of the plaintiffs, recounting the retirees' "odysseys through the State and federal courts challenging state court decrees dividing their retirement pay" and noting that the retirees "were unable, as a final matter, to convince any of these courts that division of their retirement pay was unconstitutional or legally improper." The court found that partition of military retirement benefits is precisely the sort of "economic adjustments to promote the common good" that legislatures properly perform, and that any retroactive effect of USFSPA is curative, accomplishes a rational purpose, is entitled to be liberally construed, is shielded from constitutional attack, and serves public policy. It rejected the contract clause and due process arguments as well.

Members convinced of the righteousness of their cause continue to file such actions, sometimes as a class. The results have continued to be consistent.[87]

3. *Mansell*; Disposable Pay Is All the States May Address

Mansell v. Mansell[88] was yet another case coming out of California. When the parties divorced, the *McCarty* decision had not yet issued; the member had retired, and applied for and received disability benefits. The divorce decree included the stipulation that the parties would divide the gross sum of retirement benefits (including both retired pay and disability pay).

After Congress enacted the USFSPA, the member returned to court seeking to modify the judgment to exclude the disability portion of the retired pay from division with his ex-spouse.[89] The state court denied his request, holding the division of the disability portion of the military retired pay was proper. The member appealed.

The U.S. Supreme Court majority reversed, holding that the USFSPA did ***not*** constitute a total repudiation of the pre-emption it had declared in *McCarty*. Since the statute defined "disposable pay" as what was divisible, and excluded disability pay from that definition, the

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[87] *See, e.g., Adkins v. Rumsfeld*, 464 F.3d 456 (4th Cir. 2006) (broad constitution-based assault on USFSPA rebuffed, finding that military retirement truly is a pension, or "deferred compensation for past services," rather than "compensation for reduced job activities").

[88] 490 U.S. 581, 109 S. Ct. 2023 (1989).

[89] *Mansell*, 490 U.S. at 586.

Court concluded that state courts could divide only ***non***-disability military retired pay.[90] The dissent echoed the conclusions reached earlier by the California Supreme Court in *Casas v. Thompson* – that the gross sum of retirement benefits was available to the state divorce court for division.[91]

Ultimately, the matter was remanded to state court. Ironically, that court ruled that the previously-ordered flow of payments from the member to the spouse, put into place prior to the appellate *Mansell* decision, was *res judicata* and could not be terminated.[92] In other words, the United States Supreme Court opinion had ***no effect*** on the order to divide the entirety of retirement and disability payments in the final, un-appealed divorce decree in the *Mansell* case itself.

When Congress next amended the Act in 1990, it did nothing to address the *Mansell* holding. Thus, *Mansell* is often read to stand for the proposition that the subject matter jurisdiction of the state divorce courts is limited to division of "disposable retired pay." This may be less important than was thought at the time, however, since courts have widely expressed a willingness to consider the impact of disability or other benefits ***not*** included in the definition of "disposable retired pay" when dividing assets between spouses.

VII. KEY CONCEPTS IN MILITARY RETIREMENT BENEFITS

A. The Absolute Necessity of Obtaining "Federal Jurisdiction"

1. What Is "Federal Jurisdiction"

Congress was concerned that a forum-shopping spouse might go to a State with which the member had a very tenuous connection and force defense of a claim to the benefits at such a 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

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[90] *Id.* at 594-95.

[91] Justice O'Connor, joined in a dissent by Justice Blackmun, argued that the term "disposable retired pay" only limited a state court's ability to garnish retired pay – not the court's authority to divide that pay. *Id.* at 594-604. Both the dissent and the majority in *Mansell* concluded that the savings clause merely clarified that the federal direct payment mechanism does not replace state court authority to divide and garnish property through other mechanisms.

[92] *In re Marriage of Mansell*, 265 Cal. Rptr. 227 (Ct. App. 1989), *on remand from* 490 U.S. 581, 109 S. Ct. 2023 (1989).

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.[93]

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.

2. How to Get "Federal Jurisdiction"[94]

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.[95]

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[93] 10 U.S.C. § 1408(c)(4).

[94] Many of the practice tips in this section are thanks to John C. Knoll, Esq., of San Diego, California, who presented them in a CLE in April, 2005.

[95] 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.[96] 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

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[96] *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.

permanent home "to which one returns."[97] In other places, the meanings are reversed.[98] In ***some*** States, residence and domicile have the ***same*** meaning.[99] A service member who has close connections to more than one State will ***still*** only have one domicile.[100] 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.[101]

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's Corps, the "Home of Record" is merely 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 for military purposes 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. It can and often is changed, but sometimes members simply don't get around to changing this notation for many years during active duty service.

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[97] *See Smith v. Smith*, ___ P.2d ___, 45 Cal. 2d 235 (Cal. 1955); George H. Fischer, Annotation, *Residence or Domicile, for Purposes of Divorce Action, of One in Armed Forces*, 21 A.L.R. 2d 1183 (19__).

[98] 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.

[99] 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).

[100] RESTATEMENT § 11, *supra*.

[101] *Id.* at § 20, comment b.

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. Federal law provides that members may not "accidentally" lose or acquire a residence or domicile solely by reason of military assignment,[102] so indicia of intent are critical to such an analysis.

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 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. If the member has ever been party to a lawsuit, find out what declaration of residence was made in the litigation or any affidavits. There may be similar declarations in deeds, mortgages, leases, contracts, insurance policies, or hospital records.

Some points are obvious, such as how long the member has been in the jurisdiction, where the member does his banking, and where he sends his children to school. Investing in local businesses, contributing to local charities, or joining voluntary organizations such as church, civil, professional, or fraternal organizations, indicate ties to the community. Getting married, or buying a burial plot in a place might be construed as evidence of residential intent.

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."

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[102] 50 U.S.C. App. § 571.

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.[103]

B. The "Ubiquitous Time Rule"[104] – 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.

1. 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 member spouse accrues a military retirement during marriage providing exactly $1,000 after 20 years.

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[103] 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, updated version of the standard clause set is published on our web site, under "Published Works," at http://willicklawgroup.com/page.asp?id=40.

[104] 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."[105] 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.[106] 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."[107] 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.

2. 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.[108]

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.

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[105] *See, e.g., Marriage of Bergman*, 168 Cal. App. 3d 742, 214 Cal. Rptr. 661(Cal. Ct. App. 1985).

[106] Ariz. Rev. Stat. § 25-211 (1998).

[107] *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.

[108] *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).

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 appear to have contemplated the actual mathematical impact of the decision reached.[109] 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 a member'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 member at the time of divorce.

An example is useful to illustrate this discussion. Presume a member who entered service after 1980 (and did not elect REDUX), was in service 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 had 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

[109] *See, e.g., Grier v. Grier*, 731 S.W.2d 931 (Tex. 1987).

If this hypothetical member had a standard longevity military retirement (or any other standard defined benefit plan[110]) the above wage history would make his average monthly salary during his last three years' service $4,014.21, and the military retirement formula[111] would make his retired pay $2,007.11.

Under the ***qualitative*** approach to the time rule embraced by most time rule states, the member 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:

Member:	$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 member's actual retirement, ten years later.

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

Member:	$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

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[110] 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.

[111] Years of service x 2.5% x high-three average basic pay,

Iowa Supreme Court faced such a conflict in the case of *In re Benson*.[112] The trial court had used a time-rule approach, 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.[113]

The point of the mathematics 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.

3. Variations Regarding Payment Upon Eligibility

Several state courts have held that the interest of a former spouse in retired pay is realized at ***vesting***,[114] theoretically entitling the spouse to collect a portion of what the member ***could*** get at that time irrespective of whether the member actually retires.[115] As phrased by the

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[112] 545 N.W.2d 252 (Iowa 1996).

[113] 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.

[114] 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).

[115] *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.

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."[116]

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.[117]

Whether States follow a "payment upon eligibility" or "payment upon divorce" 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.

4. 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 context, where (as discussed below) practitioners now are required to deal not only with the standard military

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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).

[116] *In re Marriage of Luciano*, *supra*, 164 Cal. Rptr. at 95.

[117] 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 a member for the last couple years of service could actually receive more money after divorce than a first spouse who assisted the member for most of the military career. There does not appear to be any valid public policy that could be served by causing this result.

retirement (a 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 attribute interest and dividends over time accordingly.[118] The scant case authority squarely addressing this issue has agreed with that proposition.[119]

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.

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[118] *See* Brett R. Turner, EQUITABLE DISTRIBUTION OF PROPERTY § 6.10, at 523 (2d ed. Supp. 2004); Amado, *The Ubiquitous Time Rule – A Responsa: 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).

[119] *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)).

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.

C. The Conundrum of "Disposable Retired Pay"

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

The "bottom line" of this procedure was to always pay more actual money to the member, and less to the former spouse, than was shown on the face of an order dividing retirement benefits by percentage.

Most courts were unaware that the payments ordered were being skewed by the phrasing of the USFSPA and the tax code, and simply had no idea that their orders were not being followed, or that further court attention would be required to correct any resulting inequity. Former spouses did not receive a Form 1099 or W-2P, and many did not realize that it was ***their*** responsibility to account for, and pay taxes on, all sums they received.[120] Many members did not realize that they had a yearly tax credit coming, or how to calculate it.

As of February 4, 1991, the definition of "disposable pay" was altered by Congress to eliminate the pay center's deduction of income taxes from gross retired pay when calculating the sum paid to spouses.[121] The change was explicitly based on the "unfairness" of the effect of the previous phrasing.[122]

The new law, codified at 10 U.S.C. § 1408(a)(4), addressed all of the problems listed above. Taxes were no longer taken "off the top" before the retirement benefits were divided. Both spouses were sent W-2Ps reflecting what they received during the year (thus allowing for reasonable tax planning), and courts were permitted to divide what was essentially the gross sum of benefits, as they intended.

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[120] *See Eatinger v. Comm.*, TC Memo 1990-310.

[121] Pub. L. No. 101-510, § 555, 104 Stat. 1485, 1569 (1990).

[122] House Report (Committee on Armed Services) 101-665, at 279-280, on H.R. 4739, 101st Congress, 2d Sess. (1990).

This change made a huge difference in the payments received over a lifetime, but it only affected divorces final on or after February 4, 1991. All ***prior*** cases continued to be governed by the older rules (i.e., the sum payable under divisions of disposable pay as previously defined remained in effect), and any variation between intent and effect could only be changed case by case.

The ABA and AAML urged Congress to apply the correction to all decrees,[123] but the Department of Defense was not convinced that the problem was significant enough to require a change in the law, and so recommended leaving courts to address those cases one at a time.[124] Congress has not acted.

As an aside, practitioners should be aware that they have a right to obtain information relating to a member's gross retired pay, and all deductions from that pay, so the former spouse' share can be properly calculated.[125]

As with the "*McCarty* gap," an ever-smaller number of people will face issues relating to this variation as time passes, but it still comes up in a number of enforcement and arrearage cases. Practitioners should therefore become versed in the various meanings that the phrase "disposable retired pay" has had over the years, and be aware of the varying degrees to which courts and commentators believe that this federal term affects the jurisdiction and discretion of state courts.

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[123] *See* M. Willick, AMERICAN BAR ASSOCIATION REPORT TO MR. FRANCIS M. RUSH, JR., ACTING ASST. SECRETARY OF DEFENSE, RE: NATIONAL DEFENSE AUTHORIZATION ACT FOR 1998 § 643, COMPREHENSIVE REVIEW OF FEDERAL FORMER SPOUSE PROTECTION LAWS dated March 14, 1999. The reason for the ABA request for a uniform national law is that all of the corrections possible for a state court in an individual case are relatively inefficient and clumsy. For example, where the spousal share is near 50%, no direct correction of the percentage payable could make up the shortfall. A court could order payment of the differential between what the military pay center sends and what the court ordered, but this has all the same enforcement problems as any required stream of monthly payments from one party to another. Some courts have ordered members to initiate allotments on pain of contempt, but this is also not self-enforcing.

[124] *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/spouserev.html.

[125] 65 Fed. Reg. 43298 (July 13, 2000) provides that in addition to any disclosures permitted under 5 U.S.C. § 552a(b) of the Privacy Act, a former spouse who receives payments under 10 U.S.C. § 1408 (i.e., the USFSPA) is entitled to information, as a "routine use" pursuant to 5 U.S.C. § 552a(b)(3), on how her payment was calculated to include what items were deducted from the member's gross pay and the dollar amount for each deduction.

D. The "Ten Year Rule"

The so-called "ten year" limitation is much misunderstood. A court order that divides military retired pay as property may only be ***directly paid*** from the military pay center to the former spouse if the parties were married for at least 10 years during which the member performed at least 10 years of creditable military service.[126] This is often called the "20/10/10" rule, for "years of service needed to reach retirement/years of marriage of the parties/years of overlap between service and marriage."

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

The 20/10/10 rule is ***not*** a limitation upon the subject matter jurisdiction of the state courts.[127] Its practical effect is sometimes the same as a legal bar, however, which is one reason that the ABA position (for over a decade) has been that the provision should be repealed.[128] A former spouse in possession of an order that does not satisfy the rule must rely on whatever state law enforcement mechanisms are available, which may or may not be of any use. The reality is that the "rule" often produces inequity, while serving no valid public policy purpose of any kind.

There are a couple of work-arounds for this trap, however. If the former spouse's interest is small, the present value of that interest could be determined and offset against other marital property or cash to be paid off. If the interest is larger, the situation is more difficult, since most parties lack sufficient assets to permit such an offset.[129] The options available to a former spouse's attorney seeking an enforceable order are then reduced to attempting to persuade the court to impose an irrevocable alimony obligation or seeking a stipulation to secure that interest. Both options have drawbacks.

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

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[126] 10 U.S.C. § 1408(d)(2); 32 C.F.R. § 63.6(a)(1)-(2).

[127] The savings clause of the statute makes it clear that payment limitations do not affect the underlying obligation, which may be enforced by any other means available. *See* 10 U.S.C. § 1408(e)(6) (set out in full above).

[128] Even the 2001 Report on the USFSPA by the Department of Defense concluded that the rule serves no useful purpose and should be eliminated. *See A Report to Congress Concerning Federal Former Spouse Protection Laws*, *supra*.

[129] In a hypothetical nine-year overlap case involving a staff sergeant (E-6) retiring at 20 years, the present value of the former spouse's putative share is some $90,000. Such a sum is typically outside the realm of possible trade-offs or pay-offs for individuals so situated.

as alimony upon request. Where the court cannot or will not do so, the attorney for the spouse has something of a dilemma, which is sometimes resolved by negotiations involving trade of a few percentage points of value for a stipulated award of irrevocable alimony.

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

The down-side to such an arrangement for the former spouse is risk of further litigation – some members have sought court orders revoking such bargained-for "irrevocable" awards, usually based on the changed circumstances of one party or the other. Even when the former spouse prevails, there is a substantial expense.[130]

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

These work-arounds to the ten-year rule are also somewhat philosophically awkward, in that they attempt to satisfy the underlying purpose of the USFSPA by circumventing one of its limitations, albeit one that should never have been enacted, which serves no useful purpose, and which should be eliminated. It is possible that courts squarely addressing the practices recommended here would give differing opinions of their permissibility.

Another trip to the United States Supreme Court (or a congressional revisiting of the issue) is necessary to eliminate the problem in the future. In the meantime, the provision remains as a technical problem for attorneys in drafting, and enforcing, orders.

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[130] *See Waltz v. Waltz*, 110 Nev. 605, 877 P.2d 501 (1994).

VIII. VALUATION OF MILITARY RETIREMENT BENEFITS

A. How Much Money is Really Involved Here?

The Department of Defense Office of the Actuary publishes "lump sum equivalency" charts for military retirements, using military-specific mortality tables, and including a much-ignored disclaimer that its figures "should not be used for property settlements."[131] The figures are updated annually, and can be downloaded from the DFAS website, www.dod.mil/dfas.

The Actuary also produces disability and non-disability retirement life expectancy tables, from which a good estimate of present value for a military retirement can be independently calculated. A convenient annual source for much of this information is the annual, privately published "Retired Military Almanac."[132]

Arriving at a "hard number" for the value of military retirement benefits is not, however, that simple. There are three different non-disability benefit formulas within the military retirement system. The first group is composed of members who entered service before September 8, 1980, the second consists of those who entered between that date and July 31, 1986, and the third is for those who entered service on or after August 1, 1986. And, effective April 1, 2007, Congress altered the longevity possibilities of all three groups.

Members who entered service before September 8, 1980, had retired pay equal to terminal basic pay times a multiplier of 2.5 percent times years of service, but limited to 75 percent. Thus, retired pay equaled 50 percent of terminal basic pay after 20 years of service, and "topped out" at 30 years.

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

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

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

[132] Uniformed Services Almanac, Inc., P.O. Box 4144, Falls Church, VA 22044; (703) 532-1631.

First, their retirement benefits multiplier was reduced by one percentage point for each full year less than 30 years of service.[133] Under this plan, at age 62, the reduction is removed and the retired pay multiplier is restored to 2.5% per year, yielding the same percentage payable under the earlier system.[134]

Second, each year the COLA for such members is less than for other retirees (Consumer Price Index adjustment minus one percent). However, at age 62, the retiree's monthly income is recomputed to supply the sum that ***would have been paid*** if the full COLA had been applied every year from retirement to age 62, which at that moment becomes prospectively payable, as if there had been no reductions during those intervening years.[135] After that "restoral," however, the reduction returns with each COLA after age 62 for life.

In 1999, Congress again changed the rules,[136] modifying what had become known as the "REDUX" plan to provide for an irrevocable choice of retirement plans to be made by that third group of members (who entered service after July 31, 1986), at their 15th year of service. Such members are given the choice of taking the same "High-3" retirement paid to those who entered service between September 8, 1980, and July 31, 1986, ***or*** to take the lowered REDUX benefits described above, ***plus*** a one-time lump-sum "Career Status Bonus" (CSB) of $30,000 payable at the 15-year mark.[137] After the 1999 change, this option became known as the CSB/REDUX option.

In 2006, Congress altered the longevity rules.[138] As of April 1, 2007, the military retired pay of retirees with more than 30 years of service is ***not*** limited to 75% of basic pay. Rather, new basic pay tables (to 40 years) are applicable for retirements on and after that date. Additionally, various enlisted and officer ranks had their basic pay increased for service longevity from a maximum of over 28 years to a maximum of over 36 years; in other words, monthly pay that used to "top out" at a certain point continued increasing with continued service.

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

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

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

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

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

[138] 2007 National Defense Authorization Act, Pub. L. No. 109-364 (_____, 2006) §§ 641-42.

Additionally, as of October 8, 2001, military members were authorized to begin participating in the same Thrift Savings Plan ("TSP") that has been in effect for civil service employees since 1987,[139] but the military chose to call its accounts "UNISERV" accounts.

The discussion below basically concerns "regular" retirement, although most of it also applies to those cases in which a member takes a 15 to 20 year TERA ("early out") retirement.

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

B. Present Value; A Bird in the Hand

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

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

For a divorce occurring while a member is still on active duty, there are even more variables. First is the uncertainty that the member will retire at all. The precise length of service cannot be known – economic conditions, the defense budget, and world crises all could change the date of separation of a member by several years. Likewise, it is usually impossible to know the rank that such an active duty member will achieve. Each of these factors affects the "present value" assigned to the spousal share.

Where a trade-off of the spousal retirement share is contemplated in a contested case, each party must usually hire an actuarial expert. Such an expert must become familiar with the military retirement system, and perhaps change certain assumptions applicable in other cases.

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[139] The military phase in permitted military members to contribute up to 7% of basic pay in 2002, increasing to 10% by 2005 and unlimited (except as to normal tax rules) by 2006. There are special rules regarding contribution limits from special pay categories, including combat pay.

For example, the military has its own set of mortality tables, set out by officers and enlisted members, and by disability and non-disability retirements. At least for non-disability retirements, there is a significant reduction in death rates for military members, boosting present values. Adopting the Actuary's valuations would require accepting its presumption of annual COLA increases, inflation assumptions, and its allowance of high likelihood that the government will make the payments, which leads to assumed inflation of only 3 percent, and an assumed present value discount rate of 6.25%, with a resulting "real interest rate" of 3.25%. These assumptions, in turn, greatly increase the present value from that which would be reached using certain commercial assumptions.

An attorney wishing to personally estimate present values can purchase computer programs that do the math involved quickly.[140] Such programs often allow the user to plug in the assumptions to be used, such as life expectancy, presumed interest rate, etc. In any event, attorneys handling these cases in States that allow or require trading the present value of the retirement benefit must become well versed in all aspects of valuation, interest rate assumptions, and other factors involved. Failure to do so invites disaster at settlement or in court.

C. If/As/When; a Monthly Annuity

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

On the other hand, such a distribution increases the possibility of later court fights over enforcement or interpretation of the original order for division.[141] It gives each of the parties a stake in the other's life – if the former spouse predeceases the member, the member's retired pay goes up by whatever sum the former spouse had been receiving, and if the member dies first, the spousal share stops unless survivor's benefits have been provided for in the order.

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

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

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

For example, drafting counsel must ensure that the facts make the former spouse eligible for direct collection, if possible – which requires satisfaction of the jurisdictional factors, and that the military service of the member overlapped the marriage to the spouse by at least ten years.

The facts of the case drive a number of other factors that might be necessarily addressed in the order, including the possibility of an early or late retirement, or a disability or any other post-retirement reduction in benefits, and whether payments are to begin at eligibility for retirement, and are to be based on the rank and grade at the time of divorce, or at actual retirement.

The attorney for the member could argue that the chance of the member retiring at all is so speculative that the court should defer the issue until the facts are known, enter an "if, as, and when" order, or refuse to assign any value to the benefits at all.[142]

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

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

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

D. Coping with COLAs

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

The need for such adjustments is obvious. In January, 1972, the government's Consumer Price Index for all urban consumers (CPI-U) was 123.2, meaning that by comparison with the base year of 1967, it took an extra $23.20 to have the same purchasing power that $100 had commanded.[143] Put another way, dollars were worth only 81¢. By January, 1992, the CPI-U was 413.8, meaning that it took an extra $313.80 to gain the purchasing power of the original $100, or that each dollar was worth only 24¢. If there had been no cost of living adjustments, a $1,000 per month retirement starting in 1972 would only be paying the equivalent value of $240 per month in 1992. Inflation has continued, cumulatively, since that time.

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

Even greater differences between similarly situated individuals will result from the changes made in retirement formulas. Since only ***partial*** COLAs will accrue for those members who entered service on or after August 1, 1986, and opted to take the REDUX plan, military retirement benefits appear to be somewhat less valuable for those who retire after August 1, 2006.

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

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

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

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

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

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

IX. THE SPECIAL PROBLEM OF DIVORCE DECREES ENTERED IN FOREIGN COUNTRIES AS TO DIVISION OF MILITARY RETIREMENT BENEFITS

Military-related divorce cases involving a court of some other country, as well as the federal and state law applicable to these cases, illustrate the principle of "the danger of unintended consequences."[144] Given the enormous number of American service personnel stationed abroad in the past 50 years,[145] it seems almost certain that the number of actual persons affected is far higher than the relatively few published cases would indicate. Examining the facts of such a case can be highly instructive.

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[144] The principle that the ultimate application of any action or rule, however well-intentioned, may be to create a worse harm than the rule was itself designed to address. This is sometimes referred to as a branch of "applied Murphology."

[145] Even in the post-cold war, post-draw-down world, there were about 295,000 personnel in foreign countries, and over 10,000 in U.S. territories or "special locations." Given these numbers – which change constantly with policy shifts and changing world events – it would be remarkable if there were ***not*** a large number of marriages, and divorces, involving persons from more than one country, and possibly involving the courts of more than one country.

Jill Prevost married Tom Harms, a career military officer, in 1967. By 1984, when their marriage ended, they were living separately in Germany. Jill filed for divorce in Illinois (Tom's legal residence) in March, 1984.[146] In May, Tom requested a stay pursuant to the Soldiers' and Sailors' Civil Relief Act. Tom filed a new action in the German court with jurisdiction over divorce actions at about that time, and the German court proceeded to judgment on questions of custody, visitation, support, and property division.

The German court, apparently aware of the USFSPA and its legal proscription against foreign-court division of military retirement, stated:

> The parties have agreed that a pension equalization shall proceed between the parties by way of the law of obligations (contracts). A regulation under U.S. law that possibly put the wife into a better position is specifically reserved to the wife. This agreement is appropriate and reserves to the parties their rights for pension equalization, it therefore was agreed to by the Family Court.

In 1987, the Illinois court dismissed the filed-but-never-completed Illinois divorce action. Jill filed a "registration petition" in 1990, trying to get the Illinois court to act on the reservation of rights in the German divorce decree. Counsel focused on the reservation clause, instead of seeking an Illinois judgment recognizing and enforcing the German settlement dividing the retirement.

The lower court eventually dismissed Jill's petition, finding that it had no subject matter jurisdiction to entertain a claim for division of a military retirement, because in the absence of a current existing marriage, it had no provision under state law permitting it to hear a case between these persons. In other words, the court found that the fact of a completed (German) divorce prevented the state court from acting.

Jill appealed. The intermediate appellate court affirmed the lower court's dismissal on February 20, 1992.[147] That court found that under the Illinois constitution, the lower courts could only hear actions for division of property where the state legislature had explicitly given authority to do so, and that judgments of foreign countries could not be registered under the Uniform Enforcement of Foreign Judgments Act. The court rebuffed Jill's claim of jurisdiction under the USFSPA, without clearly explaining its reasoning. It expressed "concern" that its decision "leads to an inequitable result," but advocated only that "those

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[146] Champaign County, Illinois, Case no. 84-C-290.

[147] *In re Brown*, 587 N.E.2d 648 (Ill. Ct. App. 1992).

who prepare uniform law proposals" should consider an enactment for undivided military retirement benefits.[148] Jill did not, or could not, appeal to the Illinois Supreme Court.

Tom retired in September, 1992, but did not send any portion of the retired pay to Jill.

In 1994, Jill filed a federal court action through counsel in Virginia,[149] which is where both she and Tom then lived. The federal district court found "no federal jurisdiction, expressed or implied," to adjudicate the partition action Jill had brought.[150] The district court judge, obviously reluctant to say anything that might even imply an expansion of the role of the federal courts, held that the USFSPA "only allows courts to apply state divorce laws to military pensions." The court distinguished *Kirby v. Mellenger*[151] (discussed elsewhere at some length) as having been decided "in circumstances quite different from those at bar" because it was a diversity case instead of a federal question case. The court rather obliquely remarked that the result it reached "may be lamentable," but found dismissal was required as a matter of federal question jurisdiction.[152]

Next, Jill tried state court. She filed an action for partition of the retirement, adding a state court action for enforcement of the parties' contract to divide retirement. The Virginia trial court dismissed the action, finding that the German decree did not constitute a written contract because it was not signed by the parties, in accordance with German procedure, and if it was an oral contract, the statute of limitations for enforcement thereof had run.

The Virginia Supreme Court affirmed the "no written contract" finding, but reversed the lower court's finding that litigation was barred by the statute of limitations on the oral contract embodied in that decree, finding that the Illinois court simply lacked subject matter

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[148] Obviously unknown to the court, the officials at NCUSL (National Commission on Uniform State Laws) had refused to do any such thing when asked to do so in 1988, claiming that the problem was too "state specific" to be the subject of any uniform law proposal, and that state courts "clearly" had the power to deal with such situations.

[149] Phillip Schwartz, Esq., now of Schwartz & Associates, LLC, Attorneys and Counselors of International Law, 8221 Old Courthouse Road, Suite 101, Fairfax, VA 22182-3831 USA; (703) 883-8035.

[150] *Brown v. Harms*, 863 F. Supp. 278 (E.D. Va. 1994).

[151] 830 F.2d 176 (11th Cir. 1987).

[152] The same result has been reached by other federal district courts in reasonably similar circumstances. *See, e.g., Miller v. Umfleet*, No. SA-88-CA-769 (W.D. Tex., Sep. 1, 1991, slip opinion) (where military member had been transferred from Texas to another state by military orders, federal district court found no subject matter to exist under USFSPA or the Federal Declaratory Judgments Act, 28 U.S.C. § 2201, and a failure of "complete diversity"; the court further opined that the case would fit within the domestic relations exception to federal jurisdiction even if such jurisdiction had been established, although dismissal was self-described as done "not lightly").

jurisdiction, and that the breach had not occurred until Tom retired in 1992.[153] The case was remanded.

On remand, through other counsel,[154] the case was transformed back into a domestic relations and equity case; motions were filed in chancery seeking specific performance of the oral contract expressed in the German decree, and in law, seeking damages. At that point, it disappeared from published authority.

An obvious lesson of the *Harms* case is to showcase the vulnerability of the legal position of overseas spouses. If they choose to defend themselves in foreign divorce actions, and litigate retirement issues, they will receive orders unenforceable under U.S. federal law, and have to face *res judicata* arguments as well. If they try to "reserve" the question, they might not ever be able to get a state court to find it has jurisdiction to enforce the "reserved" rights. And if they ignore the action, the member will be able to take a judgment against them on all contested issues, by default (again, with *res judicata* possibilities looming).

Harms is remarkable, among other things, for the sheer tenacity of its litigants. Many similar cases are apparently resolved quickly and quietly, at least where one party does not oppose a correction to what is apparently conceded to be an inequitable result. For example, in *Stewart v. Gomez*,[155] the parties had been divorced in 1987 in England. The member, who arranged for the British divorce, had specifically assured the former spouse that he "was looking out for the best interest of" the spouse and their children and "specifically promised that when he retired" the former spouse "would receive a portion of the military retirement benefits." The member subsequently retired and moved to Nevada, but did nothing to ensure payments to the former spouse. The former spouse moved to South Carolina.

She filed a "Complaint for Partition of Omitted Property and Enforcement of Express Contract" in the Nevada courts. The member essentially ignored the action; default was granted, and the former spouse began receiving the promised share of the military retirement benefits.[156]

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[153] *Brown (Harms) v. Harms*, 467 S.E.2d 805 (Va. 1996).

[154] By the time of the appeal, Jill was represented by Timothy Hyland, Esq., of Lefler, Hyland & Thompson, 11320 Random Mills Road, Ste. 540, Fairfax, VA 22030-7499, (703) 293-9300. On remand, she was represented by David L. Duff, Esq., 11320 Random Hills Road, Ste. 525, Fairfax, VA 22030.

[155] Case No. D 156799, Eighth Judicial District Court, Clark County, Nevada, November 22, 1992.

[156] Mr. Sullivan has opined that such a judgment is not an "Order Incident to Decree" under the USFSPA. *See* HANDBOOK, *supra*, at 528 & n.283, citing *Carmody v. Secretary of the Navy*, 886 F.2d 678, 681 (4th Cir. 1989). That has not been my experience, however; if pleaded as set out here, such judgments have been accepted and enforced.

The lessons to be learned from *Harms* on the one hand, and *Gomez* on the other, vary depending on one's perspective. Both certainly stand for the proposition that a former spouse must move quickly and in a court with apparent jurisdiction, if a divorce looms in any foreign jurisdiction.

Harms could be interpreted as standing for the proposition that a member can divest a spouse by arranging to have a divorce decree entered while out of the country, and ensuring that he remains outside the personal jurisdiction of any state that has procedures for dividing omitted marital property. From the spouse's perspective, the case highlights the danger of not being sure there is an enforceable order in place at the time of divorce.

Gomez, from the member's perspective, could be taken as nothing more than an illustration of the danger of not fully asserting all possible procedural and technical defenses, given the decade in which Tom Harms staved off collection by Jill Brown.

About the only tactical advice that can be offered to spouses of members who are overseas is to ensure that any divorce proceeds through the U.S. courts, with the member clearly consenting to litigation in that jurisdiction. If, for whatever reason, that is impossible, it seems that the spouse would be prudent to begin American proceedings ***simultaneously*** with any foreign divorce, in whatever state the member had last established residence or domicile, by way of declaratory judgment or partition. While this is non-obvious, and inconvenient, and expensive, it is the closest thing to some assurance of protection of the spousal share that appears to be available under current law.

X. VALUE-ALTERING POSSIBILITIES TO ANTICIPATE, AND PLAN FOR, IN A MILITARY RETIREMENT CASE

A. "Early-Outs": VSI, SSB, and Early Retirement

The Variable Separation Incentive (VSI) and Special Separation Benefit (SSB) programs were early-retirement programs offered at times by the military by means of which members could terminate service before completing 20 years, receiving lump-sum or time payments instead of a regular military pension. The military also developed an early (15-19 year) retirement program known as the "Temporary Early Retirement Authority" (TERA).[157]

The first two programs were offered to members in "selected job specialties" who had accrued between six and twenty years of service. Some were required to serve in Reserve units, as well, after leaving active duty. The early retirement option for members with more

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

than 15 but fewer than 20 years of service was similar to "regular" military retirement, except that the sum paid contained an actuarial penalty. All three of these programs were repeatedly re-authorized by Congress until 2001, and remain available to be used if perceived to be necessary.

TERA retirements are divisible in precisely the same way as regular longevity retirements taken after 20 or more years of service. The primary complications for TERA cases concern sub-issues as to medical benefits for spouses, and what adjustments might be necessary for decrees issued under the assumption that the member would be completing 20 years of service, but where the member separated under TERA with less than 20 years.

Since, by definition, no member taking a TERA retirement ever stays on active duty for 20 years, it is not possible for a spouse of such a member to ever have 20 years of marriage ***during*** active duty, and therefore become a "20/20/20" former spouse entitled to lifetime medical and other benefits.[158] This creates the situation whereby a ***current*** spouse of a TERA retiree is treated just like the spouse of any other retired member, but the ***former*** spouse of a TERA retiree (irrespective of the timing of the divorce and the retirement) has none of the ancillary benefits that the former spouse of a "regular" retiree would have.

Under the present law governing medical and other benefits for former spouses, there is no solution for this situation. It is something of a two-edged sword, however. A member negotiating for divorce could threaten to go out on TERA retirement, thus depriving a spouse of medical benefits. The spouse's counter would be to ask the divorce court to hold the member responsible for whatever medical costs would have been free or covered if the member had completed the service term, arguing that the member's choice unilaterally created the expenses and he should therefore bear the cost of it.

The powers and procedures of courts to interpret divorce court orders, when expectations embedded in the orders prove inaccurate, varies from one jurisdiction to another. The problem is often seen in court orders issued during active duty that projected a date certain for payments to start to the former spouse, or made reference to "twenty years of service," etc. The standard form clauses contain language permitting the resolution of such problems.

Especially when they were new, there was some question as to whether VSI and SSB benefits were, or should be, divisible as marital or community property. In *In re Crawford*,[159] the court specifically quoted and analogized to *In re Marriage of Strassner*,[160] which addressed disability benefits. The Arizona court held that in both situations the spousal interest had

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[158] This is explained below in the discussion of medical benefits.

[159] 884 P.2d 210 (Ariz. Ct. App. 1994).

[160] 895 S.W.2d 614 (Mo. Ct. App. 1995).

been "finally determined" on the date of the decree, and enforcing that order in the face of a post-decree recharacterization by the member did not violate *Mansell*.

Courts throughout the country are in fair consensus that a spouse can receive a share of any ***early retirement*** taken by a member, under the theory that the "early out" benefits are as divisible as the retirements that were given up to receive those benefits, despite the lack (for SSB and VSI) of any federal mechanism for direct payment to the former spouse.[161] Other courts throughout the country have used similar language or reasoning to reach the same results regarding both programs.[162]

Very few courts have reached the opposite result.[163] Others have reached that opposite result, just to be reversed on appeal or upon narrow findings of special circumstances.[164]

It could be concluded that these cases stand for the proposition that it makes no difference how or why the member reduces a divorce court's award to a former spouse – the fact that he does so mandates that compensation be provided. The cautious practitioner, however, cannot presume that a reviewing court will reach the same result, and so will ensure that the property settlement agreement or divorce decree is crafted with sufficient demonstrations of intent (and reservations of jurisdiction, if necessary) that a later reviewing court would be able to transcend recharacterization of the benefits addressed. The standard form clauses are intended to provide a statement of such intent.

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[161] *See In re McElroy*, 905 P.2d 1016 (Colo. Ct. App. 1995) (SSB); *In re Shevlin*, 903 P.2d 1227 (Colo. Ct. App. 1995) (VSI); *In re Heupel*, 936 P.2d 561 (Colo. 1997).

[162] *See Kulscar v. Kulscar*, 896 P.2d 1206 (Okla. Ct. App. 1995) (SSB divisible in place of military retirement divided in divorce, refusing to "allow[] one party to retain all the compensation for unilaterally altering a retirement plan asset in which the other party has a court-decreed interest"); *Marsh v. Wallace*, 924 S.W.2d 423 (Tex. Ct. App. 1996) (SSB); *Pavatt v. Pavatt*, 920 P.2d 1074 (Okla. Civ. App. 1996) (SSB); *Abernathy v. Fishkin*, 638 So. 2d 160 (Fla. Ct. App. 1994) (VSI); *Blair v. Blair*, 894 P.2d 958 (Mont. 1995); *Fisher v. Fisher*, 462 S.E.2d 303 (S.C. Ct. App. 1995) (VSI); *In re Babauta*, 66 Cal. App. 4th 784, 78 Cal. Rptr. 2d 281 (1998); *Marsh v. Marsh*, 973 P.2d 988 (Utah Ct. App. 1999) (SSB); *Lykins v. Lykins*, 34 S.W.3d 816 (Ky. Ct. App. 2000).

[163] *See McClure v. McClure*, 647 N.E.2d 832 (Ohio Ct. App. 1994).

[164] *See Kelson v. Kelson*, 647 So. 2d 959 (Fla. Ct. App. 1994) (VSI held not divisible in split opinion); *overruled*, 675 So. 2d 1370 (Fla. 1996); *Baer v. Baer*, 657 So. 2d 899 (Fla. Ct. App. 1995) (where service member given ultimatum to accept VSI or be immediately involuntarily terminated, VSI payments were severance pay rather than retirement pay, and not divisible); *In re Kuzmiak*, 222 Cal. Rptr. 644 (Ct. App. 1986) (pre-SSB/VSI case; separation pay received upon involuntary discharge pre-empted state court division).

B. The Dangers of REDUX

When the divorce occurs near the fifteen-year mark of the military career, there is a new danger for spouses of military members who started service after July 31, 1986. There is no provision for spousal consent, or even notification, before a member can take the $30,000 CSB/REDUX payment, which irrevocably reduces the lifetime "regular" retirement benefits payout. Especially where the parties have already separated, it is possible that the member could simply pocket the cash payment and the spouse would never even know of the devaluation of the retirement benefits being divided in the divorce.

As seen in the "early out" cases discussed above, however, and (generally) in the disability cases discussed below, precedent supports a couple of general propositions. First, that the military member may usually choose any legitimate retirement option available under law. Second, that it makes no difference how or why the member reduces the sum of retirement benefits otherwise payable to a former spouse – the fact of doing so mandates that compensation be provided to the former spouse.[165] This can play out in a number of ways, depending on the timing of events.

Where the divorce precedes the time of the member making the CBS/REDUX election, the decree most probably would anticipate payment of the maximum possible sum of retirement benefits. Where the member, post-divorce, takes the election, and thus both obtains cash and reduces the value of the retirement benefits, the expected orders should be a distribution to the spouse of a share of the cash payment equal to the spousal share of the retirement benefits, ***or*** recalculation of the spousal share of the retirement, to increase it so that it would be equal to what it would have been if the member had not taken the election. Given the complicated calculation of a REDUX retirement, the first of these would be simpler.

Where the member accepted the CBS/REDUX choice ***before*** the divorce, additional questions must be asked. Was the spouse aware of the election? Either way, did the spouse already obtain benefits from the cash pay-out? Who actually received what benefit from the cash payout would probably determine the equities of what compensation (if any) is due to the former spouse.

Regardless of the order of events, those litigating cases involving a CBS/REDUX payment will probably find that the law of "early out" cases, and disability cases, provides valuable analogies.

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[165] Again, however, the cautious practitioner for the spouse cannot presume such a result, but must craft the documents to lead to it.

C. Late Retirement by Members; the "Smaller Slice of the Larger Pie" Fallacy

As a general proposition, spouses should try to begin receiving payments as soon as possible once the right to do so accrues. Military retired pay is not like a defined contribution plan with a specific balance;[166] it is a defined benefit plan, in that it provides a stream of payments that can be tapped for a present spousal share, but has no mechanism for collecting property payments once they are missed. In other words, any arrears in military retirement benefits payments must be collected from the member directly; the military will not garnish for such arrearages.

Several courts have held that the spouse may collect the spousal portion of the retirement at ***eligibility*** for retirement, whether or not the member actually retires.[167]

The theory is that the former spouse should be able to decide when benefits that are due and payable to the spouse will actually commence – that "The employee spouse cannot by election defeat the nonemployee spouse's interest in the community property by relying on a condition within the employee spouse's control."[168] A spouse making such an election should also receive the imputed cost of living adjustments that ***would have*** accrued if the member had retired, but the former spouse would ***not*** share in any actual later increases in rank, or benefit from additional years in service.

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

Except in the extremely rare circumstance in which extraordinary changes in rank are anticipated, it would almost always be a mistake for a spouse to defer collection past first eligibility. When a member chooses to continue service after 20 years, if the spouse defers receipt of a share of the retirement until actual retirement, the ultimate collection by the spouse is typically decreased, actuarially.[169]

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

[167] *See* cases set out in Footnote 110.

[168] *In re Marriage of Luciano*, 164 Cal. Rptr. 93, 95 (Ct. App. 1980).

[169] As noted above, the difference in lifetime collection difference for the spouse is about 13%. This approximate ratio holds true across ranks.

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

This discussion is even more critical in the minority of states, such as Texas, that restrict the spousal share to the rank and grade at divorce, instead of using the standard time-rule formula. In those states, the spouse's failure to obtain a flow of payments at the member's first eligibility would result in a tremendous devaluation of the spousal share, undercutting the concept of community property (and, increasingly, the equal division sought in "equitable distribution" jurisdictions).

The possibility of continued service by the member beyond the first eligibility date for retirement should be expressly contemplated on the face of every divorce decree dealing with a member who is still on active duty at the time of divorce.

D. Disability Benefits[170]

1. Generally

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 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.[171]

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[170] 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, 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, *supra* n.1; Willick, *Death, Disability, and Related Subjects of Cheer (Part Two – Disability)*, at http://willicklawgroup.com/page.asp?id=40; Sullivan HANDBOOK, *supra*, at 441-454.

[171] *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).

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.[172]

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"[173] 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.[174]

The meaning and effect of the savings clause is discussed above in the introduction to the USFSPA, which discussion is not repeated here. Similarly, there does not seem to be much to say about disability benefits already received and used for the increase of account balances or the acquisition of assets, all of which apparently have no kind of special or protected status.[175]

In 1986, the California Supreme Court had held in *Casas*[176] 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

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[172] *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.

[173] Title 38 governs post-retirement applications for VA disability awards.

[174] 10 U.S.C. § 1041(a)(4)(C)-(D).

[175] *See, e.g., Fox v. Fox*, ___ S.W.3d ___ (Tenn. Ct. App., No. M1999-01720-COA-R3-CV, Apr. 11, 2001); *Carrier v. Bryant*, 306 U.S. 545, 59 S. Ct. 707 (1939); *Bishoff v. Bishoff.*, 987 S.W.2d 798 (Ky. Ct. App. 1999); *Gray v. Gray*, 922 P.2d 615 (Okla. 1996); *Pfeil v. Pfeil*, 341 N.W.2d 699 (Wis. Ct. App. 1983).

[176] *Casas v. Thompson*, 720 P.2d 921 (Cal. 1986), *cert. denied*, 479 U.S. 1012 (1987).

retirement (and disability) benefits.[177] The 1989 United States Supreme Court decision in *Mansell*,[178] discussed in detail above, made all such prior authority questionable.

Many courts hearing such cases when *Mansell* was decided did exactly what the California trial court did on 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.[179]

Between 1981 and 1989, *McCarty*, the USFSPA, and *Mansell* set up the framework within which all courts since then 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.

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[177] *In re Marriage of Stier*, 178 Cal. App. 3d 42, 223 Cal. Rptr. 599 (1986).

[178] 490 U.S. 581, 109 S. Ct. 2023, 104 L. Ed. 2d 675 (1989).

[179] *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); *Lyons v. Lyons*, No. C034544 (Cal. Ct. App., Aug. 9, 2002, unpublished) (applying California law as of the time of the parties' 1979 marital settlement agreement in determining that as of the member's retirement 20 years later, the former spouse was entitled to a percentage of the gross retired pay before deduction for disability or SBP premiums for a later spouse).