

# **DIVORCING THE MILITARY: HOW TO ATTACK, HOW TO DEFEND**

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

These materials address a few aspects of locating servicemembers, matters of temporary support orders, and the Servicemembers Civil Relief Act, but largely focus, even as to preliminary matters such as jurisdiction, on the discussion of retirement benefits, which comprise the bulk of the materials. Changes made in the FY 2017 National Defense Authorization Act (NDAA) are also included.

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

Since the sole subject of these materials is matrimonial law, questions of collections of commercial debts, etc., are not addressed here, except tangentially. Also, the focus here is on monetary matters, so matters of custody and visitation are given short shrift.

## **II. WHY MILITARY RETIREMENT BENEFITS MUST BE ADDRESSED AT THE TIME OF DIVORCE**

It is at this point a truism that retirement benefits, usually the most valuable asset of a marriage, are divisible upon divorce to at least the degree to which they were accrued during the marriage.<sup>1</sup> This is particularly true of military marriages, in which frequent moves are the norm and there is often less opportunity to accumulate large real estate equity.

As detailed in the next section, in many cases decided before the 1970s, pensions had been treated as the personal property of the recipients or as “mere expectancies.” Statutory and case law throughout the country now recognize pension benefits as marital property with near uniformity, and most State laws treat all pension benefits (private, State government, federal Civil Service, military, etc.) the same. However, with the changes signed into law on December 23, 2016, the way military retirement benefits are divided has been removed from the purview of State divisional schemes and is controlled by federal law.<sup>2</sup>

Stated rationales for recognizing retirement benefits as marital property include that the benefits accrued during marriage, that income during marriage was reduced in exchange for

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

<sup>2</sup> Specifically, 10 U.S.C. § 1408.

the deferred pension benefits, and that the choice was made to forego possible alternative employment which would have paid more in current wages, in order to have the pension.

It is the *far* better practice to deal with military retirement benefits fully and accurately during the divorce itself, instead of deferring the matter to be dealt with “later.”<sup>3</sup> If the benefits are addressed, however poorly, later courts may refuse to correct a mis-distribution.<sup>4</sup>

Worse, 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. Jurisdictional rules could require matters of attempted partition to be resolved in “non-partition” States.

Further complicating all possible partition cases, the FY2017 NDAA limits how division of military retirement benefits is to occur and removes the possibility of stipulation by the parties for a different division of benefits. Different States may have different policies as to conformity of the federally-mandated division with the law of the divorce State, or with the forum State of a partition action.

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.<sup>5</sup>

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<sup>3</sup> 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 same time as the parties’ other property).

<sup>4</sup> See, e.g., *Thorne v. Raccina*, 136 Cal. Rptr. 887, 203 Cal. App. 4<sup>th</sup> 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).

<sup>5</sup> See *Smith v. Lewis*, 530 P.2d 589 (Cal. 1975) (\$100,000 malpractice award for failing to list and divide a military reservist retirement), overruled on other grounds, *Marriage of Brown*, 544 P.2d 561 (Cal. 1976); *Cline v. Watkins*, 66 Cal. App. 3d 174, 135 Cal. Rptr. 838 (Ct. App. 1977) (first attorney’s liability for negligence not cut off by substitution out of case and assumption of representation by second attorney who was negligent in failing to assert community interest in federal pension benefit); *Medrano v. Miller*, 608 S.W.2d 781 (Tex. Civ. App. 1980); *Aloy v. Mash*, 696 P.2d 656 (Cal. 1985); *Martin v. Northwest Washington Legal Services*, 43 Wash. App. 405, 717 P.2d 779 (Wash. Ct. App. 1986) (lawyer and firm found to liable for failure to inquire about, discuss, or seek division of client’s husband’s military pension in a dissolution case where the attorney was on notice that one of the parties was a member of the Armed Services); *Bross v. Denny*, 791 S.W.2d 416 (Mo. Ct. App. 1990) (\$108,000 malpractice award where attorney did not know that he could seek division of military retirement after change in the law).

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

### III. A BRIEF HISTORY OF MILITARY RETIREMENT BENEFITS IN DIVORCE LITIGATION

#### A. Military Retirement Prehistory; Events until *McCarty*

Before June, 1981, the treatment of military retirement benefits upon divorce varied widely from State to State. Many courts in the 1960s and 1970s did not acknowledge such benefits as property, characterizing them as either the sole property of the individual in which they were titled or “mere expectancies.”<sup>6</sup> Spouses were seldom awarded an interest in military retirement benefits, as such, upon divorce.

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

As early as 1969, however, some States had declared pension rights to be community property, divisible upon divorce.<sup>7</sup> The tide had clearly turned on this question, at least in the community property States, when the California Supreme Court issued its 1974 opinion in *Fithian*.<sup>8</sup> Pension decisions, at first, addressed benefits which were vested at the time of divorce. Eventually, divisibility was extended to non-vested and unmatured retirement benefits as well.<sup>9</sup> Including unvested retirement benefits as divisible marital property has become the clear majority view over time.<sup>10</sup>

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<sup>6</sup> See, *e.g.*, *French v. French*, 112 P.2d 235, 17 Cal. 2d 775, 778 (1941) (Naval Fleet Reserve pay), *overruled*, *In re Marriage of Brown*, 544 P.2d 561, 15 Cal. 3d 838 (Cal. 1976).

<sup>7</sup> See *LeClert v. LeClert*, 453 P.2d 755 (N.M. 1969); *Busby v. Busby*, 457 S.W.2d 551 (Tex. 1970).

<sup>8</sup> *In re Marriage of Fithian*, 10 Cal. 3d 592, 517 P.2d 449 (Cal. 1974) (recognizing the importance of military retirement benefits as a marital asset), *disapproved on other grounds*, *In re Marriage of Brown*, 544 P.2d 561, 15 Cal. 3d 838 (Cal. 1976).

<sup>9</sup> See *In re Marriage of Brown*, 544 P.2d 561, 15 Cal. 3d 838 (Cal. 1976); *Copeland v. Copeland*, 575 P.2d 99 (N.M. 1978); *In re Marriage of Luciano*, 104 Cal. App. 3d 956, 164 Cal. Rptr. 93 (Cal. Ct. App. 1980); *Forrest v. Forrest*, 99 Nev. 602, 668 P.2d 275 (Nev. 1983).

<sup>10</sup> See, *e.g.*, *Cohen v. Cohen*, 937 S.W.2d 823 (Tenn. 1996) (holding that the value of unvested retirement plans accrued during marriage constitute marital property, and noting similar holding in 37 States); *Daniel v. Daniel*, \_\_\_ N.E.2d \_\_\_ (No. 2012-2113, Mar. 26, 2014).

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

On June 26, 1981, the United States Supreme Court focused the debate by issuing its opinion in *McCarty v. McCarty*.<sup>11</sup> The husband in a California divorce had requested that his military retirement benefits be “confirmed” as his separate property. In 1977, the California trial court refused, finding that the military retirement benefits were quasi-community property,<sup>12</sup> and therefore ordered the normal “time rule”<sup>13</sup> division of the benefits.

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

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

Congress may well decide, as it has in the Civil Service and Foreign Service contexts, that more protection should be afforded a former spouse of a retired service member. This decision, however, is for Congress alone. . . . in no area has the Court accorded Congress greater deference than in the conduct and control of military affairs.<sup>14</sup>

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<sup>11</sup> *McCarty v. McCarty*, 453 U.S. 210, 101 S. Ct. 2728 (1981).

<sup>12</sup> Essentially, quasi-community property is a label used by community property States to describe property acquired outside the State that *would have been* community property if acquired within the State; such States generally divide such property as if it were regular community property.

<sup>13</sup> Some variations in how the time rule (known in some jurisdictions as the “coverture fraction”) is applied are discussed below.

<sup>14</sup> 453 U.S. at 235-36, 101 S.Ct. at 2743.

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

Congress reacted by enacting the Uniformed Services Former Spouses Protection Act (“USFSPA”) on September 8, 1982.<sup>15</sup> The declared goal of the USFSPA at the time of its passage was to “reverse *McCarty* by returning the retired pay issue to the states.”<sup>16</sup> Later re-interpretations indicated that this stated declaration of intent might not have totally overruled

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<sup>15</sup> Also commonly known as the “Federal Uniformed Services Former Spouses Protection Act,” or FUSFSPA, or as “the Former Spouses Act,” or in some references simply as “the Act.” 10 U.S.C. § 1408; Pub. L. No. 97-252, 96 Stat. 730 (Sept. 8, 1982), amended by Pub. L. No. 98-94, 97 Stat. 653 (Sept. 24, 1983), Pub. L. No. 98-525, 98 Stat. 2545 (Oct. 19, 1984), Pub. L. 98-525, 99 Stat. 677 (Nov. 8, 1985), Pub. L. No. 99-661, 100 Stat. 3885 (Nov. 14, 1986), Pub. L. No. 101-510, § 555, 104 Stat. 1485, 1569 (Nov. 5, 1990), Pub. L. No. 102-190, § 1061(a)(7), 105 Stat. 1472 (Dec. 5, 1991), Pub. L. No. 102-484, § 653(a), 106 Stat. 2426 (Oct. 23, 1992), Pub. L. No. 103-160, § 555(a), (b), § 1182(a)(2), 107 Stat. 1666, 1771 (Nov. 30, 1993), Pub. L. No. 104-106, § 1501(c)(16), 110 Stat. 499 (Feb. 10, 1996), Pub. L. No. 104-193, §§ 362(c), 363(c)(1)-(3), 110 Stat. 2246, 2249 (Aug. 22, 1996), Pub. L. No. 104-201, § 636, 110 Stat. 2579 (Sept. 23, 1996); Pub. L. 105-85, div. A, title X, § 1073(a)(24), (25), 111 Stat. 1901 (Nov. 18, 1997); Pub. L. 107-107, div. A, title X, § 1048(c)(9), 115 Stat. 1226 (Dec. 28, 2001); Pub. L. 107-296, title XVII, § 1704(b)(1), 116 Stat. 2314 (Nov. 25, 2002); Pub. L. 108-189, § 2(c), 117 Stat. 2866 (Dec. 19, 2003); Subsec. (h)(1). Pub. L. 109-163, § 665(a)(1), designated existing provisions as subpar. (A) and added subpar. (B), Subsec. (h)(2). Pub. L. 109-163, § 665(a)(2)(A), inserted “, or a dependent child,” after “former spouse” in introductory provisions, Subsec. (h)(2)(B). Pub. L. 109-163, § 665(a)(2)(B)(i), inserted “in the case of eligibility of a spouse or former spouse under paragraph (1)(A),” after “(B),” Subsec. (h)(2)(C). Pub. L. 109-163, § 665(a)(2)(B)(ii), (C), added subpar. (c), Subsec. (h)(4). Pub. L. 109-163, § 665(a)(3), inserted “, or an eligible dependent child,” after “former spouse” in introductory provisions, Subsec. (h)(5). Pub. L. 109-163, § 665(a)(4), inserted “, or the dependent child,” after “former spouse”(2006); Subsec. (h)(2)(A). Pub. L. 111-84 struck out “and” at end (2009); Subsec. (a)(4). Pub. L. 114-328, § 641(a), designated existing provisions as subpar. (A), inserted “(as determined pursuant to subparagraph (B))” after “member is entitled” in introductory provisions, redesignated former subpars. (A) to (D) as cls. (i) to (iv), respectively, of subpar. (A), and added subpar. (B) (2016).

Subsec. (b)(1)(D). Pub. L. 114-328, § 1081(b)(2)(B), substituted “(50 U.S.C. 3901 et seq.)” for “(50 U.S.C. App. 501 et seq.)”.

<sup>16</sup> “The purpose of this provision is to place the courts in the same position that they were in on June 26, 1981, the date of the *McCarty* decision, with respect to treatment of nondisability military retired or retainer pay. The provision is intended to remove the federal pre-emption found to exist by the United States Supreme Court and permit State and other courts of competent jurisdiction to apply pertinent State or other laws in determining whether military retired or retainer pay should be divisible [*sic*]. Nothing in this provision requires any division; it leaves that issue up to the courts applying community property, equitable distribution or other principles of marital property determination and distribution. This power is returned to the courts retroactive to June 26, 1981. This retroactive application will at least afford individuals who were divorced (or had decrees modified) during the interim period between June 26, 1981 and the effective date of this legislation the opportunity to return to the courts to take advantage of this provision.” S. Rep. No. 97-502, 97th Cong., 2nd Sess. 15, (1982), reprinted in 1982 U.S.Code Cong. & Ad.News 1596, 1611. See also *Steiner v. Steiner*, 788 So. 2d 771 (Miss. 2001), *opn. on reh’g*.

*McCarty* after all,<sup>17</sup> but in any event treatment of retired pay was again made dependent on the divorce laws of the jurisdictions granting decrees.

The primary purpose of the USFSPA was to define State court jurisdiction to consider and use military retired pay in fixing the property and support rights of the parties to a divorce, dissolution, annulment, or legal separation.<sup>18</sup> By fits and starts, every State in the Union permitted military retirement benefits to be divided as property, at least in certain circumstances.<sup>19</sup>

The original USFSPA was both jurisdictional and procedural; it both permitted the State courts to distribute military retirement to former spouses, and provided a method for enforcement of these orders through the military pay center. The USFSPA itself did not give former spouses an automatic *entitlement* to any portion of members' pay; only State laws could 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.<sup>20</sup> Rights granted by State law were limited by federal law, even if State law did not so provide, and even if the courts of the States did not see any such limitations.<sup>21</sup>

The USFSPA set up a federal mechanism for recognizing State-court divisions of military retired pay, including definitions that were prospectively applicable, and rules for

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<sup>17</sup> In *Mansell v. Mansell*, 490 U.S. 581, 109 S. Ct. 2023 (1989), the Court found that the Act did not *totally* repudiate the pre-emption found by the Court to exist in *McCarty*; Congress' failure to alter the language of the Act so as to alter this finding, when it next amended the Act in 1990, has been read by some to imply congressional consent that at least some partial pre-emption was intended to remain after passage of the Act.

<sup>18</sup> Legislative History, Pub. L. No. 97-252; S. Rep. No. 97-502. The Report noted that as of June 26, 1981, case decisions in "virtually all" community property States, and in many of those employing equitable distribution principles, permitted military retired pay to be considered marital property subject to division. In only the two then-existing "title" States, Mississippi and West Virginia, were pensions considered upon divorce the exclusive property of the party in whose name the asset was titled. Since that time, both of those States have adopted equitable distribution schemes.

<sup>19</sup> Puerto Rico, a commonwealth of the United States did not allow the division of military retirement benefits.

<sup>20</sup> 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).

<sup>21</sup> *See Mansell v. Mansell*, 490 U.S. 581, 109 S. Ct. 2023 (1989), criticizing conclusions reached in *Casas v. Thompson*, 720 P.2d 921 (Cal. 1986), *cert. denied*, 479 U.S. 1012 (1987).

interpretation to be followed by the military pay centers in interpreting the law; later, regulations were adopted,<sup>22</sup> and the pay centers were consolidated.<sup>23</sup>

A former spouse's right to a portion of retired pay as property terminates upon the death of the member or the former spouse; the court order can also provide for an earlier termination.<sup>24</sup> 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.<sup>25</sup> To obtain benefits extending beyond a member's death, the former spouse must obtain designation as the beneficiary of the Survivor's Benefit Plan (discussed below), which has its own technical requirements.

Military retirement benefits can be treated as property to be divided between the parties, or as a source of payment of child or spousal support, or both. All that is necessary to use military retirement benefits as a source for child support or spousal support payments is proper service on the military pay center of a certified court order, issued by a court having personal jurisdiction over both parties under the law of that State, requiring payments to a former spouse for such support.

The statute is more limiting regarding division of retired pay as property, however. The former spouse can apply for direct payment from the military to the former spouse,<sup>26</sup> but the USFSPA limits direct payment to a former spouse to 50% of disposable retired pay for all

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<sup>22</sup> 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.

<sup>23</sup> 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., ever since. As of 2006, Army and Air Force military pay related calls (except for TSP matters) were routed to an office in Indianapolis.

<sup>24</sup> 10 U.S.C. § 1408(d)(4).

<sup>25</sup> 10 U.S.C. § 1408(c)(2).

<sup>26</sup> Application for Former Spouse Payments From Retired Pay, DD Form 2293 (DD-2293). NOTE: This form can be filled out and then printed as an interactive pdf form by going to: <http://www.dtic.mil/whs/directives/infomgt/forms/eforms/dd2293.pdf>.

payments of property division.<sup>27</sup> More than fifty percent of disposable pay may be paid<sup>28</sup> if there is a garnishment for arrears in child or spousal support,<sup>29</sup> or in payments of money as property *other than* for a division of retired pay. Application for payment must be made using the proper form.<sup>30</sup>

In other words (and counter-intuitively), about the only part of arrearages arising from a divorce judgment that *cannot* be satisfied by garnishment from retired pay is arrearages *in* retired pay.

Some courts have ruled that the 50% limitation is a *payment* limitation only, so that trial courts may award more than that amount – up to 100% of the retired pay – to the former spouse, but the pay center can only pay 50%, leaving the spouse to collect the remainder from the military member by other means (such as normal State court contempt proceedings if not paid).<sup>31</sup> The Department of Defense has concurred in this interpretation.<sup>32</sup>

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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<sup>27</sup> 10 U.S.C. § 1408(e)(1).

<sup>28</sup> Up to 65% of “remuneration for employment” under the Social Security law, 42 U.S.C. § 659.

<sup>29</sup> 10 U.S.C. § 1408(e)(4)(B).

<sup>30</sup> Application for Former Spouse Payments from Retired Pay, DD Form 2293 (also denominated OMB No. 0730-0008), which can be filled out as an interactive PDF at <http://www.dtic.mil/whs/directives/forms.efoms/dd2293.pdf>.

<sup>31</sup> 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).

<sup>32</sup> See *A Report to Congress Concerning Federal Former Spouse Protection Laws*, *infra*, at 74-76.

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.<sup>33</sup>

The USFSPA has been modified many times since 1983. Many of the more notable changes are specifically discussed in these materials, but it can generally be said that survivorship rights for former spouses were expanded, the actual procedural calculation for the division of benefits that will be performed by DFAS has been made uniform by federal mandate, 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<sup>34</sup> 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” (discussed in more detail below).

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<sup>33</sup> 10 U.S.C. § 1408(e)(6).

<sup>34</sup> Technically, they were never approved, but were 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”).

### C. The *McCarty* gap: Chaos in Wonderland

There was a twenty month “gap” between the 1981 *McCarty* decision and the congressional enactment of the USFSPA. The act was expressly made retroactive to the start of the gap period, but the language used left some room for interpretation,<sup>35</sup> which led to decades of litigation and conflicting decisions.

Some States, such as Washington, found the USFSPA itself was sufficient authority for their courts to address cases of persons divorced during the gap.<sup>36</sup> In those States, motions could be brought to divide the retirement benefits if they had been omitted, or to divide the benefits if they had been awarded solely to the member while *McCarty* was the law of the land.

Despite the “will at least afford an opportunity” language in the legislative history, however, courts in some other States, such as California and Idaho, ruled that no common law remedy existed for such persons. These rulings led to passage of “window” statutes in some of those States, specifically permitting those divorced during the gap a limited time to relitigate the division or non-division of the retirement benefits.<sup>37</sup> Nevada passed the first such statute, which expired after only six months, in 1983.<sup>38</sup> Illinois enacted the last window period, which closed in January, 1989.

Some of the States in the group which found the USFSPA inadequate authority to allow the re-opening of gap cases *never* passed legislation permitting those divorced during the gap to bring their decrees into conformity with those divorced before *McCarty* or after the USFSPA. The case law of such States, such as Texas, provides that *McCarty*-era divorces giving 100 percent of the retirement benefits to the member could not be revisited.<sup>39</sup> As the

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<sup>35</sup> The effective date section of the original enactment, Section 1006, read in part as follows:

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

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

<sup>36</sup> See, e.g., *In re Marriage of Parks*, 48 Wash. App. 166, 737 P.2d 1316 (Wash. Ct. App. 1987).

<sup>37</sup> See, e.g., *In re Marriage of Barnes*, 43 Cal. 3d 1371, 743 P.2d 915 (Cal. 1987).

<sup>38</sup> See *Burton v. Burton*, 99 Nev. 698, 669 P.2d 703 (1983) (recognizing that an order denying a motion to modify a family court order, where the motion is based on changed factual or legal circumstances, is appealable as a special order after final judgment).

<sup>39</sup> See, e.g., *Allison v. Allison*, 700 S.W.2d 915 (Tex. 1985).

number of living persons with *McCarty*-gap divorces dwindles, it becomes ever less likely that additional States will pass window statutes.

#### D. Major Cases

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

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

*Casas v. Thompson*<sup>40</sup> was a clear restatement of the law regarding military retirement benefits division as it had evolved in California prior to 1988, which was followed by several other States. It was a “partition” case ten years after entry of a divorce decree that had not mentioned the retirement. Ultimately, the spouse was granted partition of the omitted retirement from the date she filed her petition, but no arrears. The Court of Appeals affirmed with a few modifications not important here.<sup>41</sup>

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

The court found it “illogical” to limit the spousal share to a portion of *disposable* retired pay, and considered the USFSPA a complete repudiation of the *McCarty* holding. The court focused upon the legislative history that declared Congress’ intent to “restore the law to what it was,” and noted that previous California law had called for division of the entirety (i.e., the gross sum) of military retirement, as it did with all other retirement benefits.<sup>42</sup>

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<sup>40</sup> *Casas v. Thompson*, 228 Cal. Rptr. 33, 720 P.2d 921 (Cal. 1986), *cert. denied*, 479 U.S. 1012 (1987).

<sup>41</sup> *Casas v. Thompson*, 217 Cal. Rptr. 471 (Cal. Ct. App. 1985).

<sup>42</sup> *Casas v. Thompson*, 228 Cal. Rptr. 33, 720 P.2d 921 (Cal. 1986), *cert. denied*, 479 U.S. 1012 (1987). One Texas court approved a trial court’s 1995 insertion of the word “gross” in construing and enforcing its 1979 decree dividing military retirement benefits; the court found the rephrasing to be merely “reiterating” what was ordered in 1979, and added the home-spun explanation that:

though an ancient proverb attributes to lawyers the ability to change white to black, we cannot do so. A directive that X is awarded “a one-third ownership interest in an apple pie” does not mean a one third of the pie remaining after the government or anyone else takes a bite from it.

*Matter of Marriage of Reinauer*, 946 S.W.2d 853, *opn. on reh’g*, n.2 (Tex. Ct. App. 1997).

While *Casas* was widely cited and largely followed elsewhere, not all aspects of the decision had a long life, as discussed below. Today, the case is most frequently cited for the proposition that equitable defenses can be raised against a legal claim to arrearages.<sup>43</sup>

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

*Fern v. United States*<sup>44</sup> was an unusual case in that the defendant was not a former spouse but the United States itself. The suit sought to have the USFSPA declared invalid to the extent that it entitled the government to reduce the retired pay flowing to the members themselves. In other words, the members contended that, irrespective of any award to any former spouse, the full sum of retired pay should be paid to the members. It alleged unconstitutional “taking” of property in violation of the Fifth Amendment, an unconstitutional impairment of contracts with the United States (by which the members contended that they alone were to receive the entirety of their retirement benefits), and that spousal awards under the USFSPA were due process violations.

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

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

Members convinced of the righteousness of their cause continue to file such actions, sometimes as a class. The results have continued to be consistent.<sup>45</sup>

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<sup>43</sup> See also *In re Marriage of Krempin*, 83 Cal. Rptr. 2d 134, 70 Cal. App. 4th 1008 (Ct. App. 1999) (holding that respondent could raise equitable defenses to a “large arrearage in payments”).

<sup>44</sup> 15 Cl. Ct. 580 (1988), *aff’d*, 908 F.2d 955 (Fed. Cir. 1990).

<sup>45</sup> See, e.g., *Adkins v. Rumsfeld*, 464 F.3d 456 (4th Cir. 2006) (broad constitution-based assault on USFSPA rebuffed, finding that military retirement truly is a pension, or “deferred compensation for past services,” rather than “compensation for reduced job activities”).

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

*Mansell v. Mansell*<sup>46</sup> was yet another case coming out of California. When the parties divorced, the *McCarty* decision had not yet issued; the member had retired, and applied for and received disability benefits. The divorce decree included the stipulation that the parties would divide the gross sum of retirement benefits (including both retired pay and disability pay).

After Congress enacted the USFSPA, the member returned to court seeking to modify the judgment to exclude the disability portion of the retired pay from division with his ex-spouse.<sup>47</sup> The State court denied his request, holding the division of the disability portion of the military retired pay was proper. The member appealed.

The U.S. Supreme Court majority reversed, holding that the USFSPA did *not* constitute a total repudiation of the pre-emption it had declared in *McCarty*. Since the statute defined “disposable pay” as what was divisible, and excluded disability pay from that definition, the Court concluded that State courts could divide only *non*-disability military retired pay.<sup>48</sup> The dissent echoed the conclusions reached earlier by the California Supreme Court in *Casas v. Thompson* – that the gross sum of retirement benefits was available to the State divorce court for division.<sup>49</sup>

Ultimately, the matter was remanded to State court. Ironically, that court ruled that the previously-ordered flow of payments from the member to the spouse, put into place prior to the appellate *Mansell* decision, was *res judicata* and could not be terminated.<sup>50</sup> In other words, the United States Supreme Court opinion had *no effect* on the order to divide the entirety of retirement and disability payments in the final, un-appealed divorce decree in the *Mansell* case itself.

When Congress next amended the Act in 1990, it did nothing to address the *Mansell* holding. Thus, *Mansell* is often read to stand for the proposition that the subject matter jurisdiction

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<sup>46</sup> 490 U.S. 581, 109 S. Ct. 2023 (1989).

<sup>47</sup> *Mansell*, 490 U.S. at 586.

<sup>48</sup> *Id.* at 594-95.

<sup>49</sup> Justice O’Connor, joined in a dissent by Justice Blackmun, argued that the term “disposable retired pay” only limited a State court’s ability to garnish retired pay – not the court’s authority to divide that pay. *Id.* at 594-604. Both the dissent and the majority in *Mansell* concluded that the savings clause merely clarified that the federal direct payment mechanism does not replace State court authority to divide and garnish property through other mechanisms.

<sup>50</sup> *In re Marriage of Mansell*, 265 Cal. Rptr. 227 (Ct. App. 1989), *on remand from* 490 U.S. 581, 109 S. Ct. 2023 (1989).

of the State divorce courts is limited to division of “disposable retired pay.” This may be less important than was thought at the time, however, since courts have widely expressed a willingness to consider the impact of disability or other benefits *not* included in the definition of “disposable retired pay” when dividing assets between spouses.<sup>51</sup>

#### **4. *Howell*; Indemnification to Protect the Spousal Share is Disallowed by Preemption**

The divorce decree of John and Sandra Howell awarded Sandra 50% of John’s future Air Force retirement pay, which she began to receive when John retired the following year.<sup>52</sup>

About 13 years later, John applied for, and the Department of Veterans Affairs awarded, a “service-connected disability” award qualifying him for VA disability pay; the VA found John 20% disabled. To receive disability pay, John was required to give up an equivalent amount of retirement pay.<sup>53</sup>

By his election, John waived about \$250 of his retirement pay, half of which was taken from Sandra’s 50% share and paid to him instead. Sandra petitioned the Arizona family court to enforce the original divorce decree and restore the value of her share of John’s total retirement pay. The court held that the original divorce decree had given Sandra a vested interest in the prewaiver amount of John’s retirement pay and ordered John to ensure that she receive her full 50% without regard for the disability waiver. The Arizona Supreme Court affirmed, holding that federal law did not pre-empt the family court’s order.

The United States Supreme Court reversed, holding that a state court may not order a veteran to indemnify a divorced spouse for the loss in the divorced spouse’s portion of the veteran’s retirement pay caused by the veteran’s waiver of retirement pay to receive service-related disability benefits.

Resurrecting the *McCarty* holding from 1981 that federal law had “completely pre-empted” State community property law, and the *Mansell* holding from 1989 that the USFSPA only overcame that pre-emption to a “limited extent,” a unanimous Court found that *Mansell* “determines the outcome here.” The Court held that it makes no difference whether the disability occurs before or after a divorce; either way, the waived pay was beyond the power of a State court to address as a matter of federal pre-emption.

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<sup>51</sup> See, e.g., *In re Marriage of Krempin*, 83 Cal. Rptr. 2d 134, 70 Cal. App. 4th 1008 (Ct. App. 1999).

<sup>52</sup> *Howell v. Howell*, \_\_\_ U.S. \_\_\_, 2017 WL 2039158 (May 15, 2017).

<sup>53</sup> 38 U.S.C. § 5305.

Dismissing decades of holdings of the great majority of State courts and the arguments of the Solicitor General (who filed an *amicus* brief in favor of the indemnified spouse), the Court held that:

the temporal difference [between disability claims made before or after divorce] highlights only that John’s military retirement pay at the time it came to Sandra was subject to later reduction (should John exercise a waiver to receive disability benefits to which he is entitled). The state court did not extinguish (and most likely would not have had the legal power to extinguish) that future contingency. The existence of that contingency meant that the value of Sandra’s share of military retirement pay was possibly worth less—perhaps less than Sandra and others thought—at the time of the divorce.

The Court analogized military retired pay to a “defeasible property interest” subject to a condition subsequent.

Similarly, the Court dismissed any concern that the spouse’s property share had vested upon divorce, holding that “State courts cannot ‘vest’ that which (under governing federal law) they lack the authority to give.”<sup>54</sup>

The Court found that *any* orders requiring the member to indemnify or reimburse the spouse dollar for dollar so as to restore the portion of the retired pay lost due the member’s post-divorce waiver are pre-empted, “regardless of their form” because they would “displace the federal rule and stand as an obstacle to the accomplishment and execution of the purposes and objectives of Congress.”

In the slightest possible way, the Court threw a bone to spouses by “recognizing”:

as we recognized in *Mansell*, the hardship that congressional pre-emption can sometimes work on divorcing spouses. See 490 U.S., at 594. But we note that a family court, when it first determines the value of a family’s assets, remains free to take account of the contingency that some military retirement pay might be waived, or, as the petitioner himself recognizes, take account of reductions in value when it calculates or recalculates the need for spousal support.

For that proposition, the Court cited its own holding allowing contempt sanctions to issue against a member for non-payment of child support even if his only income was disability

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<sup>54</sup> Citing 38 U.S.C. § 5301(a)(1) for the principle that “disability benefits are generally nonassignable.”

pay,<sup>55</sup> and the “savings clause” of the USFSPA making state court judgments not payable under the USFSPA collectible by way of other State court proceedings<sup>56</sup> – which their own holding in this case prohibited, as it reversed the Arizona order for indemnification.

This holding appears to leave an award of “other payments” or an alimony award to the spouse, upon divorce or upon the member’s conversion of retired pay to disability pay (if it can be accomplished under State law) – the only viable means of protecting a spouse from the post-divorce recharacterization of retired pay by a member.

#### **E. FY-2017 National Defense Authorization Act (NDAA)**

As briefly discussed above, the various States have multiple presumptions and requirements for property division, but the vast majority have recognized all pensions as “property” and provided for the division of that property under some version of the “time rule” (also known as the “coverture fraction”), essentially giving to both spouses a portion of the pension benefits ultimately received in accordance with a fraction, in which the service during marriage is the numerator, and the total service is the denominator, divided by two.

For example, Nevada is a community property State in which “All property acquired after marriage is presumed to be community property.”<sup>57</sup> The Nevada statute addressing the division of community property is, typically, vague and expansive, providing only that any division other than equal must be “deemed just,” based upon a “compelling reason,” and supported by written findings.<sup>58</sup>

Nevada case law<sup>59</sup> mandates use of the “time rule” for all defined benefit pension divisions.<sup>60</sup> The time rule is defined as the time married during service divided by the total time worked for full retirement benefits; half of the resulting percentage belongs to each spouse.

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<sup>55</sup> *Rose v. Rose*, 481 U.S. 619, 630–634, and n. 6 (1987).

<sup>56</sup> 10 U.S.C. § 1408(e)(6). The provision provides that no part of the USFSPA “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” and that any benefits awarded but not payable by DFAS “may be enforced by any means available under law other than the means provided under this section.”

<sup>57</sup> *See Forrest v. Forrest*, 99 Nev. 602, 668 P.2d 275 (1983).

<sup>58</sup> *See* NRS 125.150.

<sup>59</sup> *See Gemma v. Gemma*, 105 Nev. 458, 778 P.2d 429 (1989); *Fondi v. Fondi*, 106 Nev. 856, 802 P.2d 1264 (1990); *Sertic v. Sertic*, 111 Nev. 1192, 901 P.2d 148 (1995).

<sup>60</sup> The use of the time rule for division of defined *contribution* plans is problematic and has not been addressed by the Nevada courts; the issue is discussed in greater detail below.

Additionally, the “wait and see” approach is mandated; the community has an interest in pension ultimately received, not just the pension that would be payable as of the date of divorce. Until the passage of the FY17 NDAA, **ALL** pensions divided in Nevada were subject to this uniformly applicable rule.

## **1. What Has Changed**

Based on a false assertion of fact made by a junior member of the House<sup>61</sup> and inserted into an appropriations bill without a hearing, the federal government has made an unprecedented intrusion into State domestic relations law. The USFSPA was amended through section 641 of the FY17 National Defense Authorization Act to include a provision re-defining the military retired pay that DFAS<sup>62</sup> can divide as:

- (i) the amount of basic pay payable to the member for the member’s pay grade and years of service at the time of the court order, as increased by
- (ii) each cost-of-living adjustment that occurs under section 1401a(b) of this title between the time of the court order and the time of the member’s retirement using the adjustment provisions under that section applicable to the member upon retirement.

The remainder of the USFSPA remained unchanged.

The establishment of this “Frozen Benefit” rule altered the pension division law of 45 States; the Representatives and Senators from those States approved the change without apparently knowing, or caring, that they were altering their States’ divorce statutes.

## **2. The Impact of the Statutory Change**

The change in law requires some additional work by the lawyers, and by courts, to comply with both federal and State law in a military divorce involving a member still in service. The law change did **not** affect cases where the member had already retired; those cases are treated the same as previously, since the member’s rank and time in service is already fixed by retirement.

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<sup>61</sup> That there was a widespread problem in which spouses of military members were being awarded “half the retirement benefits” after short marriages of a year or two. No example of any such case is known from anywhere in the United States.

<sup>62</sup> The Defense Finance and Accounting Service.

For any military retirement division after December 23, 2016, a still-in-service military member's rank and time in service are "frozen" for the calculation of the share of benefits that can be awarded to the former spouse and paid by DFAS.

Additionally, the former spouse's share grows only by the "retired" COLA increases that may be granted each year from the date of the order awarding the benefits to the date of actual retirement, while the member's share will grow using the (larger) active duty pay increases (COLAs) during the same period. This alone results in an unequal division of pension benefits. As an example:

Consider a spouse being awarded 50% of the benefit at the 10 year point in the member's career. Her benefit, say \$500, would equal his benefit of \$500. She does not receive this benefit until he retires after 20 years. With an average retired COLA rate of 1.99% (the average of retired COLAs over the 10 years before the statutory change), her \$500 would be worth \$608.90. The member's \$500 grows at the active duty COLA rate, which averaged 2.46% over the same period. His \$500 would be worth \$637.55 at the time of retirement.

This results in an unequal division of the community property in all active duty military divorce cases. The revised statute reduces the portion of a retirement to be received by any spouse of a military member, and makes calculations much more difficult. Whenever a court divides military retirement benefits, what the spouse will receive from DFAS is less than what many State laws require a spouse to receive.

It gets even worse if **both** parties have retirement benefits – in time-rule States, the military spouse gets a larger (time rule) interest in the non-military spouse's pension than the non-military spouse gets in the member's retirement. Such divisions, if not compensated for, violate State law.<sup>63</sup>

Since the benefit to a former spouse in such a case only increases by what she would get anyway (retired COLAs) there will **never** be a reason in still-in-service military divorce cases that the benefit should **not** be made payable at the member's first eligibility to retire.<sup>64</sup>

In one peculiar way the statutory change could work to the disadvantage of the **member** in States, such as California, that terminate marital property accrual as of the date of separation. If the regulations do what the statute indicates and require division as of the date of the court order rather than under regular state community property law, the military retirement could

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<sup>63</sup> In Nevada, for example, such a division is on its face a violation of NRS 125.150 and *Blanco v. Blanco*, 129 Nev. \_\_\_, 311 P.3d 1170 (Adv. Opn. No. 77, Oct. 31, 2013). It may also be a violation of constitutional equal protection.

<sup>64</sup> See *Sertic v. Sertic*, 111 Nev. 1192, 901 P.2d 148 (1995). The topic of pension payments to the spouse at eligibility for retirement is discussed in greater detail below.

have a larger numerator in division than other assets would be, thereby increasing the spousal share from what it would have been before the change.

### **3. Important Points About The “Frozen Benefit Rule”**

The actual regulations to be used by DFAS have yet to be promulgated as of the writing of this version of these materials. However, some aspects of changes in what is required by counsel and the courts is already apparent.

There was no “grace period” for the States to adjust to the change; the Act’s provisions were effective immediately as to all orders entered on or after 12/23/16.

There was no exception for consent of the parties. Irrespective of whether the parties have agreed on a different solution, the new definition of “disposable retired pay” will apply when the order for pension division is entered during military service (active-duty, National Guard, or Reserves).

When both parties have retirement benefits earned during the marriage, there will be a disparity between the division of the two pensions. One will be divided using a truncated benefit (the “Frozen Benefit”) under federal law, while the non-military pension will – in most States – still be divided using the time rule.

The regulations have yet to be written. When they have been drafted and vetted, the rules should be posted in the Department of Defense Financial Management Regulations (DoDFMR). However, DFAS is already enforcing the new rules.

The “hypothetical clause” (as it is called by DFAS) is the most difficult to prepare of the four acceptable military pension clauses which are accepted by the retired pay centers. The current regulation requires, for those who entered military service after September 1980, that the court order contain very detailed information about the servicemember, including the “retired pay base” calculated according to the “High Three” (the average of the highest three years of continuous compensation before the specified division date). At present, counsel must provide this information to the court. DFAS has set the following rules when submitting an order for enforcement:

- In order to enable the designated agent (DFAS Garnishment Operations) to calculate the “new” disposable retired pay amount in a case where the order becomes final prior to the member’s retirement, a court order entered after December 23, 2016, that provides for a division of military retirement pay must provide three variables:

If the member entered the service before September 8, 1980:

A fixed amount, a percentage, a formula, or a hypothetical that the former spouse is awarded;

The member's pay grade at the time of divorce;

The member's years of creditable service at the time of divorce; or in the case of a reservist, the member's creditable reserve points at the time of divorce.

If the member entered military service on or after September 8, 1980:

A fixed amount, a percentage, a formula or a hypothetical that the former spouse is awarded;

The member's high-3 amount at the time of divorce (the actual dollar figure);

The member's years of creditable service at the time of divorce; or in the case of reservist, the member's creditable reserve points at the time of divorce.

There will be an increase in the frozen benefit from the time of the court order awarding it until the actual retirement of the military member (tracking COLAs awarded regarding military retired pay).

#### **4. How to Cope with and Compensate for the Changed Federal Statute**

The USFSPA contains a "savings clause" providing that no part of the USFSPA "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" and that any benefits awarded but not payable by DFAS "may be enforced by any means available under law other than the means provided under this section."<sup>65</sup>

Nothing in the changes to the law affected a court's ability to offset other property (or make an alimony award) to equalize the property being divided, if such a division is mandatory, or deemed equitable, under State law.

Counsel and courts remain obliged to divide marital property under State law. The federal redefinition of divisible disposable retired pay appears to be a "payment limitation" like that involved in the "Ten Year Rule" rather than a limitation on the subject matter jurisdiction of the divorce court like an existing disability award under *Mansell*.<sup>66</sup>

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<sup>65</sup> 10 U.S.C. § 1408(e)(6).

<sup>66</sup> *Mansell v. Mansell*, 490 U.S. 581, 109 S. Ct. 2023 (1989).

An attorney representing a non-member spouse in a military divorce should strive to have the divorce court order that the difference between what the spouse should receive under the time rule, and what is directly payable under the revised federal law, be compensated to the spouse by a supplemental property award or alimony.<sup>67</sup>

In Nevada, for example, it is still possible to satisfy the duty under NRS 125.150 to divide property equally.<sup>68</sup> Other States can use similar provisions, with analogous citations.

Such a paragraph might look like this (if the SBP premiums are to be paid) using the DFAS default method:

**IT IS HEREBY ORDERED, ADJUDGED, AND DECREED** that [wife] is awarded her time rule share of [husband's] military retirement in accordance with the holdings in *Gemma*,<sup>69</sup> *Fondi*,<sup>70</sup> and *Sertic*.<sup>71</sup> [Wife] is deemed the irrevocable beneficiary of the Survivor Benefit Plan with the base amount set at the full retirement benefit.<sup>72</sup> The benefits payable directly from DFAS calculated in accordance with 10 U.S.C. § 1408(a) are payable upon [husband's] first eligibility to retire.<sup>73</sup> This Court retains jurisdiction to make a further property distribution or order permanent alimony in a sum sufficient, inclusive of the sums payable from DFAS, to equal a time rule distribution in accordance with Nevada law requiring equal division of community property. [Husband] is required to cooperate by providing any pay information necessary to achieve that result.

Should the final settlement/decreed *alter* the DFAS default as to how SBP premiums are to be paid, the language might look like this:

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<sup>67</sup> Some States apparently will not allow an “alimony solution” to a property equalization need. *See, e.g., In re Marriage of Casinelli*, 4 Cal. App. 5th 1285 (Cal. Ct. App. 2016) (directing that a shortfall in sums due to the spouse due to a member’s disability election be ordered as “damages,” but not spousal support).

<sup>68</sup> *See also Blanco v. Blanco*, 129 Nev. \_\_\_, 311 P.3d 1170 (Adv. Opn. No. 77, Oct. 31, 2013). This is already done to cope with other limitations of the USFSPA, such as the so-called “10-year rule,” by providing other property or an alimony award to compensate for the lack of a federal mechanism for division of that community property asset. *See Waltz v. Waltz*, 110 Nev. 605, 877 P.2d 501 (1994).

<sup>69</sup> *Gemma v. Gemma*, 105 Nev. 458, 778 P.2d 429 (1989).

<sup>70</sup> *Fondi v. Fondi*, 106 Nev. 856, 802 P.2d 1264 (1990).

<sup>71</sup> *Sertic v. Sertic*, 111 Nev. 1192, 901 P.2d 148 (1995).

<sup>72</sup> [Wife] must complete and send in DD Form 2656 within one year of this Order .

<sup>73</sup> This order eliminates the need for a further motion to be filed before payments are to begin. *See Henson v. Henson*, 130 Nev. \_\_\_, \_\_\_ P.3d \_\_\_ (Adv. Opn. No. 79, Oct. 2, 2014).

**IT IS HEREBY ORDERED, ADJUDGED, AND DECREED** that [wife] is awarded her time rule share of [husband's] military retirement in accordance with the holdings in *Gemma*,<sup>74</sup> *Fondi*,<sup>75</sup> and *Sertic*.<sup>76</sup> [Wife] is deemed the irrevocable beneficiary of the Survivor Benefit Plan with the base amount set at the full retirement benefit.<sup>77</sup> The benefits payable directly from DFAS calculated in accordance with 10 U.S.C. § 1408(a) are payable upon [husband's] first eligibility to retire.<sup>78</sup> This Court retains jurisdiction to make a further property distribution or order permanent alimony in a sum sufficient, inclusive of the sums payable from DFAS, to equal a time rule distribution in accordance with Nevada law requiring equal division of community property. The actual percentage of the military retirement awarded to [wife] must be known before SBP premium costs may be shifted as called for in this *Decree*. Accordingly, this Court further retains jurisdiction to make a clarifying order adjusting the division of military retirement benefits until [husband's] actual retirement. [Husband] is required to cooperate by providing any pay information necessary to achieve that result.

One potential solution is the substitution of unmodifiable, irrevocable alimony in the full sum of the military retired pay owed to the former spouse, as in the ten year rule cases. It is at this writing unknown if such orders will be approved by DFAS. Either way, the dangers discussed in the ten years rule section of these materials would be present in any such order.

Essentially, counsel seeking to comply with both the federal payment limitation and State law for equal/equitable division will have to draft compensatory orders involving alimony (either as an entire replacement or sufficient to bridge the gap to a time rule distribution), or division of other property sufficient to compensate, or require the member to make payments sufficient to do so. The only other method that would correct the unequal distribution caused by make is to defer the actual military retirement benefits division order until actual retirement, making the frozen benefit limitation irrelevant.

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<sup>74</sup> *Gemma v. Gemma*, 105 Nev. 458, 778 P.2d 429 (1989).

<sup>75</sup> *Fondi v. Fondi*, 106 Nev. 856, 802 P.2d 1264 (1990).

<sup>76</sup> *Sertic v. Sertic*, 111 Nev. 1192, 901 P.2d 148 (1995).

<sup>77</sup> [Wife] must complete and send in DD Form 2656 within one year of this Order .

<sup>78</sup> This order eliminates the need for a further motion to be filed before payments are to begin. *See Henson v. Henson*, 130 Nev. \_\_\_, \_\_\_ P.3d \_\_\_ (Adv. Opn. No. 79, Oct. 2, 2014).

## F. The “Blended Retirement” Effective as of 2018<sup>79</sup>

A change in the actual total pension benefits payable becomes effective in 2018. The change to the “Blended Retirement” plan passed in 2016 was the biggest re-structuring of military retired pay in decades. Beginning in 2017, current members who had less than 12 total years of service when the new plan is effective in 2018 will be able to switch over to the new system. The new system is mandatory for members entering service on or after January 1, 2018.

The (defined contribution) Thrift Savings Plan (TSP) will become a much larger asset to be divided in future divorce cases, and the (defined benefit) regular pension will become somewhat smaller. The details of the new system and valuation differences are detailed below in the discussion of the value of military retirement benefits.

## IV. KEY CONCEPTS IN MILITARY RETIREMENT BENEFITS

### A. The Absolute Necessity of Obtaining “Federal Jurisdiction”

#### 1. What Is “Federal Jurisdiction”

The legislative history indicates a Congressional concern 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 similarly restrict alimony or child support orders, which will be honored if the State court had personal and subject matter jurisdiction under its own law.<sup>80</sup>

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 the member’s: (1) residence in the territorial

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<sup>79</sup> See the House Conference Report 114-270 to the NDAA for FY 2016, pages 678 to 680.

<sup>80</sup> 10 U.S.C. § 1408(d)(1), (7); *Marriage of Hattis*, 242 Cal. Rptr. 410, 196 Cal. App. 3d 1162 (Ct. App. 1987).

jurisdiction of the court (other than by military assignment); (2) domicile in the territorial jurisdiction of the court; or (3) consent to the jurisdiction of the court.<sup>81</sup>

These limitations override State long-arm rules, and must be satisfied in *addition* to any State law jurisdictional requirements. Cases lacking such jurisdiction can go forward, but they will not result in enforceable orders as to the retirement benefits. The statute effectively creates an additional jurisdictional requirement, which for lack of a better title can be called “federal jurisdiction.”

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

## 2. How to Get “Federal Jurisdiction”<sup>82</sup>

Of the three grounds, “consent” is often easiest to establish. In most places, making a general appearance as a plaintiff or defendant, or asking for relief in the course of a divorce action, usually constitutes “consent” to trial of the entire action.<sup>83</sup> The same analysis appears to be made in post-divorce partition litigation, as well.<sup>84</sup> The 2009 regulations appear to have adopted this interpretation.<sup>85</sup>

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<sup>81</sup> 10 U.S.C. § 1408(c)(4).

<sup>82</sup> Many of the practice tips in this section are thanks to John C. Knoll, Esq., of San Diego, California, who presented them in a CLE in April, 2005.

<sup>83</sup> There is anecdotal evidence that, sometimes, complaints or motions are crafted for the purpose of provoking a response from the military member spouse seeking affirmative relief that would constitute a general appearance under the laws of the forum State. Once both parties are squarely before the divorce court, requesting relief, it may not be possible for the member to retroactively claim that the retirement benefits should not be addressed.

<sup>84</sup> See, e.g., *Pierce v. Pierce*, \_\_\_ So. 2d \_\_\_ (Miss. No. 2012-CA-01966-SCT, Feb. 20, 2014) (where member had obtained a default status-only divorce in Washington, and later sought to partition real property and apportion debts with former wife living in Mississippi, that court obtained jurisdiction to divide the military retirement benefits by the member’s implied consent, rejecting the member’s claim of *res judicata* by the status-only decree silent on the issue of property division or alimony).

<sup>85</sup> DoDFMR 7000.14-R, Vol. 7B, Ch. 29 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.”

In a few places, however, cases indicate that a service member may “un-consent” to court jurisdiction over the retirement issue alone.<sup>86</sup> Except in those locations, there generally is not a jurisdictional issue in dealing with the retirement benefits in the divorce action so long as the member is the plaintiff – or a defendant who does not raise the issue. It seems possible that the newer regulations may cause reconsideration of cases such as *Tucker*, since it represents the enforcing agencies’ interpretation of a statute; if so, the “un-consent” cases may be overturned upon challenge.

If such case law is applicable in a given place, and is not overturned, and if the member-defendant *does* raise the issue, all is not lost to the spouse, although the means of coping with it is cumbersome, often expensive, and requires some additional information.

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

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

If the matter proceeds to litigation, the forum State will have to rule on *where* the military member is actually a “resident” and “domiciled.” This can be far harder than it appears, especially since States diverge radically on the meaning of those terms. In some places “residence” is a physical question of location at the time of filing, while “domicile” is that

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<sup>86</sup> See *Tucker v. Tucker*, 277 Cal. Rptr. 403 (Ct. App. 1991) (San Diego County, California); *Wagner v. Wagner*, 768 A.2d 1112 (Pa. 2001) (finding that 10 U.S.C. § 1408(c)(4) refers to *personal* jurisdiction); *Booker v. Booker*, 833 P.2d 734 (Colo. 1992). These decisions, with enormous illogic, create the very harm that Congress was trying to avoid, but in reverse – they provide a means for manipulation of otherwise adequate jurisdiction as a tactical weapon to prevent the proper court from hearing all aspects of a case that it should decide. Doing so gives an incentive to forum shopping, and causes piecemeal litigation in a multiple venues, leading to an increased chance of inconsistent results. Most ironically, the anti-forum-shopping rules were never necessary in the first place, since no State permits division of property without sufficient minimum contacts to satisfy constitutional concerns. Both the American Bar Association (“ABA”) and the American Academy of Matrimonial Lawyers (“AAML”) have adopted position papers urging repeal of this provision of the USFSPA.

permanent home “to which one returns.”<sup>87</sup> In other places, the meanings are reversed.<sup>88</sup> In *some* States, residence and domicile have the *same* meaning.<sup>89</sup> A service member who has close connections to more than one State will *still* only have one domicile.<sup>90</sup> If the service member has significantly more connections to one State than another, then the State to which he has closer ties is his domicile.<sup>91</sup>

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

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

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

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

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<sup>87</sup> See *Smith v. Smith*, \_\_\_ P.2d \_\_\_, 45 Cal. 2d 235 (Cal. 1955); George H. Fischer, Annotation, *Residence or Domicile, for Purposes of Divorce Action, of One in Armed Forces*, 21 A.L.R. 2d 1183 (19\_\_\_).

<sup>88</sup> Restatement (Second) of Conflict of Laws, § 11, comment k states that for purposes of divorce, residence refers to a domicile where a person actually lives.

<sup>89</sup> It is the opinion of the Nevada Attorney General’s Office that “residency” in this State means the same thing as “domicile.” Op. Nev. Atty. Gen. No. 26 (Mar. 21, 1955).

<sup>90</sup> RESTATEMENT § 11, *supra*.

<sup>91</sup> *Id.* at § 20, comment b.

Perhaps more useful is the member's DD-2058 form on file with the military, which is the member's "State of Legal Residence Certificate," or legal residency form. Again, questions must be asked about when the form was filed, and why, which may have greater or lesser relevance to traditional notions of residency and domicile. Federal law provides that members may not "accidentally" lose or acquire a residence or domicile solely by reason of military assignment,<sup>92</sup> so indicia of intent are critical to such an analysis.

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

Find out where the member last voted; registering to vote usually requires an affirmation of either domicile or residency in the jurisdiction in which the vote is to be cast. Again, when the registration to vote was made could be important, as well as how recently it had last been relied upon. For example, if the registration to vote had been made twenty years ago, and the member last voted years before moving to the forum State, the fact might be of little consequence given events since that time.

Similarly, driver's licenses and car registrations may be useful in determinations to remain in a place for at least some period of time. If the member has ever been party to a lawsuit, find out what declaration of residence was made in the litigation or any affidavits. There may be similar declarations in deeds, mortgages, leases, contracts, insurance policies, or hospital records.

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

Consider asking the question "Where is home?" in deposition, and find out if the member has made any kind of pronouncement of his present or future plans.

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

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<sup>92</sup> 50 U.S.C. App. § 571.

Once “federal jurisdiction” is obtained – by consent, domicile, or residence (for purposes other than military assignment) – the forum court is fully empowered to deal with the retirement benefits as property, as it would any other asset within the jurisdiction of the court. It is good practice to recite the basis for jurisdiction over the service member on the face of the decree or other order dealing with the military retirement benefits.<sup>93</sup> The newer regulations, in fact, appear to *require* such a statement, providing that a court order asserting jurisdiction under the USFSPA “must state the basis for the finding, i.e., member’s residence, member’s domicile or member’s consent.”<sup>94</sup>

## **B. The “Ubiquitous Time Rule”<sup>95</sup>**

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 many variations evolved 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.

As to military retirement benefits, all of the variations – at least as to what DFAS will honor and pay – appear to be over-ridden. But since, at this writing, State courts still appear free to compensate spouses for the differential between what DFAS will pay and what State law requires, those variations remain important in understanding what orders might be entered by a State court to compensate the spouse.

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<sup>93</sup> The “standard form,” was printed nationally by the ABA in 1995 and has been in use throughout the country since that time. *See, e.g., Janovic v. Janovic*, 814 So. 2d 1096 (Fla. Ct. App. 2002) (noting as “standard language” the form paragraphs created for courts to use in decrees entered after *Mansell* to eliminate any ambiguity). The clause set was first published by the ABA as a guide for drafting attorneys in the form of “Military Retirement Benefit Standard Clauses” in 18 Family Advocate No. 1 (Summer, 1995) (*Family Law Clauses: The Financial Case*) at 30. The current, updated version of the standard clause set is posted on our web site, at [http://www.willicklawgroup.com/military\\_retirement\\_benefits](http://www.willicklawgroup.com/military_retirement_benefits). It has been copied, adapted and altered by many attorneys over the years – sometimes with unfortunate consequences. *See, e.g., Hayes v. Hayes*, 208 P.3d 1046 (Or. Ct. App. 2009) (approving standard language to bring general divorce decree language into effect to divide benefits); *Loria v. Loria*, 189 S.W.3d 797 (Tex. Ct. App. 2006) (variant of standard language interpreted as prohibition of right of military member to apply for disability benefits at all, and therefore held to be reversible error).

<sup>94</sup> DoDFMR 7000.14-R, Vol. 7B, Ch. 29 Sec. 290605.

<sup>95</sup> With apologies to Honey Kessler Amado, whose work is discussed below, from whom this perfect description was swiped for these materials.

Current federal law requires that the time in service and rank at the time of the order making the division be frozen with only “retired” COLAs being applied to the spousal share from the order to the date of actual retirement. This effectively reduced the share that the former spouse receives.<sup>96</sup>

### 1. Variations in Final Date of Accrual

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

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

In California, the spousal share ceases to accumulate upon “final separation.”<sup>97</sup> So the math would be  $10 \text{ (years of marriage)} \div 20 \text{ (years of service)} \times .5 \text{ (spousal share)} \times \$1,000 \text{ (pension payment)} = \$250$ .

Arizona terminates community property accruals, for the most part, on the date of filing and service of a petition for divorce.<sup>98</sup> There, on the same facts, the math would be  $10.5 \text{ (years of marriage)} \div 20 \text{ (years of service)} \times .5 \text{ (spousal share)} \times \$1,000 \text{ (pension payment)} = \$262.50$ .

Next door in Nevada, community property ceases to accrue on the “date of divorce.”<sup>99</sup> There, the math would be  $12 \text{ (years of marriage)} \div 20 \text{ (years of service)} \times .5 \text{ (spousal share)} \times \$1,000 \text{ (pension payment)} = \$300$ .

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<sup>96</sup> Hypothetical calculations indicate that the variation between standard “time rule” divisions and the “frozen benefit” calculations now required reduce the spousal share by about 40%.

<sup>97</sup> See, e.g., *In re Marriage of Bergman*, 168 Cal. App. 3d 742, 214 Cal. Rptr. 661 (Cal. Ct. App. 1985).

<sup>98</sup> Ariz. Rev. Stat. § 25-211 (1998).

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

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.<sup>100</sup>

## 2. Variations in Qualitative/Quantitative Approach to Spousal Shares

States evolved at least two ways to conceptualize, and value, the spousal share. The majority of States applying the time rule formula seem to view the “community” years of effort *qualitatively* rather than quantitatively, reasoning that the early and later years of total service are equally necessary to the retirement benefits ultimately received.<sup>101</sup> Frequently, such cases speak in terms of “building block” years.

This view of the time rule essentially provides to the former spouse an ever “smaller slice of a larger pie” – 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.<sup>102</sup>

Some critics complain that such a formula gives the non-employee former spouse an interest in the employee spouse’s post-divorce earnings, at least where the divorce occurs while the employee is still working. They argue that the spousal share should be frozen at the earnings level at divorce; a minority of States, including Texas, have adopted this approach, sometimes in cases that do not appear to have contemplated the actual mathematical impact of the decision reached.<sup>103</sup> This conceptualization is basically what was adopted by Congress in the frozen benefit rule.

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<sup>100</sup> These calculations assume that the member retires on the date of divorce and his time in service (for pay purposes) and rank do not change from the date of separation to the date of divorce.

<sup>101</sup> 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); *Johnson v. Johnson (Zoric)*, 270 P.3d 556 (Utah 2012); *Kiser v. Kiser*, 32 P.3d 244 (Or. Ct. App. 2001) (divorce court is required to look to the value of the benefit at retirement); *In re: Malpass*, \_\_\_ P.3d \_\_\_ (Or. Ct. App. No A146655, Feb. 13, 2013) (freezing spousal share to a fraction of the rank earned upon divorce was error under the time rule). 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).

<sup>102</sup> See *Glover v Ranney* 314 P.3d 535, 541 (Alaska 2013) (division of military retired pay by time rule “allowed [wife’s] share of the retirement to increase in value as a result of his promotions and pay raises”).

<sup>103</sup> See, e.g., *Grier v. Grier*, 731 S.W.2d 931 (Tex. 1987); *Armstrong v. Armstrong*, 34 S.W.3d 83 (Ky. Ct. App. 2000).

Certain States, while rejecting the Texas approach, have nevertheless left the door open to a member 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.<sup>104</sup> Such cases invite fact-intensive hair-splitting since, as the Nevada Supreme Court observed in a non-military case, 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 his post-marriage effort and accomplishments.”<sup>105</sup>

The Texas minority approach – and now the mandatory federal calculation performed by DFAS – undervalues the spousal interest by giving no compensation for deferred receipt, and also contains a logic problem, at least in a community property analysis, of treating similarly situated persons differently.

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

An example is useful to illustrate this discussion. Presume a member who entered service after 1980 (and did not elect REDUX), was in service for exactly 20 years, and was married to wife one for the first ten, and wife two for the next ten, retiring on the day of divorce from wife two. Presume he had started work at \$20,000 per year, and had enjoyed 5% raises every year. That would make his historical earnings look like this:

| Yearly Salary | Monthly Salary |
|---------------|----------------|
| \$20,000.00   | \$1,666.67     |
| \$21,000.00   | \$1,750.00     |
| \$22,050.00   | \$1,837.50     |
| \$23,152.50   | \$1,929.38     |
| \$24,310.13   | \$2,025.84     |
| \$25,525.63   | \$2,127.14     |
| \$26,801.91   | \$2,233.49     |
| \$28,142.01   | \$2,345.17     |
| \$29,549.11   | \$2,462.43     |
| \$31,026.56   | \$2,585.55     |
| \$32,577.89   | \$2,714.82     |
| \$34,206.79   | \$2,850.57     |
| \$35,917.13   | \$2,993.09     |
| \$37,712.98   | \$3,142.75     |

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<sup>104</sup> *Barr v. Barr*, \_\_\_ A.2d \_\_\_ (N.J. Super. Ct. App. Div. No. A-1389-09T2, Jan. 19, 2011).

<sup>105</sup> *Gemma v. Gemma*, 105 Nev. 458, 463, 778 P.2d 429, 432 (1989).

|             |            |
|-------------|------------|
| \$39,598.63 | \$3,299.89 |
| \$41,578.56 | \$3,464.88 |
| \$43,657.49 | \$3,638.12 |
| \$45,840.37 | \$3,820.03 |
| \$48,132.38 | \$4,011.03 |
| \$50,539.00 | \$4,211.58 |

If this hypothetical member had a standard longevity military retirement (or any other standard defined benefit plan<sup>106</sup>) the above wage history would make his average monthly salary during his last three years' service \$4,014.21, and the military retirement formula<sup>107</sup> would make his retired pay \$2,007.11.

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

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

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

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

|         |            |
|---------|------------|
| Member: | \$1,100.41 |
|---------|------------|

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<sup>106</sup> Such plans are often funded by employer contributions (although in some plans employees can contribute) and provide certain specified benefits to the employee after retirement, usually for life. Often, the benefit is determined by a formula taking into account the highest salary received and the total number of years worked for the employer (such as a "high-three" or "high five" plan). For example, a plan might pay one-tenth of an employee's average monthly salary over the three years before retirement, multiplied by one-fourth the number of years that the employee worked. A twenty-year employee earning an average of \$2,000 per month during his last years would get \$1,000 per month (i.e., \$2,000 x .1 x 20 x .25). Generally, no lump-sum distributions (other than certain nominal amounts in some plans) can be distributed from such defined benefit plans.

<sup>107</sup> Years of service x 2.5% x high-three average basic pay.

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

Perhaps the clearest expositions of the reasoning behind the two approaches are found in those cases in which a reviewing court splits as to which interpretation is most correct. The Iowa Supreme Court faced such a conflict in the case of *In re Benson*.<sup>108</sup> The trial court had used a time-rule approach, with the wife's percentage to be applied to the sum the husband actually received, whenever he actually retired.

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

Quoting at length from a law review article analyzing the mathematics of the situation, the court found that acceptance of the husband's argument would have allowed him to collect the entirety of the accumulating "earnings" on the marital property accumulated by both parties. Three judges dissented.<sup>109</sup>

The point of the mathematics is that practitioners must look beyond the mere label applied by the statutory or decisional law of a given State to see what it would actually do for the parties before it. This is particularly true when considering which forum would be most advantageous, in those cases in which a choice is possible. If States split on the question of whether courts can make up to the spouse the loss imposed by the frozen benefit rule, the choice of jurisdiction will become that much more important.

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<sup>108</sup> 545 N.W.2d 252 (Iowa 1996).

<sup>109</sup> The Iowa court apparently did not even consider the possibility of having the wife's interest begin being paid to her at the employee's first eligibility for retirement, "freezing" it at that point and letting the husband enjoy all accumulations after that time. Presumably, this is because that possibility was not litigated at the trial level. That is the result in most or all community property States, however, and case law has made it clear that a spouse choosing to accept retirement benefits at first eligibility has no interest in any credits accruing thereafter, having made an "irrevocable election." See *In re Harris*, 27 P.3d 656 (Wash. Ct. App. 2001), and the citations set out in the following section.

### 3. Variations Regarding Payment Upon Eligibility

Several State courts have held that the interest of a former spouse in retired pay is realized at *vesting*,<sup>110</sup> theoretically entitling the spouse to collect a portion of what the member *could* get at that time irrespective of whether the member actually retires.<sup>111</sup> As phrased by the California court in *Luciano*: “The employee spouse cannot by election defeat the nonemployee spouse’s interest in the community property by relying on a condition within the employee spouse’s control.”<sup>112</sup>

Most of those who advocate the “freeze at divorce” approach discussed above either oppose or ignore the question of whether distribution of the spousal share should be mandated at the time of the participant’s first eligibility for retirement. It is not possible, however, to fully and fairly evaluate the impact of a “freeze at divorce” proposal *without* examining that question as well.<sup>113</sup>

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

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<sup>110</sup> A “vested” pension is one that, having been earned and accrued, is beyond the power of the issuing authority to withdraw from payment. See *LeClert v. LeClert*, 453 P.2d 755 (N.M. 1969) (exploring definitions of “vestedness” and “maturity” of retired pay).

<sup>111</sup> 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); *Maccarone v. Maccarone*, \_\_\_ A.3d \_\_\_ (R.I. Nos. 2013-369-Appeal, 2013-370-Appeal, Jan. 26, 2015); *Janson v. Janson*, 773 A.2d 901, 903 (R.I. 2001); *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”).

<sup>112</sup> *In re Marriage of Luciano*, *supra*, 164 Cal. Rptr. at 95.

<sup>113</sup> I have independently verified the mathematical effects of the various approaches taken by courts. Unless payments to spouses are required at each first eligibility for retirement, regardless of the date of actual retirement, a “rank at divorce” proposal, at least in military cases, would result in a reduction in the value of the spousal share by at least 13%. A second spouse married to 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.

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

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

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

The disconnect, and this discussion, is fully applicable to the military context, where (as discussed below) practitioners are required to deal not only with the standard military 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.<sup>114</sup> The scant case authority squarely addressing this issue has agreed with that proposition.<sup>115</sup>

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<sup>114</sup> 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).

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

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

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

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

### C. The Conundrum of “Disposable Retired Pay”

Under the original enactment of the USFSPA, which governed all divorce decrees filed prior to February 4, 1991, the military pay center withheld taxes from the gross retired pay, divided the post-tax amount between the member and the spouse pursuant to court order, and sent a check to each.<sup>116</sup> At the end of each year, the member was eligible to claim a tax credit for amounts withheld on sums ultimately paid to the former spouse, and the former spouse owed a tax liability for any amounts received.

The “bottom line” of this procedure was to always pay more actual money to the member, and less to the former spouse, than was shown on the face of an order dividing retirement benefits by percentage.<sup>117</sup>

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<sup>116</sup> See Department of Defense, A Report to Congress Concerning Federal Former Spouse Protection Laws at 23 (2001); Pub. L. 101–510, § 555(e), 104 Stat. 1485, 1569.

<sup>117</sup> Reports by the General Accounting Office and Congressional Research Service in 1984 and 1989 found that court orders purporting to divide military retirement benefits on a “50/50” basis actually effected a split of “55.4 percent/44.6 percent” to “58.4 percent/41.6 percent” – always in favor of the former military member – after the impact of tax withholdings was considered. CONGRESSIONAL RESEARCH SERVICE, REPORT FOR CONGRESS: MILITARY BENEFITS FOR FORMER SPOUSES: LEGISLATION AND POLICY ISSUES (Mar. 20, 1989). See also CONGRESSIONAL RESEARCH SERVICE, REPORT FOR CONGRESS 88-512 A: TREATMENT OF FORMER SPOUSES UNDER VARIOUS FEDERAL RETIREMENT SYSTEMS (July 25, 1988). That is a large part of why “disposable retired pay” was formally re-defined in 1991.

Most courts were unaware that the payments ordered were being skewed by the phrasing of the USFSPA and the tax code, and simply had no idea that their orders were not being followed, or that further court attention would be required to correct any resulting inequity. Former spouses did not receive a Form 1099 or W-2P, and many did not realize that it was *their* responsibility to account for, and pay taxes on, all sums they received.<sup>118</sup> Many members did not realize that they had a yearly tax credit coming, or how to calculate it.

As of February 4, 1991, the definition of “disposable pay” was altered by Congress to eliminate the pay center’s deduction of income taxes from gross retired pay when calculating the sum paid to spouses.<sup>119</sup> The change was explicitly based on the “unfairness” of the effect of the previous phrasing.<sup>120</sup>

The 1991 change to the law, codified at 10 U.S.C. § 1408(a)(4), addressed all of the problems listed above. Taxes were no longer taken “off the top” before the retirement benefits were divided. Both spouses were sent 1099-R forms reflecting what they received during the year (thus allowing for reasonable tax planning), and courts were permitted to divide what was essentially the gross sum of benefits, as they intended.

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

The ABA and AAML urged Congress to apply the correction to all decrees,<sup>121</sup> but the Department of Defense was not convinced that the problem was significant enough to require

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<sup>118</sup> See *Eatinger v. Comm.*, TC Memo 1990-310.

<sup>119</sup> Pub. L. No. 101-510, § 555, 104 Stat. 1485, 1569 (1990).

<sup>120</sup> House Report (Committee on Armed Services) 101-665, at 279-280, on H.R. 4739, 101<sup>st</sup> Congress, 2d Sess. (1990).

<sup>121</sup> See M. Willick, AMERICAN BAR ASSOCIATION REPORT TO MR. FRANCIS M. RUSH, JR., ACTING ASST. SECRETARY OF DEFENSE, RE: NATIONAL DEFENSE AUTHORIZATION ACT FOR 1998 § 643, COMPREHENSIVE REVIEW OF FEDERAL FORMER SPOUSE PROTECTION LAWS dated March 14, 1999. The reason for the ABA request for a uniform national law is that all of the corrections possible for a State court in an individual case are relatively inefficient and clumsy. For example, where the spousal share is near 50%, no direct correction of the percentage payable could make up the shortfall. A court could order payment of the differential between what the military pay center sends and what the court ordered, but this has all the same enforcement problems as any required stream of monthly payments from one party to another. Some courts have ordered members to initiate allotments on pain of contempt, but this is also not self-enforcing.

a change in the law, and so recommended leaving courts to address those cases one at a time.<sup>122</sup> Congress has not acted on the disparate treatment.

A practitioner faced with such a case could ask the court to “translate” an award of gross into a higher percentage of “old disposable” to yield the same number of dollars as intended in the original court order.<sup>123</sup> This only works when the spouse is supposed to be receiving enough less than 50% that the translation order does not bump into the 50% maximum limit of 10 U.S.C. § 1408(e)(1).<sup>124</sup>

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

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

The change in law signed on December 23, 2016, and codified at 10 USC 1408(a)(4) has defined disposable pay for division purposes as:

“(i) the amount of basic pay payable to the member for the member’s pay grade and years of service at the time of the court order, as increased by

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<sup>122</sup> See *A Report to Congress Concerning Federal Former Spouse Protection Laws* (Report to the Committee on Armed Services of the United States Senate and the Committee on Armed Services of the House of Representatives) at 85 (Department of Defense, Sept. 4, 2001), <http://dticaw.dtic.mil/prhome/spouserev.html>.

<sup>123</sup> Due to rounding, such an order is sometimes off by a few pennies one way or the other, but the difference is never significant, and such an order tracks the desired allocation to the spouse after future COLAs.

<sup>124</sup> A hypothetical is useful, to explain. Using artificial numbers for illustration, if the total pension was \$1,000, and the former spouse was entitled to 30%, or \$300, but it was a pre-1991 divorce, so tax withholdings reduced the “old disposable” pension payments to \$800, then the spouse would be getting only \$240, and the extra \$60 would be diverted to the member. By increasing the spousal share of the remainder to 37.5%, the flow of payments to the former spouse would be restored to \$300, all amounts would again be self-corrected annually by way of COLAs, and no further court intervention would be necessary. We call such corrections “translation orders.”

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

“(ii) each cost-of-living adjustment that occurs under section 1401a(b) of this title between the time of the court order and the time of the member’s retirement using the adjustment provisions under that section applicable to the member upon retirement.”

#### **D. The “Ten Year Rule”**

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

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

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

There are a couple of work-arounds for this trap, however. If the former spouse’s interest is small, the present value of that interest could be determined and offset against other marital property or cash to be paid off. If the interest is larger, the situation is more difficult,

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<sup>126</sup> 10 U.S.C. § 1408(d)(2); former 32 C.F.R. § 63.6(a)(1)-(2).

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

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

since most parties lack sufficient assets to permit such an offset.<sup>129</sup> The options available to a former spouse's attorney seeking an enforceable order are then reduced to attempting to persuade the court to impose an irrevocable alimony obligation or seeking a stipulation to secure that interest. Both options have drawbacks.

In a nine year overlap case, the former spouse has a putative 22.5% interest (i.e.,  $9 \div 20 \times \frac{1}{2}$ ).<sup>130</sup> Some courts, seeking to make their awards enforceable, will characterize the property award as alimony upon request. Where the court cannot or will not do so, the attorney for the spouse has something of a dilemma, which is sometimes resolved by negotiations involving trade of a few percentage points of value for a stipulated award of irrevocable alimony.

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

The down-side to such an arrangement for the former spouse is risk of further litigation – some members have sought court orders revoking such bargained-for “irrevocable” awards, usually based on the changed circumstances of one party or the other. Even when the former spouse prevails, there is a substantial expense.<sup>131</sup>

If a non-alimony resolution is desired, or necessary, it is difficult in most cases to come up with sufficient security for such a lifetime stream of payments. This is a problem in jurisdictions which have formal or informal barriers to establishment of alimony awards. And, of course, all the risks associated with bankruptcy are a factor when the spouse exchanges a pension share for anything else, though these risks may be somewhat mitigated by enactment of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005,<sup>132</sup> which provided that all “domestic support obligations” have priority before all but administrative expenses.<sup>133</sup>

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<sup>129</sup> In a hypothetical nine-year overlap case involving even a staff sergeant (E-6) retiring at 20 years, the present value of the former spouse's putative share is well over \$100,000. Such a sum is typically outside the realm of possible trade-offs or pay-offs for individuals so situated.

<sup>130</sup> Due to the 2016 changes in the law, this example anticipates a divorce after the member has retired.

<sup>131</sup> See *Waltz v. Waltz*, 110 Nev. 605, 877 P.2d 501 (1994).

<sup>132</sup> (“BAPCPA”) (Pub. L. 109–8, 119 Stat 23).

<sup>133</sup> See 11 U.S.C. § 507(a)(1).

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

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

## **V. VALUATION OF MILITARY RETIREMENT BENEFITS**

### **A. How Much Money is Really Involved Here?**

The Department of Defense Office of the Actuary<sup>134</sup> publishes “lump sum equivalency” charts for military retirements, using military-specific mortality tables, and including a much-ignored disclaimer that its figures “should not be used for property settlements.”<sup>135</sup> The figures are updated annually, and can be downloaded either from the actuary’s own site,<sup>136</sup> or from the DFAS website.<sup>137</sup>

The Actuary also produces disability and non-disability retirement life expectancy tables, from which a good estimate of present value for a military retirement can be independently calculated. Previously, a convenient annual source for much of this information was the annual, privately published “Retired Military Almanac,”<sup>138</sup> which is now out of print.

Arriving at a “hard number” for the value of military retirement benefits is not, however, that simple. There are three different non-disability benefit formulas within the military retirement system, with another about to go into effect.

The first group is composed of members who entered service before September 8, 1980, the second consists of those who entered between that date and July 31, 1986, and the third is

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<sup>134</sup> Defense Human Resources Activity, Office of the Actuary, 4800 Mark Center Drive, STE 06J25-01, Alexandria, VA 22350-4000; 571-372-1993; fax 571-372-1975; <http://actuary.defense.gov/>.

<sup>135</sup> The actuary’s calculations are not as hypothetical as indicated in the disclaimer; the practitioner must merely be careful to compare the realities of the case at hand with the assumptions used for the chart. The closer the facts are, the more accurate the numbers are, and vice-versa.

<sup>136</sup> <http://actuary.defense.gov/>.

<sup>137</sup> [www.dod.mil/dfas](http://www.dod.mil/dfas).

<sup>138</sup> Uniformed Services Almanac, Inc., P.O. Box 4144, Falls Church, VA 22044; (703) 532-1631.

for those who entered service on or after August 1, 1986. Effective April 1, 2007, Congress altered the longevity possibilities of all three of those groups. The most recent changes are discussed below.

Members who entered service before September 8, 1980, received retired pay equal to terminal basic pay times a multiplier of 2.5 percent times years of service, limited to 75 percent of base pay. Thus, retired pay equaled 50 percent of terminal basic pay after 20 years of service, and “topped out” at 30 years. This formula is referred to as “final pay.”<sup>139</sup>

Members who first entered service between September 8, 1980, and July 31, 1986, had to use the highest 3 years of basic pay rather than terminal basic pay. This has the effect of lowering retired pay for members whose pay increased at any time during their three most highly compensated years of service (as is typical).<sup>140</sup> This formula is referred to as “high-3.”

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

First, their retirement benefits multiplier was reduced by one percentage point for each full year less than 30 years of service.<sup>141</sup> Under this plan, at age 62, the reduction is removed and the retired pay multiplier is restored to 2.5% per year, yielding the same percentage payable under the earlier system.<sup>142</sup>

Second, each year the COLA for such members is less than for other retirees (Consumer Price Index adjustment minus one percent). However, at age 62, the retiree’s monthly income is recomputed to supply the sum that *would have been paid* if the full COLA had been applied every year from retirement to age 62, which at that moment becomes prospectively payable, as if there had been no reductions during those intervening years.<sup>143</sup> After that “restoral,” however, the reduction returns with each COLA after age 62 for life.

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<sup>139</sup> 10 U.S.C. § 1402(a). See <http://militarypay.defense.gov/pay/retirement.aspx>.

<sup>140</sup> See 37 U.S.C. § 101(21).

<sup>141</sup> 10 U.S.C. § 1409(b)(2)(A). For example, at 20 years, instead of receiving 50% of basic pay (2½% per year x 20 = 50%), the calculation would be 2½% per year x 20 = 50% - 10 (years less than 30 years served as of retirement), or 40%. The final subtraction decreases by one for each year beyond 20 served, so that as of 30 years of service, the calculation is 2½% per year x 30 = 75% - 0 (the same 75% that it would have been under the older system).

<sup>142</sup> Pub. L. No. 99-348 (July 1, 1986). See FY 1996 Report at 1.

<sup>143</sup> Thus, at the time such members turn 62, their monthly retired pay becomes the same sum as it would have been if they had been in the class of members who first entered service between September 8, 1980, and July 31, 1986.

In 1999, Congress again changed the rules,<sup>144</sup> modifying what had become known as the “REDUX” plan to provide for an irrevocable choice of retirement plans to be made by that third group of members (who entered service after July 31, 1986), at their 15th year of service. Such members are given the choice of taking the same “High-3” retirement paid to those who entered service between September 8, 1980, and July 31, 1986, *or* to take the lowered REDUX benefits described above, *plus* a one-time lump-sum “Career Status Bonus” (CSB) of \$30,000 payable at the 15-year mark.<sup>145</sup> The \$30,000 had to be proportionally repaid if the member terminated service before 20 years. After the 1999 change, this option became known as the “CSB/REDUX option.”

In 2006, Congress altered the longevity rules.<sup>146</sup> As of April 1, 2007, the military retired pay of retirees with more than 30 years of service was *not* limited to 75% of basic pay. Rather, new basic pay tables (extended to 40 years) are applicable for retirements on and after that date. Additionally, various enlisted and officer ranks had their basic pay increased for service longevity from a maximum of over 28 years to a maximum of over 36 years; in other words, monthly pay that used to “top out” at a certain point continued increasing with continued service.

Additionally, as of October 8, 2001, military members were authorized to begin participating in the same Thrift Savings Plan (“TSP”) that has been in effect for civil service employees since 1987.<sup>147</sup> The military chose to initially call its accounts “UNISERV” accounts.<sup>148</sup>

Under the “Blended Retirement” system effective in 2018, there are four components to military retired pay:

1. Defined Benefit:

The retired pay multiplier is reduced from 2.5% to 2% times number of years of service. A member retiring at 20 years receives 40% of the high 3 base pay. Retiring at 30 years yields 60% of the high 3 base pay.

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<sup>144</sup> In Pub. L. No. 106-65, 113 Stat. 512 (October 5, 1999) the National Defense Authorization Act of 2000.

<sup>145</sup> 10 U.S.C. §§ 1407(b), 1409(b)(2); 37 U.S.C. § 354(a)-(b).

<sup>146</sup> 2007 National Defense Authorization Act, Pub. L. No. 109-364 (June, 2006) §§ 641-42.

<sup>147</sup> The military phase in permitted military members to contribute up to 7% of basic pay in 2002, increasing to 10% by 2005 and unlimited (except as to normal tax rules) by 2006. 5 U.S.C. §§ 8440e(d)(1)(B), 8440f(a), 37 U.S.C. § 211(b). There are special rules regarding contribution limits from special pay categories, including combat pay. *See, e.g.*, 37 U.S.C. § 212.

<sup>148</sup> 37 U.S.C. § 211(b).

Retired pay could be paid in different forms, by constant pension payments or lump sum (with a choice of 25% or 50% of the value of the total retired pay, detailed below) followed by smaller pension until full social security retirement. The lump sum option can be paid out over four years to lessen the tax impacts.

## 2. Defined Contribution:

The military will contribute a sum equal to 1% of base pay to each member's Thrift Savings Plan (TSP) account. The government will match contributions made by the member on top of the guaranteed 1% up to a maximum of 5%.<sup>149</sup> The benefits become fully vested once a member has served at least 2 years.

## 3. Continuation Pay:

Each branch will determine when to offer "continuation pay" between 8 and 12 years of service. For active duty members, the payment will be a sum equal to between 2.5 months of base pay and 13 months of base pay. This will be determined by a number of factors by each service. Reserve personnel are also eligible for this benefit in a sum equal to between .5 months base pay and 6 months base pay. Acceptance of continuation pay will incur a further three year service obligation. The payment can also be taken as a single lump sum or in 4 annual payments.

## 4. Elective Lump Sum Distribution of Defined Benefit Plan

Members who serve 20 or more years can voluntarily elect to take a lump sum payment of retired pay. Members who elect to take the lump sum may choose to take 25 percent or 50 percent of the discounted present value of their defined retirement benefit that would be due to them prior to becoming fully eligible for Social Security.<sup>150</sup> After achieving full social security age, the retirement benefit will be restored to the amount they would have received had they not taken the lump sum payment. Reservists are also eligible for this benefit, but will not be able to receive the lump sum until they achieve 60 years of age.<sup>151</sup>

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<sup>149</sup> The government will contribute 1% of the member's base pay automatically. The matching is as follows: 1% is matched 1%; 2% is matched 2%; 3% is matched 3%; 4% is matched 3.5%; 5% is matched 4%.

<sup>150</sup> This could be a huge malpractice trap for attorneys. If the unilateral decision is allowed to be made by the member, the former spouses share could be further eroded by reducing the benefit payable for the life of the member.

<sup>151</sup> Some reservists are eligible to receive their retired pay earlier than age 60 based on deployments while serving.

Members leaving the military before completing 20 years keep the money in their TSP fund, and can move their TSP to another 401(k) retirement plan after they leave the military. Members who contribute at least 5% of their base pay to the TSP will have those sums matched by the government and therefore doubled.<sup>152</sup> A member doing so for 20 years could have several hundred thousand dollars saved towards retirement. The TSP has significant tax advantages and low administrative costs, as discussed in these materials.

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

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

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

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

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

For a divorce occurring while a member is still on active duty, there are even more variables. First is the uncertainty that the member will retire at all. The precise length of service cannot be known – economic conditions, the defense budget, and world crises all could change the date of separation of a member by several years. Before the frozen benefit mandate, the ultimate rank of the member was another unknown; even after that change, no one knows what the retired COLAs will be from the date of the order to the date of retirement. All such factors affect the “present value” used in such exchanges.

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<sup>152</sup> This includes the 1% guaranteed government contribution plus 4% matching for contributing 5% of base pay.

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

For example, the military has its own set of mortality tables, set out by officers and enlisted members, and by disability and non-disability retirements.<sup>153</sup> At least for non-disability retirements, there is a significant reduction in death rates for military members as compared with general life tables, boosting present values. Adopting the Actuary's valuations would require accepting its presumption of annual COLA increases, inflation assumptions, and its allowance of high likelihood that the government will make the payments, which leads to assumed inflation of only 3%, and an assumed present value discount rate of 6.25%, with a resulting "real interest rate" of 3.25%. These assumptions, in turn, greatly increase the present value from that which would be reached using certain commercial assumptions.

An attorney wishing to personally estimate present values can purchase computer programs that do the math involved quickly.<sup>154</sup> Such programs often allow the user to plug in the assumptions to be used, such as life expectancy, presumed interest rate, etc. In any event, attorneys handling these cases in States that allow or require trading the present value of the retirement benefit must become well versed in all aspects of valuation, interest rate assumptions, and other factors involved. Failure to do so invites disaster at settlement or in court.

### C. If/As/When; a Monthly Annuity

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

On the other hand, such a distribution increases the possibility of later court fights over enforcement or interpretation of the original order for division.<sup>155</sup> It gives each of the parties

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<sup>153</sup> See <http://actuary.defense.gov/Portals/15/Documents/statbook13.pdf>.

<sup>154</sup> One such program is "Legal Math-Pac," Custom Legal Software Corporation, 3867 Paseo del Prado, Boulder, CO 80301; (303) 443-2634; <http://www.legalmath.com/legalmath/index.htm>.

<sup>155</sup> The evolving interpretation of the phrase "disposable retired pay" has given rise to many such cases. If the parties were divorced in 1985, should the phrase be interpreted to mean what the Court said it meant in *Mansell* four years later, or what Congress re-defined it to mean in 1991? Should the court attempt to divine the intention of the parties, or the divorce court, at the time of divorce? If so, how could this be accomplished

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

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

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

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

The attorney for the member could argue that the chance of the member retiring at all is so speculative that the court should defer the issue until the facts are known, enter an “if, as, and when” order, or refuse to assign any value to the benefits at all.<sup>156</sup>

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

Some courts are loathe to engage in any of the speculation set out above, and so tend to just enter “wait and see” orders, reserving jurisdiction to enter an order regarding the retirement benefits until the member is eligible for retirement (or actually retires). Such a non-

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if each had a different view of the meaning, or if the record is silent? As of 2016, the definition is set by 10 USC 1408(a), but the variance of the mandated calculation from divisions as required by State law continue those uncertainties and opportunities for litigation.

<sup>156</sup> Indeed, this is essentially the reasoning of those few remaining States that still refuse to divide the value of unvested retirement benefits at divorce. It is certainly the minority, and a disappearing, view of property. See *Daniel v. Daniel*, \_\_\_ N.E.2d \_\_\_ (No. 2012-2113, Mar. 26, 2014) (J. O'Donnell, dissenting on the basis that unvested benefits are not actually “owned” by either spouse).

resolution avoids all of these difficulties, but has its own down-side, in terms of making it certain that there will be later legal expenses, jurisdictional complications if one or both parties relocate, and the emotional cost of not achieving closure on an issue of primary importance.

As of 2016, it remains to be seen whether outright reservations of jurisdiction to make any order, or orders crafted to compensate for the frozen benefit rule can be enforced.

#### **D. Coping with COLAs**

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

The need for such adjustments is obvious. In January, 1972, the government’s Consumer Price Index for all urban consumers (CPI-U) was 123.2, meaning that by comparison with the base year of 1967, it took an extra \$23.20 to have the same purchasing power that \$100 had previously commanded.<sup>157</sup> Put another way, dollars were worth only 81¢.

By January, 1992, the CPI-U was 413.8, meaning that it took an extra \$313.80 to gain the purchasing power of the original \$100, or that each dollar was worth only 24¢. If there had been no cost of living adjustments, a \$1,000 per month retirement starting in 1972 would only be paying the equivalent value of \$240 per month in 1992. Inflation has continued, cumulatively, since that time.

The frozen benefit rule adopted in 2016 has created something of a dichotomy in planning for divorces depending on whether the member has already retired (so the retirement benefits is fixed and a normal time rule division can be made) or still on active duty (so the frozen benefit order is required by DFAS).

##### **1. Cases in Which the Member is Retired**

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

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<sup>157</sup> Bureau of Labor Statistics, U.S. Department of Labor.

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

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

If a decree simply recites that the military retirement is split by percentage, the military pay center will *presume* that future COLAs are to be divided in the same proportion as the sum originally payable. If the former spouse is awarded  $\frac{1}{3}$  of the retired pay, for example, then  $\frac{1}{3}$  of the COLAs will also be paid to the former spouse. The presumption is reversed if the decree simply awards a specific sum of dollars to the former spouse; the dollars payable to the former spouse will remain constant irrespective of the subsequent increase by COLA of the retirement.

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

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

## 2. Cases in Which the Member is Still on Active Duty

Much of the above information applies to this scenario as well, but if an order adhering to the frozen benefit rule is submitted, some choices are removed and other ramifications appear.

For example, since the COLA to be used for the former spouse is the *retired* COLA, while the member will be receiving an *active duty* COLA, there will be less and less correlation between what the former spouse will receive at retirement and that which the member will receive.

Prior to the 2016 changes, as discussed above, a sum certain award would not receive any COLA into the future years. The new mandatory formula appears to require a COLA in active duty cases – but substantially smaller than that to be received by the member, if the member remains on active duty for any length of time and increases in rank.

These complexities are just one example of why reservations of jurisdiction, discussed in the next section, are often important, especially for the former spouse, in military cases.

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

In both already-retired and still-on-active-duty cases, the attorney for the former spouse should try to provide for the court’s continuing jurisdiction to enforce its award by means of post-divorce order.<sup>158</sup> Virtually all of the things that could happen after divorce to change the expectations of the parties as to payments will work to the disadvantage of the former spouse, so it is that party who must make it as simple as possible to get back into court to correct later problems.

### **A. “Early-Outs”: VSI, SSB, and Early Retirement**

The Voluntary Separation Incentive (VSI)<sup>159</sup> and Special Separation Benefit (SSB)<sup>160</sup> programs were early-retirement programs offered at times by the military by means of which members could terminate service before completing 20 years, receiving lump-sum or time payments instead of a regular military pension.<sup>161</sup> The military also developed an early (15-19 year) retirement program known as the “Temporary Early Retirement Authority” (TERA) in 1993.<sup>162</sup>

The first two programs were offered to members in “selected job specialties” who had accrued between six and twenty years of service.<sup>163</sup> Some were required to serve in Reserve

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<sup>158</sup> See *In re Marriage of Bergman*, 168 Cal. App. 3d 742, 214 Cal. Rptr. 661 (Cal. Ct. App. 1985) (court can retain jurisdiction to supervise payment of benefits awarded).

<sup>159</sup> 10 U.S.C. §§ 1175-1175a.

<sup>160</sup> 10 U.S.C. § 1174a.

<sup>161</sup> 10 U.S.C. §§ 1174a(b), 1175a(h).

<sup>162</sup> Pub. L. 102-484, 106 Stat. 2315; former 10 U.S.C. § 1293.

<sup>163</sup> 10 U.S.C. §§ 1174a(c), 1175(b).

units, as well, after leaving active duty.<sup>164</sup> The TERA early retirement option was similar to “regular” military retirement, except that the sum paid contained an actuarial penalty of one percent per year for each year short of 20 years of service.<sup>165</sup>

All three of these programs were repeatedly re-authorized by Congress until 2001, and remain available to be used if perceived to be necessary. Congress extended voluntary separation pay and benefits authority, formerly set to expire at the end of 2012, to the end of 2018.<sup>166</sup>

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

Since, by definition, no member taking a TERA retirement ever stays on active duty for 20 years, it is not possible for a spouse of such a member to ever have 20 years of marriage *during* active duty, and therefore become a “20/20/20” former spouse entitled to lifetime medical and other benefits.<sup>167</sup> This creates the situation whereby a *current* spouse of a TERA retiree is treated just like the spouse of any other retired member, but the *former* spouse of a TERA retiree (irrespective of the timing of the divorce and the retirement) has none of the ancillary benefits that the former spouse of a “regular” retiree would have.<sup>168</sup>

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

The powers and procedures of courts to interpret divorce court orders, when expectations embedded in the orders prove inaccurate, varies from one jurisdiction to another. The

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<sup>164</sup> 10 U.S.C. § 1175a(d).

<sup>165</sup> Former 10 U.S.C. § 1293(e).

<sup>166</sup> Section 526 of the 2012 Defense Authorization bill.

<sup>167</sup> This is explained below in the discussion of medical benefits.

<sup>168</sup> See Department of Defense, A Report to Congress Concerning Federal Former Spouse Protection Laws at 64 (2001).

problem is often seen in court orders issued during active duty that projected a date certain for payments to start to the former spouse, or made reference to “twenty years of service,” etc. The standard form clauses contain language permitting the resolution of such problems.

Especially when they were new, there was some question as to whether VSI and SSB benefits were, or should be, divisible as marital or community property. In *In re Crawford*,<sup>169</sup> the court specifically quoted and analogized to *In re Marriage of Strassner*,<sup>170</sup> which addressed disability benefits. The Arizona court held that in both situations the spousal interest had been “finally determined” on the date of the decree, and enforcing that order in the face of a post-decree recharacterization by the member did not violate *Mansell*.

Courts throughout the country are in fair consensus that a spouse can receive a share of any *early retirement* taken by a member, under the theory that the “early out” benefits are as divisible as the retirements that were given up to receive those benefits, despite the lack (for SSB and VSI) of any federal mechanism for direct payment to the former spouse.<sup>171</sup> Other courts throughout the country have used similar language or reasoning to reach the same results regarding both programs.<sup>172</sup>

Very few courts have reached the opposite result.<sup>173</sup> Others have reached that opposite result, just to be reversed on appeal or affirmed upon narrow findings of special circumstances.<sup>174</sup>

It could be concluded that these cases stand for the proposition that it makes no difference how or why the member reduces a divorce court’s award to a former spouse – the fact that

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<sup>169</sup> *In re Crawford*, 884 P.2d 210 (Ariz. Ct. App. 1994).

<sup>170</sup> *In re Marriage of Strassner*, 895 S.W.2d 614 (Mo. Ct. App. 1995).

<sup>171</sup> See *In re McElroy*, 905 P.2d 1016 (Colo. Ct. App. 1995) (SSB); *In re Shevlin*, 903 P.2d 1227 (Colo. Ct. App. 1995) (VSI); *In re Heupel*, 936 P.2d 561 (Colo. 1997).

<sup>172</sup> See *Kulscar v. Kulscar*, 896 P.2d 1206 (Okla. Ct. App. 1995) (SSB divisible in place of military retirement divided in divorce, refusing to “allow[] one party to retain all the compensation for unilaterally altering a retirement plan asset in which the other party has a court-decreed interest”); *Marsh v. Wallace*, 924 S.W.2d 423 (Tex. Ct. App. 1996) (SSB); *Pavatt v. Pavatt*, 920 P.2d 1074 (Okla. Civ. App. 1996) (SSB); *Abernathy v. Fishkin*, 638 So. 2d 160 (Fla. Ct. App. 1994) (VSI); *Blair v. Blair*, 894 P.2d 958 (Mont. 1995); *Fisher v. Fisher*, 462 S.E.2d 303 (S.C. Ct. App. 1995) (VSI); *In re Babauta*, 66 Cal. App. 4th 784, 78 Cal. Rptr. 2d 281 (1998); *Marsh v. Marsh*, 973 P.2d 988 (Utah Ct. App. 1999) (SSB); *Lykins v. Lykins*, 34 S.W.3d 816 (Ky. Ct. App. 2000).

<sup>173</sup> See *McClure v. McClure*, 647 N.E.2d 832 (Ohio Ct. App. 1994).

<sup>174</sup> See *Kelson v. Kelson*, 647 So. 2d 959 (Fla. Ct. App. 1994) (VSI held not divisible in split opinion); *overruled*, 675 So. 2d 1370 (Fla. 1996); *Baer v. Baer*, 657 So. 2d 899 (Fla. Ct. App. 1995) (where service member given ultimatum to accept VSI or be immediately involuntarily terminated, VSI payments were severance pay rather than retirement pay, and not divisible); *In re Kuzmiak*, 222 Cal. Rptr. 644 (Ct. App. 1986) (pre-SSB/VSI case; separation pay received upon involuntary discharge pre-empted State court division).

he does so mandates that compensation be provided. The cautious practitioner, however, cannot presume that a reviewing court will reach the same result, and so will ensure that the property settlement agreement or divorce decree is crafted with sufficient demonstrations of intent (and reservations of jurisdiction, if necessary) that a later reviewing court would be able to transcend recharacterization of the benefits addressed. The standard form clauses are intended to provide a statement of such intent.

## **B. The Dangers of REDUX**

When the divorce occurs near the 15-year mark of the military career, there is a danger for spouses of military members who started service after July 31, 1986.<sup>175</sup> There is no provision for spousal consent, or even notification, before a member can take the \$30,000 CSB/REDUX payment, which irrevocably reduces the lifetime “regular” retirement benefits payout.<sup>176</sup> Especially where the parties have already separated, it is possible that the member could simply pocket the cash payment and the spouse would never even know of the devaluation of the retirement benefits being divided in the divorce.

As seen in the “early out” cases discussed above, however, and (generally) in the disability cases discussed below, precedent supports a couple of general propositions. First, that the military member may usually choose any legitimate retirement option available under law. Second, that it usually makes no difference how or why the member reduces the sum of retirement benefits otherwise payable to a former spouse – the fact of doing so mandates that compensation be provided to the former spouse<sup>177</sup> – except as to the question of disability elections.<sup>178</sup> This can play out in a number of ways, depending on the timing of events.

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

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<sup>175</sup> See 37 U.S.C. § 354.

<sup>176</sup> 37 U.S.C. § 354(a)-(b).

<sup>177</sup> Again, however, the cautious practitioner for the spouse cannot presume such a result, but must craft the documents to lead to it.

<sup>178</sup> See discussion of *Howell v. Howell*, *supra* in “Major Cases” and *infra* in “Disability.”

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

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

### C. Late Retirement by Members; the “Smaller Slice of the Larger Pie”

As a general proposition, spouses should try to begin receiving payments as soon as possible once the right to do so accrues. Military retired pay is not like a defined contribution plan with a specific balance;<sup>179</sup> it is a defined benefit plan, in that it provides a stream of payments that can be tapped for a present spousal share, but has no mechanism for collecting property payments once they are missed. In other words, any arrears in military retirement benefits payments must be collected from the member directly; the military will not garnish for such arrearages.

Several courts have held that the spouse may collect the spousal portion of the retirement at *eligibility* for retirement, whether or not the member actually retires at that time.<sup>180</sup>

The theory is that the former spouse should be able to decide when benefits that are due and payable to the spouse will actually commence – that “The employee spouse cannot by election defeat the nonemployee spouse’s interest in the community property by relying on a condition within the employee spouse’s control.”<sup>181</sup> A spouse making such an election should also receive the imputed cost of living adjustments that *would have* accrued if the member had retired but the former spouse would *not* share in any actual later increases in rank, or benefit from additional years in service.

This is another subject that the 2016 “frozen benefit” mandate has altered. Previously, the California cases made it clear that a spouse has to make an “irrevocable election” whether to begin receiving the spousal share of the retirement benefits upon maturity, or to wait until the wage-earner actually retires, thus enjoying a “smaller piece of a larger pie” by getting a

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<sup>179</sup> This has been changed slightly, as military members may after 2001 participate in the Thrift Savings Plan (TSP), and thus have both a defined contribution plan *and* a defined benefit kind of plan.

<sup>180</sup> See cases set out in Footnote 104.

<sup>181</sup> *In re Marriage of Luciano*, 164 Cal. Rptr. 93, 95 (Ct. App. 1980).

shrinking percentage of a retirement based upon post-divorce increases in the wage-earner's salary and years in service.<sup>182</sup>

Except in the extremely rare circumstance in which extraordinary changes in rank are anticipated, it would almost always be a mistake for a spouse to defer collection past first eligibility. When a member chooses to continue service after 20 years, if the spouse defers receipt of a share of the retirement until actual retirement, the ultimate collection by the spouse is typically decreased, actuarially.<sup>183</sup>

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

This is where the 2016 alterations to the USFSPA kick in. Now, everywhere, since the law restricts the spousal share to the rank and grade at divorce, instead of using the standard time-rule formula, the discussion is even more critical. The spouse's inability to obtain a flow of payments at the member's first eligibility would result in a tremendous devaluation of the spousal share, undercutting the concept of community property (and, increasingly, the equal division sought in "equitable distribution" jurisdictions).

Under the post-2016 law, it makes little sense to wait for the member to actually retire, as the former spouse's share will not grow except by the COLAs that the spouse would be entitled to anyway. The practitioner should not allow a member to demand that the former spouse wait until the member actually retires.

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

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<sup>182</sup> See *In re Marriage of Luciano*, 164 Cal. Rptr. 93 (Ct. App. 1980); *Henson v. Henson*, 130 Nev. \_\_\_, \_\_\_ P.3d \_\_\_ (Adv. Opn. No. 79, October 2, 2014).

<sup>183</sup> As noted above, the difference in lifetime collection difference for the spouse is about 13%. This approximate ratio holds true across ranks.

## D. Disability Benefits<sup>184</sup>

### 1. Generally

Retirement benefits are essentially a form of deferred reward for service, and so are generally divisible upon divorce, while disability benefits are conceptualized as compensation for future lost wages and opportunities because of disabilities suffered, and are thus typically *not* divisible or attachable. When accepting a disability award requires relinquishing a retirement benefit, the interests of the parties as to the proper characterization of the benefits become instantly polarized.<sup>185</sup>

At any time, a military retiree can apply to the Veteran's Administration to be evaluated for a "service-connected disability."<sup>186</sup> If the evaluation shows such a disability, a rating is given between 10% and 100%, and "compensation" is paid monthly from the VA in accordance with a schedule giving a dollar sum corresponding to each 10% increase, plus certain additional awards for certain serious disabilities.<sup>187</sup> Still further waivers of retired pay for VA disability pay can be given if the retiree has dependents (a spouse or children, or even dependent parents).<sup>188</sup> It makes sense for a retiree to obtain a disability award, even with a dollar-for-dollar reduction in retired pay, because the disability awards are received tax-free.<sup>189</sup>

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<sup>184</sup> The topic of military disability benefits is simply too complex and nuanced to do the subject justice in the space available in these materials. The discussion here should be taken as an overview, and those seeking a more complete discussion or list of authorities are encouraged to reference other materials. See, e.g., MILITARY RETIREMENT BENEFITS IN DIVORCE, *supra* n.1; Willick, *Death, Disability, and Related Subjects of Cheer (Part Two – Disability)*, at [http://willicklawgroup.com/published\\_works](http://willicklawgroup.com/published_works); Sullivan HANDBOOK, *supra*, at 441-454.

<sup>185</sup> See, e.g., *In re Marriage of Knies*, 979 P.2d 482 (Wash. Ct. App. 1999) (only disability award in excess of amount of retirement benefits otherwise payable are the separate property of the retiree); *Powers v. Powers*, 779 P.2d 91 (Nev. 1989) (disability benefits were divisible property to the extent they included divisible retirement benefits); *In re Marriage of Higinbotham*, 203 Cal. App. 3d 322 (Ct. App. 1988), citing *In re Marriage of Stenquist*, 21 Cal. 3d 779 (Cal. 1978) (same); *In re Marriage of Saslow*, 710 P.2d 346 (Cal. 1985) (disability benefits may be part replacement of earnings and part retirement); *In re Marriage of Anglin*, 759 P.2d 1224 (Wash. Ct. App. 1988) (disability benefits may be part replacement of earnings and part retirement); *In re Marriage of Kosko*, 611 P.2d 104 (Ariz. Ct. App. 1980) (disability benefits may be part retirement and part replacement of earnings).

<sup>186</sup> 38 U.S.C. § 1101–1142.

<sup>187</sup> 38 U.S.C. §§ 1114, 1134, 1155.

<sup>188</sup> 38 U.S.C. §§ 1115, 1135.

<sup>189</sup> See 38 U.S.C. § 5301(a); *Absher v. United States*, 9 Cl. Ct. 223 (1985), *aff'd*, 805 F.2d 1025 (Fed. Cir. 1986). Because of that tax incentive, disabled veterans often waive retired pay in favor of disability benefits. See *Mansell*, 490 U.S. at 583-84, 109 S. Ct. at 2026, 104 L. Ed. 2d at 682.

The USFSPA set up a federal mechanism for recognizing and enforcing State-court divisions of military retired pay, including definitions. One of these was of “disposable retired pay” (the sum that the military pay center could divide between spouses), which definition has changed over time.

As detailed in these materials, “disposable retired pay” originally referred to the post-tax “net” payable, and was amended in 1991 to refer to the pre-tax “gross” benefit, minus sums waived for disability. In 2016, the definition was radically altered to:

(i) the amount of basic pay payable to the member for the member’s pay grade and years of service at the time of the court order, as increased by

(ii) each cost-of-living adjustment that occurs under section 1401a(b) of this title between the time of the court order and the time of the member's retirement using the adjustment provisions under that section applicable to the member upon retirement.<sup>190</sup>

The meaning and effect of the savings clause is discussed above in the introduction to the USFSPA, which discussion is not repeated here. Similarly, there does not seem to be much to say about disability benefits already received and used for the increase of bank account balances or the acquisition of assets, all of which apparently have no kind of special or protected status.<sup>191</sup>

In 1986, the California Supreme Court had held in *Casas*<sup>192</sup> that the USFSPA direct payment limitation on State courts was strictly procedural. At least one California case went further, declaring that where the original divorce decree predated *McCarty* (i.e., June 26, 1981), the existence of a disability is simply *irrelevant* to the divorce court’s equal division of retirement (and disability) benefits.<sup>193</sup> The 1989 United States Supreme Court decision in *Mansell*,<sup>194</sup> discussed in detail above, made all such prior authority questionable.

Many courts hearing such cases when *Mansell* was decided did exactly what the California trial court did on remand in that case, issuing opinions that detailed why they would not allow the inequity of allowing post-divorce status changes by members to partially or

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<sup>190</sup> 10 U.S.C. § 1041(a)(4)(B)(i)-(ii).

<sup>191</sup> See, e.g., *Fox v. Fox*, \_\_\_ S.W.3d \_\_\_ (Tenn. Ct. App., No. M1999-01720-COA-R3-CV, Apr. 11, 2001); *Carrier v. Bryant*, 306 U.S. 545, 59 S. Ct. 707 (1939); *Bishoff v. Bishoff*, 987 S.W.2d 798 (Ky. Ct. App. 1999); *Gray v. Gray*, 922 P.2d 615 (Okla. 1996); *Pfeil v. Pfeil*, 341 N.W.2d 699 (Wis. Ct. App. 1983).

<sup>192</sup> *Casas v. Thompson*, 720 P.2d 921 (Cal. 1986), cert. denied, 479 U.S. 1012 (1987).

<sup>193</sup> *In re Marriage of Stier*, 178 Cal. App. 3d 42, 223 Cal. Rptr. 599 (1986).

<sup>194</sup> 490 U.S. 581, 109 S. Ct. 2023, 104 L. Ed. 2d 675 (1989).

completely divest their former spouses, where the original divorce decree had been issued *prior* to the *Mansell* decision.<sup>195</sup>

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

As in other subjects discussed above, the cases fit into a few separate categories, depending on the order and timing of the disability, retirement, and divorce. The category that has produced the bulk of the litigation and authority in the field is the scenario where the member waived some or all regular, longevity retired pay in favor of VA benefits *after* the parties to the case divorced.

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

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

From 1989 to 2017, with virtual uniformity, courts throughout the United States went to considerable lengths to protect former spouses from the effects of members’ post-divorce waivers of retired pay for disability pay when such waivers partially or completely divested the spouses of sums that had already been awarded to them.

The theory often applied was phrased differently from one court to another, but was essentially that of *resulting or constructive trust*.<sup>196</sup> Once a divorce was entered dividing the “gross” or “total” or “all” military retirement benefits, the money awarded to the former

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<sup>195</sup> See *Toupal v. Toupal*, 790 P.2d 1055 (N.M. 1990); *Berry v. Berry*, 786 S.W.2d 672 (Tex. 1990); *Maxwell v. Maxwell*, 796 P.2d 403 (Utah App. 1990); *MacMeeken v. MacMeeken*, 117 B.R. 642 (1990) (Bankr. D. Kan. 1990); *Lyons v. Lyons*, No. C034544 (Cal. Ct. App., Aug. 9, 2002, unpublished) (applying California law as of the time of the parties’ 1979 marital settlement agreement in determining that as of the member’s retirement 20 years later, the former spouse was entitled to a percentage of the gross retired pay before deduction for disability or SBP premiums for a later spouse).

<sup>196</sup> Alaska and California do not allow the use of a constructive trust in this context. See *Young v. Lowery*, 221 P. 3d 1006 (Alaska 2009) and *In re Marriage of Chapman*, 3 Cal. App. 5th 719 (Ct. App. 2016).

spouse was no longer considered the member's property to convert. If the member subsequently applied for and received disability benefits, or took any other action to redirect money already ordered paid to the former spouse back to himself, he violated the divorce decree.

One California court, surveying cases from around the country, held in 1999 that *Mansell* does not apply to post-judgment waivers of retirement pay **at all**, because *Mansell* held only that disability benefits could not be divided “**upon divorce**.”<sup>197</sup>

The decision in that case relied on the earlier decision of *In re Marriage of Daniels*,<sup>198</sup> which held that to whatever degree direct enforcement of a divorce decree might be prevented by application of federal law, the member would receive any sums that had been awarded to the spouse as a **resulting trustee** of her funds, and must pay them over to her. The language quoted was the principle espoused earlier by the California Supreme Court in *Gillmore*<sup>199</sup> – that one party should not be allowed to defeat the other's interest in retirement benefits “by invoking a condition wholly within his or her control.” Other courts have echoed the same thought, in similar language.<sup>200</sup>

The *Krempin* court approvingly quoted the conclusion reached in a law review article: “‘A majority of state courts,’ on one theory or another, ‘take equitable action to compensate the former spouse’ when that spouse's share of retirement pay is reduced by the other's post-judgment waiver.”<sup>201</sup> It then added its own conclusion, that: “A review of the out-of-state precedents confirms that this result is nearly universal.”<sup>202</sup>

In 2017, however, the United States Supreme Court decided *Howell*<sup>203</sup> and in an instant swept away decades of that nearly universal consensus regarding indemnification of spousal interests when a member waives retired pay for disability pay.

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<sup>197</sup> *In re Marriage of Krempin*, 83 Cal. Rptr. 2d 134, 70 Cal. App. 4<sup>th</sup> 1008 (Ct. App. 1999).

<sup>198</sup> *In re Marriage of Daniels*, 186 Cal. App. 3d 1084, 1087 (Ct. App. 1986).

<sup>199</sup> *In re Marriage of Gillmore*, 629 P.2d 1 (Cal. 1981), discussed in some detail elsewhere in these materials.

<sup>200</sup> See, e.g., *Stone v. Stone*, \_\_\_ So. 3d \_\_\_ (WL 2070861, Ala. Ct. App., June 26, 2009), approvingly quoting from *In re Marriage of Warkocz*, 141 P.3d 926 (Colo. Ct. App. 2006) (“one spouse should not be permitted to benefit economically in the division of property from a factor or contingency that could reduce the other spouse's share, if that factor or contingency is within the first party's complete control”).

<sup>201</sup> 83 Cal. Rptr. 2d at 138, quoting from Fenton, *Uniformed Services Former Spouses Protection Act and Veterans' Disability and Dual Compensation Act Awards* (Feb. 1998 Army Law. 31, 32).

<sup>202</sup> *Id.*

<sup>203</sup> *Howell v. Howell*, \_\_\_ U.S. \_\_\_, 2017 WL 2039158 (May 15, 2017).

*Howell*, discussed above in the “Major Cases” section, found that a state court may not order a veteran to indemnify a divorced spouse for the loss in the divorced spouse’s portion of the veteran’s retirement pay caused by the veteran’s waiver of retirement pay to receive service-related disability benefits.

Dismissing decades of State courts holdings, the Court found that an award to a spouse of retired pay is “subject to later reduction” if the member waives retired pay for disability pay, and that any attempted dollar-for-dollar indemnification, in any form, would be pre-empted as a matter of federal law, since the pre-emption found to exist in *McCarty* had been only partially overcome by the USFSPA.

But the Court found that a family court could “take account of the contingency that some military retirement pay might be waived” at the time of divorce, or “take account of reductions in value when it calculates or recalculates the need for spousal support.”

For that proposition, the Court cited its own holding allowing contempt sanctions to issue against a member for non-payment of child support even if his only income was disability pay,<sup>204</sup> and the “savings clause” of the USFSPA making state court judgments not payable under the USFSPA collectible by way of other State court proceedings.<sup>205</sup>

This holding appears to leave an award of “other payments” or an alimony award to the spouse, upon divorce or upon the member’s conversion of retired pay to disability pay (if such an order is possible under State law) – the only viable means of protecting a spouse from the post-divorce recharacterization of retired pay by a member.

Therefore, much of the below information as to treatment of disability benefits may have been rendered academic by the *Howell* decision. Since, as of this writing, *Howell* is still new and courts have not yet reacted to its full scope, the discussion below is retained in this text, but it should be treated as historical and potentially overruled in light of the new pronouncement.

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

One portion of the case law appeared to be *unanimous*. A comprehensive review of the cases throughout the United States reveals that there was *no* authority for the proposition that

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<sup>204</sup> *Rose v. Rose*, 481 U.S. 619, 630–634, and n. 6 (1987).

<sup>205</sup> 10 U.S.C. § 1408(e)(6). The provision provides that no part of the USFSPA “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” and that any benefits awarded but not payable by DFAS “may be enforced by any means available under law other than the means provided under this section.”

where the divorce decree *preceded Mansell*, there could *ever* be a waiver of retired pay by the retiree in favor of VA disability benefits without compensation being required to be paid to the former spouse, dollar for dollar, as to all sums the retiree's actions caused to be diverted from her back to him.

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

There are attorneys, and some trial level judges, who have tried to hold the language used in *pre-Mansell* divorce decrees to that "higher standard of clarity," arguing that the language of the USFSPA itself provided adequate "notice" of the issue to the former spouse as of 1982. Since virtually every published decision before *Mansell* had rejected the construction of the language embraced by the majority in *Mansell*, however, that argument has been almost universally rejected by appellate courts as sophistry, or at best a misdirected retroactive application of the *Mansell* holding.<sup>206</sup>

When reviewing the language of divorce decrees issued *after Mansell* (i.e., after 1989), courts (especially in earlier years) sometimes examined the decrees at issue for "safeguard" clauses or "indemnification for reduction" clauses, as necessary indicators of intent to protect spouses from members' post-divorce recharacterization of benefits.<sup>207</sup> Where such intent was

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<sup>206</sup> A common tactic used by attorneys seeking to confuse the issues during post-divorce recharacterization motions is to cite cases concerning original divorce decrees rendered when the member was already drawing disability pay, and so falling squarely within the "explicit prohibition" of *Mansell*. See, e.g., *Perkins v. Perkins*, 26 P.3d 989 (Wash. Ct. App. 2001) ("*Mansell* cannot be circumvented simply by chanting 'maintenance'; remanding for 'consideration' of receipt of disability pay as 'one factor among many' in dividing property and awarding alimony); *Lambert v. Lambert*, 395 S.E.2d 207 (Va. Ct. App. 1990). As the latter court pointed out, when such a disability award already exists at the time of divorce, the court can take the cash flow into account when determining an appropriate alimony (or other property) award to be made to the former spouse, who cannot be awarded a portion of that disability cash flow as property. Citation to such cases in a post-divorce recharacterization case is intellectually dishonest. Illustrating that point, the same court that decided *Lambert* approved the use of indemnification clauses in post-*Mansell* divorces to compensate a former spouse for any reduction caused by a disability award *after* divorce. See *Owen v. Owen*, 419 S.E.2d 267 (Va. Ct. App. 1992) (affirming an order providing that the spouse was to receive a sum equal to a percentage of the member's "gross retirement benefits," and stating that the member's request to reduce what she was owed due to his later disability claim was "irrational").

<sup>207</sup> Though now rare, examples of this reasoning still pop up from time to time. See *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).

found, even by implication, the member has been required to reimburse the former spouse for all sums his actions caused to be redirected from the former spouse back to him.<sup>208</sup>

Other courts have expressly found that reimbursement is required, whether or *not* there was any kind of indemnification or safeguard clause in the underlying decree.<sup>209</sup>

The reason for not only permitting, but encouraging the use of such indemnification clauses was explained well by the Minnesota Court of Appeals in *Gatfield*<sup>210</sup>: it basically ensures that the divorce courts are free to enforce the parties' declared intent as a matter of contract law.<sup>211</sup> Any court reviewing a decree seeking intent to indemnify must be careful to not give retroactive effect to either the USFSPA, or any case interpreting it (i.e., *Mansell*) so as to defeat an existing flow of payments to a former spouse. As stated by various courts over the years, it would "thwart the very title of the Act, the 'Uniform Services Former Spouses' Protection Act,' to construe the law as preventing a spouse from actually receiving a court ordered portion of military retirement benefits."<sup>212</sup>

In the decade following *Mansell*, the focus shifted from looking for "indemnification" or other language that such recharacterization was *prohibited* to looking for some language

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<sup>208</sup> See *In re Strassner*, 895 S.W.2d 614 (Mo. Ct. App. 1995); see also *Owen v. Owen*, 419 S.E.2d 267 (Va. Ct. App. 1992); *Dexter v. Dexter*, 661 A.2d 171 (Md. Ct. App. 1995); *McHugh v. McHugh*, 861 P.2d 113 (Idaho Ct. App. 1993); *Scheidel v. Scheidel*, 4 P.3d 670 (N.M. Ct. App. 2000).

<sup>209</sup> See *McLellan v. McLellan*, 533 S.E.2d 635, 637 & 638 n.1 (Va. Ct. App. 2000); *Longanecker v. Longanecker*, 782 So. 2d 406, 408 (Fla. Ct. App. 2001); *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).

<sup>210</sup> *Gatfield v. Gatfield*, 682 N.W.2d 632 (Minn. Ct. App. 2004).

<sup>211</sup> *Id.*, citing *Krapf v. Krapf*, 786 N.E.2d 318, 326 (Mass. 2003); see also *Shelton v. Shelton*, 78 P.3d 507, 511 (Nev. 2003); *Hisgen v. Hisgen*, 554 N.W.2d 494, 498 (S.D. 1996); *Resare v. Resare*, 908 A.2d 1006 (R.I. 2006) (holding *Mansell* inapplicable, finding fiduciary duty, and applying breach of contract analysis to require dollar for dollar indemnification for sum that would have been paid if the member had not "unilaterally modified" the property settlement agreement); *Marriage of Smith* 148 Cal. App. 4th 1115, 1123, 56 Cal. Rptr. 3d 341 (2007) (postjudgment order requiring a husband to indemnify his wife if he chose to receive disability in lieu of retirement benefits in the future was not inconsistent with federal law); *Price v. Price*, 480 S.E.2d 92, 94 (S.C. Ct. App. 1996) ("Given the fact that Husband agreed, after *Mansell*, to pay Wife a percentage of his gross monthly military retirement pay, which included disability pay, he should not be permitted to complain that the family court erred in enforcing the terms of the Agreement"); *Poullard v. Poullard*, 780 So. 2d 498 (La. Ct. App. 2001) (expressing doubt as to whether the member could ever be entitled to waive sums already awarded to the spouse without compensating her, but finding that it need not reach the question because the parties entered into a property settlement agreement); *Laffin v Laffin*, 760 N.W.2d 738 (Mich. Ct. App. 2008) (a consent judgment is in the nature of a contract); *Dexter v. Dexter*, 661 A.2d 171 (Md. Ct. App. 1995) (wife to be compensated where husband "breached his obligations").

<sup>212</sup> See *Walentowski v. Walentowski*, 672 P.2d 657 (N.M. 1983).

indicating that recharacterization is *permitted*, and requiring reimbursement of the former spouse unless the divorce decree specifically permitted the member to convert the benefits post-divorce.<sup>213</sup> Over that time, a nearly-uniform consensus emerged throughout the country that a retiree simply is not permitted to recharacterize the former spouse's share of the retirement benefits as his own separate property disability benefits, unless there is some indication *on the face of the divorce decree* that such a post-divorce recharacterization is permitted.

Sometimes, this focus is revealed in contempt cases, as in the 1995 Texas Court of Appeals rejection of a retiree's claim that federal law made him "exempt" from contempt sanction after he waived retired pay in favor of disability benefits.<sup>214</sup> This is one of the cases that have labeled a post-divorce recharacterization of benefits as an improper "collateral attack on a final unappealed divorce decree."<sup>215</sup>

*Jones* is also in the group of cases explaining that *Mansell* calls on courts to essentially take a snapshot at the time of divorce, when the award to the spouse is made. Any disposable retired pay that was already waived in favor of disability pay up to that point is not divisible, but any attempt by the member at *post*-divorce reduction in retired pay by recharacterization is seen as attempting a "de facto modification" of a final property award, which community property law does not permit.<sup>216</sup>

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<sup>213</sup> In one anomalous case, an intermediate court in North Carolina started out with finding (as had the Alaska Supreme Court in *Clauson*, *infra*) that it would be a violation of *Mansell* for a court to simply increase a spouse's percentage of the military retirement benefits in order to make up for a disability award. *Halstead v. Halstead*, 596 S.E.2d 353 (N.C. Ct. App. 2004). Unfortunately, the court then concluded that a standard provision indemnifying the former spouse against *future* waivers of retired pay for disability would also be impermissible. This is the only known case so holding, and in view of the weight of authority on the subject leads to an unjust, and unjustifiable, result not required under the relevant law – according to every other court that has opined on the subject. *See, e.g., Gatfield v. Gatfield*, *supra*.

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

<sup>214</sup> *Jones v. Jones*, 900 S.W.2d 786 (Tex. Ct. App. 1995).

<sup>215</sup> 900 S.W.2d at 788. *See also Price v. Price*, 480 S.E.2d 92, 93 (S.C. Ct. App. 1996) (same).

<sup>216</sup> These cases are perhaps best explained in, and exemplified by, *In re Gaddis*, 191 Ariz. 467, 957 P.2d 1010 (Ariz. Ct. App. 1997) (waiver of benefits to take civil service income required compensation to former spouse), *cert. denied*, 525 U.S. 826 (1998); *Harris v. Harris*, 991 P.2d 262 (Ariz. Ct. App. 1999); *Merrill v. Merrill*, 284 P.3d 880 (Ariz. Ct. App. 2012) (when a retiree waives retirement pay in favor of a tax benefit afforded to him as a disabled veteran, the retiree must make his former spouse whole to the extent his unilateral decision to receive the tax benefit has reduced her share of his retirement benefits).

The exceptions and anomalies to this line of cases were few and far between until (as detailed below) around 2009. In 1997, the Kansas Court of Appeals heard and decided *In re Marriage of Pierce*,<sup>217</sup> a “double-divorce” case in which both parties were apparently fully aware of the retiree’s disability at the time of divorce. The court found that the law was so well developed by the time of the divorce that if the spouse had sought to protect against the conversion of retirement to disability benefits, she could easily have done so, explaining that it felt its result was required under Kansas State law statute of limitations. The dissent noted that the result reached was “patently unfair to former spouses.”<sup>218</sup>

*Pierce* is something of an orphan, standing on its own odd facts, and has no following. The only known case to cite it approvingly was subsequently reversed on appeal.<sup>219</sup> Almost all other citations appear to be to note it as an aberration, in decisions holding that a former spouse **must** be compensated for a member’s post-divorce recharacterization of her property.<sup>220</sup>

Virtually all other jurisdictions lined up with the national consensus. In 2000, New Mexico verified its 1990 holding in *Toupal*, *supra*, in *Scheidel*,<sup>221</sup> rejecting a “federal law prohibits enforcement” argument and noting that there is no analytical difference between a member making a new disability application post-divorce, on the one hand, and increasing an award that existed upon divorce, on the other. That court, like many others, reinvented the core concept of the California *Gillmore* holding: “one spouse should not be permitted to benefit economically in the division of property from a factor or contingency that could reduce the other spouse’s share, if that factor or contingency is within the first party’s complete control.”<sup>222</sup>

The same result was reached in three cases from Tennessee decided in early 2001, two from that State’s Court of Appeals, and a third from the Tennessee Supreme Court: *Hillyer v.*

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<sup>217</sup> *In re Marriage of Pierce*, 982 P.2d 995 (Kan. Ct. App. 1999).

<sup>218</sup> *Id.* at 1000-01 (Green, J., dissenting).

<sup>219</sup> *Johnson v. Johnson*, 1999 Tenn. App. Lexis 625 (Tenn. Ct. App., Sept. 14, 1999), *rev’d*, *Johnson v. Johnson*, 37 S.W.3d 892 (Tenn. 2001).

<sup>220</sup> See *Scheidel*, *infra*; *Danielson*, *infra*; *Hillyer*, *infra*; *Smith*, *infra*; but see *Morgan v. Morgan*, 249 S.W.3d 226 (Mo. Ct. App. 2008) (a “throwback” case ignoring most of the national consensus, citing *Pierce* in a “but see” cite, and holding that if the spouse wanted to be spared divestment by post-divorce recharacterization, she should have put an indemnification clause in the divorce decree).

<sup>221</sup> *Scheidel v. Scheidel*, 4 P.3d 670 (N.M. Ct. App. 2000).

<sup>222</sup> Citing for that proposition *Irwin v. Irwin*, 121 N.M. 266, 271, 910 P.2d 342, 347 (Ct. App. 1995).

*Hillyer*<sup>223</sup>; *Smith v. Smith*<sup>224</sup>; *Johnson v. Johnson*.<sup>225</sup> All three decision discussed the *Mansell* holding at length. They started with the legal principles that military retired pay is marital property subject to distribution, and that periodic payments to a spouse are distributions of property rather than alimony. As such, a divorce decree’s division of retired pay is final, and when not appealed, is not subject to later modification.

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

Other courts hearing these cases have indicated a desire to reach the economic merits, and have not seemed any more impressed with semantics than were the Tennessee courts. For example, in *Janovic v. Janovic*,<sup>226</sup> the member waived a portion of retirement benefits in favor of VA disability benefits less than a year after divorce. The trial court ordered him to pay reimbursement. On appeal, the member claimed that the former spouse was only entitled to a share of “disposable retired pay,” and his application for disability had *eliminated* the disposable pay and *created* “disability pay,” which he alone was entitled to receive.

The reviewing court affirmed the order requiring reimbursement, rejecting the retiree’s argument that ordering reimbursement violated *Mansell*, and stating that it merely enforced the parties’ property settlement agreement, rather than dividing disability benefits. Since the case involved a post-*Mansell* divorce, the decree had included an indemnification provision<sup>227</sup> because of the “higher standard of clarity” some courts have required of decrees after *Mansell* to be certain of the divorce court’s intent. However, the court noted that such enforcement of the intent at the time of the dissolution was appropriate whether or *not* the

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<sup>223</sup> 59 S.W.3d 118 (Tenn. Ct. App. 2001).

<sup>224</sup> 2001 Tenn. App. LEXIS 149 (No. M1998-00937-COA-R3-CV, Tenn. Ct. App., March 13, 2001).

<sup>225</sup> 37 S.W.3d 892 (Tenn. 2001).

<sup>226</sup> *Janovic v. Janovic*, 814 So. 2d 1096 (Fla. Ct. App. 2002).

<sup>227</sup> The specific language reviewed by the court was the form paragraph I created for courts to use in decrees entered after *Mansell* to eliminate any ambiguity upon appellate review, published by the ABA as a guide for drafting attorneys in the form of “Military Retirement Benefit Standard Clauses.” See 18 Family Advocate No. 1 (Summer, 1995) (*Family Law Clauses: The Financial Case*) at 30.

original order contained a specific indemnification provision.<sup>228</sup> Finally, the appellate court noted that “[t]he equity of the result reached . . . is undeniable.”<sup>229</sup>

In 2001, the Arizona Court of Appeals again dealt with the contract theory, federal law supremacy assertion, and claims of “involuntariness” that appeared in several of the cases discussed above, in *Danielson v. Evans*.<sup>230</sup> Because the divorce at issue occurred after *Mansell*, the prevailing former spouse in *Danielson* was held to the “higher standard of clarity” in the underlying decree (discussed above) to protect her interests.

The court nevertheless found no difficulty in turning aside the military member’s attack on the Arizona rule of finality of property distributions, finding the spouse’s rights to the benefits upon divorce to be just as “vested” as those of the member.<sup>231</sup> The court waded through just about all the kinds of claims made by members attempting to redirect to themselves funds already awarded to their former spouses – the “indirect violation” or “spirit of” *Mansell* argument, exemption from community property law by reason of application for a federally-paid disability argument, and the allegation that protecting the spouse would circumvent “Congressional intent” or violate the Supremacy Clause. The court was unimpressed on all counts.<sup>232</sup>

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<sup>228</sup> 814 So. 2d at 1100, citing *Longanecker v. Longanecker*, *supra*.

<sup>229</sup> 814 So. 2d at 1101.

<sup>230</sup> *Danielson v. Evans*, 36 P.3d 749 (Ariz. Ct. App. 2001).

<sup>231</sup> 36 P.3d at 756. While the Arizona court did not further discuss the matter, a review of military retirement benefits cases shows that retirees and their representative organizations often argue that a retiree’s “entitlement” to collection of the military retirement benefits promised to him upon enlistment is a “vested right” of constitutional dimension. *See, e.g., Fern v. United States*, 15 Cl. Ct. 580 (1988), *aff’d*, 908 F.2d 955 (Fed. Cir. 1990). Those same retirees, and organizations, uniformly assert that a **former spouse** has **no** vested right to anything, no matter what any court might have decreed.

<sup>232</sup> In a footnote, the court found that its conclusions were entirely in line with the savings clause of the USFSPA, which the court found was intended to stop military members from cheating their spouses by post-decree actions. 36 P.3d at 757, n.7.

The cases continued to appear,<sup>233</sup> although some States with published authority on the subject are not publishing the follow-up cases, apparently because they were not seen as particularly precedential.<sup>234</sup>

In 2009, however, the Texas Supreme Court decided, in *Hagen*,<sup>235</sup> that a divorce decree granting a spouse a portion of military retired pay “if, as, and when” he received it provided no protection of the spouse from the member’s post-divorce recharacterization of the retired pay as non-divisible V.A. benefits, so the member simply got to keep money previously awarded to the former spouse. One justice dissented, noting the inequity and hardship being created for the former spouse.

The Texas courts of appeal promptly magnified that holding in *Sharp*<sup>236</sup> and *Jackson*.<sup>237</sup> In the former, the court extended *Hagen* to cover CRSC benefits, so if the member chose to receive them instead of divisible CRDP, again, he got to receive property previously awarded to the former spouse. In the latter, also addressing CRSC, the appellate court “reluctantly” found that the member could entirely divest the former spouse (despite a “fiduciary duty”

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<sup>233</sup> See, e.g., *In re Marriage of Lodeski*, 107 P.3d 1097 (Colo. Ct. App. 2004) (noting that “many jurisdictions” had recognized the absence of any limitation on the equitable power of courts to address recharacterization of benefits in any part of the USFSPA); *Surratt v. Surratt*, 148 S.W.3d 761 (Ark. Ct. App. 2004).

<sup>234</sup> See *In re Marriage of Harper*, 2000 Wash. App. LEXIS 333 (Wash. Ct. App. 2000) (requiring compensation to wife for sums not paid to her by reason of husband’s post-divorce disability rating increases, because such reduction in payments was “outside the contemplation of the parties” at the time of divorce and so was “fundamentally unfair”); *In re Marriage of Choat*, 2000 Wash. App. LEXIS 1288 (Wash. Ct. App. 2000) (where the parties had been married in 1951, and divorced in 1978, and the member obtained a partial disability award in 1983, but the former spouse did not find out about it until the sums being paid to her dropped suddenly in 1998, when the disability rating was increased, the court held that a final and unappealed pre-*McCarty*, pre-USFSPA divorce decree was immune from any form of collateral attack by either party based upon any subsequent changes in federal statutory or case law, whether or not they divided sums that would be non-divisible in a current divorce because they were disability benefits; because the divorce decree had stated that the wife was to receive a share of the **gross** retired pay, she was entitled to compensation for both all sums the husband had redirected to himself as disability, **and** for the difference between gross and (post-tax) disposable retired pay); *Hubble v. Hubble*, 2002 Va. App. LEXIS 459 (Va. Ct. App. 2002) (affirming lower court order that the former spouse was to receive half of the amount that she would have received if not for the “husband’s unilateral and unauthorized modification,” so as to restore the status quo existing before he elected to replace retirement benefits with disability benefits); *Olvera v. Olvera* (Nev. No. 38233, unpublished *Order of Remand*, Oct. 29, 2003) (where former spouse received benefits for many years until the member applied for and received disability, 25 years post-divorce, eliminating the spousal share, member was ordered to make up all sums that his election caused to be diverted from the former spouse to him).

<sup>235</sup> *Hagen v. Hagen*, 282 S.W.3d 899 (Tex. 2009).

<sup>236</sup> *Sharp v. Sharp*, \_\_\_ S.W.3d \_\_\_, 2009 WL 3298131 (Tex. Ct. App. Oct. 14, 2009).

<sup>237</sup> *Jackson v. Jackson*, \_\_\_ S.W.3d \_\_\_ (No. 04-09-00117-CV, Tex. Ct. App. Apr. 14, 2010).

clause), and this time adding that based on a 1981 decision,<sup>238</sup> the indemnification clauses prohibiting a member from waiving disposable retired pay for non-divisible benefits “would be questionable.”

The clear lesson of the 2009 Texas holdings is that all risk is on the non-member spouse, and that indemnification provisions must be drawn with care, not prohibiting an election of disability or other non-divisible benefits, but simply calling for compensation to the former spouse if that election is made. That distinction, thin as it may be, appears to be the difference between the courts that find such clauses enforceable as a matter of contract, and those that see a problem with federal pre-emption.

In the meantime, in Arizona, legislation quietly slipped through the legislature that attempted to reverse decades of decisions,<sup>239</sup> apparently without anyone noticing. A.R.S. § 25-530<sup>240</sup> purports to prohibit Arizona courts from “considering” any disability benefits when awarding property or awarding spousal support, or from indemnifying or compensating a spouse or former spouse from any pre-divorce or post-divorce waiver of retired pay in favor of receiving disability benefits – despite the U.S. Supreme Court’s holding in *Rose*<sup>241</sup> that “It is clear veteran’s benefits are not solely for the benefit of the veteran, but for his family as well.”<sup>242</sup> This line of authority is more fully discussed below.

The Arizona courts have construed the legislation narrowly, and deliberately so. In *Priessman*,<sup>243</sup> the Arizona Court of Appeals examined the statute in the context of the distinction between CRSC and standard VA disability awards. Since the Arizona statute bars courts from considering “any federal disability benefits awarded to the other spouse for service-connected disabilities pursuant to 38 United States Code chapter 11,” the court found it inapplicable, in its plain language, to CRSC benefits (which are payable under Title 10).

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<sup>238</sup> *Ex parte Burson*, 615 S.W.2d 192 (Tex. 1981).

<sup>239</sup> *See, e.g., In re Gaddis*, 191 Ariz. 467, 957 P.2d 1010 (Ariz. Ct. App. 1997), *cert. denied*, 525 U.S. 826 (1998); *Harris v. Harris*, 991 P.2d 262 (Ariz. Ct. App. 1999); *Danielson v. Evans*, 36 P.3d 749 (Ariz. Ct. App. 2001).

<sup>240</sup> A.R.S. § 25-530 (West 2012), introduced as H.B. 2348. In 2014, the Arizona Legislature extended the reach of statute to CRSC benefits in § 25-318.01.

<sup>241</sup> *Rose v. Rose*, 481 U.S. 619 (1987).

<sup>242</sup> *See In re Marriage of Anderson*, 522 N.W.2d 99 (Iowa Ct. App. 1994) (applying *Rose* to require a disabled veteran to pay alimony **and** child support in a divorce action, even when his only income was veterans’ disability and supplemental security income); *Casey v. Casey*, 948 N.E.2d 892 (Mass. App. Ct. 2011) (VA disability income includable in child support calculation).

<sup>243</sup> *In re Marriage of Priessman*, 228 Ariz. 336, 266 P.3d 362 (App. 2011).

The following year, in *Merrill*,<sup>244</sup> the court held that when a retiree waives retirement pay in favor of a tax benefit afforded to him as a disabled veteran, the retiree must make his former spouse whole to the extent his unilateral decision to receive the tax benefit has reduced her share of his retirement benefits. The court found no bar to its holding in the Arizona statute, giving a broad hint in its holding that it would “avoid a construction of a statute that might raise constitutional concerns,” and noting that an expansive construction of the statute “to bar her claim for relief for injury to her property interest in Husband’s retirement benefits caused by his post-decree election of CRSC would raise serious due-process concerns.”

In 2013, an Arizona court held that a trial court may consider VA disability benefits as income in determining the payment of arrearages on an award of spousal maintenance.<sup>245</sup>

The Merrills continued litigating before and after the 2014 expansion of the Arizona statute, eventually resulting in *Merrill II*,<sup>246</sup> in which the Arizona Supreme Court found that the statute was expressly intended to prevent indemnification of spouses when the military member waived retirement for disability benefits (including CRSC), but that the statute cannot prevent indemnification of the spouse in any case in which the divorce was entered prior to the effective date of the statute, because the non-military ex-spouse “had a vested right to receive future distributions of her share MRP unencumbered by any adjustments initiated by [the military member].”<sup>247</sup>

Choosing to “reserve for another day” whether post-divorce recharacterization of retired pay as disability pay would warrant a claim for reimbursement of the converted amount to the spouse, and whether an indemnity clause would be given effect, the Vermont Supreme Court held that in the absence of such a clause, a trial court could not alter the percentage of remaining payments to the former spouse so as to restore the dollar sum she was previously receiving.<sup>248</sup>

In most places, courts continued to find that a decree of divorce creates a vested right by the spouse to the property deemed sole and separate property, so that post-divorce, unilateral recharacterization by the member – as CRSC or otherwise, gives rise to a claim for

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<sup>244</sup> *Merrill v. Merrill*, 284 P.3d 880 (Ariz. Ct. App. 2012).

<sup>245</sup> *In re Dougall*, 316 P.3d 591 (Ariz. Ct. App. 2013).

<sup>246</sup> *In re Marriage of Merrill*, \_\_\_ P.3d \_\_\_ (Ariz. No. CV-15-0028-PR, Dec. 15, 2015 ).

<sup>247</sup> *Id.*, quoting from its substantively identical holding in *In re Marriage of Howell*, \_\_\_ P.3d \_\_\_ (Ariz. No. CV-15-0030-PR., Dec. 5, 2015).

<sup>248</sup> *Youngbluth v. Youngbluth*, 6 A.3d 677 (Vt. 2010). This was one of the cases cited by the United States Supreme Court in *Howell*.

indemnification and reimbursement of all sums the spouse would have received but for the member's actions.<sup>249</sup>

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

The scant federal authority led to the same result as the State cases, but by way of different rationales, primarily involving deferral to State courts in domestic relations cases,<sup>250</sup> or squarely addressing and refuting a wide assortment of federal offenses allegedly committed by spouses in State divorce courts.<sup>251</sup>

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

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

In *Torwich (Abrom) v. Torwich*,<sup>252</sup> the court found the reduction of payments to the spouse to be an “exceptional and compelling circumstance” allowing redistribution of marital property four years after the divorce, despite the existence of procedural rules normally barring such redistributions of property. This case has been relied upon for the proposition that *Mansell* permits “other adjustments to be made” to take into account the reduction in a spousal share from the disability claim of a member, so as to prevent the inequity that would

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<sup>249</sup> See, e.g., *Whitfield v. Whitfield*, 862 A.2d 1187 (N.J. Super. 2004); *Hadrych v. Hadrych*, 149 P.3d 593 (N.M. 2006); *In re Marriage of Warkocz*, 141 P.3d 926 (Colo. Ct. App., 2006); *Bandini v Bandini*, 935 N.E.2d 253 (Ind. Ct. App. 2010); *Megee v. Megee*, 802 N.W.2d 669 (Mich. Ct. App. 2010); *Provencio v. Leding*, \_\_\_ S.W.3d \_\_\_, No. CA10-312, 2011 Ark. App. LEXIS 74 (Ark. Ct. App., Jan. 26, 2011); *Bagley v. Bagley*, \_\_\_ N.E.2d \_\_\_ (Ohio Ct. App. No. 2010-CA-17, Mar. 18, 2011) (specifically referencing and approving my form clause set, including indemnification provisions).

<sup>250</sup> *Silva v. Silva*, 680 F. Supp. 1479 (D. Colo. 1988); *White v. White*, 731 F.2d 1440 (9th Cir. 1984) (no federal claim just because federal rights are implicated in a State court proceeding; suit dismissed).

<sup>251</sup> *Fern v. United States*, 15 Cl. Ct. 580 (1988), *aff'd*, 908 F.2d 955 (Fed. Cir. 1990).

<sup>252</sup> *Torwich (Abrom) v. Torwich*, 660 A.2d 1214 (N.J. Super. Ct. App. Div. 1995).

occur if a member was permitted to redirect money from the former spouse back to himself, *without* some form of compensation.<sup>253</sup>

In 1999, the Washington State Supreme Court decided *In re Marriage of Jennings*.<sup>254</sup> The court found that a retiree who terminated a stream of payments to a former spouse by electing, post-divorce, to begin taking disability rather than retired pay created such “extraordinary circumstances” that the trial court should take the “justified remedial action” of awarding compensatory spousal support even four years after the divorce in order to “overcome a manifest injustice which was not contemplated by the parties at the time of the 1992 decree.” The court noted the reduced stream of payments to the spouse, and held that:

Regardless of the reasons, the result was fundamentally unfair because it deprived Petitioner of her entitlement to one-half of a substantial community asset with her receiving \$677.50 per month less than the amount awarded her by the court. It was therefore appropriate for the trial court, in ruling on the motion by Petitioner for modification or clarification, to devise a formula which would again equitably divide the community assets without requiring the monthly amount payable to Petitioner to be paid direct from the Respondent’s military retirement.<sup>255</sup>

The State high court concluded that the result reached by the trial court was “fair and equitable and within its authority.” The court went on to approve prior holdings stating that whenever a retiree has a choice of electing retirement or disability benefits, and chooses the latter, for whatever reason, he “could not by electing to take a disability award rather than a regular retirement eliminate the community interest in the award.”<sup>256</sup>

Other courts have, similarly, found that a court can issue a spousal support award, post-divorce, sufficient to ameliorate the impact on an innocent former spouse whose “economic

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<sup>253</sup> *Clauson v. Clauson*, 831 P.2d 1257 (Alaska 1992); *McMahan v. McMahan*, 567 So. 2d 976 (Fla. Ct. App. 1990); see also *White v. White*, 568 S.E.2d 283 (N.C. Ct. App. 2002), *aff’d per curiam*, 579 S.E.2d 248 (N.C. 2003) (remanding so district court could increase the former spouse’s percentage of the remaining disposable retired pay so as to restore to her the dollars converted to disability by the retiree, and finding that “the holding in *Mansell* was actually quite narrow” and had nothing to do with the former spouse’s claim for reimbursement of the diverted sums).

<sup>254</sup> *In re Marriage of Jennings*, 980 P.2d 1248 (Wash. 1999).

<sup>255</sup> *Id.* at 1256.

<sup>256</sup> *Marriage of Knies*, *supra*, 979 P.2d at 486-87, citing *In re Marriage of Kittleson*, 21 Wash. Ct. App. 344, 352, 585 P.2d 167 (1987). In an interesting twist that questions the entire *Jennings* analysis, the Washington Court of Appeals declared that the case “no longer controls” now that 10 U.S.C. § 1414 has led to a restoral of retired pay when a retired member elects disability (above 50%, anyway). See *In re Marriage of Michael*, 188 P.3d 529 (Wash. Ct. App. 2008).

circumstances have deteriorated through no fault of her own” by reason of the former husband’s post-divorce application for disability benefits in lieu of retirement benefits.<sup>257</sup>

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

Even where disability payments are considered “exempt,” the U.S. Supreme Court has ruled that a member can be imprisoned on a contempt charge for failing to pay child support, despite his claim that payments could be made only from his VA disability award, which was exempt from execution.<sup>258</sup> The holding has been extended to alimony cases as well, on the basis of the holding in *Rose* that: “It is clear veteran’s benefits are not solely for the benefit of the veteran, but for his family as well.”<sup>259</sup>

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

For example, in *In re Marriage of McGhee*,<sup>260</sup> the court approved compensation to the former spouse by means of alimony, as set out in the agreement between the parties, when it was imposed by the dissolution court after the member halted the flow of military retirement benefits to former spouse after the *McCarty* decision. The court termed use of such “back-up” clauses to be making the property award “supportified.” Similarly, in deciding *In re Marriage of Sheldon*,<sup>261</sup> the court noted the “close relationship between the amount of a property division and the entitlement, if any, of a spouse to spousal support.” In *In re*

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<sup>257</sup> See *Kramer v. Kramer*, 567 N.W.2d 100 (Neb. 1997); *Clauson v. Clauson*, 831 P.2d 1257 (Alaska 1992).

<sup>258</sup> See *Rose v. Rose*, 481 U.S. 619 (1987). VA benefits are subject to “apportionment” under 38 U.S.C. § 5307, permitting the Secretary of the Department of Veteran’s Affairs to apportion VA benefits to the recipients’ surviving spouses or children upon application, in order to provide for their support. See 38 C.F.R. §§ 3.450-3.461 (regulations). Some VA offices, however, have denied claims for apportionment, stating that “the law does not allow for an apportionment for one who is divorced from the veteran.” Letter from A. Bittler, Veterans Service Center Manager, in case 354/21-11 (Apr. 11, 2003), on file with the author.

<sup>259</sup> See *In re Marriage of Anderson*, 522 N.W.2d 99 (Iowa Ct. App. 1994) (applying *Rose* to require a disabled veteran to pay alimony **and** child support in a divorce action, even when his only income was veterans’ disability and supplemental security income); *Nelms v. Nelms*, 99 So. 3d 1228 (Ala. Civ. App. 2012) (same; distinguishing *Billeck v. Billeck*, 777 So. 2d 105 (Ala. 2000) on the ground that the USFSPA is irrelevant and, based on the member’s assertion that VA disability is not “paid in lieu of military retirement benefits” and are therefore separate property income from which alimony or child support may be based).

<sup>260</sup> *In re Marriage of McGhee*, 131 Cal. App. 3d 408, 182 Cal. Rptr. 456 (Ct. App. 1982).

<sup>261</sup> *In re Marriage of Sheldon*, 124 Cal. App. 3d 371, 177 Cal. Rptr. 380 (Ct. App. 1981).

*Marriage of Mastropaolo*,<sup>262</sup> the court reversed an alimony award “on condition” that the court’s affirmance of the retirement division became final.

While some courts have expressed the opinion that an outright award of spousal support in the sum of military retirement benefits lost by reason of a disability election constitutes a violation of *Mansell*,<sup>263</sup> other courts have had no problem with the direct substitution of alimony for the intended property award. In *Austin (Scott) v. Austin*,<sup>264</sup> the court instituted an award of alimony, that had been previously reserved until remarriage, in lieu of the pension share lost because of the member’s transfer to VA disability status. The court gave its approval to alimony continuing after the spouse’s remarriage, where the alimony award is intended to compensate for distribution of a pension earned during marriage, citing *Arnholt v. Arnholt*.<sup>265</sup>

It may be possible to substitute alimony for the spouse’s property interest at the time of divorce. In *Waltz v. Waltz*,<sup>266</sup> the Nevada Supreme Court approved a decree which awarded the entire military retirement to the retiree, but ordered him to pay the former spouse, by military allotment, \$200 plus cost of living adjustments on that sum, as “permanent alimony.” The military service had overlapped the parties’ marriage by just less than ten years, precluding direct payment of a property award through the military pay center, and the appellate court found that in the context of the case, the parties’ use of phrase “permanent alimony,” in conjunction with the COLA clause, showed an intent to link it to the military retired pay. Further, the court held that payments to a former spouse do not terminate upon her remarriage when the payments were clearly intended to achieve a property settlement.

On the other hand, where the spousal interest may be distributed as a regular property division, some reviewing courts have held it error for a trial court to deny the spouse the property interest and attempt to treat the military retirement benefits as “merely an income stream.”<sup>267</sup>

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<sup>262</sup> *In re Marriage of Mastropaolo*, 213 Cal. Rptr. 26 (Ct. App. 1985).

<sup>263</sup> See, e.g., *Clauson v. Clauson*, *supra*; *In re Marriage of Kraft*, 832 P.2d 871 (Wash. 1992); *Billeck v. Billeck*, 777 So. 2d 105 (Ala. 2000) (holding that alimony based on consideration of disability benefits is “essentially” a prohibited division of disability benefits).

<sup>264</sup> *Austin (Scott) v. Austin*, Mich. Ct. App. No. 92-15818 (unpublished intermediate court opinion), *rev. den.*, 546 N.W.2d 255 (Mich. 1996).

<sup>265</sup> *Arnholt v. Arnholt*, 343 N.W.2d 214 (Mich. Ct. App. 1983) (non-military case).

<sup>266</sup> *Waltz v. Waltz*, 110 Nev. 605, 877 P.2d 501 (1994).

<sup>267</sup> See *Casey v. Casey*, 948 N.E.2d 892 (Mass. App. Ct. 2011).

Many courts have awarded alimony upon divorce to the spouse, on the basis that the member was enjoying a separate property cash flow from disability benefits applied for before divorce that *would* have been divisible retirement benefits but for the member's election. Where VA disability exists at the time of divorce, the court cannot divide those benefits, but they "may be considered as a resource for purposes of determining [one's] ability to pay alimony."<sup>268</sup> Generally, State courts have felt free to make alimony awards where necessary to do substantial justice to the parties in front of them, taking into account the entirety of the actual financial circumstances of the parties.

There are members who continue trying to argue that an alimony order effects an "attachment, levy, or seizure" of veterans' disability benefits under 38 U.S.C. § 5301(a)(1), but that argument is contrary to essentially all law on the subject.<sup>269</sup> The South Dakota Supreme Court, summarizing the national decisional law in 2011, noted that "An overwhelming majority of courts have held that [federal veterans'] disability payments may be considered as income in awarding spousal support."<sup>270</sup> As noted by the collected opinions, that conclusion is undeniable as a statement of current law on the subject.<sup>271</sup>

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<sup>268</sup> See *Riley v. Riley*, 571 A.2d 1261 (Md. Ct. Spec. App. 1990); *In re Marriage of Howell*, 434 N.W.2d 629, 633 (Iowa 1989); *Nelms v. Nelms*, 99 So. 3d 1228 (Ala. Civ. App. 2012).

<sup>269</sup> See, e.g., *Nelms v. Nelms*, 99 So. 3d 1228 (Ala. Civ. App. 2012); *Case v. Dubaj*, \_\_\_ F. Supp. \_\_\_ (W.D. Pa. No. 08-347, Aug. 29, 2011) (no 42 U.S.C. § 1983 violation could be asserted against county support enforcement workers who seized or froze a bank account consisting entirely of veterans' disability benefits, because 38 U.S.C. § 5301 does not apply to claims for spousal and child support); 52 A.L.R.5th 221 §28[a] ("With few exceptions, the cases hold that payments arising from service in the Armed Forces . . . , though exempt as to the claims of ordinary creditors, are not exempt from a claim for alimony, support, or maintenance . . ."); *Commonwealth ex. rel. Caler v. Caler*, 1981 WL 207422 (Pa. Com. Pl. 1981) (exemption statutes such as § 5301(a) "are generally held to apply only to claims arising from the debtor-creditor relation and have no application to claims for family support absent clear statutory language to the contrary"); *In re Marriage of Dora Pope-Clifton*, 823 N.E.2d 607 (Ill. App. 2005) (veteran's bank account could be frozen to satisfy his support obligations despite that the proceeds in the account consisted of veterans' disability funds because "veterans' benefits are not for the sole benefit of disabled veterans," but rather, "[are] intended to benefit both veterans and their families"); *Steiner v. Steiner*, 788 So. 2d 771 (Miss. 2001), *opn. on reh'g*.

<sup>270</sup> *Urbaniak v. Urbaniak*, 807 N.W.2d 621, 626 (S.D. 2011) (quotation omitted).

<sup>271</sup> "These courts conclude that federal law does not prohibit an award of alimony against a spouse receiving military disability pay and, once alimony is awarded, federal law will not relieve the paying spouse from paying such alimony obligations, even if most of the veteran's income consists of military disability benefits." *Urbaniak, supra*; see *In re Marriage of Wojcik*, 838 N.E.2d 282, 299 (Ill. Ct. App. 2005); *Morales and Morales*, 214 P.3d 81, 85 (Or. Ct. App. 2009); *Youngbluth v. Youngbluth*, 6 A.3d 677, 687 n.3 (Vt. 2010); Annotation, Enforcement of Claim for Alimony or Support, or for Attorneys' Fees and Costs Incurred in Connection Therewith, Against Exemptions, 52 A.L.R.5th 221, 372 (1997) ("With few exceptions, the cases hold that payments arising from service in the Armed Forces . . . , though exempt as to the claims of ordinary creditors, are not exempt from a claim for alimony, support, or maintenance . . .").

The courts so holding have relied upon *Rose*,<sup>272</sup> which was briefly addressed in the preceding section. The issue in *Rose* was whether a state court had jurisdiction to hold a disabled veteran in contempt for failing to pay child support when federal veterans' disability benefits were the veteran's only means of satisfying his obligation.<sup>273</sup> The veteran argued that federal law conflicted with and, thus, preempted state statutes that purport to give state courts jurisdiction over veterans' disability benefits, but the court disagreed. One of the federal provisions upon which the veteran relied was the precursor to section 5301(a).<sup>274</sup>

The Montana Supreme Court, reviewing *Rose* in a similar case in 2000, observed: "After reviewing the legislative history" of the provision, "the Court held that [veterans'] disability benefits were never intended to be exclusively for the subsistence of the beneficiary."<sup>275</sup> Rather, they were intended to support "the veteran's family as well."<sup>276</sup>

Accordingly, the courts reviewing this subject have held, with near unanimity, that to recognize an exception to the statute's prohibition against attachment, levy, or seizure in the child support context "would further, not undermine, the federal purpose in providing these benefits."<sup>277</sup> In *Rose*, the United States Supreme Court concluded that "regardless of the merit of the distinction between the moral imperative of family support obligations and the businesslike justifications for community property division, . . . [the statute] does not extend to protect a veteran's disability benefits from seizure where the veteran invokes that provision to avoid an otherwise valid order of child support."

Other courts have used "the logic of *Rose*" to hold that "a state court is clearly free to consider post-dissolution disability income and order a disabled veteran to pay *spousal* support even where disability benefits will be used to make such payments."<sup>278</sup>

In the absence of further federal legislation or a changed opinion from the United States Supreme Court, those arguing that courts may not consider disability or any other form of benefits in fashioning child support and spousal support orders are arguing out of wishful thinking, without any kind of legitimate legal basis.

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<sup>272</sup> *Rose v. Rose*, 481 U.S. 619 (1987).

<sup>273</sup> *Rose*, 481 U.S. at 621-22.

<sup>274</sup> *Rose*, 481 U.S. at 630.

<sup>275</sup> *Strong v. Strong*, 8 P.3d 763, 770 (Mont. 2000); see *Rose*, 481 U.S. at 634.

<sup>276</sup> *Rose*, 481 U.S. at 634.

<sup>277</sup> *Id.*

<sup>278</sup> *Strong v. Strong*, 8 P.3d 763, 770 (Mont. 2000).

It does not mean that the proponents of an overly-expansive view of § 5301 are not sometimes successful. Stating that it saw only “a split of authority on the subject,” the Mississippi Supreme Court did not mention even perceiving the “overwhelming unanimity of opinion” seen by virtually all other courts, and held that a military member could obtain a disability award post-divorce, and thus eliminate the spousal share of the retirement benefits with no recourse for the spouse, by alimony or otherwise, “whatever the equities may be.”<sup>279</sup>

For reasons unclear on the face of the opinion, the Mississippi court claimed to be unable to distinguish between a disability existing at the time of divorce, and one claimed post-divorce that recharacterized benefits that had already been divided. In any event, whatever the Mississippi court could not perceive, the national consensus on the topic is nearly uniform.

This discussion may be analogized in litigation regarding the 2016 amendments to the USFSPA. Specifically, nothing in the new law specifically affects the ability of a court to award any percentage of the final retirement benefit to the former spouse. Like the “10 year rule” discussed above, the amended law only affects what *DFAS* will pay concerning that award.<sup>280</sup>

As an example, if a court awarded a former spouse her time rule interest in the ultimate benefit received by a member still on active duty at the time of the order, DFAS will limit what is paid to some amount less than what was ordered by the court. The court could reserve jurisdiction to award additional alimony or to redistribute community property to equalize what is not directly paid by DFAS.

After *Howell*, the parameters of using alimony as a complete work-around for the potential defeasance of the spousal interest is unclear. Apparently, an award of alimony intended to encompass the entire interest of the spouse in the retirement benefits at the time of divorce would be permissible. And State courts could easily provide for cost of living adjustment adjustments on such an award.

As to awards of alimony post-divorce, if a member recharacterizes retired pay as disability pay and therefore reduces or eliminates the spousal share, *Howell* provides what appear to be contradictory statements that “any form” of dollar-for-dollar indemnification is pre-empted, *and* that re-visiting alimony upon that occurrence is permissible. It is possible that, in combination, those statements mean that an automatic compensatory alimony award might be reversed, while a review and allocation of alimony in some amount – less than, equal to, or greater than the property payments made before the VA waiver – would be fine.

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<sup>279</sup> *Mallard v. Burkart*, \_\_\_ So. 2d \_\_\_ (Miss. No. 2010-CA-02069-SCT, Aug. 30, 2012).

<sup>280</sup> The USFSPA contains a “savings clause” providing that any benefits awarded but not payable by DFAS “may be enforced by any means available under law other than the means provided under this section.”

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

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

There are lump-sum distribution options from the plan (if \$3,500 or less, the full fund balance is *automatically* distributed at the time of separation from service). More importantly, hardship loans up to \$50,000 are available against the plan balance, and a specific category of hardship for loan purposes is “unpaid legal costs associated with a separation or divorce.” Presumably, a developing disability would likewise qualify as a “hardship.”

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

#### 5. Concurrent Receipt

The sheer number of post-divorce recharacterization cases involving disability benefits since *Mansell*<sup>281</sup> makes clear the duty of attorneys (and *especially* the attorneys for the spouses) to anticipate post-divorce status changes and build that anticipation into the decrees they write.

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

Ironically, given the decades of litigation regarding disability benefits and military retirement benefits, many of the *specific* issues at play in those cases may largely disappear from the legal landscape (except, perhaps, as to questions of arrearages).

For many years, members of Congress introduced “concurrent receipt” bills of various sorts seeking to partially or fully repeal the requirement of waiver of longevity retired pay in order to receive

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<sup>281</sup> In *Mansell v. Mansell*, 490 U.S. 581, 109 S. Ct. 2023 (1989), the Court found that the USFSPA did not *totally* repudiate the pre-emption found by the Court to exist in *McCarty*; Congress’ failure to alter the language of the Act so as to alter this finding, when it next amended the Act in 1990, has been read by some to imply congressional consent that at least some partial pre-emption was intended to remain after passage of the Act; this was an explicit basis of and finding in *Howell*.

disability pay. Of course, any such program would cost the government the entirety of the additional VA payment, which is why it was resisted so strenuously for so long.

The first “break in the dam” was the modest “combat-related special compensation” or “CRSC,” pay put in the 2003 Defense Authorization Act. It granted an additional payment to two (relatively small)<sup>282</sup> categories of retirees: those with 20 or more years of service who were receiving disability compensation for which they also received a Purple Heart medal; and those with 20 or more years of service who were receiving disability compensation rated at 60% or higher as a result of injuries suffered in combat or “combat-like” training.<sup>283</sup>

The true breakthrough came with the National Defense Authorization Act for Fiscal Year 2004.<sup>284</sup> Two programs were passed in tandem. First, CRSC was expanded to include all combat-related disabilities or operations-related disabilities<sup>285</sup> from 10% to 100% ratings, effective January 1, 2004, and extended to Guard and Reserve members. CRSC payments are explicitly defined as *not* being “retired pay.”<sup>286</sup>

Second, by way of Concurrent Receipt (also called “Concurrent Disability Pay,” or “CDP,” but later re-titled “Concurrent Retirement and Disability Pay” or “CRDP”),<sup>287</sup> all retirees with 20 years of service and VA disability ratings of 50% or higher, had their retired pay offsets phased out over a ten year period. In other words, the military retired pay previously waived for disability pay was slowly restored, until the retirees were receiving *both* their full retired pay *and* the VA disability payments. Because the restored money is the fully-divisible longevity retired pay that was waived for VA benefits in the first place, it *is* “retired pay.”

Specifically, through CRDP, a dollar sum starting at \$100 per month for those with a 50% rating, to \$750 for those with a 100% rating, was restored,<sup>288</sup> the sums were increased by an additional 10%

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<sup>282</sup> While there were no accurate figures, the estimates in the press commentary were that some five percent of disabled veterans would qualify under the original rules.

<sup>283</sup> Unfortunately, from the spouse’s point of view, the new compensation did *not* provide actual concurrent receipt, which would restore previously-waived retired pay. Instead, it added a *third* category of pay – to the retiree only. The program did nothing to address the problems detailed in this article.

<sup>284</sup> Pub. L. 108-136; 117 Stat. 1392 (Nov. 24, 2003).

<sup>285</sup> Phrased in the alternative as an injury for which the member was awarded the Purple Heart, *or* incurred as a result of armed conflict, while engaged in “hazardous service,” in the performance of duty “under conditions simulating war,” or “through an instrumentality of war.” 10 U.S.C. § 1413a(e).

<sup>286</sup> 10 U.S.C. § 1413a(g). Presumably, this makes the payments *not* divisible as property, unlike longevity retired pay.

<sup>287</sup> The latter acronym was provided in 2004.

<sup>288</sup> Those with 50% disability got \$100 more each month, those with 60% got \$125, those with 70% got \$250, those with 80% got \$350, those with 90% got \$500 and those with 100% disability got \$750.

each year<sup>289</sup> through 2014, at which time full concurrent receipt was paid. In 2005, retirees with a 100% disability were accelerated to immediate full concurrent receipt.

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

While CRSC is subject to garnishment for alimony and child support, it may not be attached for property payments. It is considered disability pay, and while it is determined in accordance with a separate disability value table (and varies in amount in accordance with the number of the member’s dependents), it cannot exceed the sum of retired pay waived by the member for VA disability.

Apparently, the pay centers threw out paperwork related to former spouse collections whenever the spousal share was *completely* eliminated, so those former spouses whose payments dropped to zero (because the disability award consumed the entire disposable retired pay) were required to re-apply for payment of benefits.<sup>290</sup>

When concurrent receipt under CRDP was fully implemented in a given case, totally eliminating the required waiver, a retiree’s application for and receipt of regular VA disability benefits would have *no effect* on a pre-existing division of military retired pay between the retiree and his former spouse; he would just get additional benefits.

It may not be that simple, however, as the member can elect between CRDP and CRSC annually, and which would actually provide more money in a given year varied. From the spouse’s point of view, the money just “stops,” requiring re-application each year, with no explanation from DFAS as to what happened or why.<sup>291</sup>

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<sup>289</sup> It is geometric, not additive – i.e., the percentage added each year was measured by the difference between the initial dollar sum restored and the full amount waived, not simply by adding 10% each year to the original remaining retired pay that was being paid. It was thus “front-loaded,” in that most of the money was restored much sooner than 2014. 10 U.S.C. § 1414(c).

<sup>290</sup> A former spouse for whom DFAS has a complete application on file, but who has not received any payments due to the retiree’s being 100 percent disabled, is required to send a written request with a current payment address, to restart payments, to DFAS, either by fax to (216) 522-6960; or by mail to DFAS-GAG/CL, P.O. Box 998002, Cleveland OH 44199-8002. DFAS suggested including the retiree’s name and social security number for proper routing. For those former spouses for whom DFAS no longer has an application on file, re-application for benefits under the USFSPA is required to restart payments.

<sup>291</sup> Attorney Mark Sullivan of Raleigh, North Carolina ([mark.sullivan@ncfamilylaw.com](mailto:mark.sullivan@ncfamilylaw.com)) has written extensively on this topic. Terming the CRDP and CRSC programs as “The Evil Twins,” he summarized them in the following chart:

| Name:                              | CRDP              | CRSC           |
|------------------------------------|-------------------|----------------|
| Type of disability required        | Service-connected | Combat-related |
| Considered longevity retired pay   | Yes               | No             |
| Divisible as Property              | Yes               | No             |
| Minimum disability rating required | 50%               | 10%            |
| Taxable                            | Yes               | No             |

The phase-in process for CRDP created an issue like the *McCarty*-gap cases or the (prior) Civil Service dual-compensation laws – the legal dispute affected fewer and fewer people over time, to a lesser and lesser degree, which eventually rendered the entire body of case law applicable to indemnification of spouses for (non-CRSC) disability awards to members mere fodder for footnotes or to be raised only for analogy to other, current disputes – so long as the disability in question was for a 10% to 50% disability.

The legislation did not contain any authority for DFAS to issue retroactive payments, so litigation was required as to all matters of arrearages (for sums of retired pay that retirees waived and personally collected in the form of disability pay to the exclusion of the former spouse before CRDP was in effect). All the normal rules regarding arrearages applied (including the illogical, and apparently accidental rule that arrearages in retired pay cannot be collected *from* retired pay). Those with arrearages in child support or alimony, however, could initiate a withholding order that includes a payment toward the arrearage.

After 2014, spousal suits based on regular VA waiver disability applications should no longer happen – at least where the member has a disability award of 50% or more and took benefits under the CRDP, *not* the CRSC, program. For cases involving lesser VA disability percentages, the legal issues are identical, but the dollars at stake are (necessarily) lesser.

All the case law established for VA waiver cases is probably applicable whenever a member chooses CRSC, and thus wipes out payments to a former spouse that *would have been made* under CRDP. Members making the election to receive CRSC will be getting substantially more money each month, but their former spouses will see nothing, and will presumably have to continue suing in divorce court for indirect compensation. As illustrated by the Texas cases discussed above, the spouses have not been universally successful in those efforts.

## 6. Aside Regarding Temporary Disability Before Retirement Eligibility

In some ways, a disability suffered while on active duty before retirement eligibility and before divorce is the easiest type of “disability” case in the divorce context. At least it seems to have the fewest traps for the unwary.

When a military member becomes disabled while on active duty, and before reaching eligibility for a normal, longevity retirement, his disposition depends on the degree and apparent permanence of the disability incurred. For all of the following, the disability cannot have been caused by any intentional misconduct or willful neglect, or have been incurred during any “unauthorized absence.”

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|                                       |                                    |                          |
|---------------------------------------|------------------------------------|--------------------------|
| Phase-in                              | Yes (except 100% disability cases) | No                       |
| Retroactive payment                   | No                                 | Yes (to date of VA app.) |
| Increases with number of dependents   | No                                 | Yes (if over 40%)        |
| Garnishable for child support/alimony | Yes                                | Yes                      |
| Survivor benefits                     | No                                 | No                       |

If the disability is perceived as temporary, the member is placed on a temporary disability retired list (“TDRL”), and re-evaluated at least every 18 months. The member receives temporary disability pay, with a minimum benefit of 50% of basic pay. This can go on for up to five years, at the end of which the member may be retired for permanent disability (if the disability is rated as being at least 30%, or if at that point the member has achieved 20 years of service), or returned to active duty, or separated from service.<sup>292</sup>

A member who is separated without being eligible for disability retired pay is awarded severance pay, calculated at the rate of two months of basic pay for each year of service time accrued, up to a maximum of a sum equal to two years of basic pay.

If the disability is considered permanent, at the initial evaluation or during a periodic re-evaluation, the member is eligible for disability retired pay if he is either at least 30% disabled, or has accrued 20 years of creditable service.

The amount of pay is determined by two alternative formulas. First, the retired pay corresponding to the rank of the member is multiplied by 2.5% and multiplied again by the years of creditable service accrued. Second, the retired pay corresponding to the rank of the member is multiplied by the percentage of the disability. The greater number is used, with a minimum of 30% of basic pay, and a maximum of 75%.<sup>293</sup>

The two alternative calculations give rise to a number of ramifications as to how the benefit stream is treated by the government and may be treated by courts.

The benefits are taxable, in part – to the extent the benefits received exceeds the second calculation. If the disability is deemed “combat-related,” however, it is not taxable. Additionally, as detailed above, a member receiving taxable disability pay can usually waive its receipt in favor of tax-free VA disability compensation, dollar for dollar.

The same dichotomy appears to govern the treatment of the benefits by divorce courts. When the member is placed on the TDRL before achieving eligibility for longevity retirement, several courts have held that the *entire* TDRL benefit is a separate property income stream.<sup>294</sup>

The result is different when the member is placed on TDRL *after* achieving eligibility for longevity retirement.<sup>295</sup> The USFSPA excludes from the definition of disposable retired pay sums calculated

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<sup>292</sup> 10 U.S.C. § 1202 (2011).

<sup>293</sup> 10 U.S.C. § 1401(a) (2011); 10 U.S.C. § 1202.

<sup>294</sup> See, e.g., *In re Marriage of Williamson*, 205 P.3d 538, 540 (Colo. App. 2009); *Thomas v. Piorkowski*, 286 S.W.3d 662, 667 (Tex. App. 2009); *Davies v. Beres*, 233 P.3d 1139, 1142 (Ariz. Ct. App. 2010).

<sup>295</sup> *In re Marriage of Poland*, \_\_\_ P.3d \_\_\_ (Colo. App. No. 10CA1158, Sept. 29, 2011); *In re Marriage of Strunck*, 570 N.E.2d 1, 2 (Ill. App. Ct. 1991); *Bullis v. Bullis*, 467 S.E.2d 830, 836 (Va. Ct. App. 1996); *In re Marriage of Wherrell*, 58 P.3d 734, 740-41 (Kan. 2002).

using the disability percentage.<sup>296</sup> From that, courts reason that the *exclusion* from disposable pay of amounts based upon the service member’s initial disability rating in 10 U.S.C. § 1408(a)(4)(C) is an implicit *inclusion* of amounts received above that level.

In other words, once the member is eligible to retire, if the member receives higher benefits by using the second TDRL pay calculation, the amount that the second exceeds the first calculation is considered divisible military retired pay.

At least one court, relying on a contract theory, has held that where the member is already on TDRL, but executes a separation agreement awarding to his soon-to-be former spouse “half of the military retirement,” the subsequent determination by the military to permanently retire the member for disability did not alter the member’s obligation to provide the former spouse with half of all benefits received regardless of their designation as disability or non-disability.<sup>297</sup>

## 7. Limits to § 5301 Exempt Property Classification

While the statutory language of 38 U.S.C. § 5301(a) exempts veterans’ disability benefits from “attachment, levy, or seizure” either before or after receipt by the veteran,<sup>298</sup> the limits are not absolute.

In 1962, the United States Supreme Court considered the circumstances under which benefits paid by the Veterans’ Administration retain their exempt status under the statutory predecessor of § 5301(a),<sup>299</sup> and held that veterans’ disability benefits are the separate property of the beneficiary, exempt from creditors’ claims, attachment, levy or seizure, “provided the benefit funds . . . are

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<sup>296</sup> The definition of “disposable retired pay” does not include:  
in the case of a member entitled to retired pay under chapter 61 of this title, [amounts that] are equal to the amount of retired pay of the member under that chapter computed using the percentage of the member’s disability on the date when the member was retired (or the date on which the member's name was placed on the temporary disability retired list)[.]  
10 U.S.C. § 1408(a)(4)(C).

<sup>297</sup> *Wilson v. Wilson*, \_\_\_ A.3d \_\_\_, No. 497, (Md. Ct. Spec. App., July 1, 2015 ).

<sup>298</sup> Specifically:  
(a) Payments of benefits due or to become due under any law administered by the Secretary [of Veterans Affairs] shall not be assignable except to the extent specifically authorized by law, and such payments made to, or on account of, a beneficiary shall be exempt from taxation, shall be exempt from the claim of creditors, and shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary. The preceding sentence shall not apply to claims of the United States arising under such laws nor shall the exemption therein contained as to taxation extend to any property purchased in part or wholly out of such payments.

<sup>299</sup> 38 U.S.C. § 3101(a). That subsection has since been renumbered to § 5301(a). Pub. L. 102-40, Title IV, § 402(c)(1), 105 Stat. 239. With one minor exception, the relevant language of the provisions is identical.

readily available as needed for support and maintenance, actually retain the qualities of moneys, and have not been converted into permanent investments.”<sup>300</sup>

The statutory language only limited the exemption “as to taxation” as regarded property purchased with benefits. However, in an even earlier case,<sup>301</sup> the Court held that benefits invested in property were *also* nonexempt from creditor actions, since they were not “payments of benefits due or to become due” and thus did not fall within the initial immunizing language. On this basis, the Court held property acquired *with* VA disability benefits has no exempt status of any kind – it is property like any other property, and to be analyzed as it would be analyzed without any special gloss from being traceable to acquisition with VA benefits.<sup>302</sup>

Accordingly, federal and State courts have held for many decades that the exempt character of VA disability benefits does not extend to property purchased with the benefit funds.<sup>303</sup> So if a former military member receiving VA disability benefits buys houses, cars, or other personal property during marriage, and the relevant State’s laws would consider such purchases to be marital property, the assets are fully divisible upon divorce.<sup>304</sup>

Even funds not used to purchase “things” could lose their exempt status and be fully divisible. In Pennsylvania, for example, the increase in value of non-marital property during marriage is considered marital property, so the doubling in value of an investment account consisting entirely of pre-marital deposits of VA disability funds, which had been placed in securities, mutual funds, and annuities,” had been turned into “permanent investments,” and was divisible between the parties.<sup>305</sup>

These limitations on the extent of the exemption from execution are analogous to limitations on “assignability” found in other federal retirement and benefit schemes that protect benefit streams from attachment.

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<sup>300</sup> *Porter v. Aetna Casualty and Surety Co.*, 370 U.S. 159, 162, 82 S. Ct. 1231, 1233, 8 L. Ed.2d 407 (1962).

<sup>301</sup> *Carrier v. Bryant*, 306 U.S. 545, 59 S. Ct. 707, 83 L. Ed. 976 (1939).

<sup>302</sup> *Porter v. Aetna Casualty and Surety Co.*, 370 U.S. 159, 161, n.3, 82 S. Ct. 1231, 1232, n.3, 8 L. Ed.2d 407 (1962).

<sup>303</sup> See, e.g., *Bischoff v. Bischoff*, 987 S.W.2d 798 (Ky. Ct. App. 1998); *Gray v. Gray*, 922 P.2d 615 (Okla. 1996); *Pfeil v. Pfeil*, 341 N.W.2d 699 (Wis. Ct. App. 1983); see also *Lawrence v. Shaw*, 300 U.S. 245 (1937).

<sup>304</sup> *Gray v. Gray*, 922 P.2d 615 (Okla. 1996) (“once the veteran applied his disability benefits toward the purchase of the two vans and the motor home, those funds were no longer ‘readily available as needed for support and maintenance,’ they did not ‘actually retain the qualities of moneys,’ and they were ‘converted into permanent investments.’ Once spent, the funds were no longer ‘payments of benefits due or to become due’ pursuant to *Carrier*” and so the two vans, and the insurance proceeds received from destruction of the motor home, were subject to equitable division by the trial court).

<sup>305</sup> *Goodemote v. Goodemote*, 44 A.3d 74 (Pa. Super. Ct. 2012).

For example, the Social Security Act<sup>306</sup>, contains limiting language comparable to that found in 38 U.S.C. § 5301, and sub-section (a) of that section states:

The right of any person to any future payment under this subchapter shall not be transferable or assignable, at law or in equity, and none of the moneys paid or payable or rights existing under this subchapter shall be subject to execution, levy, attachment, garnishment, or other legal process, or to the operation of any bankruptcy or insolvency law.

But the uniform interpretation of that provision across the United States appears to be that, for reasons similar to those announced in *Porter* and *Carrier*, any property purchased with Social Security disability benefits would be treated the same as property purchased with veterans' disability benefits – as property purchased with an income stream containing no special properties – because Social Security benefits that have been converted to property are not “moneys paid or payable” within the meaning of § 407(a).

In the world of ERISA-based private pensions, the courts have long held that ERISA preemption supercedes “any and all state laws insofar as they may now or hereafter relate to any employee benefit plan” covered by ERISA, citing 29 U.S.C. § 1144(a). The United States Supreme Court has observed that the preemption provision is “clearly expansive” but has also added that it cannot be taken “to extend to the furthest stretch of its indeterminacy.”<sup>307</sup>

The bottom line to the case law is a reminder that any given statutory provision exists in the context of other provisions, and of decades (or longer) of interpretation, rather than in a vacuum. Those myopic partisans determined to read 38 U.S.C. § 5301 – or any other provision of statutory or case law – alone and outside its full legal context are in error, and misinterpreting the law.<sup>308</sup>

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<sup>306</sup> 42 U.S.C. § 407.

<sup>307</sup> *Egelhoff v. Egelhoff*, 532 U.S. 141, 146 (2001) (citations and internal quotation marks omitted). *See also Araiza-Klier v. Teachers Insurance and Annuity Association*, 2001 Cal. App. LEXIS 2794 (Ct. App. No. D034967, Nov. 29, 2001) (designated as unpublished) (despite the expansive reading often given to ERISA, as a matter of both logic and law, “the term ‘relate to’ cannot be taken ‘to extend to the furthest stretch of its indeterminacy,’ or else ‘for all practical purposes preemption would never run its course’”); *see also Carmona v. Carmona*, 603 F.3d 1041 (9<sup>th</sup> Cir. 2010) (revised op’n on rehearing).

<sup>308</sup> Experienced practitioners in divorce law run into such misguided thinking all the time. We have coined an expressed to describe it – “Simon’s Second Law: “A man hears what he wants to hear, and disregards the rest.” *See* Paul Simon, *The Boxer*, from “Bridge Over Troubled Water,” 1970.

## 8. Conclusions as to Disability Awards

Before *Howell*, several commentators and researchers have reviewed the cases nationally, reaching the conclusion that post-divorce recharacterization of retired pay as disability benefits just was not permitted without compensation to the former spouse.<sup>309</sup> Even where *Mansell* was considered in post-divorce recharacterization cases, courts mandated that former spouses must be compensated, by awards of other property, or alimony, or (most commonly) dollar-for-dollar compensation of all amounts that would have been paid but for the recharacterization.

That clear near-unanimous consensus was swept away by *Howell*, apparently leaving unscathed only the decisions of those courts requiring or permitting “other property” or alimony awards as a means of redress for retroactively-deprived spouses.

The inequity of permitting unilateral post-divorce recharacterization of retired pay as disability pay to the deprivation of the spouse is overwhelmingly obvious. Whether and how States will ameliorate that post-divorce enrichment of the member to the deprivation of the spouse remains to be seen and will probably vary from jurisdiction to jurisdiction.

### E. Partition Actions

If the original divorce decree did not address the military retirement benefits at all, or failed to do so sufficiently to permit payments to the former spouse to actually be made, all is not necessarily lost.

Many States permit former spouses to return to court for partition of assets not disposed of in the original divorce proceeding, typically as “tenants in common” of the omitted assets,<sup>310</sup> either under their decisional law or as a matter of statute.<sup>311</sup> The seminal 1980 California

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<sup>309</sup> See, e.g., Fenton, *Uniformed Services Former Spouses' Protection Act and Veterans' Disability and Dual Compensation Act Awards*, *Army Law.*, Feb. 1998, 31, 33 (noting a “growing trend” among courts to ensure that former spouses’ property interests are protected in the event of a future VA disability award to the service member, and that such is the majority view in this country); Mary J. Bradley, *Calling for a Truce on the Military Divorce Battlefield: A Proposal to Amend the USFSPA*, 168 *Military. L. Rev.* 40, 49 (June 2001) (noting in part the rationale that “military spouses contribute to the effectiveness of the military community while at the same time forgoing the opportunity to have careers and their own retirement”).

<sup>310</sup> See, e.g., *Henn v. Henn*, 605 P.2d 10 (Cal. 1980).

<sup>311</sup> The vagaries of trial courts have led some legislatures to make the remedy of partition available as a matter of statute. For example, Alaska Stat. 25.24.160(a)(4) provides: “In a judgment in an action for divorce . . . or any time after judgment, the court may provide . . . for the division between the parties of their property, including retirement benefits . . .” See *Schaub v. Schaub*, \_\_\_ P.3d \_\_\_ (S-14502, No. 6803, Alaska, August 2, 2013) (rejecting laches defense to prospective payments from when wife asserted her claim, while upholding

case of *Henn*<sup>312</sup> is **universally** followed in all other community property states,<sup>313</sup> with Nevada being the only one of those with contradictory case law<sup>314</sup> before its statute was amended in 2015 to explicitly authorize the remedy of partition.<sup>315</sup> The same rule has been expressed in many non-community property States, as well.

The February 4, 1991, amendments to the USFSPA put into place a prohibition on partition actions (for omitted pensions) if the underlying divorce decree was dated prior to June 25, 1981, and did **not** divide the pension or reserve jurisdiction to do so. The amendment had **no effect** on pre-*McCarty* divorces which **did** divide military retirement benefits, or on partition judgments which addressed divorces finalized **on or after** June 25, 1981.

The special jurisdictional rules discussed above are applicable in partition cases. Partition actions, to be enforceable, must be brought with both sufficient “federal jurisdiction” under 10 U.S.C. § 1408 and adequate State court jurisdiction. The USFSPA only allows partition (or any other post-divorce order affecting the retirement benefits) if the issuing court has proper federal jurisdiction over both the member and the former spouse in the action.<sup>316</sup>

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trial court rejection of claim to benefits received for the preceding 20 years.

<sup>312</sup> *Henn v. Henn*, 605 P.2d 10 (Cal. 1980).

<sup>313</sup> *Casas v. Thompson*, 720 P.2d 921 (Cal. 1986), *cert. denied*, 479 U.S. 1012 (1987) (“*Henn* implicitly holds . . . that the policy favoring equitable division of marital property outweighs that of stability and finality in the limited context of omitted assets”); *Bumgardner v. Bumgardner*, 521 So. 2d 668 (La. Ct. App. 1988) (court retained continuing jurisdiction to partition retirement after the divorce); *Grier v. Grier*, 731 S.W.2d 931 (Tex. 1987) (same); *Kovacich v. Kovacich*, 705 S.W.2d 281 (Tex. App. 1986) (parties to decree that silently omits retirement benefits remain tenants in common of those benefits); *Norris v. Saueressig*, 717 P.2d 52 (N.M. 1986) (unaddressed and undistributed retirement benefits to be paid to former spouse once claim was made in partition); *Sparks v. Caldwell*, 723 P.2d 244 (N.M. 1986) (same); *Flynn v. Rogers*, 834 P.2d 148 (Ariz. 1992) (same); *Cooper v. Cooper*, 808 P.2d 1234 (Ariz. Ct. App. 1990) (same); *In re Marriage of Parks*, 737 P.2d 1316 (Wash. Ct. App. 1987) (same); *Molvick v. Molvick*, 639 P.2d 238 (Wash. Ct. App. 1982) (same); *Pike v. Pike*, 80 P.3d 342 (Idaho 2003) (court order stating that personal property was “divided prior to this action” did not shield undivided retirement accounts from partition).

<sup>314</sup> The *Henn* decision has been approvingly cited by the Nevada Supreme Court in three separate opinions (*Haws v. Haws*, 96 Nev. 727, 615 P.2d 978 (1980); *Amie v. Amie*, 106 Nev. 541, 796 P.2d 233 (1990) (for the core holding, that partition of all unadjudicated assets is allowed); *Gramanz v. Gramanz*, 113 Nev. 1, 930 P.2d 753 (1997) (again, for the core holding)). But Nevada has never expressly overruled earlier, contradictory holdings stating that partition was not available for omitted military retirement benefits. See *Tomlinson v. Tomlinson*, 102 Nev. 652, 729 P.2d 1363 (1986); *Taylor v. Taylor*, 105 Nev. 384, 775 P.2d 703 (1989).

<sup>315</sup> NRS 125.150(3).

<sup>316</sup> See 10 U.S.C. § 1408(d).

The action may be brought in the court with personal jurisdiction over the member, even if the original divorce was entered elsewhere.<sup>317</sup> That jurisdiction can apparently be achieved by way of counterclaim in other litigation between the parties.<sup>318</sup>

According to most courts that have ruled on the question, the jurisdictional test is to be applied in the *present* (i.e., when the current action is commenced) as opposed to considering what jurisdiction was established during the original divorce. Oddly, the federal courts have been willing to permit State-court long-arm jurisdiction where the States themselves find they cannot exercise it.<sup>319</sup>

When the partition action is brought in a different State than the one which granted the divorce, some courts have applied the partition law of the former matrimonial domicile,<sup>320</sup> while others have elected to use the law of the forum where the suit is heard.<sup>321</sup>

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

The Texas cases provide a good example. If the original decree contained a residuary clause stating that un-mentioned property belonged to the non-member former spouse, then she

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<sup>317</sup> See, e.g., *Webber v. Webber*, 109 S.W.3d 357 (Tenn. Ct. App. 2003) (where member made special appearance contesting jurisdiction of Nevada court to divide property, former spouse could file for division of property in Tennessee, where member lived, and member was estopped from arguing that the decree that was silent as to property was *res judicata*); *Stuart v. Gomez*, Case No. D 156799, Eighth Judicial District Court, Clark County, Nevada, November 22, 1992 (partition granted upon domestication of foreign judgment); *but see In re Brown*, 587 N.E.2d 648 (Ill. Ct. App. 1992) (no remedy of partition available for retirement reserved to American courts by German divorce decree).

<sup>318</sup> See, e.g., *Pierce v. Pierce*, \_\_\_ So. 2d \_\_\_ (Miss. No. 2012-CA-01966-SCT, Feb. 20, 2014) (where member had obtained a default status-only divorce in Washington, and later sought to partition real property and apportion debts with former wife living in Mississippi, that court obtained jurisdiction to divide the military retirement benefits by the member’s implied consent, rejecting the member’s claim of *res judicata* by the status-only decree silent on the issue of property division or alimony).

<sup>319</sup> See, e.g., *Tarvin v. Tarvin*, 187 Cal. App. 3d 56, 232 Cal. Rptr. 13 (Cal. Ct. App. 1986); *Kovacich v. Kovacich*, 705 S.W.2d 281 (Tex. Ct. App. 1986); *Messner v. District Court*, 104 Nev. 759, 766 P.2d 1320 (1988); *contra, Lewis v. Lewis*, 695 F. Supp. 1089 (D. Nev. 1988); *Delrie v. Harris*, 962 F. Supp. 931 (D.W. La. 1997).

<sup>320</sup> See *Kirby v. Mellenger*, 830 F.2d 176 (11th Cir. 1987).

<sup>321</sup> See *Fransen v. Fransen*, 190 Cal. Rptr. 885 (Ct. App. 1983); *Berry v. Berry*, 216 Cal. App. 3d 1155, 265 Cal. Rptr. 338 (Ct. App. 1989) (Arizona divorce followed by California action to divide omitted military pension); *In re Marriage of Moore & Ferrie*, 14 Cal. App. 4th 1472, 18 Cal. Rptr. 2d 543 (Ct. App. 1993) (Ohio divorce followed by California action to divide omitted United Airlines pension).

could get her share of benefits silently omitted from decree.<sup>322</sup> At least one intermediate appellate court held that the same result followed from total silence of the decree *without* a residuary clause, since Texas statutory law held that undivided assets were “held” by the parties as tenants in common.<sup>323</sup> In 1999, however, the Texas Supreme Court “disapproved” that holding, stating that partition was only permitted if there had been a residuary clause which arguably “treated” the pension in the original divorce.<sup>324</sup>

Courts nationally have reached the same conclusion, in various language, finding that in the absence of a clause in the decree stating something that could be interpreted as “treating” the un-mentioned asset, military retirement benefits omitted from pre-*McCarty* decrees simply cannot be partitioned, whether or not State law provides an “automatic” reservation provision for omitted assets.<sup>325</sup>

Most partition cases involve military retirement benefits entirely omitted from decrees. That situation is distinguishable from a mistake as to the *value* of the benefits. Where the problem asserted is misvaluation, courts have expressed a greater reluctance to relieve parties of the consequences of their choices and actions during the original divorce.<sup>326</sup> The language

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<sup>322</sup> *Buys v. Buys*, 924 S.W.2d 369 (Tex. 1996).

<sup>323</sup> *Lee v. Walton*, 888 S.W.2d 604 (Tex. Ct. App. 1994), *cert. denied*, 516 U.S. 870 (1995).

<sup>324</sup> *Havlen v. McDougall*, S.W.3d 343, 347 (Tex. 2000). Other courts, in other States, have held similarly. *See, e.g., Scheidel v. Scheidel*, 4 P.3d 670, 674 (N.M. Ct. App. 2000).

<sup>325</sup> *See Curtis v. Curtis*, 9 Cal. Rptr. 2d 145 (Ct. App. 1992); *Johnson v. Johnson*, 824 P.2d 1381, 1383 (Alaska 1992); *In re Marriage of Booker*, 833 P.2d 734, 739 (Colo. 1992); *Dunham v. Dunham*, 602 So. 2d 1139, 1143 (La. Ct. App. 1992); *Johnson v. Johnson*, 605 So. 2d 1157, 1160-1161 (La. Ct. App. 1992); *Mings v. Mings*, 841 S.W.2d 267, 269-270 (Mo. Ct. App. 1992); *White v. White*, 623 So. 2d 31, 34 (La. Ct. App. 1993); *Hollyfield v. Hollyfield*, 618 So. 2d 1303, 1304-1305 (Miss. 1993); *Kemp v. United States Dept. of Defense*, 857 F. Supp. 32, 33 (W.D. La. 1994); *Terry v. Lee*, 445 S.E.2d 435 (S.C. 1994); *Hennessy v. Duryea*, 955 P.2d 683 (N.M. Ct. App. 1998); *Schexnayder v. Holbert*, 714 So. 2d 680 (La. 1998); *Bottiggi v. Wall*, 765 N.E.2d 819 (Mass. App. Ct. 2002). *But see* Reppy, *The 1990 U.S.F.S.P.A. Amendment: No Bar to Recognition of Tenancy in Common Interest Created by Pre-McCarty Divorces that Fail to Divide Military Retired Benefits*, 29 Idaho L.R. 941 (1992).

<sup>326</sup> *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); *see also Simkin v. Blank*, 945 N.Y.S.2d 222 (N.Y. 2012) (non-military case refusing to reopen distribution of assets in divorce on the claimed ground of “mutual mistake” after husband complained that his Bernard Madoff investments were actually an illusory and worthless product of a Ponzi scheme); *Kaftan v. Kaftan*, 834 N.W.2d 657 (Mich. Ct. App. 2013) (non-military case where husband unsuccessfully moved to set aside property settlement after divorce on the basis that the real estate he received was worth millions less than thought at divorce, where the agreement did not purport to be an equal division of assets and no specific value of assets on either side was recited in the decree, but it did stress that it was intended to be a “final” distribution of assets).

chosen for even boilerplate mentions of benefits can be critical, and determine the right to seek a later partition, or its absence.<sup>327</sup>

The amount of time since entry of the decree usually makes little difference. Most courts have held that the statute of limitations applicable to division of retirement benefits runs from each installment payment.<sup>328</sup>

As a strategic point, any former spouse facing a challenge from the member to the jurisdiction of the Court to divide a previously-omitted retirement on jurisdictional grounds (as with the *Tucker* case discussed in footnote 79) would probably be well-served by a contemporaneous partition action in the jurisdiction of the member's residence. Both sides would then be faced with an equivalent waste of time and resources,<sup>329</sup> which might result in a stipulation to resolve the entire case in one jurisdiction, as would have been most reasonable in the first place.

## F. Bankruptcy<sup>330</sup>

A member declaring bankruptcy does not lose the right to receive future retired pay based upon prior or future military service. In cases decided prior to enactment of the USFSPA,

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<sup>327</sup> In *Burnell v. Burnell*, 40 A.3d 390 (Maine 2012), the decree addressed the military retirement benefits by stating that "The Court hereby awards to the husband his National Guard Pension Plan except that the wife shall be entitled to any rights that she has to said plan pursuant to Federal Law." After husband retired, wife sought partition on the basis that 27 years of service were during marriage, and was granted half the retirement benefits earned during marriage by the trial court. The appellate court reversed, noting that the federal law is only an enabling statute, and that Maine divorce law does not require an equal division of assets, so the language was simply a "reservation of [spouse's] rights . . . recognizing that the rights of former spouses of service members may change based on congressional action and preserving [spouse's] opportunity to claim a share of [member's] pension should she gain a right to do so in the future."

<sup>328</sup> See, e.g., *Johnson v. Johnson (Zoric)*, 270 P.3d 556 (Utah 2012); *Gilmore v. Gilmore*, 227 P.3d 115 (N.M. 2009) (statute of limitations runs from each installment payment of pension benefits, not from divorce which did not address the benefits); *Fischbach v. Fischbach*, 975 A.2d 333 (Md. Ct. App. 2009); *Ryan v. Janovsky*, 999 N.E.2d 895 (Ind. 2013) (20-year delay in having QDRO prepared is not relevant where benefits have not yet entered pay status, so no statute of limitations had even begun to run); *Jordan v. Jordan*, 147 S.W.3d 255 (Tenn. Ct. App. 2004); *Ochoa v. Ochoa*, 71 S.W.3d 593 (Mo. 2002); *Duhamel v. Duhamel*, 753 N.Y.S.2d 673 (N.Y. Sup. Ct. 2002) (action to compel the entry of a QDRO is an action "to compel the other [spouse] to perform a mere ministerial task necessary to distribute funds previously allocated by the parties' own binding agreement" and is not subject to the limitations period on actions to enforce a judgment).

<sup>329</sup> Reasons cited by the dissent in *Wagner v. Wagner, supra*, 768 A.2d 1112 (Pa. 2001), for why the majority's reading of the statute was illogical.

<sup>330</sup> All of the case law discussed in this section was issued prior to enactment of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA), effective October 17, 2005. That sweeping law will have ramifications for most, if not all, of the doctrines discussed below.

an order to pay a portion of retired pay to a former spouse (or a sum of money in lieu of such a portion) was often considered a “debt” dischargeable in bankruptcy rather than a property interest. Since enactment of the USFSPA, courts have generally held awards to former spouses of a portion of military retired pay to be non-dischargeable.

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

The Fifth Circuit has simply held that an award to a former spouse of a portion of the retired pay as property made it her separate property from that day forward, leaving no “debt” to be discharged or otherwise addressed by the bankruptcy court.<sup>331</sup> The Ninth and Eighth Circuits have generally agreed with this principle, although their opinions diverge on the question of arrearages.

Probably the most widely cited case is *In re Teichman*,<sup>332</sup> in which the Ninth Circuit confirmed the non-dischargeability of the former spouse’s *future* interest in payments to her of military retired pay to be paid after the date of the bankruptcy petition. By split decision, however, the court termed amounts previously paid to the member (despite the divorce court order awarding those sums to the former spouse) as a “debt” to her that could be discharged. Thus, the member was able to retain all sums that he *should* have previously paid to the former spouse under the State court order (i.e., the arrearages).

Five years later, in *Bush v. Taylor*,<sup>333</sup> the Eighth Circuit concurred as to the non-dischargeability of the former spouse’s future interest in payments to the former spouse, but held that any sums paid to the member and kept rather than being paid to the former spouse were retained by the member wrongfully, and he remained liable despite the bankruptcy for the full amount of payments that should have, but were not, made to the former spouse. The bankruptcy thus had no impact on the former spouse’s rights.

The Seventh Circuit reached much the same result, but only by means of the tenuous finding that military retirement benefits are not part of the bankruptcy estate because post-petition services are required of the member, making the benefits post-petition wages.<sup>334</sup>

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<sup>331</sup> See *In re Chandler*, 805 F.2d 555 (5th Cir. 1986), *cert. denied*, 481 U.S. 1049 (1987).

<sup>332</sup> *In re Teichman*, 774 F.2d 1395 (9th Cir. 1985).

<sup>333</sup> *Bush v. Taylor*, 912 F.2d 989, *vacating* 893 F.2d 962 (8th Cir. 1990).

<sup>334</sup> See *Matter of Haynes*, 679 F.2d 718 (7th Cir.); *cert. denied*, 459 U.S. 970 (1982).

Various lower bankruptcy courts have issued opinions along the same lines.<sup>335</sup> Where divorce counsel had the foresight to include language indicating that any sums paid to the member that should, under the decree, have been paid to the former spouse would be considered subject to an express trust, the courts have enforced it as a non-dischargeable debt.<sup>336</sup> Some courts have “saved” the allocation to the former spouse only by finding it to be, at root, “in the nature of” some form of alimony or maintenance.<sup>337</sup>

This is not to say that the case law has uniformly favored former spouses. Where counsel for the former spouse was not sufficiently careful in drafting the language of the decree, where the funds paid to the former spouse were not a portion of the retired pay but a sum meant to compensate the former spouse for her interest therein, and where no argument could be successfully made that the funds were necessary for the support of the former spouse, the former spouse’s interest has sometimes been found to be dischargeable.<sup>338</sup>

It is possible for a former spouse to contest the discharge in bankruptcy of an obligation to remit to the former spouse a portion of retired pay, by attacking it as a “fraud while acting in a fiduciary capacity” or a tortious “debt for willful and malicious injury.”<sup>339</sup> Litigation in bankruptcy court may cause that court to carry into effect the divorce court’s orders.<sup>340</sup> At least one court has held a designation of the former spouse as the Survivor’s Benefit Plan beneficiary was a non-dischargeable transfer and not a “debt” subject to discharge in bankruptcy.<sup>341</sup>

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<sup>335</sup> See *In re Hall*, 51 B.R. 1002 (Bankr. S.D. Ga. 1985). For cases holding generally that the former spouse’s share of a retirement interest was such that the debtor retained no interest, see, e.g., *In re Resare*, 142 B.R. 44 (Bankr. D. R.I. 1992) & *Resare v. Resare*, 154 B.R. 399 (Bankr. D. R.I. 1993); *In re Stolp*, 116 B.R. 131 (Bankr. W.D. Wis. 1990); *In re Farrow*, 116 B.R. 131 (Bankr. M.D. Ga. 1990). For cases following the constructive trust reasoning, see, e.g., *In re Sommerville*, 122 B.R. 446 (Bankr. M.D. Ala. 1990).

<sup>336</sup> See *In re Dahlin*, 94 B.R. 79 (Bankr. E.D. Va. 1988); see also *In re Eichelberger*, 100 B.R. 861 (Bankr. S.D. Tex. 1989). One text cautions that the result would have been different in a Chapter 13 bankruptcy, in which since debts for breach of fiduciary duties are dischargeable. See H. Sommer & M. McGarity, *Collier Family Law and the Bankruptcy Code* (L. King ed. 1991), at ¶ 6.05[8], n.132.

<sup>337</sup> See *Love v. Love*, 116 B.R. 267 (Bankr. D. Kan. 1990); *In re Anderson*, 21 B.R. 335 (Bankr. S.D. Cal. 1982); *Ersparn v. Badgett*, 647 F.2d 550 (5th Cir. 1981); *In re Corrigan*, 93 B.R. 81 (Bankr. E.D. Va. 1988).

<sup>338</sup> See *In re Neely*, 59 Bankr. Rep. 189 (B. Ct., D. S.D. 1986); *In the Matter of Heck*, 53 Bankr. Rep. 402 (B. Ct., S.D. Ohio 1985) (non-military case).

<sup>339</sup> See 11 U.S.C. § 523(a)(4), (6).

<sup>340</sup> See *In re Thomas*, 47 Bankr. Rep. 27 (B. Ct., S.D. Cal. 1984); *In re Wood*, 96 Bankr. Rep. 993 (9th Cir., B.A.P., 1988) (non-military case).

<sup>341</sup> See *In re Anderson*, 1988 WL 122983 (Bankr. N.D. Iowa 1988).

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

We are increasingly troubled by the trend of parties to leave divorce court with an agreement that settles property and alimony matters, only to immediately walk down the street to the federal courthouse and attempt to relitigate those issues. Such actions call into question the good faith of the parties and their counsel and raise thorny issues of comity and finality of judgments, to say nothing of attempting to make the bankruptcy court into some type of appellate divorce court. We do not think Congress intended this result when it enacted § 523(a)(5). While we recognize that certain marital debts and obligations are and should be dischargeable, we do not believe that § 523(a)(5) gives one spouse carte blanche to retain marital property at the other spouse's expense.<sup>342</sup>

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

American Bar Association committee recommendations to Congress to make division of retirement benefits non-dischargeable were apparently responsible in part for enactment of the prior subsection (a)(15) exceptions to discharge, but a detailed exploration of those provisions is beyond the scope of these materials.<sup>343</sup>

Under the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA),<sup>344</sup> the balancing of hardships under the prior law between the debtor and creditor spouse was eliminated, and "domestic support obligations"<sup>345</sup> were made nondischargeable in Chapter 7 bankruptcies, but apparently not under Chapter 13 plans that are successfully concluded. Such obligations were given a high priority, requiring their payment before satisfaction of virtually any other obligations of the debtor.

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<sup>342</sup> *McGraw v. McGraw (In re McGraw)*, 176 B.R. 149 (Bankr. S.D. Ohio 1994) (finding that divorce decree made member husband the constructive trustee of all military retirement benefits intended by that decree to be paid to spouse).

<sup>343</sup> Basically, a property distribution or debt division obligation arising from a divorce decree would normally be dischargeable under § 523(a)(15), unless the creditor spouse timely filed an objection based upon the exceptions found in the old § 523(a)(15)(A) or (B). This led to the court balancing hardships between allowing the debtor a discharge and its effect on the creditor spouse as compared to denying the discharge and its effect on the debtor.

<sup>344</sup> Apparently referred to in certain circles as the Bankruptcy Abuse Reform Fiasco (BARF).

<sup>345</sup> The term domestic support obligation is defined very broadly to include all debts to a spouse, former spouse or child incurred during a divorce or separation regardless of whether the debt is designated as a "support" obligation or not.

In light of the continuing evolution of bankruptcy law, it has generally become easier for spouses to prevent discharge of arrearages in military retirement benefits, as well as saving future payments, even if the property division is treated *as* a property division.

### **G. Some Practical Points to Actual Collection of Child Support, Alimony, and Property Divisions From Military Members**

As briefly recounted above in the section introducing the USFSPA, there is more than one way to obtain collection of a court award from an active-duty or retired military member.

The simplest is to send a freshly (within 90 days) certified copy of the order requiring payment by the retired member of child support, alimony, or a property award (including any order to pay lump sum property equalization, or awards such as attorney's fees, but ironically *not* including orders for payment of arrearages in military retired pay itself), to DFAS, along with the appropriate application form.<sup>346</sup>

Of course, the issuing court must have had personal jurisdiction over both parties under the law of that State, requiring payments to a former spouse for such support or property.

Where the military member is still on active duty, things are more complicated. An order may be obtained specifying that the *military pay center*, as opposed to the member personally, is required to pay a child support order,<sup>347</sup> including an award of arrearages.<sup>348</sup>

Unfortunately, the information posted by DFAS, while technically accurate, is somewhat misleading to a practitioner trying to find a simple route to collect a child support order. For example, the DFAS web site<sup>349</sup> giving instructions for collecting "child and/or spousal support" from "active, reserve, and retired members of the military" (and civilian employees of the Federal government) does not mention the simple process above for collecting child support from military retired pay.

Instead, it speaks only to the Social Security law permitting garnishments, a much more cumbersome procedure.<sup>350</sup> The DFAS guidance notes that the order cannot be the divorce

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<sup>346</sup> Application for Former Spouse Payments From Retired Pay, DD Form 2293 (DD-2293). Again, this form can be filled out and then printed as an interactive pdf form by going to: <http://www.dtic.mil/whs/directives/infomgt/forms/eforms/dd2293.pdf>.

<sup>347</sup> See 42 U.S.C. §§ 659-662.

<sup>348</sup> See 5 C.F.R. Part 581.

<sup>349</sup> <http://www.dod.mil/dfas/militarypay/garnishment/childsupportandalimony.html>.

<sup>350</sup> 42 U.S.C. § 659; implementing regulation at 5 C.F.R. Part 581.

decree or other order requiring the *member* to make the payment, but must direct the government, “as the employer,” to withhold and remit payments to satisfy the support obligation. It helpfully adds that such a specific “federal-government-must-withhold” order must be served on DFAS, and must include the obligor’s full legal name and social security number, but need not name the specific government office in which the obligor is employed.

No mention is made of the apparent requirement that the “wage withholding or similar process” may only be initiated by an “authorized person” by sending the support order to the DFAS – or that such a person must normally be a District Attorney or other person with Title IV-D enforcement authority, not a private attorney.<sup>351</sup> In other words, the process discussed is even more cumbersome than indicated, normally requiring a trip through the State’s child support enforcement bureaucracy before even *starting* the military process.

These omission are unfortunate, as is the lack of any actual practical analysis and guidance for attorneys seeking the simplest routes to enforce such orders as they happen to have. For example, there is no known posted guidance of the practicalities of trying to enforce both child support and a property award against a military member when the size of the required monthly payment exceeds 50% of the disposable retired pay that can be reached by direction application to DFAS.

**PRACTICE TIP:** When money is owed for both retired pay and for child support, it is usually wise to get the retired pay as property started first (even if it means sending in two DD-2293 forms, a couple weeks apart). The reason to do so is that retired pay arrears *cannot* be garnished from future retired pay, but arrears in child support *can* – through the above-described Social Security garnishment order, a support obligee can get up to 65% of total retired pay, not just the 50% available under a DD-2293 direct payment procedure. So a practitioner taking the long-term approach should get the stream of property payments established quickly, and can always go back and slowly collect the support arrears by getting a garnishment order against an additional 15%. Note that, once established, such a garnishment order can remain in place for the long haul, even if the child emancipates, and the elimination of “current” support frees up in that 65% total that allows for payment of the arrears.

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<sup>351</sup> See 32 C.F.R. § 54.3(a).

## H. Death Benefits in the Military Retirement System – the Survivor Benefit Plan (“SBP”)

### 1. Introduction

From a retirement benefits point of view, the death of one party or the other is merely another “value-altering possibility” to be anticipated and structured into the disposition of the retirement benefits upon divorce.

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 revert to the member, as detailed below.

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.<sup>352</sup>

This is an essential concept, which practitioners ignore at their considerable peril in malpractice. As noted at the beginning of these materials, 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.<sup>353</sup>

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.<sup>354</sup> In other words, divorces involving pensions, but in which no provision was made

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<sup>352</sup> 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”).

<sup>353</sup> 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).

<sup>354</sup> 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).

for survivorship interests, are malpractice land mines, lying dormant for perhaps many years until the right combination of events sets them off.

It is worth pausing to note that the various different retirement schemes, public and private, have a dizzying array of survivorship vehicles, which range from going into effect automatically unless specific steps are timely taken to prevent it,<sup>355</sup> to being lost forever by silence unless very specific steps are timely taken to preserve them.<sup>356</sup> There is no automatic statutory entitlement to a survivor's benefit under the USFSPA; in this regard, it is an enabling statute, requiring an agreement or order for a former spouse to have survivorship benefits.<sup>357</sup>

Yet even within that analytical framework, courts have come to curiously illogical conclusions as to the interplay between the SBP statutory scheme and "normal" State divorce law. One court ignored most of the statutory language indicating that the SBP can be ordered to be provided to a former spouse, overriding a divorce decree so providing in order to permit the member to alter the beneficiary designation to his later "surviving spouse."<sup>358</sup>

Yet another court used exactly the same statutory authority to override a State statute and overturn a trial court's finding that the former spouse's right to be the beneficiary of the SBP lapsed permanently when she had remarried to another before the age of 55, but later divorced that person, since the federal statute permits the former spouse in such circumstances to be reinstated as the SBP beneficiary.<sup>359</sup>

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<sup>355</sup> For example, the standard death benefit payable after retirement and after the death of the employee in an ERISA-governed plan is a "qualified joint and survivor annuity," or (unpronounceably) "QJSA." *See, e.g.,* Marvin Snyder, *VALUE OF PENSIONS IN DIVORCE* (3d. ed., Panel Publishers 1999), at 22.

<sup>356</sup> In military cases, to initiate a "deemed election" of the Survivor's Benefit Plan, the former spouse must file a written request with the appropriate Service Secretary requesting that the election be deemed to have been made within one year of the date of the court order. 10 U.S.C. § 1450(f)(3)(B).

<sup>357</sup> *See, e.g., Williams v. Williams*, 37 So. 3d 1171 (Miss. 2010) (a decree providing that the wife would receive "all survivor's benefits otherwise accorded to her by law" provided no benefits at all since SBP had not been elected by agreement or court order).

<sup>358</sup> *Dugan v. Childers*, 539 S.E.2d 723 (Va. 2001) (citing federal preemption as the reason 10 U.S.C. § 1450 prevented a former spouse from imposing a constructive trust on sums paid to a later spouse, despite the agreement in the divorce decree to do so); *King v. King*, 483 S.E.2d 379 (Ga. Ct. App. 1997).

<sup>359</sup> *Smith v. McIntosh*, \_\_\_ S.3d \_\_\_ (2011 WL 1205670, Ala. Civ. App., Apr. 1, 2011) (holding that the former spouse was not barred from being made the SBP beneficiary, but remanding for a determination of whether the former spouse or current spouse should actually be the named beneficiary).

There are similarly large disparities in how the cost of survivorship benefits is paid. Some retirement plans, like the Civil Service system, allow one party or the other,<sup>360</sup> or both parties together,<sup>361</sup> to bear the cost of the survivorship benefits, so long as they are paid by way of reduction in the monthly retirement payments.<sup>362</sup> Other plans, like those governed by ERISA, give no real choice in the matter; if the benefits are not waived by the spouse, then the sum payable during life is actuarially adjusted to compensate for the cost of the survivorship interest.

Whether a survivorship interest for the non-employee spouse is in place – and who pays for it – has a major impact on the net benefits flowing to each of the parties to a divorce involving any form of retirement benefit.

Arguably, the military retirement system provides the most arcane, convoluted, and illogical of the death and survivorship interests of any major retirement system. These materials deal with what benefits are in issue, sketches how they work, and makes some suggestions for dealing with those assets before they become liabilities, specifically addressing how the practitioner can achieve cost-shifting in one direction or the other as might be appropriate in a given case.

## **2. History of SBP Elections, and Mechanics of Election of Beneficiary by the Member and “Deemed Election” of the Former Spouse**

Former spouse coverage was not possible before 1983, and has evolved considerably over the years, as it was made no more expensive than current spouse coverage, and then stipulations to provide such coverage were made enforceable.

In 1986, Congress amended the USFSPA so that State courts could *order* that former spouses be members’ beneficiaries.<sup>363</sup> 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

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<sup>360</sup> If the intent is to have the former spouse only pay the premium, then the OPM should be directed to divide the “self only” annuity, defined as the total monthly benefit before deduction of any survivorship premium, and deduct the entire premium from the former spouse’s share.

<sup>361</sup> If the intent is to have the parties both pay part of the premium, the OPM should be directed to divide the “gross” annuity, defined as the total monthly benefit after deduction of any survivorship premium.

<sup>362</sup> 5 C.F.R. § 838.807.

<sup>363</sup> Pub. Law No. 99-661 (Nov. 15, 1986).

spouse cannot be beneficiaries.<sup>364</sup> 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.<sup>365</sup>

To initiate a “deemed election,” the former spouse was required to file a written request with the appropriate Service Secretary within one year of the date of the court order requesting that the election be deemed to have been made.<sup>366</sup> As of September 30, 2008, the election was required to be made, not just in writing, but on the DD-2656-10 form to be a valid election.<sup>367</sup> There are various other technical requirements.

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.<sup>368</sup> Unfortunately, and counter-intuitively, that results in the parties each bearing a portion of the survivorship premium in exact proportion to their shares of the retirement itself. In other words, if the retirement is being split 50/50, then the parties share the cost of the SBP premium equally, but if the spouse is entitled to only 25% of the monthly retired pay, then the member effectively pays 75% of the SBP premium.

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. An explanation of why such shifting might be appropriate, and how to actually do so, is set out below.

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<sup>364</sup> 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).

<sup>365</sup> 10 U.S.C. § 1450(f)(1)-(2).

<sup>366</sup> 10 U.S.C. § 1450(f)(3)(B).

<sup>367</sup> Memorandum dated May 30, 2008, from Michael L. Dominguez, Principal Deputy, Office of Under Secretary of Defense, on file with the author.

<sup>368</sup> The Department of Defense also asked Congress to change *this* aspect of the SBP program in the *Report to Congress, supra*, requesting that court orders, or stipulations, could specify who was to pay the premium. As noted above, Congress has not acted.

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.<sup>369</sup> 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.<sup>370</sup>

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.

The Services, additionally, have sometimes 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.”<sup>371</sup>

At other times, however, the technical requirements can defeat “expressions of intent, however clear,” to name a former spouse as SBP beneficiary, because such expressions “do not constitute substantial compliance with specific statutory and regulatory requirements.”<sup>372</sup>

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<sup>369</sup> 10 U.S.C. § 1448(b)(3)(A).

<sup>370</sup> 10 U.S.C. § 1448(b)(5).

<sup>371</sup> 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.

<sup>372</sup> *Bonewell v. U.S.*, 111 Fed. Cl. 129 (Fed. Cl. 2013) (affirming Secretary of the Air Force refusal to grant correction of military records deeming former spouse the SBP beneficiary where the member had submitted a DD Form 2558 (Permission to Start, Stop Or Change An Allotment) not a DD Form 2656 (Survivor Benefit Plan (SBP) Election Statement For Former Spouse) because it did not “substantially comply with the

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,<sup>373</sup> 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,”<sup>374</sup> whereas the *former spouse* must make the request “within one year of the date of the court order or filing involved.”<sup>375</sup>

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requirement” of 10 U.S.C. § 1448(b). Stating that the role of the AFBCMR was not to construe or enforce court orders, reconcile conflicting court orders and statutes, or decide, in effect, claims disputes between two or more private parties, it held that no “injustice” would normally be found when providing the SBP to one person meant removing it from another, despite its finding that “There is no doubt that plaintiff has suffered, and continues to suffer, from the operation of a statutory scheme that punishes former spouses who are entitled to a SBP annuity pursuant to a divorce decree and, due to the amicable nature of the divorce and the repeated assurances of the retiree, have no reason to suspect that the retiree did not file the proper paperwork. While the SBP statute allows individuals like plaintiff to protect themselves by seeking a deemed election of former spouse coverage, there is no mechanism for advising them of this right, even if the relevant military service has been made aware of the divorce through other means.”)

<sup>373</sup> Cf. 10 U.S.C. § 1448 with 10 U.S.C. § 1450.

<sup>374</sup> 10 U.S.C. § 1448(b)(3)(A).

<sup>375</sup> 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.<sup>376</sup> 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.<sup>377</sup>

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.<sup>378</sup>

This is where the complications and illogic come in. Presume three identical divorces on the same day. In the first case, the attorney, who knew almost nothing about military retirement benefits law, did not even know there was an SBP to allocate. The second knew that something had to be done, and so put a statement in the Order verifying that the former spouse was to be the beneficiary. The third not only knew to secure the right, but knew about the deemed election procedure, sent the required notice in, etc.

One year and one day after the divorce, the *third* former spouse's rights would be secure. The *first* former spouse could go back to court at any time (prior to the member's death) to get a valid order for SBP beneficiary status, and then serve the pay center. The *second* former spouse, however, whose rights were supposed to be "secured" by the judgment, would be entirely without a remedy (except a malpractice claim against the divorce attorney).

It makes little sense for the law to protect the putative rights of those who do not even try to secure rights upon divorce, while denying any protection to those who believe they have already litigated and received a valid court order protecting those same rights, but that is the bottom line of the law as it now stands.<sup>379</sup> Even the Department of Defense has recognized

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<sup>376</sup> 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).

<sup>377</sup> 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).

<sup>378</sup> 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. DoDFMR 7000.14-R, Vol. 7B., Chap 43, 430504.C.

<sup>379</sup> "The life of the law has not been logic; it has been experience." Oliver Wendell Holmes, *The Common Law* (1881).

the unnecessarily harsh results that are produced by the current law,<sup>380</sup> but Congress has not yet taken any action to correct the situation.

In addition to the conditions and difficulties mentioned above, practitioners should keep in mind (and advise their clients) when dealing with the SBP, that an annuity payable to a widow, widower, or former spouse is “suspended” if the beneficiary remarries before age 55.<sup>381</sup>

At first blush, this would have counsel advise former spouse clients to *not* remarry prior to the relevant age, unless willing to forgo continuing payment of the SBP benefits.<sup>382</sup> However, as discussed more thoroughly below, there may be a counterintuitive benefit to both the member and the former spouse to doing precisely the opposite, and encouraging former spouse remarriage before age 55.

Notably, none of the various time limits and statutes of limitations appear to be applicable to proceedings in the Board for Correction of Military Records, which has “broad remedial and discretionary powers to correct records.”<sup>383</sup>

There appear to be five separate possible effects of a death on a couple in which one party is or was a member of the armed forces, depending upon whether death is before or after retirement, and before or after divorce, and which of the parties has died. Nothing stated below has any effect on service life insurance, which is discussed separately below.

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<sup>380</sup> See *A Report to Congress, supra* (recommending repeal of the one-year limitation). This is not a new position. A memorandum to Congress in 1991 recommended extending the period in which application could be made from one year to five. See “DoD Report on The Survivor Benefit Plan, August, 1991,” under cover entitled “A Review of the Uniformed Services Survivor Benefit Plan (SBP) and Report on the Pending Supplemental Plan and Open Enrollment Period, Prepared by Department of Defense, October, 1991,” in turn attached to correspondence dated October 1, 1991, from Christopher Jehn, Assistant Secretary of Defense, to Hon. Les Aspin, Chairman, House Armed Services Committee. Congress took no action then, either.

<sup>381</sup> 10 U.S.C. § 1450(b). Before November 14, 1986, benefits were suspended if the former spouse was not yet age 60.

<sup>382</sup> This is strictly a legal analysis, and I take no position herein on the moral or other ramifications of cohabitation, unlike some pundits: “A fate worse than marriage. A sort of eternal engagement.” Alan Ayckbourn, *Living Together* (1975).

<sup>383</sup> *Bates v. United States*, 453 F.2d 1382 (Ct. Cl. 1972), citing 10 U.S.C. § 1552(b); *Pride v. United States*, \_\_\_ Fed. Cl. \_\_\_ (No. 97-394C, May 18, 1998) (time period for widow of member to apply for correction of records to name her as SBP beneficiary did not run from the member’s death in 1979, but from 15 years later when benefits payable to the children stopped and she obtained an order correcting designation to name her as beneficiary, when she had not been notified of member’s failure to name her upon retirement).

### 3. Death of Member Before Retirement and Before Divorce

Whether everyone is living happily together or not, if the member dies before a divorce is final,<sup>384</sup> the spouse is the recipient of certain benefits made available for the survivors of active duty military personnel, under 38 U.S.C. § 1311(a), which created a program called Dependency and Indemnity Compensation (“DIC”). DIC payments have been payable to the survivors of any veteran who died after December 31, 1956, from a service-connected or compensable disability.<sup>385</sup> DIC payments are not made to persons divorced from members.<sup>386</sup>

If a person happens to be a recipient of both DIC payments and payments under the Survivor’s Benefit Plan (“SBP”) explained below, all DIC payments are subtracted from the SBP payments.<sup>387</sup> However, certain supplements to the DIC benefits, for support of a dependent child or because of certain disabilities, do *not* get offset against SBP.<sup>388</sup> DIC payments are not taxed, and are therefore more valuable than the (taxable) SBP payments that would otherwise go to the survivor.

Previously, the rule was that if the survivor remarried, DIC payments were permanently terminated,<sup>389</sup> even if the second marriage ended by death or divorce.<sup>390</sup> However, a rule effective December 16, 2003, permitted former spouses receiving DIC to retain the benefits despite their remarriage – so long as they were at least 57 years old at the time of remarriage. Those that remarried, over 57 years old but prior to December 16, 2003, could have their DIC benefits restored, so long as they applied for it by December 15, 2004.

Further, if the former spouse was receiving both DIC and SBP, and the remarriage occurred when the former spouse was over 55 years, the SBP payment is apparently increased to the full amount (in other words, the DIC offset is replaced by additional SBP dollars, leaving the only effect one of taxation).<sup>391</sup>

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<sup>384</sup> This scenario could lead to different results in those States in which separation or the filing for divorce has a greater legal effect.

<sup>385</sup> 38 U.S.C. § 410(a). *See* Pub. L. No. 84-881, 70 Stat. 862, 867 (Aug 1, 1956).

<sup>386</sup> *See* 38 U.S.C. §1311(a)(2).

<sup>387</sup> 10 U.S.C. § 1451(c)(2).

<sup>388</sup> *See* 38 U.S.C. § 411(b)-(d).

<sup>389</sup> Pub. L. No. 101-508, § 8004, 104 Stat. 1388-343 (Nov. 5, 1990).

<sup>390</sup> Remarriage has been defined as “The triumph of hope over experience.” Samuel Johnson, *Life of Boswell*, vol. 2, at 128 (1770).

<sup>391</sup> *See, generally*, Benjamin Franklin, *In Praise of Older Women*.

#### 4. Death of Member Before Retirement and After Divorce

This is a most dangerous situation for a former spouse. As noted in the section above, spouses lose DIC eligibility upon divorce. And the member could name another survivor beneficiary during the period before retirement. In other words, the former spouse risks total divestment if the member dies during the period between divorce and the member's actual retirement.

The only practical method of ameliorating this risk other than having an order in place naming the former spouse as SBP beneficiary would appear to be through private insurance.<sup>392</sup> The problem is that few service members carry significant sums of secondary private insurance.

It is worth pausing for a moment to clarify that any former spouse who will be the recipient of retirement benefit payments if her former spouse lives, but will not get such money if he dies, *definitionally* has an "insurable interest" in the life of the member (this is true for military or non-military cases). The matter is one of fact, not a matter of discretion, award, or debate.<sup>393</sup> Anecdotal accounts indicate that some insurers are reluctant to issue private policies of insurance without some court order indicating that the intended beneficiary (the former spouse) is entitled to insure the life of the other party. Attorneys for former spouses should therefore make a point of reciting the fact of such an interest on the face of the decree.

The survivor of a member who died while still on active duty is not *necessarily* excluded from receiving SBP benefits. The Finance Centers will honor a member's election to treat a former spouse as the SBP beneficiary if the member died after: (1) becoming eligible to receive retired pay; (2) qualifying for retired pay but not yet having applied for or been granted that pay; or (3) completing twenty years of service, but not yet completing ten years of active *commissioned* service needed for retirement as a commissioned officer.<sup>394</sup> The procedural requirements are the same as in other cases.

Additionally, the 2002 Defense Authorization Act included a provision, retroactive to September 10, 2001, making survivors of members who die in the line of duty<sup>395</sup> eligible to

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<sup>392</sup> *Not* through SGLI, as set out in the last subsection of this section, since it is not secure.

<sup>393</sup> "Insurable interest" survivorship provisions are found throughout various federal regulations, as an *alternative* to covering a spouse or former spouse (i.e., if no such person exists); it refers to any person who has a valid financial interest in the continued life of the member. *See, e.g.*, 10 U.S.C. §§ 1448(b) & 1450(a)(1); 10 U.S.C. § 1450(a)(4).

<sup>394</sup> 10 U.S.C. § 1448(d)(1).

<sup>395</sup> Essentially defined as virtually any cause of death not experienced while AWOL or otherwise at odds with the military authorities.

receive SBP. This has apparently created a *pre-retirement survivor annuity*, for spouses or former spouses.

There is not yet a body of published authority dealing with the details of this benefit, but some developments indicate the contours of applying this legal change in the real world.

Theoretically, the election of the former spouse as SBP beneficiary would occur in the original divorce proceedings, and be on file during the member's lifetime. However, as discussed in the "deemed election" and "choosing between a former spouse and current spouse" sections above and below, things do not always happen in that order, or that cleanly.

It now appears that if the member dies during a time in which litigation has begun, even if it has not yet been concluded, as to who should be the SBP beneficiary, DFAS will conform its records to designate whichever beneficiary is ultimately named as the appropriate beneficiary by a court of competent jurisdiction.<sup>396</sup>

## 5. Death of Member After Retirement and Before Divorce

This was apparently the scenario contemplated when the SBP was created in 1972, to provide a monthly annuity to spouses and dependents of retired members of the Uniformed Services. It largely replaced an earlier survivor's plan known as the RSFPP,<sup>397</sup> which is of little importance here. All members entitled to retired pay are eligible to participate in the SBP,<sup>398</sup> under which a survivor's annuity is payable after a member's death.<sup>399</sup>

Some members retired *before* 1972 are nevertheless participants in the SBP, since Congress has provided a number of "open enrollment periods" or "open seasons" during which non-participants could join the program, and those who had selected less than the full amount of benefits could increase their level of participation. Those choosing to begin or increase their

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<sup>396</sup> See April 15, 2009, letter from Scott Lafferty, Assistant Counsel, Military and Civilian Pay Law, DFAS Office of General Counsel, to Richard L. Crane, Esq., Willick Law Group, relating to *Mason v. Cuisenaire* Former Spouse SBP Annuity Claim, posted under the title "Letter from DFAS re: Benefits" under the *Cuisenaire* heading at <http://www.willicklawgroup.com/appeals>.

<sup>397</sup> The Retired Serviceman's Family Protection Plan (RSFPP) was originally known as the Uniformed Services Contingency Option Plan of 1953, enacted by Pub. L. No. 83-239, 67 Stat. 501 (Aug. 8, 1953). The name was changed by Pub. L. No. 87-381, 75 Stat. 810 (Oct. 4, 1961). The RSFPP is described at 10 U.S.C. § 1431, *et seq.* That program was generally considered a failure due to the very low participation rate of eligible members.

<sup>398</sup> 10 U.S.C. § 1448(a)(1)(A).

<sup>399</sup> 10 U.S.C. § 1447 *et seq.*

participation in the SBP program during an open season are also faced with paying an additional retroactive premium.

The SBP is not divisible. It can be made to cover more than one person in certain circumstances (as in a spouse and dependent child), but it cannot be divided between a spouse and former spouse, or between two former spouses.<sup>400</sup>

The SBP applies automatically to a member who is married or has at least one dependent child at the time the member becomes entitled to retired pay, unless the member affirmatively elects not to participate in the SBP.<sup>401</sup> The member's spouse must be notified of any attempt by a member to not designate a spousal SBP interest,<sup>402</sup> and must consent to any election not to participate in the SBP, to provide an annuity for that spouse at less than the maximum level, or to provide an annuity for a dependent child but not for the spouse.<sup>403</sup>

Where the spouse did not consent to non-coverage, and no "special circumstances" are present, the spouse can petition for "instatement" of the benefits later, even after the member's death.<sup>404</sup> The spouse can be named SBP beneficiary even where he or she has little or no time-rule percentage of the retired pay itself.<sup>405</sup>

A dependent child can only be an SBP beneficiary if the child is also one of the following: (1) the child of the former spouse who is the beneficiary; or (2) the child of a current spouse

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<sup>400</sup> The military retirement system has no provision for division of a survivorship interest. The absence of such a provision works hardships of unjust enrichment and dispossession. Members' political pressure groups, former spouses' political pressure groups, and the American Bar Association have all stated that this requires correction, and the Department of Defense has recommended that the SBP be made divisible among multiple beneficiaries. See *A Report to Congress Concerning Federal Former Spouse Protection Laws*, *supra*. Congress has taken no action to date.

<sup>401</sup> 10 U.S.C. § 1448(a)(2).

<sup>402</sup> Spousal notification is mandatory. *Hart v. United States*, 910 F.2d 815 (Fed. Cir. 1990), *citing* 10 U.S.C. § 1448(a)(3)(A) (1976) (holding, however, that the relevant statute of limitations for making such a claim had expired). "The military's failure to notify the member's spouse voids the member's election not to participate in the SBP." *Id.*, *citing* *Barber v. United States*, 676 F.2d 651 (Ct. Cl. 1982); *Trone v. United States*, 230 Ct. Cl. 904 (1982).

<sup>403</sup> 10 U.S.C. § 1448(a)(3)(A).

<sup>404</sup> See *McCarthy v. United States*, 10 Cl. Ct. 573 (1986), *aff'd*, 826 F.2d 1049 (Fed. Cir. 1987).

<sup>405</sup> See *Matthews v. Matthews*, 647 A.2d 812 (Md. Ct. App. 1994); *In re Marriage of Ziegler*, 207 Cal. App. 3d 788, 255 Cal. Rptr. 100 (1989) (spouse with no interest in the military retirement benefits could be ordered maintained as SBP beneficiary as security for member's support obligation); *Hipps v. Hipps*, 597 S.E.2d 359 (Ga. 2004) (same; Survivor's Benefit Plan served as security for alimony award in the event that husband predeceased wife).

who is the beneficiary, or who has consented to provide the benefit to the child only; or (3) if the previously-named former spouse beneficiary is no longer still alive.<sup>406</sup>

The SBP is funded by contributions taken out of the member's retired pay. For members entering service before March 1, 1990, premiums are the lesser of the amount computed by two tests. First, 2.5% of the first \$572<sup>407</sup> of the base amount, plus 10% of the remaining base amount. Second, 6.5% of the base amount. For members entering service on or after March 1, 1990, SBP premiums are 6.5% of the base amount. Premiums continue indefinitely. Beginning October, 2008, however, SBP premiums stop, with benefits still fully payable, once premiums have been paid for 30 years *and* the member reaches the age of 70.<sup>408</sup>

The maximum amount of the standard SBP annuity for a beneficiary under age 62 or a dependent child is 55 percent of the elected amount of the member's base retired pay<sup>409</sup> as adjusted from time to time for cost of living increases.<sup>410</sup>

Previously, SBP payments were reduced for a beneficiary who was 62 or older, although an expensive supplement was developed which, if purchased, eliminated the reduction.<sup>411</sup> Continued political pressure resulted in elimination of the Social Security offset, phased in over three and a half years starting in October, 2005, and ending April, 2008.<sup>412</sup> The SSBP premiums were phased out; at the end of the adjustment period, all SBP recipients should receive 55% of the base amount indefinitely, regardless of age.

The bottom line is that it is possible for a military member to provide for survivorship benefits for a spouse after retirement, almost automatically. This was its original purpose.

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<sup>406</sup> 10 U.S.C. § 1448(b)(4). In any event, for "child only" designations, the benefits continue only until the child is 18 years old (or 22, if a full-time student). 10 U.S.C. § 1447(5).

<sup>407</sup> Amount effective as of January 1, 2003. It is adjusted annually.

<sup>408</sup> Pub. L. No. 105-261, § 641 \_\_\_ Stat. \_\_\_ (Oct. 17, 1998).

<sup>409</sup> As computed under 10 U.S.C. §§ 1401-1401a.

<sup>410</sup> 10 U.S.C. § 1451(a)(1)(A).

<sup>411</sup> Criticism of the lowering of benefits at age 62 led to the development of a "high option" supplement known as the "Supplemental Survivor Benefit Plan," or SSBP. *See* Pub. L. No. 101-189, 103 Stat. 1352 (Nov. 29, 1989). Under the supplement program, payment of additional premiums could increase the survivor's benefits by five percent for each SSBP unit purchased. Unlike the SBP itself, which the government theoretically subsidizes to the extent of 40%, the SSBP was designed to be actuarially neutral – i.e., to neither save nor cost the government any money. Thus, the increased coverage came at a significantly increased cost.

<sup>412</sup> Pub. L. No. 108-375 § 644, \_\_\_ Stat. \_\_\_ (2005).

## 6. Death of Member After Retirement and After Divorce

This is the classic divorce scenario. Whether divorce occurs before or after retirement, it is usually expected that both parties will continue to live until after the member retires from active duty, and the SBP process structurally contemplates that beneficiary election, or deemed election, will occur promptly after a divorce.

This is where most divorce court litigation of SBP beneficiary designations should be expected to occur, with the resulting court orders determining the recipient of the survivorship interest. As explained in detail throughout the surrounding sub-sections, however, real-world events can often upset the anticipated orderly process, with a host of interesting resulting ramifications.

## 7. Death of Spouse

In marked contrast to the multiple line-drawing and subtle distinctions discussed above regarding the death of a member, the death of a spouse has a very simple effect – the member is freed from all relevant restrictions, claims, and costs.

If the spouse dies before retirement (whether the parties are married or divorced), no spousal consent is needed to waive the SBP. If the spouse dies during marriage but after retirement, SBP premium deduction stops as soon as the military pay center is informed of the spouse's death.

If the former spouse dies after retirement and divorce, both the spousal share of current military retired pay and any SBP benefits in the spouse's name revert to the member – they may not be left to anyone by will or intestate succession.<sup>413</sup> As of 2006, Congress permitted a member to elect a new survivor beneficiary for the SBP upon the death of a current beneficiary.<sup>414</sup>

And, finally, if the former spouse dies after divorce, retirement, *and* after the death of the member, the benefits simply stop.

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<sup>413</sup> 10 U.S.C. § 1408(c)(2).

<sup>414</sup> John Warner National Defense Authorization Act for Fiscal Year 2007 (H.R. 5122, 109 Cong. 2d Sess. (2006); 10 U.S.C. § 1448(b)(1). This benefit was apparently lost as of 2013 by reason of internal administrative determinations, but was restored in the 2016 Defense Authorization Act, with an open season to make new spouse designations until November 24, 2016.

## 8. Mathematical Mechanics of the SBP – Who Gets How Much If the Other Party Dies

The mathematics of what happens to one party if the other should die is actually pretty straightforward.<sup>415</sup>

Suppose a couple who have been married for the entire military career. Using artificial numbers, if the retirement was exactly \$1,000, each party would receive \$500. If there was no SBP, if the member dies, the spouse would receive nothing thereafter. If the spouse dies, though, the member would receive his \$500 *and* her \$500 – a total of \$1,000 for life. This would clearly be an inequitable result in any property division scheme requiring an equal division of property upon divorce.

With an SBP at the full maximum amount, the total retired pay is reduced by \$65. The remaining \$935 would be equally divided between the parties for life (\$467.50 per month per party in lifetime benefits). If the spouse dies, the premiums end, and member gets his \$500, *plus* the full amount of the spousal share (another \$500), totaling \$1,000, for life. If the member dies, the spouse would receive 55% of the base amount, for life – \$550. In other words, the member will *always* have superior rights, and a greater upside, even if the parties exactly split the premium. It is built into the system. He gets a \$500 increase on her death; her maximum increase is \$50.<sup>416</sup>

Such a retirement division would treat the parties equally, at least as to cost. The member's benefit is still vastly superior to that of the spouse, so while they share the cost equally, the member gets a whole lot more out of that cost than the spouse does.

The equities are not much different even where the marriage and service overlap for less than the full time of the marriage. Again, the military member *always* has the much better deal.

Suppose the same retirement as discussed above (\$1,000), but a marriage of exactly half the length of the military career; the spousal share would be 25%, and with no SBP in effect, the former spouse would receive \$250 per month out of a \$1,000 total retirement.

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<sup>415</sup> Some folks get lost in the math; if this happens, step through the nine flowcharts posted at [http://www.willicklawgroup.com/military\\_retirement\\_benefits](http://www.willicklawgroup.com/military_retirement_benefits) under the title “Exhibits to Death and Related Subjects of Cheer” and it will be rendered easy.

<sup>416</sup> If that \$50 increase to the spouse was for some reason problematic, it would be a simple matter to reduce the base amount to \$909, so that 55% yielded \$499.95. The member and the spouse would share in the saved \$5.92 per month in premium cost during their mutual lives, and the member would still have vastly superior results if the former spouse died first (a \$500 increase) while the former spouse would continue receiving exactly the same amount if the member died first.

If the former spouse predeceased the member, then the following month the member's share of the benefit would increase by one hundred percent of what the spouse was receiving, and instantly, automatically, and without the payment of any premium would gain an increase to \$1,000 per month, for the remainder of the member's life. This is the member's "cost free" automatic survivorship interest in the former spouse's life. It is built in to the structure of the retirement system. But on these facts, if the member died first, the former spouse would receive nothing further.

As with the prior hypothetical, during life, with an SBP at the full maximum amount, the total retired pay is reduced by \$65. But since the premium is paid off the top, the parties effectively bear the premium in accordance with their lifetime share of the benefit. In this hypothetical, since the former spouse receives 25% of the lifetime benefit, she effectively pays 25% of the premium – \$16.25, while the member effectively pays 75% of the premium – \$48.75. They would actually respectively receive \$701.25 (member) and \$233.75 (spouse).

This is the scenario focused upon by those who insist the former spouse should pay the entire SBP premium. But the math reveals that it is not really disproportionate to the benefits received, even if left to the "default" premium-payment.

Specifically, if the spouse dies, the premiums end, and the member thus gets his \$701.25 increased to \$750, *plus* the full amount of the spousal share (another \$250), totaling \$1,000, for life (an increase of \$298.75). Whereas, if the member dies, the spouse still can only receive 55% of the base amount – \$550 (an increase of \$316.25). In other words, the spouse does get an increase, but the total increase the member would get for the premium paid during life is about the same size.

Rather, the equitable problem in this scenario is that the parties have not been treated equally for that equal benefit to be received upon the death of the other, because the member is paying more but only getting about the same result.

But that is easily fixed (as detailed two sections below) – by simply altering the lifetime spousal share downward from 25% to 23.262%. Each party would effectively be paying \$32.50 of the \$65 premium, and each would get an approximately-equal several hundred dollar bump-up upon the death of the other.<sup>417</sup>

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<sup>417</sup> And for those who could not accept the possibility that upon the member's death, the spouse would receive *any* increase (although those making that protest never seem to have a problem with the *member* getting an increase if the former spouse dies first), the base amount could be simply and easily lowered from \$1,000 to \$454.55. This would lower the premium to \$29.55. If the member died first, the spousal share would remain exactly the same – \$235.22. Of course, if the spouse died first, the member's share would still jump – on these facts, from \$735.23 to \$1,000 per month (about a \$265 bump-up upon the former spouse's death).

## 9. Why it Might Be Appropriate to Re-allocate the SBP Premium – and Who Should Pay for it

As explained elsewhere in these materials, the military system does not permit the creation of a divided interest to the spouse, but only a divided payment stream. As detailed in the section immediately below, there is an automatic reversion of the spousal share of those payments to the member, should the spouse die first.

In other words, the member essentially has an automatic, cost-free, survivorship benefit built into the law that automatically restores to him the *full amount of the spouse's share* of the lifetime benefit if she should die before him. No matter what any court might order, if the former spouse dies first, the member not only continues to get *his* share of the benefits, but he will *also* get *her* share, for as long as he lives.

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

One court that did explain why it was ruling as it did was the Colorado Court of Appeals, in *In re Marriage of Payne*.<sup>418</sup> The court held that ordering the member to contribute to the cost of the SBP gave the wife a right already enjoyed by the husband, that is “the right to receive her share of the marital property awarded to her.” The court adopted the “default” position for distribution of the premiums (discussed in the next section), observing that:

The cost of the Survivor Benefit Plan is deducted from the husband-retiree's gross pension income of \$2200 per month before the net remainder is divided between the parties pursuant to the permanent orders. Thus, the expense is shared equally by both parties.<sup>419</sup>

The military member had appealed in *Payne*, claiming that the SBP should be funded solely by the former spouse because it is “a court-created asset for her benefit alone.” The appellate court rejected that argument, holding instead that the SBP is “an equitable mechanism selected by the trial court to preserve an existing asset – the wife's interest in the military pension.”<sup>420</sup> Several other courts have reached the same conclusion, but most of the

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<sup>418</sup> *In re Marriage of Payne*, 897 P.2d 888, 889 (Colo. App. 1995).

<sup>419</sup> *Id.*

<sup>420</sup> *Id.*

decisions so holding did not fully discuss the math involved in the text of their decisions, or explain the policy choices for who should bear what expense.<sup>421</sup>

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

The *only* person for whom a survivorship interest has any cost is the former spouse. If both parties are to share benefits, and burdens, of the assets and liabilities distributed, they must equally (or as equally as possible) bear this cost as well, just as they share the zero cost of the member's survivorship interest in the spouse's life. Otherwise one of them gets a survivorship benefit for free, and the other gets a survivorship benefit at significant cost – which would appear to violate the law of all States having divorce law requiring the presumptively equal division of property.

Unless one believes that upon divorce one party is entitled to a greater share of the benefits, and a lesser share of the burdens, accrued during marriage, then it is necessary to deal with the structure of any retirement system so that the parties benefit, and are burdened, as nearly equally as may be made true.

In the military system, that would seem to require dividing the burden of the only survivorship benefit that *has* a cost – the one for the benefit of the spouse – between the parties, either equally, or per the default percentage-of-lifetime benefit method built into the system.

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<sup>421</sup> *Marriage of Smith* 148 Cal. App. 4th 1115, 1123, 56 Cal. Rptr. 3d 341 (2007) (trial court had jurisdiction to order the husband to elect a survivor benefit plan for the wife's benefit); *Potts v. Potts*, 790 A.2d 703 (Md. Ct. Spec. App. 2002) (survivorship interest falls within the definition of marital property); *Harris v. Harris*, 621 N.W.2d 491 (Neb. 2001); *Zito v. Zito*, 969 P.2d 1144 (Alaska 1998) (“Barring an express understanding to the contrary, an agreement for equitable division of retirement benefits earned during a marriage presumptively encompasses survivor benefits”); *Kramer v. Kramer*, 510 N.W.2d 351, 356 (Neb. Ct. App. 1993) (affirming award of SBP, reasoning that requiring the purchase of an SBP “gives the division of a nondisability military pension more of the attributes of a true property division”); *Smith v. Smith*, 438 S.E.2d 582 (W. Va. 1993) (ordering husband in dissolution action to purchase and pay for SBP for wife to avoid unfairness of wife's receiving nothing if husband predeceases her); *Haydu v. Haydu*, 591 So. 2d 655 (Fla. App. 1991) (trial courts have discretion to order spouse to maintain annuity for former spouse under SBP); *In re Marriage of Bowman*, 734 P.2d 197, 203 (Mont. 1987) (court recognized that “to terminate [wife's] survivor's benefits jeopardizes her 29 year investment in the marital estate”); *Matthews v. Matthews*, 647 A.2d 812 (Md. 1994) (court order requiring party to designate a former spouse as a plan beneficiary does not constitute a transfer of property); *In re Marriage of Lipkin*, 566 N.E.2d 972 (Ill. App. Ct. 1991) (survivor's benefit is a separate and distinct property interest).

It cannot be said that even the default approach is inequitable, at least until the lifetime spousal share is less than 25%. This is so because the member has a far superior survivorship benefit, without cost, automatically, and for 100% of the spousal share. So if the member pays a greater percentage of the premium during the parties' mutual lifetimes, the member receives a superior benefit in return for that cost.

For those that can't see justification of an increased cost to the member to compensate for that superior, bumped-up survivorship benefit, it is possible to adjust the math (as detailed in the following section) to make sure the parties effectively bear any premiums equally.

Mathematically, the "default" position discussed in the following section distributes the premium debt proportionally to the parties' respective shares of the benefits taken – *not* equally, as some of the courts say they do.

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

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

## 10. How to Allocate the SBP Premium – Cost-Shifting

If the former spouse dies first, then the member automatically gets back the entirety of the monthly spousal share, for the rest of his life. There are nine basic possibilities, however, as to what the *spouse* should receive in the event that the *member* dies first. Each carries with it a different weighing of equities, rights, and responsibilities.<sup>422</sup>

First, there could be no SBP award to the former spouse. The lifetime benefit stream will be divided as the court indicates, but the parties will be left in an unequal position as to *risk*,

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<sup>422</sup> To make this somewhat easier to visualize, I've set out nine flowcharts illustrating the math done at each step of the following nine scenarios; they are posted under the heading "Exhibits to Death and Related Subjects of Cheer" at [http://www.willicklawgroup.com/military\\_retirement\\_benefits](http://www.willicklawgroup.com/military_retirement_benefits). Each presumes the division is done in a State following the "time rule," and presumes a ten-year marriage during service, out of a 20-year military career, yielding a presumptive spousal share would be 25%. The scenarios presume that the military retired pay is exactly \$1,000.

because if the member dies, the former spouse gets nothing, but if the former spouse dies, the member gets his share of the benefits, plus hers.

Second, there is the “default” – what would happen if the court deemed the former spouse to be the SBP beneficiary, at the full base amount, but took no steps to alter the ramifications of that election. The spouse would be “over-secured,” to a greater or lesser extent.<sup>423</sup> The smaller the lifetime interest of the former spouse happened to be, the larger the share of the premium that the member would pay.<sup>424</sup> If the member died first, payments to the spouse would increase from \$233.75 to \$550. If the spouse died first, payments to the member would increase from \$701.25 to \$1,000.

The third scenario would have the former spouse pay the entire SBP premium. Using the same hypothetical facts, reducing the spousal share from 25% to 19.7861% would free the member from paying any portion of the premium, directly or indirectly.<sup>425</sup> The former spouse is still over-secured, as in the prior scenario, and the parties are still left in an unequal position regarding risks and burdens, since the member still has an entirely free survivorship interest on the spouse’s life, and she is paying the entire premium for the survivorship interest on the member’s life.

The fourth scenario imposes the SBP premium payment entirely on the member, by increasing the spousal share to 26.7380%.<sup>426</sup> The former spouse remains over-secured, as above. The entire premium falls to the member, who still has the free survivorship on the spouse’s life. Shifting the premium in this way is analogous to making a spousal support award.

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<sup>423</sup> Since the SBP program pays 55% of the base amount, and the maximum spousal share is 50%, the spouse would receive at least *some* more money in SBP than her lifetime share. If the marriage did not completely overlap the service time, then under any “time rule” formula, the spousal interest would be *less* than 50%. In the hypothetical 10 year marriage out of a 20-year military career, if the SBP was in place at the maximum base amount, then the death of the member would cause a jump in payments to the former spouse from 25% to 55%.

<sup>424</sup> In the hypothetical case where the marriage exactly overlapped the last 10 years of a 20-year career, and the gross retirement was exactly \$1,000, the 6.5% SBP premium would be \$65. After taking it “off the top,” the military pay center would divide the remaining \$935 in “disposable retired pay” 75% (\$701.25) to the member, and 25% (\$233.75) to the spouse. The member would effectively pay \$48.75 of the premium, and the spouse would effectively pay \$16.25.

<sup>425</sup> The 6.5% SBP premium would still be \$65. After taking it “off the top,” the military pay center would divide the remaining \$935 in “disposable retired pay” 80.2139% (\$750) to the member, and 19.7861% (\$185) to the spouse. The member would effectively pay nothing, and the spouse would effectively pay \$65.

<sup>426</sup> Again, the 6.5% SBP premium would be \$65. After taking it “off the top,” the military pay center would divide the remaining \$935 in “disposable retired pay” 73.2620% (\$685) to the member, and 26.7380% (\$250) to the spouse. The member would effectively pay \$65, and the spouse would effectively pay nothing.

The fifth scenario presumes that the court wants to “equally divide” the premium, which would be accomplished by decreasing the spousal share to 23.2620%.<sup>427</sup> This requires decreasing the spousal share somewhat from the default, and increasing the member’s share somewhat, to cause a sufficient dollar adjustment so that each pays exactly the same amount toward the premium cost that the military will take “off the top.” There is some equitable logic in this idea, although it still leaves the former spouse over-secured, in that the possible survivorship that each party might receive is maximized, and they equally share both the cost of the survivorship benefit that the member has on the spouse’s life (i.e., none), *and* the cost of the survivorship benefit that the spouse has on the member (the only survivorship benefit that has a cost associated with it).

As discussed above, it *is* possible to restrict the SBP to *only* secure the former spouse’s lifetime interest – i.e., to arrange things so that she would get the same amount if the member died that she received while he remained alive. Notably, it is *not* possible to similarly restrict the *member’s* interest; no matter what the court does, the member will retain an automatic reversion of all the money paid to the former spouse, if she dies first.<sup>428</sup> In the next four scenarios, then, if the spouse dies first, the member gets the full gross military retirement benefits, but if the member dies first, the spouse continues to get only her share of the benefits.

Scenario six therefore is the same “default” as set out in scenario two, the only difference being that the base amount is lowered, from the entire retirement benefit, to only that portion of which 55% would equal the former spouse’s lifetime interest, in this hypothetical case, \$454.55.<sup>429</sup> Since the 6.5% premium is reduced to only \$29.55, the member’s 75% of the \$970.45 of remaining “disposable retired pay” yields \$727.84, and the spouse’s 25% yields \$242.61. The member effectively pays \$22.16 toward the premium cost, and the spouse pays \$7.39.

Scenario seven shifts that reduced SBP premium to the spouse by reducing her percentage of the lifetime benefit.<sup>430</sup>

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<sup>427</sup> The 6.5% SBP premium is, of course, still \$65. After taking it “off the top,” the military pay center would divide the remaining \$935 in “disposable retired pay” 76.7380% (\$717.50) to the member, and 23.2620% (\$217.50) to the spouse. The member would effectively pay \$32.50, and the spouse would effectively pay \$32.50.

<sup>428</sup> There have been several cases of members taking action to accelerate that reversion by trying to kill former spouses.

<sup>429</sup> This is because 55% of \$454.55 would be \$250 – the sum awarded to the spouse.

<sup>430</sup> To 22.7163%, so that she receives \$220.45. The member’s share, increased to 77.2837%, yields the full \$750 that he would have received if there had been no SBP, and the spouse thus effectively pays the entire \$29.55 SBP premium.

Scenario eight shifts the reduced premium the other way, to the member, for the same reasons, and to the same effect, as set out in scenario four, but with smaller totals, since the spousal survivorship interest has been reduced.<sup>431</sup>

And in scenario nine, the reduced burden is equally divided between the parties, for the same reasons as set out in scenario five, but without over-securing the former spouse.<sup>432</sup>

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

The math looks harder than it really is. For those who wish to shift the premium between member and former spouse in any way, we have designed, and posted, a simple-to-operate calculator that allows the operator to calculate what the lifetime percentages of retired pay should be to effectuate any intended distribution of the premium cost, at any intended level of SBP benefit for the former spouse.<sup>433</sup>

## 11. Reserve-Component SBP

The Reserve Component Survivor Benefit Plan (RC-SBP) was established to provide annuities to beneficiaries of reservists who completed the requirements for eligibility for retired pay at age sixty but died before reaching that age.<sup>434</sup>

Before 1978, reservists could not elect participation in their SBP program until they were eligible to draw retired pay (that is, at age sixty). That year, legislation granted them the

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<sup>431</sup> To 25.7613% of the \$970.45 remaining “disposable retired pay” after deduction of the SBP premium, in this scenario, so that she continues to receive \$250. The member’s share, decreased to 74.2387%, yields \$720.45, so that he effectively pays the entire \$29.55 SBP premium.

<sup>432</sup> Making the spousal interest 24.2382% yields \$235.22; increasing the member’s share to 75.7618% increases his share to \$735.23. Both parties pay \$14.77 (actually, there is an odd penny, which for no good reason I allocated to the former spouse, who pays \$14.78).

<sup>433</sup> See “Universal SBP Premium-Shifting Calculator,” posted for free public access and use at [http://www.willicklawgroup.com/military\\_retirement\\_benefits](http://www.willicklawgroup.com/military_retirement_benefits).

<sup>434</sup> See Pub. L. No. 95-397, 92 Stat. 843 (1978).

power to elect participation upon notification of eligibility for retirement, which generally is before they reach age sixty.<sup>435</sup>

There are three options available to reservists upon notification for eligibility. Option A declines coverage until age sixty; if the member dies before that age, there is no benefit. Presuming survival to that time, this option has the same costs and benefits as the active-duty SBP program.

Option B provides coverage so that payments begin on the later of (1) the date of the retiree's death, or (2) the date the retiree would have turned sixty. Benefits are actuarially reduced from the sum provided in Option A.

Option C provides coverage so that payments begin immediately after the retiree dies, regardless of age. Benefits are actuarially reduced from the sum provided in Option A.

The premiums for Option A work like normal SBP premiums, in that they come "off the top" of benefits payable. Premiums for Options B and C are paid by way of that reduction, *plus* an actuarial reduction in the benefits paid. This is how the system accounts for coverage being in existence years before eligibility for retirement benefits is reached.

As of 1983, it was possible for reservists to designate former spouses as their SBP recipients,<sup>436</sup> and the 1986 amendments presumably gave courts the same power to deem beneficiary designations in Reservist cases as in any others. SBP benefits based on reserve-component service had a reduction similar to that for regular retirement SBP benefits after a beneficiary turns age sixty-two, which presumably was phased out on the same schedule.

The RC-SBP was amended as of January 1, 2001, to require written spouse concurrence for taking any benefit less than Option C. Thus, the order of events for retirement and divorce make a difference as to whether the former spouse will have any input into the option selected.

Actual calculation of the SBP premiums in a Reservist case can be extraordinarily complex. The RC-SBP premium consists of both an SBP portion and an RC-SBP, or reserve tack-on portion. The SBP portion is computed like any other SBP premium (6.5%) if the selected base amount is greater than \$1,554 (as of 2010). However, if the selected base amount is less than \$725, the SBP premium is only equivalent to 2.5% of the base amount; any amount that exceeds \$725, but less than \$1,553 is computed at 10%. Thus, if the selected base amount

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<sup>435</sup> *See id.*

<sup>436</sup> *See* Pub. L. No. 98-94, 97 Stat. 614 (1983).

is \$1,553, the first \$725 is multiplied by 2.5% and the remaining \$828 is multiplied by 10% resulting in an SBP premium cost of ( $\$18.13 + \$82.80 = \$100.93$ ).

The cost of the RC-SBP portion of the premium (or monthly reserve portion of the RC-SBP premium) depends on the type of beneficiary elected, the annuity option elected, and the age difference between the member and beneficiary (collectively, these are referred to as the “cost factors”). DFAS allegedly publishes these cost factor tables, which provide a decimal (or percentage that must be converted to a decimal, i.e. 0.36% to .0036) that is to be multiplied by the selected base amount, but they do not appear to be publicly accessible. The supposed links appear to be re-directions to the Office of the Actuary and then assorted useless spreadsheets.

There does appear to be a “cost factor” table on the Army Human Resources Command site,<sup>437</sup> The site also has a nifty RC-SBP premium calculator which may prove helpful. Multiplying the cost factor by the selected base amount yields the reserve cost for the RC-SBP premium; adding that cost to the underlying SBP premium should yield the total SBP cost.<sup>438</sup>

The problem appears to be that there is no to accurately estimate what the actuarial factors will be at any particular time. The actuary periodically reviews funding to determine if the premiums must be adjusted; the actuarial factors for the RC-SBP were apparently last adjusted in 2010. Inquiries to DFAS yielded a referral to the same website referenced in the footnote before last, above.

## **12. Choosing Between A Spouse and A Former Spouse as the Proper Beneficiary of the SBP**

The United States Congress determined that as of November 14, 1986, a court with jurisdiction is explicitly empowered to order members to elect to provide SBP annuities to former spouses, irrespective of the date of divorce, or retirement.<sup>439</sup> The only limitation is that if the member refuses to submit the required paperwork, the former spouse must file a written request with the appropriate Service Secretary requesting that the election be deemed

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<sup>437</sup> [www.hrc.mil/site/Reserve/soldierservices/retirement/DetailsCalcSBP.aspx](http://www.hrc.mil/site/Reserve/soldierservices/retirement/DetailsCalcSBP.aspx).

<sup>438</sup> See Department of Defense Financial Management Regulation (DoDFMR) Volume 7B, Chapter 4, subsections 100401-100405 (Feb. 2009).

<sup>439</sup> Pub. L. No. 99-661 (Nov. 14, 1986).

to have been made. The written request must be filed within one year of the date of the court order.<sup>440</sup>

Courts are divided as to whether the SBP is part of the underlying military retirement, or a separate asset, which has ramifications under the relevant State law governing “omitted” assets.<sup>441</sup> While courts have been uncertain how to characterize the nature of the SBP,<sup>442</sup> those squarely addressing the question have concluded that a spouse is “to be awarded a proper share of *both* the former husband’s military retirement plan and the survivor benefit plan,” because of the “‘potential unfairness’ to the wife should her former husband predecease her, thereby extinguishing pension rights.”<sup>443</sup>

As detailed above, a military member has no risk of loss in a division of military retirement benefits, because the member enjoys a built-in survivorship interest in the former spouse’s life – if the former spouse dies first, her entire interest reverts to him automatically. The former spouse has no such protection – she stands to lose the entire flow of benefits if he should predecease her, unless the SBP is in place.<sup>444</sup> Many courts have recognized that

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<sup>440</sup> 10 U.S.C. § 1450(f)(3)(B); see *Bonewell v. U.S.* 111 Fed. Cl. 129, 131 n3 (2013) (describing deemed election procedure, in contrast to election by member).

<sup>441</sup> See, e.g., *Zito v. Zito*, 969 P.2d 1144 (Alaska 1998) (in Alaska, the SBP is held to be part of the pension division and must be added to the order if it was omitted from the original order); *cited with approval*, *McDougall v. Lumpkin*, 11 P.3d 990 (Alaska 2000); *Harris v. Harris*, 621 N.W.2d 491 (Neb. 2001) (same); *but see Potts v. Potts*, 790 A.2d 703 (Md. Ct. Spec. App. 2002) (survivorship interest falls within the definition of marital property) (no post-divorce order awarding survivorship interests is permitted if the decree did not expressly contemplate that award to the former spouse); *Williams v. Williams*, 37 So. 3d 1171 (Miss. 2010); *Stiel v. Stiel*, 348 S.W.2d 879 (Tenn. Ct. App. 2011). Sitting at the mid-point is the Iowa decision holding that the trial court must construe the underlying decree to determine the intention of the trial court at the time of entry of the decree in *In re Morris*, 810 N.W.2d 880 (Iowa 2012).

<sup>442</sup> See *Matthews v. Matthews*, *supra*, 647 A.2d 812 (Md. Ct. App. 1994) (divorce court could not tell if 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).

<sup>443</sup> *Johnson v. Johnson*, 602 So. 2d 1348, 1350 (Fla. Dist. Ct. App. 1992) (emphasis added); *Matthews*, *supra*.

<sup>444</sup> See, e.g., *In Re Payne*, *supra*, 897 P.2d 888 (Colo. Ct. App. 1995) (Divorce court did not err when, after awarding wife 48% of military retirement, it adopted “default” position and had premiums deducted from gross before disposable pay was divided. The court rejected the husband’s position that the SBP should be funded solely by the wife because it is “a court-created asset for her benefit alone.” The court stated that SBP is “an equitable mechanism selected by the trial court to preserve an existing asset – the wife’s interest in the military pension”).

survivorship interests accrued during marriage are a valuable property right that are part of the pension to be divided.<sup>445</sup>

If the parties divorce *after* retirement, the spouse is still generally secured, because the SBP will have gone into effect automatically; for it to *not* go into effect, a specific waiver of the SBP must be signed by the non-member spouse.<sup>446</sup> In such cases, the SBP must merely change form from “spouse” to “former spouse.” Where fully-informed counsel negotiate the matter in good faith at the time of divorce, this is a straight-forward subject to negotiate, or litigate. Usually, the SBP is left in place for the soon-to-be former spouse; if the member wishes to name some other as beneficiary, some other provision is typically made to secure her insurable interest.

When the parties divorce while the member is still on active duty, however, they do so prior to the time of making an election regarding the SBP. If the matter remains unaddressed at divorce – by the machinations of the member-spouse, or innocently,<sup>447</sup> the now-former spouse does not have the waiver right of a current spouse. It is therefore possible for the member to cancel the SBP entirely, or to name some third party (usually, a later-acquired spouse) as beneficiary.

That is the set-up for the kind of dispute discussed here.<sup>448</sup> As a technical matter, a divorce court clearly has the authority under the USFSPA to order that the former spouse be deemed

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<sup>445</sup> See, e.g., *Carlson v. Carlson*, 108 Nev. 358, 832 P.2d 380 (1992); *Wolff v. Wolff*, 112 Nev. 1355, 929 P.2d 916 (1996). *Wolff* held that trial courts are required to balance the property and debts attributable to both spouses in making awards. 112 Nev. at 1360-61. It is impossible under the current federal set-up to precisely balance the prospective benefits and burdens imposed by the survivorship scheme – the member will always have a “better deal” than the spouse could possibly get because of the nature of the SBP program. This is one of the ways in which the military retirement system is skewed in favor of the member spouse. The closest that courts can do is elect to provide some survivorship coverage each way – with the member getting such coverage automatically, and naming the former spouse the deemed beneficiary of the SBP.

<sup>446</sup> See generally 10 U.S.C. § 1447-1450.

<sup>447</sup> Unless divorce counsel were alert to the existence and mechanics of the SBP, they might not address the issue at all, as a matter of mutual mistake.

<sup>448</sup> In legalese, it could be stated that at the time of divorce the SBP was a potential future asset, the right to which accrued during the marriage, but which had not yet matured at the time of divorce. Courts typically allow for post-divorce recovery of such unmatured assets post-divorce. See *Amie v. Amie*, 106 Nev. 541, 796 P.2d 233 (1990) (permitting spouse to recover a portion of the proceeds of a lawsuit that was not completed until after the parties divorced, because the facts giving rise to the suit had occurred during the marriage, making those proceeds potential property “omitted” from distribution upon divorce. This has been the holding of most, but not all, cases addressing the issue. See, e.g., *Buchanan v. Buchanan*, 207 P. 3d 478 (Wash. Ct. App. 2009) (SBP not in original Decree is an “omitted asset” that may be awarded upon later discovery); but see *Hayes v. Hayes*, 208 P.3d 1046 (Or. Ct. App. 2009) (divorce decree silent as to survivorship benefit barred division of those benefits in enforcement action filed years later).

the beneficiary of the SBP.<sup>449</sup> The question is left to the court's discretion,<sup>450</sup> with the only issue being whether it *should* do so – which also is not much of an issue in any community property or equitable distribution regime that attempts to treat spouses as equally as possible as to the property acquired during marriage.

When the member has remarried by the time the court is looking at the issue, however, there can be competing equities – protection of the former spouse from divestment, on the one hand, and the member's presumptive desire to name his later spouse, on the other. The conflict is created by the fact that there can only be a single named survivor beneficiary.

Normally, in such cases, courts are keen to determine whether the former spouse or the later-acquired spouse has the larger legitimate interest to protect. This is a simple matter of comparing the marriage/service overlap of each spouse – exactly the same analysis as is done in determining the “time rule” percentage of the retirement that would be allocated to each successive spouse.

For example, if the member was married to the former spouse for 15 out of 20 years of total service, and he married the later spouse a year after the divorce from the former spouse, then the equities would seem to clearly favor the former spouse, who would have a 75% marriage/service overlap, compared to the later spouse's 20%.

Put another way, the legitimate insurable interest to be secured is much higher for the former spouse. If the retirement was worth \$1,000 per month, then the former spouse would have an insurable interest of \$375 per month for her lifetime to secure, while the interest of the later spouse was only \$100. It would thus be much easier for the member (and he would typically be much more inclined) to provide substitute security for the later spouse than for the former spouse.

This is a discretionary (as opposed to strictly legal) decision, but it does not seem reasonable for a trial court to get dragged into a dispute as to which of the two potential beneficiaries is most “deserving” of the SBP – a dispute that would almost certainly devolve into a conflict over the causes of the original divorce, with all of the fault-based overtones that modern divorce practice tries to avoid.

Instead, it would seem to make more sense to inquire into the economics of the question, and in the absence of some compelling reason to do otherwise, provide the insurable interest security that is the SBP to the spouse with the larger insurable interest to be secured. This serves the interest of securing to each spouse to the original divorce their respective rights

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<sup>449</sup> Pub. Law No. 99-661 (Nov. 15, 1986).

<sup>450</sup> See, e.g., *Fowler v. Fowler*, 636 So. 2d 433 (Ala. Ct. App. 1994) (lower court erred in determining that it did not have discretion to award SBP, which it termed “marital property”).

to the benefit stream divided upon divorce, unaffected by decisions the other makes, whether to marry, divorce, live, or die.<sup>451</sup>

### **13. The “Free” Survivorship Interest Available During Active Duty**

As noted above, the 2002 Defense Authorization Act included a provision, retroactive to September 10, 2001, making survivors of members who die in the line of duty eligible to receive SBP. However, also as detailed above, the military system does not begin charging premiums for SBP coverage until the actual retirement of the member.<sup>452</sup> This provides a planning opportunity.

Specifically, it provides a means of providing SBP coverage, without cost to the member or to the former spouse, for the duration of the member’s military service. Since that designation can be changed by further court order at least through the date of actual retirement, security can be provided during service even when the former spouse is not to be designated as the post-retirement SBP beneficiary, by reserving jurisdiction to alter the designation, and then getting the amended court order entered and served on DFAS before the member’s retirement.

In a situation where a court would have ordered the member to maintain a policy of life insurance for any reason (for example, to secure a child or spousal support award), the SBP might be sufficient to secure all interests in question, making the purchase of separate insurance unnecessary.

This is not without risks, of course, depending on what the parties’ (and court’s) intentions were. If the spouse was not intended to be the post-retirement survivor beneficiary, it may not be possible to alter that designation if the member leaves service before securing the amended order.

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<sup>451</sup> See *In Re Payne*, *supra*, 897 P.2d 888 (Colo. Ct. App. 1995) (seeking to “preserve an existing asset” for each party – their respective interests in the military pension).

<sup>452</sup> At least in the active-duty setting. Reserve Component cases are more complex because of the actuarial reductions built into the RC-SBP system.

#### 14. The Loophole by Which Remarried Former Spouse SBP Premiums Can Be Made Apparently Cost Free

As discussed above, the SBP annuity payable to a widow, widower, or former spouse is “suspended” if the beneficiary remarries before age 55,<sup>453</sup> which makes the knee-jerk advice to any former spouse to not re-marry until that date. However, an odd adoption of federal laws might make it most financially advantageous for both members and their former spouses if the former spouses *do* remarry before age 55.

This counterintuitive result stems from the Congressional assignment of former spouse deemed election coverage under the spouse category of coverage in 10 U.S.C. § 1450, and the direction to DFAS that it cannot deduct premiums nor pay an annuity at such times that there is not an eligible SBP beneficiary.

Apparently, if a former spouse remarries before age 55, that former spouse’s eligibility is “suspended,” but *not* terminated. As the former spouse is ineligible as a beneficiary during that time, no annuity is payable to the former spouse, so no premium is due from the lifetime benefit stream being divided between the member and the former spouse – payments to both parties go up by whatever sum of SBP premium was previously being deducted to provide for the SBP benefit.

That makes sense, but the illogical part is what happens if there is a further change of status.

If the former spouse’s later marriage terminates, the former spouse regains eligibility for the SBP, and the premiums then become due again; however, there is no provision in federal law for recoupment of prior premiums in this circumstance, so the period of “suspended” benefit – even if many years long, is apparently free to both parties.

And the effect is even stranger if the member dies prior to the date that the former spouse’s later marriage ends. If the member is deceased, and the former spouse’s later marriage ends, the former spouse resumes eligibility and can begin benefits, but since the lifetime stream of payments ended with the death of the member, no premiums can be deducted from any retirement benefits, and the SBP benefits are received without any premiums having been paid for the benefit from the date of the former spouse’s remarriage until the date she begins receiving the benefit after that remarriage ends.

In other words:

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<sup>453</sup> 10 U.S.C. § 1450(b). Before November 14, 1986, benefits were suspended if the former spouse was not yet age 60.

- Any premiums being taken from the lifetime benefit stream (the SBP premium) cease upon the remarriage before age 55 of a former spouse SBP beneficiary.
- If the former spouse's remarriage ends (by death or divorce), the premiums re-start, but there is no recoupment of premiums that would have otherwise come due during the years it was suspended.
- If the member is deceased when the former spouse remarries before age 55, so that the SBP is in pay status, the benefit stream to the former spouse ceases upon the former spouse's remarriage.
- If the former spouse's remarriage ends (by death or divorce) thereafter, the benefits re-start, without any premiums ever being due from anyone for whatever time the former spouse's eligibility was suspended.

Given that the SBP premium is 6.5% of the selected base amount – essentially \$65 per month for every \$1,000 of total pension benefit being divided between the member and former spouse – this oddity of the law presents a very substantial planning opportunity, or fortuitous windfall, in appropriate cases.

If, for example, the parties had been married for 10 out of a 20 year career, and the retirement benefit was exactly \$1,000, the member would receive an additional \$48.75 – and the former spouse an additional \$16.25 – for every month in which former spouse eligibility was suspended. This can add up to a lot of money over a period of years.

Of course, parties are not always cooperative even when it is financially advantageous to be so. Anecdotal accounts indicate that a fair amount of expensive litigation has instead occurred when members, upon their former spouse's remarriages and suspension of eligibility, have instead attempted to switch the SBP beneficiary designation to later spouses. Counsel, reviewing all possibilities, could perhaps counsel their respective clients to approach the matter more wisely.

## 15. The Two-Year Opt-Out Escape Provision

In a change made effective in 1998, Congress added a provision whereby a retired member participating in the SBP can elect to discontinue that participation.<sup>454</sup> The time period within

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<sup>454</sup> P.L. 105-85 div. A, title VI, § 641(a)(1), 111 Stat. 1797 (Nov. 18, 1997), effective May 17, 1998.

which that election may be made is the one-year period beginning on the second anniversary on which payments of retired pay to the member began.<sup>455</sup>

If the member is married at the time, spousal concurrence is required, the same as it would be, and with the same very limited exceptions, for declining the SBP upon retirement.<sup>456</sup>

The discontinuation option is subject to: agreement of the former spouse, if the SBP is in effect because of an agreement not incorporated in a court order; or to a requirement of producing a superseding court order, if the former spouse had been named as the SBP beneficiary by way of prior court order.<sup>457</sup>

As a practical matter, this opt-out provision provides some greater flexibility to courts, and the opportunity for some mischief. When the divorce is occurring at the time of retirement, it allows a court to order that the SBP go into effect, knowing that the decision can be altered in the future if it is established in litigation that such a choice was inappropriate.

Where the SBP was simply in effect without court intervention, however, or where parties or counsel did not know to incorporate the SBP terms into the decree, or serve it on DFAS, it gives rise to an opportunity for a recently-divorced member to quietly divest the former spouse of survivorship benefits without her even knowing about it. For this reason, it is easy to predict that this provision will be the root cause of a number of malpractice claims.

## 16. Service Member's Life Insurance

A mistake frequently made in the course of negotiation or litigation is the effort to compel (or trade assets in order to receive) beneficiary status for a former spouse in a member's Veteran's Group Life Insurance (VGLI, previously known as National Service Life Insurance, or NSLI), or its active-duty counterpart, Serviceman's Group Life Insurance (SGLI).

This is a mistake because any such stipulation or court order is simply unenforceable – a court order compelling beneficiary status *cannot be enforced*. Under the laws setting up these insurance plans,<sup>458</sup> the former spouse cannot be made the owner of the policy, and the

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<sup>455</sup> 10 U.S.C. § 1448a(a).

<sup>456</sup> I.e., that the spouse's whereabouts cannot be determined, or that there are such "exceptional circumstances" that requiring the member to seek the spouse's consent would otherwise be inappropriate." See 10 U.S.C. § 1448(a)(3)(C).

<sup>457</sup> 10 U.S.C. § 1448a(c); see 10 U.S.C. § 1450(f)(2).

<sup>458</sup> See 38 U.S.C. § 1917, Pub. L. No. 85-857, 72 Stat. 1152, § 717 (Sept. 2, 1958), as amended.

insured has complete freedom to designate or re-designate the intended beneficiary of the program. The federal courts, early and forcefully, held that the programs were “the congressional mode of affording a uniform and comprehensive system of life insurance for members and veterans of the armed forces of the United States,” and the resulting benefits were therefore immune from State court division or allocation, even when community property was the source of the premiums paying for the policy.<sup>459</sup> A host of similar programs have been established, and expired, since 1919.

A former spouse who negotiated beneficiary status for SGLI in exchange for giving up other rights, or even obtained an order to receive beneficiary status under that plan, thus has no direct remedy if the member dies having named someone else anyway; a member is free to change beneficiaries, and such a named beneficiary is free from suits from the former spouse for a portion of the proceeds.<sup>460</sup>

There is apparently no prohibition, however, against a former spouse who has been thus deceived proceeding against the member (at least while everyone is still alive). Such a suit would not be interfering with the protected insurance policy, but punishing the contemptuous act of duplicity by the member. As with similar matters involved in these cases, the key is adequate vigilance, especially by the former spouse, to be sure that what was negotiated or ordered was actually put into place, and that no one attempts to fraudulently evade the orders, **before** anyone dies.<sup>461</sup>

Far better than trying to fix such problems would be to avoid them altogether, of course. Preferable mechanisms by which payments after the member’s death could be accomplished

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<sup>459</sup> See *Wissner v. Wissner*, 338 U.S. 655 (1950); see also *Estate of Allie*, 50 Cal. 2d 794, 329 P.2d 903 (Cal. 1958); C.J.S. *Armed Services* § 226.

<sup>460</sup> The key case is *Ridgway v. Ridgway*, 454 U.S. 48 (1981). Cases since then have cited it for the proposition that there is simply nothing they can do for defrauded former spouses. See, e.g., *Kaminski v. Kaminski*, 1995 WL 106497 (Del. Chanc. Ct. 1995). In that case, the member had promised in his stipulated divorce decree to name his daughter from his first marriage as his irrevocable beneficiary. When he died leaving his second wife as sole beneficiary, the first wife’s action seeking a constructive trust for the daughter was dismissed. The court said that the “narrow exception” for fraud was restricted to “extreme factual situations” unlike simple breach of contract. The case law presents opportunities for unjust enrichment in all directions. See *Dohnalik v. Somner*, \_\_\_ F.3d \_\_\_ (5<sup>th</sup> Cir. No. 05-50072, Oct. 6, 2006) (where member died right after entry of divorce decree which purported to divest the spouse of her beneficiary interest, but he had not yet submitted the beneficiary-change form, the ex-wife got the proceeds anyway; the appellate court distinguished ERISA-based cases in which such divorce decree waivers were recognized, based on the United States Supreme Court’s “clear guidance” that only the formal beneficiary designation would be followed).

<sup>461</sup> “Mendacity is a system that we live in.  
Liquor is one way out an’ death’s the other.”  
Tennessee Williams, *Cat on a Hot Tin Roof* (1955), act 2.

include private life insurance (with the intended beneficiary as owner),<sup>462</sup> or beneficiary status under the Survivor's Benefit Plan, discussed above.

The "bottom line" to all of the cases addressing early retirement, late retirement, disability, partition, bankruptcy, and death benefits, is that it is incumbent upon the attorneys, especially the attorney for the spouse, to anticipate post-divorce status changes and build that anticipation into the decree. Any failure to do so is an invitation to further litigation in some forum, between the parties, or directed at the attorney.

## VII. MEDICAL AND OTHER ANCILLARY MILITARY BENEFITS TO CONSIDER

### A. Medical Benefits<sup>463</sup>

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 post-divorce medical benefits to be enjoyed by a former spouse, 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).<sup>464</sup> "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

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

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

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<sup>462</sup> "I detest life-insurance agents; they always argue that I shall some day die, which is not so." Stephen Leacock, *Literary Lapses* (1910).

<sup>463</sup> This discussion goes only to spousal benefits. As with other topics, and discussed in part elsewhere in these materials, the benefits available to the member operate under different rules, always making the benefits to the member superior to those of a former spouse. For example, if a person's insurance would otherwise end because that person enters into active military duty, that member could elect to continue insurance (including dependent coverage) in accordance with the Uniformed Services Employment and Reemployment Rights act of 1994 (USERRA).

<sup>464</sup> See 10 U.S.C. § 1072(2)(F) and (G).

- The former spouse must not be covered by an employer-sponsored health care plan. If there is such a plan, however, and coverage thereunder is terminated (voluntarily or otherwise), eligibility for benefits is restored.
- The former spouse must not yet be age 65. Upon eligibility for Medicare (Part A), CHAMPUS eligibility ends. Some continuing benefits for former spouses may be available under the “TRICARE-for-life” program effective October 1, 2001.<sup>465</sup>

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.

When the former spouse is *not* eligible for post-divorce Tricare and has serious ongoing medical needs, the only risk-free, cost-free option available to maintain health coverage for the former spouse is apparently to not get divorced. So long as they remain remarried, the spouse will remain covered by Tricare, and the cost-allocation decisions detailed below need not be made.

If either of the parties insists on divorce, however, the choices – and costs – detailed below must be examined. For a cost, 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 as for Tricare (length of service, length of marriage, and overlap).<sup>466</sup>

The “Continuation of Health Care Benefits Plan” was designed to provide “transitional” health care to a former military dependent spouse; it was modeled on a similar program available to the spouses of Civil Service employees.<sup>467</sup> A former spouse has up to 36 months of CHCBP provided he or she was covered under Tricare (in the “DEERS” military medical

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<sup>465</sup> 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/>.

<sup>466</sup> 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/beneficiary/plans-and-programs/chcbp>. There is a premium cost and certainly is not as desirable as TRICARE, but certainly beats not having any other option available.

<sup>467</sup> 10 U.S.C. § 1078a 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.”

system) on the day before the divorce from the military sponsor (i.e., the military spouse). There is a substantial premium cost,<sup>468</sup> and strict application deadlines.<sup>469</sup>

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, and to extend the “temporary health benefits” for a former spouse indefinitely, at least in certain circumstances.

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:<sup>470</sup>

- 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.<sup>471</sup>

Apparently, the same premium cost 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.

If there is a desire for the spouse to remain a CHCBP participant, and if one of the parties insists on divorce, a cost, a condition, and a limitation are presented.

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<sup>468</sup> As of 2011, individual coverage cost \$1,065 per quarter, and family coverage cost \$2,390 per quarter.

<sup>469</sup> Application must 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.

<sup>470</sup> Implementing regulations are at 32 C.F.R. § 199.20, but they are not very clear. There was a change in the regulation as of September 11, 2011, that appeared to require that for “extended/unlimited” former spouse CHCBP coverage the divorce had to occur *after* the member retired. The matter is in flux; at least for those who point out to DFAS that no such requirement is in the CHCBP statute (10 USC §1078a, ). Notwithstanding this language in the current CFR, anecdotal evidence indicates that the former spouse is being permitted to remain eligible for extended CHCBP even if the divorce occurred before the member’s retirement.

<sup>471</sup> Most experts believe that although the statute is written in the disjunctive “either SBP or pension” the prudent course is to advise clients to get *both* SBP and pension, on the theory that if the member dies first, the military retirement benefits per se will stop, and DFAS could construe the regulations in such a way as to deny benefits if it was based solely on a lifetime share of the retirement benefits.

The “cost” is the CHCBP premium. Someone will have to pay a cost (some \$400 per month); while things in American health care are moving quickly, and the information is somewhat anecdotal, it is believed that the coverage provided under CHCBP is better, and at lower cost, than can be obtained on the exchanges under the Affordable Care Act. So it is worth doing, if it can be done under the facts of the case.

The “condition” is that the former spouse must be entitled to a portion of the military retirement benefits, or be an SBP beneficiary, or both, to qualify to continue participation in the CHCBP beyond the initial 36 months. If the former spouse had no such portion under the relevant State law, it might be necessary to set apart a portion of the member’s retirement benefits to the spouse, by stipulation or otherwise, so as to make her qualify.

The “limitation” is the reality that even if the Court does these things, the former spouse’s eligibility for medical coverage under CHCBP may only be effective so long as the member lives, unless the SBP had been elected and the former spouse was the named beneficiary, since otherwise the former spouse’s eligibility based on being a recipient of a lifetime share of the military benefits may be construed as having lapsed when the member dies.

## **B. Accrued Leave**

Military members accrue thirty days of leave each year. If not used, it accrues throughout service, and is worth its monthly equivalent pay, although newer regulations limit the amount of leave that can be accrued to 60 days, with some exceptions. States vary on whether or not unused vacation or sick pay (and thus, by analogy, accrued but unused military leave) constitutes “property” for equitable or community property division. Various citations are

extremely supportive of the idea<sup>472</sup>; others are just as vehement that vacation or sick pay is not any kind of marital property.<sup>473</sup>

### C. G.I. Bill

The Post-9/11 Veterans Educational Assistance Act of 2008, known as the Post-9/11 GI Bill, went into effect August 1, 2009.<sup>474</sup> The benefits provided by the Post-9/11 GI Bill include the cost of college tuition and fees, a stipend for books each semester, and a monthly housing

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<sup>472</sup> See, e.g., Mark Sullivan, “Hidden money in Military Divorce Cases,” 20 Nev. Fam. L. Rep. 4 (Fall, 2007) at 4; 2 Gary N. Skoloff, et al., *Valuation and Distribution of Marital Property* § 23.04A (2002); Kenneth W. Weber, 19 Washington Practice, Family and Community Property Law, § 11.19 (1997); *In re Cardona and Castro*, 316 P.3d 626 (Colo. 2014) (where a spouse has an enforceable right to be paid for accrued vacation or sick leave, as established by an employment agreement or policy, such accrued leave earned during the marriage is marital property); *Arnold v. Arnold*, 77 P.3d 285 (N.M. Ct. App. 2003) (husband’s accumulated vacation leave and sick leave hours were community property because they were fruits of labor during marriage, had value, and were not separate property as that is defined; “the essence of leave is that it is a benefit of employment and, whether considered a benefit in addition to salary, or somehow an aspect of salary, it has independent value”); *Grund v. Grund*, 151 Misc. 2d 852, 573 N.Y.S. 2d 840 (N.Y. Sup. Ct. 1991); *Schober v. Schober*, 692 P.2d 267 (Alaska 1984) (unused cashable leave valued and distributed at the number of hours multiplied by the employee’s hourly rate at the time of divorce); *MEA/AFSCME Local 519 v. City of Sioux Falls*, 423 N.W.2d 164 (S.D. 1988); *In the Matter of the Marriage of Susan M. Hurd*, 848 P.2d 185 (Wash. App. 1993) (while no specific rationale provided for finding that vacation leave was ruled a divisible asset, record included finding that the husband was already eligible for retirement, so an additional payment was likely to be made to him); *Lesko v. Lesko*, 457 N.W. 2d 695 (Mich. App. 1993) (over vigorous dissent, majority concluded in an equitable division state, accrued vacation and sick time could be divided); *Saustez v. Plastic Dress-Up Co.*, 647 P.2d 122 (Cal. 1982); *In re Marriage of Williams*, 927 P.2d 679 (Wash. App. 1996); *In re Marriage of Hurd*, 848 P.2d 185 (Wash. App. 1993); *In re Marriage of Nuss*, 828 P.2d 627 (Wash. App. 1992); *In re Marriage of Sheffer*, 802 P.2d 817 (Wash. App. 1990) see also *In re Marriage of Fithian*, 517 P.2d 449 (Cal. 1974) (“vacation pay is similar to pension or retirement benefits, another form of deferred compensation. Those benefits, too, ‘do not derive from the beneficence of the employer, but are properly part of the consideration earned by the employee’”).

<sup>473</sup> See *In re Marriage of Abrell*, 923 N.E.2d 791 (Ill. 2010), *affirming* 898 N.E.2d 1163 (2008) (accrued vacation and sick days are not marital property subject to distribution, but if a party has actually received payment for vacation and/or sick days accrued during marriage prior to a judgment for dissolution, the payment is marital property); *Bratcher v. Bratcher*, 26 S.W.3d 797 (Ky. App. 2000) (where wife had accumulated vacation and sick leave, would lose any sick leave if she terminated but would be paid for any accrued vacation, court concluded that neither constituted “property” divisible upon divorce); *Akers v. Akers*, 729 N.E.2d 1029 (Ind. Ct. App. 2000); *Thomasian v. Thomasian*, 556 A.2d 675 (Md. App. 1989) (husband’s accrued holiday and vacation leave were not marital property, because they were not entitlements like pension or retirement benefits, only replaced wages on days the employee did not work, and did not need to be, and often were not, liquidated by a payment of cash, but instead frequently dissipated, and therefore too speculative to constitute property); *Smith v. Smith*, 733 S.W.2d 915 (Tex. Ct. App. 1987) (accrued vacation and sick pay are not marital assets, as the husband owned no physical control or power of immediate enjoyment over them).

<sup>474</sup> See 38 U.S.C. § 3301, *et seq.* (2011).

stipend.<sup>475</sup> The service member entitled to the benefits is allowed to transfer a maximum of thirty-six months of benefits to a spouse or child.<sup>476</sup> The federal law provides that if a service member elects to transfer his or her benefits, the “[e]ntitlement transferred ... may not be treated as marital property, or the asset of a marital estate, subject to division in a divorce or other civil proceeding.”<sup>477</sup>

Authority relating to those provisions is very scant, but there is at least one case indicating that where a retired member elects to provide those benefits to a child, in a state that permits the parents to be ordered to provide post-secondary support, the member should be given 100% of the credit for those benefits rather than “taking them off the top” of the child’s college expenses and having the parents be equally responsible for the remaining costs.<sup>478</sup>

## VIII. MILITARY RESERVISTS

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

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

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

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

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<sup>475</sup> 38 U.S.C. § 3313(c)(1) (2011).

<sup>476</sup> 38 U.S.C. § 3319(a)-(d) (2011).

<sup>477</sup> 38 U.S.C. § 3319(f)(3) (2011).

<sup>478</sup> *Neville v. Blitz*, 122 So. 3d 70 (Miss. 2013).

of eligibility of ten years (at age 50).<sup>479</sup> 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 total retirement points earned is divided by 360 to yield “years of service” for retired pay purposes. That figure is multiplied by 2½ percent; the resulting percentage is multiplied by the active duty basic pay payable to an active duty member with the same grade and number of years creditable for retirement.

As with active duty members, there is a distinction between reservist retirees depending on the date they entered service. For members who first entered service before September 8, 1980, the figure for “base pay” in the above calculation is the active duty basic pay in effect for the retiree’s grade and years of service in effect *when the retired pay begins*. For members who first served after September 8, 1980, “base pay” is the *average* basic pay for the member’s grade in the last three years that the member served.

And even when the total points earned are known, the totals could be misleading. Total career points *might* not be equal to all points credited for retirement, because of the “sixty-point rule,” where a member can get no more than a combined 60 points in one year for Inactive Duty Training (IDT), extension courses, and membership, in addition to any active duty points earned. In 1996, this was changed to 75 points, in 2000 to 90 points, and in 2007 to 130 points. The only points relevant for retirement benefits are the Total Points for Retired Pay, as any points earned over the limits set are of no value.

Practitioners therefore must be careful in all reservist cases; they should be wary in a case involving reserve component service of any calculations that presuppose the typical “years of marriage divided by years of service” formula.<sup>480</sup> Since point accumulation might have been intermittent, significantly different spousal percentages could be obtained by the two methods of figuring. Note that the amended (prior) regulations in 32 C.F.R. § 63.6 specifically directed dividing reservist’s retirements by points accrued during marriage, rather than duty time during marriage. That directive appears to have remained in all subsequent military guidelines, including the 2009 regulations.<sup>481</sup>

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<sup>479</sup> See Pub. L. No. 110-181, 122 Stat. 160, § 647 (Jan. 28, 2008).

<sup>480</sup> See, e.g., *Bojarski v. Bojarski*, \_\_\_ A.2d \_\_\_ (Maine 2012) (reversing standard time rule division and remanding for division of reservist retirement according to points earned during the marriage); *In re Marriage of Beckman*, 800 P.2d 1376 (Colo. App. 1990); (same); *Bloomer v. Bloomer*, 927 S.W.2d 118, 120 (Tex. App. 1996).

<sup>481</sup> See DoDFMR 7000.14-R, Vol. 7B, Ch. 29 Sec. 290211(B) (“For members retiring from Reserve duty, the fraction must be expressed in Reserve points rather than months . . . .”)

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

## IX. TAX NOTES AS TO MILITARY RETIREMENT BENEFITS

When military retired pay is used as a source for child support or alimony payments, the usual tax consequences remain true (i.e., child support is non-deductible to the payor and non-taxable to the recipient, whereas alimony is deductible to the payor and taxable to the recipient).<sup>482</sup>

Non-disability retired pay is treated as wages and is subject to federal income tax withholding.<sup>483</sup> The division of military retired pay as property is not a taxable event.<sup>484</sup>

There was significant confusion in prior years; eventually, the Tax Court ruled that a community property share of the retirement to the former spouse, whether received from the government or the member, was income to the former spouse.<sup>485</sup> This was consistent with the position evolved within the IRS that classified payments of military retirement benefits as not qualifying under section 1041.<sup>486</sup>

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

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

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<sup>482</sup> IRC §§ 71, 215. See also *Proctor v Comm'r* 129 TC 92, 97 (2007) .

<sup>483</sup> IRC § 3401.

<sup>484</sup> IRC § 1041.

<sup>485</sup> *Barbara E. Seaman*, 2007 T.C. Memo No.189; *Eatinger v. Commr.*, 1990 T.C. Memo No. 310 (June 20, 1990); see also *Proctor v. Commr.*, 2007 T.C. No. 12, 2007 U.S. Tax Ct. LEXIS 31 (#2813-06, U.S. Tax Court 2007); *Martin Tombs*, TC Summary Opinion 2013-51 (discussing general rule of distributee tax liability for distributions under qualified domestic relations order).

<sup>486</sup> See IRS Letter Ruling 8813023.

Before the effective date of the 1990 amendments (February 4, 1991), amounts deducted for payment to a former spouse were still considered wages of the retired member for withholding purposes.<sup>487</sup> The member had income withheld on the entire gross amount, the resulting “disposable” pay was divided, and the member was entitled to a refund of taxes withheld on amounts paid to the former spouse. The former spouse then owed full taxes on whatever she received. Any percentage divisions of retirement benefits under the former law increased property distribution to the member and reduced them to the former spouse as a matter of course.<sup>488</sup>

The amounts withheld were based on the member’s pay period and exemptions. This led to widespread anecdotal accounts of abuse by members, who manipulated their tax status so as to maximize withholding and minimize disposable income available for division with former spouses. There has been an administrative ruling from the Comptroller General prohibiting this practice since 1984, but enforcement of the prohibition was uneven, since the pay centers had no uniform policy on how to handle accusations of such manipulation.<sup>489</sup>

Eventually, the pay center developed internal reviews, requiring that in calculating the amount of disposable retired pay subject to apportionment with a former spouse, the deductions of federal income tax withholdings from gross retired pay may not be fixed at a percentage rate exceeding the member’s projected effective tax rate (i.e., the ratio of the member’s anticipated total income tax to his anticipated total gross income from all sources).<sup>490</sup>

For divisions of retired pay as property pursuant to decrees entered on or after February 4, 1991, the tax consequences are much simpler, and much more similar to those in other retirement systems. Portions of a member’s retired pay awarded to a former spouse explicitly “may not be treated as amounts received as retired pay for service in the uniformed

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<sup>487</sup> Treas. Reg. § 31.3401(a)-(1)(b)(5).

<sup>488</sup> As noted above, reports by the General Accounting Office and Congressional Research Service in 1984 and 1989 found that court orders purporting to divide military retirement benefits on a “50/50” basis actually effected a split of “55.4%/44.6%” to “58.4%/41.6%” – always in favor of the former military member – after the impact of tax withholdings was considered. CRS Report For Congress: “Military Benefits for Former Spouses: Legislation and Policy Issues,” March 20, 1989.

<sup>489</sup> Matter of: Uniformed Services Former Spouses Protection Act, April 25, 1984 (*In re Flynn*), 63 Comp. Gen. 322 (1984) (Comptroller General’s Decision No. B-213895, April 25, 1984). A retired Air Force Colonel had nearly all his retired pay withheld for federal income taxes, thus reducing the sums available as “disposable pay” for division with his former spouse. The ruling found that practice impermissible, and withholding for purposes of figuring “disposable pay” was limited to amounts necessary to cover the retired pay itself and amounts for which the member “presents evidence of a tax obligation which supports such withholding.”

<sup>490</sup> *In re Krone*, Comptroller General’s Decision No. B-271052, August 6, 1996, at 3-4.

services.”<sup>491</sup> Therefore, there is no withholding of taxes (before division of retired pay) on amounts paid to a former spouse when the divorce occurred after February 4, 1991.<sup>492</sup>

Some groups still try to pretend that military retirement benefits are something other than a pretty normal, non-contributory defined benefit pension plan – claims usually made based on the peculiarities of retainer obligations and potential recall to service that were conditions for receiving the benefits. However, those arguments tend to melt away when the self-interest of those same groups is at issue.

In *Barker v. Kansas*,<sup>493</sup> the U.S. Supreme Court struck down the tax imposed by the state of Kansas on military retirement benefits paid to retirees, because the state did not similarly tax retirees under the Kansas Public Employees Retirement System. Previously, in *Davis v. Michigan Department of Treasury*, the Court had ruled that a state could not tax federal civil service retirees if it did not also tax recipients of state retirement benefits.<sup>494</sup> Under the standard set forth in *Davis*, the question was whether taxation on the federal, but not the state, retirees was “directly related to, and justified by, ‘significant differences between the two classes.’”<sup>495</sup> The *Barker* Court found no such differences between the classes of federal and state retirees.

In other words, as argued by the military retirees, military retirement benefits are just as much a pension as any State retirement system, requiring equal tax treatment. And, of course, equal treatment in all other forums, including family court.

The former spouse is taxed on Survivor’s Benefit Plan payments as he or she would be for other payments from an annuity.<sup>496</sup> The payments to the former spouse are taxable income.

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<sup>491</sup> 10 U.S.C. § 1408(c)(2).

<sup>492</sup> See *In re Larry G. Mitchell*, 131 T.C. 215 (2008) (discussing statutory changes on tax withholding from military retired pay for pre- and post-February 3, 1991, divorces).

<sup>493</sup> *Barker v. Kansas*, 503 U.S. 594 (1992).

<sup>494</sup> See *Davis v. Michigan Dep’t of Treasury*, 489 U.S. 803 (1989).

<sup>495</sup> *Id.* at 816 (as quoted in *Barker*, 503 U.S. at 598).

<sup>496</sup> 26 U.S.C. § 72.

## X. INTERACTIONS BETWEEN MILITARY AND CIVIL SERVICE RETIREMENTS

A retired military member might seek a further career in federal civil service, or have been employed in civil service prior to beginning a military career.<sup>497</sup> The interplay between military and civil service retirements have changed over time.

### A. Effects on Military Retirement Benefits from Civil Service Employment

The “dual receipt” prohibition in federal law was long a source of troubling inequities in military retirement benefits cases, and led to a large number of “dual comp” cases involving waiver of military retirement benefits. Those inequities were (apparently) solved when Congress repealed the “dual compensation” law, effective October 1, 1999.<sup>498</sup> Most of this section is therefore of primarily historical interest, or for purpose of analogies drawn to other areas still litigated (such as disability offsets).

The full history of the dual compensation rules are beyond the scope of these materials.<sup>499</sup> The short version is that military retired pay was reduced for members who retired from the military and began civilian work for the federal government. Obviously, any reduction in the amount of retired pay payable to a member affected the spousal interest as well. Court decisions did not appear to follow any clear theoretical model.

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

In Texas, a court found that the trial court could neither divide the retired pay waived for VA benefits, nor divide the sums waived under the dual compensation law, in an attempt to comply with the United States Supreme Court’s directives in *Mansell*.<sup>500</sup>

The same court later ruled, however, that the same result could be reached indirectly, by way of a contempt action against a husband for non-payment of a portion of military retirement benefits which he claimed were exempt by reason of his waiver of retired pay in favor of

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<sup>497</sup> See, e.g., *Hayward v. Office of Personnel Mgmt.*, 578 F.3d 1337 (Fed. Cir. 2009).

<sup>498</sup> Pub. L. 106-65, § 651(a)(1), 113 Stat. 664.

<sup>499</sup> See generally former 5 U.S.C. § 5532(b); 10 U.S.C. § 1408(a)(4)(B).

<sup>500</sup> *Gallegos v. Gallegos*, 788 S.W.2d 158 (Tex. Ct. App. 1990).

disability benefits.<sup>501</sup> In that case, the wife was ultimately allowed to collect from the husband all sums called for by the decree but which he had sought to recharacterize as disability. The Texas court sided with the clear majority of courts in so holding.

In *Knoop v. Knoop*,<sup>502</sup> the North Dakota appellate court attempted to steer a course allowing the former spouse to collect the sums intended while claiming to respect the dual-compensation restrictions.<sup>503</sup>

The Arizona Court of Appeals was more direct in *In re Gaddis*,<sup>504</sup> when it held that divorce courts were only required to find reductions in military pay benefitting the member to bar compensation to the spouse if those reductions in retired pay existed **when the award to the former spouse was made**. The court saw the proscription of *Mansell* – that the USFSPA “does not grant state courts the power to treat as property divisible upon divorce military retired pay that has been waived to receive veterans’ disability payments” – as a call to essentially take a snapshot when the award to the spouse is made. If sums of disposable retired pay had been waived up to that point, they were not divisible. Where a member sought a post-divorce reduction in retired pay, however, his efforts at re-characterization were seen as attempting a “de facto modification” of a final property award, which State law did not permit.<sup>505</sup>

These cases collectively stand for the proposition that actual division of the retired pay at divorce was limited to disposable pay, with any shortfall to the spouse to be compensated by other means. Once an award was made, however, in post-decree enforcement, the spouse could be compensated for any action taken by the member that lowered sums payable to the spouse.

This provides a nice “bright line” for practitioners, and highlights the cautions expressed in these materials. First, if there has been any waiver of divisible benefits by a member, counsel for the spouse should consider whether an alimony or other award to compensate the spouse

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<sup>501</sup> *Jones v. Jones*, 900 S.W.2d 786 (Tex. Ct. App. 1995).

<sup>502</sup> 542 N.W.2d 114 (N.D. 1996).

<sup>503</sup> See also *Vitko v. Vitko*, 524 N.W.2d 102 (N.D. 1994) (*Mansell* is to be “construed narrowly to allow trial courts to consider parties’ ultimate economic circumstances in dividing their marital property”).

<sup>504</sup> 957 P.2d 1010 (Ariz. Ct. App. 1997).

<sup>505</sup> See also *Crawford v. Crawford*, 884 P.2d 210 (Ariz. Ct. App. 1994) (same result in SSB case). The court in *In re Gaddis*, 957 P.2d 1010 (Ariz. Ct. App. 1997) specifically quoted and analogized to *In re Marriage of Strassner*, 895 S.W.2d 614 (Mo. Ct. App. 1995), which is discussed in the section addressing disability benefits. The Arizona court held that in this situation, like that one, the spousal interest had been “finally determined” on the date of the decree, and enforcing that order in the face of a post-decree recharacterization by the member did not violate *Mansell*.

is appropriate. Second, counsel for the spouse must safeguard any award made to allow for compensation in the event the member attempts to reduce the benefits by post-divorce recharacterization.

## **B. Military Retirement Benefits Component of a Civil Service Retirement**

It is possible for a military retiree to simply continue receiving military retired pay, and then go to work for, qualify for, and begin receiving retirement benefits through the Civil Service system. It is also possible for a military retiree to “roll over” the accrued years of military service into a civil service retirement. Which is the better choice depends on the rank and grade achieved by the member in each system. If the member had a relatively low military rank, but achieved a high “GS” rating in the Civil Service, then the years of military credit might well be most valuable if treated as additional service credits in the Civil Service calculation. Obviously, the calculations will vary case by case.

### **1. Mechanics and Ramifications**

Perhaps ironically, there have been situations in which the dual receipt rules resulted in former spouses receiving shares of military retirement benefits from which they otherwise would have been barred. In one post-*McCarty* gap case, brought under a State window statute, the court “traced” the spousal share of the military service, even though the member had been awarded all of the interest in the retirement in a divorce during the *McCarty* gap, *and* had subsequently obtained a 100% VA disability rating, since he waived all of those awards in order to roll his military service into a later (divisible) Civil Service retirement.<sup>506</sup>

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

Notably, Congress itself appears to have adopted the reasoning of this theory in the amendments to the USFSPA that went into effect in 1997 (for both CSRS and FERS retirements, but only as to waivers made on or after January 1, 1997). Under those rules, if a military member waives military retired pay in order to take a Civil Service retirement, the

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<sup>506</sup> *Leatherman v. Leatherman*, 833 P.2d 105 (Idaho 1992).

former spouse must be paid what she would have received from the military in order for the waiver to be accepted by the Office of Personnel Management.<sup>507</sup>

The Office of Personnel Management (“OPM”) *Handbook for Attorneys* includes a model paragraph entitled “Protecting a former spouse entitled to military retired pay” (paragraph 111). It reads:

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

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

## 2. Costs and Calculations

Where it is desired to roll former military service credits into a Civil Service retirement, there is a cost – but how and how much depend on a few variables.

For CSRS retirements, honorable active military service is generally creditable, if the military retired pay is waived. Even that has an exception: the military retired pay need not be waived if it is based on disability involving certain injuries incurred in wartime or if it is Chapter 67 (Reservist) retired pay.

Beginning in 1957, military service became subject to Social Security, and treatment of military service under retirement depends on whether or not it was performed after December 31, 1956.

Beginning in 1982, employees employed in the Civil Service before October 1, 1982, could roll the military time in without cost. However, credit for this service will be eliminated if the individual becomes eligible (or would become eligible upon proper application) for Social Security old-age benefits at age 62, unless a deposit for the service is made before retirement.

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<sup>507</sup> See Pub. L. 104-201, Div. A, Title VI, Subtitle D, § 637, 110 Stat. 2579 (Sept. 23, 1996).

Employees who first became subject to CSRS on or after October 1, 1982, have to make a deposit to get credit for military service performed after 1956.

The amount of the deposit is 7% of the military basic pay for the period, plus interest. CSRS Offset employees pay the same amount. Interest is computed at the rate of 3% through 1984 and an annually variable rate beginning in 1985. Interest begins on October 1, 1985, or 2 years after the employee is first hired in a position subject to CSRS; whichever is later. However, because the method of computing the deposit calls for adding interest only at the end of the year after it begins, no interest is charged if the deposit has been paid in full by September 30, 1986, or within 3 years after first becoming subject to CSRS, if later.

For employees participating in FERS, all military service after 1956 must be covered by a deposit to receive credit. Even if an employee covered by FERS was first hired before October 1, 1982, military service after 1956 cannot be credited under FERS rules unless the required deposit is completed. The deposit must be made directly to the employing agency before retirement.

The amount of the deposit is 3% of the military basic pay for the period, plus interest. The deposit rate for qualifying National Guard service is limited to the amount that would have been deducted from pay had the person remained in his/her civilian position. Interest is computed at the same rate as applicable to CSRS deposits. Interest for military service to be credited under FERS begins 2 years after the effective date of an election to join FERS. As under CSRS, however, no interest will actually be charged if the deposit is completed before the end of the year after interest begins (i.e., if the deposit is completed within 3 years of the effective date of the election to join FERS).

Whether past military service is credited under CSRS rules or FERS rules depends on how much non-offset civilian service a Civil Service worker has as of the effective date of transfer to FERS. Any military service performed after transfer to FERS and before retirement can be credited only under FERS rules. If a Civil Service employee becomes subject to FERS rules but has already made a deposit under CSRS rules, a refund is payable, equal to the difference between the 7% deposit and the 3% deposit.

## **XI. THE THRIFT SAVINGS PLAN**

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. 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 October 8, 2001,<sup>508</sup> military members were authorized to begin participating in the TSP, permitting members to invest in a variety of funds.<sup>509</sup> 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.<sup>510</sup> As of 2012, a "Roth" (post-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,<sup>511</sup> 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.<sup>512</sup>

There are a variety of funds in which contributions may be invested: the "Government Securities Investment" or "G" fund, the "Common Stock Index Investment" or "C" fund, the

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<sup>508</sup> Per Pub. L. No. 106-398 (Oct. 30, 2000); the regulations are found at 5 C.F.R. § 1600-1690.

<sup>509</sup> See 5 C.F.R. §§ 1600.1-1690.14.

<sup>510</sup> For military members, some forms of tax-exempt special compensation can be contributed, which then accrue investment returns that are also tax-exempt.

<sup>511</sup> 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.

<sup>512</sup> 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.

“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.

The TSP is expressly *excluded* from the regulations governing the Civil Service defined benefit plans.<sup>513</sup> It is administered by a Board (the Federal Retirement Thrift Investment Board),<sup>514</sup> entirely separate from the OPM, and has its own governing statutory sections and regulations.<sup>515</sup> The TSP Board has its own finance center.<sup>516</sup>

The military will contribute a sum equal to 1% of base pay to each member’s Thrift Savings Plan (TSP) account. Members are to be automatically enrolled with a 3% base pay contribution to their TSP, and could then raise or lower contribution or terminate individual contributions. The military matches up to 5% of contributions after 2 years of service, and the accrued benefits become vested at the 2-year mark

#### **A. Withdrawal and Borrowing of Money from the TSP During Service**

The practitioner must find out whether a military member is or has been a participant in the Thrift Savings Plan, and if so whether any funds have been withdrawn or borrowed from the plan.

Withdrawal of TSP funds by a participant is normally limited to those separating from service, but in-service withdrawals may be made in two categories: “age-based” withdrawals<sup>517</sup> and special “financial hardship” withdrawals. Notably, one of the four categories for such financial hardship withdrawals is “legal expenses for separation or

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<sup>513</sup> 5 C.F.R. § 838.101(d).

<sup>514</sup> 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).

<sup>515</sup> 5 U.S.C. § 8435(d)(1)-(2), 8467; 5 C.F.R. Part 1653, Subpart A.

<sup>516</sup> 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.

<sup>517</sup> In-service withdrawals for participants who are 59½ or older. There should be very few of these in military cases.

divorce.”<sup>518</sup> Counter-intuitively, however, if a member is married, the spouse must normally consent to an in-service withdrawal, whether or not the parties are separated.<sup>519</sup>

Spousal consent is also required for any loans borrowed against the TSP. Again, a specific category of “hardship” for loan purposes is “unpaid legal costs associated with a separation or divorce.” Such a loan, if taken, accrues interest at the same rate paid on the “G” category of investments.

As to both loans and withdrawals, the Federal Retirement Thrift Investment Board will honor “most” court orders restricting distribution (such as preliminary injunctions prohibiting withdrawals) or safeguarding funds for other purposes (such as child support or alimony awards). Thus, in divorce cases or successive spouse cases, there could be some element of a “race to the courthouse,” with the non-employee spouse trying to get a restraining order on file and served on the TSP before the employee can withdraw the funds.<sup>520</sup>

Obviously, if the employee manages to reduce or eliminate the value of the TSP prior to a court-ordered division, that fact should be discovered and taken into account.

## **B. Withdrawal and Borrowing of Money from the TSP After Retirement**

Upon separation from service, a tangle of other rules spring into effect. First, TSP accounts of less than \$200 are automatically distributed at the time of separation. If between \$200 and \$3,500, the sums may be left in the TSP, or withdrawn in a single payment or multiple payments (cashed, or rolled over into an IRA or other retirement account). For accounts containing more than \$3,500, the TSP balance can be partially or fully withdrawn in a single payment, or by way of a series of monthly payments, *or* by way of a life annuity. Any combination of the full withdrawal options is called a “mixed withdrawal.”

The spousal rights provisions only apply only if the TSP account contains more than \$3,500. If the participant is married and wants to make a *partial* withdrawal of funds, the spouse’s notarized written consent to the withdrawal is required.

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<sup>518</sup> The other three conditions that can cause a permissible “financial hardship” withdrawal are: “negative monthly cash flow,” “medical expenses” (including household improvements needed for medical care), or “personal casualty losses.”

<sup>519</sup> The criteria for a claim on the basis of “exceptional circumstances” under which no spousal consent is required are very strict. The fact that there is a separation agreement, a prenuptial agreement, a protective or restraining order, or a divorce petition does not in itself support a claim of exceptional circumstances. As with everything else, there is a form (TSP-16) for making an “exceptional circumstances” application for withdrawal without a spousal consent.

<sup>520</sup> This is yet another illustration of why it is almost *always* a good idea to get any orders concerning division of retirement assets on file at the same time that a decree of divorce is entered.

If a *full* withdrawal is desired, the default is for the funding of a joint and survivor annuity with the “survivor” being the spouse at the time of withdrawal. The default annuity funded pays a 50 percent survivor benefit, has level payments, and does not include a cash refund feature. If the participant chooses any full withdrawal method other than the default (“prescribed”) annuity, the spouse must make a written, notarized waiver of his or her right to the prescribed annuity.<sup>521</sup> It is also possible in some circumstances to obtain a joint life annuity with someone other than the spouse.<sup>522</sup>

All of these withdrawals presume that the TSP Board had not previously been served with a valid court order awarding a portion of a TSP account to a current or former spouse or one that requires payment for enforcement of child support or alimony obligations. If such an order was served on the TSP Board, it will comply with the court order before permitting purchase of an annuity or other withdrawal.

### **C. Court-Ordered Divisions of the TSP**

Although the agency administering the TSP has proven more flexible than either the military or the OPM, its regulations did spawn yet another acronym for a court order dividing benefits – “RBCO,” for “Retirement Benefits Court Order.”<sup>523</sup>

No QDRO is required for a TSP distribution. The TSP will honor any order that is issued by a competent authority, expressly relates to the TSP account of a TSP participant, and requires the TSP to either: (1) pay a stated dollar amount from a participant’s TSP account (framed as a specific dollar amount, a stated percentage or fraction of the account, or a survivor annuity); or (2) freeze the participant’s account in anticipation of an order to pay from the account.<sup>524</sup>

The order must be written in terms appropriate to a defined contribution plan rather than a defined benefit plan, and if the participant has both a civilian TSP account and a uniformed services TSP account, the order must expressly identify the account to which it relates. Orders dividing an account as of a specific date will cause the payee’s entitlement to be calculated on the basis of the account balance as of that date, but plan balances are always

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<sup>521</sup> As with in-service withdrawals, a participant who is not able to locate his or her spouse, or claims “exceptional circumstances” making it inappropriate for the spouse to sign a waiver, can seek an exception by submitting a Form TSP-U-16 (“Exception to Spousal Requirements”), and providing the requisite supporting documentation.

<sup>522</sup> Generally, with a former spouse or other person with an insurable interest in the life of the participant; not all options are available with each form of annuity.

<sup>523</sup> See 5 C.F.R. § 1653.1; 5 C.F.R. § 1653.12 (defining qualifying legal process).

<sup>524</sup> See 5 C.F.R. § 1653.2(a).

calculated on the last day of the month. If the order recites both a fixed dollar amount and a percentage or fraction of the account, the TSP will pay the fixed dollar amount.

In 2012, amendments to the TSP regulations<sup>525</sup> were adopted that treat as “not qualifying” a court order that “designates the TSP Fund, source of contributions, or balance (e.g., traditional, Roth, or tax exempt) from which the payment or portions of the payment shall be made,” because court-ordered payments now must be disbursed pro rata from a participant’s traditional and Roth balances, if both exist.<sup>526</sup>

A spousal share may be rolled over to an IRA or other eligible plan, in which case no taxes are withheld. Otherwise, the spouse is taxed on the distribution, and 20% is withheld.

An order for payment may be for payments for a child or other third party, including the attorney for the former spouse. If the money is paid to a third party, however, such as a child (or, presumably, either party’s attorney), the *participant* must report the amount of the distribution as part of gross income for that year, and 10% is withheld. These rules provide a way of shifting the tax burden of funds to be withdrawn and used to pay attorney’s fees, just by changing the payee of the withdrawal.

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

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

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<sup>525</sup> 5 C.F.R. §§1653.2, 1653.12.

<sup>526</sup> 5 CFR §§ 1653.2(b)(7), 1653.12(c)(6). *See* 77 Fed Reg 26417 (adopting amendments as of May 7, 2012).

#### D. Survivorship Benefits for the TSP

There are no “survivorship” benefits, *per se*, for a TSP account, as it is a cash plan like a 401(k). However, plan participants can and should designate beneficiaries to receive the account balance in the event of the participant’s death.<sup>527</sup> In the absence of the form, regular intestate succession rules determine the distribution of the TSP account.

## XII. THE SERVICEMEMBERS CIVIL RELIEF ACT OF 2003

In light of ongoing military actions and the greatly-increased number of deployed active-duty and Guard and Reserve personnel, it is necessary for any practitioner approaching a military divorce case to have at least some familiarity with the Servicemembers Civil Relief Act of 2003 (“SCRA”).<sup>528</sup>

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

Contrary to belief in some circles, the SCRA does affect divorce, custody, and paternity cases,<sup>529</sup> but it only applies if the opposing party is on active duty.<sup>530</sup> If the member is on active duty, but has not made an appearance, the court *may* stay the proceedings for at least 90 days on application of counsel or the court’s own motion – *if* the court determines that

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<sup>527</sup> By means of Form TSP-U-3 (“Designation of Beneficiary”).

<sup>528</sup> 50 U.S.C. §§ 3901-4026. See *genly Vockroth v. First Cir. Family Court* 747 F. Supp. 2d 1297, 1301 (MD Ala. 2010) (discussing federal district court’s lack of jurisdiction to vacate or impede state court’s order or judgment or to interfere with exercise by state court of jurisdiction conferred on it by SCRA).

<sup>529</sup> Ongoing concern in Congress that State courts might not be giving adequate deference to the Act in child custody matters led to insertion in the 2008 Defense Authorization Act of Section 584, entitled “Protection of Child Custody Arrangements for Parents Who Are Members of the Armed Forces Deployed In Support of a Contingency Operation,” which added the words “including any child custody proceeding,” in the sections of the SCRA dealing with defaults and stays. The conference report included language urging “judges who must decide such cases not to consider the mere absence of a service member who is performing military duty to constitute the sole or even a major factor in a court’s determination about what is in the best interests of a child.”

<sup>530</sup> The Department of Defense (“DoD”) is required to verify this, one way or the other, if contacted at Defense Manpower Data Center, 1600 Wilson Blvd., Ste. 400, Attn: Military Verification, Arlington, VA 22209-2593; (Ph) 703-696-6762 (or -5790); (fax) 703-696-4156. They also have a website, <https://www.dmdc.osd.mil/scra>. A name and Social Security number will be needed.

there might be a defense which cannot be presented in the absence of the member, or if the member has not been contacted and it can't be determine if a meritorious defense exists.<sup>531</sup>

When the member *does* have notice, the court may grant the stay anyway if the member requests it. That minimum 90-day stay becomes mandatory if the request includes four items, with no formality requirement:<sup>532</sup>

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

Notably, the federal law provides that such a stay request does *not* constitute the making of a general appearance and does not waive or relinquish *any* defenses otherwise available, whether substantive or procedural.<sup>533</sup>

In that original request, or later, the member can ask for a further stay, providing the same information; however, such further stay is discretionary, and depends on the court's finding that the ability of the member to prosecute or defend is "materially affected" by his or her active duty service,<sup>534</sup> but it should last only until the end of the "military necessity" which required the stay – usually until leave is available in good faith and with due diligence.<sup>535</sup>

If the court declines to allow a stay of proceedings, it is required to appoint counsel to represent the member,<sup>536</sup> but the SCRA is silent as to the duties of the appointed attorney, or how such a lawyer should get paid, if at all.

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<sup>531</sup> 50 U.S.C. §3931(d).

<sup>532</sup> 50 U.S.C. § 3932(b)(2).

<sup>533</sup> 50 U.S.C. § 3932(c).

<sup>534</sup> 50 U.S.C. § 3932(d)(1).

<sup>535</sup> Members seeking stays for the entirety of their careers have been denied any stay at all. *See Ensley v. Carter*, 538 S.E.2d 98 (Ga. Ct. App. 2000); *Palo v. Palo*, 299 N.W.2d 577 (S.D. 1980) (case proceeded to judgment in absence of member where court found unwillingness, rather than inability, to attend the proceedings). Servicemembers accrue 30 days of leave each year, at the rate of 2.5 days per month. But they still may not be able to leave particular training or duty postings for various periods of time.

<sup>536</sup> 50 U.S.C. § 3932(d)(2).

Where a defendant has not made an appearance in an action, a default judgment (for temporary or permanent orders) may only be obtained upon affidavit stating that the person against whom default is requested is *not* in the military.<sup>537</sup> If it appears that a person against whom default is sought *is* a member of the armed services, default may not be entered against the member until the court appoints an attorney for the member, who is then charged with the duty to “not waive any defense” until the member is located.<sup>538</sup>

A default against the member is voidable – apparently forever – if the court did not appoint an attorney for the member before entering the order. The act grants a member the ability to reopen and set aside a default, or even prevent execution on a judgment, by applying to the court that entered the order within 90 days of leaving military service, if the member can demonstrate that military service prejudiced the member’s ability to defend, and that there was a meritorious defense.<sup>539</sup> A period of military service apparently tolls all statutes of limitations for the duration of military service.<sup>540</sup>

### **XIII. SPECIAL PROBLEMS AND CONSIDERATIONS IN INTERNATIONAL MILITARY-RELATED CASES**

#### **A. Preliminary Issues: Location and Service upon Servicemembers Outside the Country<sup>541</sup>**

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

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<sup>537</sup> 50 U.S.C. § 3931.

<sup>538</sup> 50 U.S.C. § 3931(b)(2).

<sup>539</sup> See *Davidson v. Gen. Fin. Corp.*, 295 F. Supp. 878 (N.D. Ga. 1968); *Bell v. Niven*, 35 S.E.2d 182 (N.C. 1945).

<sup>540</sup> 50 U.S.C. § 3936 (the period of military service shall not be included in computing any limitation period for filing suit, either by or against any person in military service; this also includes suit by or against the heirs, executors, administrators, or assigns of the member, when the claim accrues before or during the period of service).

<sup>541</sup> Much of the information here, and in the next several sections, was derived directly from the excellent and comprehensive treatise by Mark E. Sullivan, *THE MILITARY DIVORCE HANDBOOK: A PRACTICAL GUIDE TO REPRESENTING MILITARY PERSONNEL AND THEIR FAMILIES* (ABA 2006) with the permission of the author.

It is possible that a spouse may not even know how to *find* a member stationed elsewhere. With a full name and Social Security Number, however, some footwork may be able to track a reassigned member from the last known duty station to a current posting. The Legal Assistance Attorney at the military installation nearest the spouse (or the member's last posting) may be able to provide the necessary information.<sup>542</sup> There is also a Worldwide Military Locator Service<sup>543</sup> for each branch of service, which may help locate a member or forward written documents to a member (some States permit written service in this matter of certain pre- or post-divorce pleadings, notices, or other documents).

Where child support is involved, the federal rules requiring tracking of all federal employees<sup>544</sup> provides a list of designated agents for income and address verification.<sup>545</sup> There are multiple layers of regulations governing service on military personnel.<sup>546</sup>

In all domestic relations cases, traps abound relating to service of process.<sup>547</sup> Where a member is located within the United States, the authorities controlling the installation will normally allow the member the choice of accepting service of process, or not (apparently except the Air Force, which allows process servers on federal installations). Where refused, accommodation is typically made by ordering the member to be at a designated place at a designated time to be served, where that does not interfere with the operation of the military facility, but it would appear that there is significant variation and can be significant delay and difficulty.

Matters are even worse outside the U.S. Where the member refuses to consent to service, all the procedures set out in the Hague Convention on the Service Abroad of Judicial and

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<sup>542</sup> A list of worldwide armed forces legal assistance offices is posted at <http://assistance.law.af.mil/>. Attorney Chaim Steinberger of New York has contributed the practice tip that Army Regulations require that a letter from counsel to a the legal office requires forwarding to the member's command, and has the force of a "command inquiry" requiring a response in a timely fashion, under AR 608-99.

<sup>543</sup> [Http://www.defenselink.mil/people\\_records.html](http://www.defenselink.mil/people_records.html).

<sup>544</sup> Executive order 12953, <http://www.worldnetdaily.com/resources/govdocs/eos/eo12953.html>.

<sup>545</sup> In Appendix A to 5 C.F.R. § 581, again broken down service by service.

<sup>546</sup> *See, e.g.*, 32 C.F.R. § 720.20 (Service of Process on U.S. military bases and ships for Navy and Marines).

<sup>547</sup> *See* W. Mark C. Weidemaier, *Service of Process and the Military* (North Carolina School of Government, Dec., 2004), at <http://www.ncbar.com/home/lamp.htm> [click on "other Publications/Resources," and go to "Administration of Justice – Service of Process and the Military"].

Extrajudicial Documents<sup>548</sup> may come into play; the U.S. has been a signatory since February 10, 1969. As framed by the United States Department of State circular on the topic:

SERVICE ON U.S. MILITARY PERSONNEL ABROAD: We understand that the general position of the military departments is that the service of civil process on military personnel stationed abroad (or at sea) is not a proper military function. Thus, governing military regulations expressly prohibit commanders from serving civil process upon their personnel unless the individual agrees to accept the process voluntarily. Generally, commanders or other officials in charge when contacted about service of process on an employee will bring the matter to the attention of the individual and will determine whether he or she wishes to accept service voluntarily. If the individual does not desire to accept service, the party requesting such service will be notified and will be advised to follow the procedures prescribed or recognized by the laws of the foreign country. In countries party to the Hague Service Convention or Inter-American Service Convention, the foreign Central Authority may attempt to accomplish service under the applicable Convention if the prevailing Status of Forces (SOFA) agreement permits access to the base. Installation commanders may impose reasonable restrictions upon persons who enter their installations to serve process. It may therefore be necessary for the foreign Central Authority to effect service on the individual outside the installation. Some foreign Central Authorities may decline jurisdiction over cases involving U.S. military personnel depending on the SOFA agreement applicable (if any). Likewise, a request for service on U.S. military personnel pursuant to a letter rogatory may prove difficult as the foreign court may decline jurisdiction. It may be necessary to retain the services of a private attorney or other agent to effect service on the individual outside the U.S. military installation. Service by registered mail is also another option. You may wish to consult the Judge Advocate General's office for the appropriate branch of the U.S. military at the Pentagon for further guidance. See also, *A Guide to Child Support Enforcement Against Military Personnel, Serving the Soldier*, (February 1996), Administrative and Civil Law Department, Legal Assistance Branch, The Judge Advocate General's School, U.S. Army, Charlottesville, VA 22093-1781 and Barber, *Soldiers, Sailors and the Law, Family Advocate*, ABA Family Law Section, Vol. 9, No. 4, 38, 41 (Spring 1987).<sup>549</sup>

The “bottom line,” really, is that where actual physical service is not going to be voluntarily accepted, the practitioner is required to either become completely conversant with the details of the treaty, personally or by hiring another professional or service company, or risk the

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<sup>548</sup> Hague Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, 20 U.S.T. 361 T.I.A.S. No. 6638, 658 U.N.T.S. 163, *reprinted in* 28 U.S.C.A., Fed. R. Civ. P. 4; *see also* O.C.G.A. Sec. 9-11-4(f)(3) (essentially, incorporating the Hague Convention for Service Abroad for military personnel).

<sup>549</sup> “Service of Legal Documents Abroad” Circular, Dept. of State circular 2003. A bit ironically, it was the research for the article cited in the quote above, written by former ABA Family Law Section Michael Barber, that sparked his interest in the field, ultimately leading to the commissioning of my 1998 textbook on military retirement benefits, and later to Mr. Sullivan’s MILITARY HANDBOOK.

entire lawsuit being thrown out on a very technical basis. This goes for the individual rules of individual countries, over and beyond the Treaty itself, because many imposed specific conditions when they signed on to the Treaty.<sup>550</sup> On the other hand, many U.S. courts have expressed the thought that if service of a U.S. citizen is adequate under State and federal law, wherever accomplished, they do not consider the views of the country where process is actually served to be of much importance.

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

## **B. Custody, Visitation and Temporary Support Issues**

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

Since military pay tables are readily discoverable, in print or even on the Internet,<sup>551</sup> the ability of the member to appear may not be relevant to a child support determination, although there could be exceptions.<sup>552</sup> So it may be possible to defeat claims for an SCRA stay of child support proceedings. It is also possible to get support in advance of a formal court order. Each branch of the military service has its own rules regarding support of family members in the *absence* of a court order, and the rules govern both child support and spousal support (alimony).

The Air Force "expects" that its members will support their families, and will recoup BAH<sup>553</sup> payments if it concludes that the member is receiving the "with-dependent" rate but not

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<sup>550</sup> See, e.g., *Vorhees v. Fischer & Krecke*, 697 F.2d 574 (4<sup>th</sup> Cir. 1983) (quashing service against German defendant on ground that Germany has imposed conditions in its accession to the Treaty, including that papers served bear a German translation and that service not be made by direct mail). Mr. Sullivan's book takes a heroic swing at setting out all the ways in which service may have to be accomplished in most of the places that American servicemembers are actually posted – today – at pages 19-93 of his HANDBOOK.

<sup>551</sup> Start with <http://www.dod.mil/dfas>, and follow the links.

<sup>552</sup> See *Smith v. Davis*, 364 S.E.2d 156 (N.C. Ct. App. 1988) (support order set aside on the basis of affidavit from member that he had not been paid in several months and was unable to comply with the order).

<sup>553</sup> Basic Allowance for Housing.

supporting dependents, but basically pushes the matter to the civilian courts.<sup>554</sup> The Marine Corps is more specific, requiring its members to provide the greater of a specific sum per dependent or a specified percentage of the BAH and certain other benefits.<sup>555</sup> The Navy has its own chart of percentages,<sup>556</sup> as does the Coast Guard.<sup>557</sup> The Army has an extensive, complex regulation governing the support of dependents in the absence of agreement or a court order.<sup>558</sup>

In light of the family support regulations, often a letter to the commanding officer of the member can initiate at least some support payments pending issuance of a court order. Once an order is obtained, support may be enforced by way of garnishment.<sup>559</sup> Accrued arrears may also be recovered if they are specified in the order.<sup>560</sup> An “involuntary allotment” can be initiated by an “authorized person” by sending the support order to the DFAS – but such an “authorized person” must be a District Attorney or other person with Title IV-D enforcement authority, not a private attorney.<sup>561</sup>

Normally, when parents live in different places, child support is set in accordance with the law of the residence of the obligor.<sup>562</sup> But a military member may have an anomalous status under the Uniform Interstate Family Support Act; if the member maintains his residence or domicile elsewhere than where he is stationed, that State might maintain exclusive

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<sup>554</sup> A.F. 36-2906 ¶ 3.1.2.

<sup>555</sup> U.S. Marine Corps Order P5800.16a, MARINE CORPS MANUAL FOR LEGAL ADMINISTRATION ch. 15 (Dependent Support and Paternity) § 15001 (2003).

<sup>556</sup> U.S. Dep’t of Navy, NAVAL MILITARY PERSONNEL MANUAL art. 1754-030 (Support of Family Members) ¶ 4 (Aug. 22, 2002).

<sup>557</sup> U.S. Dep’t of Homeland Security, U.S. COAST GUARD COMMANDANT INSTR. M1000.6A, ch. 8M (Supporting Dependents) (May 3, 2001).

<sup>558</sup> AR 608-99.

<sup>559</sup> See 42 U.S.C. §§ 659-662.

<sup>560</sup> See 5 C.F.R. Part 581.

<sup>561</sup> See 32 C.F.R. § 54.3(a).

<sup>562</sup> See *Vaile v. District Court*, 118 Nev. 262, 44 P.3d 506 (2002) (“Simply because a court might order one party to pay child support to another in the exercise of its personal jurisdiction over the parties does not permit the court to extend its jurisdiction to the subject matters of child custody and visitation.” 118 Nev. at 275, 44 P.3d at 515); see also *Kulko v. California*, 436 U.S. 84, 91-92, 56 L. Ed. 2d 132, 98 S. Ct. 1690 (1978) (where a defendant is subject to a State’s jurisdiction, his rights in the matters ancillary to divorce may be determined by its courts); Prof. John J. Sampson, “UIFSA: Ten Years of Progress in Interstate Child Support Enforcement” (Legal Education Institute National CLE Conference on Family Law, Aspen, Colorado, 2003) at 184.

modification jurisdiction, and the law of that State might control child support awards and modifications.<sup>563</sup>

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

Where the military member is the custodial parent, there is authority indicating that the member can use the SCRA to stave off change-of-custody or contempt proceedings, even where the non-military parent is thus deprived of contact with the subject child for months, or even years.<sup>564</sup> Denial of contact has, however, been deemed important when it is the member making that assertion, requesting a stay of proceedings under the SCRA when the non-military spouse is the child's custodian.<sup>565</sup>

It is difficult to generalize. Courts have focused on the apparent tactics of the non-military spouse,<sup>566</sup> or on the apparent bad-faith conduct of the member<sup>567</sup> in reaching their decisions. The cases are – necessarily – very fact-specific.

As a theoretical matter, tactical filing of an SCRA request would apparently prevent a court from making a preliminary custody order, leaving no order in place for custody of a child for months at a time. Courts put in such situations have generally erred on protecting children,<sup>568</sup> but the statutory conflict is obvious.

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<sup>563</sup> *Amezquita v. Archuleta*, 101 Cal. App. 4<sup>th</sup> 1415; 124 Cal. Rptr. 2d 887 (Ct. App. 2002) (finding that New Mexico retained exclusive child support modification jurisdiction over member who had been stationed in California for five years).

<sup>564</sup> *See, e.g., Kline v. Kline*, 455 N.E.2d 407 (Ind. Ct. App. 1983); *Coburn v. Coburn*, 412 So. 2d 947 (Fla. Dist. Ct. App. 1982).

<sup>565</sup> *See, e.g., Williams v. Williams*, 552 So. 2d 531 (La. Ct. App. 1989).

<sup>566</sup> *Chaffey v. Chaffey*, 382 P.2d 365, 31 Cal. Rptr. 325 (Cal. 1963) (reversing trial court order changing custody where the non-custodian served a restraining order the day before a remote deployment, which put the member in an “impossible situation” of disobeying either the court order or his military orders). The court apparently did not consider viable the option that the member could have obeyed both, leaving the children with his former spouse while deploying, and seeking a restoral of custody when his military duties permitted.

<sup>567</sup> *Hibbard v. Hibbard*, 431 N.W.2d 637 (Neb. 1988) (member's long-standing violation of orders in denying visitation to former spouse substantiated denial of stay and granting of change of custody motion, where facts indicated that he could have participated in court action if he had wished to do so).

<sup>568</sup> *See, e.g., Ex Parte K.N.L.*, 872 So. 2d 868 (Ala. Civ. App. 2003) (refusing stay to member who placed child with new spouse immediately before deploying overseas and filing a stay motion, holding that the other parent's rights also merited protection, and that members should not be permitted to use the law enacted for their protection as “a vehicle of oppression or abuse” to deprive the other parent of custody).

Some courts have refused to permit the member to effectively transfer non-reviewable custody to a third party while staying the non-military parent's access to the courts for child custody.<sup>569</sup> In other contexts, courts have been much less sympathetic to arguments based on the parental preference doctrine.<sup>570</sup>

And the law is even more inclined to err in favor of the member in disputes relating to visitation and the substitution of third parties for the member's usual time. In Illinois, since World War II, the courts have decided that the SSCRA permitted granting fit relatives (at least grandparents) to exercise the child visitation previously enjoyed by a deployed military member.<sup>571</sup> Other States have similar case law.<sup>572</sup>

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

In Kentucky, the legislature decided in 2006 that any custodial change premised on member's deployment or activation is only a temporary order which "reverts" to the prior order upon return of the member; the Kentucky Supreme Court apparently approves of the statute.<sup>573</sup> Louisiana has enacted a "compensatory visitation" statute.<sup>574</sup> California prohibits use of military activation and deployment out of State from being used against a member in a custody or visitation case.<sup>575</sup>

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<sup>569</sup> *Lebo v. Lebo*, 886 So. 2d 491 (La. Ct. App. 2004).

<sup>570</sup> See, e.g., *Rayman v. Rayman*, 47 P.3d 413 (Kan. 2002) (in post-divorce context, leaving children in custody of step-mother while father went on unaccompanied tour to Korea).

<sup>571</sup> *Solomon v. Solomon*, 49 N.E.2d 807 (Ill. App. 1943); *IRMO Sullivan*, 795 N.E.2d 392 (Ill. App. 2003).

<sup>572</sup> See *McQuinn v. McQuinn*, 866 So. 2d 570 (Ala. Civ. pp. 2003) (permitting member to designate any member of his extended family while he was absent on active duty, and barring the non-military parent's right to interfere, at least where her complaints were made "without any particular reason"); *Webb v. Webb*, \_\_\_ P.3d \_\_\_, 2006 IDAHO LEXIS 152 (Idaho Opinion No. 106, Nov. 29, 2006) (approving delegation of visitation rights thru power of attorney to member's parents while member was deployed).

<sup>573</sup> See *Crouch v. Crouch*, 201 S.W.3d 463 (Ky. 2006) (discussing in part KRS 403.340(5)).

<sup>574</sup> LA R.S. 9:348 "Loss of visitation due to military service; compensatory visitation."

<sup>575</sup> Cal. Fam. Code § 3047 ("A party's absence, relocation, or failure to comply with custody and visitation orders shall not, by itself, be sufficient to justify a modification of a custody or visitation order if the reason for the absence, relocation, or failure to comply is the party's activation to military service and deployment out of state").

North Carolina went further than any other State in 2007 when it passed fairly sweeping legislation designed to “protect servicemembers.”<sup>576</sup> The new law allows expedited hearings upon the request of a servicemember, lets a court use electronic testimony when the servicemember is unavailable, allows a court to delegate the visitation rights of the servicemember to another family member, and requires that any temporary custody order entered upon a member’s deployment end within ten days of the member’s return, and that his or her absence due to deployment may not be used against the servicemember in a change of custody hearing. Other States are considering and passing similar laws.

The spate of State statutory enactments appear rooted in the patriotic fervor attendant to the U.S. wars in Afghanistan and Iraq, and the huge number of people affected by the rounds of deployments and activation of Reserve and Guard units. But such enactments take the focus off of the *child* involved in such cases, in apparent contradiction of the judicial policy that in making custody determinations, the court’s sole consideration is the best interest of the child,<sup>577</sup> which provides “the polestar for judicial decision.”<sup>578</sup>

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

Notwithstanding the protections for members, courts have been less than indulgent of attempts to use the SCRA as a tactical weapon. In *Lenser v. Lenser*,<sup>579</sup> the parties had separated, but did not yet have a custody order; the child was primarily living with the non-military spouse, but visiting briefly with the member. The Arkansas Supreme Court was unimpressed by the attempt of the member to transfer custody to the child’s grandmother by dropping her off there and seeking a stay.

The trial court entered a temporary custody order in favor of the other parent, but stayed the remainder of the case, over the objection of the member and the grandmother, who argued that the stay was “automatic” and prevented entry of a temporary custody order. The Supreme Court of Arkansas held that an SCRA stay does not “freeze” a case, leaving it in limbo indefinitely and allowing no authority for the trial court to act. Rather, the court found that a trial court could properly entertain the issue of temporary custody, even if the stay was in place when the issue was considered, on the basis that a child’s life cannot be put in

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<sup>576</sup> North Carolina House Bill 1634 (S.L. 2007-175).

<sup>577</sup> See *Ellis v. Carucci*, 123 Nev. Adv. Op. No. 18 (June 28, 2007).

<sup>578</sup> *Schwartz v. Schwartz*, 107 Nev. 378, 382, 812 P.2d 1268, 1272 (1991).

<sup>579</sup> 2004 Ark. LEXIS 490 (Ark. Sept. 16, 2004).

“suspended animation” awaiting the member’s return. For the same reason, the trial court was able to consider issues such as support.<sup>580</sup>

The availability of military Family Care Plans, which are required by military regulations to designate guardians for a child, also may not generally be used offensively, to cut off the right of a natural parent to seek or obtain temporary custody, at least until the member returns from deployment.<sup>581</sup>

There are mechanisms for dealing with members who legitimately have custody of dependent children outside the United States, but fail or refuse to return the children to the U.S. pursuant to a court order.<sup>582</sup> The various services have their own implementations of the directive, but the purpose and effect is to obtain compliance with court orders requiring the return to the United States of minor children who are the subject of court orders regarding custody or visitation.<sup>583</sup>

In some circumstances, such as where both parties have resided overseas for a substantial period of time, or the children were born in a foreign country, the best route to obtaining a legitimate order for custody might be through the courts of the foreign country. The Uniform Child Custody Jurisdiction and Enforcement Act recognizes many foreign countries as “States,”<sup>584</sup> and such orders may generally be registered and enforced in the United States.

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<sup>580</sup> *Id.*, citing *Jelks v. Jelks*, 207 Ark. 475, 181 S.W.2d 235 (1944) (in which the court stayed the divorce proceeding at the member’s request, but granted maintenance to the spouse pending trial).

<sup>581</sup> *See, e.g., Diffin v. Towne*, 3 Misc. 3d 1107A, 2004 N.Y. Misc. LEXIS 622 (May 21, 2004, unpublished) (a stay of proceedings is simply intended as a shield to protect servicemembers, not as a sword with which to deprive others of their rights); *In re Marriage of Grantham*, 698 N.W.2d 140 (Iowa 2005) (similarly, granting application of a stay under the SCRA but allowing placement or temporary custody of the child on an interim basis).

<sup>582</sup> DoD Instruction 5525.09 (Feb. 10, 2006); 32 C.F.R. Part 146.

<sup>583</sup> *See also* the International Parental Kidnapping Crime Act of 1993, 18 U.S.C. § 1204. Matters pertaining to “The Convention on the Civil Aspects of International Child Abduction, done at the Hague on 25 Oct. 1980” [commonly referred to as “the Hague Convention”], and its implementing legislation, the International Child Abduction Remedies Act (“ICARA”), 42 U.S.C. §§ 11601-11610, are beyond the scope of these materials.

<sup>584</sup> Basically, when the law of that country provide reasonable notice, the law in that country is substantially similar to the UCCJEA, and there is opportunity to be heard afforded to all affected persons. *See, e.g., Dorrity v. Dorrity*, 695 So. 2d 411 (Fla. Dist. Ct. App. 1997) (Germany was the proper venue to grant a custody order where the child had been born there, and mother and child had lived in Florida only six weeks before returning to Germany).

### C. The Special Problem of Divorce Decrees Entered in Foreign Countries as to Division of Military Retirement Benefits

Military-related divorce cases involving a court of some other country, as well as the federal and State law applicable to these cases, illustrate the principle of “the danger of unintended consequences.”<sup>585</sup> Given the enormous number of American service personnel stationed abroad in the past 50 years,<sup>586</sup> it seems almost certain that the number of actual persons affected is far higher than the relatively few published cases would indicate. Examining the facts of such a case can be highly instructive.

Jill Prevost married Tom Harms, a career military officer, in 1967. By 1984, when their marriage ended, they were living separately in Germany. Jill filed for divorce in Illinois (Tom’s legal residence) in March, 1984.<sup>587</sup> In May, Tom requested a stay pursuant to the Soldiers’ and Sailors’ Civil Relief Act. Tom filed a new action in the German court with jurisdiction over divorce actions at about that time, and the German court proceeded to judgment on questions of custody, visitation, support, and property division.

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

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

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

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<sup>585</sup> The principle that the ultimate application of any action or rule, however well-intentioned, may be to create a worse harm than the rule was itself designed to address. This is sometimes referred to as a branch of “applied Murphology.”

<sup>586</sup> Even in the post-cold war, post-draw-down world, there were about 295,000 personnel in foreign countries, and over 10,000 in U.S. territories or “special locations.” Given these numbers – which change constantly with policy shifts and changing world events – it would be remarkable if there were *not* a large number of marriages, and divorces, involving persons from more than one country, and possibly involving the courts of more than one country.

<sup>587</sup> Champaign County, Illinois, Case no. 84-C-290.

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

Jill appealed. The intermediate appellate court affirmed the lower court's dismissal on February 20, 1992.<sup>588</sup> That court found that under the Illinois constitution, the lower courts could only hear actions for division of property where the State legislature had explicitly given authority to do so, and that judgments of foreign countries could not be registered under the Uniform Enforcement of Foreign Judgments Act. The court rebuffed Jill's claim of jurisdiction under the USFSPA, without clearly explaining its reasoning. It expressed "concern" that its decision "leads to an inequitable result," but advocated only that "those who prepare uniform law proposals" should consider an enactment for undivided military retirement benefits.<sup>589</sup> Jill did not, or could not, appeal to the Illinois Supreme Court.

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

In 1994, Jill filed a federal court action through counsel in Virginia,<sup>590</sup> which is where both she and Tom then lived. The federal district court found "no federal jurisdiction, expressed or implied," to adjudicate the partition action Jill had brought.<sup>591</sup> The district court judge, obviously reluctant to say anything that might even imply an expansion of the role of the federal courts, held that the USFSPA "only allows courts to apply state divorce laws to military pensions." The court distinguished *Kirby v. Mellenger*<sup>592</sup> (discussed elsewhere at some length) as having been decided "in circumstances quite different from those at bar" because it was a diversity case instead of a federal question case. The court rather obliquely remarked that the result it reached "may be lamentable," but found dismissal was required as a matter of federal question jurisdiction.<sup>593</sup>

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<sup>588</sup> *In re Brown*, 587 N.E.2d 648 (Ill. Ct. App. 1992).

<sup>589</sup> Obviously unknown to the court, the officials at NCUSL (National Commission on Uniform State Laws) had refused to do any such thing when asked to do so in 1988, claiming that the problem was too "state specific" to be the subject of any uniform law proposal, and that State courts "clearly" had the power to deal with such situations.

<sup>590</sup> Phillip Schwartz, Esq., now of Schwartz & Associates, LLC, Attorneys and Counselors of International Law, 8221 Old Courthouse Road, Suite 101, Fairfax, VA 22182-3831 USA; (703) 883-8035.

<sup>591</sup> *Brown v. Harms*, 863 F. Supp. 278 (E.D. Va. 1994).

<sup>592</sup> *Kirby v. Mellenger*, 830 F.2d 176 (11th Cir. 1987).

<sup>593</sup> The same result has been reached by other federal district courts in reasonably similar circumstances. See, e.g., *Miller v. Umfleet*, No. SA-88-CA-769 (W.D. Tex., Sep. 1, 1991, slip opinion) (where military member had been transferred from Texas to another State by military orders, federal district court found no subject

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

The Virginia Supreme Court affirmed the "no written contract" finding, but reversed the lower court's finding that litigation was barred by the statute of limitations on the oral contract embodied in that decree, finding that the Illinois court simply lacked subject matter jurisdiction, and that the breach had not occurred until Tom retired in 1992.<sup>594</sup> The case was remanded.

On remand, through other counsel,<sup>595</sup> the case was transformed back into a domestic relations and equity case; motions were filed in chancery seeking specific performance of the oral contract expressed in the German decree, and in law, seeking damages. At that point, it disappeared from published authority.

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

*Harms* is remarkable, among other things, for the sheer tenacity of its litigants. Many similar cases are apparently resolved quickly and quietly, at least where one party does not oppose a correction to what is apparently conceded to be an inequitable result. For example, in *Stewart v. Gomez*,<sup>596</sup> the parties had been divorced in 1987 in England. The member, who arranged for the British divorce, had specifically assured the former spouse that he "was looking out for the best interest of" the spouse and their children and "specifically promised that when he retired" the former spouse "would receive a portion of the military retirement

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matter to exist under USFSPA or the Federal Declaratory Judgments Act, 28 U.S.C. § 2201, and a failure of "complete diversity"; the court further opined that the case would fit within the domestic relations exception to federal jurisdiction even if such jurisdiction had been established, although dismissal was self-described as done "not lightly").

<sup>594</sup> *Brown (Harms) v. Harms*, 467 S.E.2d 805 (Va. 1996).

<sup>595</sup> By the time of the appeal, Jill was represented by Timothy Hyland, Esq., of Lefler, Hyland & Thompson, 11320 Random Mills Road, Ste. 540, Fairfax, VA 22030-7499, (703) 293-9300. On remand, she was represented by David L. Duff, Esq., 11320 Random Hills Road, Ste. 525, Fairfax, VA 22030.

<sup>596</sup> Case No. D 156799, Eighth Judicial District Court, Clark County, Nevada, November 22, 1992.

benefits.” The member subsequently retired and moved to Nevada, but did nothing to ensure payments to the former spouse. The former spouse moved to South Carolina.

She filed a “Complaint for Partition of Omitted Property and Enforcement of Express Contract” in the Nevada courts. The member essentially ignored the action; default was granted, and the former spouse began receiving the promised share of the military retirement benefits.<sup>597</sup>

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

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

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

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

#### XIV. CONCLUSION

Military retirement benefits are so central to any divorce involving those assets that practitioners cannot afford to *not* know a great deal of the detail required to provide for their adequate disposition. It has become increasingly important for domestic relations

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<sup>597</sup> Mr. Sullivan has opined that such a judgment is not an “Order Incident to Decree” under the USFSPA. See HANDBOOK, *supra*, at 528 & n.283, citing *Carmody v. Secretary of the Navy*, 886 F.2d 678, 681 (4<sup>th</sup> Cir. 1989). That has not been my experience, however; if pleaded as set out here, such judgments have been accepted and enforced.

practitioners to learn all aspects of relevant retirement plans, and to develop appropriate valuations for those assets, with thoughtful written contingencies for all matters that could vary, including tax, survivorship, and related issues. Only then can counsel intelligently negotiate – or litigate – their clients’ interests in such retirement benefits.

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