PENSIONS AND RETIREMENT ACCOUNTS: RECENT DEVELOPMENTS AND CURRENT ISSUES

by

Marshal S. Willick, Esq.
WILLICK LAW GROUP
3591 East Bonanza Rd., Ste. 200
Las Vegas, NV 89110-2101
Tel: (702) 438-4100
Fax: (702) 438-5311
website: willicklawgroup.com
e-mail: Marshal@willicklawgroup.com

March 3, 2023

TABLE OF CONTENTS

I. INTRODUCTION 1

II. NEVADA ENFORCES AGREEMENTS TO DIVIDE MILITARY DISABILITY PAY 3

III. OTHER MILITARY RETIREMENT ISSUES: THE BLENDED RETIREMENT SYSTEM AND THE FROZEN BENEFIT RULE 12

A. Blended Retirement System Issues 12

B. The Frozen Benefit Rule and What to Do About It 15

1. What Has Changed 16

2. The Impact of the Statutory Change 17

3. Important Points About The "Frozen Benefit Rule". 18

4. How to Cope with and Compensate for the Changed Federal Statute . . . 19

IV. THE *WOLFF/HENSON* ERROR AND ITS POSSIBLE FIXES 22

A. How to Equally Divide Retirement Benefits. 22

B. The *Wolff* Error. 23

C. Making it Worse; the *Henson* Error Flowing from the *Wolff* Error to Equally Divide Retirement Benefits, and the Error of *Holguin* 24

D. Several Missed Opportunities to Fix it 26

E. Could the Court Have Fixed the Errors If They Wanted To? 27

F. A Legislative Fix; the California Precedent 27

G. The Propriety of Pointing Out Factual and Legal Error 28

H. Conclusions 28

V. THE TIME RULE AND DEFINED CONTRIBUTION PLANS. 28

VI. RECENT CHANGES IN TSP ADMINISTRATION 31

VII. CONCLUSIONS 31

PRESENTER BIOGRAPHY

Marshal S. Willick is the principal of the Willick Law Group, an A/V rated Family Law firm in Las Vegas, Nevada, and practices in trial and appellate Family Law. He is a Certified Family Law Specialist, a Fellow of both the American Academy of Matrimonial Lawyers (AAML) and the International Academy of Family Lawyers (IAML), former Chair of the Nevada Bar Family Law Section and former President of the Nevada chapter of the AAML. He has authored many books and articles on Family Law and retirement benefits issues, and was managing editor of the Nevada Family Law Practice Manual. He is frequent teacher of continuing legal education classes and is often sought as a lecturer on family law issues.

In addition to litigating trial and appellate cases in Nevada, Mr. Willick has participated in hundreds of divorce and pension cases in the trial and appellate courts of other states, and in the drafting of various state and federal statutes in the areas of divorce and property division. He has chaired several Committees of the American Bar Association Family Law Section, AAML, and Nevada Bar, has served on many more committees, boards, and commissions of those organizations, and has been called on to sometimes represent the entire ABA in Congressional hearings on military pension matters. He has served as an alternate judge in various courts, and frequently testifies as an expert witness. He serves on the Board of Directors for the Legal Aid Center of Southern Nevada.

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

Mr. Willick can be reached at 3591 East Bonanza Rd., Ste. 200, Las Vegas, NV 89110-2101. His phone number is (702) 438-4100, extension 103. Fax is (702) 438-5311. E-mail can be directed to Marshal@willicklawgroup.com, and additional information can be obtained from the firm web sites, www.willicklawgroup.com and http://www.qdromasters.com.

I. INTRODUCTION

Retirement benefits are usually the most valuable asset of a marriage and are generally divisible upon divorce to at least the degree to which they were accrued during the marriage.[1] What is surprising is the near-universal lack of appreciation of this fact. Most people still working, asked what their most valuable assets are, don't even think to mention their slowly-accruing retirement benefits, even though those benefits are quite commonly more valuable than everything else the parties have combined, including the equity in the marital residence.

These realities causes a continuing stream of conflicts, between divorcing parties and in post-divorce litigation, as to whether and how various benefits are divisible at all, and how such divisions can be enforced.

Most people in this country earning retirement benefits work for private employers. Most private employee-benefit plans, or "pension plans"[2] in the United States today are qualified under, and governed by, the Employee Retirement Income Security Act of 1974, known as "ERISA,"[3] codified at 29 U.S.C. § 1001 *et seq*.

But millions of people are involved with pension and retirement plans ***not*** governed by ERISA, but instead falling under completely separate regulatory schemes with very different rules and possibilities.

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

The entire system was altered for incoming employees in a "new" system ("Federal Employees' Retirement System," or "FERS"), for those who began service on or after January 1, 1984.[4]

---

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

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

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

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

Those defined benefit plans are administered by the Office of Personnel Management ("OPM") under extensive separate federal regulations.[5] An order dividing Civil Service retirement benefits is required by regulation to be titled "COAP."[6]

The new system also created a defined contribution retirement account called the "Thrift Savings Plan" ("TSP").[7] In 2001, the defined contribution program was also made available to those in the armed forces. An order dividing a TSP account is a "RBCO."[8]

At about the same time as the federal efforts in the 1980s, various States actively cooked up new or refined retirement schemes for those employed by State governments.

In Nevada, State public employees fall under the Public Employees' Retirement System ("PERS"), which in its modern form has existed since 1975, but was entirely revised and reorganized in 1993. Those who put the Nevada PERS regulations together chose to (confusingly) use the same titles, etc., as are in the federal ERISA law, and even copied some of the statutory language from the far larger, and more complex, federal law. However, a State pension plan (such as PERS) does ***not*** fall within ERISA, and the federal statutes do ***not*** apply to the plan, or to the benefits. Instead, there is an entirely different set of (State) laws that govern distribution of PERS benefits, at NRS chapter 286.

The retirement benefits of all current members of the armed forces, and those retired from military service, are also outside of ERISA; those benefits are governed by the Uniformed Services Former Spouses Protection Act ("USFSPA").[9] The primary purpose of the USFSPA was to define state court jurisdiction to consider and use military retired pay in fixing the property and support rights of parties to a divorce; the federal statute was essentially an enabling act permitting States to address the subject, so treatment of retired pay was again made dependent on State divorce laws. There is no specific title required for a military pension division order, but an order dividing military retirement benefits has come to be known as a Military Benefit Division Order ("MBDO") or more technically as labeled in 10 U.S.C. § 1408(a)(2), Order Incident to Decree ("OID").

---

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

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

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

[8] For "Retirement Benefits Court Order."

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

Nevada law does not distinguish among these myriad retirement systems. Under NRS 123.225, spouses have a "present, existing, and equal interest" in ***all*** benefits, and burdens, of all property accrued during the marriage, including all of the various retirement plans and assets in which either party might have an interest.

But the reality is that some retirement plans (like private pensions under ERISA, or for Civil Service) are set up to make an equal and permanent division of benefits easy. In ***those*** systems, it is simple to create a "separate interest" for the spouse, so each party has what amounts to a separate retirement – if the participant dies, the spouse's benefits are unaffected, and if the spouse dies, the participant's benefits are unaffected.

Other retirement plans make an equal division harder to accomplish. Nevada PERS, and the military retirement system, do not allow the creation of a "separate interest" for the spouse, no matter what a court orders; only the "payment stream" can be divided. Those systems also have "one-way" survivorship benefits built into their structures.

The mash-up of completely different retirement systems, state law that requires an equal division of assets accrued during marriage, and intersecting considerations of immunity, federal pre-emption, and other doctrines, creates a fertile field for conflict and confusion as to who is entitled to what at and after divorce, and why.

This short course addresses a few such conflicts, some of which (at least for now) have been resolved, and some of which remain pending.

II. NEVADA ENFORCES AGREEMENTS TO DIVIDE MILITARY DISABILITY PAY

Issues concerning disability benefits are often contentious. 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.[10]

Nevada has long been in the mainstream of national law on the subject; while our community property statutes are pretty vague on the matter, case law establishes that here, as in most places,

---

[10] *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); *In re Marriage of Higinbotham*, 203 Cal. App. 3d 322 (Ct. App. 1988), *citing In re Marrriage 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).

payments labeled "disability benefits" are divisible property to the extent they include divisible retirement benefits.[11]

On June 26, 1981, the United States Supreme Court issued its opinion in *McCarty v. McCarty*.[12] The Court determined that state community property laws conflicted with the federal military retirement scheme, and thus were impliedly pre-empted by federal law. The majority held that the apparent congressional intent was to make military retirement benefits a "personal entitlement" and thus the sole property of individual service members, so the benefits could not be considered as community property in a California divorce. The Court invited Congress to change the statutory scheme if divisibility of retired pay was desired.[13]

It was, and Congress reacted by enacting the Uniformed Services Former Spouses Protection Act ("USFSPA") on September 8, 1982.[14] 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."[15]

But the USFSPA is written to permit state courts to only address "disposable retired pay," and disability benefits fall outside that term.

At any time, a military retiree can apply to the Veteran's Administration to be evaluated for a "service-connected disability."[16] 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

---

[11] *Powers v. Powers*, 105 Nev. 514, 779 P.2d 91 (1989).

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

[13] 453 U.S. at 235-36, 101 S.Ct. at 2743.

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

[15] "The purpose of this provision is to place the courts in the same position that they were in on June 26, 1981, the date of the *McCarty* decision, with respect to treatment of nondisability military retired or retainer pay. The provision is intended to remove the federal pre-emption found to exist by the United States Supreme Court and permit State and other courts of competent jurisdiction to apply pertinent State or other laws in determining whether military retired or retainer pay should be divisable [*sic*]. Nothing in this provision requires any division; it leaves that issue up to the courts applying community property, equitable distribution or other principles of marital property determination and distribution. This power is returned to the courts retroactive to June 26, 1981. This retroactive application will at least afford individuals who were divorced (or had decrees modified) during the interim period between June 26, 1981 and the effective date of this legislation the opportunity to return to the courts to take advantage of this provision." S. Rep. No. 97-502, 97th Cong., 2nd Sess. 15, (1982), *reprinted in* 1982 U.S. Code Cong. & Ad.News 1596, 1611. *See also Steiner v. Steiner*, 788 So. 2d 771 (Miss. 2001), *opn. on reh'g*; *Mansell v. Mansell*, 490 U.S. 581, 109 S. Ct. 2023 (1989) (some partial federal pre-emption may remain after passage of the USFSPA).

[16] 38 U.S.C. § 1101–1142.

serious disabilities.[17] 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).[18] 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.[19]

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.[20]

In *Mansell v. Mansell*,[21] the United States Supreme Court addressed disability pay for the first time. When the parties had divorced, the 1981 *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.[22] 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.[23] The dissent echoed the

---

[17] 38 U.S.C. §§ 1114, 1134, 1155.

[18] 38 U.S.C. §§ 1115, 1135.

[19] *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.

[20] The history of the definitions and terms are beyond the scope of these materials. For further details, see Marshal Willick, *Divorcing the Military: How to Attack, How to Defend*, posted at: https://www.willicklawgroup.com/military-retirement-benefits/.

[21] *Mansell v. Mansell*, 490 U.S. 581, 109 S. Ct. 2023 (1989).

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

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

conclusions reached earlier by the California Supreme Court in *Casas v. Thompson*[24] – that the gross sum of retirement benefits was available to the State divorce court for division.[25]

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.[26] In other words, the United States Supreme Court opinion had ***no effect*** on the order to divide the entirety of retirement and disability payments in the final, un-appealed divorce decree in the *Mansell* case itself.

When Congress next amended the Act in 1990, it did nothing to address the *Mansell* holding. Thus, *Mansell* is often read to stand for the proposition that the subject matter jurisdiction of the State divorce courts is limited to division of "disposable retired pay." This may be less important than was thought at the time, however, since courts have widely expressed a willingness to consider the impact of disability or other benefits ***not*** included in the definition of "disposable retired pay" when dividing assets or making alimony orders between spouses.[27]

For many years, most courts throughout the U.S. did exactly what the California trial court did on remand in that case, issuing opinions that detailed why they would not allow the inequity of allowing post-divorce status changes by members to partially or completely divest their former spouses, where the original divorce decree had been issued ***prior*** to the *Mansell* decision,[28] or in which the disability was taken by the member after the divorce, thus retroactively dispossessing 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.

---

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

[25] 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.

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

[27] *See*, *e.g.*, *In re Marriage of Krempin*, 83 Cal. Rptr. 2d 134, 70 Cal. App. 4th 1008 (Ct. App. 1999).

[28] *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).

The theory often applied was phrased differently from one court to another, but was essentially that of ***resulting or constructive trust***.[29] Once a divorce was entered dividing the "gross" or "total" or "all" military retirement benefits, the money awarded to the former spouse was no longer considered the member's property to convert. If the member subsequently applied for and received disability benefits, or took any other action to redirect money already ordered paid to the former spouse back to himself, he violated the divorce decree.

The decision in the cases largely 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*[30] – 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.[31]

In 2017, however, the United States Supreme Court decided *Howell*[32] 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.

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.[33]

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.[34]

---

[29] 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).

[30] *In re Marriage of Gillmore*, 629 P.2d 1 (Cal. 1981).

[31] *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").

[32] *Howell v. Howell*, ___ U.S. ___, 2017 WL 2039158 (May 15, 2017).

[33] *Howell v. Howell*, 137 S. Ct. 1400, 581 US __, 197 L. Ed. 2d 781 (2017), makes all military disability non-divisible. The appropriate means of dealing with that possibility is an award, and reservation, of alimony, as cogently detailed in cases appearing in multiple States. *See Cassinelli v. Cassinelli*, 20 Cal. App. 5th 1267, 229 Cal. Rptr. 3d 801 (Cal. Ct. App., Mar. 2, 2018); *Hurt v. Jones-Hurt*, 168 A.3d 992 (Md. Ct. Spec. App. 2017).

[34] 38 U.S.C. § 5305.

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 pre-waiver 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.[35]

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.

Dismissing decades of holdings of the great majority of State courts[36] and the arguments of the Solicitor General (who filed an *amicus* brief in favor of the indemnified spouse), the Court sided with the minority of States that had found some preemption in similar circumstances[37] and held that:

---

[35] *Howell v. Howell*, 137 S. Ct. 1400, 581 US __, 197 L. Ed. 2d 781 (2017).

[36] *See In re Marriage of Howell*, 361 P.3d 936 (Ariz. 2015); *Surratt v. Surratt*, 148 S.W.3d 761 (Ark. Ct. App. 2004); *In re Marriage of Krempin*, 83 Cal. Rptr. 2d 134 (Cal. Ct. App. 1999); *In re Marriage of Warkocz*, 141 P.3d 926 (Colo. App. 2006); *Blann v. Blann*, 971 So. 2d 135 (Fla. Dist. Ct. App. 2007); *Perez v. Perez*, 110 P.3d 409 (Haw. Ct. App. 2005); *McHugh v. McHugh*, 861 P.2d 113 (Idaho Ct. App. 1993); *In re Marriage of Neilsen and Magrini*, 792 N.E.2d 844 (Ill. App. Ct. 2003); *Bandini v. Bandini*, 935 N.E.2d 253 (Ind. Ct. App. 2010); *In re Marriage of Gahagen*, 690 N.W.2d 695 (Iowa Ct. App. 2004); *Black v. Black*, 842 A.2d 1280 (Me. 2004); *Dexter v. Dexter*, 661 A.2d 171 (Md. Ct. Spec. App. 1995); *Krapf v. Krapf*, 786 N.E.2d 318 (Mass. 2003); *McGee v. Carmine*, 802 N.W.2d 669 (Mich. Ct. App. 2010); *Gatfield v. Gatfield*, 682 N.W.2d 632 (Minn. Ct. App. 2004); *In re Marriage of Strassner*, 895 S.W.2d 614 (Mo. Ct. App. 1995); *Shelton v. Shelton*, 78 P.3d 507 (Nev. 2003); *Whitfield v. Whitfield*, 862 A.2d 1187 (N.J. Super. Ct. App. Div. 2004); *Scheidel v. Scheidel*, 4 P.3d 670 (N.M. Ct. App. 2000); *Bagley v. Bagley*, 2011-Ohio-1272 (Ohio Ct. App. 2011); *Hodge v. Hodge*, 197 P.3d 511 (Okla. Civ. App. 2008); *In re Marriage of Hayes*, 208 P.3d 1046 (Ore. Ct. App. 2009); *Resare v. Resare*, 908 A.2d 1006 (R.I. 2006); *Price v. Price*, 480 S.E.2d 92 (S.C. Ct. App. 1996); *Hisgen v. Hisgen*, 554 N.W.2d 494 (S.D. 1996); *Johnson v. Johnson*, 37 S.W.3d 892 (Tenn. 2001); *Owen v. Owen*, 419 S.E.2d 267 (Va. Ct. App. 1992).

[37] *Clauson v. Clauson*, 831 P.2d 1257 (Alaska 1992); *Ashley v. Ashley*, 990 S.W.2d 507 (Ark. 1999) (conflict with later case); *In re Marriage of Pierce*, 982 P.2d 995 (Kan. Ct. App. 1999); *Copas v. Copas*, 359 S.W.3d 471 (Ky. Ct. App. 2012); *Wright v. Wright*, 594 So.2d 1139 (La. Ct. App. 1992); *Mallard v. Burkart*, 95 So. 3d 1264 (Miss. 2012); *Morgan v. Morgan*, 249 S.W.3d 226 (Mo. Ct. App. 2008); *Kramer v. Kramer*, 567 N.W.2d 100 (Neb. 1997); *Halstead v. Halstead*, 596 S.E.2d 353 (N.C. Ct. App. 2004); *Tirado v. Tirado*, 530 S.E.2d 128 (S.C. Ct. App. 2000); *Gillin v. Gillin*, 307 S.W.3d 395 (Tex. Ct. App. 2009); *Youngbluth v. Youngbluth*, 6 A.3d 677 (Vt. 2010).

> 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."[38]

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."

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.**

[Emphasis added.]

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,[39] and the "savings clause" of the USFSPA making state court judgments not payable under the USFSPA

---

[38] *Citing* 38 U.S.C. § 5301(a)(1) for the principle that "disability benefits are generally nonassignable."

[39] *Rose v. Rose*, 481 U.S. 619, 630–634, and n. 6 (1987).

collectible by way of other State court proceedings[40] – which their own holding in this case prohibited, as it reversed the Arizona order for indemnification.

Cases began popping up all over the country of members who had elected disability after divorce trying to prevent their former spouses from collecting indemnification payments that they had promised to make in long-final divorce decrees.

The first four State Supreme Court cases to address the issue were in Alaska, Michigan, Nevada, and Virginia.

In the Alaska case, *Jones*,[41] the parties had expressly agreed to an indemnification provision in the Property Settlement Agreement of their divorce decree. The Alaska Supreme Court distinguished *Howell* on that basis, explaining that "[a]lthough Howell makes clear that state courts cannot simply order a military spouse who elects disability pay to reimburse or indemnify the other on a dollar for dollar basis, Howell does not preclude one spouse from agreeing to indemnify the other as part of a negotiated property settlement." The Alaska court embraced the observation by one expert commentator: "[i]t's one thing to argue about a judge's power to require ... a duty to indemnify, but another matter entirely to require a litigant to perform what he has promised in a contract."[42] The contractual indemnification provision was approved and enforced.

In the Michigan case, *Foster*,[43] the court found that the contractual indemnification did violate federal law, "impermissibly" dividing military disability pay in violation of federal law, but the court further found, as the California court had on remand in *Mansell* many years earlier, that "the doctrine of res judicata applies even if the prior judgment rested on an invalid legal principle," and "a divorce decree which has become final may not have its property settlement provisions modified except for fraud or for other such causes as any other final decree may be modified." Again, the contractual indemnification provision was enforced.

The Nevada case involved a couple, Erich and Raina, who married in 2002 while Erich was serving in the military. Erich filed a complaint for divorce, and the district court ordered mediation, resulting in a signed marital settlement agreement.

---

[40] 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."

[41] *Jones v. Jones*, 505 P.3d 224, 230 (Alaska 2022).

[42] 2 Mark E. Sullivan, THE MILITARY DIVORCE HANDBOOK: A PRACTICAL GUIDE TO REPRESENTING MILITARY PERSONNEL AND THEIR FAMILIES 691 (3d ed. 2019) (explaining that the *Howell* decision "magnifies the importance of using an indemnification provision in the property settlement" for parties negotiating division of marital property).

[43] *Foster v. Foster*, No. 161892, 2022 WL 1020390 (Mich. Apr. 5, 2022).

The decree allotted to Raina half of Erich's military retirement benefits and provided that Erich was to reimburse Raina for any reduction in that amount if he elected to receive disability pay instead of retirement pay. A year later, the court entered an OID dividing the military benefits, also including a provision under which Erich was to pay Raina directly to make up any deficit created if he applied for disability pay.[44]

Erich retired from the military in 2019, and Raina began receiving her agreed-upon share of Erich's retirement benefits from DFAS. In 2020, DFAS informed Raina that she would no longer be receiving benefit payments from DFAS because Erich opted for full disability pay, waiving all retirement pay. Erich informed Raina that he would not pay her as agreed, claiming he was not required to do so under federal law.

In the subsequent motion for enforcement, the district court issued an order enforcing the divorce decree, finding that federal law did not "divest the parties of their right to contract" to the terms in the divorce decree requiring Erich to reimburse or indemnify Raina for any waiver of military retirement benefits resulting in a reduction of her payments. The district court also concluded that the decree was binding on the parties as *res judicata*, and ordered Erich to pay Raina as he promised.

Erich appealed. The Court of Appeals reversed the order enforcing the divorce decree, largely based on its decision the year before in *Byrd*.[45] The Nevada Supreme Court granted Raina's petition for review, and the American Academy of Matrimonial Lawyers (AAML) filed an amicus brief in support of Raina, in which the Family Law Section of the State Bar of Nevada joined.

The majority of the Nevada Supreme Court adopted the reasoning of both the Alaska court in *Jones*, and the *Michigan* court in *Foster*. It found that federal law did not bar the parties contracting for any kind of payments, noting the mention in *Howell* that parties and courts were directed to "take into account" the contingency of possible waiver and do something about it if they wished, and that the provision was also enforceable as a matter of *res judicata*.

The Court found *Howell* and *Mansell* distinguishable, finding that neither case bars parties themselves from taking into account the possibility that one divorcing spouse may elect to receive disability compensation in the future and structuring the divorce decree accordingly.

The majority found no federal preemption to enforcement of such an agreement, since nothing in 10 U.S.C. § 1408 addresses what contractual commitments a veteran may make to his or her spouse in

---

[44] The language used is part of the standard form used by QDRO Masters to divide military retirement benefits which I created 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 of the intent to contractually indemnify, 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).

[45] *Byrd v. Byrd,* 137 Nev. ___, ___ P.3d ___ (COA Adv. Opn. No. 60, Sept. 30, 2021).

a negotiated property settlement incident to divorce, but only what divisions a state court may impose based on community property laws, noting the history recounted above of the *Mansell* case after remand.

The Court reaffirmed its prior enforcement of such agreements on the basis of *res judicata*,[46] noting that its prior holdings "aligns with the majority practice in state courts following Mansell," and that "divorce decrees that incorporate settlement agreements are interpreted under contract principles."

Two justices concurred, finding that the indemnification provision did run afoul of the prohibition of division of disability benefits, but since it was contained in a long-since-final, unappealed divorce decree, it could not be collaterally attacked as a matter of *res judicata* (claim preclusion).

As of this writing, a motion for rehearing is pending in *Martin*. Since *Martin*, there has been one additional State Supreme Court argument in this subject area, in Virginia, in *Yourko*.[47] As of this writing, that decision is pending.

The bottom line—for now—is that a final, unappealed divorce decree containing a provision for contractual indemnification as set out in our "standard form" will be enforced in Nevada, and apparently elsewhere. As with several issues, further United States Supreme Court cases could alter the reality of what can be done to actually enforce equal division of community property and hold people to the agreements that they make.

III. OTHER MILITARY RETIREMENT ISSUES: THE BLENDED RETIREMENT SYSTEM AND THE FROZEN BENEFIT RULE

A. Blended Retirement System Issues

Since the first Continental Congress, the United States has provided pensions to career military members. During the past 50 years, Congress has repeatedly sought to reduce the cost of military retirement benefits. The calculation went from a percentage of the highest grade held at retirement to a "high 3" calculation similar to that used for federal civil service workers. Service members were offered early retirements and baited with cash pay outs that permanently reduced their future retirement benefits. Each of these was a quick fix that did reduce the overall liability of the federal government to members, but in the end only proved to hurt the service members.

A major change in the actual total pension benefits payable was passed in 2016 and became effective in 2018. Named the "Blended Retirement" plan, it was the biggest re-structuring of military retired

---

[46] *Shelton v. Shelton*, 119 Nev. 492, 78 P.3d 507 (2003).

[47] Va Case No. No. 220039.

pay in decades. Beginning in 2017, current members who had fewer than 12 total years of service when the new plan became effective were able to switch over to the new system or remain in the system that covered them since they joined. It became mandatory for members entering service on or after January 1, 2018.

Under the "Blended Retirement" system, there are four components to military retired pay: a Defined Benefit, a Defined Contribution, Continuation Pay, and Elective Lump Sum of the Defined Benefit.

1. Defined Benefit:

This is similar to the current pension that is paid to a retired member. However, the retired pay multiplier was 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 where retiring at 30 years yields 60% of the high 3 base pay, etc.

Retired pay could be paid in different forms: by constant pension payments, or by 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 Thrift Savings Plan (TSP) is no longer a voluntary option. The military contributes a sum equal to 1% of base pay to each member's TSP account no matter whether the member contributes. The government will match contributions made by the member on top of the guaranteed 1% up to a maximum of 5%.[48] The benefits become fully vested once a member has served at least 2 years. This was considered the "shining star" of the new system as it guarantees that every service member gets *some* retirement no matter how long they serve.[49]

3. Continuation Pay:

To encourage qualified members to remain in the service, "continuation pay" will be offered to all members. Each branch will determine exactly when to offer the "continuation pay" sometime between the 8 and 12 year point of service. For active duty members, the payment will be a sum equal to something 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 including the need for that member's specialty. Reserve personnel are also eligible for this benefit, but in a sum equal to between .5 months base pay and 6 months base pay. Acceptance of continuation pay

[48] 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%.

[49] Any money contributed by the member is fully vested upon contribution. There is a two year service commitment to vest in any contributions made by the government.

incurs a further three year service obligation. The payment can 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.[50] 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.[51]

Members leaving the military before completing 20 years keep the money in their TSP fund, and can move their TSP funds to another 401(k) retirement plan or to an IRA 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.[52] 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.

Every servicemember and lawyer that deals with retirement division in divorce needs to understand the different options afforded the member as this will affect the benefit payable to the former spouse.

Every military order should explicitly deal with all 4 components, including providing explicitly for spousal sharing in the possible lump-sum payout. Counsel for spouses will have to use the state court remedies used for analogous obligations to enforce payment to former spouses if the payment can't be made by DFAS.

The continuation pay should also be explicitly addressed. The conceptual difficulty is that the continuation pay has been explicitly made a component of the altered benefits and lowering of the retired pay that was previously divided with the spouse, but it contains an obligation for ***future*** service.

At this writing, there is no consensus as to how to deal with this substituted portion of the exchange for traditional defined benefit plan benefits.

---

[50] This could be a huge malpractice trap for attorneys. If the unilateral decision is allowed to be made by the member without input, compensation, or sharing, the former spouse's share could be further eroded by reducing the benefit payable for the life of the member.

[51] Some reservists are eligible to receive their retired pay earlier than age 60 based on deployments while serving.

[52] This includes the 1% guaranteed government contribution plus 4% matching for contributing 5% of base pay.

One school of thought looks to the requirement of future service, and considers that it is a reward for future service, and therefore belongs entirely to the member if that future service occurs after divorce from a spouse.

This analysis presumes that the "prior service performed" is not graded or evaluated, but could consider "some" spousal interest in the continuation pay if in practice there is some evaluation of past "merit" a factor in who gets the offer. Given the contingency of future service as a condition of keeping the money, this analysis analogizes stock options awarded for future continued services.[53]

Complicating the analysis is that only those who "opted in" to the new system formally waived a portion of retired pay otherwise payable, for which members compensating the spouse for that choice seems most straight-forward.

The contrary analysis notes that since other components of total retired pay were lowered when this benefit was put into place, it logically must be considered a substitute benefit, so spouses should be entitled to a portion of it as they were entitled to the benefit that this component replaced, as it is a *quid pro quo* of giving up one form of retirement in exchange for another.

Proponents of this analysis propose mathematically allocating the continuation pay between the prior and future service, effectively giving the former spouse a portion of the pay despite it being contingent on future service.

As is true with most major changes to government plans, the "how to" is yet to be decided and challenges in court are quite likely.

B. The Frozen Benefit Rule and What to Do About It

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."[54] The Nevada statute addressing the division of community

---

[53] *See*, *e.g.*, *Chehab v. Hamilton-Chehab*, 45 So. 3d 533, 536 (Fla. DCA 2010) (applying a "coverture fraction" for future stock options comparing the marriage term and vesting period); *Davidson v. Davidson*, 254 Neb. 656, 578 N.W.2d 848 (1998) (restricted stock, granted to encourage husband to remain with employer in the future, was part marital and part separate property, based upon an allocation formula).

[54] *See Forrest v. Forrest*, 99 Nev. 602, 668 P.2d 275 (1983).

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.[55]

Nevada case law[56] mandates use of the "time rule" for all defined benefit pension divisions.[57] 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. 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[58] 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[59] 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. The legislation applies "with respect to any division of property as part of a final decree of divorce, dissolution, annulment, or legal separation involving a member of the Armed Forces to which section 1408 of title 10, United States

---

[55] *See* NRS 125.150.

[56] *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).

[57] 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.

[58] 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.

[59] The Defense Finance and Accounting Service.

Code, applies that becomes final after the date of the enactment of this Act." The legislation was signed into law on December 23, 2016.

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.

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.[60]

[60] In Nevada, for example, such a division is on its face a violation of NRS 125.150 and *Blanco v. Blanco*, 129 Nev. 723, 311 P.3d 1170 (Adv. Opn. No. 77, Oct. 31, 2013). It may also be a violation of constitutional equal protection.

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.[61]

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 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"

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 "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:

[61] *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 beyond the scope of these materials.

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."[62]

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. And as discussed above regarding the *Martin* decision, pre-emption is not assumed, and neither specific nor field pre-emption apply here.

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*.[63]

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

[62] 10 U.S.C. § 1408(e)(6).

[63] *Mansell v. Mansell*, 490 U.S. 581, 109 S. Ct. 2023 (1989).

is directly payable under the revised federal law, be compensated to the spouse by a supplemental property award or alimony.[64]

In Nevada, for example, it is still possible to satisfy the duty under NRS 125.150 to divide property equally.[65] 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*,[66] *Fondi*,[67] and *Sertic*.[68] [Wife] is deemed the irrevocable beneficiary of the Survivor Benefit Plan with the base amount set at the full retirement benefit.[69] 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.[70] 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/decree ***alter*** the DFAS default as to how SBP premiums are to be paid, the language might look like this:

---

[64] Some States that initially did not allow an "alimony solution" to a property equalization need have reconsidered in light of the *Howell* decision. *See*, *e.g.*, *In re Marriage of Cassinelli*, 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), vacated by *Marriage of Cassinelli*, 20 Cal. App. 5th 1267 (2018), 229 Cal. Rptr. 3d 801 (Ct. App. 2018) (holding that the court can still award or recalculate spousal support in light of the changed circumstance of the retirement waiver, however the spousal support award cannot be a dollar-for-dollar match to the waived retired pay because then it is more like reimbursement or indemnification); *see also Jennings v. Jennings*, 2017 Ohio 8974 [2017 Ohio App. Lexis 5406] (2017) (trial court could take the military spouse's disability benefits into account in awarding support to the civilian spouse).

[65] *See also Blanco v. Blanco*, 129 Nev. 723, 311 P.3d 1170 (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).

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

[67] *Fondi v. Fondi*, 106 Nev. 856, 802 P.2d 1264 (1990).

[68] *Sertic v. Sertic*, 111 Nev. 1192, 901 P.2d 148 (1995).

[69] [Wife] must complete and send in DD Form 2656 within one year of this Order .

[70] This order eliminates the need for a further motion to be filed before payments are to begin. *See Henson v. Henson*, 130 Nev. 814, 334 P.3d 933 (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*,[71] *Fondi*,[72] and *Sertic*.[73] [Wife] is deemed the irrevocable beneficiary of the Survivor Benefit Plan with the base amount set at the full retirement benefit.[74] 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.[75] 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. Be advised that the dangers discussed in the ten years rule section of the main CLE materials would be present in any such order.[76]

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 is to defer the actual military retirement benefits division order until actual retirement, making the frozen benefit limitation irrelevant.

---

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

[72] *Fondi v. Fondi*, 106 Nev. 856, 802 P.2d 1264 (1990).

[73] *Sertic v. Sertic*, 111 Nev. 1192, 901 P.2d 148 (1995).

[74] [Wife] must complete and send in DD Form 2656 within one year of this Order .

[75] This order eliminates the need for a further motion to be filed before payments are to begin. *See Henson v. Henson*, 130 Nev. 814, 334 P.3d 933 (2014).

[76] *Divorcing the Military*, *supra*.

IV. THE *WOLFF/HENSON* ERROR AND ITS POSSIBLE FIXES[77]

Under NRS 125.150, Nevada, like California, requires an actual ***equal*** division of community property and debts in the absence of written findings of "compelling reasons" to divide property unequally. In other words, "equal means equal."

The Nevada Supreme Court has repeatedly acknowledged the law, stating in *Blanco*[78] that "With property division in particular . . . we conclude that community property and debt must be divided in accordance with the law. NRS 125.150(1)(b) requires the court to make an equal disposition of property upon divorce, unless the court finds a compelling reason for an unequal disposition and sets forth that reason in writing. The equal disposition of community property may not be dispensed with through default."

A. How to Equally Divide Retirement Benefits

Some retirement plans (like private pensions under ERISA, or for Civil Service) are set up to make an equal and permanent division of benefits easy. In ***those*** systems, it is simple to create a "separate interest" for the spouse, so each party has what amounts to a separate retirement – if the participant dies, the spouse's benefits are unaffected, and if the spouse dies, the participant's benefits are unaffected.

Other retirement plans make an equal division harder to accomplish. PERS, and the military retirement system, do not allow the creation of a "separate interest" for the spouse, no matter what a court orders; only the "payment stream" can be divided. Those systems also have "one-way" survivorship benefits built into their structures.

In those retirement systems, if the spouse dies, before or after retirement, the spousal share reverts to the participant, no matter what any court says; the participant will get the participant's share, ***and*** the spouse's share, for the rest of the participant's life. That is the "one-way survivorship" benefit in those systems. There is no corresponding benefit to the spouse in the participant's life in those systems; if a survivorship benefit is not provided for, the spouse gets ***nothing*** if the participant dies first.

Really, it boils down to a pretty simple concept: to make an "equal division" of retirement benefits actually equal, if the participant has a survivorship benefit in the spouse's life, then the spouse should have a survivorship benefit in the participant's life. Whenever one party has an "automatic" survivorship benefit, in order to make an equal division, the court has to make the division of benefits and burdens actually equal by providing survivorship benefits to the other party, too.

---

[77] A variation of these materials was published as Marshal Willick, *The Continuing Problems with Survivorship Benefits in Nevada Pension Cases*, 35 Nev. Fam. L. Rep., Summer 2022, at 1.

[78] *Blanco v. Blanco*, 129 Nev. 723, 311 P.3d 1170 (2013).

When retirement benefits that only allow dividing the payment stream (like PERS) are involved, in order to give the spouse an equal benefit to that of the participant, the court has to secure the spousal interest. In a system like PERS, doing so requires private life insurance (before retirement), and an award of a survivor's benefit (after retirement). Not doing so is inherently ***un***equal, because one party has greater benefits than the other, even if the pension payments are allegedly being divided 50/50.

The value of such survivorship interests are huge – it varies from case to case, but the survivorship benefits can easily be one-fourth to one-third of the entire value of the retirement benefits. Ignoring that basic truth is a violation of NRS 125.150.

B. The *Wolff* Error

Wolff v. Wolff, 112 Nev. 1355, 929 P.2d 916 (1996), was the appeal of a divorce case in which the husband was a Highway Patrol officer who had benefits through the Nevada Public Employee Retirement System ("PERS").

There were several aspects to the case, each of which was correctly decided as a matter of community property theory, including affirmance of the line of authority, adopted from California case law, that a spouse is entitled to the spousal share of the retirement benefits at the time of the participant spouse's first eligibility to retire.

Along the way, the Court specifically affirmed the lower court's order that the spouse's share of the retirement benefits would ***not*** revert to the participant if she predeceased him, but would instead continue being paid to her estate, explaining that the community interest was divided upon divorce to two sole and separate interests, so her estate was entitled to the payments that she would have received if alive.

The error in the case is that what the Court said is just not true. PERS will ignore any order purporting to require payments to be made to the spouse's estate; the benefits will automatically revert to the participant. In other words, simply declaring the division a permanent and equal one like the Court did in *Wolff* does not make it so; the trial court has to actually ***do*** something to make the division of benefits and burdens in those assets equal.

In *Wolff*, the Supreme Court did not realize that what it pronounced was factually impossible. Based on its error of fact, the Court *reversed* the trial court order for the participant spouse to carry a life insurance policy to protect the spouse's pension interest, claiming that it violated the equal division mandate of NRS 125.150.

In actuality, the Court ***caused*** the violation of the statutory mandate of equal division, because the participant was already and automatically ***secured***. The spouse's death would not affect the participant's benefits in any way (except to ***also*** give the participant the spouse's share of the benefits). But without the insurance until retirement, and a survivorship benefit thereafter, the spouse was entirely ***unsecured*** – the retirement benefits were ***not*** equally divided. The "fact" recited

by the Court was simply false. This is not a matter of interpretation, debate, or decision – it is simply a factual error.

C. Making it Worse; the *Henson* Error Flowing from the *Wolff* Error to Equally Divide Retirement Benefits, and the Error of *Holguin*

The Court's error of fact in *Wolff* led it to make an error of law in *Henson*,[79] where the Court recited, incorrectly, that under PERS, "neither the employee nor the nonemployee spouse automatically receives a survivor beneficiary interest."

As detailed above, that is just not true, but on the basis of that false "fact," the Court held that Decree language saying simply "Equally divide the pension" did not include a survivor beneficiary interest for the spouse unless the survivorship benefit was explicitly recited as being provided.

Henson did not actually do what the opinion said it was doing; instead, it did nearly the opposite, essentially redefining the spousal share of a pension such as PERS or the military from community property into something more like a life estate based on the employee's life. The *Henson* holding therefore amplified the error in *Wolff* and made it even ***harder*** for spouses to get an actual equal division of retirement benefits, by stating that if the litigant or counsel did not know of and deal with it during the original divorce, then too bad.

After *Henson*, if the decree of divorce is silent as to survivor benefits, those benefits are lost to the spouse, dispossessing the spouse if the participant dies first. To the degree that courts (correctly) treat survivorship benefits as "omitted assets" if left out of a Decree, this factually, legally, and equitably wrong result has been partially ameliorated by the passage of the partition statute (NRS 125.150(3)), but the underlying problem, based on a false "fact," should not exist in the first place.

Pensions are property, like any other property, which for some reason seems confusing to many lawyers and judges. To illustrate the conflict between community property theory plus the mandate of NRS 125.150 to equally divide all property, on one side, and the second *Henson* holding, on the other, just apply it to any ***other*** property that might be distributed – for instance, cars. The *Henson* holding, applied to that property, would mean that – unless the decree specifically recited otherwise – if the non-participant spouse died first, the participant gets to keep the participant's own car, and receives the spouse's car too; but if the participant spouse dies first, the non-employee spouse's car is destroyed.

That result would not be tolerated as to any other item of community property, as a violation of the statutory mandate to provide each spouse with a permanent division of an equal share. Permitting the post-divorce destruction of a property interest whenever survivor benefit language is not specifically recited is a violation of community property theory, as the California (and many others) courts have repeatedly held.

---

[79] *Henson v. Henson*, 130 Nev. 814, 334 P.3d 933 (2014).

As succinctly stated by one court, ordering a survivorship benefit, the cost of which is split between the parties, just gives the spouse a right already enjoyed by the participant, that is "the right to receive her share of the marital property awarded to her"; the survivorship is "an equitable mechanism selected by the trial court to preserve an existing asset – the wife's interest in the . . . pension."[80]

Very few lawyers and judges – and almost no *pro se* litigants – understand this. The majority of divorces in Nevada today are between proper person litigants, the overwhelming majority of whom have no idea how retirement or survivorship interests work, or what to recite in a divorce decree to properly distribute those interests. If most Decrees say ***anything*** about retirement benefits, it is along the lines of "spouse should get her time rule interest in the retirement." *Henson* held that if a survivorship benefit is not specifically identified and provided for it is lost.

The result has been that every division of retirement benefits in which the spouse does not have counsel at the time of divorce who understands and specifically addresses the survivorship benefits has resulted in an ***un***equal division of what is, in most cases, the most valuable asset of the marriage. Virtually every divorce involving such retirement plans is resulting in an unequal division of assets, and the spouse is being deprived of the ability to fix it even when it is later discovered.

It is poor public policy to not include the survivorship component of retirement benefits in the definition of "property" that ***must*** be divided upon divorce. The second *Henson* holding directly contradicts the holdings in *Wolff* and *Blanco*, and causes both unjust enrichment and wrongful deprivation in violation of the mandate of NRS 125.150 – all without ***any*** valid purpose being served.

Accordingly, the second *Henson* holding should be overruled in favor of a directive that in ***every*** retirement division in which the plan includes a reversionary interest in favor of the employee (and thus an ***automatic*** survivorship beneficiary interest in the spouse's share of the pension), the divorce court is required to provide an equal benefit to the former spouse, and to balance the cost of all distributed benefits between the parties. In other words, if one party has a survivorship, the other one gets one too.

The Court already held years ago that vague language should be construed to comply with Nevada law unless specifically stating otherwise. In *Walsh*,[81] the Court held that in the absence of express language specifying otherwise, the phrase "one-half of [James'] pension with the United States Government" was construed as referencing only the pension earned during marriage.

Henson should be reversed on the same basis – saying "half the pension" necessarily includes ***all*** of the value of the retirement benefits, including the survivorship benefits.

---

[80] *In re Marriage of Payne*, 897 P.2d 888, 889 (Colo. App. 1995).

[81] *Walsh v. Walsh*, 103 Nev. 287, 738 P.2d 117 (1988).

This will of necessity involve re-visiting references to the erroneous holding of *Henson* in follow-up and derivative cases, such as the incorrect statement in *Holguin*[82] that "Nevada does not consider a survivorship interest to be a community property asset and, as such, does not require a divorce decree to provide a former spouse with a survivor beneficiary interest." For the reasons set out here, all such statements are legal error based on a factual error, and should be expressly disapproved.

D. Several Missed Opportunities to Fix it

The *Wolff* error (now compounded by *Henson*) has been talked about in CLE presentations for over 20 years. Throughout that time, various justices of the Court attending those lectures have privately opined that the factual and legal error is a problem that should be fixed, and asked for the "opportunity to do so."

Based on those requests, it has been repeatedly brought to the Court's attention in appellate filings, but the Court has never acted to fix its errors.

In *Hedlund v. Hedlund*, No. 48944, Order of Reversal and Remand (Unpublished Disposition, Sept. 25, 2009), the State Bar Family Law Section submitted a detailed *Amicus Brief*, explaining the *Wolff* error and the damage it was doing. The Court did not address the issue at all in its disposition.

In *Doan v. Wilkerson*, 130 Nev. 449, 328 P.3d 498 (2014) and *Holyoak v. Holyoak*, No. 67490, Order of Affirmance (Unpublished Disposition, May 19, 2016), the errors were again fully explained; the Court elected not to address it, stating in a footnote in the latter case that the issue was not "before the Court" because the spouse had not filed a formal cross-appeal.

The errors in both *Wolff* and *Henson* were fully laid out yet again in *Peterson v. Peterson*, No. 77478, Order of Reversal and Remand (Unpublished Disposition, May 22, 2020), and again the Court did nothing to correct the case law errors, stating that because counsel for both Appellant and Respondent *agreed* that the district court had made an erroneous decision, they did not have to decide anything, but simply remand for its correction in that case.

It is worth noting that at least three of those decisions involved volunteer lawyers spending many dozens of hours of time *pro bono* for the purpose of improving family law, at the direct invitation of multiple justices of the Nevada Supreme Court, only to have those efforts be disregarded and the errors they were invited to address left uncorrected.

[82] *Holguin v. Holguin*, No. 81373, Order Affirming in Part, Reversing in Part, and Remanding (Unpublished Disposition, July 23, 2021).

E. Could the Court Have Fixed the Errors If They Wanted To?

Of ***course*** the Nevada Supreme Court can correct known errors in the case law at any time; it has done so repeatedly over the years, when it feels so inclined.[83]

Given the clear equal-division mandate of NRS 125.150, and the Court's promise to enforce that mandate in cases like *Blanco*, there is no apparent explanation for the Court's refusal to fix open, obvious, and detrimental errors in its precedent causing unequal division in thousands of divorce cases, despite individual justices repeatedly acknowledging the problem and vowing to fix it "if given the opportunity." The Court, collectively, has never said why it refuses to correct an error laid out before it multiple times. It might be reasonable to just shrug once, or twice, or even three times. But four?

Whatever the actual explanation, the gaffe is an embarrassment in our case law, and the refusal to correct the known error for 25 years despite multiple opportunities to do so is inexcusable.

F. A Legislative Fix; the California Precedent

As noted at the top of this section, the substantive law of mandatory equal division of property is identical in California and Nevada. California has *exactly* the same law as we do for mandatory equal division of community property, and had the same problem with trial court judges not dealing with survivorship benefits, and so actually dividing retirement benefits unequally. The difference between California and Nevada is that at least the appellate courts in California kept issuing decisions telling the district courts to make actual equal divisions.[84]

But the trial courts there continued to do what our trial courts have done – divide property unequally by failing to account for the valuable survivorship benefits and make sure they were equally distributed as well. So California passed a specific statute (Cal. Civ. Code 2610) saying that an equal division includes equally dividing the value of survivorship benefits – not to ***change*** the equal division law, but to get courts to enforce it.

Corrective legislation modeled after the parallel California provision was drafted, debated at great length, and approved by the Nevada AAML Chapter, but since the proposed statute would "just" improve the law instead of benefitting anyone in particular, it had no paid lobbying and failed to gain a hearing in the 2021 Nevada Legislature.

---

[83] *See*, *e.g.*, *Rivero v. Rivero*, 125 Nev. 410, 216 P.3d 213 (2009) ("disaffirming" a holding in *Scott v. Scott*, 107 Nev. 837, 822 P.2d 654 (1991); *Castle v. Simmons*, 120 Nev. 98, 86 P.3d 1042 (2004) (overruling in part *McMonigle v. McMonigle*, 110 Nev. 1407, 887 P.2d 742 (1994); *Wright v. Osburn*, 114 Nev. 1367, 970 P.2d 1071 (1998) (overruling *Barbagallo v. Barbagallo*, 105 Nev. 546, 779 P.2d 532 (1989)).

[84] *See*, *e.g.*, *In re Marriage of Sonne*, 225 P.3d 546, 105 Cal. Rptr. 3d 414 (Cal. 2010), as completed on remand with *In re Marriage of Sonne* [*Sonne II*], 111 Cal. Rptr. 3d 506, 185 Cal. App. 4th 1564 (Ct. App. 2010).

Contemplating legislative action should not be necessary. The Nevada Supreme Court can, and should, correct its own errors, when they have been repeatedly pointed out, as here. But if the Court just won't fix its known mistakes, it falls to the Nevada Legislature to do so.

G. The Propriety of Pointing Out Factual and Legal Error

As noted above, a version of this section of these materials was published in the NFLR. That publication was delayed for a year, apparently because there are those who were very reluctant to publish information that might "offend" our appellate courts by pointing out a known error.

It is not just an option, but a ***duty*** of subject matter experts to bring to the attention of decision-makers known factual and legal errors in existing precedent. Those who will not do so have no right to complain about errors in the law.

H. Conclusions

Equal means equal. When the community property assets before the court – like a PERS pension – provides by default different benefits and burdens to the participant and the spouse, it is the job of the lawyers and judges to nevertheless divide the benefits and burdens – i.e., the ***value*** – of that property equally, even if that requires some actual effort on their part. In too many cases, that is not happening in Nevada divorce courts.

The Nevada Supreme Court bears a large part of the blame for this ongoing problem, not so much for making the original 1996 error in *Wolff*, where it was probably not briefed and presented by the counsel who argued the case, but for failing for a quarter century to fix the mistake after it was identified, and then making unequal distributions even worse in *Henson* in 2014, magnifying the scope and impact of its error in *Wolff*.

From elementary school on, most of us are told to clean up our own messes; it is the decent thing to do. For whatever reason, on the subject of equal distribution of retirement and survivorship benefits, the Nevada Supreme Court has refused at least four opportunities to do so. If the Court will not comply with the statutory mandate of actual equal division of community property, it falls to the Nevada Legislature to fix the Court's mistakes.

V. THE TIME RULE AND DEFINED CONTRIBUTION PLANS

A defined contribution plan is one in which a specified amount is contributed by the employer and/or the employee into an individual account and invested on the employee's behalf. The most common examples of defined contribution plans are IRAs, SEPs, 401(k), and the federal TSP plans. The key concept for such plans is that they have a specific balance of funds belonging to each particular employee.

Such plans usually provide a statement of each participant's account at least annually. Defined contribution plans generally pay lump sums, but they may offer other forms of benefits.

Most States that have brought themselves to issuing any guidelines at all for the distribution of pension plans have done so in defined benefit plan cases. The cases tend to espouse rules for the division of the case at issue without limiting language concerning whether different rules might be better applied if the retirement plan was some other ***kind*** of retirement plan.

Traditionally most retirement plans available to workers have been "defined benefit" plans but this has changed as many companies terminated such plans, in or out of bankruptcy, and converted to "cash plans" or defined contribution plans, at least for all new workers. This set up a situation in which the controlling decisional law was developed to distribute an entirely different kind of benefits (defined benefit plans) than will actually be at issue in many divorce cases (defined contribution plans).

In Nevada, ***all*** of the published authority has addressed defined-benefit "pension" plans, not defined-contribution "retirement account" plans.[85] One former Clark County family court judge would not permit anyone to present evidence of actual tracing, reasoning that the case law all addresses the time rule. But the judge ignored the fact that the cases in question all concerned defined benefit plans; no one apparently took any of the cases up on appeal.

The "time rule" gives equal weight to each year in which an employee participated in a pension plan, even as wages rose over time, on the theory that the earliest and latest years of employment are equally necessary to receipt of the ultimate benefit. That is why a 20-year employee, who was married to one spouse for the first 10 years of a career, and to a second for the last 10, would split 25% of the ultimately-resulting pension with each former spouse under the time rule, rather than a much smaller sum with spouse one than with spouse two.

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

The valuation problem for defined contribution plans has not received nearly enough attention in the case law. If the marriage was not ***completely*** coextensive with the period of contributions, and there was ***any*** variation in the relative rate of contribution over time, a standard time-rule analysis to value the spousal share might not be appropriate at all.

By way of example, presume an employee with a 20-year career, who was married during the last ten years of that career, and presume that, like many such workers, the employee had increasing wages over time and deposited increasing sums to a defined-contribution plan, or only contributed

---

[85] *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); *Wolff v. Wolff*, 112 Nev. 1355, 929 P.2d 916 (1996); *Henson v. Henson*, 130 Nev. 814, 334 P.3d 933 (2014).

to the plan in some years, but not others, and that the plan did better in some years than in others (which is true for ***all*** market-invested plans).

In this scenario, the ultimate sums received would ***not*** be equally attributable to the earlier and later years of plan participation, or even just to contributions over those years. The ultimate sum received would be attributable to all of the contributions to the plan, large or small, and the growth/dividends on those contributions over time. Granting equal weight to all such contribution years regardless of the sums contributed and the actual earnings on those contributions would unfairly weight those years, skewing the ultimate distribution for or against the equitable interests of the parties.

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.[86] The scant case authority squarely addressing this issue has agreed with that proposition.[87]

In many cases, this is not particularly difficult, and even where there are gaps in the data, our QDRO Masters division has been able to interpolate data sufficiently to be able to derive a much more equitable distribution than would have occurred under the time rule. Sometimes, the difference in distributions is remarkably large.

Every attorney dealing with a defined contribution account should attempt to do an actual tracing evaluation rather than simply accepting a time-rule distribution; the failure to do so could lead to an enormous inequity in distribution, and potential malpractice liability.

---

[86] *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).

[87] *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)).

VI. RECENT CHANGES IN TSP ADMINISTRATION

Every attorney dealing with federal employees or military members who participate in the Thrift Savings Plan—which is essentially all of them—should be aware that the administration of those plans has recently changed.

Specifically, the Thrift Savings Board has outsourced administration of the plans to third party administrators:

TSP Court Order Center
C/O Broadridge Processing
P.O. Box 120
Newark, NJ 07101-0120

fax 1-773-915-6006
email courtorder@tsp.gov

Further information is available at the third party administrator's web site: https://qoc.rk.tsp.gov/qoc/b/CsHome010Home.htm

Unhappily, TSP processing of RBCOs is no longer free – there is a $600 fee, and anecdotal evidence indicates that some people, but not others, have been able to get the administrator to split that cost between a participant and a spouse. It also appears that the new administrators will be less flexible than previously with the form of orders that will be deemed acceptable for processing. Previously, TSP orders were among the simplest to produce, but that appears to have changed.

VII. CONCLUSIONS

Retirement benefit issues remain as flashpoints for conflict, and the law concerning them and their attributes, including survivor's benefits, disability benefits, and other aspects, continues to change by way of legislation and case law.

Most cases in the modern world will involve at least one aspect of some retirement benefit—defined contribution, defined benefit, and through Nevada PERS, the military, the Civil Service, or private employment governed by ERISA. Some cases will involve multiple benefits, administered by multiple administrators under different laws, rules, and regulations.

Every family law attorney who has a client with any form of retirement benefits simply has to stay abreast of the changing law governing the benefits at question, or have the ability to obtain assistance where necessary, to competently deal with what is, and is likely to remain, the most valuable asset of each marriage.