

# **CRITICAL ISSUES IN FEDERAL AND STATE RETIREMENT BENEFITS**

by

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## I. INTRODUCTION; ALPHABET SOUP

### A. Why Bother Dealing With Pensions? Duty and Liability

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

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 their marital residence.

It is the *far* better practice to deal with retirement benefits fully and accurately during the divorce itself, instead of deferring the matter to be dealt with "later."<sup>2</sup> Some States do not permit a spouse who does *not* receive a portion of pension benefits to bring a partition action at a later date to divide those benefits, and parties often relocate after divorce. The jurisdictional rules could require the matter to be resolved in such States.

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

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

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

retirement benefits that might exist.<sup>3</sup> An offhand remark by a reviewing court could point a litigant directly toward seeking compensation by erring counsel.<sup>4</sup>

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

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

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

Starting in the late 1960s, some States were coming to recognize the importance of pension, retirement, and other deferred benefits in divorce actions.<sup>6</sup> The 1970s saw the law of property division throughout the country evolve toward “equitable distribution,” which increasingly resembled a community property scheme in which divorce courts were to ascertain, and divide, the property acquired by both parties during the marriage.

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

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

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

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

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

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

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

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

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

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<sup>7</sup> 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.

<sup>8</sup> Pub. L. No. 93-406, 88 Stat. 829 (Sept. 2, 1974).

<sup>9</sup> 29 U.S.C. § 1056(d)(1); Internal Revenue Code (“IRC”) § 401(a)(13)(A).

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

<sup>11</sup> Pub. L. 98-397, 98 Stat. 1426 (Aug. 23, 1984).



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

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

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

It was, and Congress reacted by enacting the Uniformed Services Former Spouses Protection Act (“USFSPA”) on September 8, 1982.<sup>16</sup> The declared goal of the USFSPA at the time of its passage

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

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

<sup>14</sup> *McCarty v. McCarty*, 453 U.S. 210, 101 S. Ct. 2728 (1981).

<sup>15</sup> 453 U.S. at 235-36, 101 S.Ct. at 2743.

<sup>16</sup> Also commonly known as the “Federal Uniformed Services Former Spouses Protection Act,” or FUSFSPA, or as “the Former Spouses Act,” or in some references simply as “the Act.” 10 U.S.C. § 1408 (amended every year or two since 1983).

was to “reverse *McCarty* by returning the retired pay issue to the states.”<sup>17</sup> By fits and starts, every State in the Union eventually permitted military retirement benefits to be divided as property.<sup>18</sup>

The primary purpose of the USFSPA was to define state court jurisdiction to consider and use military retired pay in fixing the property and support rights of parties to a divorce; the point here is that the federal statute was essentially an enabling act permitting States to address the subject, so treatment of retired pay was again made dependent on State divorce laws. There is no specific title required for a military pension division order, but orders dividing military retirement benefits have come to be known as Military Benefit Division Orders, or “MBDOs.”

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

The entire system was altered for incoming employees in a “new” system (“Federal Employees’ Retirement System,” or “FERS”), for those who began service on or after January 1, 1984.<sup>19</sup>

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<sup>17</sup> “The purpose of this provision is to place the courts in the same position that they were in on June 26, 1981, the date of the *McCarty* decision, with respect to treatment of nondisability military retired or retainer pay. The provision is intended to remove the federal pre-emption found to exist by the United States Supreme Court and permit State and other courts of competent jurisdiction to apply pertinent State or other laws in determining whether military retired or retainer pay should be divisible [*sic*]. Nothing in this provision requires any division; it leaves that issue up to the courts applying community property, equitable distribution or other principles of marital property determination and distribution. This power is returned to the courts retroactive to June 26, 1981. This retroactive application will at least afford individuals who were divorced (or had decrees modified) during the interim period between June 26, 1981 and the effective date of this legislation the opportunity to return to the courts to take advantage of this provision.” S. Rep. No. 97-502, 97th Cong., 2nd Sess. 15, (1982), reprinted in 1982 U.S. Code Cong. & Ad. News 1596, 1611. See also *Steiner v. Steiner*, 788 So. 2d 771 (Miss. 2001), *opn. on reh’g*; *Mansell v. Mansell*, 490 U.S. 581, 109 S. Ct. 2023 (1989) (some partial federal pre-emption may remain after passage of the USFSPA).

<sup>18</sup> Legislative History, Pub. L. No. 97-252; S. Rep. No. 97-502. As of June 26, 1981, all community property States, and most equitable distribution States, treated military retired pay as marital property subject to division. The two last “title” states, Mississippi and West Virginia, have since then adopted equitable distribution schemes. However, Puerto Rico – a commonwealth territory of the United States – does not allow the division of military retired pay.

<sup>19</sup> 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.<sup>20</sup> An order dividing Civil Service retirement benefits is required by regulation to be titled “COAP.”<sup>21</sup>

The new system also created a defined contribution retirement account called the “Thrift Savings Plan” (“TSP”).<sup>22</sup> In 2001, the defined benefit program was also made available to those in the armed forces. An order dividing a TSP account is a “RBCO.”<sup>23</sup>

And, virtually simultaneously with the federal efforts, the various States starting cooking up new or refined retirement schemes for those employed by State governments.

In South Dakota, State public employees fall under the South Dakota Retirement System (“SDRS”), which has existed since 1974. SDRS includes four classes of members: Class A general members, Class B public safety and judicial members, Class C Cement Plant members, and Class D Department of Labor members. (Class C Cement Plant members: Former members of the Cement Plant Retirement Plan were merged into SDRS effective April 1, 2014; Class D Department of Labor members: Former members of the Department of Labor Pension Plan were merged into SDRS effective July 1, 2020.)

The SDRS is divisible via QDRO.<sup>24</sup> Not only can the QDRO award a share of the pension to the former spouse during her lifetime, but her share can continue to be paid to her estate if she predeceases the member.<sup>25</sup>

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<sup>20</sup> 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.

<sup>21</sup> “Court Order Acceptable for Processing.” 5 C.F.R. § 838.803.

<sup>22</sup> 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.

<sup>23</sup> For “Retirement Benefits Court Order.”

<sup>24</sup> Under ERISA, an order dividing a pension is a Domestic Relations Order (DRO). It becomes qualified if it meets the requirements of ERISA then making it a QDRO. SDRS is not subject to ERISA but like many states, they have adopted the term “QDRO” as a pension division order. This is part of the reason there is so much confusion among attorneys as to what law applies to what kind of benefits.

<sup>25</sup> See *Divitch v. Divitch*, 665 NW 2d 109, 2003 SD 73 (2003).

The SDRS also includes an optional Defined Contribution Plan called the Supplemental Retirement Plan (SRP). Contributions can be pre-tax and/or Roth (after tax), depending upon the tax advantage preference. This plan is subject to ERISA and is divisible via QDRO.<sup>26</sup>

### **C. The Modern Landscape of Pensions in Divorce Cases**

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

The resulting legal landscape is one where few parties appreciate the importance of retirement benefits, and relatively few lawyers understand what they are and how they work. This has led to massive confusion, delay, and accidental loss in family law, estate planning, and every other field touching upon the property of husbands and wives. It also created a cottage industry of folks claiming to “help” with all these assets and programs, the large majority of whom are mere form peddlers with no real clue of what they are doing or how anything works, who often make things worse.

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

#### **1. State Versus Federal Law**

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

First, the question of whether retirement benefits are divisible and, if so, how they should be divided, is overwhelmingly a matter of *State* law. As the United States Supreme Court put it: “We have consistently recognized that ‘the whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States.’”<sup>27</sup>

Generally, therefore, States are free to distribute property as they see fit, and every variety of retirement benefit is a property interest, and therefore at issue upon divorce. Sometimes, however,

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<sup>26</sup> To learn more, please visit the SDRS website at <https://www.sd.gov/sdrs>.

<sup>27</sup> *Rose v. Rose*, 481 U.S. 619, 625, 107 S. Ct. 2029, 95 L. Ed.2d 599 (1987).

Congress wishes to “occupy the field” in a particular question of law, and generally, it has the power to do so, even when it results in unintended consequences of unjust enrichment and inequity.<sup>28</sup>

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

Because domestic relations are preeminently matters of state law, we have consistently recognized that Congress, when it passes general legislation, rarely intends to displace state authority in this area. Thus we have held that we will not find preemption absent evidence that it is “positively required by direct enactment.”<sup>29</sup>

On the rare occasion when state family law has come into conflict with a federal statute, this Court has limited review under the Supremacy Clause to a determination whether Congress has “positively required by direct enactment” that state law be pre-empted. . . . Before a state law governing domestic relations will be overridden, it “must do ‘major damage’ to ‘clear and substantial’ federal interests.”<sup>30</sup>

It is for this reason that State divorce courts can, for example, order that a spouse of a military member is entitled to 100% of the retirement benefits, although disposable retired pay is defined by federal law as not more than 50% of such benefits.<sup>31</sup> Even in ERISA cases – arguably the single most highly pre-empted area of retirement benefits – Congress may require that various benefits of federal employees are or are not in existence, but it is for the States to determine who should get what benefits upon divorce.<sup>32</sup>

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<sup>28</sup> See *Carmona v. Carmona*, 603 F.3d 1041 (9<sup>th</sup> Cir. 2010) (revised op’n on rehearing) (permitting a former spouse who had bargained away certain benefits for value to nevertheless make a claim to them despite her agreement, the order of the divorce court, and the wishes of the employee, due to the happenstance of the timing of divorce and retirement, and the preemptive scope of ERISA).

<sup>29</sup> *Mansell v. Mansell*, 490 U.S. 581, 587, 109 S. Ct. 2023, 2028 (1989), quoting *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 581, 99 S. Ct. 802, 808, 59 L. Ed. 2d 1 (1979) (quoting *Wetmore v. Markoe*, 196 U.S. 68, 77, 25 S. Ct. 172, 176, 49 L. Ed. 390 (1904)).

<sup>30</sup> *Rose v. Rose*, 481 U.S. 619, 625, 107 S. Ct. 2029, 95 L. Ed.2d 599 (1987).

<sup>31</sup> See, e.g., *Ex parte Smallwood*, 811 So. 2d 537 (Ala. 2001), cert. denied, 534 U.S. 1066 (2001); *Grier v. Grier*, 731 S.W.2d 931 (Tex. 1987) (USFSPA did not limit the amount of retirement benefits that could be apportioned under Texas community property law, but only the percentage subject to direct payment); *Deliduka v. Deliduka*, 347 N.W.2d 52 (Minn. Ct. App. 1984).

<sup>32</sup> “When Congress provided that a benefit should be available to ‘surviving spouses,’ see, e.g., 29 U.S.C. § 1055(a)(2), it expressly left to state law the determination of the *identity* of such surviving spouse.” *Torres v. Torres*, 60 P.3d 798, 817 (Haw. 2003).

Most recently, the United States Supreme Court weighed in on divisibility of military disability benefits that are claimed after a divorce.<sup>33</sup> Prior to this decision, the majority of states had determined that a post-divorce waiver of retirement benefits for a disability award should result in indemnification by the member to the former spouse as a matter of state law. Now, lawyers must be aware that a former spouse's share of military benefits could be reduced or eliminated by a disability award to the military member and could result in a malpractice trap for the unwary. A reservation of jurisdiction over alimony or a valuation of the benefits offsetting other property at the time of divorce should be considered.

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

In Nevada, for example, the legislative history of NRS 125.155 reveals that most of those commenting seemed to understand the difference between defined benefit (pension) plans, and defined contribution (account balance) plans. But the history indicates that the Legislature was repeatedly told that the PERS plan was "unique" in refusing to actually make payments to a former spouse until the retiree actually retires.

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

Courts, properly, tend to be deferential to the legislative branch in construing legislative enactments.<sup>34</sup> But that deference is misplaced where the legislative record shows that the laws were structured based upon mistaken facts. Courts are sometimes required to go to some lengths to fashion orders complying with plan requirements while still satisfying their primary duty to do equity to the parties before the court.<sup>35</sup>

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<sup>33</sup> See *Howell v. Howell*, 137 S. Ct. 1400, 581 US \_\_\_, 197 L. Ed. 2d 781 (2017).

<sup>34</sup> See *Edgington v. Edgington*, 119 Nev. 577, 80 P.3d 1282 (2003) (the legislative intent behind ambiguous terms must be ascertained from the statute's terms, and its objectives and purpose, "in line with what reason and public policy" dictate).

<sup>35</sup> See, e.g., *Waltz v. Waltz*, 110 Nev. 605, 877 P.2d 501 (1994), in which the Nevada Supreme Court had to construe poor phrasing as an allocation of "permanent alimony" in order to provide payments clearly agreed to, but technically disallowed by the so-called "10 year rule" limiting allocations of military retirement benefits as property.

## 2. General Marital Property and South Dakota Law

Pensions have been recognized as marital property by the majority of States for many decades,<sup>36</sup> and that recognition was extended to unvested<sup>37</sup> and unmatured<sup>38</sup> pension benefits long ago.<sup>39</sup> Statutory and case law throughout the country now recognizes pension benefits as marital property with near-uniformity.<sup>40</sup>

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

As stated above, South Dakota recognizes that pensions – both vested and unvested – are divisible marital property.

## II. IDENTIFICATION OF PENSION PLANS IN DIVORCE ACTIONS

### A. Means of Acquiring Information

#### 1. The Client Interview

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

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<sup>36</sup> See *LeClert v. LeClert*, 453 P.2d 755 (N.M. 1969); *Busby v. Busby*, 457 S.W.2d 551 (Tex. 1970); *In re Marriage of Fithian*, 517 P.2d 449 (Cal. 1974) (recognizing the importance of retirement benefits as a marital asset).

<sup>37</sup> A “vested” pension is one that, having been earned and accrued, is beyond the power of the issuing authority to withdraw. See *LeClert v. LeClert*, 453 P.2d 755 (N.M. 1969) (exploring definitions of “vestedness” and “maturity” of retired pay).

<sup>38</sup> *Id.* A “matured” pension is one in which a particular employee is eligible for present payments from a plan.

<sup>39</sup> See *In re Marriage of Brown*, 544 P.2d 561 (Cal. 1976); *Copeland v. Copeland*, 575 P.2d 99 (N.M. 1978); *In re Marriage of Luciano*, 104 Cal. App. 3d 956, 164 Cal. Rptr. 93 (Cal. Ct. App. 1980); *Forrest v. Forrest*, 99 Nev. 602, 668 P.2d 275 (1983).

<sup>40</sup> See *Divitch v. Divitch*, 665 NW 2d 109, 2003 SD 73 (2003).

## 2. Informal and Formal Discovery

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

The United States Civil Service also generally requires a release form or subpoena. In military cases, the pay centers should release, upon request, date of first eligibility to retire, date of first eligibility to receive retirement benefits, date of retirement, last unit assignment, final rank, grade, and pay, present or past retired pay, or other such information as may be required to enforce an award or revise it so as to make it enforceable.<sup>41</sup> The military will not respond to a subpoena issued by the Clerk of Court's office, but requires an original judge's signature. Military information requests must be directed to the proper branch of service.

It is a good practice to request all materials relating to pension or retirement benefits (and, perhaps, a release form to obtain back-up and supplemental documentation) at the joint case conference or other early case management meeting. Later, interrogatories or requests to produce can be sent for updated information. Cases indicate that this is another area where just failing to affirmatively seek out information could lead to liability on the part of the lawyer.<sup>42</sup>

### B. Knowing It When You See It

#### 1. The Basics to Watch For

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

1. **What** will be available (and the form – whether a monthly annuity, or with a lump sum option), and whether there might be more than one plan associated with a particular wage-earner.<sup>43</sup>

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<sup>41</sup> 65 Fed. Reg. 43298 (July 13, 2000), providing that in addition to any disclosures permitted under 5 U.S.C. § 552a(b) of the Privacy Act, a former spouse who receives payments under 10 U.S.C. § 1408 (i.e., the USFSPA) is entitled to information, as a "routine use" pursuant to 5 U.S.C. § 552a(b)(3), on how their payment was calculated to include what items were deducted from the member's gross pay and the dollar amount for each deduction.

<sup>42</sup> See T. Harrison, "IRS Grabs Ex-Wife's Pension Share; Malpractice 'Warning Bell' for Divorce Lawyers," *Lawyers Weekly USA*, Sept. 27, 1993, at 1.

<sup>43</sup> As an example, in South Dakota where a public employee is involved, there are two pensions – the SDRS defined benefit plan and the SRP defined contribution plan.



2. The **amount** of the benefit that is divisible marital property, under the time rule, direct tracing, or some other analysis.
3. **When** that sum is to be **first available** for distribution, and what steps might be taken by either party to accelerate or delay that availability.
4. What, if any, **survivor benefits** might be accorded to a former spouse in addition to or in place of the retirement benefits, and who will pay for them.
5. Whether any **ancillary** benefits are available (most importantly, medical benefits).

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

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

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

It is worth noting that not every spousal interest affects the wage-earner. Most commonly, for example, a spousal entitlement to make a claim for Social Security benefits under a worker's experience rather than his or her own work experience has no effect at all on the sum payable to the wage-earner. And many courts have expressly forbidden the direct allocation of those benefits,<sup>44</sup> or their use as offsets or purporting to indirectly "take them into consideration" in distributing property.<sup>45</sup>

Practitioners should distinguish the "value" of a plan from the "benefits" it is expected to provide, and distinguish both of those terms from "contributions." The **value** of a pension interest is generally considered to be equal to the cost, at any given time, of acquiring an annuity that would pay equivalent benefits. **Benefits**, on the other hand, are what the retiree will actually receive upon

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<sup>44</sup> See, e.g., *Boulter v. Boulter*, 113 Nev. 74, 930 P.2d 112 (1997).

<sup>45</sup> *Wolff v. Wolff*, 112 Nev. 1355, 929 P.2d 916 (1996) (social security benefits are not "a form of deferred compensation, and therefore not . . . community property subject to division between the spouses" and cannot be given any consideration in "offsetting" one spouse's community property interest in the other spouse's retirement benefits. Acerbically, the Court added that it does not make any difference how indirect or disguised the consideration is, because "Calling a duck a horse does not change the fact that it is still a duck").

retirement,<sup>46</sup> usually phrased as a right to receive certain sums on a certain schedule. *Contributions*, whether from the employee, the employer, or both, do not necessarily have any correspondence to either the benefits of a plan or its value at any given time. Failure to perceive these distinctions can lead to gross over- or under-valuation of the assets at issue.

It is important to note that pension interests are property and not alimony. The Nevada Supreme Court has expressed its intention to stress the distinction based upon the non-modifiability of pension awards, whereas alimony is generally modifiable, and to generally prohibit classifying one kind of payment as the other.<sup>47</sup>

## **2. Vestedness and Maturity; Red Herrings**

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

### **C. The Time Rule**

#### **1. Defined Benefit Types of Plans**

A defined *benefit* plan (often called a pension plan or retirement plan) is usually funded by employer contributions (although in some plans employees can contribute) and is intended to provide certain specified benefits to the employee after retirement, usually for life. Often, the benefit is determined by a formula taking into account the highest salary received and the total number of years worked for the employer (such as a “high-three” or “high five” plan).

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<sup>46</sup> Definitions vary between and among retirement systems. Here, “retirement” means that an employee has stopped working *and* that retirement benefits are payable to that individual. Given the many ways in which an employee may stop working prior to eligibility for retirement benefit payments, care must be taken in definitions when engaging actuaries or accountants, or negotiating these cases.

<sup>47</sup> See *Wolff v. Wolff*, 112 Nev. 1355, 929 P.2d 916 (1996); *Walsh v. Walsh*, 103 Nev. 287, 738 P.2d 117 (1987); *Carrell v. Carrell*, 108 Nev. 670, 836 P.2d 1243 (1992). The logic of these holding is open to some question, since the Court in other contexts has had no trouble with the proposition of awarding alimony in compensation for, among other things, a superior property position of the paying spouse. See *Heim v. Heim*, 104 Nev. 605, 763 P.2d 678 (1988) (husband, whose future earning capacity was a community asset that could have been made the subject of trial proceedings, ordered to make permanent alimony payments).

For example, a plan might pay one-tenth of an employee's average monthly salary over the three years before retirement, multiplied by one-fourth the number of years that the employee worked. A twenty-year employee earning an average of \$2,000 per month during his last years would get \$1,000 per month (i.e.,  $\$2,000 \times .1 \times 20 \times .25$ ). Generally, no lump-sum distributions can be distributed from defined benefit plans.

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

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

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

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

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

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

In California, the spousal share ceases to accumulate upon "final separation."<sup>48</sup> So the math would be  $10$  (years of marriage)  $\div$   $20$  (years of service)  $\times$   $.5$  (spousal share)  $\times$   $\$1,000$  (pension payment) =  $\$250$ .

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<sup>48</sup> See, e.g., *In re Marriage of Bergman*, 168 Cal. App. 3d 742, 214 Cal. Rptr. 661 (Cal. Ct. App. 1985).

Arizona terminates community property accruals, for the most part, on the date of filing and service of a petition for divorce.<sup>49</sup> On the same facts, the math would be  $10.5$  (years of marriage)  $\div$   $20$  (years of service)  $\times$   $.5$  (spousal share)  $\times$   $\$1,000$  (pension payment) =  $\$262.50$ .

In Nevada, community property ceases to accrue on the “date of divorce.”<sup>50</sup> The math would be  $12$  (years of marriage)  $\div$   $20$  (years of service)  $\times$   $.5$  (spousal share)  $\times$   $\$1,000$  (pension payment) =  $\$300$ .

Under South Dakota law, marital property is that which is acquired or is a direct result of the labor and investments of the parties during the marriage, and is subject to equitable division. Equitable division does not necessarily mean marital property is divided equally, it is divided in manner that results in a fair or equitable result for each spouse.

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

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

As a matter of law, it is possible to value the spousal share in at least two ways. The majority of States applying the time rule formula seem to view the “marital” years of effort *qualitatively* rather than quantitatively, reasoning that the early and later years of total service are equally necessary to the retirement benefits ultimately received.<sup>51</sup>

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

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<sup>49</sup> Ariz. Rev. Stat. § 25-211 (1998).

<sup>50</sup> See, e.g., *Forrest v. Forrest*, 99 Nev. 602, 606, 668 P.2d 275, 278 (1983). While there is scant published authority for the proposition, this had usually been thought to mean the date of the divorce trial. In *Kogod v. Cioffi-Kogod*, 135 Nev. \_\_\_, 439 P.3d 397 (Adv. Opn. No. 9, Apr. 25, 2019), the Nevada Supreme Court changed that rule to mean the date of the divorce decree being entered. By local rule, at least in Clark County, the prior rule has been restored.

<sup>51</sup> See, e.g., *Marriage of Poppe*, 97 Cal. App. 3d 1, 158 Cal. Rptr. 500 (1979); *Bangs v. Bangs*, 475 A.2d 1214 (Md. App. Ct. 1984); *Gemma v. Gemma*, 105 Nev. 458, 778 P.2d 429 (1989); *In re Hunt*, 909 P.2d 525 (Colo. 1995); *Croley v. Tiede*, \_\_\_ S.W.3d \_\_\_, 2000 WL 1473854 (Tenn. Ct. App., No. M1999-00649-COA-R3-VC, Oct. 5, 2000). Such jurisdictions typically add a hedge; the trial court can reserve jurisdiction to determine, after retirement, whether the benefits proved to be much greater than expected because of extraordinary “effort and achievement” (as opposed to “ordinary promotions and cost of living increases”), in which case the court could recalculate the spousal interest. See, e.g., *Fondi v. Fondi*, 106 Nev. 856, 802 P.2d 1264 (1990).

Some critics complain that such a formula gives the non-employee former spouse an interest in the employee spouse's post-divorce earnings, at least where the divorce occurs while the employee is still working. They argue that the spousal share should be frozen at the earnings level at divorce; a minority of States, including Texas, have adopted this approach, sometimes in cases that do not appear to have contemplated the actual mathematical impact of the decision reached.<sup>52</sup>

Certain other States, while rejecting the Texas approach, have nevertheless left the door open to an employee spouse establishing that increases in retirement benefits are “attributable to post-dissolution efforts of the employee spouse, and not dependent on the prior joint efforts of the parties during the marriage,” and therefore are the separate property of the member.<sup>53</sup> Such cases invite fact-intensive hair-splitting since, as the Nevada Supreme Court observed, there is an expectation of pension increases by way of “ordinary promotions and cost of living increases, in contradistinction to the increased income the employee spouse achieved because of post-marriage effort and accomplishments.”<sup>54</sup>

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

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

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

Yearly Salary	Monthly Salary
\$20,000.00	\$1,666.67
\$21,000.00	\$1,750.00
\$22,050.00	\$1,837.50
\$23,152.50	\$1,929.38
\$24,310.13	\$2,025.84
\$25,525.63	\$2,127.14
\$26,801.91	\$2,233.49
\$28,142.01	\$2,345.17

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<sup>52</sup> See, e.g., *Grier v. Grier*, 731 S.W.2d 931 (Tex. 1987). Also See *Weiland v. Weiland*, 951 NW 2d 519, 307 Neb. 882 (2020).

<sup>53</sup> *Barr v. Barr*, \_\_\_ A.2d \_\_\_ (N.J. Super. Ct. App. Div. No. A-1389-09T2, Jan. 19, 2011).

<sup>54</sup> *Gemma v. Gemma*, 105 Nev. 458, 463, 778 P.2d 429, 432 (1989).

\$29,549.11	\$2,462.43
\$31,026.56	\$2,585.55
\$32,577.89	\$2,714.82
\$34,206.79	\$2,850.57
\$35,917.13	\$2,993.09
\$37,712.98	\$3,142.75
\$39,598.63	\$3,299.89
\$41,578.56	\$3,464.88
\$43,657.49	\$3,638.12
\$45,840.37	\$3,820.03
\$48,132.38	\$4,011.03
\$50,539.00	\$4,211.58

If this hypothetical employee had a standard longevity retirement defined benefit plan the above wage history would make his average monthly salary during his last three years \$4,014.21, and a standard “high-three” retirement formula<sup>55</sup> would make his retired pay \$2,007.11.

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

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

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

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

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

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<sup>55</sup> Years of service x 2.5% x high-three average pay.

Perhaps the clearest expositions of the reasoning behind the two approaches are found in those cases in which a reviewing court splits as to which interpretation is most correct. The Iowa Supreme Court faced such a conflict in *Benson*.<sup>56</sup> The trial court had used a time-rule approach, with the wife's percentage to be applied to the sum the husband actually received, whenever he actually retired.

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

Quoting at length from a law review article analyzing the mathematics of the situation, the court found that acceptance of the husband's argument would have allowed him to collect the entirety of the accumulating "earnings" on the marital property accumulated by both parties. Three judges dissented.<sup>57</sup>

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

#### 4. Variations Regarding Payment Upon Eligibility

Several State courts have held that the interest of a former spouse in retired pay is realized at *vesting*,<sup>58</sup> theoretically entitling the spouse to collect a portion of what the member *could* get at that time irrespective of whether the member actually retires.<sup>59</sup> As phrased by the California court in

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<sup>56</sup> *In re Benson*, 545 N.W.2d 252 (Iowa 1996).

<sup>57</sup> The Iowa court apparently did not even consider the possibility of having the wife's interest begin being paid to her at the employee's first eligibility for retirement, "freezing" it at that point and letting the husband enjoy all accumulations after that time. Presumably, this is because that possibility was not litigated at the trial level. That is the result in most or all community property States, however, and case law has made it clear that a spouse choosing to accept retirement benefits at first eligibility has no interest in any credits accruing thereafter, having made an "irrevocable election." See *In re Harris*, 27 P.3d 656 (Wash. Ct. App. 2001), and the citations set out in the following section.

<sup>58</sup> A "vested" pension is one that, having been earned and accrued, is beyond the power of the issuing authority to withdraw from payment. See *LeClert v. LeClert*, 453 P.2d 755 (N.M. 1969) (exploring definitions of "vestedness" and "maturity" of retired pay).

<sup>59</sup> See *In re Marriage of Luciano*, 164 Cal. Rptr. 93, 104 Cal. App. 3d 956 (Ct. App. 1980); *In re Marriage of Gillmore*, 629 P.2d 1, 174 Cal. Rptr. 493 (Cal. 1981); *In re Marriage of Scott*, 202 Cal. Rptr. 716, 156 Cal. App. 3d 251 (Ct. App. 1984); *Gemma v. Gemma*, 105 Nev. 458, 778 P.2d 429 (1989); *Koelsch v. Koelsch*, 713 P.2d 1234 (Ariz.

*Luciano*: “The employee spouse cannot by election defeat the nonemployee spouse’s interest in the community property by relying on a condition within the employee spouse’s control.”<sup>60</sup>

Most of those who advocate the “freeze at divorce” approach discussed above either oppose or ignore the question of whether distribution of the spousal share should be mandated at the time of the participant’s first eligibility for retirement. It is not possible, however, to fully and fairly evaluate the impact of a “freeze at divorce” proposal *without* examining that question as well.<sup>61</sup>

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

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

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

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

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 pension in 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.

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1986); *Ruggles v. Ruggles*, 860 P.2d 182 (N.M. 1993); *Balderson v. Balderson*, 896 P.2d 956 (Idaho 1994); *Blake v. Blake*, 807 P.2d 1211 (Colo. Ct. App. 1990); *Harris v. Harris*, 107 Wash. App. 597, 27 P.3d 656 (Wash. Ct. App. 2001); *Bailey v. Bailey*, 745 P.2d 830 (Utah 1987) (time of distribution of retirement benefits is when benefits are received “or at least until the earner is eligible to retire”).

<sup>60</sup> *In re Marriage of Luciano*, *supra*, 164 Cal. Rptr. at 95.

<sup>61</sup> I have independently verified the mathematical effects of the various approaches taken by courts. Unless payments to spouses are required at each first eligibility for retirement, regardless of the date of actual retirement, a “rank at divorce” proposal, at least in military cases, would result in a reduction in the value of the spousal share by at least 13%. A second spouse married to a member for the last couple years of service could actually receive more money after divorce than a first spouse who assisted the member for most of the military career. There does not appear to be any valid public policy that could be served by causing this result.



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

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

The valuation problem for defined contribution plans has not received nearly enough attention in the case law. If the marriage was not completely coextensive with the period of contributions, and there was *any* variation in the relative rate of contribution over time, a standard time-rule analysis to value the spousal share might not be appropriate at all. It would appear to be more precise – i.e., “fairer” – to trace the *actual contributions* to such an account from marital or community and separate sources, and attribute interest and dividends over time accordingly.<sup>62</sup> The scant case authority squarely addressing this issue has agreed with that proposition.<sup>63</sup>

## D. Overview of the Major Retirement Systems

### 1. Private Pensions

Many attorneys find the various forms of benefits available from private employers to be confusing. Generally, private plans come in the two varieties discussed above – defined benefit plans and

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<sup>62</sup> See Brett R. Turner, *EQUITABLE DISTRIBUTION OF PROPERTY* § 6.10, at 523 (2d ed. Supp. 2004); Amado, *The Ubiquitous Time Rule – A Responsa: An Argument for the Applicability of Tracing, Not the Time Rule, to Defined Contribution Plans*, 13 Family Law News, Sum. 1990, at 2 (California State Bar, Family Law Section Publication) (arguing that a *tracing* analysis would be superior for defined contribution plans – as opposed to the “time rule” – because it is possible to discover the source of all funds in the account).

<sup>63</sup> See *Tanghe v. Tanghe*, 115 P.3d 567 (Alaska 2005) (citing *In re Marriage of Hester*, 856 P.2d 1048, 1049 (Or. App. 1993) (“When the value of a particular plan is determined by the amount of employee contributions, application of [a coverture fraction] could result in a division of property that is demonstrably inequitable”); *Paulone v. Paulone*, 649 A.2d 691, 693-94 (Pa. Super. 1994) (rejecting the use of the coverture fraction and adopting an accrued benefits test, deemed the “subtraction method,” for the distribution of a defined contribution plan); *Smith v. Smith*, 22 S.W.3d 140, 148-49 (Tex. App. 2000) (finding that it was incorrect to apply a coverture fraction to a defined contribution account); *Mann v. Mann*, 470 S.E.2d 605, 607 n.6 (Va. App. 1996) (“Applying [a coverture] fraction to a defined contribution plan could lead to incongruous results, and such an approach is not generally used”); *Bettinger v. Bettinger*, 396 S.E.2d 709, 718 (W. Va. 1990) (rejecting the use of a discounted present value calculation for division of a defined contribution plan “because no consideration was given to the fact that the fund was earning interest” (quotation marks omitted)).

defined contribution plans. But since private employers are generally free to provide any (or no) retirement plans to their employees, there are huge variations in plan specifics from one employer to another, which is fully allowable so long as the plan does not violate the relevant federal law – ERISA and the REA.

The basic requisites for “qualifying” a DRO as a QDRO are discussed above. An order is *not* “qualified” if it requires a plan to provide a type or form of benefit not otherwise available under the plan, or requires the plan to provide a greater (actuarially computed) sum of benefits, or requires payment of benefits to an Alternate Payee that are required to be paid to *another* Alternate Payee under a prior QDRO.<sup>64</sup> QDROs need not necessarily be long or complex (although they sometimes are both of those things); the question is what is sought to be accomplished, and what safeguards are reasonably necessary given the parties, the background factual situation, the kind of plan involved, and the desired distributions.

Individual Retirement Accounts (“IRAs”), and “Keogh” plans are private retirement plans that do not really fit in with the above two varieties. Keoghs are essentially like the above plans but for sole proprietors, partnerships, or “S” corporations. Note that an IRA can be divided in a divorce action without a QDRO, so long as the Decree or other court order explicitly calls for its distribution.<sup>65</sup>

## **2. Civil Service Benefits**

### **a. CSRS & FERS Benefits**

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

For those working in the U.S. Civil Service, a retirement system has been in place in some form since 1920, which is the date from which the “old” system (“Civil Service Retirement System,” or “CSRS”) for those who began service before 1984, can be traced.<sup>66</sup> 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.<sup>67</sup>

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<sup>64</sup> See 29 U.S.C. § 414(p)(3), 29 U.S.C. § 1056(d)(3)(D).

<sup>65</sup> Without stating why, some IRA Plan Administrators do require a QDRO for the division of these assets. The practitioner should verify with the Plan before the entry of the *Decree of Dissolution*.

<sup>66</sup> See 5 U.S.C. § 8331.

<sup>67</sup> See 5 U.S.C. § 8401.

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

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

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

How these benefits are treated upon divorce is primarily governed by State law, except where limited by the federal regulations. Guidance is available in the form of a "Handbook for Attorneys" who are drafting retirement orders for CSRS or FERS retirement benefits; it is available on line.<sup>68</sup>

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

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

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

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<sup>68</sup> See *A Handbook for Attorneys on Court-ordered Retirement, Health Benefits, and Life Insurance Under the Civil Service Retirement System, Federal Employees Retirement System, Federal Employees Health Benefits Program, and Federal Employees Group Life Insurance Program* (United States Office of Personnel Management, Retirement and Insurance Group, rev. ed. July, 1997); <http://www.opm.gov/retire/html/library/other.html>.

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

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

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

Three separate orders should be in every COAP, addressing: the lifetime benefits (“employee annuity”); the potential refund of employee contributions; and death benefits (“former spouse survivor annuity”). A proper order will contain specific provisions dealing with each of the three types of benefits addressed in the regulations. If an order is submitted using the words “retirement accounts” or “retirement fund” as the thing to be divided, OPM will interpret the order as going to contributions only and will *not* divide the annuity.<sup>69</sup> Attempts to stipulate to modifications without a formal order will be ignored.

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

A COAP may be used as a resource for payment of accrued arrearages. The COAP must specify how much is to be paid, so as to obtain accrued arrears, interest on the arrears, and interest on the declining balance of arrears until paid. An amortization schedule must be done so that the order can reference how much will be due and when it will be due (OPM will not do the calculations for you). Note that if payment of a lump sum is ordered, and there is no specific order to direct the entire monthly retirement payment to the former spouse, OPM will only make payments against that lump

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<sup>69</sup> See 5 C.F.R. § 838.612.

sum up to half of the gross payment, and will not allow modification for interest. Again, if such is the situation, run the amortization schedule ahead of time, and make the lump sum in an amount that contemplates interest.

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

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

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

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

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

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

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

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

The Civil Service rules are rather rigidly set up to expect that all the divorcing, re-marrying, and adjustments to orders will go on while an employee is still in service, *or* that the first order entered

after the retirement of the worker deals with all aspects of the retirement and survivorship benefits perfectly.

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

In the lingo of the OPM, if a court order awards, increases, reduces, eliminates, explains, or clarifies an award to a former spouse, the court order must be issued before retirement or death of the employee, **or** it must be the first order dividing the marital property of the retiree and the former spouse.<sup>70</sup>

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

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

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

#### **b. The Thrift Savings Plan (TSP)**

A “Thrift Savings Plan” (“TSP”) was created by the 1986 statute creating the “Federal Employees Retirement System,” or FERS, which replaced the older Civil Service Retirement System,” or CSRS. It first accepted contributions on April 1, 1987. FERS employees get matching federal contributions up to a certain level. While the program is open to CSRS employees, there are no matching contributions for them. The TSP is a defined contribution type of plan for federal employees; like a private employer’s 401(k) plan, it is a mechanism for diverting pre-tax funds into retirement savings. As of 2012, a “Roth” (pre-tax contributions) option was added to the TSP.

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<sup>70</sup> See 5 C.F.R. § 838.806.

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

The TSP is expressly *excluded* from the regulations governing the Civil Service defined benefit plans.<sup>71</sup> It is administered by a Board (the Federal Retirement Thrift Investment Board),<sup>72</sup> entirely separate from the OPM, and has its own governing statutory sections and regulations.<sup>73</sup> The TSP Board has its own finance center.<sup>74</sup>

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](mailto: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

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<sup>71</sup> 5 C.F.R. § 838.101(d).

<sup>72</sup> The Thrift Savings Plan is *not* addressed in the clause set provided by Office of Personnel Management. Those wishing further information on the Thrift Savings Plan can call the administering agency (Federal Retirement Thrift Investment Board) toll free at its Louisiana finance center: (1-877-968-3778).

<sup>73</sup> 5 U.S.C. § 8435(d)(1)-(2), 8467; 5 C.F.R. Part 1653, Subpart A.

<sup>74</sup> Thrift Savings Plan Service Office, National Finance Center, P.O. Box 61500, New Orleans, LA 70161-1500 (TSP Service Office fax number: (504) 255-5199). The TSP Service Office is the primary contact for participants who have left federal service, and it also handles questions about loans, contribution allocations, interfund transfers, designations of beneficiaries, and withdrawals for all participants.

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.

### **(1) Withdrawal and Borrowing of Money from the TSP During Service**

The practitioner must find out whether an employee is or has been a participant in the Thrift Savings Plan, and if so whether any funds have been withdrawn or borrowed from the plan.

Withdrawal of TSP funds by a participant is normally limited to those separating from service, but in-service withdrawals may be made in two categories: “age-based” withdrawals<sup>75</sup> and special “financial hardship” withdrawals. Notably, one of the four categories for such financial hardship withdrawals is “legal expenses for separation or divorce.”<sup>76</sup> Counter-intuitively, however, if a member is married, the spouse must normally consent to an in-service withdrawal, whether or not the parties are separated.<sup>77</sup>

Spousal consent is also required for any loans borrowed against the TSP. Again, a specific category of “hardship” for loan purposes is “unpaid legal costs associated with a separation or divorce.” Such a loan, if taken, accrues interest at the same rate paid on the “G” category of investments.

As to both loans and withdrawals, the Federal Retirement Thrift Investment Board will honor “most” court orders restricting distribution (such as preliminary injunctions prohibiting withdrawals) or safeguarding funds for other purposes (such as child support or alimony awards). Thus, in divorce cases or successive spouse cases, there could be some element of a “race to the courthouse,” with the non-employee spouse trying to get a restraining order on file and served on the TSP before the employee can withdraw the funds.<sup>78</sup>

Obviously, if the employee manages to reduce or eliminate the value of the TSP prior to a court-ordered division, that fact should be discovered and taken into account.

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<sup>75</sup> In-service withdrawals for participants who are 59½ or older.

<sup>76</sup> The other three conditions that can cause a permissible “financial hardship” withdrawal are: “negative monthly cash flow,” “medical expenses” (including household improvements needed for medical care), or “personal casualty losses.”

<sup>77</sup> The criteria for a claim on the basis of “exceptional circumstances” under which no spousal consent is required are very strict. The fact that there is a separation agreement, a prenuptial agreement, a protective or restraining order, or a divorce petition does not in itself support a claim of exceptional circumstances. As with everything else, there is a form (TSP-16) for making an “exceptional circumstances” application for withdrawal without a spousal consent.

<sup>78</sup> This is yet another illustration of why it is almost *always* a good idea to get any orders concerning division of retirement assets on file at the same time that a decree of divorce is entered.



## (2) Withdrawal and Borrowing of Money from the TSP After Retirement

Upon separation from service, a tangle of other rules spring into effect. First, TSP accounts of less than \$200 are automatically distributed at the time of separation. If between \$200 and \$3,500, the sums may be left in the TSP, or withdrawn in a single payment or multiple payments (cashed, or rolled over into an IRA or other retirement account). For accounts containing more than \$3,500, the TSP balance can be partially or fully withdrawn in a single payment, or by way of a series of monthly payments, *or* by way of a life annuity. Any combination of the full withdrawal options is called a “mixed withdrawal.”

The spousal rights provisions only apply if the TSP account contains more than \$3,500. If the participant is married and wants to make a *partial* withdrawal of funds, the spouse’s notarized written consent to the withdrawal is required.

If a *full* withdrawal is desired, the default is for the funding of a joint and survivor annuity with the “survivor” being the spouse at the time of withdrawal. The default annuity funded pays a 50 percent survivor benefit, has level payments, and does not include a cash refund feature. If the participant chooses any full withdrawal method other than the default (“prescribed”) annuity, the spouse must make a written, notarized waiver of his or her right to the prescribed annuity.<sup>79</sup> It is also possible in some circumstances to obtain a joint life annuity with someone other than the spouse.<sup>80</sup>

All of these withdrawals presume that the TSP Board had not previously been served with a valid court order awarding a portion of a TSP account to a current or former spouse or one that requires payment for enforcement of child support or alimony obligations. If such an order was served on the TSP Board, it will comply with the court order before permitting the purchase of an annuity or other withdrawal.

## (3) Court-Ordered Divisions of the TSP

Although the agency administering the TSP has proven more flexible than either the military or the OPM, its regulations did spawn yet another acronym for a court order dividing benefits – “RBCO,” for “Retirement Benefits Court Order.”<sup>81</sup>

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<sup>79</sup> As with in-service withdrawals, a participant who is not able to locate his or her spouse, or claims “exceptional circumstances” making it inappropriate for the spouse to sign a waiver, can seek an exception by submitting a Form TSP-U-16 (“Exception to Spousal Requirements”), and providing the requisite supporting documentation.

<sup>80</sup> Generally, with a former spouse or other person with an insurable interest in the life of the participant; not all options are available with each form of annuity.

<sup>81</sup> See 5 C.F.R. § 1653.1; 5 C.F.R. § 1653.12 (defining qualifying legal process).

Until recently no QDRO was required for a TSP distribution with the board honoring any order that expressly related to the TSP account of the participant. However, in the past year, the TSP Board outsourced the division of the TSP funds to a private company that now requires a RBCO that is more like an ERISA QDRO. The review period has also increased from about 30 days to six months. There is nothing like progress.

A spousal share may be rolled over to an IRA or other eligible plan, in which case no taxes are withheld. Otherwise, the spouse is taxed on the distribution, and 20% is withheld.

If the money is paid to a third party, however, such as a child (or, presumably, either party's attorney), the *participant* is stuck with the amount of the distribution as part of gross income for that year, and 10% is withheld. These rules provide a way of shifting the tax burden of funds to be withdrawn and used to pay attorney's fees, just by changing the payee of the withdrawal.

The attorney for a spouse seeking a portion of a TSP account should specify that the award is to be paid along with interest and earnings on that award. If such language *is* in the order, the spouse will receive the same accumulations attributable to the spousal share that the participant receives as to the account; if such language is *not* included in the order, the spouse will receive no accumulations, interest, or earnings on the defined share through the date of distribution. A court order may also specify an interest rate to be applied to a distribution from a given date.

The TSP will also honor post-decree orders, which it refers to as "amendatory court orders," and which presumably include *nunc pro tunc* amendments to decrees and partition judgments relating to omitted assets.

#### **(4) Survivorship Benefits for the TSP**

There are no "survivorship" benefits, *per se*, for a TSP account, as it is a cash plan like a 401(k). However, plan participants can and should designate beneficiaries to receive the account balance in the event of the participant's death.<sup>82</sup> In the absence of the form, regular intestate succession rules determine the distribution of the TSP account.

##### **c. Medical Benefits: FEHB/CHCBP**

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

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<sup>82</sup> By means of Form TSP-U-3 ("Designation of Beneficiary").

FEHB coverage is in effect if the spouse is awarded *either* a portion of the annuity upon retirement *or* a survivorship interest.<sup>83</sup> The spouse loses eligibility to continue with the insurance if the spouse remarries prior to age 55.

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

### 3. Military Benefits<sup>84</sup>

#### a. Retirement Benefits

The USFSPA is both jurisdictional and procedural; it both permits the State courts to distribute military retirement to former spouses, and provides a method for enforcement of these orders through the military pay center. The USFSPA itself does not give former spouses an automatic *entitlement* to any portion of members' pay. Only State laws can provide for division of military retirement pay in a divorce, or provide that alimony or child support are to be paid from military retired pay.<sup>85</sup> Rights granted by State law are limited by federal law, even if State law does not so provide, and even if the courts of the States do not see any such limitations.<sup>86</sup>

The USFSPA set up a federal mechanism for recognizing State-court divisions of military retired pay, including definitions that were prospectively applicable, and rules for interpretation to be followed by the military pay centers in interpreting the law; later, regulations were adopted,<sup>87</sup> and

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<sup>83</sup> 5 C.F.R. § 890.803(3)(i).

<sup>84</sup> These materials contain the barest possible sketch of the materials necessary to appropriately address these benefits. For much more detail, see Marshal Willick, *MILITARY RETIREMENT BENEFITS IN DIVORCE* (ABA 1998); Marshal Willick, *Divorcing the Military: How to Attack; How to Defend*, posted at [http://www.willicklawgroup.com/military\\_retirement\\_benefits](http://www.willicklawgroup.com/military_retirement_benefits).

<sup>85</sup> Military retired pay is simply one additional asset to be distributed in the overall resolution of the property and debts accrued during the marriage. *See, e.g., In re Marriage of Konzen*, 693 P.2d 97 (Wash. Ct. App. 1985) (spouse awarded percentage of military retired pay, even though the entire retirement was separate property, because the overall distribution of community property was equal, and the retired pay was a "liquid asset" used as part of that overall distribution).

<sup>86</sup> *See Mansell v. Mansell*, 490 U.S. 581, 109 S. Ct. 2023 (1989), criticizing conclusions reached in *Casas v. Thompson*, 720 P.2d 921 (Cal. 1986), *cert. denied*, 479 U.S. 1012 (1987).

<sup>87</sup> The regulations, which also were amended several times, were found at 32 C.F.R. § 63 until they were (apparently accidentally) deleted by Congress in the post-9/11 legislative rush. *See* 66 Fed. Reg. 53957-01 p. 635 (2001). Confusion reigned for years, during which DFAS apparently relied primarily on the 1995 proposed regulations. DFAS finally issued comprehensive replacement regulations, at Department of Defense Financial Management Regulation (DoDFMR) 7000.14-R, Vol. 7B, Ch. 29 ("Former Spouse Payments From Retired Pay") (Feb. 2009). For DoDFMR 7000.14-R, see the DFAS website at <http://www.dod.mil/comptroller/fmr>. For the first time, DFAS included

the pay centers were consolidated.<sup>88</sup> There are at least three different possible ways to calculate military retirement benefits; which is applicable depends on the date the member first entered service.

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

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

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

In a “mixed” service case, the age of retirement may not be 60. Effective January 27, 2008, eligibility to receive retired pay is advanced by three months for each 90 days of qualifying active duty service performed after that date in any fiscal year, to a maximum advancement of eligibility of ten years (at age 50).<sup>89</sup> That include training, operational support duties and even attendance at military schools, but not weekend drills, the regular two weeks of annual training, or time spent receiving medical care or being medically evaluated for disability.

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

A former spouse’s right to a portion of retired pay as property terminates upon the death of the member or the former spouse; the court order can also provide for an earlier termination.<sup>90</sup> Any right to receive payments under the USFSPA is non-transferable; the former spouse may not sell, assign,

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a model retirement division order, but like most model orders, it does not anticipate all the choices counsel are required to consider (such as survivorship benefits), and should not be relied upon.

<sup>88</sup> The eventual consolidated center was the Defense Finance and Accounting Service, located in Cleveland, but the re-assignment process has never ended. DFAS has continued dabbling with out-sourcing, privatization, etc. As of 2006, Army and Air Force military-pay related calls (except for TSP matters) were all routed to an office at Indianapolis.

<sup>89</sup> See Pub. L. No. 110-181, 122 Stat. 160, § 647 (Jan. 28, 2008).

<sup>90</sup> 10 U.S.C. § 1408(d)(4).

or transfer his or her rights, or dispose of them by inheritance.<sup>91</sup> To obtain benefits extending beyond a member's death, the former spouse must obtain designation as the beneficiary of the Survivor's Benefit Plan (discussed below), which has its own technical requirements.

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

The statute is more limiting regarding division of retired pay as property, however. The former spouse can apply for direct payment from the military to the former spouse,<sup>92</sup> but the USFSPA limits direct payment to a former spouse to 50% of disposable retired pay for all payments of property division.<sup>93</sup> More than fifty percent of disposable pay may be paid<sup>94</sup> if there is a garnishment for arrears in child or spousal support, or in payments of money as property *other than* for a division of retired pay. In other words (and counter-intuitively), about the only part of arrearages arising from a divorce judgment that *cannot* be satisfied by garnishment from retired pay is arrearages *in* retired pay.

Some courts have ruled that the 50% limitation is a *payment* limitation only, so that trial courts may award more than that amount – up to 100% of the retired pay – to the former spouse, but the pay center can only pay 50%, leaving the spouse to collect the remainder from the military member by

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<sup>91</sup> 10 U.S.C. § 1408(c)(2).

<sup>92</sup> Application for Former Spouse Payments From Retired Pay, DD Form 2293 (DD-2293). NOTE: This form can be filled out and then printed as an interactive pdf form by going to: <http://www.dtic.mil/whs/directives/infomgt/forms/eforms/dd2293.pdf>.

<sup>93</sup> 10 U.S.C. § 1408(e)(1).

<sup>94</sup> Up to 65% of “remuneration for employment” under the Social Security law, 42 U.S.C. § 659.

other means (such as normal State court contempt proceedings if not paid).<sup>95</sup> The Department of Defense has concurred in this interpretation.<sup>96</sup>

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

Nothing in this section shall be construed to relieve a member of liability for the payment of alimony, child support, or other payments required by a court order on the grounds that payments made out of disposable retired pay under this section have been made in the maximum amount permitted under paragraph (1) or subparagraph (B) of paragraph (4). Any such unsatisfied obligation of a member may be enforced by any means available under law other than the means provided under this section in any case in which the maximum amount permitted under paragraph (1) has been paid and under section 459 of the Social Security Act (42 U.S.C. 659) in any case in which the maximum amount permitted under subparagraph (B) of paragraph (4) has been paid.<sup>97</sup>

The USFSPA has been modified many times since 1983. Generally, survivorship rights for former spouses have been expanded, definitions have generally been changed so that court orders are more likely to result in the intended divisions of benefits, some opportunities for fraud have been limited, and it has been made very difficult to alter pre-1982 divorce decrees in order to treat people divorced before then the same as people divorced after the USFSPA went into effect. The definition of “disposable retired pay” was changed to nationally enforce the “frozen benefit rule” in 2017.

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

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<sup>95</sup> See, e.g., *Gonzalez v. Gonzalez*, \_\_\_ S.W.3d \_\_\_ (No. M2008-01743-COA-R3-CV, 2011 WL 221888, Tenn. Ct. App., Jan. 24, 2011) (while the amended USFSPA “presents a frustrating tangle of mixed messages and conflicting intentions,” the savings clause of 10 U.S.C. § 1408(e)(6) offers “the only clear expression of Congress’ intent as to state court orders . . . not . . . totally satisfied by the federal government’s payments made directly”); *In re Madsen*, No. 00-4811-WH, 2002 WL 34552506 (Bankr. S. D. Iowa, Oct. 15, 2002); *MacMeeken v. MacMeeken*, 117 B.R. 642 (1990) (Bankr. D. Kan. 1990); *Maxwell v. Maxwell*, 796 P.2d 403 (Utah App. 1990); *Ex parte Smallwood*, 811 So. 2d 537 (Ala. 2001), cert. denied, 534 U.S. 1066 (2001); *In re Marriage of Bacanegra*, 792 P.2d 1263 (Wash. Ct. App. 1990); *Grier v. Grier*, 731 S.W.2d 931 (Tex. 1987) (USFSPA did not limit the amount of retirement benefits that could be apportioned under Texas community property law, but only the percentage subject to direct payment); *Deliduka v. Deliduka*, 347 N.W.2d 52 (Minn. Ct. App. 1984); see also *Coon v. Coon*, 614 S.E.2d 616 (S.C. 2005) (USFSPA neither confers nor removes subject matter jurisdiction; lower court can address all disposable retired pay); but see *Cline v. Cline*, 90 P.3d 147 (Alaska 2004) (50% limit is jurisdictional); *In re Marriage of Bowman*, 972 S.W.2d 635 (Mo. Ct. App. 1998); *Knoop v. Knoop*, 542 N.W.2d 114 (N.D. 1996) (indicating in dicta that awards are limited to 50%); *Beesley v. Beesley*, 758 P.2d 695 (Idaho 1988).

<sup>96</sup> See Department of Defense, A Report to Congress Concerning Federal Former Spouse Protection Laws at 76 (2001); Pub. L. 101-510, § 555(e), 104 Stat. 1485, 1569.

<sup>97</sup> 10 U.S.C. § 1408(e)(6).

percentage that could have easily been calculated using figures completely available to the pay center.

Effective April 1, 1995, revised regulations<sup>98</sup> allowed use of formulas under certain circumstances, most commonly so a pre-retirement divorce decree could specify that the denominator in a time-rule calculation was to be the total service time.

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

Military retirement benefits are absolutely critical in any divorce case involving a military member; in a long-term marriage involving years of active duty service, the pension is typically the sole or major asset of the marriage. Senior enlisted personnel frequently retire after 20 years active service in their early forties and receive a lifetime pension of one-half their basic pay – a minimum of about \$2,000 per month, every month for life (this was reduced to 40% under the “Blended Retirement System” now in effect). And there are cost of living adjustments. In present value terms, a typical military retirement is worth some half million to million dollars.

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

A court order that divides military retired pay as property may only be enforced by direct payment to the former spouse if the parties were married for at least ten years during which the member performed at least ten years of creditable military service.<sup>99</sup> This is often called the “20/10/10” rule, for “years of service needed to reach retirement/years of marriage of the parties/years of overlap between service and marriage.”

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

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<sup>98</sup> Technically, they were never approved, but they have been followed since April, 1995, anyway. Newer “proposed regulations” after 1995 did not all include the revisions, but the deletions were apparently inadvertent, and formula orders continued to be honored, and are specifically contemplated in the 2017 regulations in DoDFMR 7000.14-R, Vol. 7B, Ch. 29 (“Former Spouse Payments From Retired Pay”).

<sup>99</sup> 10 U.S.C. § 1408(d)(2); 32 C.F.R. § 63.6(a)(1)-(2).

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

Military cases are more complex when the divorce occurs while the member is still on active duty. First, the member could retire early. Over the years Congress has periodically re-authorized various “early out” programs, including the SSB, VSI, and 15-year retirement program called TERA. There is also the new Frozen Benefit Rule that is discussed below.

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

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

Where V.A. disability exists at the time of divorce or after the divorce, the court cannot divide those benefits as property, but the cash flow “may be considered as a resource for purposes of determining [one’s] ability to pay alimony.”<sup>100</sup>

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

Another way that military retirement benefits could be swapped is by being rolled into Civil Service retirement, which as detailed above is a completely different retirement program, administered by a different federal agency (OPM), but is also essentially a non-contributory defined benefit pension plan. A military member with subsequent Civil Service work history can either get military retirement benefits, then qualify for and receive Civil Service benefits, *or* roll the military time into

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<sup>100</sup> See *Riley v. Riley*, 571 A.2d 1261 (Md. Ct. Spec. App. 1990); *In re Marriage of Howell*, 434 N.W.2d 629, 633 (Iowa 1989). *Howell v. Howell*, 137 S. Ct. 1400, 581 US \_\_\_, 197 L. Ed. 2d 781 (2017).



the Civil Service. Which is better depends on amount of military retired pay versus the value of that many years of service in expanding the available Civil Service retirement.<sup>101</sup>

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

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

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

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

Nevada case law mandates use of the “time rule” for all defined benefit pension divisions. 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 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 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

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<sup>101</sup> In 1997, Congress required tracing spousal interest in military retirement benefits to Civil Service benefits when they were combined; *see* Handbook for Attorneys, *supra*, at ¶ 111.

(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, for some people.

## (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 or marital 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.

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. In Arizona, this is a problem. In the *Barron*<sup>102</sup> case, it was determined that based on the Supreme Court decision in *Howell*,<sup>103</sup> the State Court is not allowed to require payment from the member spouse to the former spouse. This stretch is contrary to the law in all other community property states. In other words, the former spouse not only has her benefit frozen, but she has to wait until the member decides to retire to receive her property interest.

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.<sup>104</sup>

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

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

The regulations have been updated. They are included in the Department of Defense Financial Management Regulations (DoDFMR), and DFAS is already enforcing the new rules.

The “hypothetical clause” (as it is called by DFAS) is the most difficult to prepare of the four acceptable military pension clauses which are accepted by the retired pay centers. The current regulation requires, for those who entered military service after September 1980, that the court order

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<sup>102</sup> See *In Re Marriage of Barron v. Barron*, Ariz: Court of Appeals, 1st Div. (July 31, 2018).

<sup>103</sup> See *Howell v. Howell*, No. 15-1031, U.S. Supreme Court May 15, 2017.

<sup>104</sup> The actual regulations to be used by DFAS are included the DoD 7000.14-R Vo. 7B Chap 29.

contain very detailed information about the service member, including the “retired pay base” calculated according to the “High Three” (the average of the highest three years of continuous compensation before the specified division date). At present, counsel must provide this information to the court. DFAS has set the following rules when submitting an order for enforcement:

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

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

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

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

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

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

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

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

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

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

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

The USFSPA contains a “savings clause” providing that no part of the USFSPA “shall be construed to relieve a member of liability for the payment of alimony, child support, or other payments required by a court order on the grounds that payments made out of disposable retired pay under this section have been made in the maximum amount permitted” and that any benefits awarded but not payable by DFAS “may be enforced by any means available under law other than the means provided under this section.”

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

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

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

In Nevada, for example, it is still possible to satisfy the duty under NRS 125.150 to divide property equally. 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, Fondi, and Sertic*. [Wife] is deemed the irrevocable beneficiary of the Survivor Benefit Plan with the base amount set at the full retirement benefit. 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. 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:

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, Fondi, and Sertic*. [Wife] is deemed the irrevocable beneficiary of the Survivor Benefit Plan with the base amount set at the full retirement benefit. 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. This Court retains jurisdiction to make a further property distribution or order permanent alimony in a sum sufficient, inclusive of the sums payable from DFAS, to equal a time rule

distribution in accordance with Nevada law requiring equal division of community property. The actual percentage of the military retirement awarded to [wife] must be known before SBP premium costs may be shifted as called for in this Decree. Accordingly, this Court further retains jurisdiction to make a clarifying order adjusting the division of military retirement benefits until [husband's] actual retirement. [Husband] is required to cooperate by providing any pay information necessary to achieve that result.

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

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

### **c. The “Blended Retirement” Effective as of 2018**

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

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

#### **(1) How to Cope with and Compensate for the Blended Retirement System**

The regulations associated with the changes can be found in DoDFMR 7000.14-R Vol &b Chap 2.

Every military order should explicitly deal with all 4 components, including providing explicitly for spousal sharing in the possible lump-sum payout. This may, or may not (as with VSI and SSB) be

directly payable through DFAS. If it is not, counsel for spouses will have to use the state court remedies used for analogous obligations to enforce payment to former spouses.

The continuation pay should explicitly be 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 are no proposals, nevertheless consensus, as to how to deal with this substituted portion of the exchange for traditional defined benefit plan benefits. We propose that the service member be credited with the requirement of post-divorce service by altering the sum otherwise divisible with the spouse.

Specifically, we suggest that the pre-divorce service credit be equally divided, but the post-divorce service necessary to realization of the benefit be credited solely to the member. This is accomplished by adding three years (36 months) to the denominator for division of the continuation pay benefit, in recognition of that future service.

#### **d. Survivor's Benefits (SBP)**

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

What may happen if the *member* dies first is much more potentially variable, and complex. For a spouse – or former spouse – to continue receiving money after death of the member or participant, there must be specific provision made for payments after the death of the member, by way of a separate survivorship interest payable to the former spouse upon the death of the member.<sup>105</sup>

The Survivor's Benefit Plan (SBP) pays a percentage of the member's retirement to the surviving spouse or former spouse. In 1986, Congress amended the USFSPA so that State courts could *order* that former spouses be members' beneficiaries.<sup>106</sup> If a member elects, or is "deemed" by a court to have elected, to provide the SBP to a *former* spouse, the member's current spouse and children of

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<sup>105</sup> See, e.g., *Smith v. Smith*, 438 S.E.2d 582, 584 (1993) ("The survivor benefit plan is designed to provide financial security to a designated beneficiary of a military member, payable only upon the member's death in the form of an annuity. Upon the death of the member, all pension rights are extinguished, and the only means of support available to survivors is in the form of the survivor benefit plan").

<sup>106</sup> Pub. Law No. 99-661 (Nov. 15, 1986).

that spouse cannot be beneficiaries.<sup>107</sup> Generally, an election to make a former spouse a SBP beneficiary is not revocable; if the election was pursuant to court order, a superseding court order is necessary to change it.<sup>108</sup> A survivor annuity payable to a widow, widower, or former spouse is “suspended” if the beneficiary remarries before age 55.<sup>109</sup>

To initiate a “deemed election,” the former spouse must file a written request with the appropriate Service Secretary requesting that the election be deemed to have been made. The written request must be filed within one year of the date of the court order.<sup>110</sup> There are various technical requirements.

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

No matter what any court orders, the military pay center can *only* take the premium “off the top” of the monthly payments of the regular retirement.<sup>111</sup> Unfortunately, and counter-intuitively, that results in the parties each bearing a portion of the survivorship premium in exact proportion to their shares of the retirement itself. In other words, if the retirement is being split 50/50, then the parties share the cost of the SBP premium equally, but if the spouse is entitled to only 25% of the monthly retired pay, then the member effectively pays 75% of the SBP premium.

It *is* possible to effectively cause the member, or the spouse, to bear the full financial burden of the SBP premium, but doing so requires indirectly adjusting the percentage of the monthly lifetime benefits each party receives.<sup>112</sup>

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<sup>107</sup> 10 U.S.C. § 1448(b)(2). The Finance Center will notify the member’s spouse of the election to make the member’s former spouse the SBP beneficiary, but the current spouse’s consent is not required. 10 U.S.C. § 1448(b)(3)(D).

<sup>108</sup> 10 U.S.C. § 1450(f)(1)-(2).

<sup>109</sup> 10 U.S.C. § 1450(b). Before November 14, 1986, benefits were suspended if the former spouse was not yet age 60.

<sup>110</sup> 10 U.S.C. § 1450(f)(3)(B).

<sup>111</sup> The Department of Defense also asked Congress to change *this* aspect of the SBP program in the *Report to Congress, supra*, requesting that court orders, or stipulations, could specify who was to pay the premium. Congress has not acted.

<sup>112</sup> This is not entirely true. The SBP premiums are due for a total of 360 payments *AND* until the member reaches 70 years of age. After that, the premiums are considered to be “paid up” and no further payments are due. A new order restoring the Former Spouse’s share of the military pension should be done in the case where the premiums



If the designation of a former spouse as beneficiary is made by a member, it technically is to be written, signed by the member, and received by the Defense Finance and Accounting Service within one year after the date of the decree of divorce, dissolution, or annulment.<sup>113</sup> But, as a practical matter, this has not been nearly so much a bright line test as might be thought.

At the time of the election, the member must submit a written statement to the appropriate Service Secretary. The statement must be signed by both the former spouse and the member, and state whether the election is being made pursuant to the requirements of a court order or a written voluntary agreement previously entered into by the member as a part of or incident to a divorce, dissolution, or annulment proceeding. If pursuant to a written agreement, the statement must state whether such a voluntary agreement was incorporated in, ratified, or approved by a court order.<sup>114</sup>

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

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

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

Because the rules for members’ designation of beneficiaries, and former spouse *deemed* elections are provided by different sections of law enacted at different times, however,<sup>115</sup> the prior “common knowledge” is not correct; the actual rules are slightly more flexible, much more complicated, and a bit illogical in application.

If the original divorce decree is silent as to the SBP (or perhaps just so unclear as to make the original order unworkable), the spouse might be able to extend the period within which he or she can request a deemed election by returning to court after the divorce and obtaining an order stating that the spouse is to be deemed the SBP beneficiary. This is because the *member* is obliged to make the

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are “paid up.”

<sup>113</sup> 10 U.S.C. § 1448(b)(3)(A).

<sup>114</sup> 10 U.S.C. § 1448(b)(5).

<sup>115</sup> Cf. 10 U.S.C. § 1448 *with* 10 U.S.C. § 1450.

election “within one year after the date of the decree of divorce, dissolution, or annulment,”<sup>116</sup> whereas the *former spouse* must make the request “within one year of the date of the court order or filing involved.”<sup>117</sup>

Thus, if there was *no* previous order giving a right to the former spouse to be the SBP beneficiary, the one-year deemed election period runs from the date of a post-divorce order concerning the SBP.<sup>118</sup> This is true for orders that issued prior to the effective date of the SBP deemed beneficiary law, as well as orders that inadequately attempted to provide for the SBP, or omitted all mention of the benefit.<sup>119</sup>

However, once a valid court order is issued requiring coverage, the one year period begins to run, and any subsequent court order that merely reiterates, restates, or confirms the right of coverage as SBP beneficiary cannot be used to start a new one-year election period.<sup>120</sup>

The SBP is an extremely important benefit, which practitioners ignore at their considerable peril in malpractice. While there are malpractice dangers in all retirement-related cases, they are most severe relating to survivorship matters. The potential losses to the client are catastrophic, and the resulting risks to counsel are enormous.<sup>121</sup>

Federal law and regulations have very stringent service requirements for electing an SBP beneficiary which, if not precisely followed, cause the benefit to be lost regardless of the court order. Perhaps

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<sup>116</sup> 10 U.S.C. § 1448(b)(3)(A).

<sup>117</sup> 10 U.S.C. § 1450(f)(3)(B); Claims Case No. 99102801 (July 21, 2000, *aff'd*, Dept. of Defense Deputy Gen'l Counsel, March 8, 2002, <http://www.dod.mil/dodgc/doha/claims/military/99102801.html>). Apparently, decisions previously made by the Comptroller General's Office were deferred to the Department of Defense, Defense Office of Hearings and Appeals (“DOHA”).

<sup>118</sup> See, e.g., Comp. Gen. B-232319 (*In re Minier*, Mar. 23, 1990), 1990 U.S. Comp. Gen. Lexis 319; Comp. Gen. B-226563 (*In re Early*, Mar. 2, 1990), 1990 U.S. Comp. Gen. Lexis 449; Comp. Gen. B-247508 (Sept. 2, 1992).

<sup>119</sup> As an aside, this is true even when the divorce court is unsure how to characterize the benefit. In one case, the court made a point of saying that it could not tell if the SBP was a property right, an alimony allocation, or some kind of insurance, but in any event it was valuable, and the benefit was to be secured to the former spouse, even though she did not qualify to receive a portion of the military retirement benefits themselves because the marriage at issue did not overlap the military service. See *Matthews v. Matthews*, 647 A.2d 812 (Md. Ct. App. 1994).

<sup>120</sup> Comp. Gen. B-244101 (*In re: Driggers*, Aug. 3, 1992); 71 Comp. Gen. 475, 478 (1992). The current regulations say that a “modification” order must actually change something before the one-year period will start over from the date of the modification order. FMR Vol. 7B., Chap 43, § 430503C.

<sup>121</sup> While there is not much appellate authority in this area, and virtually no statutory authority anywhere, I have been hired as an expert witness in several such cases, in which liability was sought against practitioners who were alleged to have not properly seen to securing survivorship benefits for a spouse. Edwin Schilling, Esq., of Aurora, Colorado, estimated that 90% of his malpractice consultations involved failure to address survivor beneficiary issues. Lawyer's Weekly USA, Oct. 18, 1999, at 22 (99 LWUSA 956).

most unsettling from a malpractice perspective is the length of time such a claim can lay dormant. Several courts have adopted a “discovery rule” for attorney malpractice cases.<sup>122</sup> In other words, divorces involving pensions, but in which no provision was made for survivorship interests, are malpractice land mines, lying dormant for perhaps many years until the right combination of events sets them off.

#### e. Medical Benefits

Another thing to watch closely in military cases is the time restrictions for former spouse qualification for ancillary benefits (medical, commissary, theater, etc.) For full benefits, the member must have served twenty years, the marriage must have lasted twenty years, and the service and marriage must have overlapped by twenty years (the “20/20/20” rule).<sup>123</sup> “20/20/15” former spouses divorced before April 1, 1985, are also eligible for lifetime medical benefits. Lesser benefits are available for “20/20/15” spouses divorced after that date.

A special insurance program is available for former military spouses married at least one year, but the terms and restrictions vary according to the same three factors.<sup>124</sup> In an appropriate case, deferring the divorce could prove to be in the parties’ mutual best interest (for example, where the spouse has to have a major medical procedure, covered under military insurance, but not otherwise, and there is no other insurance available post-divorce).

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

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

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

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<sup>122</sup> See *Petersen v. Bruen*, 106 Nev. 271, 792 P.2d 18 (1990); *Semenza v. Nevada Med. Liability Ins. Co.*, 104 Nev. 666, 765 P.2d 184 (1988).

<sup>123</sup> See 10 U.S.C. § 1072(2)(F) and (G).

<sup>124</sup> The Continuation of Health Care Benefits Plan (“CHCBP”; see 10 U.S.C. § 1078a) has always provided some relief, allowing *any* former spouse to get up to 36 months of CHCBP coverage, and a former spouse who satisfies the 20/20/15 rule up to 48 months of post-divorce coverage (12 months free + 36 months of CHCBP coverage). See <http://www.humana-military.com/chcbp/main.htm>. There is a premium cost and certainly is not as desirable as TRICARE, but certainly beats not having any other option available.

- The former spouse must not remarry. Eligibility for health benefits ceases upon remarriage and is *not* regained even if the subsequent marriage terminates.
- The former spouse must not be covered by an employer-sponsored health care plan. If there is such a plan, however, and coverage thereunder is terminated (voluntarily or otherwise), eligibility for benefits is restored.
- The former spouse must not yet be age 65. Upon eligibility for Medicare (Part A), CHAMPUS eligibility ends. Some continuing benefits for former spouses may be available under the “TRICARE-for-life” program effective October 1, 2001.<sup>125</sup>

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

Under 10 U.S.C. § 1078a(g)(4), the “temporary” health benefits coverage becomes “unlimited” for former spouses who were enrolled in TRICARE at the time they divorced – if they meet certain criteria:<sup>126</sup>

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

The statute (10 U.S.C. § 1078a(g)(4)) provides that the continued coverage can continue beyond the “temporary” periods set out at the beginning of the statute, upon the request of a former spouse who makes a request for such coverage. Apparently, the same premium cost<sup>127</sup> as for temporary coverage continues to be assessed for as long as coverage is provided, and a full quarter of premium is required to be paid with the enrollment application. Application must also be made promptly – enrollment in CHCBP must be completed within 60 days of losing “normal” eligibility as either an active duty spouse or a retiree spouse – the date of entry of the divorce decree.

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<sup>125</sup> See 32 C.F.R. § 728.31. A summary of TRICARE information designed for the public, which includes a link to basic eligibility information (*see* TRICARE Beneficiaries, Using TRICARE) can be found at <http://www.tricare.osd.mil/>.

<sup>126</sup> Implementing regulations are at 32 C.F.R. § 199.20, but they are not very clear.

<sup>127</sup> As of 2022, individual coverage cost \$1,654 per quarter, and family coverage cost \$4,134 per quarter.

## f. TSP

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

As of October 8, 2001,<sup>128</sup> military members were authorized to begin participating in the TSP, permitting members to invest in a variety of funds.<sup>129</sup> Military members therefore now have both a defined benefit *and* a defined contribution type of retirement program, both of which should be addressed upon divorce.<sup>130</sup> As of 2012, a “Roth” (pre-tax contributions) option was added to the TSP.

At the outset, the military chose to call its plan “UNISERV” accounts, but it is increasingly referred to simply as “TSP” like its Civil Service equivalent. If the same person has simultaneous or consecutive military and Civil Service employment, the interplay between the two plans can be complex. It is usually possible to combine the accounts, but it takes a specific application to do so,<sup>131</sup> and tax-exempt military contributions (i.e., those made as a result of a combat zone tax exclusion) in a military TSP account may not be transferred to a civilian TSP account.

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

The military service secretaries are permitted, but not required, to designate “critical specialties.” Members within those specialties serving on active duty for a minimum of six years would receive contributions by the government, matching some of the sums contributed from basic pay.<sup>132</sup>

The military TSP plays a much larger role in military retirement under the new “Blended Retirement System” that was discussed earlier. Please refer to that section for more information.

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<sup>128</sup> Per Pub. L. No. 106-398 (Oct. 30, 2000); the regulations are found at 5 C.F.R. § 1600-1690.

<sup>129</sup> See 5 C.F.R. §§ 1600.1-1690.14.

<sup>130</sup> For military members, some forms of tax-exempt special compensation can be contributed, which then accrue investment returns that are also tax-exempt.

<sup>131</sup> Once a participant separates from either the uniformed services or federal Civil Service, the accounts *can* be combined (by completing Form TSP-65 and sending it to the TSP Service Office). By default, military and Civil Service accounts are *not* combined, but must be separately addressed.

<sup>132</sup> Matching contributions are designed to apply to the first five percent of pay contributed, dollar-for-dollar on the first three percent of pay, and 50 cents on the dollar for the next two percent of pay.

**g. Special Caution for Military Cases**

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

In enacting the Uniformed Services Former Spouses Protection Act,<sup>133</sup> Congress was concerned that a forum-shopping spouse might go to a State with which the member had a very tenuous connection and force defense of a claim to the benefits at such a location.

Accordingly, the USFSPA included special jurisdictional rules that must be satisfied in military cases to get an enforceable order for division of the benefits as property. In *other* public and private plans, *any* State court judgment valid under the laws of the State where it was entered is generally enforceable to divide retirement benefits; this is not true for orders dividing military retirement benefits as property. The rules do not restrict alimony or child support orders, which will be honored if the State court had personal and subject matter jurisdiction under its own law.

In a military case, an order dividing retired pay as the property of the member and the former spouse will only be honored by the military if the issuing court exercised personal jurisdiction over the member by *reason of*: (1) residence in the territorial jurisdiction of the court (other than by military assignment); (2) domicile in the territorial jurisdiction of the court; or (3) consent to the jurisdiction of the court.<sup>134</sup>

These limitations override State long-arm rules, and must be satisfied in *addition* to any State law jurisdictional requirements. Cases lacking such jurisdiction can go forward, but they will not result in enforceable orders as to the retirement benefits. The statute effectively creates an additional jurisdictional requirement, which for lack of a better title can be called “federal jurisdiction.”<sup>135</sup>

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

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<sup>133</sup> 10 U.S.C. § 1408 *et seq.*

<sup>134</sup> 10 U.S.C. § 1408(c)(4). The new regulations (DoDFMR 7000.14-R, Vol. 7B, Ch. 29 (“Former Spouse Payments From Retired Pay”) (Jun. 2017); see the DFAS website at <http://www.dod.mil/comptroller/fmr> for the first time, at Sec. 290604(A)(3) (Feb. 2009) provides: “The member indicates his or her consent to the jurisdiction of the court by participating in some way in the legal proceeding.”

<sup>135</sup> A full explanation of “federal jurisdiction,” what it is and how to get it, is set out in detail in the article “Divorcing the Military: How to Attack, How to Defend,” posted at: <https://www.willicklawgroup.com/military-retirement-benefits/>.

#### **4. SOUTH DAKOTA STATE RETIREMENT SYSTEM**

##### **a. A Little About the Plan<sup>136</sup>**

The South Dakota Retirement System (SDRS) is a 401(a) defined benefit pension plan that provides retirement, survivor, and disability benefits for South Dakota's public employees.

Full-time employee of an SDRS participating employer, are required to participate in and make contributions to SDRS. Full-time employees are those customarily working at least 20 hours per week and six months per year. The membership in SDRS begins with the first contribution.

Class A members include all state administrative employees, Board of Regents employees, teachers and classified employees of participating school districts, and general employees of participating municipalities and counties. Full-time elected officials whose positions normally require the performance of duty for 20 or more hours each week and at least six months of the year have one irrevocable option to participate or not participate. The elected official's choice of whether to participate or not participate is a permanent election for the elected official's entire career. Ninety-three percent of SDRS' members are Class A members.

Class B members have different benefits, which are described in the Class B Public Safety and Class B Judicial Handbooks which can be found on the SDRS website. Class B members are justices, judges, and magistrate judges, state law enforcement officers, municipal police officers, firefighters, county sheriffs, deputy county sheriffs, correctional security staff, parole agents, air rescue firefighters, campus security officers, court services officers, juvenile corrections agents, conservation officers, and park rangers.

The governing body of any participating county, municipality, or other political subdivision are excluded from membership in SDRS.

Foundation members include all Class A and Class B members that joined SDRS prior to July 1, 2017. Foundation members have a different benefit design, which is described in the Class handbooks for Foundation members available on the SDRS website.

Generational members include all Class A and Class B members that joined SDRS on and after July 1, 2017.

In cases of divorce, a member's accrued benefits under SDRS represent an asset of the marital estate and therefore are subject to equitable division by the Court. If there are not sufficient assets to offset the SDRS benefit so that a portion of the SDRS benefit is assigned to the former spouse, a qualified

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<sup>136</sup> This information was taken from the SDRS Website.

domestic relations order (QDRO) is required. A QDRO assigns all or a portion of the member's benefit to the former spouse, also known as the alternate payee.

SDRS and Social Security benefits are designed to provide dependable lifetime income. The SDRS Supplemental Retirement Plan (SRP) is a 457(b) plan that offers all employees working for SDRS participating employers the opportunity to save additional money for retirement. A QDRO will be necessary to divide this Plan if a divorce occurs.

### **b. Plan Description and Benefits**

In broad terms, there are generally two types of retirement plans – a defined benefit plan and a defined contribution plan.

The SDRS Plan is a cost-sharing, multi-employer, and public employee defined benefit plan. Cost-sharing means that both the member and employer contribute a percentage of compensation to the member's retirement account.

The SDRS plan is tax qualified under section 401(a) of the Internal Revenue Code. It is an employer pick-up plan under section 414(h)(2) of the Code. As such, member contributions are tax deferred until the member receives a benefit or refund payment.

SDRS members are immediately vested in their own retirement contributions. Depending on their membership date, after three years, they may also be vested in a portion of their employer contributions for any refund payments prior to retirement.

As a defined benefit plan, the SDRS provides a lifetime retirement benefit, or pension, for eligible members based on average monthly compensation and service credit.

### **c. Survivor Benefits**

The SDRS has two basic classes of members. They are Foundation Members and Generational Members. A definition of each can be found on the Plans Website.<sup>137</sup>

For Foundation members, if you are receiving SDRS retirement benefits and die, your eligible surviving spouse will receive a surviving spouse benefit. This benefit is equal to 60 percent of the benefit you were receiving at the time of your death and is payable for your spouse's lifetime with cost-of-living adjustments.

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<sup>137</sup> <https://www.sd.gov/sdrs>.



Note: To qualify for death benefits, your spouse must have been married to you prior to your retirement and for at least 12 months before your death.

A Generational Members benefit is a single-life benefit; however, a Generational member may make an election at retirement to provide a survivor benefit to the member's eligible surviving spouse. Depending on the member's election, the benefit may stop upon the member's death or a percentage (60% or 100%) of the member's benefit may be payable to the member's surviving spouse.

If the member is single or is married and elects a single-life benefit at retirement, the benefit will be payable for the member's lifetime only. No benefit will be payable to the member's surviving spouse, if applicable.

If a married member elects a 60% Joint & Survivor benefit at retirement, the member's retirement benefit will be actuarially reduced to provide for a surviving spouse benefit after the member's death. The surviving spouse benefit is equal to 60% of the benefit being paid at the time of the member's death and will continue for the spouse's lifetime with annual cost-of-living adjustments.

If a married member elects a 100% Joint & Survivor benefit at retirement, the member's retirement benefit will be actuarially reduced to provide for a surviving spouse benefit after the member's death. The surviving spouse benefit is equal to 100% of the benefit being paid at the time of the member's death and will continue for the spouse's lifetime with annual cost-of-living adjustments.

If both the member and his/her spouse die before the accumulated contributions have been paid out, the named beneficiary or estate will receive any remaining balance as a lump-sum payment.

#### **d. SDRS Benefits and Divorce**

Because South Dakota is an equitable division State, the SDRS retirement account of a member who is married while actively contributing may be considered a "marital" asset and subject to the laws relating to the equitable distribution of marital property between a spouse and a former spouse in the event of a divorce.

A court approved order, called a "qualified domestic relations order" (QDRO), directs the SDRS how to divide a member's current or future retirement benefit or refund. In order for the SDRS to comply with any court order, the SDRS must receive and approve the language of the QDRO before any benefits can be divided and processed.

### **5. Other Government Pension Plans & Social Security**

Foreign Service and CIA pensions are not often involved in South Dakota divorces, but practitioners should be aware that several "other" agencies and organizations have their own retirement rules and

regulations; as always, it is necessary to obtain the plan documents/rules/regulations for the specific plan at issue, and govern the decision and drafting work in accordance with the plan requirements.

Railroad retirement has its own specialized rules, which provides statutory benefits for divorced spouses.<sup>138</sup> Tier I benefits are similar to Social Security, and different from military or Civil Service plans, in that payments to the spouse do *not* reduce the benefit being received by the retiree. Tier II benefits, however, are like other pension benefits and divisible as marital property.<sup>139</sup>

Railroad retirement sometimes has both government and private pension benefits involved. For the public portion, some information and help is available from the Railroad Retirement Board.<sup>140</sup> If the participant worked for a private rail company, there could be one or more private pensions on top of the government plan benefits.

While they are largely outside the scope of these materials, there are also Social Security benefits to at least know about when contemplating alimony. If the marriage lasted at least ten years, the former spouse is eligible for certain benefits under Social Security, based upon the spouse's own earnings, or those of the wage-earner, whichever are greater. Such Social Security payments are statutory entitlements that do not reduce benefits paid to retirees. Most recent opinions have repeatedly stressed that State courts are prohibited from ordering any assignment, transfer, execution, levy, attachment, or garnishment of amounts paid by Social Security, directly or indirectly.<sup>141</sup> Oddly, the Nevada Supreme Court has not expressly overruled an earlier case indicating that the amounts received in Social Security *may* be taken into consideration both in dividing property and in awarding alimony.<sup>142</sup>

### III. VALUATION OF PLANS IN DIVORCE ACTIONS

In the overwhelming majority of divorce cases, no “valuation” of retirement benefits is necessary.

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<sup>138</sup> See 45 U.S.C. § 231(a); 20 C.F.R. § 295.1.

<sup>139</sup> See *Belt v. Belt*, 398 N.W.2d 737 (N.D. 1987).

<sup>140</sup> Railroad Retirement Board (RRB) help line: 800-808-0772; RRB Web site: <https://secure.rrb.gov/>. Some forms and information that might be helpful:

Form T-25f (statement of benefits of the RR employee, including the Tier I and Tier II benefits)

Form G-177c (explanation of divorced spouse benefit available)

Form G-177d (summary of QDRO requirements for dividing the Tier II benefits)

Form RB-30 (spouse/divorced spouse annuity information booklet)

“Attorney’s Guide to the Partition of Railroad Retirement Annuities” booklet.

“Railroad Retirement and Survivors Benefits” pamphlet.

<sup>141</sup> *Boulter v. Boulter*, 113 Nev. 74, 930 P.2d 112 (1997).

<sup>142</sup> See *Anderson v. Anderson*, 107 Nev. 570, 816 P.2d 463 (1991).

“Valuation” should therefore be distinguished from a dispute as to how much of the retirement benefits are at issue in the divorce. Generally, practitioners going to trial should seek an account valuation or total as close in time to the date of division as possible. The amount or value of any retirement at an earlier time is irrelevant under the law as it now stands.

#### **A. Vestedness and Maturity Revisited**

A pension division “if, as, and when” received or receivable, pursuant to the “time rule” eliminates the need to perform actuarial computations, since the parties end up sharing the risk of non-payment (by premature death, plan failure, etc.) proportionately to their ultimately payable percentages in the benefits to be received.

Where the nonemployee spouse has a small interest, however, or where there are other significant assets in a case which could be exchanged for the pension, it might be necessary or advisable to place a value on a pension plan. Valuation for “cashing out” is particularly attractive for pensions that are neither vested nor matured, because the spousal share of such pensions are necessarily smaller and deferred.

If trial seems likely, and for some reason valuation is a relevant issue,<sup>143</sup> it is probably necessary to retain an expert in such cases. Valuations in unvested/unmatured pension cases are inherently subjective due to the uncertainty of the events that could cause the pension not to vest or mature.

At the very least, the expert will need to have a copy of the plan in question or the statutory scheme creating and regulating the benefits, the specifics of the participant’s interest in the plan,<sup>144</sup> and know the ages of the parties, the date the employee began work for the employer, the dates and amounts of all contributions (if any) made to the plan, prospects for early or late retirement, and the health of the parties.

There is always more room for negotiation when benefits are not vested or matured, since the employee spouse has the option of taking unilateral action that could prevent benefits from ever being payable to either party, such as changing careers. Of course, if a party did take a “cut off your nose to spite your face” action, it is possible that the other party could argue “waste” and convince the court to enter an alimony award for the sum to compensate the party who would otherwise have received a sizeable property distribution.

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<sup>143</sup> It typically is not, since the parties simply get their time rule share of the benefits, whatever they are worth, but it is not difficult to project circumstances where the value of present or future benefits would be helpful to the Court, such as in trying to project a standard of living for purposes of setting a required sum of alimony.

<sup>144</sup> The questionnaires attached as exhibits to these materials provide a list of the questions that any expert should have about a participant’s interest.

## B. Valuation Variations Among Types of Plans

Because the value of a participant's interest in a defined benefit plan depends upon numerous subjective factors, it is difficult to measure precisely until after retirement. If the employee spouse is still working, assumptions must be made as to how many more years will be worked, whether (and how much) salary will increase, whether the employee might be fired or die before retirement, how long the employee will live *after* retirement, whether the plan benefits will change (say by creation of an early retirement subsidy, or by a firm bankruptcy, merger, acquisition), and other value-altering possibilities.

Expert assistance is almost always required for these plans, since life tables, discount rates, actuarial accounting, etc., are required in arriving at a valuation. There are several approaches to such valuations, and a startling number of those professing to be able to do such valuation work turn out to be uninformed about the actual mechanics of how various retirement plans work, which (of course) greatly impacts the values they assign to interests in those plans. *Caveat emptor*.

It is considerably easier to place a value on a participant's interest in a defined contribution plan, since it is a sum certain in a segregated account. Still, valuation in a divorce action may not be as simple as dividing up the balance according to the marital percentages.

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

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

The lessons relating to defined contribution plans thus include considering whether the “usual way” of dividing benefits in a given jurisdiction (*e.g.*, the time rule) is the *right* way to divide those particular benefits, and in any event, to be sure to specify with precision what is being divided as of when.

CSRS and FERS benefits are somewhat complex. Proper valuation of those plans should include consultation with or retention of an expert.

Each year, the Department of Defense compiles a chart of non-disability retirement benefit values according to rank and years of service upon retirement, published by the Department of Defense

Office of the Actuary as “lump sum equivalency” charts for military retirements, using military-specific mortality tables. That office also includes as a footnote to the chart a much-ignored disclaimer that its figures should not be used for property settlements. The Actuary also produces disability and non-disability retirement life expectancy tables, from which a good estimate of present value for a military retirement can be independently calculated.

### **C. Valuation of Ancillary Benefits**

Counsel must be careful to know what benefits are accorded by virtue of the retirement programs at issue, or as a matter of federal entitlement. For example, under no circumstances should a spouse concede anything “in exchange” for COBRA<sup>145</sup> medical coverage or Social Security; federal law confers such coverage and benefits as a matter of right.

But there are “ancillary” benefits available through some retirement plans, such as early retirement subsidies in private pensions, or medical benefits that may (or may not) be available to spouses through governmental plans depending on facts and circumstances that are subject to alteration, or negotiation, between the parties. These can be included in orders, or excluded, or arranged to exist or not exist, as the circumstances of the cases indicate – and with ramifications for both parties.

In most retirement plans, survivor’s benefits may be divided proportionately among successive spouses. In military cases, most public pensions, and some private plans, however, only one person may be named as recipient of the survivor’s benefits. Where the member wishes to nominate another person as recipient of those benefits, they may have a litigation value greater than their actuarial value.<sup>146</sup>

It is sometimes possible to arrange by three-party contract an out-of-system means of dividing such a “non-divisible” survivorship benefit. Exactly how to do so is outside the scope of these materials; any practitioner with such a situation should contact us and we will provide more detailed guidance.

Similar considerations apply to timing questions. For example, if the parties to a military marriage have been married for eighteen years during service, so that two additional years of marriage are required for full medical benefits, a member could probably exact some price for simply entering into a property settlement agreement and deferring the divorce itself. On the other hand, the negotiations could cut the other way; such deferral could be the only event preventing a spouse from making a claim for support sufficient to cover anticipated medical costs.

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<sup>145</sup> Consolidated Omnibus Budget Reconciliation Act. Congress mandated that certain employers must provide transitional health coverage, at controlled premiums, to individuals whose right to participate in group health plans terminated for various causes, including divorce. State “mini-Cobra” laws cover even more employees.

<sup>146</sup> FERS Survivor Benefits may be divided among a number of beneficiaries.

Sometimes, valuable ancillary benefits are not obvious. Many (especially public) employment systems permit employees to accrue either vacation or sick leave time, and to cash it in under some or any circumstances when they leave employment. States vary on whether or not unused vacation or sick pay constitutes “property” for equitable or community property division. Various citations are extremely supportive of the idea<sup>147</sup>; others are just as vehement that vacation or sick pay is not any kind of marital property.<sup>148</sup>

#### IV. DIVISION/DISTRIBUTION OF BENEFITS

Identifying and valuing benefits are matters that counsel must know and competently handle, but clients generally have a much simpler perspective – they are going to judge the efficacy of counsel’s work on whether and when and how much money actually arrives.

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<sup>147</sup> See, e.g., Mark Sullivan, “Hidden money in Military Divorce Cases,” 20 Nev. Fam. L. Rep. 4 (Fall, 2007) at 4; 2 Gary N. Skoloff, et al., *Valuation and Distribution of Marital Property* § 23.04A (2002); Kenneth W. Weber, 19 Washington Practice, Family and Community Property Law, § 11.19 (1997); *Kilgore v. Kilgore*, 135 Nev. 357, 449 P. 3d 843 (2019) (accrued vacation and sick pay are divisible); *Arnold v. Arnold*, 77 P.3d 285 (N.M. Ct. App. 2003) (husband’s accumulated vacation leave and sick leave hours were community property because they were fruits of labor during marriage, had value, and were not separate property as that is defined; “the essence of leave is that it is a benefit of employment and, whether considered a benefit in addition to salary, or somehow an aspect of salary, it has independent value”); *Grund v. Grund*, 151 Misc. 2d 852, 573 N.Y.S. 2d 840 (N.Y. Sup. Ct. 1991); *Schober v. Schober*, 692 P.2d 267 (Alaska 1984) (unused cashable leave valued and distributed at the number of hours multiplied by the employee’s hourly rate at the time of divorce); *MEA/AFSCME Local 519 v. City of Sioux Falls*, 423 N.W.2d 164 (S.D. 1988); *In the Matter of the Marriage of Susan M. Hurd*, 848 P.2d 185 (Wash. App. 1993) (while no specific rationale provided for finding that vacation leave was ruled a divisible asset, record included finding that the husband was already eligible for retirement, so an additional payment was likely to be made to him); *Lesko v. Lesko*, 457 N.W. 2d 695 (Mich. App. 1993) (over vigorous dissent, majority concluded in an equitable division state, accrued vacation and sick time could be divided); *Saustez v. Plastic Dress-Up Co.*, 647 P.2d 122 (Cal. 1982); *In re Marriage of Williams*, 927 P.2d 679 (Wash. App. 1996); *In re Marriage of Hurd*, 848 P.2d 185 (Wash. App. 1993); *In re Marriage of Nuss*, 828 P.2d 627 (Wash. App. 1992); *In re Marriage of Sheffer*, 802 P.2d 817 (Wash. App. 1990) see also *In re Marriage of Fithian*, 517 P.2d 449 (Cal. 1974) (“vacation pay is similar to pension or retirement benefits, another form of deferred compensation. Those benefits, too, ‘do not derive from the beneficence of the employer, but are properly part of the consideration earned by the employee’”).

<sup>148</sup> See *In re Marriage of Abrell*, 923 N.E.2d 791 (Ill. 2010), affirming 898 N.E.2d 1163 (2008) (accrued vacation and sick days are not marital property subject to distribution, but if a party has actually received payment for vacation and/or sick days accrued during marriage prior to a judgment for dissolution, the payment is marital property); *Bratcher v. Bratcher*, 26 S.W.3d 797 (Ky. App. 2000) (where wife had accumulated vacation and sick leave, would lose any sick leave if she terminated but would be paid for any accrued vacation, court concluded that neither constituted “property” divisible upon divorce); *Akers v. Akers*, 729 N.E.2d 1029 (Ind. Ct. App. 2000); *Thomasian v. Thomasian*, 556 A.2d 675 (Md. App. 1989) (husband’s accrued holiday and vacation leave were not marital property, because they were not entitlements like pension or retirement benefits, only replaced wages on days the employee did not work, and did not need to be, and often were not, liquidated by a payment of cash, but instead frequently dissipated, and therefore too speculative to constitute property); *Smith v. Smith*, 733 S.W.2d 915 (Tex. Ct. App. 1987) (accrued vacation and sick pay are not marital assets, as the husband owned no physical control or power of immediate enjoyment over them).

## A. Public Versus Private Plans

A very common misperception is that division of retirement benefits always requires a Qualified Domestic Relations Order, or “QDRO.” In actuality, a QDRO is only required for plans established by private employers which seek to take advantage of certain tax deductions for contributions to the plans (i.e., “qualified” plans).<sup>149</sup> State and federal governmental plans (including SDRS) are explicitly exempt from the legislative scheme constructed by ERISA (the “Employee Retirement Income Security Act of 1974”) and REA (the “Retirement Equity Act of 1984”), which together establish the QDRO requirements. The history of those statutory schemes are detailed above in the introduction sections.

For private plans, practice varies widely, but the modern consensus appears to be that a QDRO is best made a separate document from the Decree itself, although referenced in the Decree. In this way, any problems with getting the Plan Administrator to recognize and enforce the QDRO can be accomplished with amendments to only that order, rather than amendments to the Decree of Divorce itself. The Decree should anticipate the possibility of amendments to the QDRO being necessary, and reserve jurisdiction to do so.

For governmental plans (including military and Civil Service), the safest practice may be to include all critical terms in the Decree itself (this would safeguard against unanticipated application of the OPM’s “first order” rule), although federal law generally allows the division of benefits to be pursuant to a document “incident to” such a Decree, such as a property settlement agreement. If a separate order is drafted, it should be expressly incorporated and referenced in the Decree.

## B. Timing: Prepare Retirement Orders *Before* the Divorce

Obviously, if the retirement division order is to be “incorporated and referenced in the Decree,” it actually has to be *drafted* before the divorce is completed. This single step can reduce malpractice exposure at least by half, and it remains incredible that so many divorce practitioners still do not make this a regular part of their practice.

The reasons are obvious and simple. In addition to some parts of the applicable regulations requiring some benefits be provided for in the “first order dividing property” or forever lost, there is the reality that if someone should retire, or die, before the relevant order is entered, it may be impossible to secure them for the intended beneficiary, no matter *what* the Decree says.

Avoiding that risk is easy. If a retirement is in issue, obtain expert assistance to draft the orders *before* negotiating or litigating the rest of the case. The non-employee loses all leverage to negotiate terms once the MSA or decree is completed, and discovery is often only available *prior* to the completion of the divorce. The risk of completely losing retirement or survivorship interests arises

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<sup>149</sup> See 29 U.S.C. § 401(a).

at the moment of divorce without a pension division order in place, and continue escalating with each day that goes by thereafter.

### C. The Requirements of Service

It is not enough to just *draft* the retirement order, either – it must actually get to the plan administrator and be in place, or the same risk (divestment of the intended beneficiary) remains. Amazingly, some practitioners continue to close their files upon entry of the Divorce Decree, without ever notifying the holder of funds of the existence of the order for allocation of a part thereof to a former spouse.

For private pension plans, the Plan Administrator must be notified, and must approve the Order submitted. All administrators will provide information as to how to do so upon request. Civil Service pension division orders go to the Office of Personnel Management (“OPM”). Orders relating to military retirement benefits go to the pay center (DFAS). SDRS QDROs should be mailed to South Dakota Retirement System P.O. Box 1098 Pierre, South Dakota 57501.

In January, 2009, the United States Supreme Court decided *Kennedy*<sup>150</sup> – a decision that should cause every divorce lawyer to feel some discomfort.

In 1974, Bill designated his then-spouse Liv as beneficiary of his ERISA-based account balance (savings) plan. In 1994, the parties divorced, and the Decree included a provision stating that Liv waived all interests in that plan (and others).

In 2001, Bill died, having never sent the “beneficiary change” form to the pension plan. His heir made a claim, but the plan paid the ex-wife, Liv, anyway, notwithstanding her explicit waiver of the benefits in the Decree. And after eight years of litigation, the United States Supreme Court said the plan was right in doing so, because plan administrators should be able to rely on the documents in their files, without having to look at “extraneous” documents like divorce decrees.

In other words, the highest court in the U.S. has said that the administrative convenience of plan administrators is more important than obeying divorce court orders or following the intent of parties.

That left the divorce lawyer, who probably thought he had finished his job when he got the waiver put in the Decree, facing a possible malpractice suit from the intended beneficiary for not ensuring that the right form was sent to the plan at the conclusion of the divorce.

A certain degree of paranoia, or at least a healthy degree of obsessive-compulsiveness, is a good thing regarding retirement benefits. If a retirement-division order is drafted, and signed by the court, but not served on the plan, it is useless in preventing the employee from choosing another form of

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<sup>150</sup> *Kennedy v. Plan Adm’r for DuPont Sav. And Inv.*, 555 U.S. 285, 129 S. Ct. 865, 172 L. Ed.2d 662 (2009).



benefit than required by the order, and that situation may not be fixable when the facts are discovered.

For example, if the worker chooses a form of benefit that provides no survivorship benefits for the former spouse, the retirement plan will almost certainly refuse to alter the order. When the worker dies, the spouse's benefits will simply stop. A malpractice action against the divorce lawyer is highly likely, and in most states the "discovery rule" for malpractice actions can lead to liability decades after the divorce was completed, notwithstanding any statute of limitations.

The lesson is that it is necessary to not only draft and *file* the order, but to serve it on the plan, and get verification that it *was* served on the plan. Anecdotal reports continue to appear of pension plans that pay benefits out contrary to court orders, and when challenged, simply deny having received the orders in the first place. One way to leave a findable paper trail of having completed all steps is to file the proof of service with the court entering the Decree and QDRO.

As to both drafting retirement division orders and having them served on plans, it is Russian Roulette for divorce lawyers to *not* deal with retirement benefits during the course of a divorce. Sooner or later, something will go wrong (for example, if survivorship interests are not secured, it tends to be discovered when people happen to die in an inconvenient order), and the lawyer will look like a target of opportunity. As detailed above, the case law indicates that the scope of damages is whatever funds the client did not receive because of the error.

It is *possible*, of course, that with adequate CYA letters, etc., lawyers could make it their clients' problems (from a malpractice liability perspective) to figure out what to do after the divorce and try to get it done. But it is far better lawyering – in the client's interest and that of the attorney seeking to avoid potential liability – to deal with the retirement benefits at the time of divorce. Doing so means making sure the proper orders are in place at the time of entry of the Decree – and making sure the relevant retirement plans acknowledge getting them.

#### **D. Reservations of Jurisdiction; Indemnification**

The lawyer's two best tools for ensuring that orders are enforced, and that exposure to liability is reduced, are reservations of jurisdiction to correct problems, and express "indemnification," meaning that if benefits are paid for any reason at variance from what is specified in the court order, the recipient holds those funds as constructive trustee for the intended beneficiary.

The precise dangers to be addressed, and language to be used to avoid it, varies from one type of retirement plan to another. Experience in dealing with the specific type of retirement plan at issue is critical to knowing what to insert in the relevant order.

## E. Disability Benefits

Generally, divorce practitioners tend to try to make their property distributions “permanent”; the case law contemplates that once a final distribution is made, it is to be enforced, but not modified.

The question is what to do when a party substitutes a non-divisible income stream for another divisible income stream after the date that a court decides to distribute the original asset as the separate property of the employee and the spouse.

Probably the most common instance of such substitution difficulty involves a disability rating on the part of the employee spouse which alters the “normal” retirement otherwise payable. 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.

Usually, the change is replacement of a portion of (taxable) retirement benefits with (generally nontaxable) disability benefits in an equal amount, but sometimes a disability award supplements the retirement benefits with a separate payment relating to the disability, either temporarily (until normal retirement age) or permanently. When accepting a disability award requires relinquishing a retirement benefit, the interests of the parties as to the proper characterization of the benefits become instantly polarized.<sup>151</sup>

The ways in which possible disability benefits interact with retirement benefits varies enormously from one kind of retirement plan to another. In the military context, for example, there are multiple kinds of possible disability benefits, distinguishable by whether they supplement or replace regular retired pay, and the basis for their award. To receive tax-free disability pay, a member must usually waive an equivalent portion of retired pay. Such waived pay is deducted from the definition of “disposable” pay that may be split with a former spouse in accordance with a court order. Ultimately, most disability claims increase the money flowing to the retiree at the expense of the former spouse, even to the point of eliminating the spousal share entirely.<sup>152</sup>

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<sup>151</sup> See, e.g., *In re Marriage of Knies*, 979 P.2d 482 (Wash. Ct. App. 1999) (only disability award in excess of amount of retirement benefits otherwise payable are the separate property of the retiree); *Powers v. Powers*, 779 P.2d 91 (Nev. 1989) (disability benefits were divisible property to the extent they included divisible retirement benefits); *In re Marriage of Higinbotham*, 203 Cal. App. 3d 322 (Ct. App. 1988), citing *In re Marriage of Stenquist*, 21 Cal. 3d 779 (Cal. 1978) (same); *In re Marriage of Saslow*, 710 P.2d 346 (Cal. 1985) (disability benefits may be part replacement of earnings and part retirement); *In re Marriage of Anglin*, 759 P.2d 1224 (Wash. Ct. App. 1988) (disability benefits may be part replacement of earnings and part retirement); *In re Marriage of Kosko*, 611 P.2d 104 (Ariz. Ct. App. 1980) (disability benefits may be part retirement and part replacement of earnings).

<sup>152</sup> See *Mansell v. Mansell*, 490 U.S. 581, 109 S. Ct. 2023 (1989). Also see *Howell v. Howell*, 137 S. Ct. 1400, 581 US \_\_\_, 197 L. Ed. 2d 781 (2017).

This area of law is enormously complicated, and the federal programs involved continue to change. Some guidance is set out in posted CLE materials.<sup>153</sup>

For all retirement systems, knowing what would happen to the anticipated benefit stream in the event of a disability claim is – or certainly could become – critical. Fallback indemnification clauses will work for most plans but are especially necessary in military cases.<sup>154</sup> There is no obvious reason not to reserve jurisdiction in the event of *any* interruption in the payment stream, including one caused by a disability conversion of the retirement.<sup>155</sup>

## F. Bankruptcy

Potential bankruptcy is an obvious example of an action by the wage-earner that could alter the distribution of the benefits at issue.<sup>156</sup> If the underlying divorce documents are correctly structured, it is often possible to ensure that even if the benefits themselves are out of reach, the court would be empowered to award alimony sufficient to deflect the impact of divesting of the spousal interest.

Historically, there was a split in the federal circuits as to the dischargeability in bankruptcy of one spouse's obligations to another for future pension payments (or accrued arrears).<sup>157</sup>

Under the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA),<sup>158</sup> the balancing of hardships under the prior law between the debtor and creditor spouse was eliminated,

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<sup>153</sup> See Marshal Willick, *Divorcing the Military: How to Attack; How to Defend*, posted at [http://www.willicklawgroup.com/military\\_retirement\\_benefits](http://www.willicklawgroup.com/military_retirement_benefits).

<sup>154</sup> See *Howell v. Howell*, 137 S. Ct. 1400, 581 US \_\_\_, 197 L. Ed. 2d 781 (2017); *Jones v. Jones*, 505 P.3d 224, 230 (Alaska 2022).

<sup>155</sup> Of course, the decision by the United States Supreme Court in *Howell v. Howell*, *supra*, makes all military disability non-divisible. The appropriate means of dealing with that possibility is express indemnification as in *Jones*, *supra*, and/or an award, and reservation, of alimony, as cogently detailed in cases appearing in multiple States. See *Cassinelli v. Cassinelli*, \_\_\_ Cal. App. 5th \_\_\_, \_\_\_ Cal. Rptr. \_\_\_ (Cal. Ct. App. No. E063769, Mar. 2, 2018); *Hurt v. Jones-Hurt*, 168 A.3d 992 (Md. Ct. Spec. App. 2017).

<sup>156</sup> See *Siragusa v. Siragusa*, 108 Nev. 987, 843 P.2d 807 (1992); *Martin v. Martin*, 108 Nev. 384, 832 P.2d 390 (1992) (“hold harmless” provision qualified as maintenance or support, since court found that without it “spouse would be inadequately supported”; alimony ordered).

<sup>157</sup> The Fifth Circuit simply held that an award to a former spouse of a portion of the retired pay as property made it her separate property from that day forward, leaving no “debt” to be discharged or otherwise addressed by the bankruptcy court. See *In re Chandler*, 805 F.2d 555 (5th Cir. 1986), *cert. denied*, 481 U.S. 1049 (1987). The rule in the Ninth Circuit was that prospective payments are not dischargeable, but accrued arrearages may be. See *In re Teichman*, 744 F.2d 1395 (9th Cir. 1985). The Tenth circuit did not allow discharge of either. See *Bush v. Taylor*, 912 F.2d 989, *vacating* 912 F.2d 962 (8th Cir. 1990).

<sup>158</sup> Apparently referred to in certain circles as the Bankruptcy Abuse Reform Fiasco (BARF).

and “domestic support obligations”<sup>159</sup> were made nondischargeable in Chapter 7 bankruptcies, but apparently not under Chapter 13 plans that are successfully concluded. Such obligations were given a high priority, requiring their payment before satisfaction of virtually any other obligations of the debtor.

In light of the continuing evolution of bankruptcy law, it has generally become easier for spouses to prevent discharge of arrearages in retirement benefits, as well as saving future payments, even if the pension award is treated *as* a property division. But the intersection of pension division and bankruptcy remains problematic, and counsel should always be wary of any bankruptcy filing, or potential filing.

### **G. Transmutation Versus Severance Pay**

The powers and procedures of courts to interpret divorce court orders, when expectations embedded in the orders prove inaccurate, varies from one jurisdiction to another. As with the disability cases referenced above, payments to an employee can be altered by altering or terminating the service being performed or job held. The problem is often seen in court orders issued during employment that projected a date certain for payments to start to the former spouse, or made reference to “twenty years of service,” etc.

One example of how such problems arise and can be addressed was seen in the military cases involving the Variable Separation Incentive (VSI)<sup>160</sup> and Special Separation Benefit (SSB)<sup>161</sup> programs, which were early-retirement programs offered at times by the military by means of which members could terminate service before completing 20 years, receiving lump-sum or time payments instead of a regular military pension.<sup>162</sup> The military also developed an early (15-19 year) retirement program known as the “Temporary Early Retirement Authority” (TERA) in 1993.<sup>163</sup>

The first two programs were offered to members in “selected job specialties” who had accrued between six and twenty years of service.<sup>164</sup> Some were required to serve in Reserve units, as well,

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<sup>159</sup> The term domestic support obligation is defined very broadly to include all debts to a spouse, former spouse or child incurred during a divorce or separation regardless of whether the debt is designated as a “support” obligation or not.

<sup>160</sup> 10 U.S.C. §§ 1175-1175a.

<sup>161</sup> 10 U.S.C. § 1174a.

<sup>162</sup> 10 U.S.C. §§ 1174a(b), 1175a(h).

<sup>163</sup> Pub. L. 102-484, 106 Stat. 2315; former 10 U.S.C. § 1293.

<sup>164</sup> 10 U.S.C. §§ 1174a(c), 1175(b).

after leaving active duty.<sup>165</sup> The TERA early retirement option was similar to “regular” military retirement, except that the sum paid contained an actuarial penalty of one percent per year for each year short of 20 years of service.<sup>166</sup>

All three of these programs were repeatedly re-authorized by Congress until 2001, and remain available to be used if perceived to be necessary. Most recently, Congress extended voluntary separation pay and benefits authority, formerly set to expire at the end of 2012, to the end of 2018.<sup>167</sup>

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

Especially when they were new, there was some question as to whether VSI and SSB benefits were, or should be, divisible as marital or community property. In *Crawford*,<sup>168</sup> the court specifically quoted and analogized to *Marriage of Strassner*,<sup>169</sup> which addressed disability benefits. The Arizona court held that in both situations the spousal interest had been “finally determined” on the date of the decree, and enforcing that order in the face of a post-decree recharacterization by the member did not violate *Mansell*.

Courts throughout the country are in fair consensus that a spouse can receive a share of any *early retirement* taken by a member, under the theory that the “early out” benefits are as divisible as the retirements that were given up to receive those benefits, despite the lack (for SSB and VSI) of any federal mechanism for direct payment to the former spouse.<sup>170</sup> Other courts throughout the country have used similar language or reasoning to reach the same results regarding both programs.<sup>171</sup>

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<sup>165</sup> 10 U.S.C. § 1175a(d).

<sup>166</sup> Former 10 U.S.C. § 1293(e).

<sup>167</sup> Section 526 of the 2012 Defense Authorization bill.

<sup>168</sup> *In re Crawford*, 884 P.2d 210 (Ariz. Ct. App. 1994).

<sup>169</sup> *In re Marriage of Strassner*, 895 S.W.2d 614 (Mo. Ct. App. 1995).

<sup>170</sup> See *In re McElroy*, 905 P.2d 1016 (Colo. Ct. App. 1995) (SSB); *In re Shevlin*, 903 P.2d 1227 (Colo. Ct. App. 1995) (VSI); *In re Heupel*, 936 P.2d 561 (Colo. 1997).

<sup>171</sup> See *Kulscar v. Kulscar*, 896 P.2d 1206 (Okla. Ct. App. 1995) (SSB divisible in place of military retirement divided in divorce, refusing to “allow[] one party to retain all the compensation for unilaterally altering a retirement plan asset in which the other party has a court-decreed interest”); *Marsh v. Wallace*, 924 S.W.2d 423 (Tex. Ct. App. 1996) (SSB); *Pavatt v. Pavatt*, 920 P.2d 1074 (Okla. Civ. App. 1996) (SSB); *Abernathy v. Fishkin*, 638 So. 2d 160 (Fla. Ct. App. 1994) (VSI); *Blair v. Blair*, 894 P.2d 958 (Mont. 1995); *Fisher v. Fisher*, 462 S.E.2d 303 (S.C. Ct. App. 1995) (VSI); *In re Babauta*, 66 Cal. App. 4<sup>th</sup> 784, 78 Cal. Rptr. 2d 281 (1998); *Marsh v. Marsh*, 973 P.2d 988 (Utah Ct. App.

Very few courts have reached the opposite result.<sup>172</sup> Others have reached that opposite result, just to be reversed on appeal or affirmed upon narrow findings of special circumstances.<sup>173</sup> But the result may hinge on who frames the debate, since some courts still perceive benefits characterized as “severance” as non-divisible separate property.<sup>174</sup>

Care should be taken to ensure that any “residuary” benefits surviving a conversion to severance pay, etc., is also divided by the court. In the military context, for example, members carry with them the potential to significantly increase the time credited for second retirement programs by counting military service. Many state governmental programs, including Nevada PERS, and many private retirement programs, grant credit in their retirement systems for military service, especially when no separate pension resulted from that service.

Failure to make the resulting increase in benefits allocable to the former spouse is probably a mistake. A spouse seeking to share in a transmuted benefit or severance pay should also ask the court for a reservation of jurisdiction, at least, to enter such further order as is necessary to trace the spousal share of any later increase in benefits in another retirement system that is attributable to service during marriage.

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

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1999) (SSB); *Lykins v. Lykins*, 34 S.W.3d 816 (Ky. Ct. App. 2000).

<sup>172</sup> See *McClure v. McClure*, 647 N.E.2d 832 (Ohio Ct. App. 1994).

<sup>173</sup> See *Kelson v. Kelson*, 647 So. 2d 959 (Fla. Ct. App. 1994) (VSI held not divisible in split opinion); *overruled*, 675 So. 2d 1370 (Fla. 1996); *Baer v. Baer*, 657 So. 2d 899 (Fla. Ct. App. 1995) (where service member given ultimatum to accept VSI or be immediately involuntarily terminated, VSI payments were severance pay rather than retirement pay, and not divisible); *In re Kuzmiak*, 222 Cal. Rptr. 644 (Ct. App. 1986) (pre-SSB/VSI case; separation pay received upon involuntary discharge pre-empted State court division).

<sup>174</sup> See *In re Holmes*, 841 P.2d 388 (Colo. Ct. App. 1992) (severance pay is payment for expected loss of future income, not deferred compensation for services rendered, despite being based upon years of service); *Lawson v. Lawson*, 208 Cal. App. 3d 406, 256 Cal. Rep. 283 (1989) (listing factors for evaluating severance pay to see if they are marital or non-marital property).

## H. Stock Options

A number of companies offer stock options as either a benefit or as a retirement option for their employees— sometimes referred to as deferred compensation. The diligent family law practitioner will ensure that discovery is done on *all* possibilities when it comes to the benefits that are provided during the marriage.

Stock options are contingent rights given to employees of a company to purchase stock of the company at a price set at the time the option is created. The employee does not have to put up any money for an option until the time that options are exercised. If the stock has not increased in value an employee is not required to exercise the option so the right has no element of downside risk.

Typically the employee does not have a vested interest in the stock until some time period or periods have run. If an employee with options leaves the company prior to a stated time period, the right to exercise some or all of the options is lost in most option contracts. The conceptual approach is that employees will have incentive to work hard for the company to increase the value of the stock and will stay employed with the company in order to be able to purchase the stock. The latter concept is often referred to as “golden handcuffs.”

In startup companies in particular, options are a way of having key employees work for less than a market salary in the hope of bigger rewards from the increase in value of the stock.

Stock options can come in two specific ways, immediate vesting and vesting over time. In the first instance, the participant is awarded the right to purchase stock at a certain price – usually discounted off the market price at the time of the award – for a period into the future. It then becomes the participant’s decision on whether or when to “exercise” that option. Obviously, if stock options are granted to a participant during the marriage for work performed during the marriage, the options would be considered marital property.<sup>175</sup>

In the second instance, the stock options may be granted during the marriage, but vesting does not occur until some time in the future. This raises the clear question as to whether an option that is granted during the marriage, but does not vest until sometime after the divorce, is separate or marital property.

The legal question has been extensively litigated in California.

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<sup>175</sup> Of Course, if there are any restrictions created by a premarital agreement or other contract between the parties that characterize the benefit as sole and separate property, that would apply over and above the presumption of it being a marital asset.

The leading stock option case, *Marriage of Hug*,<sup>176</sup> sets forth the basic principles for division of stock options and had been cited and followed in all of the subsequent cases. Justice King stated in his decision that the following principals apply:

- 1) Section 5118 of the Civil Code (now Family Code 772) applies to stock options. Post separation earnings of a spouse are the separate property of that spouse and options are earnings.
- 2) Trial courts have broad discretion to select an equitable method of allocating marital and separate property interests in stock options granted prior to separation and not fully exercisable until after separation. The purpose of any method of division is to achieve substantial justice between the parties considering all of the facts and circumstances of the case.
- 3) Time rules for division of options are appropriate. No single formula is required or approved. A single formula would be promotive of settlement but notes that “to do so would be to follow the recent tendency of appellate courts and the Legislature, which we decry, to adopt rules which on the surface are easy to apply and foster consistency yet, as applied, too often achieve inequitable results.”
- 4) It is appropriate to award each spouse a portion of benefits as they are paid.

In other words and simply, if the grant occurs during the marriage, it does not matter if the vesting occurs after the divorce, the options are marital property to be divided between the parties.

Options may be qualified or non-qualified under federal tax law. Qualified options receive favorable tax treatment and do not result in any tax consequence to the grantee of the option until and unless the option is exercised. The difference does not affect ownership of the options but can affect valuation if the options are not divided in kind. More on qualified and unqualified benefits follows in the next section.

## **I. Non-Qualified Plans**

ERISA requires *most* retirement plans to be funded, with the assets held in trust. Such plans, and the related trusts, are subject to the fiduciary responsibility rules of Title I of ERISA, which include numerous rules designed to ensure the fairness of plans and the safety of the promised retirement benefits. Exceptions to these rules are made for some plans, most notably “Top Hat” plans (unfunded plans of deferred compensation for a select group of management or highly compensated

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<sup>176</sup> 54 C.A.3d 780, 201 Cal. Rptr. 676(1984).



employees),<sup>177</sup> unfunded “excess benefit” plans, and government plans. Top Hat plans are subject only to ERISA reporting and disclosure obligations, and claims regulation. Government and unfunded excess benefit plans are exempted from ERISA coverage entirely.

Plans are not required to honor “QDROs” for distribution of such plan benefits because the plans are not tax-qualified; the orders can therefore never be “qualified,” either. Nevertheless, many non-qualified plans will honor court orders dividing plan benefits; others will not. It is critical for counsel to figure out what benefits are actually involved in a case, and what is required to divide them. Where the plan benefits are not directly divisible, counsel may be required to find more creative solutions such as offsets, constructive trusts, or other means of achieving equitable distribution under marital property rules.

## J. Taxes

Books could be written on the subject of proper tax treatment of pension and retirement interests. In fact, several existing books spend considerable time and attention on this subject, and no effort will be made here to recapitulate that information.<sup>178</sup>

One particular tax distinction, however, should be stressed. Most, but not all, retirement assets are pre-tax assets, which should *not* be directly offset on a balance sheet against post-tax assets such as money in a savings account or equity in a home. Doing so is possible, but requires assumptions about tax rates and actual values, which may or may not pan out. For example, if money in a pre-tax IRA account was discounted by 18% to account for future taxes, but Congress raised the effective tax rate on such withdrawals for the party involved to 25%, the assumed and actual values of the benefits would be quite different. And, depending on the facts, there could be penalties for withdrawal of the funds as well.

Transfers of a portion of a retirement plan to a former spouse by means of a QDRO is not a taxable event to the wage-earner. Similarly, an employee realizes no gain for tax purposes by withdrawing Keogh or IRA funds pursuant to court order and dividing them with a former spouse.<sup>179</sup> Benefit payments to a former spouse under a QDRO, however, are generally taxable income.<sup>180</sup>

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<sup>177</sup> See, e.g., 29 U.S.C. §1101(a)(1).

<sup>178</sup> See, e.g., *Retirement Equity Act: Divorce and Pensions* (Divorce Taxation Education, Inc. 1985 & Supp. 1988); H. Wren, L. Gabinet, & D. Carrad, *Tax Aspects of Marital Dissolution* (1991).

<sup>179</sup> See Private Letter Ruling 9016077 (April 20, 1990).

<sup>180</sup> See 29 U.S.C. §§ 402(a)(9), 72(m)(10).

The REA does not govern the division of IRAs, but the Internal Revenue Code provides that they may be divided tax free between divorcing spouses by agreement or court order.<sup>181</sup> A QDRO is *not* required to divide IRA accounts, as long as the decree (or an order incident to the decree) specifies the division.<sup>182</sup>

Rollovers must be handled very carefully, usually by direct transfer of the money from one account to the other without being withdrawn and re-deposited, which action could trigger imposition of withholding and taxes on the sums involved. Doing this incorrectly could lead to very serious economic effects.<sup>183</sup>

Similarly, if a participant takes the money outside of a QDRO, even to give it to the former spouse under a court order, full tax consequences and the 10% penalty are triggered as to the participant. If a QDRO is used to send the money to the Alternate Payee (or to the Alternate Payee's qualified tax-deferred plan), the "taxable event" is attributed to the Alternate Payee, and there is no 10% penalty.

Similar situations exist in most retirement systems. The difference in the definition of "disposable retired pay" for pre-1991 and post-1991 military divorces is huge – amounting to a 10% or greater lifetime difference in actual payments to a former spouse. And the change in definition in the 2017 National Defense Authorization Act reduced the value of military retirement benefits to former spouses by about 30-40%, on its face.

The point is that the question of what is taxable, to whom, and when, is one more thing that counsel must consider and address in dividing retirement benefits in divorce.

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<sup>181</sup> See 29 U.S.C. § 408(d)(6).

<sup>182</sup> See 29 U.S.C. § 408(d)(6).

<sup>183</sup> The entire amount withheld would itself be considered a taxable distribution, on which regular income taxes, plus early withdrawal penalties, are assessed. If a 31% bracket taxpayer tried to roll over \$100,000 by having a check issued to his spouse's IRA the next day, he would actually receive only \$80,000. Taxes of \$6,200 would be owed that year on the \$20,000 withheld, plus a \$2,000 penalty for early withdrawal. The net cost for holding the funds for a day would therefore be \$8,200, and the \$20,000 withheld would earn nothing during the entire tax year. There could be a refund of the remainder at the end of the tax year.

## K. Practicalities and Cautions

The mechanics of dividing private pension plans are largely beyond the scope of these materials.<sup>184</sup>

Many practitioners do not understand why they cannot simply obtain a form order from the Plan Administrator of a pension plan, fill in the blanks, and submit it for signature by the Judge. The answer lies in the interests of the parties. The form orders distributed by Plan Administrators are largely sufficient to pass the test of qualification to *be* QDROs, but that is the Plan Administrator's only concern; he or she neither knows, nor cares, about what steps may be taken to protect your client from the vagaries of life (or the malice of the other party), or to protect counsel from malpractice liability by having not complied with State law mandating equal division of property, etc.

In other words, there is a huge difference between the terms necessary to creating an *enforceable* QDRO and those *adequate* to protect the client's actual interests. Counsel must seek to have the QDRO address many items that are not strictly necessary for the draft just to be accepted as "qualified." The absence of such provisions will not affect the *validity* of the order, but may well determine whether or not the order actually does a client any good in the real world.

For example, counsel should expressly deal with potential changes in status, the ultimate example of which is death. But a Plan Administrator may not care a bit if the former spouse is left with no survivorship benefits; protecting the parties is not the Plan Administrator's job.

The absence of such a provision will not affect the validity of a QDRO, but if the facts are that the participant dies, has a new spouse, and the former spouse's attorney did *not* put such a clause in the QDRO, malpractice liability looms. On the flip side, failure to restrict the former spouse's "surviving spouse" benefit to the portion of the retirement benefits earned during marriage could leave the *participant's* attorney vulnerable to a claim by the participant's later spouse and intended beneficiary of the remainder of those benefits.

Similarly, the QDRO should provide for distribution from successor plans, for early retirement subsidies or other bonuses that might accrue, and should allocate the risk that, for whatever reason, the benefits are not paid. Plan Administrators do not care about such things – but divorce counsel should care.

For the moment, it should suffice to say that hiring an appropriate expert draftsman for such orders is often the best way of obtaining a proper order and avoiding liability for the divorce practitioner.

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<sup>184</sup> Courses by experienced QDRO experts on order-drafting typically take one to two days to cover the intricacies of QDRO-drafting and private pension rules. No such effort is attempted here. The intent of these materials is more to flag the practitioner on what needs to be known to do this correctly, than to actually provide the instruction required to do so.

Divorce counsel should beware, however, of paralegal form-peddlers and others who talk the talk, but actually have no idea what they are doing. Under the Captain of the Ship doctrine, counsel using such services or individuals to create retirement division orders will probably be held responsible – directly or indirectly – for the errors and omissions of the order-preparers.

#### **L. Offsets: How to Do (and Not Do) Them**

In many divorce scenarios both parties may have retirement accounts and/or Individual Retirement Accounts (IRAs) that need to be divided. To limit the number of domestic relations orders required to “balance” the accounts between the parties, offsetting is employed. However, great caution must be used here as not all retirement accounts are the same and you certainly can’t mix apples and oranges.

It used to be simple to balance IRAs as all you had to do was get the total of all of the IRAs, divide by two and ensure that the party with a greater balance transferred to the other an amount to achieve equity. A term within the decree of divorce is all that is needed to grant the authority for the transfer without incurring tax or penalty liability.

However, with the advent of the ROTH IRA, counsel must verify that all accounts are the same (ROTH or Traditional) before attempting a balance as the tax treatment of these accounts is substantially different.

This applies to pension plans as well. Unless both parties began work on the exact same day, worked for the exact same period, and qualified for retirement at the exact same time, two defined benefit plans cannot be simply balanced. Two separate orders are required to achieve equity in this case. Similarly, it is not simple to balance a defined benefit plan with either a defined contribution plan (i.e. 401(k)) or an IRA (whether ROTH or Traditional). It usually is possible, however, to balance a defined contribution plan with another like plan or with a traditional IRA.

The practitioner also should *never* offset non-retirement property with a retirement account unless there are just no other assets to use, and an offset must be done for some reason. Even then, it is necessary to take into consideration the tax consequences of the offset to the party receiving the retirement accounts to ensure neither party is being short-changed.<sup>185</sup>

Understanding the character of each client’s retirement assets is critical to ensuring that an offset can take place. A practitioner should seek the assistance of an expert before writing any decree or other order that attempts to balance assets using offsets.

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<sup>185</sup> If husband is to receive a house with an equity value of \$100,000, and wife gets a 401(k) plan with the same dollar value, equity has not been achieved. Husband can sell the house and he will have \$100,000. If wife cashes out of the 401(k), she will have to pay taxes on the money and will receive substantially less.

## **M. Security Interest QDROs**

The use of a QDRO for the division of a pension has come a long way since its inception as a means of dividing property upon divorce. It can be used to recover child support and alimony payments that are or have already become due.

One newer angle to consider is the granting of a *security interest* (also known as a Indemnity QDRO) in favor of one spouse who is owed sums upon divorce, using the benefits in a retirement plan as the security. The IRS approved of such an arrangement in Private Letter Ruling 9234014 (August 21, 1992), where each of the parties was granted a security interest in the benefits allocated to the other to secure contingent tax obligations.<sup>186</sup>

Various obligations that could be secured by a Security Interest QDRO include: (1) satisfaction of tax liabilities (e.g. when one party owes another an amount or is responsible for discharging a tax liability affecting the other); (2) payment of marital debts or ongoing expenses; (3) payment of attorneys' and experts' fees (if one party is to pay amounts to the other for such fees – need to make sure the payee is eligible under the plan rules); (4) transfer of assets; (5) release of security interests or mortgages; (6) purchase or transfer of life insurance, and (7) designations of beneficiary.

At present, security interest QDROs are underutilized and could be a wonderful new tool in the family law toolbox.

## **V. GUIDE FOR JUDGES**

### **A. During the Litigation**

As early in the litigation process as possible (no later than the Case Management Conference), every judge in every case should ask whether there are any retirement plans that need to be considered and addressed in the divorce. A pension is most likely the most valuable asset of the marriage, and ensuring it is adequately dealt with is important for a number of reasons:

1. So all parties know what assets should be distributed.
2. So the assets can be preserved for adjudication, avoiding issues of fraud, waste, and post-divorce litigation for partition or otherwise.
3. So any possible settlement takes those assets into account, for division or balancing against other assets.
4. So parties can hire valuation/pension experts early in the process if needed to assist in the division of the assets.

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<sup>186</sup> Also see IRS Private Letter Ruling 2002-52093, which reaches the same conclusion on almost identical facts, but is more complete in its explanation.

5. To prevent delay in the proceedings when one party or the other starts late in the litigation to do the discovery and other work necessary to adequately address pension assets.

Of course, each party has a duty of disclosure; however, not every attorney is diligent or fully forthcoming, and pro per litigants typically do not understand their responsibilities. In either event, it may fall to the judge to avoid substantial injustice (by loss of the primary marital assets, loss of survivorship eligibility, or otherwise).

Additionally, many lawyers do not understand the complexities of pension division in divorce, and a little judicial nudge to get them to deal with the matter as early in the process as possible (by either learning what is needed to be known, or obtaining competent assistance) will ultimately save considerable time and aggravation for the parties *and* for the Court.

## **B. At Trial or Prove-Up**

A judge can't ignore the division of the pensions at the time of trial or prove-up without facilitating the mischief that will virtually always follow. Just asking the same questions asked earlier on in the litigation:

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

will force the parties to place on the record what is to become of the pension assets.

It certainly is not the judge's duty to advise litigants – especially if they are represented – as to all of their rights and responsibilities. That said, since the plans' existence will already be part of the court record at that point, the Court can inquire – *sua sponte* – what decisions have been made regarding the disposition of the assets, as a matter of efficient court administration, if for no other reason.

Prove-up or trial is also the appropriate time to ask who will be responsible for preparing the required additional orders – such as QDROs or COAPs – and when, precisely, they will be submitted to the Court for signature. This simple reminder could avoid malpractice claims stemming from the

OPM's "first order" rule, or other inadvertent loss of retirement or survivorship benefits, and thus prevent considerable unnecessary misery for a number of people involved.

### C. Upon Submission of a Decree, QDRO, or Pension-Division Order

The judge should ensure that any post trial or prove-up order or decree recites the intent of the Court and/or the intent of the parties on the division of the pension assets. The Court should inquire as to who drafted the pension language, whether the order has been pre-approved (if applicable), whether the division is to be effective on first eligibility to retire, at actual retirement,<sup>187</sup> or at some other time, and should ensure that there is a reservation of jurisdiction for the Court to correct any errors and to allow enforcement of the Court's intentions.

The list of possible problems that may be encountered in each pension division order or QDRO is too lengthy and varied to include here. A judge should become familiar enough with the process to ensure that any order that is presented for signature and entry does not violate either the terms of State law, or the intent of the Court and parties.

## VI. CONCLUSIONS

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

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

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<sup>187</sup> Such a deferred division might well not comply with the mandate of equal division of assets required by state law, such as Nevada NRS 125.150, and thus may require explicit written findings on the record to withstand appellate scrutiny.

## TABLE OF EXHIBITS

1. Checklist: Federal Employees Retirement System (FERS)/Civil Service Retirement System (CSRS)
2. Questionnaire: FERS/CSRS
3. Checklist: Military Retirement Benefits Cases
4. Questionnaire: Military Divorce MRB/SBP Orders
5. Checklist: Private Qualified Domestic Relations Order
6. Questionnaire: QDRO