RETIREMENT BENEFITS FOR LEGAL PROFESSIONALS: A VERY BRIEF PRIMER

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 (the AAML and IAML), former Chair of the Nevada Bar Family Law Section and former President of the Nevada chapter of the AAML. He has authored many books and articles on Family Law and retirement benefits issues, and was managing editor of the Nevada Family Law Practice Manual. He is frequent teacher of continuing legal education classes and is often sought as a lecturer on family law issues.

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 divorce and property division. He has chaired several Committees of the American Bar Association Family Law Section, AAML, and Nevada Bar, has served on many more committees, boards, and commissions of those organizations, and has been called on to sometimes represent the entire ABA in Congressional hearings on military pension matters. He has served as an alternate judge in various courts, and frequently testifies as an expert witness. He serves on the Board of Directors for the Legal Aid Center of Southern Nevada.

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: THE UNIVERSE OF RETIREMENT BENEFITS

The "Guidelines for Speakers" for this seminar instruct presenters to confine written materials to 20 pages, and to make the materials "organized, accurate, practical, and should cover the entire topic."

With due respect to the organizers, the task is impossible. Multiple volumes of necessary information have been written as to each of the systems touched on below, and multiple days-long seminars exist on various aspects of those materials. All that can be reasonably hoped for in the sliver of time and few pages we have here is to provide a peek through the window into the world of retirement benefits in divorce cases, in the hope that issue-spotting will lead to sufficient attention to lead to adequate handling of a critical issue in real cases.

II. ALPHABET SOUP: ERISA, REA AND QDROS; PERS, FERS, CSRS AND MBDOS; WHAT YOU DON'T KNOW CAN HURT YOU

A. Why Bother Dealing With Pensions? Duty and Liability

Many judges, parties, and lawyers and their staff fail to pay sufficient attention to pension and retirement plans when evaluating the community or other property available for distribution upon divorce. This is a mistake. It is at this point a truism that retirement benefits, usually the most valuable asset of a marriage, are divisible upon divorce to at least the degree to which they were accrued during the marriage.[1] This is particularly true of certain kinds of employment, such as the military, in which frequent moves are the norm and there is often less opportunity to accumulate large real estate equity or other assets.

What is surprising is the near-universal lack of appreciation of this fact. Most people still working, asked what their most valuable assets are, don't even think to mention their slowly-accruing retirement benefits, even though those benefits are quite commonly more valuable than ***everything else the parties have, combined***, including the equity in the marital residences.

It is the ***far*** better practice to deal with retirement benefits fully and accurately during the divorce itself, instead of deferring the matter to be dealt with "later."[2] 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.

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[1] *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.

[2] *See In re Marriage of Bergman*, 168 Cal. App. 3d 742, 214 Cal. Rptr. 661 (Cal. Ct. App. 1985) (there is no good reason to perpetuate litigation indefinitely when retirement benefits can and should be divided at the same time as the parties' other property).

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.[3] An offhand remark by a reviewing court could point a litigant directly toward seeking compensation by erring counsel.[4]

In short, ignoring pension benefits is just not an option – it leaves the divorce attorney subject to malpractice liability. It is likewise critical for the benefits not just to be mentioned, but to be addressed ***competently***. Just making some vague reference such as "the benefits are to be divided in accordance with the time rule," or "the wife may submit a pension division order" is likewise an invitation to malpractice liability. If retirement benefits are mentioned, however poorly, later courts may refuse to correct a mis-distribution,[5] leading directly back to litigation directed against the divorce lawyer that allowed the mis-distribution to occur.

The non-uniform national law governing partition of omitted or mis-distributed 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.

B. A Ridiculously-Brief History of Major Developments from 1969 to Present – and Lots of Acronyms

Starting in the late 1960s, some States were coming to recognize the importance of pension, retirement, and other deferred benefits in divorce actions.[6] The 1970s saw the law of property division throughout the country evolve toward "equitable distribution," which increasingly

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[3] *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 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).

[4] *See*, *e.g.*, *Carlson v. Carlson*, 108 Nev. 358, 832 P.2d 380 (1992) (in NRCP 60(b) case, Supreme Court noted that "Arguably, Trudy's counsel should have more diligently pursued information about the pension or, at least, moved for a continuance until she determined the actual value of the pension").

[5] *See*, *e.g.*, *Thorne v. Raccina*, 136 Cal. Rptr. 887, 203 Cal. App. 4th 492 (Ct. App. 2012) (refusing post-divorce correction of decree providing to spouse less than her full time-rule portion of military retirement, in the absence of fraud and when spouse could have sought independent counsel before divorce but elected not to do so).

[6] *See LeClert v. LeClert*, 453 P.2d 755 (N.M. 1969); *In re Marriage of Fithian*, 517 P.2d 449 (Cal. 1974).

resembled a community property scheme in which divorce courts were to ascertain, and divide, the property acquired by both parties during the marriage.

Most people in this country earning retirement benefits work for private employers. Most private employee-benefit plans, or "pension plans"[7] in the United States today are qualified under, and governed by, the Employee Retirement Income Security Act of 1974, known as "ERISA,"[8] codified at 29 U.S.C. § 1001 *et seq*.

The intention of the law was to ensure that employees actually received the deferred benefits that they were promised, due to the perception that there was widespread abuse of employees in the private sector. ERISA and the Internal Revenue Code ("IRC") are the controlling bodies of law for most private plans. Those laws, and the regulations of the Department of Labor, IRS, and the Pension Benefit Guaranty Corporation, control nearly all pension, profit sharing, stock bonus, and other retirement plans provided by private industry employers.

But ERISA, as originally enacted, did not explicitly contemplate divorce. And then, in the 1980s, all ***kinds*** of developments occurred, nearly simultaneously, affecting the economic lives upon divorce of virtually all folks in America who worked for a living (and their spouses), whether they worked in the private or public sectors.

ERISA provided that pension benefits could not be "assigned or alienated."[9] This created a dilemma in jurisdictions recognizing that retirement benefits constituted valuable community or marital property rights. Many courts found a common law exception for domestic relations orders,[10] but the legal landscape was confused until the passage in 1984 of the Retirement Equity Act ("REA"),[11] which provided that certain domestic relations orders, containing specific terms, must be accepted and honored by ERISA-qualified pension plans. It was that law that created "QDROs," – Qualified Domestic Relations Orders.

Virtually ***any*** judgment, decree, or order dealing with alimony or support for a spouse, former spouse, child, or other dependent made according to local domestic relations law is considered a

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[7] A plan providing for retirement benefits or deferred income, extending to or beyond the end date of covered employment. *See* 29 U.S.C. § 1002(2)(A). This includes pension plans, profit sharing plans, "401(k)" plans, and some employee stock ownership plans. It does ***not*** include any kind of government plans – Civil Service, Military, state or local government, etc. It also does not include certain other types of private-employer benefits, such as severance pay benefits and vacation plans, or IRAs or SEP-IRAs, which are governed by other laws.

[8] Pub. L. No. 93-406, 88 Stat. 829 (Sept. 2, 1974).

[9] 29 U.S.C. § 1056(d)(1); Internal Revenue Code ("IRC") § 401(a)(13)(A).

[10] *See*, *e.g.*, *American Tel. & Tel. Co. v. Merry*, 592 F.2d 118 (2nd Cir. 1979) (alimony order impliedly exempted from ERISA preemption).

[11] Pub. L. 98-397, 98 Stat. 1426 (Aug. 23, 1984).

domestic relations order, or "DRO" under ERISA/REA.[12] It becomes a ***Qualified*** Domestic Relations Order, or "QDRO," and must be recognized and enforced by an ERISA plan, when it creates or recognizes one of the listed classes of persons[13] as an "Alternate Payee" with a right to receive all or any portion of the benefits normally payable to a participant in that plan, contains the various required terms for such an order, and omits anything that would ***dis***-qualify it from qualifying.

At about the same time (the 1980s), similar (but not identical!) developments were altering divorces for those working in the ***public*** sector.

On June 26, 1981, the United States Supreme Court issued its opinion in *McCarty v. McCarty*.[14] The Court determined that state community property laws conflicted with the federal military retirement scheme, and thus were impliedly pre-empted by federal law. The majority held that the apparent congressional intent was to make military retirement benefits a "personal entitlement" and thus the sole property of individual service members, so the benefits could not be considered as community property in a California divorce. The Court invited Congress to change the statutory scheme if divisibility of retired pay was desired.[15]

It was, and Congress reacted by enacting the Uniformed Services Former Spouses Protection Act ("USFSPA") on September 8, 1982.[16] The declared goal of the USFSPA at the time of its passage

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[12] *See* 29 U.S.C. § 414(p)(1)(B). More specifically, it is a decree, judgment, or other order providing for payment of child support, spousal support, or marital or community property payment to a spouse, former spouse, child, or other dependent of a participant in a qualified retirement plan.

[13] Normally, any spouse, former spouse, child or other dependent of a participant who is recognized by a domestic relations order as having a right to receive all, or a portion of, the benefits payable under a plan with respect to such participant.

[14] *McCarty v. McCarty*, 453 U.S. 210, 101 S. Ct. 2728 (1981).

[15] 453 U.S. at 235-36, 101 S.Ct. at 2743.

[16] Also commonly known as the "Federal Uniformed Services Former Spouses Protection Act," or FUSFSPA, or as "the Former Spouses Act," or in some references simply as "the Act." 10 U.S.C. § 1408 (amended every year or two since 1983).

was to "reverse *McCarty* by returning the retired pay issue to the states."[17] By fits and starts, every State in the Union eventually permitted military retirement benefits to be divided as property.[18]

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 parties to a divorce; the point here is that the federal statute was essentially an enabling act permitting States to address the subject, so treatment of retired pay was again made dependent on State divorce laws. There is no specific title required for a military pension division order, but an order dividing military retirement benefits has come to be known as a Military Benefit Division Order ("MBDO") or more technically as labeled in 10 U.S.C. § 1408(a)(2), "Order Incident to Decree."

Also outside the scope of ERISA are retirement benefits of federal Civil Service employees. Those working in the U.S. Civil Service have had a retirement system in place in some form since 1920, which is the date from which the "old" system ("Civil Service Retirement System," or "CSRS") for those who began service before January 1, 1984, can be traced. The retirement system is essentially a defined benefit plan, which takes into account years of service and highest salary in determining a monthly sum to be paid to an employee from the date of retirement until death.

The entire system was altered for incoming employees in a "new" system ("Federal Employees' Retirement System," or "FERS"), for those who began service on or after January 1, 1984.[19]

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[17] "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*; *Mansell v. Mansell*, 490 U.S. 581, 109 S. Ct. 2023 (1989) (some partial federal pre-emption may remain after passage of the USFSPA).

[18] Legislative History, Pub. L. No. 97-252; S. Rep. No. 97-502. As of June 26, 1981, all community property States, and most equitable distribution States, treated military retired pay as marital property subject to division. The two last "title" states, Mississippi and West Virginia, have since then adopted equitable distribution schemes.

[19] *See* 5 U.S.C. §§ 8331, 8401; Pub. L. 99-335 (1986).

Those defined benefit plans are administered by the Office of Personnel Management ("OPM") under extensive separate federal regulations.[20] An order dividing Civil Service retirement benefits is required by regulation to be titled "COAP."[21]

The new system also created a defined contribution retirement account called the "Thrift Savings Plan" ("TSP").[22] In 2001, the defined contribution program was also made available to those in the armed forces. An order dividing a TSP account is a "RBCO."[23]

And, virtually simultaneously with the federal efforts in the 1980s, various States actively cooked up new or refined retirement schemes for those employed by State governments.

For example, in Nevada, State public employees fall under the Public Employees' Retirement System ("PERS"), which in its modern form has existed since 1975, but was entirely revised and reorganized in 1993. Those who put the Nevada PERS regulations together chose to (confusingly) use the same titles, etc., as are in the federal ERISA law, and even copied some of the statutory language from the far larger, and more complex, federal law. However, a State pension plan (such as PERS) does ***not*** fall within ERISA, and the federal statutes do ***not*** apply to the plan, or to the benefits. Instead, there is an entirely different set of (State) laws that govern distribution of PERS benefits.

C. The Modern Landscape of Pensions in Divorce Cases

All those developments laid the groundwork for the confusion now seen. Those practicing law before the mid-1980s were overwhelmed with a mind-boggling array of new plans, opportunities, rules, requirements, and acronyms, while at the same time the benefits regulated by those plans contained an ever-increasing percentage of the actual wealth owned by most people.

The resulting legal landscape is one where few parties appreciate the importance of retirement benefits, and relatively few lawyers understand what they are and how they work. This has led to massive confusion, delay, and accidental loss in family law, estate planning, and every other field

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[20] *See* Court Orders Affecting Retirement Benefits, 57 Fed. Reg. 33,570 (July 29, 1992) (codified at 5 C.F.R. Parts 831 *et seq*.) The new regulations addressed the employee annuity (the pension), refunds of employee contributions, and survivor's benefits, but not the Thrift Savings Plan ("TSP"), which was set up to work like a 401(k), and is administered separately.

[21] "Court Order Acceptable for Processing." 5 C.F.R. § 838.803.

[22] Created by the 1986 statute creating FERS, the TSP is a defined contribution type of plan for federal employees. The TSP is expressly ***excluded*** from the regulations governing the CSRS and FERS retirement benefits. 5 C.F.R. § 838.101(d). Instead, It is administered by a Board entirely separate from the OPM (the Federal Retirement Thrift Investment Board). 5 U.S.C. § 8435(d)(1)-(2), 8467; 5 C.F.R. Part 1653, Subpart A.

[23] For "Retirement Benefits Court Order."

touching upon the property of husbands and wives. It also created a cottage industry of folks claiming to "help" with all these assets and programs, the large majority of whom are mere form peddlers with no real clue of what they are doing or how anything works (or outright frauds and con artists), who often make things worse.

Still, knowledge of a relative handful of critical concepts by lawyers, estate and financial planners, and others, can make all the difference between adequately addressing a client's concerns or failing to do so. Providing the basic information necessary for lawyers and judges to identify and address pension questions in divorce is the purpose of these materials.

1. State Versus Federal Law

There are enormous variations among the technical requirements of the various administering bodies for valid orders dividing retirement plans, but after the cases of the 1980s, a few unifying principles were clarified.

First, the question of whether retirement benefits are divisible and, if so, how they should be divided, is overwhelmingly a matter of ***State*** law. As the United States Supreme Court put it: "We have consistently recognized that 'the whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States.'"[24]

Generally, therefore, States are free to distribute property as they see fit, and every variety of retirement benefit is a property interest, and therefore at issue upon divorce. Sometimes, however, Congress wishes to "occupy the field" in a particular question of law, and generally, it has the power to do so, even when it results in unintended consequences of unjust enrichment and inequity.[25]

Much more often, federal law is only seen where principles such as due process and equal protection bear on the divisibility of retirement benefits, or it is necessary to comply with the technical requirements of a federal agency administering retirement benefits. Preemption is explained, again by the United States Supreme Court, as necessary for a federal system, but to be very strictly limited because of the obvious opportunity for abuse and inequity:

> Because domestic relations are preeminently matters of state law, we have consistently recognized that Congress, when it passes general legislation, rarely intends to displace state

[24] *Rose v. Rose*, 481 U.S. 619, 625, 107 S. Ct. 2029, 95 L. Ed.2d 599 (1987).

[25] *See Carmona v. Carmona*, 603 F.3d 1041 (9th Cir. 2010) (revised op'n on rehearing) (permitting a former spouse who had bargained away certain benefits for value to nevertheless make a claim to them despite her agreement, the order of the divorce court, and the wishes of the employee, due to the happenstance of the timing of divorce and retirement, and the preemptive scope of ERISA).

> authority in this area. Thus we have held that we will not find preemption absent evidence that it is "positively required by direct enactment."[26]
>
> On the rare occasion when state family law has come into conflict with a federal statute, this Court has limited review under the Supremacy Clause to a determination whether Congress has "positively required by direct enactment" that state law be pre-empted. . . . Before a state law governing domestic relations will be overridden, it "must do 'major damage' to 'clear and substantial' federal interests."[27]

It is for this reason that State divorce courts can, for example, order that a spouse of a military member is entitled to 100% of the retirement benefits, although disposable retired pay is defined by federal law as not more than 50% of such benefits.[28] It is why a court can order a retiree who has waived military retirement benefits for disability, as allowed under the federal retirement scheme, to nevertheless personally pay to the former spouse the amount that is not directly payable by the federal pay center.[29]

Even in ERISA cases – arguably the single most highly pre-empted area of retirement benefits – Congress may require that various benefits of federal employees are or are not in existence, but it is for the States to determine who should get what benefits upon divorce.[30]

Second, the technical webs of laws governing division of retirement benefits are complex, and even many of those litigating retirement benefits cases, or deciding their distribution upon divorce, or drafting legislation governing retirement benefit law, are often uninformed or confused as to what benefits exist, or how they are administered. Sometimes, this confusion is innocent; other times, not so much.

In Nevada, for example, the legislative history of NRS 125.155 reveals that most of those commenting seemed to understand the difference between defined benefit (pension) plans, and

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[26] *Mansell v. Mansell*, 490 U.S. 581, 587, 109 S. Ct. 2023, 2028 (1989), *quoting Hisquierdo v. Hisquierdo*, 439 U.S. 572, 581, 99 S. Ct. 802, 808, 59 L. Ed. 2d 1 (1979) (*quoting Wetmore v. Markoe*, 196 U.S. 68, 77, 25 S. Ct. 172, 176, 49 L. Ed. 390 (1904)).

[27] *Rose v. Rose*, 481 U.S. 619, 625, 107 S. Ct. 2029, 95 L. Ed.2d 599 (1987).

[28] *See*, *e.g.*, *Ex parte Smallwood*, 811 So. 2d 537 (Ala. 2001), *cert. denied*, 534 U.S. 1066 (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).

[29] *Shelton v. Shelton*, 119 Nev. 492, 78 P.3d 507, 511 (Nev. 2003); *see also Krapf v. Krapf*, 786 N.E.2d 318, 326 (Mass. 2003); *Hisgen v. Hisgen*, 554 N.W.2d 494, 498 (S.D. 1996); *Resare v. Resare*, 908 A.2d 1006 (R.I. 2006).

[30] "When Congress provided that a benefit should be available to 'surviving spouses,' *see*, *e.g.*, 29 U.S.C. § 1055(a)(2), it expressly left to state law the determination of the *identity* of such surviving spouse." *Torres v. Torres*, 60 P.3d 798, 817 (Haw. 2003).

defined contribution (account balance) plans. But the history indicates that the Legislature was repeatedly told that the PERS plan was "unique" in refusing to actually make payments to a former spouse until the retiree actually retires.

In fact, there is nothing at all "unique" about that plan attribute – it is true of ***every*** plan that has only a "divided payment stream" form of benefit, rather than a "divided interest" form – including the military and Civil Service retirement plans governing millions of retirees. All such plans prohibit the plan from paying anything to a former spouse until the member's actual retirement. And in all such pension plans, orders requiring the payment to a former spouse upon eligibility of the employee to retire requires the worker to pay the former spouse directly, out of pocket, until actual retirement and payments from the retirement plan begin.

Courts, properly, tend to be deferential to the legislative branch in construing legislative enactments.[31] But that deference is misplaced where the legislative record shows that the laws were structured based upon mistaken facts. Courts are sometimes required to go to some lengths to fashion orders complying with plan requirements while still satisfying their primary duty to do equity to the parties before the court.[32]

2. General Community Property Law

Pensions have been recognized as community property by community property States for many decades,[33] and that recognition was extended to unvested[34] and unmatured[35] pension benefits long ago.[36] Statutory and case law throughout the country now recognizes pension benefits as marital property with near-uniformity.

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[31] *See Edgington v. Edgington*, 119 Nev. 577, 80 P.3d 1282 (2003) (the legislative intent behind ambiguous terms must be ascertained from the statute's terms, and its objectives and purpose, "in line with what reason and public policy" dictate).

[32] *See*, *e.g.*, *Waltz v. Waltz*, 110 Nev. 605, 877 P.2d 501 (1994), in which the Court had to construe poor phrasing as an allocation of "permanent alimony" in order to provide payments clearly agreed to, but technically disallowed by the so-called "10 year rule" limiting allocations of military retirement benefits as property.

[33] *See LeClert v. LeClert*, 453 P.2d 755 (N.M. 1969); *Busby v. Busby*, 457 S.W.2d 551 (Tex. 1970); *In re Marriage of Fithian*, 517 P.2d 449 (Cal. 1974) (recognizing the importance of retirement benefits as a marital asset).

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

[35] *Id*. A "matured" pension is one in which a particular employee is eligible for present payments from a plan.

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

Rationales for that recognition usually include that the benefits accrued during marriage, that income during marriage was effectively reduced in exchange for the deferred pension benefits, and that the choice was made to forego possible alternative employment which would have paid more in current wages, in order to have the pension.

Every State has its own individual history for the treatment of retirement benefits in divorce, but in the modern age, most or all retirement benefits are divisible either by specific enactment or under the "all other property" general provision of State divorce law.

III. IDENTIFICATION OF PENSION PLANS IN DIVORCE ACTIONS

A. Means of Acquiring Information

1. The Client Interview

The easiest means of starting the search for pension benefits is asking for the full employment history of both spouses during the initial client interview. Further investigation is warranted if either party has ever worked for the United States government (i.e., the Civil Service, including the Post Office), the United States Armed Forces (including the Reserves or National Guard), a state or local government, a corporation of any appreciable size, an employer that reasonably should have used union labor, or a professional corporation.

2. Informal and Formal Discovery

Most private pension plan administrators will gladly provide a copy of all plans offered by the employer, and summaries of those plans, upon a telephone or written request; much is freely available on the Internet. Information about a specific employee, however, will usually not be released without a release from that person, or under subpoena. Private pension plan information requests should be directed to plan administrators (not just employers).

The United States Civil Service also generally requires a release form or subpoena. In military cases, the pay centers should release, upon request, date of first eligibility to retire, date of first eligibility to receive retirement benefits, date of retirement, last unit assignment, final rank, grade, and pay, present or past retired pay, or other such information as may be required to enforce an award or revise it so as to make it enforceable.[37] The military will not respond to a subpoena issued by the

[37] 65 Fed. Reg. 43298 (July 13, 2000), providing 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 their payment was calculated to include what items were deducted from the member's gross pay and the dollar amount for each deduction.

Clerk's office, but requires an original judge's signature. Military information requests must be directed to the proper branch of service.

It is a good practice to request and provide all materials relating to pension or retirement benefits (and, perhaps, a release form to obtain back-up and supplemental documentation) in initial discovery and disclosures. Later, interrogatories or requests to produce can be sent for updated information. Cases indicate that this is another area where just failing to affirmatively seek out information could lead to liability on the part of the lawyer.[38]

B. Knowing It When You See It

1. The Basics to Watch For

In dealing with any retirement program, the practitioner should pay attention to the following essential elements:

1. ***What*** will be available (and the form – whether a monthly annuity, or with a lump sum option), and whether there might be more than one plan associated with a particular wage-earner.
2. The ***amount*** of the benefit that is divisible community property, under the time rule, direct tracing, or some other analysis.
3. ***When*** that sum is to be ***first available*** for distribution, and what steps might be taken by either party to accelerate or delay that availability.
4. What, if any, ***survivor benefits*** might be accorded to a former spouse in addition to or in place of the retirement benefits, and who will pay for them.
5. Whether any ***ancillary*** benefits are available (most importantly, medical benefits).

After these basics come a few other matters that should be consciously addressed in every divorce case involving pension benefits before the case is over:

1. What ***notices*** are required to be given, within what time limits, to which authorities, in order to make sums payable to the spouse or permit the transfer of other interests.
2. What effect a present or future ***disability*** claim by the retiree or the former spouse could have on payment of benefits (and what, if anything, you can do about it in advance).
3. Whether and what post-divorce actions of either of the parties (such as nomination of the wage-earner of a second spouse as beneficiary, or remarriage of the former spouse) could affect the distribution of benefits provided by the Decree, and what can or should be done about those possibilities.

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[38] *See* T. Harrison, "IRS Grabs Ex-Wife's Pension Share; Malpractice `Warning Bell' for Divorce Lawyers," Lawyers Weekly USA, Sept. 27, 1993, at 1.

Failure to deal with ***all*** of those factors in litigation or negotiations, and especially in the court orders, could lead to unforeseen and unfortunate results for parties, or counsel, or both.

It is worth noting that not every spousal interest affects the wage-earner. Most commonly, for example, a spousal entitlement to make a claim for Social Security benefits under a worker's experience rather than his or her own work experience has no effect at all on the sum payable to the wage-earner. And the Nevada Supreme Court – like most courts – has expressly forbidden the direct allocation of those benefits,[39] or their use as offsets or purporting to indirectly "take them into consideration" in distributing property.[40] Others have held directly to the opposite, and permitted their consideration.[41]

Practitioners should distinguish the "benefits" expected to be provided by a plan from the "value" of that plan, and distinguish both of those terms from "contributions." ***Benefits*** are what the retiree will actually receive upon retirement,[42] usually phrased as a right to receive certain sums on a certain schedule. The ***value*** of a pension interest, on the other hand, is generally considered to be equal to the cost, at any given time, of acquiring an annuity that would pay equivalent benefits. ***Contributions***, whether from the employee, the employer, or both, do not necessarily have any correspondence to either the benefits of a plan or its value at any given time. Failure to perceive these distinctions can lead to gross over- or under-valuation of the assets at issue.

It is important to note that pension interests are property and not alimony. The Nevada Supreme Court has expressed its intention to stress that distinction based upon the non-modifiability of pension awards, whereas alimony is generally modifiable, and to generally prohibit classifying one kind of payment as the other.[43]

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[39] *Boulter v. Boulter*, 113 Nev. 74, 930 P.2d 112 (1997).

[40] *Wolff v. Wolff*, 112 Nev. 1355, 929 P.2d 916 (1996) (social security benefits are not "a form of deferred compensation, and therefore not . . . community property subject to division between the spouses" and cannot be given any consideration in "offsetting" one spouse's community property interest in the other spouse's retirement benefits. Acerbically, the Court added that it does not make any difference how indirect or disguised the consideration is, because "Calling a duck a horse does not change the fact that it is still a duck").

[41] *See*, *e.g.*, *Herald v. Stead man*, ___ P.3d ___ (No. S061362, Or., Mar. 20, 2014).

[42] Definitions vary between and among retirement systems. Here, "retirement" means that an employee has stopped working *and* that retirement benefits are payable to that individual. Given the many ways in which an employee may stop working prior to eligibility for retirement benefit payments, care must be taken in definitions when engaging actuaries or accountants, or negotiating these cases.

[43] *See Wolff v. Wolff*, 112 Nev. 1355, 929 P.2d 916 (1996); *Walsh v. Walsh*, 103 Nev. 287, 738 P.2d 117 (1987); *Carrell v. Carrell*, 108 Nev. 670, 836 P.2d 1243 (1992). The logic of these holding is open to some question, since the Court in other contexts has had no trouble with the proposition of awarding alimony in compensation for, among other things, a superior property position of the paying spouse. *See Heim v. Heim*, 104 Nev. 605, 763 P.2d 678 (1988) (husband, whose future earning capacity was a community asset that could have been made the subject of trial proceedings, ordered to make permanent alimony payments).

2. Vestedness and Maturity; (Usually) Red Herrings

A "vested" pension is one in which the employee has met certain conditions (usually, length of service) which stop an employer from arbitrarily preventing the employee's enjoyment of benefits. A "matured" pension is one in which a particular employee is eligible for present payments from a plan. In some jurisdictions (the number of which continues to decline), lack of vestedness or maturity causes pensions to be considered "mere expectancies" or otherwise non-divisible. It is therefore most important to consider these factors when involved in multi-jurisdictional cases. Vestedness or maturity may, however, have an impact on valuation of pension benefits.

Several States have adopted, or echoed, the law of California commonly referenced as the "*Gillmore*" rule.[44] Those cases made it clear that in California a spouse has to make an "irrevocable election" at the time of divorce whether to begin receiving the spousal share of the retirement benefits upon maturity, or 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.

The core holding of the California courts:

> 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.[45]

In practice, this has required the use of a spousal share to be paid based upon a hypothetical sum payable to the worker at the moment of eligibility, and a reservation of jurisdiction to recast that spousal share as a percentage of the retirement benefit ultimately received upon actual retirement. The precise language necessary to accomplish this task varies depending on the type of retirement at issue.

3. Place of Accrual; Technicality and Practicality

The majority of jurisdictions, and nearly al the community property States, follow some form or quasi-community property statute, providing that property acquired outside the state is deemed to be community property if it would have been community property if acquired within the state. The others follow a "pure borrowed law" approach, whereby their courts determine the divisibility of assets according to the law of the state in which those assets accrued.[46]

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[44] As set out in *In re Marriage of Gillmore*, 629 P.2d 1 (Cal. 1981), and *In re Marriage of Luciano*, 164 Cal. Rptr. 93 (Ct. App. 1980).

[45] *Gemma, supra*, 105 Nev. at 463-64, *quoting Luciano, supra*, 164 Cal. Rptr. at 95.

[46] *See Braddock v. Braddock*, 91 Nev. 735, 542 P.2d 1060 (1975).

C. The Time Rule

1. Defined Benefit Types of Plans

A defined ***benefit*** plan (often called a pension plan or retirement plan) is usually funded by employer contributions (although in some plans employees can contribute) and is intended to 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 can be distributed from defined benefit plans.

In addition to traditional private-employer plans governed by ERISA, the primary retirement benefits provided by the Civil Service under CSRS and FERS, military retired pay, and most PERS plans are all variations of defined benefit plans.

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.

2. 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 retirement during marriage providing exactly $1,000 after 20 years.

In California, the spousal share ceases to accumulate upon "final separation."[47] 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.[48] 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.

Here in Nevada, community property ceases to accrue on the "date of divorce."[49] 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.

3. 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 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.[50]

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

Some critics complain that such a formula gives the non-employee former spouse an interest in the employee spouse's post-divorce earnings, where the divorce occurs while the employee is still

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

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

[49] *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.

[50] *See*, *e.g.*, *Marriage of Poppe*, 97 Cal. App. 3d 1, 158 Cal. Rptr. 500 (1979); *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).

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.[51]

Certain other States, while rejecting the Texas approach, have nevertheless left the door open to an employee spouse establishing that increases in retirement benefits are "attributable to post-dissolution efforts of the employee spouse, and not dependent on the prior joint efforts of the parties during the marriage," and therefore are the separate property of the member.[52] Such cases invite fact-intensive hair-splitting since, as the Nevada Supreme Court observed, there is an expectation of pension increases by way of "ordinary promotions and cost of living increases, in contradistinction to the increased income the employee spouse achieved because of post-marriage effort and accomplishments."[53]

The Texas 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.

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.

4. Variations Regarding Payment Upon Eligibility

Several State courts have held that the interest of a former spouse in retired pay is realized at ***vesting***,[54] theoretically entitling the spouse to collect a portion of what the member ***could*** get at that

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

[52] *Barr v. Barr*, ___ A.2d ___ (N.J. Super. Ct. App. Divorce. No. A-1389-09T2, Jan. 19, 2011).

[53] *Gemma v. Gemma*, 105 Nev. 458, 463, 778 P.2d 429, 432 (1989).

[54] 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).

time irrespective of whether the member actually retires.[55] As phrased by the California court in *Luciano*: "The employee spouse cannot by election defeat the nonemployee spouse's interest in the community property by relying on a condition within the employee spouse's control."[56]

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.[57]

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

5. Should the Time Rule Apply to Defined Contribution Plans?

A defined contribution plan is one in which a specified amount is contributed by the employer and/or the employee into an individual account and invested on the employee's behalf. Such plans usually provide a statement of each participant's account at least annually. Defined contribution plans generally pay lump sums, but they may offer other forms of benefits.

The most common examples of defined contribution plans are discretionary profit-sharing plans and formula plans (e.g., money purchase and target benefit pension plans). Other examples are employee stock ownership plans (ESOPs), simplified employee pensions (SEPs), and SIMPLE 401(k) plans. The key concept for such plans is that they have a specific balance of funds belonging to each particular employee.

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[55] *See In re Marriage of Luciano*, 164 Cal. Rptr. 93, 104 Cal. App. 3d 956 (Ct. App. 1980); *In re Marriage of Gillmore*, 629 P.2d 1, 174 Cal. Rptr. 493 (Cal. 1981); *In re Marriage of Scott*, 202 Cal. Rptr. 716, 156 Cal. App. 3d 251 (Ct. App. 1984); *Gemma v. Gemma*, 105 Nev. 458, 778 P.2d 429 (1989); *Koelsch v. Koelsch*, 713 P.2d 1234 (Ariz. 1986); *Ruggles v. Ruggles*, 860 P.2d 182 (N.M. 1993); *Balderson v. Balderson*, 896 P.2d 956 (Idaho 1994); *Blake v. Blake*, 807 P.2d 1211 (Colo. Ct. App. 1990); *Harris v. Harris*, 107 Wash. App. 597, 27 P.3d 656 (Wash. Ct. App. 2001); *Bailey v. Bailey*, 745 P.2d 830 (Utah 1987) (time of distribution of retirement benefits is when benefits are received "or at least until the earner is eligible to retire").

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

[57] 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.

Most States that have brought themselves to issuing any guidelines at all for the distribution of pension plans have done so in defined benefit plan cases. The cases tend to espouse 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 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 at issue in many divorce cases (defined contribution plans).

The disconnect, and this discussion, is fully applicable in the Civil Service and military case context, as well as in private pension cases, because (as discussed below) practitioners now are required to deal not only with the standard 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.[58] The scant case authority squarely addressing this issue has agreed with that proposition.[59]

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[58] *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).

[59] *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)).

D. Overview of the Major Retirement Systems

1. Private Pensions

Many attorneys find the various forms of benefits available from private employers to be confusing. Generally, private plans come in the two varieties discussed above – defined benefit plans and defined contribution plans. But since private employers are generally free to provide any (or no) retirement plans to their employees, there are huge variations in plan specifics from one employer to another, which is fully allowable so long as the plan does not violate the relevant federal law – ERISA and the REA.

The basic requisites for "qualifying" a DRO as a QDRO are discussed above. An order is *not* "qualified" if it requires a plan to provide a type or form of benefit not otherwise available under the plan, or requires the plan to provide a greater (actuarially computed) sum of benefits, or requires payment of benefits to an Alternate Payee that are required to be paid to *another* Alternate Payee under a prior QDRO.[60] QDROs need not necessarily be long or complex (although they sometimes are both of those things); the question is what is sought to be accomplished, and what safeguards are reasonably necessary given the parties, the background factual situation, the kind of plan involved, and the desired distributions.

Individual Retirement Accounts ("IRAs"), and "Keogh" plans are private retirement plans that do not really fit in with the above two varieties. Keoghs are essentially like the above plans but for sole proprietors, partnerships, or "S" corporations. Note that an IRA can be divided in a divorce action without a QDRO, so long as the Decree or other court order explicitly calls for its distribution.

2. Civil Service Benefits

a. CSRS & FERS Benefits

Employees of the United States Government have several different kinds of retirement plans. The largest of these governs the Civil Service. It is a unique statutory scheme with its own rules, tests, opportunities and traps.

For those working in the U.S. Civil Service, a retirement system has been in place in some form since 1920, which is the date from which the "old" system ("Civil Service Retirement System," or "CSRS") for those who began service before 1984, can be traced.[61] The entire system was altered

[60] *See* 29 U.S.C. § 414(p)(3), 29 U.S.C. § 1056(d)(3)(D).

[61] *See* 5 U.S.C. § 8331.

for incoming employees in a "new" system ("Federal Employees' Retirement System," or "FERS"), for those who began service on or after January 1, 1984.[62]

Under both systems, federal statutes permit the division and direct payment to the former spouse of *all* or a portion of a retiree's benefits in conformity with a State court's decree or approved property settlement agreement. Voluntary allotments may also be put in place by the retiree. There is no minimum age for the former spouse, but the marriage must have lasted at least nine months. The former spouse's payments of the lifetime benefits end when the retiree dies.

Essentially, the Civil Service retirement system is a defined benefit plan, which takes into account years of service and highest salary in determining a monthly sum to be paid to an employee from the date of retirement until death. In 1984, the new system also created a defined contribution retirement account called the "Thrift Savings Plan" ("TSP"), but it is administered separately; so there are really two different benefits to track in every divorce case.

In 1992, sweeping changes were made to the regulations governing division of Civil Service retirement benefits, making virtually every prior reference on the subject out of date. The new regulations addressed the employee annuity (the pension), refunds of employee contributions, and survivor's benefits, but not the TSP.

How these benefits are treated upon divorce is primarily governed by State law, except where limited by the federal regulations. Guidance is available in the form of a "Handbook for Attorneys" who are drafting retirement orders for CSRS or FERS retirement benefits; it is available on line.[63]

One special peculiarity of Civil Service cases is the completely different lexicon used by the OPM, which any attorney crafting orders must know to effectively address those benefits. Essentially, the OPM re-invented many words. At the top of the terminology list is the caution to ***never*** use the term "QDRO" or "Qualified Domestic Relations Order" in any Civil Service case. The OPM word is "COAP" ("Court Order Acceptable for Processing"). For the same reason, do *not* use the ERISA term "Alternate Payee." Refer to the spouse of the wage-earner as "Former Spouse."

The OPM even assigned new meanings to words long used elsewhere to mean something else. For example, in OPM-ese, the "accrue" does ***not*** refer to the accumulation of benefits; it means the commencement of payments under the retirement plan. "Employee annuity" means recurring payments to a retiree, not the account itself. In other words, it is a verb, not a noun. "Gross" does not mean "all." "***Self-only***" means all. "Gross" means self-only less survivorship premium.

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[62] *See* 5 U.S.C. § 8401.

[63] *See A Handbook for Attorneys on Court-ordered Retirement, Health Benefits, and Life Insurance Under the Civil Service Retirement System, Federal Employees Retirement System, Federal Employees Health Benefits Program, and Federal Employees Group Life Insurance Program* (United States Office of Personnel Management, Retirement and Insurance Group, rev. ed. July, 1997); http://www.opm.gov/retire/html/library/other.html.

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

The original regulations would have voided any order using that term even if otherwise perfect. The OPM reasoning is that use of the language indicates that the courts and attorneys drafting the order do not know that ERISA is inapplicable to federal retirement plans, and so the orders are presumed defective. Now, the order will still be enforced if technically sufficient (so long as all the correct terminology is present), but the better practice is to not use language found objectionable by OPM.

Every nook and cranny of the regulations must be examined to prevent error. There are too many to list, so only examples are provided here. Practitioners are urged to get the reference works and regulations, and review them carefully.

The COAP must specifically state that OPM is to pay the money directly to the former spouse. Any reference to a "Self-only Annuity" contradicts any attempt to insert a survivor annuity. It is apparently possible to have an "interim COAP" provide for payments to a court while matters are being worked out, with an amended COAP submitted when the court issues its final order. The COAP may *not* specify that payments continue for the lifetime of the former spouse (since the benefits terminate at the death of the employee, and only *survivor's* benefits would be available after that date). Which retirement system is at issue *must* appear in the COAP (but the order is probably enforceable even if an error is made in that regard).

Three separate orders should be in every COAP, addressing: the lifetime benefits ("employee annuity"); the potential refund of employee contributions; and death benefits ("former spouse survivor annuity"). A proper order will contain specific provisions dealing with each of the three types of benefits addressed in the regulations. If an order is submitted using the words "retirement accounts" or "retirement fund" as the thing to be divided, OPM will interpret the order as going to contributions only and will *not* divide the annuity.[64] Attempts to stipulate to modifications without a formal order will be ignored.

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

A COAP may be used as a resource for payment of accrued arrearages. The COAP must specify how much is to be paid, so as to obtain accrued arrears, interest on the arrears, and interest on the

[64] *See* 5 C.F.R. § 838.612.

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

As with ERISA-based private plans, but unlike the military and most State plans, a spouse can be awarded up to 100% of the retirement benefits. If the order does not specify, the OPM will presume that any percentage or fraction payable to the spouse is from what OPM defines as the "gross" annuity (i.e., ***after*** deduction for the survivorship premium).

Amendments to court orders altering the payments due to a former spouse will be honored, prospectively, but specific instructions have to be given if OPM is asked to make up for a prior under- or over-payment.

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

The regulations allow the spouse to be awarded a percentage, fraction, formula, fixed dollar sum certain, or "prorata share" of whatever benefits (self-only, gross, or net) are being divided.

Apparently, unlike with military orders, it is ***possible*** to issue a "dollars plus percentage of COLAs" form of order as long as everything is clearly spelled out, but OPM will ***presume*** that an order for a percentage or fraction is supposed to include COLAs, while a dollar sum certain award is not.

Another direct contradiction to the military presumptions: an order including both a formula or percentage ***and*** a dollar sum certain will be presumed to have included the dollar sum only as an ***estimate*** of the initial payment, so that the formula or percentage controls.

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

Survivor's benefits are different for Civil Service cases. If the former spouse predeceases the member: the former spouse's share of the retirement benefits revert automatically to the retiree ***unless*** the court order provides otherwise. Instead of that automatic reversion, the court ***can*** provide that the money is paid: (1) into court (presumably for further distribution upon further court order); (2) to "an officer of the court acting as a fiduciary"; (3) to the estate of the former spouse; or (4) to

one or more of the retiree's children. Thus, it is possible to create a heritable asset for the former spouse.

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

Amendments to orders are possible, but ***not*** if they are issued after the date of retirement or death of the employee and they modify or replace the first order dividing the marital property of the employee or retiree and the former spouse. In fact, any order that awards, increases, reduces, or eliminates a former spouse survivor annuity, or explains, interprets, or clarifies any such order, ***must*** be: (1) issued prior to retirement or death of an ***employee***; ***or*** (2) the first order dividing the marital property of a ***retiree*** and former spouse.

In the lingo of the OPM, if a court order awards, increases, reduces, eliminates, explains, or clarifies an award to a former spouse, the court order must be issued before retirement or death of the employee, *or* it must be the first order dividing the marital property of the retiree and the former spouse.[65]

In other words, an order may be amended, and a COAP may issue after a divorce decree, altering, explaining, or specifying its terms – ***as long as the employee is still working and alive***. If the employee retires or dies, or is already retired or dead when the first order dividing property is submitted, it is generally too late to alter the terms of a Civil Service case; this is an enormous malpractice trap in all Civil Service cases.

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

The short version is that any practitioner drafting a COAP for a retired Civil Service worker pretty much has to get it right the first time, because the niceties of altering such an order are horribly complex, and often impossible.

b. The Thrift Savings Plan (TSP)

A "Thrift Savings Plan" ("TSP") was created by the 1986 statute creating the "Federal Employees Retirement System," or FERS, which replaced the older Civil Service Retirement System," or CSRS.

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[65] *See* 5 C.F.R. § 838.806.

It first accepted contributions on April 1, 1987. FERS employees get matching federal contributions up to a certain level. While the program is open to CSRS employees, there are no matching contributions for them. The TSP is a defined contribution type of plan for federal employees; like a private employer's 401(k) plan, it is a mechanism for diverting pre-tax funds into retirement savings. As of 2012, a "Roth" (pre-tax contributions) option was added to the TSP.

There are a variety of funds in which contributions may be invested, including the "Government Securities Investment" or "G" fund, the "Common Stock Index Investment" or "C" fund, the "Fixed Income Index Investment" or "F" fund, the "Small Capitalization Stock Index Investment" or "S" fund, and the "International Stock Index Investment" or "I" fund. Funds are periodically added, changed, or removed.

The TSP is expressly ***excluded*** from the regulations governing the Civil Service defined benefit plans.[66] It is administered by a Board (the Federal Retirement Thrift Investment Board),[67] entirely separate from the OPM, and has its own governing statutory sections and regulations.[68] The TSP Board has its own finance center.[69]

c. Medical Benefits: FEHB/CHCBP

Health Benefits are provided under the Federal Civil Service Retirement System, for both employees and their spouses. Post-divorce spousal coverage requires prompt application. Within 60 days of the divorce, the spouse must apply for continuation of "FEHB" ("Federal Employees Health Benefits") and to be eligible to receive those benefits, must receive a portion of the retiree's annuity under a valid COAP.

FEHB coverage is in effect if the spouse is awarded ***either*** a portion of the annuity upon retirement ***or*** a survivorship interest.[70] The spouse loses eligibility to continue with the insurance if the spouse remarries prior to age 55.

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[66] 5 C.F.R. § 838.101(d).

[67] The Thrift Savings Plan is ***not*** addressed in the clause set provided by Office of Personnel Management. Those wishing further information on the Thrift Savings Plan can call the administering agency (Federal Retirement Thrift Investment Board) toll free at its Louisiana finance center: (1-877-968-3778).

[68] 5 U.S.C. § 8435(d)(1)-(2), 8467; 5 C.F.R. Part 1653, Subpart A.

[69] Thrift Savings Plan Service Office, National Finance Center, P.O. Box 61500, New Orleans, LA 70161-1500 (TSP Service Office fax number: (504) 255-5199). The TSP Service Office is the primary contact for participants who have left federal service, and it also handles questions about loans, contribution allocations, interfund transfers, designations of beneficiaries, and withdrawals for all participants.

[70] 5 C.F.R. § 890.803(3)(i).

If a spouse is ineligible for any of the benefits, there is a COBRA-like program of carry-over coverage available for 3 years.

3. Military Benefits[71]

a. Retirement Benefits

The USFSPA is both jurisdictional and procedural; it both permits the State courts to distribute military retirement to former spouses, and provides a method for enforcement of these orders through the military pay center. The USFSPA itself does not give former spouses an automatic ***entitlement*** to any portion of members' pay. Only State laws can provide for division of military retirement pay in a divorce, or provide that alimony or child support are to be paid from military retired pay.[72] 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.[73]

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,[74] and the pay centers were consolidated.[75] There are at least three different possible ways to calculate

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[71] These materials contain the barest possible sketch of the information necessary to appropriately address these benefits. For much more detail, see Marshal Willick, MILITARY RETIREMENT BENEFITS IN DIVORCE (ABA 1998); Marshal Willick, *Divorcing the Military: How to Attack; How to Defend*, posted at http://www.willicklawgroup.com/military_retirement_benefits.

[72] 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).

[73] *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).

[74] 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. *See* 66 Fed. Reg. 53957-01 p. 635 (2001). Confusion reigned for years, during which DFAS apparently relied primarily on the 1995 proposed regulations. DFAS finally issued comprehensive replacement regulations, at Department of Defense Financial Management Regulation (DoDFMR) 7000.14-R, Vol. 7B, Ch. 29 ("Former Spouse Payments From Retired Pay") (Feb. 2009). For DoDFMR 7000.14-R, see the DFAS website at http://www.dod.mil/comptroller/fmr. For the first time, DFAS included a model retirement division order, but like most model orders, it does not anticipate all the choices counsel are required to consider (such as survivorship benefits), and should not be relied upon.

[75] 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.

military retirement benefits; which is applicable depends on the date the member first entered service.

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

To be entitled to a "year" of creditable service, the reservist must obtain at least 50 "retirement points." A point is awarded for each day of active service, or for full-time service while performing annual active duty for training or attending required training. A point is awarded for each drill performed adequately, or for each three hours of military correspondence or extension courses that are successfully completed. There are various other ways of acquiring points. A maximum of 365 points may be earned each year (366 in a leap year). Any year in which the 50-point minimum is not reached does not count toward retirement, although the points earned in such years eventually factor into the retired pay paid.

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

In a "mixed" service case, the age of retirement may not be 60. Effective January 27, 2008, eligibility to receive retired pay is advanced by three months for each 90 days of qualifying active duty service performed after that date in any fiscal year, to a maximum advancement of eligibility of ten years (at age 50).[76] That include training, operational support duties and even attendance at military schools, but not weekend drills, the regular two weeks of annual training, or time spent receiving medical care or being medically evaluated for disability.

Figuring reserve retirement pay is complex; the details are beyond the scope of these materials.

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.[77] 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.[78] 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

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[76] *See* Pub. L. No. 110-181, 122 Stat. 160, § 647 (Jan. 28, 2008).

[77] 10 U.S.C. § 1408(d)(4).

[78] 10 U.S.C. § 1408(c)(2).

retirement benefits as a source for child support or spousal support payments is proper service on the military pay center of a certified court order, issued by a court having personal jurisdiction over both parties under the law of that State, requiring payments to a former spouse for such support.

The statute is more limiting regarding division of retired pay as property, however. The former spouse can apply for direct payment from the military to the former spouse,[79] but the USFSPA limits direct payment to a former spouse to 50% of disposable retired pay for all payments of property division.[80] More than fifty percent of disposable pay may be paid[81] 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).[82] The Department of Defense has concurred in this interpretation.[83]

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

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[79] 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.

[80] 10 U.S.C. § 1408(e)(1).

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

[82] *See*, *e.g.*, *Gonzalez v. Gonzalez*, ___ S.W.3d ___ (No. M2008-01743-COA-R3-CV, 2011 WL 221888, Tenn. Ct. App., Jan. 24, 2011) (while the amended USFSPA "presents a frustrating tangle of mixed messages and conflicting intentions," the savings clause of 10 U.S.C. § 1408(e)(6) offers "the only clear expression of Congress' intent as to state court orders . . . not . . . totally satisfied by the federal government's payments made directly"); *In re Madsen*, No. 00-4811-WH, 2002 WL 34552506 (Bankr. S. D. Iowa, Oct. 15, 2002); *MacMeeken v. MacMeeken*, 117 B.R. 642 (1990) (Bankr. D. Kan. 1990); *Maxwell v. Maxwell*, 796 P.2d 403 (Utah App. 1990); *Ex parte Smallwood*, 811 So. 2d 537 (Ala. 2001), *cert. denied*, 534 U.S. 1066 (2001); *In re Marriage of Bacanegra*, 792 P.2d 1263 (Wash. Ct. App. 1990); *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); *In re Marriage of Bowman*, 972 S.W.2d 635 (Mo. Ct. App. 1998); *Knoop v. Knoop*, 542 N.W.2d 114 (N.D. 1996) (indicating in dicta that awards are limited to 50%); *Beesley v. Beesley*, 758 P.2d 695 (Idaho 1988).

[83] *See* Department of Defense, A Report to Congress Concerning Federal Former Spouse Protection Laws at 76 (2001); Pub. L. 101–510, § 555(e), 104 Stat. 1485, 1569.

> Nothing in this section shall be construed to relieve a member of liability for the payment of alimony, child support, or other payments required by a court order on the grounds that payments made out of disposable retired pay under this section have been made in the maximum amount permitted under paragraph (1) or subparagraph (B) of paragraph (4). Any such unsatisfied obligation of a member may be enforced by any means available under law other than the means provided under this section in any case in which the maximum amount permitted under paragraph (1) has been paid and under section 459 of the Social Security Act (42 U.S.C. 659) in any case in which the maximum amount permitted under subparagraph (B) of paragraph (4) has been paid.[84]

The USFSPA has been modified many times since 1983. Generally, 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[85] 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 direct payments to the spouse are limited to 50% of "disposable pay."

Military retirement benefits are absolutely critical in any divorce case involving a military member; in a long-term marriage involving years of active duty service, the pension is typically the sole or major asset of the marriage. Senior enlisted personnel frequently retire after 20 years active service in their early forties and receive a lifetime pension of one-half their basic pay – a minimum of about

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[84] 10 U.S.C. § 1408(e)(6).

[85] 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, and are specifically contemplated in the 2009 regulations in DoDFMR 7000.14-R, Vol. 7B, Ch. 29 ("Former Spouse Payments From Retired Pay").

$2,000 per month, every month for life. And there are cost of living adjustments. In present value terms, a typical military retirement is worth some half million to million dollars.

There are lots of peculiarities to the military retirement system. One that frequently is misunderstood, stemming from a Congressional compromise when the USFSPA was first passed, is the so-called "ten year rule."

A court order that divides military retired pay as property may only be enforced by direct payment to the former spouse if the parties were married for at least ten years during which the member performed at least ten years of creditable military service.[86] 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."

The restriction is upon direct payment ***only***, and not upon the substantive right of the former spouse under state law to a portion of the retired pay as property. If the marriage lasted less than ten years during active duty, the retired pay could still be treated as marital property by the court in balancing the property awards to each spouse, but no award to the former spouse of a portion of that retired pay could be enforced by obtaining direct payment from the military pay center.

In other words, the 20/10/10 rule is *not* a limitation upon the subject matter jurisdiction of the state courts. Its practical effect can be the same as a legal bar, however. A former spouse in possession of an order that does not satisfy the rule must rely on whatever enforcement mechanisms are available under state law. The only work-around for this trap is to provide for alimony, either entirely as a replacement for a property interest in the retirement, or as a reserved possibility if the retirement cannot be divided as provided in the decree or the member fails to make required payments.

Military cases are more complex when the divorce occurs while the member is still on active duty. First, the member could retire early. Over the years Congress has periodically re-authorized various "early out" programs, including the SSB, VSI, and 15-year retirement program called TERA.

Second, the member could retire late. A military career may now extend for 40 years. Therefore, any Nevada divorce of a still-serving military member should include conscious consideration of the *Gillmore*/*Gemma*/*Fondi* division at eligibility provisions.

Third, the retirement could be entirely swapped for something else. Even many years after the divorce, a member may request a disability rating, obtain it, be awarded (non-divisible) disability retired pay, and waive (divisible) retired pay equal to the sum of disability pay, thus effectively reducing or eliminating the spousal share.

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[86] 10 U.S.C. § 1408(d)(2); 32 C.F.R.§ 63.6(a)(1)-(2).

Where V.A. disability exists at the time of divorce, the court cannot divide those benefits as property, but the cash flow "may be considered as a resource for purposes of determining [one's] ability to pay alimony."[87]

The situation is more difficult for disability claims made after a divorce in which a spouse is awarded a portion of the retirement benefits as that spouse's separate property. Many courts have held that reimbursement to a spouse when the member recharacterizes retirement as disability, whether or ***not*** there was any kind of indemnification or safeguard clause in the underlying decree.[88] But the cases are not uniform around the country, and a cautious practitioner should not take that result for granted, and insist on fallback indemnification clauses.

There is way more to the disability picture, including multiple programs through which disability benefits may be awarded, having different effects on the retired pay. Two currently in operation are CRDP and CRSC, but the entire disability compensation legal framework has been and apparently will be in flux for some time.

Another way that military retirement benefits could be swapped is by being rolled into Civil Service retirement, which as detailed above is a completely different retirement program, administered by a different federal agency (OPM), but is also essentially a non-contributory defined benefit pension plan. A military member with subsequent Civil Service work history can either get military retirement benefits, then qualify for and receive Civil Service benefits, ***or*** roll the military time into the Civil Service. Which is better depends on amount of military retired pay versus the value of that many years of service in expanding the available Civil Service retirement.[89]

Perhaps more critically in military cases than in any others involving retirement benefit division, counsel for the spouse should ensure that the court orders contain both a reservation of jurisdiction to enter an alimony award if the retired pay is ever reduced, and a direct explicit indemnification clause.[90]

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[87] *See Riley v. Riley*, 571 A.2d 1261 (Md. Ct. Spec. App. 1990); *In re Marriage of Howell*, 434 N.W.2d 629, 633 (Iowa 1989).

[88] *See McLellan v. McLellan*, 533 S.E.2d 635, 637 & 638 n.1 (Va. Ct. App. 2000); *Longanecker v. Longanecker*, 782 So. 2d 406, 408 (Fla. Ct. App. 2001); *Blann v. Blann*, 971 So. 2d 135 (Fla. Ct. App. 2007); *Bienvenue v. Bienvenue*, 72 P.3d 531 (Haw. Ct. App. 2003); *In re Marriage of Nielsen and Magrini*, 792 N.E.2d 844 (Ill. App. Ct. 2003) (indemnification inferred from percentage award to former spouse); *Black v. Black*, 842 A.2d 1280 (Maine 2004); *In re Marriage of Warkocz*, 141 P.3d 926 (Colo. Ct. App. 2006).

[89] In 1997, Congress required tracing spousal interest in military retirement benefits to Civil Service benefits when they were combined; *see* Handbook for Attorneys, *supra*, at ¶ 111.

[90] *See In re Strassner*, 895 S.W.2d 614 (Mo. Ct. App. 1995); *see also Owen v. Owen*, 419 S.E.2d 267 (Va. Ct. App. 1992); *Dexter v. Dexter*, 661 A.2d 171 (Md. Ct. App. 1995); *McHugh v. McHugh*, 861 P.2d 113 (Idaho Ct. App. 1993); *Scheidel v. Scheidel*, 4 P.3d 670 (N.M. Ct. App. 2000); *Morgan v. Morgan*, 249 S.W.3d 226 (Mo. Ct. App. 2008) (if the spouse wanted to be spared divestment by post-divorce recharacterization, she should have put an indemnification clause in the divorce decree);

b. Survivor's Benefits (SBP)

In a system like that of the military – in which the payments (but not the retirement itself) can be divided – the payment of all ***retirement*** benefits, *per se*, ends with the life of the person in whose name the benefits were earned. The structure of the plan determines what happens to the ***spousal*** portion of the payment stream if the spouse dies first – they automatically revert to the member.

What may happen if the ***member*** dies first is much more potentially variable, and complex. For a spouse – or former spouse – to continue receiving money after death of the member or participant, there must be specific provision made for payments after the death of the member, by way of a separate, survivorship interest payable to the former spouse upon the death of the member.[91]

The Survivor's Benefit Plan (SBP) pays a percentage of the member's retirement to the surviving spouse or former spouse. In 1986, Congress amended the USFSPA so that State courts could ***order*** that former spouses be members' beneficiaries.[92] If a member elects, or is "deemed" by a court to have elected, to provide the SBP to a ***former*** spouse, the member's current spouse and children of that spouse cannot be beneficiaries.[93] Generally, an election to make a former spouse an SBP beneficiary is not revocable; if the election was pursuant to court order, a superseding court order is necessary to change it.[94] A survivor annuity payable to a widow, widower, or former spouse is "suspended" if the beneficiary remarries before age 55.[95]

To initiate a "deemed election," the former spouse must file a written request with the appropriate Service Secretary requesting that the election be deemed to have been made. The written request must be filed within one year of the date of the court order.[96] There are various technical requirements.

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[91] *See*, *e.g.*, *Smith v. Smith*, 438 S.E.2d 582, 584 (1993) ("The survivor benefit plan is designed to provide financial security to a designated beneficiary of a military member, payable only upon the member's death in the form of an annuity. Upon the death of the member, all pension rights are extinguished, and the only means of support available to survivors is in the form of the survivor benefit plan").

[92] Pub. Law No. 99-661 (Nov. 15, 1986).

[93] 10 U.S.C. § 1448(b)(2). The Finance Center will notify the member's spouse of the election to make the member's former spouse the SBP beneficiary, but the current spouse's consent is not required. 10 U.S.C. § 1448(b)(3)(D).

[94] 10 U.S.C. § 1450(f)(1)-(2).

[95] 10 U.S.C. § 1450(b). Before November 14, 1986, benefits were suspended if the former spouse was not yet age 60.

[96] 10 U.S.C. § 1450(f)(3)(B).

It should be noted that the ***amount*** of the survivorship interest is variable, and provides planning opportunities for counsel. The maximum SBP is selected if the entire retired pay is selected as the "base amount." The smaller the base amount selected, the smaller the survivor annuity – and the smaller the lifetime premium paid to supply it. Whatever the base amount selected, cost of living adjustments increase a base amount so as to keep it proportionally the same as the amount initially selected.

No matter what any court orders, the military pay center can ***only*** take the premium "off the top" of the monthly payments of the regular retirement.[97] Unfortunately, and counter-intuitively, that results in the parties each bearing a portion of the survivorship premium in exact proportion to their shares of the retirement itself. In other words, if the retirement is being split 50/50, then the parties share the cost of the SBP premium equally, but if the spouse is entitled to only 25% of the monthly retired pay, then the member effectively pays 75% of the SBP premium.

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

If the designation of a former spouse as beneficiary is made by a member, it technically is to be written, signed by the member, and received by the Defense Finance and Accounting Service within one year after the date of the decree of divorce, dissolution, or annulment.[98] But, as a practical matter, this has not been nearly so much a bright line test as might be thought.

At the time of the election, the member must submit a written statement to the appropriate Service Secretary. The statement must be signed by both the former spouse and the member, and state whether the election is being made pursuant to the requirements of a court order or a written voluntary agreement previously entered into by the member as a part of or incident to a divorce, dissolution, or annulment proceeding. If pursuant to a written agreement, the statement must state whether such a voluntary agreement was incorporated in, ratified or approved by a court order.[99]

Anecdotal accounts, however, suggest that, informally, DFAS has adopted the position that a member divorced prior to retiring ***actually*** is to be provided the opportunity to name a former spouse as the SBP beneficiary until the last day of military service within which to name his former spouse as the beneficiary, even if that last date of service is years after the date of divorce.

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

[98] 10 U.S.C. § 1448(b)(3)(A).

[99] 10 U.S.C. § 1448(b)(5).

The Services, additionally, have been quite liberal in granting "administrative corrections" at the requests of members, even years after a divorce, when spouse coverage was in effect rather than "former spouse" coverage, but premiums were paid and the members claimed that they "mistakenly assumed that [the former spouse] remained the covered beneficiary following the divorce since SBP costs continued to be withheld."[100]

The situation is quite different when the former spouse sends in a "deemed election" after a court orders the beneficiary designation, but without the active cooperation of the member. In fact, the matter of "deemed elections" and former spouse eligibility for SBP payments presents the single biggest malpractice trap in this area, at least when it is attempted without the member's cooperation.

For many years, it was widely believed that the one-year period in which a former spouse must request a deemed election ran concurrently with the one-year period in which a member must make the election after the divorce. It was therefore thought that the former spouse simply lost the SBP designation entirely if he or she waited until the member's one-year election period ended.

Because the rules for members' designation of beneficiaries, and former spouse ***deemed*** elections are provided by different sections of law enacted at different times, however,[101] the prior "common knowledge" is not correct; the actual rules are slightly more flexible, much more complicated, and a bit illogical in application.

If the original divorce decree is silent as to the SBP (or perhaps just so unclear as to make the original order unworkable), the spouse might be able to extend the period within which he or she can request a deemed election by returning to court after the divorce and obtaining an order stating that the spouse is to be deemed the SBP beneficiary. This is because the ***member*** is obliged to make the election "within one year after the date of the decree of divorce, dissolution, or annulment,"[102] whereas the ***former spouse*** must make the request "within one year of the date of the court order or filing involved."[103]

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[100] *See*, *e.g.*, Memorandum dated February 20, 1997, from Gary F. Smith, Chief, Army Retirement Services, on behalf of the Secretary of the Army, to Director, DFAS, re: "Administrative Correction of SBP Election – Johnson, Alfred H. III" (on file with author) noting a 1994 divorce decree requiring him to maintain coverage for his former spouse and the member's 1997 request for a change in the SBP election from "spouse" to "former spouse," and directing collection of the cost refund that was paid to the member be collected, and that the records be corrected to show former spouse coverage.

[101] *Cf.* 10 U.S.C. § 1448 *with* 10 U.S.C. § 1450.

[102] 10 U.S.C. § 1448(b)(3)(A).

[103] 10 U.S.C. § 1450(f)(3)(B); Claims Case No. 99102801 (July 21, 2000, *aff'd*, Dept. of Defense Deputy Gen'l Counsel, March 8, 2002, http://www.dod.mil/dodgc/doha/claims/military/99102801.html. Apparently, decisions previously made by the Comptroller General's Office were deferred to the Department of Defense, Defense Office of Hearings and Appeals ("DOHA").

Thus, if there was ***no*** previous order giving a right to the former spouse to be the SBP beneficiary, the one-year deemed election period runs from the date of a post-divorce order concerning the SBP.[104] This is true for orders that issued prior to the effective date of the SBP deemed beneficiary law, as well as orders that inadequately attempted to provide for the SBP, or omitted all mention of the benefit.[105]

However, once a valid court order is issued requiring coverage, the one year period begins to run, and any subsequent court order that merely reiterates, restates, or confirms the right of coverage as SBP beneficiary cannot be used to start a new one-year election period.[106]

The SBP is an extremely important benefit, which practitioners ignore at their considerable peril in malpractice. While there are malpractice dangers in all retirement-related cases, they are most severe relating to survivorship matters. The potential losses to the client are catastrophic, and the resulting risks to counsel are enormous.[107]

Federal law and regulations have very stringent service requirements for electing an SBP beneficiary which, if not precisely followed, cause the benefit to be lost regardless of the court order. Perhaps most unsettling, from a malpractice perspective, is the length of time such a claim can lay dormant. Several courts have adopted a "discovery rule" for attorney malpractice cases.[108] In other words, divorces involving pensions, but in which no provision was made for survivorship interests, are malpractice land mines, lying dormant for perhaps many years until the right combination of events sets them off.

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[104] *See*, *e.g.*, Comp. Gen. B-232319 (*In re Minier*, Mar. 23, 1990), 1990 U.S. Comp. Gen. Lexis 319; Comp. Gen. B-226563 (*In re Early*, Mar. 2, 1990), 1990 U.S. Comp. Gen. Lexis 449; Comp. Gen. B-247508 (Sept. 2, 1992).

[105] As an aside, this is true even when the divorce court is unsure how to characterize the benefit. In one case, the court made a point of saying that it could not tell if the SBP was a property right, an alimony allocation, or some kind of insurance, but in any event it was valuable, and the benefit was to be secured to the former spouse, even though she did not qualify to receive a portion of the military retirement benefits themselves because the marriage at issue did not overlap the military service. *See Matthews v. Matthews*, 647 A.2d 812 (Md. Ct. App. 1994).

[106] Comp. Gen. B-244101 (*In re: Driggers*, Aug. 3, 1992); 71 Comp. Gen. 475, 478 (1992). The current regulations say that a "modification" order must actually change something before the one-year period will start over from the date of the modification order. FMR Vol. 7B., Chap 43, § 430503C.

[107] While there is not much appellate authority in this area, and virtually no statutory authority anywhere, I have been hired as an expert witness in several such cases in the past several years, in which liability was sought against practitioners who were alleged to have not properly seen to securing survivorship benefits for a spouse. Edwin Schilling, Esq., of Aurora, Colorado, estimated that 90% of his malpractice consultations involved failure to address survivor beneficiary issues. Lawyer's Weekly USA, Oct. 18, 1999, at 22 (99 LWUSA 956).

[108] *See Petersen v. Bruen*, 106 Nev. 271, 792 P.2d 18 (1990); *Semenza v. Nevada Med. Liability Ins. Co.*, 104 Nev. 666, 765 P.2d 184 (1988).

c. Medical Benefits

Another thing to watch closely in military cases is the time restrictions for former spouse qualification for ancillary benefits (medical, commissary, theater, etc.) For full benefits, the member must have served twenty years, the marriage must have lasted twenty years, and the service and marriage must have overlapped by twenty years (the "20/20/20" rule).[109] "20/20/15" former spouses divorced before April 1, 1985, are also eligible for lifetime medical benefits. Lesser benefits are available for "20/20/15" spouses divorced after that date.

A special insurance program is available for former military spouses married at least one year, but the terms and restrictions vary according to the same three factors.[110] In an appropriate case, deferring the divorce could prove to be in the parties' mutual best interest (for example, where the spouse has to have a major medical procedure, covered under military insurance, but not otherwise, and there is no other insurance available post-divorce).

The medical benefits available to qualified spouses are for treatment at uniformed services medical facilities, and benefits under programs that have undergone a variety of name changes.

It is irrelevant whether the divorce decree specifies any such benefit, or whether the parties contemplated the benefit. Like Social Security, medical benefits for former spouses who fulfill the legislative criteria have a statutory entitlement separate from the rights and obligations accruing to the member. They cost the member nothing and never should be the subject of negotiations in a divorce action.

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

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

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

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[109] *See* 10 U.S.C. § 1072(2)(F) and (G).

[110] The Continuation of Health Care Benefits Plan ("CHCBP"; *see* 10 U.S.C. § 1078a) has always provided some relief, allowing ***any*** former spouse to get up to 36 months of CHCBP coverage, and a former spouse who satisfies the 20/20/15 rule up to 48 months of post-divorce coverage (12 months free + 36 months of CHCBP coverage). *See* http://www.humana-military.com/chcbp/main.htm. There is a premium cost and certainly is not as desirable as TRICARE, but certainly beats not having any other option available.

- The former spouse must not yet be age 65. Upon eligibility for Medicare (Part A), CHAMPUS eligibility ends. Some continuing benefits for former spouses may be available under the "TRICARE-for-life" program effective October 1, 2001.[111]

Additionally, it now appears that it is possible to extend the "temporary health benefits" for a former spouse indefinitely under 10 U.S.C. § 1078a, which states that "the purpose of the CHCBP is to provide to military personnel and their dependents 'temporary' health benefits comparable to what is provided to federal civilian employees.'"

Under 10 U.S.C. § 1078a(g)(4), the "temporary" health benefits coverage becomes "unlimited" for former spouses who were enrolled in TRICARE at the time they divorced – if they meet certain criteria:[112]

- The former spouse must not be covered under any other health insurance plan.
- The former spouse must not be remarried prior to the age of 55.
- The former spouse must ***either*** receive a portion of the military retirement benefits, ***or*** be the beneficiary of the SBP as a former spouse.

The statute (10 U.S.C. § 1078a(g)(4)) provides that the continued coverage can continue beyond the "temporary" periods set out at the beginning of the statute, upon the request of a former spouse who makes a request for such coverage. Apparently, the same premium cost[113] as for temporary coverage continues to be assessed for as long as coverage is provided, and a full quarter of premium is required to be paid with the enrollment application. Application must also be made promptly – enrollment in CHCBP must be completed within 60 days of losing "normal" eligibility as either an active duty spouse or a retiree spouse – the date of entry of the divorce decree.

d. TSP

Most of the above discussion of the TSP for Civil Service employees is equally applicable here.

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[111] *See* 32 C.F.R. § 728.31. A summary of TRICARE information designed for the public, which includes a link to basic eligibility information (*see* TRICARE Beneficiaries, Using TRICARE) can be found at http://www.tricare.osd.mil/.

[112] Implementing regulations are at 32 C.F.R. § 199.20, but they are not very clear.

[113] As of 2011, individual coverage cost $1,065 per quarter, and family coverage cost $2,390 per quarter.

As of October 8, 2001,[114] military members were authorized to begin participating in the TSP, permitting members to invest in a variety of funds.[115] Military members therefore now have both a defined benefit ***and*** a defined contribution type of retirement program, both of which should be addressed upon divorce.[116] As of 2012, a "Roth" (pre-tax contributions) option was added to the TSP.

At the outset, the military chose to call its plan "UNISERV" accounts, but it is increasingly referred to simply as "TSP" like its Civil Service equivalent. If the same person has simultaneous or consecutive military and Civil Service employment, the interplay between the two plans can be complex. It is usually possible to combine the accounts, but it takes a specific application to do so,[117] and tax-exempt military contributions (i.e., those made as a result of a combat zone tax exclusion) in a military TSP account may not be transferred to a civilian TSP account.

The military plan was phased in by allowing ever greater percentages of basic pay to be contributed through 2005, where it reached 10%, after which only IRS regulations would govern contribution limits. If contributions are made to the TSP from basic pay, they may also be made from any incentive pay or special pay (including bonus pay) received, again subject to IRS limits.

The military service secretaries are permitted, but not required, to designate "critical specialties." Members within those specialties serving on active duty for a minimum of six years would receive contributions by the government, matching some of the sums contributed from basic pay.[118]

e. Special (Jurisdiction) Caution for Military Cases

When a Court intends to divide military retired pay as the community property of a member and a spouse, another requirement besides traditional subject matter and personal jurisdiction is in play.

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[114] Per Pub. L. No. 106-398 (Oct. 30, 2000); the regulations are found at 5 C.F.R. § 1600-1690.

[115] *See* 5 C.F.R. §§ 1600.1-1690.14.

[116] For military members, some forms of tax-exempt special compensation can be contributed, which then accrue investment returns that are also tax-exempt.

[117] Once a participant separates from either the uniformed services or federal Civil Service, the accounts ***can*** be combined (by completing Form TSP-65 and sending it to the TSP Service Office). By default, military and Civil Service accounts are ***not*** combined, but must be separately addressed.

[118] Matching contributions are designed to apply to the first five percent of pay contributed, dollar-for-dollar on the first three percent of pay, and 50 cents on the dollar for the next two percent of pay.

In enacting the Uniformed Services Former Spouses Protection Act,[119] 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 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.[120]

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."[121]

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.

4. Government Plan (PERS)

Most states have their own pension program for State employees. The rules for such plans vary widely, and are not governed by ERISA or any other national law.

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[119] 10 U.S.C. § 1408 *et seq.*

[120] 10 U.S.C. § 1408(c)(4). The new regulations (DoDFMR 7000.14-R, Vol. 7B, Ch. 29 ("Former Spouse Payments From Retired Pay") (Feb. 2009);see the DFAS website at http://www.dod.mil/comptroller/fmr) for the first time, at Sec. 290604(A)(3) (Feb. 2009) provides: "The member indicates his or her consent to the jurisdiction of the court by participating in some way in the legal proceeding."

[121] A full explanation of "federal jurisdiction," what it is and how to get it, is set out in detail in the article "Divorcing the Military: How to Attack, How to Defend," posted at: http://willicklawgroup.com/published_works.

IV. VALUATION OF PLANS IN DIVORCE ACTIONS

Some States require "valuation" of retirement plan upon divorce. Other do not. As a matter of logic, such valuation should not be required when the plan benefits are being divided in kind.

Different kinds of plans are valued in different ways. Assumptions (such as using "employee contributions" to value a plan) should be avoided, and expert assistance should be obtained where necessary.

Counsel must be careful to know what benefits are accorded by virtue of the retirement programs at issue, or as a matter of federal entitlement. There are "ancillary" benefits available through some retirement plans, such as early retirement subsidies in private pensions, or medical benefits that may (or may not) be available to spouses through governmental plans depending on facts and circumstances that are subject to alteration, or negotiation, between the parties. These can be included in orders, or excluded, or arranged to exist or not exist, as the circumstances of the cases indicate – and with ramifications for both parties.

V. OTHER MATTERS

There are ***lots*** of additional matters to consider in any divorce case involving a pension – actual division and distribution of benefits, bankruptcy possibilities and safeguards, timing and service requirements, public versus private pension variations, disability safeguards, reservations of jurisdiction, taxes, offsets, etc. The list is lengthy.

VI. CONCLUSIONS

Pension plans are ubiquitous, and are typically the most important single asset at issue in a divorce case. It has become increasingly important for domestic relations practitioners to seek out the existence of such assets in each case, to learn all aspects of the relevant plans, to develop appropriate valuations for those assets where necessary, and to properly provide for the distribution of all retirement and survivorship benefits available. Only then can counsel intelligently negotiate – or litigate – their clients' interests in such retirement benefits.

Practitioners are cautioned that the drafting of QDROs and other retirement benefit division orders can be a complex venture, replete with traps by omission and commission. **Slavish copying of any form is an invitation to disaster.** Unless counsel is fully comfortable with all plan rules, requirements, attributes, and limitations, expert assistance should be obtained wherever necessary.

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