



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

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

by

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

These materials address a few aspects of locating servicemembers, matters of temporary support orders, and the Servicemembers Civil Relief Act, but largely focus, even as to preliminary matters such as jurisdiction, on the discussion of retirement benefits, which comprise the bulk of the materials.

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

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

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

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

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

It is the *far* better practice to deal with military retirement benefits during the divorce itself, instead of deferring the matter to be dealt with “later.”<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

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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).

to divide those benefits, and parties often relocate after divorce. The jurisdictional rules could require the matter to be resolved in such States.

When partition is unavailable, the only mechanism for recovery for a divested spouse may be a malpractice suit against divorce counsel, in which the potential liability is the value of the benefit lost by the shortchanged spouse. Courts hearing such cases have stated that any attorney practicing divorce law is charged with knowing about the existence, value, and mechanics of dividing any retirement benefits that might exist.<sup>3</sup>

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

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

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

Before June, 1981, the treatment of military retirement benefits upon divorce varied widely from State to State. Many courts in the 1960s and 1970s did not acknowledge such benefits as property, characterizing them as either the sole property of the individual in which they were titled or “mere expectancies.”<sup>4</sup> Spouses were seldom awarded an interest in military retirement benefits, as such, upon divorce.

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

As early as 1969, however, some States had declared pension rights to be community property, divisible upon divorce.<sup>5</sup> The tide had clearly turned on this question, at least in the

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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 to liable for failure to inquire about, discuss, or seek division of client’s husband’s military pension in a dissolution case where the attorney was on notice that one of the parties was a member of the Armed Services); *Bross v. Denny*, 791 S.W.2d 416 (Mo. Ct. App. 1990) (\$108,000 malpractice award where attorney did not know that he could seek division of military retirement after change in the law)

<sup>4</sup> See, *e.g.*, *French v. French*, 112 P.2d 235, 17 Cal. 2d 775, 778 (1941) (Naval Fleet Reserve pay), *overruled*, *In re Marriage of Brown*, 544 P.2d 561, 15 Cal. 3d 838 (Cal. 1976).

<sup>5</sup> See *LeClert v. LeClert*, 453 P.2d 755 (N.M. 1969); *Busby v. Busby*, 457 S.W.2d 551 (Tex. 1970).

community property States, when the California Supreme Court issued its 1974 opinion in *Fithian*.<sup>6</sup> Pension decisions, at first, addressed benefits which were vested at the time of divorce. Eventually, divisibility was extended to non-vested and unmatured retirement benefits as well.<sup>7</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. The national legal community developed a consciousness of the importance of retirement benefits, resulting in a larger number of military retirements being considered – directly or indirectly – in property settlements and divorce decrees. Still, there was no enforcement mechanism, and in 1980 the treatment of military retirement benefits still varied widely.

On June 26, 1981, the United States Supreme Court focused the debate by issuing its opinion in *McCarty v. McCarty*.<sup>8</sup> The husband in a California divorce had requested that his military retirement benefits be “confirmed” as his separate property. In 1977, the California trial court refused, finding that the military retirement benefits were quasi-community property,<sup>9</sup> and therefore ordered the normal “time rule”<sup>10</sup> division of the benefits.

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

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<sup>6</sup> *In re Marriage of Fithian*, 10 Cal. 3d 592, 517 P.2d 449 (Cal. 1974) (recognizing the importance of military retirement benefits as a marital asset), *disapproved on other grounds, In re Marriage of Brown*, 544 P.2d 561, 15 Cal. 3d 838 (Cal. 1976).

<sup>7</sup> *See In re Marriage of Brown*, 544 P.2d 561, 15 Cal. 3d 838 (Cal. 1976); *Copeland v. Copeland*, 575 P.2d 99 (N.M. 1978); *In re Marriage of Luciano*, 104 Cal. App. 3d 956, 164 Cal. Rptr. 93 (Cal. Ct. App. 1980); *Forrest v. Forrest*, 99 Nev. 602, 668 P.2d 275 (Nev. 1983).

<sup>8</sup> 453 U.S. 210, 101 S. Ct. 2728 (1981).

<sup>9</sup> Essentially, quasi-community property is a label used by community property States to describe property acquired outside the State that *would have been* community property if acquired within the State; such States generally divide such property as if it were regular community property.

<sup>10</sup> Some variations in how the time rule (known in some jurisdictions as the “coverture fraction”) is applied are discussed below.

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

Congress may will decide, as it has in the Civil Service and Foreign Service contexts, that more protection should be afforded a former spouse of a retired service member. This decision, however, is for Congress alone. . . . in no area has the Court accorded Congress greater deference than in the conduct and control of military affairs.<sup>11</sup>

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

Congress reacted by enacting the Uniformed Services Former Spouses Protection Act (“USFSPA”) on September 8, 1982.<sup>12</sup> The declared goal of the USFSPA, at the time of its passage, was to “reverse *McCarty* by returning the retired pay issue to the states.”<sup>13</sup> Later re-interpretations indicated that this stated declaration of intent might not have totally overruled

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<sup>11</sup> 453 U.S. at 235-36, 101 S.Ct. at 2743.

<sup>12</sup> Also commonly known as the “Federal Uniformed Services Former Spouses Protection Act,” or FUSFSPA, or as “the Former Spouses Act,” or in some references simply as “the Act.” 10 U.S.C. § 1408; Pub. L. No. 97-252, 96 Stat. 730 (Sept. 8, 1982), amended by Pub. L. No. 98-94, 97 Stat. 653 (Sept. 24, 1983), Pub. L. No. 98-525, 98 Stat. 2545 (Oct. 19, 1984), Pub. L. 98-525, 99 Stat. 677 (Nov. 8, 1985), Pub. L. No. 99-661, 100 Stat. 3885 (Nov. 14, 1986), Pub. L. No. 101-510, § 555, 104 Stat. 1485, 1569 (Nov. 5, 1990), Pub. L. No. 102-190, § 1061(a)(7), 105 Stat. 1472 (Dec. 5, 1991), Pub. L. No. 102-484, § 653(a), 106 Stat. 2426 (Oct. 23, 1992), Pub. L. No. 103-160, § 555(a), (b), § 1182(a)(2), 107 Stat. 1666, 1771 (Nov. 30, 1993), Pub. L. No. 104-106, § 1501(c)(16), 110 Stat. 499 (Feb. 10, 1996), Pub. L. No. 104-193, §§ 362(c), 363(c)(1)-(3), 110 Stat. 2246, 2249 (Aug. 22, 1996), Pub. L. No. 104-201, § 636, 110 Stat. 2579 (Sept. 23, 1996); Pub. L. 105-85, div. A, title X, § 1073(a)(24), (25), 111 Stat. 1901 (Nov. 18, 1997); Pub. L. 107-107, div. A, title X, § 1048(c)(9), 115 Stat. 1226 (Dec. 28, 2001); Pub. L. 107-296, title XVII, § 1704(b)(1), 116 Stat. 2314 (Nov. 25, 2002); Pub. L. 108-189, § 2(c), 117 Stat. 2866 (Dec. 19, 2003).

<sup>13</sup> “The purpose of this provision is to place the courts in the same position that they were in on June 26, 1981, the date of the *McCarty* decision, with respect to treatment of nondisability military retired or retainer pay. The provision is intended to remove the federal pre-emption found to exist by the United States Supreme Court and permit State and other courts of competent jurisdiction to apply pertinent State or other laws in determining whether military retired or retainer pay should be divisible [*sic*]. Nothing in this provision requires any division; it leaves that issue up to the courts applying community property, equitable distribution or other principles of marital property determination and distribution. This power is returned to the courts retroactive to June 26, 1981. This retroactive application will at least afford individuals who were divorced (or had decrees modified) during the interim period between June 26, 1981 and the effective date of this legislation the opportunity to return to the courts to take advantage of this provision.” S. Rep. No. 97-502, 97th Cong., 2nd Sess. 15, (1982), reprinted in 1982 U.S.Code Cong. & Ad.News 1596, 1611. See also *Steiner v. Steiner*, 788 So. 2d 771 (Miss. 2001), *opn. on reh’g*.

*McCarty* after all,<sup>14</sup> but in any event treatment of retired pay was again made dependent on the divorce laws of the jurisdictions granting decrees.

The primary purpose of the USFSPA was to define State court jurisdiction to consider and use military retired pay in fixing the property and support rights of the parties to a divorce, dissolution, annulment, or legal separation.<sup>15</sup> By fits and starts, every State in the Union has permitted military retirement benefits to be divided as property, at least in certain circumstances.

The USFSPA is both jurisdictional and procedural; it both permits the State courts to distribute military retirement to former spouses, and provides a method for enforcement of these orders through the military pay center. The USFSPA itself does not give former spouses an automatic *entitlement* to any portion of members' pay. Only State laws can provide for division of military retirement pay in a divorce, or provide that alimony or child support are to be paid from military retired pay.<sup>16</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>17</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>18</sup> and the pay centers were consolidated.<sup>19</sup>

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<sup>14</sup> In *Mansell v. Mansell*, 490 U.S. 581, 109 S. Ct. 2023 (1989), the Court found that the Act did not *totally* repudiate the pre-emption found by the Court to exist in *McCarty*; Congress' failure to alter the language of the Act so as to alter this finding, when it next amended the Act in 1990, has been read by some to imply congressional consent that at least some partial pre-emption was intended to remain after passage of the Act.

<sup>15</sup> Legislative History, Pub. L. No. 97-252; S. Rep. No. 97-502. The Report noted that as of June 26, 1981, case decisions in "virtually all" community property States, and in many of those employing equitable distribution principles, permitted military retired pay to be considered marital property subject to division. In only the two "title" States, Mississippi and West Virginia, were pensions considered upon divorce the exclusive property of the party in whose name the asset was titled. Since that time, both of those States have adopted equitable distribution schemes.

<sup>16</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>17</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>18</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

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>20</sup> Any right to receive payments under the USFSPA is non-transferable; the former spouse may not sell, assign, or transfer his or her rights, or dispose of them by inheritance.<sup>21</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>22</sup> but the USFSPA limits direct payment to a former spouse to 50% of disposable retired pay for all payments of property division.<sup>23</sup> More than fifty percent of disposable pay may be paid<sup>24</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.

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regulations. DFAS finally issued comprehensive replacement regulations, at Department of Defense Financial Management Regulation (DoDFMR) 7000.14-R, Vol. 7B, Ch. 29 ("Former Spouse Payments From Retired Pay") (Feb. 2009). For DoDFMR 7000.14-R, see the DFAS website at <http://www.dod.mil/comptroller/fmr>. For the first time, DFAS included a model retirement division order, but like most model orders, it does not anticipate all the choices counsel are required to consider (such as survivorship benefits), and should not be relied upon.

<sup>19</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>20</sup> 10 U.S.C. § 1408(d)(4).

<sup>21</sup> 10 U.S.C. § 1408(c)(2).

<sup>22</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>23</sup> 10 U.S.C. § 1408(e)(1).

<sup>24</sup> Up to 65% of "remuneration for employment" under the Social Security law, 42 U.S.C. § 659.

Some courts have ruled that the 50% limitation is a *payment* limitation only, so that trial courts may award more than that amount – up to 100% of the retired pay – to the former spouse, but the pay center can only pay 50%, leaving the spouse to collect the remainder from the military member by other means (such as normal State court contempt proceedings if not paid).<sup>25</sup> The Department of Defense has concurred in this interpretation.<sup>26</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>27</sup>

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

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

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<sup>25</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); see also *Coon v. Coon*, 614 S.E.2d 616 (S.C. 2005) (USFSPA neither confers nor removes subject matter jurisdiction; lower court can address all disposable retired pay); but see *Cline v. Cline*, 90 P.3d 147 (Alaska 2004) (50% limit is jurisdictional); *Knoop v. Knoop*, 542 N.W.2d 114 (N.D. 1996) (indicating in dicta that awards are limited to 50%).

<sup>26</sup> See *A Report to Congress Concerning Federal Former Spouse Protection Laws*, *infra*, at 76.

<sup>27</sup> 10 U.S.C. § 1408(e)(6).

order” was needed to set out a percentage that could have easily been calculated using figures completely available to the pay center.

Effective April 1, 1995, revised regulations<sup>28</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 payments to the spouse are limited to 50% of “disposable pay” (discussed in more detail below).

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

There was a twenty month “gap” between the *McCarty* decision and the congressional enactment of the USFSPA. The act was expressly made retroactive to the start of the gap period, but the language used left some room for interpretation,<sup>29</sup> which has led to more than 20 years of litigation and conflicting decisions.

Some States, such as Washington, found the USFSPA itself was sufficient authority for their courts to address cases of persons divorced during the gap.<sup>30</sup> In those States, motions could be brought to divide the retirement benefits if they had been omitted, or to divide the benefits if they had been awarded solely to the member while *McCarty* was the law of the land.

Despite the “will at least afford an opportunity” language in the legislative history, however, courts in some other States, such as California and Idaho, ruled that no common law remedy

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<sup>28</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 2009 regulations in DoDFMR 7000.14-R, Vol. 7B, Ch. 29 (“Former Spouse Payments From Retired Pay”).

<sup>29</sup> The effective date section of the original enactment, Section 1006, read in part as follows:

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

<sup>30</sup> See, e.g., *In re Marriage of Parks*, 48 Wash. App. 166, 737 P.2d 1316 (Wash. Ct. App. 1987).

existed for such persons. These rulings led to passage of “window” statutes in some of those States, specifically permitting those divorced during the gap a limited time to relitigate the division or non-division of the retirement benefits.<sup>31</sup> Nevada passed the first such statute, which expired after only six months, in 1983. Illinois enacted the most recent window period, which closed in January, 1989.

Some of the States in the group which found the USFSPA inadequate authority to allow the re-opening of gap cases never passed legislation permitting those divorced during the gap to bring their decrees into conformity with those divorced before *McCarty* or after the USFSPA. The case law of such States, such as Texas, provides that *McCarty*-era divorces giving 100 percent of the retirement benefits to the member could not be revisited.<sup>32</sup> As the number of living persons with *McCarty*-gap divorces dwindles, it becomes ever less likely that additional States will pass window statutes.

#### **D. Major Cases**

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

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

*Casas v. Thompson*<sup>33</sup> was a clear restatement of the law regarding military retirement benefits division as it had evolved in California prior to 1988, which was followed by several other States. It was a partition case ten years after entry of a divorce decree that had not mentioned the retirement. Ultimately, the spouse was granted partition of the omitted retirement from the date she filed her petition, but no arrears. The Court of Appeals affirmed with a few modifications not important here.<sup>34</sup>

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

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<sup>31</sup> See, e.g., *In re Marriage of Barnes*, 43 Cal. 3d 1371, 743 P.2d 915 (Cal. 1987).

<sup>32</sup> See, e.g., *Allison v. Allison*, 700 S.W.2d 915 (Tex. 1985).

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

<sup>34</sup> *Casas v. Thompson*, 217 Cal. Rptr. 471 (Cal. Ct. App. 1985).

The court found it “illogical” to limit the spousal share to a portion of *disposable* retired pay, and considered the USFSPA a complete repudiation of the *McCarty* holding. The court focused upon the legislative history that declared Congress’ intent to “restore the law to what it was,” and noted that previous California law had called for division of the entirety (i.e., the gross sum) of military retirement, as it did with all other retirement benefits.<sup>35</sup>

While *Casas* was widely cited and largely followed elsewhere, not all aspects of the decision had a long life, as discussed below. Today, the case is most frequently cited for the proposition that equitable defenses can be raised against a legal claim to arrearages.<sup>36</sup>

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

*Fern v. United States*<sup>37</sup> was an unusual case in that the defendant was not a former spouse but the United States itself. The suit sought to have the USFSPA declared invalid to the extent that it entitled the government to reduce the retired pay flowing to the members themselves. In other words, the members contended that, irrespective of any award to any former spouse, the full sum of retired pay should be paid to the members. It alleged unconstitutional “taking” of property in violation of the Fifth Amendment, an unconstitutional impairment of contracts with the United States (by which the members contended that they alone were to receive the entirety of their retirement benefits), and that spousal awards under the USFSPA were due process violations.

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

The court rejected the “equal protection” attack on partition of pensions omitted from the initial decrees of some of the plaintiffs, recounting the retirees’ “odysseys through the State and federal courts challenging state court decrees dividing their retirement pay” and noting that the retirees “were unable, as a final matter, to convince any of these courts that division

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<sup>35</sup> *Casas v. Thompson*, 228 Cal. Rptr. 33, 720 P.2d 921 (Cal. 1986), *cert. denied*, 479 U.S. 1012 (1987). One Texas court approved a trial court’s 1995 insertion of the word “gross” in construing and enforcing its 1979 decree dividing military retirement benefits; the court found the rephrasing to be merely “reiterating” what was ordered in 1979, and added the home-spun explanation that:

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

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

<sup>36</sup> See also *In re Marriage of Krempin*, 83 Cal. Rptr. 2d 134, 70 Cal. App. 4th 1008 (Ct. App. 1999) (holding that respondent could raise equitable defenses to a “large arrearage in payments”).

<sup>37</sup> 15 Cl. Ct. 580 (1988), *aff’d*, 908 F.2d 955 (Fed. Cir. 1990).

of their retirement pay was unconstitutional or legally improper.” The court found that partition of military retirement benefits is precisely the sort of “economic adjustments to promote the common good” that legislatures properly perform, and that any retroactive effect of USFSPA is curative, accomplishes a rational purpose, is entitled to be liberally construed, is shielded from constitutional attack, and serves public policy. It rejected the contract clause and due process arguments as well.

Members convinced of the righteousness of their cause continue to file such actions, sometimes as a class. The results have continued to be consistent.<sup>38</sup>

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

*Mansell v. Mansell*<sup>39</sup> was yet another case coming out of California. When the parties divorced, the *McCarty* decision had not yet issued; the member had retired, and applied for and received disability benefits. The divorce decree included the stipulation that the parties would divide the gross sum of retirement benefits (including both retired pay and disability pay).

After Congress enacted the USFSPA, the member returned to court seeking to modify the judgment to exclude the disability portion of the retired pay from division with his ex-spouse.<sup>40</sup> The State court denied his request, holding the division of the disability portion of the military retired pay was proper. The member appealed.

The U.S. Supreme Court majority reversed, holding that the USFSPA did *not* constitute a total repudiation of the pre-emption it had declared in *McCarty*. Since the statute defined “disposable pay” as what was divisible, and excluded disability pay from that definition, the Court concluded that State courts could divide only *non*-disability military retired pay.<sup>41</sup> The dissent echoed the conclusions reached earlier by the California Supreme Court in *Casas v. Thompson* – that the gross sum of retirement benefits was available to the State divorce court for division.<sup>42</sup>

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<sup>38</sup> See, e.g., *Adkins v. Rumsfeld*, 464 F.3d 456 (4<sup>th</sup> Cir. 2006) (broad constitution-based assault on USFSPA rebuffed, finding that military retirement truly is a pension, or “deferred compensation for past services,” rather than “compensation for reduced job activities”).

<sup>39</sup> 490 U.S. 581, 109 S. Ct. 2023 (1989).

<sup>40</sup> *Mansell*, 490 U.S. at 586.

<sup>41</sup> *Id.* at 594-95.

<sup>42</sup> Justice O’Connor, joined in a dissent by Justice Blackmun, argued that the term “disposable retired pay” only limited a State court’s ability to garnish retired pay – not the court’s authority to divide that pay. *Id.* at 594-604. Both the dissent and the majority in *Mansell* concluded that the savings clause merely clarified that

Ultimately, the matter was remanded to State court. Ironically, that court ruled that the previously-ordered flow of payments from the member to the spouse, put into place prior to the appellate *Mansell* decision, was *res judicata* and could not be terminated.<sup>43</sup> In other words, the United States Supreme Court opinion had *no effect* on the order to divide the entirety of retirement and disability payments in the final, un-appealed divorce decree in the *Mansell* case itself.

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

#### **IV. KEY CONCEPTS IN MILITARY RETIREMENT BENEFITS**

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

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

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

Accordingly, the USFSPA included special jurisdictional rules that must be satisfied in military cases to get an enforceable order for division of the benefits as property. In *other* public and private plans, *any* State court judgment valid under the laws of the State where 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

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the federal direct payment mechanism does not replace State court authority to divide and garnish property through other mechanisms.

<sup>43</sup> *In re Marriage of Mansell*, 265 Cal. Rptr. 227 (Ct. App. 1989), *on remand from* 490 U.S. 581, 109 S. Ct. 2023 (1989).

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>44</sup>

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

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

## 2. How to Get “Federal Jurisdiction”<sup>45</sup>

Of the three grounds, “consent” is often easiest to establish. In most places, making a general appearance as a plaintiff or defendant, or asking for relief in the course of a divorce action, usually constitutes “consent” to trial of the entire action.<sup>46</sup> The 2009 regulations appear to have adopted this interpretation.<sup>47</sup>

In a few places, however, cases indicate that a service member may “un-consent” to court jurisdiction over the retirement issue alone.<sup>48</sup> Except in those locations, there generally is

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<sup>44</sup> 10 U.S.C. § 1408(c)(4).

<sup>45</sup> Many of the practice tips in this section are thanks to John C. Knoll, Esq., of San Diego, California, who presented them in a CLE in April, 2005.

<sup>46</sup> There is anecdotal evidence that, sometimes, complaints or motions are crafted for the purpose of provoking a response from the military member spouse seeking affirmative relief that would constitute a general appearance under the laws of the forum State. Once both parties are squarely before the divorce court, requesting relief, it may not be possible for the member to retroactively claim that the retirement benefits should not be addressed.

<sup>47</sup> DoDFMR 7000.14-R, Vol. 7B, Ch. 29 Sec. 290604(A)(3) (Feb. 2009) provides: “The member indicates his or her consent to the jurisdiction of the court by participating in some way in the legal proceeding.”

<sup>48</sup> See *Tucker v. Tucker*, 277 Cal. Rptr. 403 (Ct. App. 1991) (San Diego County, California); *Wagner v. Wagner*, 768 A.2d 1112 (Pa. 2001) (finding that 10 U.S.C. § 1408(c)(4) refers to *personal* jurisdiction); *Booker v. Booker*, 833 P.2d 734 (Colo. 1992). These decisions, with enormous illogic, create the very harm that Congress was trying to avoid, but in reverse – they provide a means for manipulation of otherwise adequate jurisdiction as a tactical weapon to prevent the proper court from hearing all aspects of a case that it should decide. Doing so gives an incentive to forum shopping, and causes piecemeal litigation in a multiple venues,

not a jurisdictional issue in dealing with the retirement benefits in the divorce action so long as the member is the plaintiff – or a defendant who does not raise the issue. It seems possible that the new regulations may cause reconsideration of cases such as *Tucker*, since it represents the enforcing agencies’ interpretation of a statute; if so, the “un-consent” cases may be overturned upon challenge.

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

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

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

If the matter proceeds to litigation, the forum State will have to rule on *where* the military member is actually a “resident” and “domiciled.” This can be far harder than it appears, especially since States diverge radically on the meaning of those terms. In some places “residence” is a physical question of location at the time of filing, while “domicile” is that permanent home “to which one returns.”<sup>49</sup> In other places, the meanings are reversed.<sup>50</sup> In

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leading to an increased chance of inconsistent results. Most ironically, the anti-forum-shopping rules were never necessary in the first place, since no State permits division of property without sufficient minimum contacts to satisfy constitutional concerns. Both the American Bar Association (“ABA”) and the American Academy of Matrimonial Lawyers (“AAML”) adopted position papers urging repeal of this provision of the USFSPA.

<sup>49</sup> See *Smith v. Smith*, \_\_\_ P.2d \_\_\_, 45 Cal. 2d 235 (Cal. 1955); George H. Fischer, Annotation, *Residence or Domicile, for Purposes of Divorce Action, of One in Armed Forces*, 21 A.L.R. 2d 1183 (19\_\_\_).

<sup>50</sup> Restatement (Second) of Conflict of Laws, § 11, comment k states that for purposes of divorce, residence refers to a domicile where a person actually lives.

*some* States, residence and domicile have the *same* meaning.<sup>51</sup> A service member who has close connections to more than one State will *still* only have one domicile.<sup>52</sup> If the service member has significantly more connections to one State than another, then the State to which he has closer ties is his domicile.<sup>53</sup>

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

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

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

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

Perhaps more useful is the member's DD-2058 form on file with the military, which is the member's "State of Legal Residence Certificate," or legal residency form. Again, questions must be asked about when the form was filed, and why, which may have greater or lesser relevance to traditional notions of residency and domicile. Federal law provides that

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<sup>51</sup> It is the opinion of the Nevada Attorney General's Office that "residency" in this State means the same thing as "domicile." Op. Nev. Atty. Gen. No. 26 (Mar. 21, 1955).

<sup>52</sup> RESTATEMENT § 11, *supra*.

<sup>53</sup> *Id.* at § 20, comment b.

members may not “accidentally” lose or acquire a residence or domicile solely by reason of military assignment,<sup>54</sup> so indicia of intent are critical to such an analysis.

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

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

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

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

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

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

Once “federal jurisdiction” is obtained – by consent, domicile, or residence (for purposes other than military assignment) – the forum court is fully empowered to deal with the retirement benefits as property, as it would any other asset within the jurisdiction of the court. It is good practice to recite the basis for jurisdiction over the service member on the

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<sup>54</sup> 50 U.S.C. App. § 571.

face of the decree or other order dealing with the military retirement benefits.<sup>55</sup> The new regulations, in fact, appear to *require* such a statement, providing that a court order asserting jurisdiction under the USFSPA “must state the basis for the finding, i.e., member’s residence, member’s domicile or member’s consent.”<sup>56</sup>

## **B. The “Ubiquitous Time Rule”<sup>57</sup> – More Flavors than You Might Expect**

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

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

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

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

Presume that a couple live together in marriage for ten years before they separate. The parties discuss reconciliation and possible divorce terms, but after six months, it becomes clear that the split is permanent, and one of them files for divorce. The divorce turns out to

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<sup>55</sup> The “standard form,” was printed nationally by the ABA in 1995 and has been in use throughout the country since that time. *See, e.g., Janovic v. Janovic*, 814 So. 2d 1096 (Fla. Ct. App. 2002) (noting as “standard language” the form paragraphs created for courts to use in decrees entered after *Mansell* to eliminate any ambiguity). The clause set was first published by the ABA as a guide for drafting attorneys in the form of “Military Retirement Benefit Standard Clauses” in 18 Family Advocate No. 1 (Summer, 1995) (*Family Law Clauses: The Financial Case*) at 30. The current, updated version of the standard clause set is posted on our web site, under “Published Works,” at [http://www.willicklawgroup.com/military\\_retirement\\_benefits](http://www.willicklawgroup.com/military_retirement_benefits). It has been copied, adapted and altered by many attorneys over the years – sometimes with unfortunate consequences. *See, e.g., Hayes v. Hayes*, 208 P.3d 1046 (Or. Ct. App. 2009) (approving standard language to bring general divorce decree language into effect to divide benefits); *Loria v. Loria*, 189 S.W.3d 797 (Tex. Ct. App. 2006) (variant of standard language interpreted as prohibition of right of military member to apply for disability benefits at all, and therefore held to be reversible error).

<sup>56</sup> DoDFMR 7000.14-R, Vol. 7B, Ch. 29 Sec. 290605.

<sup>57</sup> With apologies to Honey Kessler Amado, whose work is discussed below, from whom this perfect description was swiped for these materials.

be a messy, acrimonious matter which proceeds through motions, custody evaluations, returns, etc., for another year and a half, when the parties finally get to trial and are declared divorced. Also presume that the member spouse accrues a military retirement during marriage providing exactly \$1,000 after 20 years.

In California, the spousal share ceases to accumulate upon “final separation.”<sup>58</sup> So the math would be  $10 \text{ (years of marriage)} \div 20 \text{ (years of service)} \times .5 \text{ (spousal share)} \times \$1,000 \text{ (pension payment)} = \$250$ .

Arizona terminates community property accruals, for the most part, on the date of filing and service of a petition for divorce.<sup>59</sup> There, on the same facts, the math would be  $10.5 \text{ (years of marriage)} \div 20 \text{ (years of service)} \times .5 \text{ (spousal share)} \times \$1,000 \text{ (pension payment)} = \$262.50$ .

Next door in Nevada, community property ceases to accrue on the “date of divorce.”<sup>60</sup> There, the math would be  $12 \text{ (years of marriage)} \div 20 \text{ (years of service)} \times .5 \text{ (spousal share)} \times \$1,000 \text{ (pension payment)} = \$300$ .

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.

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<sup>58</sup> See, e.g., *In re Marriage of Bergman*, 168 Cal. App. 3d 742, 214 Cal. Rptr. 661 (Cal. Ct. App. 1985).

<sup>59</sup> Ariz. Rev. Stat. § 25-211 (1998).

<sup>60</sup> See, e.g., *Forrest v. Forrest*, 99 Nev. 602, 606, 668 P.2d 275, 278 (1983). While there is scant published authority for the proposition, this is usually thought to mean the date of the divorce trial.

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

As a matter of law, it is possible to value the spousal share in at least two ways. The majority of States applying the time rule formula seem to view the “community” years of effort *qualitatively* rather than quantitatively, reasoning that the early and later years of total service are equally necessary to the retirement benefits ultimately received.<sup>61</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 post-divorce increases in the wage-earner’s salary and years in service.

Some critics complain that such a formula gives the non-employee former spouse an interest in the employee spouse’s post-divorce earnings, 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>62</sup> This minority approach undervalues the spousal interest by giving no compensation for deferred receipt, and also contains a logic problem, at least in a community property analysis, of treating similarly situated persons differently.

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

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

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<sup>61</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).

<sup>62</sup> See, e.g., *Grier v. Grier*, 731 S.W.2d 931 (Tex. 1987).

Yearly Salary	Monthly Salary
\$20,000.00	\$1,666.67
\$21,000.00	\$1,750.00
\$22,050.00	\$1,837.50
\$23,152.50	\$1,929.38
\$24,310.13	\$2,025.84
\$25,525.63	\$2,127.14
\$26,801.91	\$2,233.49
\$28,142.01	\$2,345.17
\$29,549.11	\$2,462.43
\$31,026.56	\$2,585.55
\$32,577.89	\$2,714.82
\$34,206.79	\$2,850.57
\$35,917.13	\$2,993.09
\$37,712.98	\$3,142.75
\$39,598.63	\$3,299.89
\$41,578.56	\$3,464.88
\$43,657.49	\$3,638.12
\$45,840.37	\$3,820.03
\$48,132.38	\$4,011.03
\$50,539.00	\$4,211.58

If this hypothetical member had a standard longevity military retirement (or any other standard defined benefit plan<sup>63</sup>) the above wage history would make his average monthly salary during his last three years' service \$4,014.21, and the military retirement formula<sup>64</sup> would make his retired pay \$2,007.11.

Under the *qualitative* approach to the time rule embraced by most time rule States, the member would receive half of this sum 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

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<sup>63</sup> Such plans are often funded by employer contributions (although in some plans employees can contribute) and provide certain specified benefits to the employee after retirement, usually for life. Often, the benefit is determined by a formula taking into account the highest salary received and the total number of years worked for the employer (such as a “high-three” or “high five” plan). For example, a plan might pay one-tenth of an employee’s average monthly salary over the three years before retirement, multiplied by one-fourth the number of years that the employee worked. A twenty-year employee earning an average of \$2,000 per month during his last years would get \$1,000 per month (i.e., \$2,000 x .1 x 20 x .25). Generally, no lump-sum distributions (other than certain nominal amounts in some plans) can be distributed from such defined benefit plans.

<sup>64</sup> Years of service x 2.5% x high-three average basic pay,

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

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

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

Perhaps the clearest expositions of the reasoning behind the two approaches are found in those cases in which a reviewing court splits as to which interpretation is most correct. The Iowa Supreme Court faced such a conflict in the case of *In re Benson*.<sup>65</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>66</sup>

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<sup>65</sup> 545 N.W.2d 252 (Iowa 1996).

<sup>66</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.

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

### 3. Variations Regarding Payment Upon Eligibility

Several State courts have held that the interest of a former spouse in retired pay is realized at *vesting*,<sup>67</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>68</sup> As phrased by the California court in *Luciano*: “The employee spouse cannot by election defeat the nonemployee spouse’s interest in the community property by relying on a condition within the employee spouse’s control.”<sup>69</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>70</sup>

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

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<sup>67</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>68</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. 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).

<sup>69</sup> *In re Marriage of Luciano*, *supra*, 164 Cal. Rptr. at 95.

<sup>70</sup> I have independently verified the mathematical effects of the various approaches taken by courts. Unless payments to spouses are required at each first eligibility for retirement, regardless of the date of actual retirement, a “rank at divorce” proposal, at least in military cases, would result in a reduction in the value of the spousal share by at least 13%. A second spouse married to a member for the last couple years of service could actually receive more money after divorce than a first spouse who assisted the member for most of the military career. There does not appear to be any valid public policy that could be served by causing this result.

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

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

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

The disconnect, and this discussion, is fully applicable to the military context, where (as discussed below) practitioners now are required to deal not only with the standard military retirement (a defined benefit plan), but also with the Thrift Savings Plan (a defined contribution plan).

The valuation problem for defined contribution plans has not received nearly enough attention in the case law. If the marriage was not completely coextensive with the period of contributions, and there was *any* variation in the relative rate of contribution over time, a standard time-rule analysis to value the spousal share might not be appropriate at all. It would appear to be more precise – i.e., “fairer” – to trace the *actual contributions* to such an account from community and separate sources, and attribute interest and dividends over time accordingly.<sup>71</sup> The scant case authority squarely addressing this issue has agreed with that proposition.<sup>72</sup>

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<sup>71</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>72</sup> See *Tanghe v. Tanghe*, 115 P.3d 567 (Alaska 2005) (citing *In re Marriage of Hester*, 856 P.2d 1048, 1049 (Or. App. 1993) (“When the value of a particular plan is determined by the amount of employee contributions, application of [a coverture fraction] could result in a division of property that is demonstrably inequitable”); *Paulone v. Paulone*, 649 A.2d 691, 693-94 (Pa. Super. 1994) (rejecting the use of the coverture fraction and adopting an accrued benefits test, deemed the “subtraction method,” for the distribution of a defined contribution plan); *Smith v. Smith*, 22 S.W.3d 140, 148-49 (Tex. App. 2000) (finding that it was incorrect to apply a coverture fraction to a defined contribution account); *Mann v. Mann*, 470 S.E.2d 605, 607 n.6 (Va. App. 1996) (“Applying [a coverture] fraction to a defined contribution plan could lead to incongruous results, and such an approach is not generally used”); *Bettinger v. Bettinger*, 396 S.E.2d 709, 718 (W. Va. 1990) (rejecting the use of a discounted present value calculation for division of a defined contribution plan “because no consideration was given to the fact that the fund was earning interest” (quotation marks omitted)).

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

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

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

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

Under the original enactment of the USFSPA, which governed all divorce decrees filed prior to February 4, 1991, the military pay center withheld taxes from the gross retired pay, divided the post-tax amount between the member and the spouse pursuant to court order, and sent a check to each.<sup>73</sup> At the end of each year, the member was eligible to claim a tax credit for amounts withheld on sums ultimately paid to the former spouse, and the former spouse owed a tax liability for any amounts received.

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

Most courts were unaware that the payments ordered were being skewed by the phrasing of the USFSPA and the tax code, and simply had no idea that their orders were not being followed, or that further court attention would be required to correct any resulting inequity. Former spouses did not receive a Form 1099 or W-2P, and many did not realize that it was *their* responsibility to account for, and pay taxes on, all sums they received.<sup>74</sup> Many members did not realize that they had a yearly tax credit coming, or how to calculate it.

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<sup>73</sup> See Department of Defense, A Report to Congress Concerning Federal Former Spouse Protection Laws at 23 (2001); Pub. L. 101–510, § 555(e), 104 Stat. 1485, 1569.

<sup>74</sup> See *Eatinger v. Comm.*, TC Memo 1990-310.

As of February 4, 1991, the definition of “disposable pay” was altered by Congress to eliminate the pay center’s deduction of income taxes from gross retired pay when calculating the sum paid to spouses.<sup>75</sup> The change was explicitly based on the “unfairness” of the effect of the previous phrasing.<sup>76</sup>

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

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

The ABA and AAML urged Congress to apply the correction to all decrees,<sup>77</sup> but the Department of Defense was not convinced that the problem was significant enough to require a change in the law, and so recommended leaving courts to address those cases one at a time.<sup>78</sup> Congress has not acted.

A practitioner faced with such a case could ask the court to “translate” an award of gross into a higher percentage of “old disposable” to yield the same number of dollars as intended in

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<sup>75</sup> Pub. L. No. 101-510, § 555, 104 Stat. 1485, 1569 (1990).

<sup>76</sup> House Report (Committee on Armed Services) 101-665, at 279-280, on H.R. 4739, 101<sup>st</sup> Congress, 2d Sess. (1990).

<sup>77</sup> See M. Willick, AMERICAN BAR ASSOCIATION REPORT TO MR. FRANCIS M. RUSH, JR., ACTING ASST. SECRETARY OF DEFENSE, RE: NATIONAL DEFENSE AUTHORIZATION ACT FOR 1998 § 643, COMPREHENSIVE REVIEW OF FEDERAL FORMER SPOUSE PROTECTION LAWS dated March 14, 1999. The reason for the ABA request for a uniform national law is that all of the corrections possible for a State court in an individual case are relatively inefficient and clumsy. For example, where the spousal share is near 50%, no direct correction of the percentage payable could make up the shortfall. A court could order payment of the differential between what the military pay center sends and what the court ordered, but this has all the same enforcement problems as any required stream of monthly payments from one party to another. Some courts have ordered members to initiate allotments on pain of contempt, but this is also not self-enforcing.

<sup>78</sup> See *A Report to Congress Concerning Federal Former Spouse Protection Laws* (Report to the Committee on Armed Services of the United States Senate and the Committee on Armed Services of the House of Representatives) at 85 (Department of Defense, Sept. 4, 2001), <http://dticaw.dtic.mil/prhome/spouserev.html>.

the original court order.<sup>79</sup> This only works when the spouse is supposed to be receiving enough less than 50% that the translation order does not bump into the 50% maximum limit of 10 U.S.C. § 1408(e)(1).<sup>80</sup>

As an aside, practitioners should be aware that they have a right to obtain information relating to a member's gross retired pay, and all deductions from that pay, so the former spouse's share can be properly calculated.<sup>81</sup>

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

#### **D. The "Ten Year Rule"**

The so-called "ten year" limitation is much misunderstood. A court order that divides military retired pay as property may only be *directly paid* from the military pay center to the former spouse if the parties were married for at least 10 years during which the member performed at least 10 years of creditable military service.<sup>82</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."

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<sup>79</sup> Due to rounding, such an order is sometimes off by a few pennies one way or the other, but the difference is never significant, and such an order tracks the desired allocation to the spouse after future COLAs.

<sup>80</sup> A hypothetical is useful, to explain. Using artificial numbers for illustration, if the total pension was \$1,000, and the former spouse was entitled to 30%, or \$300, but it was a pre-1991 divorce, so tax withholdings reduced the "old disposable" pension payments to \$800, then the spouse would be getting only \$240, and the extra \$60 would be diverted to the member. By increasing the spousal share of the remainder to 37.5%, the flow of payments to the former spouse would be restored to \$300, all amounts would again be self-corrected annually by way of COLAs, and no further court intervention would be necessary. We call such corrections "translation orders."

<sup>81</sup> 65 Fed. Reg. 43298 (July 13, 2000) provides that in addition to any disclosures permitted under 5 U.S.C. § 552a(b) of the Privacy Act, a former spouse who receives payments under 10 U.S.C. § 1408 (i.e., the USFSPA) is entitled to information, as a "routine use" pursuant to 5 U.S.C. § 552a(b)(3), on how her payment was calculated to include what items were deducted from the member's gross pay and the dollar amount for each deduction.

<sup>82</sup> 10 U.S.C. § 1408(d)(2); 32 C.F.R. § 63.6(a)(1)-(2).

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

The 20/10/10 rule is *not* a limitation upon the subject matter jurisdiction of the State courts.<sup>83</sup> Its practical effect is sometimes the same as a legal bar, however, which is one reason that the ABA position (for over a decade) has been that the provision should be repealed.<sup>84</sup> A former spouse in possession of an order that does not satisfy the rule must rely on whatever State law enforcement mechanisms are available, which may or may not be of any use. The reality is that the “rule” often produces inequity, while serving no valid public policy purpose of any kind.

There are a couple of work-arounds for this trap, however. If the former spouse’s interest is small, the present value of that interest could be determined and offset against other marital property or cash to be paid off. If the interest is larger, the situation is more difficult, since most parties lack sufficient assets to permit such an offset.<sup>85</sup> The options available to a former spouse’s attorney seeking an enforceable order are then reduced to attempting to persuade the court to impose an irrevocable alimony obligation or seeking a stipulation to secure that interest. Both options have drawbacks.

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

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

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<sup>83</sup> The savings clause of the statute makes it clear that payment limitations do not affect the underlying obligation, which may be enforced by any other means available. *See* 10 U.S.C. § 1408(e)(6) (set out in full above).

<sup>84</sup> Even the 2001 Report on the USFSPA by the Department of Defense concluded that the rule serves no useful purpose and should be eliminated. *See A Report to Congress Concerning Federal Former Spouse Protection Laws, supra.*

<sup>85</sup> In a hypothetical nine-year overlap case involving a staff sergeant (E-6) retiring at 20 years, the present value of the former spouse’s putative share is some \$90,000. Such a sum is typically outside the realm of possible trade-offs or pay-offs for individuals so situated.

The down-side to such an arrangement for the former spouse is risk of further litigation – some members have sought court orders revoking such bargained-for “irrevocable” awards, usually based on the changed circumstances of one party or the other. Even when the former spouse prevails, there is a substantial expense.<sup>86</sup>

If a non-alimony resolution is desired, or necessary, it is difficult in most cases to come up with sufficient security for such a lifetime stream of payments. This is a problem in jurisdictions which have formal or informal barriers to establishment of alimony awards. And, of course, all the risks associated with bankruptcy are a factor when the spouse exchanges a pension share for anything else, though these risks may be somewhat mitigated by enactment of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005,<sup>87</sup> which provided that all “domestic support obligations” have priority before all but administrative expenses.<sup>88</sup>

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

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

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

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

The Department of Defense Office of the Actuary publishes “lump sum equivalency” charts for military retirements, using military-specific mortality tables, and including a much-ignored disclaimer that its figures “should not be used for property settlements.”<sup>89</sup> The figures are updated annually, and can be downloaded from the DFAS website, [www.dod.mil/dfas](http://www.dod.mil/dfas).

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<sup>86</sup> See *Waltz v. Waltz*, 110 Nev. 605, 877 P.2d 501 (1994).

<sup>87</sup> (“BAPCPA”) (Pub. L. 109–8, 119 Stat 23).

<sup>88</sup> See 11 U.S.C. § 507(a)(1).

<sup>89</sup> The actuary’s calculations are not as hypothetical as indicated in the disclaimer; the practitioner must merely be careful to compare the realities of the case at hand with the assumptions used for the chart. The closer the facts are, the more accurate the numbers are, and vice-versa.

The Actuary also produces disability and non-disability retirement life expectancy tables, from which a good estimate of present value for a military retirement can be independently calculated. A convenient annual source for much of this information is the annual, privately published “Retired Military Almanac.”<sup>90</sup>

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

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

Members who first entered service between September 8, 1980, and July 31, 1986, must use the highest 3 years of basic pay rather than terminal basic pay. This has the effect of lowering retired pay for members whose pay increased at any time during their three most highly compensated years of service (as is typical).<sup>91</sup>

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

First, their retirement benefits multiplier was reduced by one percentage point for each full year less than 30 years of service.<sup>92</sup> Under this plan, at age 62, the reduction is removed and the retired pay multiplier is restored to 2.5% per year, yielding the same percentage payable under the earlier system.<sup>93</sup>

Second, each year the COLA for such members is less than for other retirees (Consumer Price Index adjustment minus one percent). However, at age 62, the retiree’s monthly

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<sup>90</sup> Uniformed Services Almanac, Inc., P.O. Box 4144, Falls Church, VA 22044; (703) 532-1631.

<sup>91</sup> See 37 U.S.C. § 101(21).

<sup>92</sup> 10 U.S.C. § 1409(b)(2)(A). For example, at 20 years, instead of receiving 50% of basic pay ( $2\frac{1}{2}\% \text{ per year} \times 20 = 50\%$ ), the calculation would be  $2\frac{1}{2}\% \text{ per year} \times 20 = 50\% - 10$  (years less than 30 years served as of retirement), or 40%. The final subtraction decreases by one for each year beyond 20 served, so that as of 30 years of service, the calculation is  $2\frac{1}{2}\% \text{ per year} \times 30 = 75\% - 0$  (the same 75% that it would have been under the older system).

<sup>93</sup> Pub. L. No. 99-348 (July 1, 1986). See FY 1996 Report at 1.

income is recomputed to supply the sum that *would have been paid* if the full COLA had been applied every year from retirement to age 62, which at that moment becomes prospectively payable, as if there had been no reductions during those intervening years.<sup>94</sup> After that “restoral,” however, the reduction returns with each COLA after age 62 for life.

In 1999, Congress again changed the rules,<sup>95</sup> modifying what had become known as the “REDUX” plan to provide for an irrevocable choice of retirement plans to be made by that third group of members (who entered service after July 31, 1986), at their 15th year of service. Such members are given the choice of taking the same “High-3” retirement paid to those who entered service between September 8, 1980, and July 31, 1986, *or* to take the lowered REDUX benefits described above, *plus* a one-time lump-sum “Career Status Bonus” (CSB) of \$30,000 payable at the 15-year mark.<sup>96</sup> After the 1999 change, this option became known as the CSB/REDUX option.

In 2006, Congress altered the longevity rules.<sup>97</sup> As of April 1, 2007, the military retired pay of retirees with more than 30 years of service is *not* limited to 75% of basic pay. Rather, new basic pay tables (to 40 years) are applicable for retirements on and after that date. Additionally, various enlisted and officer ranks had their basic pay increased for service longevity from a maximum of over 28 years to a maximum of over 36 years; in other words, monthly pay that used to “top out” at a certain point continued increasing with continued service.

Additionally, as of October 8, 2001, military members were authorized to begin participating in the same Thrift Savings Plan (“TSP”) that has been in effect for civil service employees since 1987,<sup>98</sup> but the military chose to call its accounts “UNISERV” accounts.

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

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<sup>94</sup> Thus, at the time such members turn 62, their monthly retired pay becomes the same sum as it would have been if they had been in the class of members who first entered service between September 8, 1980, and July 31, 1986.

<sup>95</sup> In Pub. L. No. 106-65, 113 Stat. 512 (October 5, 1999) the National Defense Authorization Act of 2000.

<sup>96</sup> It has to be proportionally repaid if the member terminates service before 20 years.

<sup>97</sup> 2007 National Defense Authorization Act, Pub. L. No. 109-364 (June, 2006) §§ 641-42.

<sup>98</sup> The military phase in permitted military members to contribute up to 7% of basic pay in 2002, increasing to 10% by 2005 and unlimited (except as to normal tax rules) by 2006. There are special rules regarding contribution limits from special pay categories, including combat pay.

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

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

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

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

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

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

For example, the military has its own set of mortality tables, set out by officers and enlisted members, and by disability and non-disability retirements.<sup>99</sup> At least for non-disability retirements, there is a significant reduction in death rates for military members, boosting present values. Adopting the Actuary’s valuations would require accepting its presumption of annual COLA increases, inflation assumptions, and its allowance of high likelihood that the government will make the payments, which leads to assumed inflation of only 3%, and an assumed present value discount rate of 6.25%, with a resulting “real interest rate” of 3.25%. These assumptions, in turn, greatly increase the present value from that which would be reached using certain commercial assumptions.

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<sup>99</sup> See <http://www.dod.mil/actuary/statbook05.pdf>; [http://amsa.army.mil/1Msmr/2003/V09\\_N01.pdf](http://amsa.army.mil/1Msmr/2003/V09_N01.pdf).

An attorney wishing to personally estimate present values can purchase computer programs that do the math involved quickly.<sup>100</sup> Such programs often allow the user to plug in the assumptions to be used, such as life expectancy, presumed interest rate, etc. In any event, attorneys handling these cases in States that allow or require trading the present value of the retirement benefit must become well versed in all aspects of valuation, interest rate assumptions, and other factors involved. Failure to do so invites disaster at settlement or in court.

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

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

On the other hand, such a distribution increases the possibility of later court fights over enforcement or interpretation of the original order for division.<sup>101</sup> It gives each of the parties a stake in the other’s life – if the former spouse predeceases the member, the member’s retired pay goes up by whatever sum the former spouse had been receiving, and if the member dies first, the spousal share stops unless survivor’s benefits have been provided for in the order.

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

For example, drafting counsel must ensure that the facts make the former spouse eligible for direct collection, if possible – which requires satisfaction of the jurisdictional factors, and

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<sup>100</sup> One such program is “Legal Math-Pac,” Custom Legal Software Corporation, 3867 Paseo del Prado, Boulder, CO 80301; (303) 443-2634; <http://www.legalmath.com/legalmath/index.htm>.

<sup>101</sup> The evolving interpretation of the phrase “disposable retired pay” has given rise to many such cases. If the parties were divorced in 1985, should the phrase be interpreted to mean what the Court said it meant in *Mansell* four years later, or what Congress re-defined it to mean in 1991? Should the court attempt to divine the intention of the parties, or the divorce court, at the time of divorce? If so, how could this be accomplished if each had a different view of the meaning, or if the record is silent?

that the military service of the member overlapped the marriage to the spouse by at least ten years.

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

The attorney for the member could argue that the chance of the member retiring at all is so speculative that the court should defer the issue until the facts are known, enter an “if, as, and when” order, or refuse to assign any value to the benefits at all.<sup>102</sup>

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

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

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

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

The need for such adjustments is obvious. In January, 1972, the government’s Consumer Price Index for all urban consumers (CPI-U) was 123.2, meaning that by comparison with the base year of 1967, it took an extra \$23.20 to have the same purchasing power that \$100

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<sup>102</sup> Indeed, this is essentially the reasoning of those few remaining States that still refuse to divide the value of unvested retirement benefits at divorce.

had commanded.<sup>103</sup> Put another way, dollars were worth only 81¢. By January, 1992, the CPI-U was 413.8, meaning that it took an extra \$313.80 to gain the purchasing power of the original \$100, or that each dollar was worth only 24¢. If there had been no cost of living adjustments, a \$1,000 per month retirement starting in 1972 would only be paying the equivalent value of \$240 per month in 1992. Inflation has continued, cumulatively, since that time.

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

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

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

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

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

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

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<sup>103</sup> Bureau of Labor Statistics, U.S. Department of Labor.

The attorney for the former spouse should try to provide for the court's continuing jurisdiction to enforce its award by means of post-divorce order.<sup>104</sup> Virtually all of the things that could happen after divorce to change the expectations of the parties as to payments will work to the disadvantage of the former spouse, so it is that party who must make it as simple as possible to get back into court to correct later problems.

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

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

The Variable Separation Incentive (VSI)<sup>105</sup> and Special Separation Benefit (SSB)<sup>106</sup> programs were early-retirement programs offered at times by the military by means of which members could terminate service before completing 20 years, receiving lump-sum or time payments instead of a regular military pension.<sup>107</sup> The military also developed an early (15-19 year) retirement program known as the "Temporary Early Retirement Authority" (TERA) in 1993.<sup>108</sup>

The first two programs were offered to members in "selected job specialties" who had accrued between six and twenty years of service.<sup>109</sup> Some were required to serve in Reserve units, as well, after leaving active duty.<sup>110</sup> The TERA early retirement option was similar to "regular" military retirement, except that the sum paid contained an actuarial penalty.<sup>111</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.

TERA retirements were 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

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<sup>104</sup> See *In re Marriage of Bergman*, 168 Cal. App. 3d 742, 214 Cal. Rptr. 661 (Cal. Ct. App. 1985) (court can retain jurisdiction to supervise payment of benefits awarded).

<sup>105</sup> 10 U.S.C. §§ 1175-1175a.

<sup>106</sup> 10 U.S.C. § 1174a.

<sup>107</sup> 10 U.S.C. §§ 1174a(b), 1175a(h).

<sup>108</sup> Pub. L. 102-484, 106 Stat. 2315; former 10 U.S.C. § 1293.

<sup>109</sup> 10 U.S.C. §§ 1174a(c), 1175(b).

<sup>110</sup> 10 U.S.C. § 1175a(d).

<sup>111</sup> Former 10 U.S.C. § 1293(e).

sub-issues as to medical benefits for spouses, and what adjustments might be necessary for decrees issued under the assumption that the member would be completing 20 years of service, but where the member separated under TERA with less than 20 years.

Since, by definition, no member taking a TERA retirement ever stays on active duty for 20 years, it is not possible for a spouse of such a member to ever have 20 years of marriage *during* active duty, and therefore become a “20/20/20” former spouse entitled to lifetime medical and other benefits.<sup>112</sup> This creates the situation whereby a *current* spouse of a TERA retiree is treated just like the spouse of any other retired member, but the *former* spouse of a TERA retiree (irrespective of the timing of the divorce and the retirement) has none of the ancillary benefits that the former spouse of a “regular” retiree would have.<sup>113</sup>

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

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

Especially when they were new, there was some question as to whether VSI and SSB benefits were, or should be, divisible as marital or community property. In *In re Crawford*,<sup>114</sup> the court specifically quoted and analogized to *In re Marriage of Strassner*,<sup>115</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

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<sup>112</sup> This is explained below in the discussion of medical benefits.

<sup>113</sup> See Department of Defense, A Report to Congress Concerning Federal Former Spouse Protection Laws at 64 (2001).

<sup>114</sup> 884 P.2d 210 (Ariz. Ct. App. 1994).

<sup>115</sup> 895 S.W.2d 614 (Mo. Ct. App. 1995).

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>116</sup> Other courts throughout the country have used similar language or reasoning to reach the same results regarding both programs.<sup>117</sup>

Very few courts have reached the opposite result.<sup>118</sup> Others have reached that opposite result, just to be reversed on appeal or affirmed upon narrow findings of special circumstances.<sup>119</sup>

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

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

When the divorce occurs near the fifteen-year mark of the military career, there is a new danger for spouses of military members who started service after July 31, 1986. There is no provision for spousal consent, or even notification, before a member can take the \$30,000 CSB/REDUX payment, which irrevocably reduces the lifetime “regular” retirement benefits payout. Especially where the parties have already separated, it is possible that the member

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<sup>116</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>117</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. 1999) (SSB); *Lykins v. Lykins*, 34 S.W.3d 816 (Ky. Ct. App. 2000).

<sup>118</sup> See *McClure v. McClure*, 647 N.E.2d 832 (Ohio Ct. App. 1994).

<sup>119</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).

could simply pocket the cash payment and the spouse would never even know of the devaluation of the retirement benefits being divided in the divorce.

As seen in the “early out” cases discussed above, however, and (generally) in the disability cases discussed below, precedent supports a couple of general propositions. First, that the military member may usually choose any legitimate retirement option available under law. Second, that it makes no difference how or why the member reduces the sum of retirement benefits otherwise payable to a former spouse – the fact of doing so mandates that compensation be provided to the former spouse.<sup>120</sup> This can play out in a number of ways, depending on the timing of events.

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

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

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

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

As a general proposition, spouses should try to begin receiving payments as soon as possible once the right to do so accrues. Military retired pay is not like a defined contribution plan with a specific balance;<sup>121</sup> it is a defined benefit plan, in that it provides a stream of payments that can be tapped for a present spousal share, but has no mechanism for collecting property payments once they are missed. In other words, any arrears in military retirement benefits

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<sup>120</sup> Again, however, the cautious practitioner for the spouse cannot presume such a result, but must craft the documents to lead to it.

<sup>121</sup> This has been changed slightly, as military members may after 2001 participate in the Thrift Savings Plan (TSP), and thus have both a defined contribution plan *and* a defined benefit kind of plan.

payments must be collected from the member directly; the military will not garnish for such arrearages.

Several courts have held that the spouse may collect the spousal portion of the retirement at *eligibility* for retirement, whether or not the member actually retires.<sup>122</sup>

The theory is that the former spouse should be able to decide when benefits that are due and payable to the spouse will actually commence – that “The employee spouse cannot by election defeat the nonemployee spouse’s interest in the community property by relying on a condition within the employee spouse’s control.”<sup>123</sup> A spouse making such an election should also receive the imputed cost of living adjustments that *would have* accrued if the member had retired, but the former spouse would *not* share in any actual later increases in rank, or benefit from additional years in service.

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

Except in the extremely rare circumstance in which extraordinary changes in rank are anticipated, it would almost always be a mistake for a spouse to defer collection past first eligibility. When a member chooses to continue service after 20 years, if the spouse defers receipt of a share of the retirement until actual retirement, the ultimate collection by the spouse is typically decreased, actuarially.<sup>124</sup>

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

This discussion is even more critical in the minority of States, such as Texas, that restrict the spousal share to the rank and grade at divorce, instead of using the standard time-rule formula. In those States, the spouse’s failure to obtain a flow of payments at the member’s first eligibility would result in a tremendous devaluation of the spousal share, undercutting

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<sup>122</sup> See cases set out in Footnote 68.

<sup>123</sup> *In re Marriage of Luciano*, 164 Cal. Rptr. 93, 95 (Ct. App. 1980).

<sup>124</sup> As noted above, the difference in lifetime collection difference for the spouse is about 13%. This approximate ratio holds true across ranks.

the concept of community property (and, increasingly, the equal division sought in “equitable distribution” jurisdictions).

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

## **D. Disability Benefits<sup>125</sup>**

### **1. Generally**

Retirement benefits are essentially a form of deferred reward for service, and so are generally divisible upon divorce, while disability benefits are conceptualized as compensation for future lost wages and opportunities because of disabilities suffered, and are thus typically *not* divisible or attachable. When accepting a disability award requires relinquishing a retirement benefit, the interests of the parties as to the proper characterization of the benefits become instantly polarized.<sup>126</sup>

At any time, a military retiree can apply to the Veteran’s Administration to be evaluated for a “service-connected disability.”<sup>127</sup> If the evaluation shows such a disability, a rating is given between 10% and 100%, and “compensation” is paid monthly from the VA in accordance with a schedule giving a dollar sum corresponding to each 10% increase, plus certain additional awards for certain serious disabilities.<sup>128</sup> Still further waivers of retired pay for VA disability pay can be given if the retiree has dependents (a spouse or children, or even

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<sup>125</sup> The topic of military disability benefits is simply too complex and nuanced to do the subject justice in the space available in these materials. The discussion here should be taken as an overview, and those seeking a more complete discussion or list of authorities are encouraged to reference other materials. See, e.g., MILITARY RETIREMENT BENEFITS IN DIVORCE, *supra* n.1; Willick, *Death, Disability, and Related Subjects of Cheer (Part Two – Disability)*, at [http://willicklawgroup.com/published\\_works](http://willicklawgroup.com/published_works); Sullivan HANDBOOK, *supra*, at 441-454.

<sup>126</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>127</sup> 38 U.S.C. § 1101–1142.

<sup>128</sup> 38 U.S.C. §§ 1114, 1134, 1155.

dependent parents).<sup>129</sup> It makes sense for a retiree to obtain a disability award, even with a dollar-for-dollar reduction in retired pay, because the disability awards are received tax-free.<sup>130</sup>

The USFSPA set up a federal mechanism for recognizing and enforcing State-court divisions of military retired pay, including definitions. One of these was of “disposable retired pay” (the sum that the military pay center could divide between spouses), which was defined as “the total monthly retired pay” minus certain sums, including sums deducted “as a result of a waiver of retired pay required by law in order to receive compensation under title 5 or title 38”<sup>131</sup> or “equal to the amount of retired pay of the member under that chapter computed using the percentage of the member’s disability on the date when the member was retired” for a member retired under chapter 61.<sup>132</sup>

The meaning and effect of the savings clause is discussed above in the introduction to the USFSPA, which discussion is not repeated here. Similarly, there does not seem to be much to say about disability benefits already received and used for the increase of account balances or the acquisition of assets, all of which apparently have no kind of special or protected status.<sup>133</sup>

In 1986, the California Supreme Court had held in *Casas*<sup>134</sup> that the USFSPA direct payment limitation on State courts was strictly procedural. At least one California case went further, declaring that where the original divorce decree predated *McCarty* (i.e., June 26, 1981), the existence of a disability is simply *irrelevant* to the divorce court’s equal division of retirement (and disability) benefits.<sup>135</sup> The 1989 United States Supreme Court decision in *Mansell*,<sup>136</sup> discussed in detail above, made all such prior authority questionable.

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<sup>129</sup> 38 U.S.C. §§ 1115, 1135.

<sup>130</sup> See 38 U.S.C. § 5301(a); *Absher v. United States*, 9 Cl. Ct. 223 (1985), *aff’d*, 805 F.2d 1025 (Fed. Cir. 1986). Because of that tax incentive, disabled veterans often waive retired pay in favor of disability benefits. See *Mansell*, 490 U.S. at 583-84, 109 S. Ct. at 2026, 104 L. Ed. 2d at 682.

<sup>131</sup> Title 38 governs post-retirement applications for VA disability awards.

<sup>132</sup> 10 U.S.C. § 1041(a)(4)(C)-(D).

<sup>133</sup> See, e.g., *Fox v. Fox*, \_\_\_ S.W.3d \_\_\_ (Tenn. Ct. App., No. M1999-01720-COA-R3-CV, Apr. 11, 2001); *Carrier v. Bryant*, 306 U.S. 545, 59 S. Ct. 707 (1939); *Bishoff v. Bishoff*, 987 S.W.2d 798 (Ky. Ct. App. 1999); *Gray v. Gray*, 922 P.2d 615 (Okla. 1996); *Pfeil v. Pfeil*, 341 N.W.2d 699 (Wis. Ct. App. 1983).

<sup>134</sup> *Casas v. Thompson*, 720 P.2d 921 (Cal. 1986), *cert. denied*, 479 U.S. 1012 (1987).

<sup>135</sup> *In re Marriage of Stier*, 178 Cal. App. 3d 42, 223 Cal. Rptr. 599 (1986).

<sup>136</sup> 490 U.S. 581, 109 S. Ct. 2023, 104 L. Ed. 2d 675 (1989).

Many courts hearing such cases when *Mansell* was decided did exactly what the California trial court did on remand in that case, issuing opinions that detailed why they would not allow the inequity of allowing post-divorce status changes by members to partially or completely divest their former spouses, where the original divorce decree had been issued *prior* to the *Mansell* decision.<sup>137</sup>

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

As in other subjects discussed above, the cases fit into a few separate categories, depending on the order and timing of the disability, retirement, and divorce. For the purpose of this discussion, we will focus solely on the category that has produced the bulk of the litigation, and authority in the field – where members waived at least *some* regular, longevity retired pay in favor of VA benefits, *after* the parties to the case divorced.

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

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

One California court, surveying cases from around the country, held in 1999 that *Mansell* does not apply to post-judgment waivers of retirement pay *at all*, because *Mansell* held only that disability benefits could not be divided “*upon divorce*.”<sup>138</sup>

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<sup>137</sup> See *Toupal v. Toupal*, 790 P.2d 1055 (N.M. 1990); *Berry v. Berry*, 786 S.W.2d 672 (Tex. 1990); *Maxwell v. Maxwell*, 796 P.2d 403 (Utah App. 1990); *MacMeeken v. MacMeeken*, 117 B.R. 642 (1990) (Bankr. D. Kan. 1990); *Lyons v. Lyons*, No. C034544 (Cal. Ct. App., Aug. 9, 2002, unpublished) (applying California law as of the time of the parties’ 1979 marital settlement agreement in determining that as of the member’s retirement 20 years later, the former spouse was entitled to a percentage of the gross retired pay before deduction for disability or SBP premiums for a later spouse).

<sup>138</sup> *In re Marriage of Krempin*, 83 Cal. Rptr. 2d 134, 70 Cal. App. 4th 1008 (Ct. App. 1999).

The decision in that case relied on the earlier decision of *In re Marriage of Daniels*,<sup>139</sup> which held that to whatever degree direct enforcement of a divorce decree might be prevented by application of federal law, the member would receive any sums that had been awarded to the spouse as a **resulting trustee** of her funds, and must pay them over to her. The language quoted was the principle espoused earlier by the California Supreme Court in *Gillmore*<sup>140</sup> – that one party should not be allowed to defeat the other’s interest in retirement benefits “by invoking a condition wholly within his or her control.” Other courts have echoed the same thought, in similar language.<sup>141</sup>

The *Krempin* court approvingly quoted the conclusion reached in a law review article: “‘A majority of state courts,’ on one theory or another, ‘take equitable action to compensate the former spouse’ when that spouse’s share of retirement pay is reduced by the other’s post-judgment waiver.”<sup>142</sup> It then added its own conclusion, that: “A review of the out-of-state precedents confirms that this result is nearly universal.”<sup>143</sup>

Anecdotal accounts, however, indicate that some trial courts continue to be misled into ruling to the contrary, based upon an overly-expansive reading of *Mansell* and misplaced concerns about violating the Supremacy Clause, or simply by seeing the word “disability” and reacting without any sort of adequate inquiry into what the law is, or why.

Most reviewing courts have either found or simply assumed that *Mansell* is applicable in litigation concerning post-divorce recharacterizations by retirees, and attempted to apply it to resolve the cases before them. Nevertheless, those appellate courts have almost uniformly reached the same ultimate destination as the court in *Krempin*, by means of a longer analysis.

Courts have gone to considerable lengths to protect former spouses from the effects of members’ post-divorce waivers of retired pay for disability pay, when such waivers partially or completely divested the spouses of sums that had already been awarded to them. The theory applied was phrased differently from one court to another, but was essentially that of **constructive trust**. Once a divorce was decreed dividing the “gross” or “total” or “all” military retirement benefits, the money awarded to the former spouse was no longer

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<sup>139</sup> *In re Marriage of Daniels*, 186 Cal. App. 3d 1084, 1087 (1986).

<sup>140</sup> *In re Marriage of Gillmore*, 629 P.2d 1 (Cal. 1981), discussed in some detail elsewhere in these materials.

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

<sup>142</sup> 83 Cal. Rptr. 2d at 138, quoting from Fenton, *Uniformed Services Former Spouses Protection Act and Veterans’ Disability and Dual Compensation Act Awards* (Feb. 1998 Army Law. 31, 32).

<sup>143</sup> *Id.*

considered the member's property to convert. If the member subsequently applied for and received disability benefits, or took any other action to redirect money already ordered paid to the former spouse back to himself, he violated the divorce decree.

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

One portion of the case law is apparently *unanimous*. A comprehensive review of the cases throughout the United States reveals that there is *no* legitimate authority for the proposition that where the divorce decree *preceded Mansell*, there can *ever* be a waiver of retired pay by the retiree in favor of VA disability benefits without compensation being required to be paid to the former spouse, dollar for dollar, as to all sums the retiree's actions caused to be diverted from her back to him.

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

There are attorneys, and some trial level judges, who have tried to hold the language used in *pre-Mansell* divorce decrees to that "higher standard of clarity," arguing that the language of the USFSPA itself provided adequate "notice" of the issue to the former spouse as of 1982. Since virtually every published decision before *Mansell* had rejected the construction of the language embraced by the majority in *Mansell*, however, that argument has been almost universally rejected by appellate courts as sophistry, or at best a misdirected retroactive application of the *Mansell* holding.<sup>144</sup>

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<sup>144</sup> A common tactic used by attorneys seeking to confuse the issues is to cite cases concerning divorce decrees rendered when the member was already drawing disability pay, and so falling squarely within the "explicit prohibition" of *Mansell*. See, e.g., *Perkins v. Perkins*, 26 P.3d 989 (Wash. Ct. App. 2001) ("*Mansell* cannot be circumvented simply by chanting 'maintenance'; remanding for 'consideration' of receipt of disability pay as 'one factor among many' in dividing property and awarding alimony); *Lambert v. Lambert*, 395 S.E.2d 207 (Va. Ct. App. 1990). As the latter court pointed out, when such a disability award already exists at the time of divorce, the court can take the cash flow into account when determining an appropriate alimony (or other property) award to be made to the former spouse, who cannot be awarded a portion of that disability cash flow as property. Citation to such cases in a post-divorce recharacterization case is intellectually dishonest. Illustrating that point, the same court that decided *Lambert* has approved the use of indemnification clauses in post-*Mansell* divorces to compensate a former spouse for any reduction caused by a disability award *after* divorce. See *Owen v. Owen*, 419 S.E.2d 267 (Va. Ct. App. 1992) (affirming an order providing that the spouse was to receive a sum equal to a percentage of the member's "gross retirement benefits," and stating that the member's request to reduce what she was owed due to his later disability claim was "irrational").

When reviewing the language of divorce decrees issued *after Mansell* (i.e., after 1989), courts (especially in earlier years) sometimes examined the decrees at issue for “safeguard” clauses or “indemnification for reduction” clauses, as necessary indicators of intent to protect spouses from members’ recharacterization of benefits.<sup>145</sup> Where such intent was found, even by implication, the member has been required to reimburse the former spouse for all sums his actions caused to be redirected from the former spouse back to him.<sup>146</sup>

Other courts have expressly found that reimbursement is required, whether or *not* there was any kind of indemnification or safeguard clause in the underlying decree.<sup>147</sup>

The reason for not only permitting, but encouraging the use of such indemnification clauses was explained well by the Minnesota Court of Appeals in *Gatfield*<sup>148</sup>: it basically ensures that the divorce courts are free to enforce the parties’ declared intent as a matter of contract law.<sup>149</sup> Any court reviewing a decree seeking intent to indemnify must be careful to not give retroactive effect to either the USFSPA, or any case interpreting it (i.e., *Mansell*) so as to defeat an existing flow of payments to a former spouse. As stated by various courts over the years, it would “thwart the very title of the Act, the ‘Uniform Services Former Spouses’

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<sup>145</sup> Though now rare, examples of this reasoning still pop up from time to time. See *Morgan v. Morgan*, 249 S.W.3d 226 (Mo. Ct. App. 2008) (if the spouse wanted to be spared divestment by post-divorce recharacterization, she should have put an indemnification clause in the divorce decree).

<sup>146</sup> See *In re Strassner*, 895 S.W.2d 614 (Mo. Ct. App. 1995); see also *Owen v. Owen*, 419 S.E.2d 267 (Va. Ct. App. 1992); *Dexter v. Dexter*, 661 A.2d 171 (Md. Ct. App. 1995); *McHugh v. McHugh*, 861 P.2d 113 (Idaho Ct. App. 1993); *Scheidel v. Scheidel*, 4 P.3d 670 (N.M. Ct. App. 2000).

<sup>147</sup> See *McLellan v. McLellan*, 533 S.E.2d 635, 637 & 638 n.1 (Va. Ct. App. 2000); *Longanecker v. Longanecker*, 782 So. 2d 406, 408 (Fla. Ct. App. 2001); *In re Marriage of Nielsen and Magrini*, 792 N.E.2d 844 (Ill. App. Ct. 2003) (indemnification inferred from percentage award to former spouse); *Black v. Black*, 842 A.2d 1280 (Maine 2004); *In re Marriage of Warkocz*, 141 P.3d 926 (Colo. Ct. App. 2006).

<sup>148</sup> *Gatfield v. Gatfield*, 682 N.W.2d 632 (Minn. Ct. App. 2004).

<sup>149</sup> *Id.*, citing *Krapf v. Krapf*, 786 N.E.2d 318, 326 (Mass. 2003); see also *Shelton v. Shelton*, 78 P.3d 507, 511 (Nev. 2003); *Hisgen v. Hisgen*, 554 N.W.2d 494, 498 (S.D. 1996); *Resare v. Resare*, 908 A.2d 1006 (R.I. 2006) (holding *Mansell* inapplicable, finding fiduciary duty, and applying breach of contract analysis to require dollar for dollar indemnification for sum that would have been paid if the member had not “unilaterally modified” the property settlement agreement); *Marriage of Smith* 148 Cal. App. 4th 1115, 1123, 56 Cal. Rptr. 3d 341 (2007) (postjudgment order requiring a husband to indemnify his wife if he chose to receive disability in lieu of retirement benefits in the future was not inconsistent with federal law); *Price v. Price*, 480 S.E.2d 92, 94 (S.C. Ct. App. 1996) (“Given the fact that Husband agreed, after Mansell, to pay Wife a percentage of his gross monthly military retirement pay, which included disability pay, he should not be permitted to complain that the family court erred in enforcing the terms of the Agreement”); *Poullard v. Poullard*, 780 So. 2d 498 (La. Ct. App. 2001) (expressing doubt as to whether the member could ever be entitled to waive sums already awarded to the spouse without compensating her, but finding that it need not reach the question because the parties entered into a property settlement agreement).

Protection Act,’ to construe the law as preventing a spouse from actually receiving a court ordered portion of military retirement benefits.”<sup>150</sup>

In the decade following *Mansell*, the focus shifted from looking for “indemnification” or other language that such recharacterization is *prohibited*, to looking for some language indicating that recharacterization is *permitted*, and requiring reimbursement of the former spouse unless the divorce decree permitted the member to convert the benefits post-divorce.<sup>151</sup> Over that time, a nearly-uniform consensus emerged throughout the country that a retiree simply is not permitted to recharacterize the former spouse’s share of the retirement benefits as his own separate property disability benefits, unless there is some indication *on the face of the divorce decree* that such a post-divorce recharacterization *is* permitted.

Sometimes, this focus is revealed in contempt cases, as in the 1995 Texas Court of Appeals rejection of a retiree’s claim that federal law made him “exempt” from contempt sanction after he waived retired pay in favor of disability benefits.<sup>152</sup> This is one of the cases that have labeled a post-divorce recharacterization of benefits as an improper “collateral attack on a final unappealed divorce decree.”<sup>153</sup>

*Jones* is also in the group of cases explaining that *Mansell* calls on courts to essentially take a snapshot at the time of divorce, when the award to the spouse is made. Any disposable retired pay that was already waived in favor of disability pay up to that point is not divisible, but any attempt by the member at *post*-divorce reduction in retired pay by recharacterization

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<sup>150</sup> See *Walentowski v. Walentowski*, 672 P.2d 657 (N.M. 1983).

<sup>151</sup> In one anomalous case, an intermediate court in North Carolina started out with finding (as had the Alaska Supreme Court in *Clauson, infra*) that it would be a violation of *Mansell* for a court to simply increase a spouse’s percentage of the military retirement benefits in order to make up for a disability award. *Halstead v. Halstead*, 596 S.E.2d 353 (N.C. Ct. App. 2004). Unfortunately, the court then concluded that a standard provision indemnifying the former spouse against *future* waivers of retired pay for disability would also be impermissible. This is the only known case so holding, and in view of the weight of authority on the subject leads to an unjust, and unjustifiable, result not required under the relevant law – according to every other court that has opined on the subject. See, e.g., *Gatfield v. Gatfield, supra*.

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

<sup>152</sup> *Jones v. Jones*, 900 S.W.2d 786 (Tex. Ct. App. 1995).

<sup>153</sup> 900 S.W.2d at 788. See also *Price v. Price*, 480 S.E.2d 92, 93 (S.C. Ct. App. 1996) (same).

is seen as attempting a “de facto modification” of a final property award, which community property law does not permit.<sup>154</sup>

The exceptions and anomalies to this line of cases were few and far between until (as detailed below) around 2009. In 1997, the Kansas Court of Appeals heard and decided *In re Marriage of Pierce*,<sup>155</sup> a “double-divorce” case in which both parties were apparently fully aware of the retiree’s disability at the time of divorce. The court found that the law was so well developed by the time of the divorce that if the spouse had sought to protect against the conversion of retirement to disability benefits, she could easily have done so, explaining that it felt its result was required under Kansas State law statute of limitations. The dissent noted that the result reached was “patently unfair to former spouses.”<sup>156</sup>

*Pierce* is something of an orphan, standing on its own odd facts, and has no following. The only known case to cite it approvingly was subsequently reversed on appeal.<sup>157</sup> Almost all other citations appear to be to note it as an aberration, in decisions holding that a former spouse **must** be compensated for a member’s post-divorce recharacterization of her property.<sup>158</sup>

Virtually all other jurisdictions lined up with the national consensus. In 2000, New Mexico verified its 1990 holding in *Toupal, supra*, in *Scheidel*,<sup>159</sup> rejecting a “federal law prohibits enforcement” argument and noting that there is no analytical difference between a member making a new disability application post-divorce, on the one hand, and increasing an award that existed upon divorce, on the other. That court, like many others, reinvented the core concept of *Gillmore*: “one spouse should not be permitted to benefit economically in the division of property from a factor or contingency that could reduce the other spouse’s share, if that factor or contingency is within the first party’s complete control.”<sup>160</sup>

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<sup>154</sup> These cases are perhaps best explained in, and exemplified by, *In re Gaddis*, 191 Ariz. 467, 957 P.2d 1010 (Ariz. Ct. App. 1997) (waiver of benefits to take civil service income required compensation to former spouse), *cert. denied*, 525 U.S. 826 (1998); *Harris v. Harris*, 991 P.2d 262 (Ariz. Ct. App. 1999).

<sup>155</sup> *In re Marriage of Pierce*, 982 P.2d 995 (Kan. Ct. App. 1999).

<sup>156</sup> *Id.* at 1000-01 (Green, J., dissenting).

<sup>157</sup> *Johnson v. Johnson*, 1999 Tenn. App. Lexis 625 (Tenn. Ct. App., Sept. 14, 1999), *rev’d*, *Johnson v. Johnson*, 37 S.W.3d 892 (Tenn. 2001).

<sup>158</sup> See *Scheidel, infra*; *Danielson, infra*; *Hillyer, infra*; *Smith, infra*; but see *Morgan v. Morgan*, 249 S.W.3d 226 (Mo. Ct. App. 2008) (a “throwback” case ignoring most of the national consensus, citing *Pierce* in a “but see” cite, and holding that if the spouse wanted to be spared divestment by post-divorce recharacterization, she should have put an indemnification clause in the divorce decree).

<sup>159</sup> *Scheidel v. Scheidel*, 4 P.3d 670 (N.M. Ct. App. 2000).

<sup>160</sup> Citing for that proposition *Irwin v. Irwin*, 121 N.M. 266, 271, 910 P.2d 342, 347 (Ct. App. 1995).

The same result was reached in three cases from Tennessee decided in early 2001, two from that State's Court of Appeals, and a third from the Tennessee Supreme Court: *Hillyer v. Hillyer*<sup>161</sup>; *Smith v. Smith*<sup>162</sup>; *Johnson v. Johnson*.<sup>163</sup> All three decision discussed the *Mansell* holding at length. They started with the legal principles that military retired pay is marital property subject to distribution, and that periodic payments to a spouse are distributions of property rather than alimony. As such, a divorce decree's division of retired pay is final, and when not appealed, is not subject to later modification.

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

Other courts hearing these cases have indicated a desire to reach the economic merits, and have not seemed any more impressed with semantics than were the Tennessee courts. For example, in *Janovic v. Janovic*,<sup>164</sup> the member waived a portion of retirement benefits in favor of VA disability benefits less than a year after divorce. The trial court ordered him to pay reimbursement. On appeal, the member claimed that the former spouse was only entitled to a share of "disposable retired pay," and his application for disability had **eliminated** the disposable pay and **created** "disability pay," which he alone was entitled to receive.

The reviewing court affirmed the order requiring reimbursement, rejecting the retiree's argument that ordering reimbursement violated *Mansell*, and stating that it merely enforced the parties' property settlement agreement, rather than dividing disability benefits. Since the case involved a post-*Mansell* divorce, the decree had included an indemnification provision<sup>165</sup> because of the "higher standard of clarity" some courts have required of decrees after *Mansell* to be certain of the divorce court's intent. However, the court noted that such enforcement of the intent at the time of the dissolution was appropriate whether or **not** the

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<sup>161</sup> 59 S.W.3d 118 (Tenn. Ct. App. 2001).

<sup>162</sup> 2001 Tenn. App. LEXIS 149 (No. M1998-00937-COA-R3-CV, Tenn. Ct. App., March 13, 2001).

<sup>163</sup> 37 S.W.3d 892 (Tenn. 2001).

<sup>164</sup> 814 So. 2d 1096 (Fla. Ct. App. 2002).

<sup>165</sup> The specific language reviewed by the court was the form paragraph I created for courts to use in decrees entered after *Mansell* to eliminate any ambiguity upon appellate review, published by the ABA as a guide for drafting attorneys in the form of "Military Retirement Benefit Standard Clauses." See 18 Family Advocate No. 1 (Summer, 1995) (*Family Law Clauses: The Financial Case*) at 30.

original order contained a specific indemnification provision.<sup>166</sup> Finally, the appellate court noted that “[t]he equity of the result reached . . . is undeniable.”<sup>167</sup>

In 2001, the Arizona Court of Appeals again dealt with the contract theory, federal law supremacy assertion, and claims of “involuntariness” that appeared in several of the cases discussed above, in *Danielson v. Evans*.<sup>168</sup> Because the divorce at issue occurred after *Mansell*, the prevailing former spouse in *Danielson* was held to the “higher standard of clarity” in the underlying decree (discussed above) to protect her interests.

The court nevertheless found no difficulty in turning aside the military member’s attack on the Arizona rule of finality of property distributions, finding the spouse’s rights to the benefits upon divorce just as “vested” as those of the member.<sup>169</sup> The court waded through just about all the kinds of claims made by members attempting to redirect to themselves funds already awarded to their former spouses – the “indirect violation” or “spirit of” *Mansell* argument, exemption from community property law by reason of application for a federally-paid disability argument, and the allegation that protecting the spouse would circumvent “Congressional intent” or violate the Supremacy Clause. The court was unimpressed on all counts.<sup>170</sup>

The cases continued to appear,<sup>171</sup> although some States with published authority on the subject are not publishing the follow-up cases, apparently because they were not seen as particularly precedential.<sup>172</sup>

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<sup>166</sup> 814 So. 2d at 1100, citing *Longanecker v. Longanecker*, *supra*.

<sup>167</sup> 814 So. 2d at 1101.

<sup>168</sup> *Danielson v. Evans*, 36 P.3d 749 (Ariz. Ct. App. 2001).

<sup>169</sup> 36 P.3d at 756. While the Arizona court did not further discuss the matter, a review of military retirement benefits cases will show that retirees and their representative organizations often argue that a retiree’s “entitlement” to collection of the military retirement benefits promised to him upon enlistment is a “vested right” of constitutional dimension. *See, e.g., Fern v. United States*, 15 Cl. Ct. 580 (1988), *aff’d*, 908 F.2d 955 (Fed. Cir. 1990). Those same retirees, and organizations, uniformly assert that a *former spouse* has *no* vested right to anything, no matter what any court might have decreed.

<sup>170</sup> In a footnote, the court found that its conclusions were entirely in line with the savings clause of the USFSPA, which the court found was intended to stop military members from cheating their spouses by post-decree actions. 36 P.3d at 757, n.7.

<sup>171</sup> *See, e.g., In re Marriage of Lodeski*, 107 P.3d 1097 (Colo. Ct. App. 2004) (noting that “many jurisdictions” had recognized the absence of any limitation on the equitable power of courts to address recharacterization of benefits in any part of the USFSPA).

<sup>172</sup> *See In re Marriage of Harper*, 2000 Wash. App. LEXIS 333 (Wash. Ct. App. 2000) (requiring compensation to wife for sums not paid to her by reason of husband’s post-divorce disability rating increases, because such reduction in payments was “outside the contemplation of the parties” at the time of divorce and

In 2009, however, the Texas Supreme Court decided, in *Hagen*,<sup>173</sup> that a divorce decree granting a spouse a portion of military retired pay “if, as, and when” he received it provided no protection from the member’s post-divorce recharacterization of the retired pay as non-divisible V.A. benefits, so the member simply got to keep money previously awarded to the former spouse. One justice dissented, noting the inequity and hardship being created for the former spouse.

The Texas courts of appeal promptly magnified that holding in *Sharp*<sup>174</sup> and *Jackson*.<sup>175</sup> In the former, the court extended *Hagen* to cover CRSC benefits, so if the member chose to receive them instead of divisible CRDP, again, he got to receive property previously awarded to the former spouse. In the latter, also addressing CRSC, the appellate court “reluctantly” found that the member could entirely divest the former spouse (despite a “fiduciary duty” clause), and this time adding that based on a 1981 decision,<sup>176</sup> the legitimacy indemnification clauses prohibiting a member from waiving disposable retired pay for non-divisible benefits “would be questionable.”

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

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

<sup>173</sup>*Hagen v. Hagen*, 282 S.W.3d 899 (Tex. 2009).

<sup>174</sup>*Sharp v. Sharp*, \_\_\_ S.W.3d \_\_\_, 2009 WL 3298131 (Tex. Ct. App. Oct. 14, 2009).

<sup>175</sup>*Jackson v. Jackson*, \_\_\_ S.W.3d \_\_\_ (No. 04-09-00117-CV, Tex. Ct. App. Apr. 14, 2010).

<sup>176</sup>*Ex parte Burson*, 615 S.W.2d 192 (Tex. 1981).

In the meantime, in Arizona, legislation quietly slipped through the legislature that reversed decades of decisions,<sup>177</sup> apparently without anyone noticing. H.B. 2348 prohibits Arizona courts from “considering” any disability benefits when awarding property or awarding spousal support, or from indemnifying or compensating a spouse or former spouse from any pre-divorce or post-divorce waiver of retired pay in favor of receiving disability benefits – despite the U.S. Supreme Court’s holding in *Rose*<sup>178</sup> that “It is clear veteran’s benefits are not solely for the benefit of the veteran, but for his family as well.”<sup>179</sup>

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

The scant federal authority has led to the same result as the State cases, but by way of different rationales, primarily involving deferral to State courts in domestic relations cases,<sup>180</sup> or squarely addressing and refuting a wide assortment of federal offenses allegedly committed by spouses in State divorce courts.<sup>181</sup>

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

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

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<sup>177</sup> See, e.g., *In re Gaddis*, 191 Ariz. 467, 957 P.2d 1010 (Ariz. Ct. App. 1997), *cert. denied*, 525 U.S. 826 (1998); *Harris v. Harris*, 991 P.2d 262 (Ariz. Ct. App. 1999); *Danielson v. Evans*, 36 P.3d 749 (Ariz. Ct. App. 2001).

<sup>178</sup> *Rose v. Rose*, 481 U.S. 619 (1987).

<sup>179</sup> See *In re Marriage of Anderson*, 522 N.W.2d 99 (Iowa Ct. App. 1994) (applying *Rose* to require a disabled veteran to pay alimony *and* child support in a divorce action, even when his only income was veterans’ disability and supplemental security income).

<sup>180</sup> *Silva v. Silva*, 680 F. Supp. 1479 (D. Colo. 1988); *White v. White*, 731 F.2d 1440 (9th Cir. 1984) (no federal claim just because federal rights are implicated in a State court proceeding; suit dismissed).

<sup>181</sup> *Fern v. United States*, 15 Cl. Ct. 580 (1988), *aff’d*, 908 F.2d 955 (Fed. Cir. 1990).

In *Torwich (Abrom) v. Torwich*,<sup>182</sup> the court found the reduction of payments to the spouse to be an “exceptional and compelling circumstance” allowing redistribution of marital property four years after the divorce, despite the existence of procedural rules normally barring such redistributions of property. This case has been relied upon for the proposition that *Mansell* permits “other adjustments to be made” to take into account the reduction in a spousal share from the disability claim of a member, so as to prevent the inequity that would occur if a member was permitted to redirect money from the former spouse back to himself, *without* some form of compensation.<sup>183</sup>

In 1999, the Washington State Supreme Court decided *In re Marriage of Jennings*.<sup>184</sup> The court found that a retiree who terminated a stream of payments to a former spouse by electing, post-divorce, to begin taking disability rather than retired pay created such “extraordinary circumstances” that the trial court should take the “justified remedial action” of awarding compensatory spousal support even four years after the divorce in order to “overcome a manifest injustice which was not contemplated by the parties at the time of the 1992 decree.” The court noted the reduced stream of payments to the spouse, and held that:

Regardless of the reasons, the result was fundamentally unfair because it deprived Petitioner of her entitlement to one-half of a substantial community asset with her receiving \$677.50 per month less than the amount awarded her by the court. It was therefore appropriate for the trial court, in ruling on the motion by Petitioner for modification or clarification, to devise a formula which would again equitably divide the community assets without requiring the monthly amount payable to Petitioner to be paid direct from the Respondent’s military retirement.<sup>185</sup>

The State high court concluded that the result reached by the trial court was “fair and equitable and within its authority.” The court went on to approve prior holdings stating that whenever a retiree has a choice of electing retirement or disability benefits, and chooses the

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<sup>182</sup> 660 A.2d 1214 (N.J. Super. Ct. App. Div. 1995).

<sup>183</sup> *Clauson v. Clauson*, 831 P.2d 1257 (Alaska 1992); *McMahan v. McMahan*, 567 So. 2d 976 (Fla. Ct. App. 1990); see also *White v. White*, 568 S.E.2d 283 (N.C. Ct. App. 2002), *aff’d per curiam*, 579 S.E.2d 248 (N.C. 2003) (remanding so district court could increase the former spouse’s percentage of the remaining disposable retired pay so as to restore to her the dollars converted to disability by the retiree, and finding that “the holding in *Mansell* was actually quite narrow” and had nothing to do with the former spouse’s claim for reimbursement of the diverted sums).

<sup>184</sup> 980 P.2d 1248 (Wash. 1999).

<sup>185</sup> *Id.* at 1256.

latter, for whatever reason, he “could not by electing to take a disability award rather than a regular retirement eliminate the community interest in the award.”<sup>186</sup>

Other courts have, similarly, found that a court can issue a spousal support award, post-divorce, sufficient to ameliorate the impact on an innocent former spouse whose “economic circumstances have deteriorated through no fault of her own” by reason of the former husband’s post-divorce application for disability benefits in lieu of retirement benefits.<sup>187</sup>

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

Even where disability payments are considered “exempt,” the U.S. Supreme Court has ruled that a member can be imprisoned on a contempt charge for failing to pay child support, despite his claim that payments could be made only from his VA disability award, which was exempt from execution.<sup>188</sup> The holding has been extended to alimony cases as well, on the basis of the holding in *Rose* that: “It is clear veteran’s benefits are not solely for the benefit of the veteran, but for his family as well.”<sup>189</sup>

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

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<sup>186</sup> *Marriage of Knies, supra*, 979 P.2d at 486-87, citing *In re Marriage of Kittleson*, 21 Wash. Ct. App. 344, 352, 585 P.2d 167 (1987). In an interesting twist that questions the entire *Jennings* analysis, the Washington Court of Appeals declared that the case “no longer controls” now that 10 U.S.C. § 1414 has led to a restoration of retired pay when a retired member elects disability (above 50%, anyway). See *In re Marriage of Michael*, 188 P.3d 529 (Wash. Ct. App. 2008).

<sup>187</sup> See *Kramer v. Kramer*, 567 N.W.2d 100 (Neb. 1997); *Clauson v. Clauson*, 831 P.2d 1257 (Alaska 1992).

<sup>188</sup> See *Rose v. Rose*, 481 U.S. 619 (1987). VA benefits are subject to “apportionment” under 38 U.S.C. § 5307, permitting the Secretary of the Department of Veteran’s Affairs to apportion VA benefits to the recipients’ former spouses or children upon application, in order to provide for their support. See 38 C.F.R. §§ 3.450-3.461 (regulations). Some VA offices, however, have denied claims for apportionment, stating that “the law does not allow for an apportionment for one who is divorced from the veteran.” Letter from A. Bittler, Veterans Service Center Manager, in case 354/21-11 (Apr. 11, 2003), on file with the author.

<sup>189</sup> See *In re Marriage of Anderson*, 522 N.W.2d 99 (Iowa Ct. App. 1994) (applying *Rose* to require a disabled veteran to pay alimony **and** child support in a divorce action, even when his only income was veterans’ disability and supplemental security income).

For example, in *In re Marriage of McGhee*,<sup>190</sup> the court approved compensation to the former spouse by means of alimony, as set out in the agreement between the parties, when it was imposed by the dissolution court after the member halted the flow of military retirement benefits to former spouse after the *McCarty* decision. The court termed use of such “back-up” clauses to be making the property award “supportified.” Similarly, in deciding *In re Marriage of Sheldon*,<sup>191</sup> the court noted the “close relationship between the amount of a property division and the entitlement, if any, of a spouse to spousal support.” In *In re Marriage of Mastropaolo*,<sup>192</sup> the court reversed an alimony award “on condition” that the court’s affirmance of the retirement division became final.

While some courts have expressed the opinion that an outright award of spousal support in the sum of military retirement benefits lost by reason of a disability election constitutes a violation of *Mansell*,<sup>193</sup> other courts have had no problem with the direct substitution of alimony for the intended property award. In *Austin (Scott) v. Austin*,<sup>194</sup> the court instituted an award of alimony, that had been previously reserved until remarriage, in lieu of the pension share lost because of the member’s transfer to VA disability status. The court gave its approval to alimony continuing after the spouse’s remarriage, where the alimony award is intended to compensate for distribution of a pension earned during marriage, citing *Arnholt v. Arnholt*.<sup>195</sup>

The arrangement can be set up at the time of divorce. In *Waltz v. Waltz*,<sup>196</sup> the Nevada Supreme Court approved a decree which awarded the entire military retirement to the retiree, but ordered him to pay the former spouse, by military allotment, \$200 plus cost of living adjustments on that sum, as “permanent alimony.” The military service had overlapped the parties’ marriage by just less than ten years, precluding direct payment of a property award through the military pay center, and the appellate court found that in the context of the case, the parties’ use of phrase “permanent alimony,” in conjunction with the COLA clause, showed an intent to link it to the military retired pay. Further, the court held that payments

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<sup>190</sup> 131 Cal. App. 3d 408, 182 Cal. Rptr. 456 (Ct. App. 1982).

<sup>191</sup> 124 Cal. App. 3d 371, 177 Cal. Rptr. 380 (Ct. App. 1981).

<sup>192</sup> 213 Cal. Rptr. 26 (Ct. App. 1985).

<sup>193</sup> See, e.g., *Clauson v. Clauson*, *supra*; *In re Marriage of Kraft*, 832 P.2d 871 (Wash. 1992); *Billeck v. Billeck*, 777 So. 2d 105 (Ala. 2000) (holding that alimony based on consideration of disability benefits is “essentially” a prohibited division of disability benefits).

<sup>194</sup> Mich. Ct. App. No. 92-15818 (unpublished intermediate court opinion), *rev. den.*, 546 N.W.2d 255 (Mich. 1996).

<sup>195</sup> 343 N.W.2d 214 (Mich. Ct. App. 1983) (non-military case).

<sup>196</sup> *Waltz v. Waltz*, 110 Nev. 605, 877 P.2d 501 (1994).

to a former spouse do not terminate upon her remarriage when the payments were clearly intended to achieve a property settlement.

Many courts have awarded alimony upon divorce to the spouse, on the basis that the member was enjoying a separate property cash flow from disability benefits applied for before divorce that *would* have been divisible retirement benefits but for the member's election. Where VA disability exists at the time of divorce, the court cannot divide those benefits, but they "may be considered as a resource for purposes of determining [one's] ability to pay alimony."<sup>197</sup> Generally, State courts have felt free to make alimony awards where necessary to do substantial justice to the parties in front of them, taking into account the entirety of the actual financial circumstances of the parties.

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

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

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

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

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<sup>197</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).

## 5. Concurrent Receipt

The sheer number of post-divorce recharacterization cases involving disability benefits since *Mansell*<sup>198</sup> makes clear the duty of attorneys (and *especially* the attorneys for the spouses) to anticipate post-divorce status changes and build that anticipation into the decrees they write.

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

Ironically, given the enormous amount of litigation regarding disability benefits and military retirement benefits during the past twenty years or so, it appears that many of the *specific* issues at play in those cases will largely disappear from the legal landscape (except, perhaps, as to questions of arrearages).

For many years, members of Congress introduced “concurrent receipt” bills of various sorts seeking to repeal, to a greater or lesser extent, the requirement of waiver of longevity retired pay in order to receive disability pay. Of course, any such program would cost the government the entirety of the additional VA payment, which is why it was resisted so strenuously for so long.

The first “break in the dam” was the modest “combat-related special compensation” or “CRSC,” pay put in the 2003 Defense Authorization Act. It granted an additional payment to two (relatively small)<sup>199</sup> categories of retirees: those with 20 or more years of service who were receiving disability compensation for which they also received a Purple Heart medal; and those with 20 or more years of service who were receiving disability compensation rated at 60% or higher as a result of injuries suffered in combat or “combat-like” training.<sup>200</sup>

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<sup>198</sup> In *Mansell v. Mansell*, 490 U.S. 581, 109 S. Ct. 2023 (1989), the Court found that the USFSPA did not *totally* repudiate the pre-emption found by the Court to exist in *McCarty*; Congress’ failure to alter the language of the Act so as to alter this finding, when it next amended the Act in 1990, has been read by some to imply congressional consent that at least some partial pre-emption was intended to remain after passage of the Act.

<sup>199</sup> While there were no accurate figures, the estimates in the press commentary were that some five percent of disabled veterans would qualify under the original rules.

<sup>200</sup> Unfortunately, from the spouse’s point of view, the new compensation did *not* provide actual concurrent receipt, which would restore previously-waived retired pay. Instead, it added a *third* category of pay – to the retiree only. The program did nothing to address the problems detailed in this article.

The true breakthrough came with the National Defense Authorization Act for Fiscal Year 2004.<sup>201</sup> Two programs were passed in tandem. First, CRSC was expanded to include all combat-related disabilities or operations-related disabilities,<sup>202</sup> from 10% to 100% ratings, effective January 1, 2004, and extended to Guard and Reserve members. CRSC payments are explicitly defined as *not* being “retired pay.”<sup>203</sup>

Second, by way of Concurrent Receipt (also called “Concurrent Disability Pay,” or “CDP,” but later re-titled “Concurrent Retirement and Disability Pay” or “CRDP”),<sup>204</sup> all retirees with 20 years of service and VA disability ratings of 50% or higher, had their retired pay offsets phased out over a ten year period. In other words, the military retired pay previously waived for disability pay would be slowly restored, until the retirees were receiving *both* their full retired pay *and* the VA disability payments. Because the restored money is the fully-divisible longevity retired pay that was waived for VA benefits in the first place, it *is* “retired pay.”

Specifically, through CRDP, a dollar sum starting at \$100 per month for those with a 50% rating, to \$750 for those with a 100% rating, was restored,<sup>205</sup> the sums were scheduled to increase by an additional 10% each year<sup>206</sup> through 2014, by which time full concurrent receipt will be paid. In 2005, retirees with a 100% disability were accelerated to immediate full concurrent receipt.

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

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<sup>201</sup> Pub. L. 108-136; 117 Stat. 1392 (Nov. 24, 2003).

<sup>202</sup> Phrased in the alternative as an injury for which the member was awarded the Purple Heart, *or* incurred as a result of armed conflict, while engaged in “hazardous service,” in the performance of duty “under conditions simulating war,” or “through an instrumentality of war.” 10 U.S.C. § 1413a(e).

<sup>203</sup> 10 U.S.C. § 1413a(g). Presumably, this makes the payments *not* divisible as property, unlike longevity retired pay.

<sup>204</sup> The latter acronym was provided in 2004.

<sup>205</sup> Those with 50% disability got \$100 more each month, those with 60% got \$125, those with 70% got \$250, those with 80% got \$350, those with 90% got \$500 and those with 100% disability got \$750.

<sup>206</sup> It is geometric, not additive – i.e., the percentage added each year is measured by the difference between the initial dollar sum restored and the full amount waived, not simply by adding 10% each year to the original remaining retired pay that was being paid. It is thus “front-loaded,” in that most of the money will be restored much sooner than 2014. 10 U.S.C. § 1414(c).

While CRSC is subject to garnishment for alimony and child support, it may not be attached for property payments. It is considered disability pay, and while it is determined in accordance with a separate disability value table (and varies in amount in accordance with the number of the member’s dependents), it cannot exceed the sum of retired pay waived by the member for VA disability. Because it is not being phased in, CRSC will actually be around longer than CRDP – the latter will disappear as of 2014, when the full amount of longevity pay is restored by the program.

Apparently, the pay centers threw out paperwork related to former spouse collections whenever the spousal share was *completely* eliminated, so those former spouses whose payments dropped to zero (because the disability award consumed the entire disposable retired pay) are required to re-apply for payment of benefits.<sup>207</sup> Where the spousal share was reduced but not eliminated, and the member is receiving CRDP, the former spouse should see automatic, incremental restoral of the payment stream ordered in the documents previously submitted to DFAS, as the retired pay is slowly restored.

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

It may not be that simple, however, as the member can elect between CRDP and CRSC annually, and which would actually provide more money in a given year can vary throughout the phase-in of CRDP. From the spouse’s point of view, the money may just “stop” one or more times, requiring re-application each year, with no explanation from DFAS as to what happened or why.<sup>208</sup>

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<sup>207</sup> A former spouse for whom DFAS has a complete application on file, but who has not received any payments due to the retiree’s being 100 percent disabled, is required to send a written request with a current payment address, to restart payments, to DFAS, either by fax to (216) 522-6960; or by mail to DFAS-GAG/CL, P.O. Box 998002, Cleveland OH 44199-8002. DFAS suggested including the retiree’s name and social security number for proper routing. For those former spouses for whom DFAS no longer has an application on file, re-application for benefits under the USFSPA is required to restart payments.

<sup>208</sup> Attorney Mark Sullivan of Raleigh, North Carolina ([mark.sullivan@ncfamilylaw.com](mailto:mark.sullivan@ncfamilylaw.com)) has written extensively on this topic. Terming the CRDP and CRSC programs as “The Evil Twins,” he summarized them in the following chart:

Name:	CRDP	CRSC
Type of disability required	Service-connected	Combat-related
Considered longevity retired pay	Yes	No
Divisible as Property	Yes	No
Minimum disability rating required	50%	10%
Taxable	Yes	No
Phase-in	Yes (except 100% disability cases)	No

The phase-in process for CRDP creates an issue like the *McCarty*-gap cases or the (prior) Civil Service dual-compensation laws – the legal dispute affects fewer and fewer people over time, to a lesser and lesser degree, which will eventually (presuming it is expanded to cover the 10% to 50% disability cases) render the entire body of case law applicable to indemnification of spouses for (non-CRSC) disability awards to members mere fodder for footnotes or to be raised only for analogy to other, current disputes.

In any event, for the short term, there remains the question of arrearages, consisting of sums of retired pay that retirees waived and personally collected in the form of disability pay to the exclusion of the former spouse. As to those cases, all of the above factors remain relevant. The legislation did not contain any authority for DFAS to issue retroactive payments.

Presumably, all the normal rules regarding arrearages still exist (including the illogical, and apparently accidental rule that arrearages in retired pay cannot be collected From Retired Pay). Those with arrearages in child support or alimony, however, could initiate a withholding order that includes a payment toward the arrearage.

After 2014, spousal suits based on regular VA waiver disability applications should no longer be happening – at least for those with a disability award of 50% or more and who are taking benefits under the CRDP, *not* the CRSC, program. For those with lesser VA disability percentages, the legal issues are identical, but the dollars at stake are (necessarily) lesser.

All the case law established for VA waiver cases will probably be found applicable whenever a member chooses CRSC, and thus wipes out payments to a former spouse that *would have been made* under CRDP. Members making the election to receive CRSC will be getting substantially more money each month, but their former spouses will see nothing, and will presumably have to continue suing in divorce court for indirect compensation.

## 6. Conclusions as to Disability Awards

Several commentators and researchers have reviewed the cases nationally, reaching the conclusion that post-divorce recharacterization of retired pay as disability benefits just is not permitted without compensation to the former spouse.<sup>209</sup>

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Retroactive payment	No	Yes (to date of VA app.)
Increases with number of dependents	No	Yes (if over 40%)
Garnishable for child support/alimony	Yes	Yes
Survivor benefits	No	No

<sup>209</sup> See, e.g., Fenton, *Uniformed Services Former Spouses' Protection Act and Veterans' Disability and Dual Compensation Act Awards*, Army Law., Feb. 1998, 31, 33 (noting a “growing trend” among courts to ensure that former spouses’ property interests are protected in the event of a future VA disability award to the service

In the cases cited above, and others, the post-divorce disability award sought and awarded to the retiree was not allowed to block the spouse's right to continued payments under the terms of the decree. Even if *Mansell* **does** have to be considered in post-divorce recharacterization cases, courts have mandated that former spouses must be compensated, by awards of other property, or alimony, or (most commonly) dollar-for-dollar compensation of all amounts that would have been paid but for the recharacterization.

Further, in the years since *Mansell*, reviewing courts have gone from examination of the decree to see if there was a specific savings clause by which the spousal share could **survive** the retiree's recharacterization, to examining the underlying decree for a specific provision permitting the retiree to retroactively reduce the award to the former spouse.

In the absence of a provision explicitly permitting a retiree to recharacterize retired pay as disability pay and so divert money awarded to his former spouse back to himself, the retiree is required to reimburse the former spouse for all sums diverted, according to the highest courts to consider the question in Alabama, Arizona, California, Colorado, Florida, Idaho, Illinois, Iowa, Kansas,<sup>210</sup> Louisiana, Maine, Maryland, Massachusetts, Minnesota, Missouri, Nevada, New Jersey, New Mexico, North Carolina, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, and Wisconsin.<sup>211</sup>

Alaska and Nebraska, while not requiring direct compensation, have indicated that other property should be distributed, or post-divorce alimony should be awarded, to compensate the former spouse in such situations.

Washington goes along with the methodology of those two States, when the disability exists at the time of retirement. Alabama seems to lean against compensating a spouse when the disability benefits exist at the time of divorce, but has not spoken as to post-divorce recharacterization.

However, in 2009, as detailed above, Arizona, at least for the time being, reversed course, and the Texas courts seemed to go out of their way to find ways in which service-members could unilaterally convert community property already ordered as belonging to the former

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member, and that such is the majority view in this country); Mary J. Bradley, *Calling for a Truce on the Military Divorce Battlefield: A Proposal to Amend the USFSPA*, 168 Military. L. Rev. 40, 49 (June 2001) (noting in part the rationale that "military spouses contribute to the effectiveness of the military community while at the same time forgoing the opportunity to have careers and their own retirement").

<sup>210</sup> As discussed in detail above, Kansas is somewhat conflicted, requiring full compensation in *MacMeeken v. MacMeeken*, 117 B.R. 642 (1990) (Bankr. D. Kan. 1990), but permitting an aberration in one case in *In re Marriage of Pierce*, 982 P.2d 995 (Kan. Ct. App. 1999).

<sup>211</sup> The case law in Wisconsin predates *Mansell*. See *Loveland v. Loveland*, 433 N.W.2d 625 (Wisc. Ct. App. 1988).

spouse back into some form of benefit payable only to the member, without compensation of any kind.

The overwhelming weight of authority indicates that it makes no difference *how*, or *why* the retiree diverts money to himself that had been awarded to the former spouse in a final, unappealed decree; his act of doing so is a violation of the *Decree* every month he takes and keeps sums awarded to the former spouse, and requires an order of reimbursement.

But the push-back in Arizona and Texas indicates that there is still a movement in place seeking to treat the military member as in a superior position to determine, even retroactively, whether there is any community property to be divided, and what, if anything, the former spouse will receive post-divorce.

Depending on the letters used in the alphabet soup, enforcing the divorce decree's allocation of retirement benefits to the spouse may – or may not – require litigation.

#### E. Partition Actions

If the original divorce decree did not address the military retirement benefits at all, or failed to do so sufficiently to permit payments to the former spouse to actually be made, all is not necessarily lost. Many States permit former spouses to return to court for partition of assets not disposed of in the original divorce proceeding, typically as “tenants in common” of the omitted assets.<sup>212</sup> The action may be brought in the court with jurisdiction over the member, even if the original divorce was entered elsewhere.<sup>213</sup>

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

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<sup>212</sup> See, e.g., *Henn v. Henn*, 605 P.2d 10 (Cal. 1980).

<sup>213</sup> See, e.g., *Webber v. Webber*, \_\_\_ S.W.3d \_\_\_ (No. E2002-01355-COA-R3-CV, Tenn. Ct. App., Feb. 4, 2003) (where member made special appearance contesting jurisdiction of Nevada court to divide property, former spouse could file for division of property in Tennessee, where member lived, and member was estopped from arguing that the decree that was silent as to property was *res judicata*); *Stuart v. Gomez*, Case No. D 156799, Eighth Judicial District Court, Clark County, Nevada, November 22, 1992 (partition granted upon domestication of foreign judgment); but see *In re Brown*, 587 N.E.2d 648 (Ill. Ct. App. 1992) (no remedy of partition available for retirement reserved to American courts by German divorce decree).

The special jurisdictional rules discussed above are applicable in partition cases. According to most courts that have ruled on the question, the jurisdictional test is to be applied in the *present* (i.e., when the current action is commenced) as opposed to considering what jurisdiction was established during the original divorce. Oddly, the federal courts have been willing to permit State-court long-arm jurisdiction where the States themselves find they cannot exercise it.<sup>214</sup>

Partition actions, to be enforceable, must be brought with both sufficient “federal jurisdiction” under 10 U.S.C. § 1408 and adequate State court jurisdiction. When the partition action is brought in a different State than the one which granted the divorce, some courts have applied the partition law of the former matrimonial domicile,<sup>215</sup> while others have elected to use the law of the forum where the suit is heard.<sup>216</sup> The USFSPA now only allows partition (or any other post-divorce order affecting the retirement benefits) if the issuing court has proper federal jurisdiction over both the member and the former spouse in the action.<sup>217</sup>

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

The Texas cases provide a good example. If the original decree contained a residuary clause stating that un-mentioned property belonged to the non-member former spouse, then she could get her share of benefits silently omitted from decree.<sup>218</sup> At least one intermediate appellate court held that the same result followed from total silence of the decree *without* a residuary clause, since Texas statutory law held that undivided assets were “held” by the parties as tenants in common.<sup>219</sup> In 1999, however, the Texas Supreme Court “disapproved”

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<sup>214</sup> See, e.g., *Tarvin v. Tarvin*, 187 Cal. App. 3d 56, 232 Cal. Rptr. 13 (Cal. Ct. App. 1986); *Kovacich v. Kovacich*, 705 S.W.2d 281 (Tex. Ct. App. 1986); *Messner v. District Court*, 104 Nev. 759, 766 P.2d 1320 (1988); *contra*, *Lewis v. Lewis*, 695 F. Supp. 1089 (D. Nev. 1988); *Delrie v. Harris*, 962 F. Supp. 931 (D.W. La. 1997).

<sup>215</sup> See *Kirby v. Mellenger*, 830 F.2d 176 (11th Cir. 1987).

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

<sup>217</sup> See 10 U.S.C. § 1408(d).

<sup>218</sup> *Buys v. Buys*, 924 S.W.2d 369 (Tex. 1996).

<sup>219</sup> *Lee v. Walton*, 888 S.W.2d 604 (Tex. Ct. App. 1994), *cert. denied*, 516 U.S. 870 (1995).

that holding, stating that partition was only permitted if there had been a residuary clause which arguably “treated” the pension in the original divorce.<sup>220</sup>

Courts nationally have reached the same conclusion, in various language, finding that in the absence of a clause in the decree stating something that could be interpreted as “treating” the un-mentioned asset, military retirement benefits omitted from pre-*McCarty* decrees simply cannot be partitioned, whether or not State law provides an “automatic” reservation provision for omitted assets.<sup>221</sup>

As a strategic point, any former spouse facing a challenge from the member to the jurisdiction of the Court to divide a previously-omitted retirement on jurisdictional grounds (as with the *Tucker* case discussed in footnote 48) would probably be well-served by a contemporaneous partition action in the jurisdiction of the member’s residence. Both sides would then be faced with an equivalent waste of time and resources,<sup>222</sup> which might result in a stipulation to resolve the entire case in one jurisdiction, as would have been most reasonable in the first place.

## F. Bankruptcy<sup>223</sup>

A member declaring bankruptcy does not lose the right to receive future retired pay based upon prior or future military service. In cases decided prior to enactment of the USFSPA, an order to pay a portion of retired pay to a former spouse (or a sum of money in lieu of such a portion) was often considered a “debt” dischargeable in bankruptcy rather than a property

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<sup>220</sup> *Havlen v. McDougall*, S.W.3d 343, 347 (Tex. 2000). Other courts, in other States, have held similarly. See, e.g., *Scheidel v. Scheidel*, 4 P.3d 670, 674 (N.M. Ct. App. 2000).

<sup>221</sup> See *Curtis v. Curtis*, 9 Cal. Rptr. 2d 145 (Ct. App. 1992); *Johnson v. Johnson*, 824 P.2d 1381, 1383 (Alaska 1992); *In re Marriage of Booker*, 833 P.2d 734, 739 (Colo. 1992); *Dunham v. Dunham*, 602 So. 2d 1139, 1143 (La. Ct. App. 1992); *Johnson v. Johnson*, 605 So. 2d 1157, 1160-1161 (La. Ct. App. 1992); *Mings v. Mings*, 841 S.W.2d 267, 269-270 (Mo. Ct. App. 1992); *White v. White*, 623 So. 2d 31, 34 (La. Ct. App. 1993); *Hollyfield v. Hollyfield*, 618 So. 2d 1303, 1304-1305 (Miss. 1993); *Kemp v. United States Dept. of Defense*, 857 F. Supp. 32, 33 (W.D. La. 1994); *Terry v. Lee*, 445 S.E.2d 435 (S.C. 1994); *Hennessy v. Duryea*, 955 P.2d 683 (N.M. Ct. App. 1998); *Schexnayder v. Holbert*, 714 So. 2d 680 (La. 1998); *Bottiggi v. Wall*, 765 N.E.2d 819 (Mass. App. Ct. 2002). But see *Reppy, The 1990 U.S.F.S.P.A. Amendment: No Bar to Recognition of Tenancy in Common Interest Created by Pre-McCarty Divorces that Fail to Divide Military Retired Benefits*, 29 Idaho L.R. 941 (1992).

<sup>222</sup> Reasons cited by the dissent in *Wagner v. Wagner*, *supra*, 768 A.2d 1112 (Pa. 2001), for why the majority’s reading of the statute was illogical.

<sup>223</sup> All of the case law discussed in this section was issued prior to enactment of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA), effective October 17, 2005. That sweeping law will have ramifications for most, if not all, of the doctrines discussed below.

interest. Since enactment of the USFSPA, courts have generally held awards to former spouses of a portion of military retired pay to be non-dischargeable.

The law regarding the member's filing of a bankruptcy petition *during* the divorce (before the former spouse's interest is ruled upon by the divorce court) is not well developed, and the results are uncertain. More is known about the effect of a member's filing a bankruptcy petition *after* a divorce court has ruled that a former spouse is entitled to a portion of the retired pay.

The Fifth Circuit has simply held that an award to a former spouse of a portion of the retired pay as property made it her separate property from that day forward, leaving no "debt" to be discharged or otherwise addressed by the bankruptcy court.<sup>224</sup> The Ninth and Eighth Circuits have generally agreed with this principle, although their opinions diverge on the question of arrearages.

Probably the most widely cited case is *In re Teichman*,<sup>225</sup> in which the Ninth Circuit confirmed the non-dischargeability of the former spouse's future interest in payments to her of military retired pay to be paid after the date of the bankruptcy petition. By split decision, however, the court termed amounts previously paid to the member (despite the divorce court order awarding those sums to the former spouse) as a "debt" to her that could be discharged. Thus, the member was able to retain all sums that he *should* have previously paid to the former spouse under the State court order (i.e., the arrearages).

Five years later, in *Bush v. Taylor*,<sup>226</sup> the Eighth Circuit concurred as to the non-dischargeability of the former spouse's future interest in payments to the former spouse, but held that any sums paid to the member and kept rather than being paid to the former spouse were retained by the member wrongfully, and he remained liable despite the bankruptcy for the full amount of payments that should have, but were not, made to the former spouse. The bankruptcy thus had no impact on the former spouse's rights.

The Seventh Circuit reached much the same result, but only by means of the tenuous finding that military retirement benefits are not part of the bankruptcy estate because post-petition services are required of the member, making the benefits post-petition wages.<sup>227</sup>

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<sup>224</sup> See *In re Chandler*, 805 F.2d 555 (5th Cir. 1986), *cert. denied*, 481 U.S. 1049 (1987).

<sup>225</sup> *In re Teichman*, 774 F.2d 1395 (9th Cir. 1985).

<sup>226</sup> *Bush v. Taylor*, 912 F.2d 989, *vacating* 893 F.2d 962 (8th Cir. 1990).

<sup>227</sup> See *Matter of Haynes*, 679 F.2d 718 (7th Cir.); *cert. denied*, 459 U.S. 970 (1982).

Various lower bankruptcy courts have issued opinions along the same lines.<sup>228</sup> Where divorce counsel had the foresight to include language indicating that any sums paid to the member that should, under the decree, have been paid to the former spouse would be considered subject to an express trust, the courts have enforced it as a non-dischargeable debt.<sup>229</sup> Some courts have “saved” the allocation to the former spouse only by finding it to be, at root, “in the nature of” some form of alimony or maintenance.<sup>230</sup>

This is not to say that the case law has uniformly favored former spouses. Where counsel for the former spouse was not sufficiently careful in drafting the language of the decree, where the funds paid to the former spouse were not a portion of the retired pay but a sum meant to compensate the former spouse for her interest therein, and where no argument could be successfully made that the funds were necessary for the support of the former spouse, the former spouse’s interest has sometimes been found to be dischargeable.<sup>231</sup>

It is possible for a former spouse to contest the discharge in bankruptcy of an obligation to remit to the former spouse a portion of retired pay, by attacking it as a “fraud while acting in a fiduciary capacity” or a tortious “debt for willful and malicious injury.”<sup>232</sup> Litigation in bankruptcy court may cause that court to carry into effect the divorce court’s orders.<sup>233</sup> At least one court has held a designation of the former spouse as the Survivor’s Benefit Plan beneficiary was a non-dischargeable transfer and not a “debt” subject to discharge in bankruptcy.<sup>234</sup>

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<sup>228</sup> See *In re Hall*, 51 B.R. 1002 (Bankr. S.D. Ga. 1985). For cases holding generally that the former spouse’s share of a retirement interest was such that the debtor retained no interest, see, e.g., *In re Resare*, 142 B.R. 44 (Bankr. D. R.I. 1992) & *Resare v. Resare*, 154 B.R. 399 (Bankr. D. R.I. 1993); *In re Stolp*, 116 B.R. 131 (Bankr. W.D. Wis. 1990); *In re Farrow*, 116 B.R. 131 (Bankr. M.D. Ga. 1990). For cases following the constructive trust reasoning, see, e.g., *In re Sommerville*, 122 B.R. 446 (Bankr. M.D. Ala. 1990).

<sup>229</sup> See *In re Dahlin*, 94 B.R. 79 (Bankr. E.D. Va. 1988); see also *In re Eichelberger*, 100 B.R. 861 (Bankr. S.D. Tex. 1989). One text cautions that the result would have been different in a Chapter 13 bankruptcy, in which since debts for breach of fiduciary duties are dischargeable. See H. Sommer & M. McGarity, *Collier Family Law and the Bankruptcy Code* (L. King ed. 1991), at ¶ 6.05[8], n.132.

<sup>230</sup> See *Love v. Love*, 116 B.R. 267 (Bankr. D. Kan. 1990); *In re Anderson*, 21 B.R. 335 (Bankr. S.D. Cal. 1982); *Ersparn v. Badgett*, 647 F.2d 550 (5th Cir. 1981); *In re Corrigan*, 93 B.R. 81 (Bankr. E.D. Va. 1988).

<sup>231</sup> See *In re Neely*, 59 Bankr. Rep. 189 (B. Ct., D. S.D. 1986); *In the Matter of Heck*, 53 Bankr. Rep. 402 (B. Ct., S.D. Ohio 1985) (non-military case).

<sup>232</sup> See 11 U.S.C. § 523(a)(4), (6).

<sup>233</sup> See *In re Thomas*, 47 Bankr. Rep. 27 (B. Ct., S.D. Cal. 1984); *In re Wood*, 96 Bankr. Rep. 993 (9th Cir., B.A.P., 1988) (non-military case).

<sup>234</sup> See *In re Anderson*, 1988 WL 122983 (Bankr. N.D. Iowa 1988).

Not all bankruptcy courts are blind to the damage caused to equity by uncritical application of traditional bankruptcy principles to the domestic relations field. One bankruptcy court has commented:

We are increasingly troubled by the trend of parties to leave divorce court with an agreement that settles property and alimony matters, only to immediately walk down the street to the federal courthouse and attempt to relitigate those issues. Such actions call into question the good faith of the parties and their counsel and raise thorny issues of comity and finality of judgments, to say nothing of attempting to make the bankruptcy court into some type of appellate divorce court. We do not think Congress intended this result when it enacted § 523(a)(5). While we recognize that certain marital debts and obligations are and should be dischargeable, we do not believe that § 523(a)(5) gives one spouse carte blanche to retain marital property at the other spouse's expense.<sup>235</sup>

Bankruptcy poses many problems in this area. When a member chooses to try to defeat the divorce court's order in bankruptcy court, the only guarantee is greater expenses for both parties and further litigation.

American Bar Association committee recommendations to Congress to make division of retirement benefits non-dischargeable were apparently responsible in part for enactment of the prior subsection (a)(15) exceptions to discharge, but a detailed exploration of those provisions is beyond the scope of these materials.<sup>236</sup>

Under the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA),<sup>237</sup> the balancing of hardships under the prior law between the debtor and creditor spouse was eliminated, and "domestic support obligations"<sup>238</sup> were made nondischargeable in Chapter 7 bankruptcies, but apparently not under Chapter 13 plans that are successfully concluded. Such obligations were given a high priority, requiring their payment before satisfaction of virtually any other obligations of the debtor.

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<sup>235</sup> *McGraw v. McGraw (In re McGraw)*, 176 B.R. 149 (Bankr. S.D. Ohio 1994) (finding that divorce decree made member husband the constructive trustee of all military retirement benefits intended by that decree to be paid to spouse).

<sup>236</sup> Basically, a property distribution or debt division obligation arising from a divorce decree would normally be dischargeable under § 523(a)(15), unless the creditor spouse timely filed an objection based upon the exceptions found in the old § 523(a)(15)(A) or (B). This led to the court balancing hardships between allowing the debtor a discharge and its effect on the creditor spouse as compared to denying the discharge and its effect on the debtor.

<sup>237</sup> Apparently referred to in certain circles as the Bankruptcy Abuse Reform Fiasco (BARF).

<sup>238</sup> The term domestic support obligation is defined very broadly to include all debts to a spouse, former spouse or child incurred during a divorce or separation regardless of whether the debt is designated as a "support" obligation or not.

In light of the continuing evolution of bankruptcy law, it has generally become easier for spouses to prevent discharge of arrearages in military retirement benefits, as well as saving future payments, even if the property division is treated *as* a property division.

### **G. Some Practical Points to Actual Collection of Child Support, Alimony, and Property Divisions From Military Members**

As briefly recounted above in the section introducing the USFSPA, there is more than one way to obtain collection of a court award from an active-duty or retired military member.

The simplest is to send a freshly (within 90 days) certified copy of the order requiring payment by the retired member of child support, alimony, or a property award (including any order to pay lump sum property equalization, or awards such as attorney's fees, but ironically *not* including orders for payment of arrearages in military retired pay itself), to DFAS, along with the appropriate application form.<sup>239</sup>

Of course, the issuing court must have had personal jurisdiction over both parties under the law of that State, requiring payments to a former spouse for such support or property.

Where the military member is still on active duty, things are more complicated. An order may be obtained specifying that the *military pay center*, as opposed to the member personally, is required to pay a child support order,<sup>240</sup> including an award of arrearages.<sup>241</sup>

Unfortunately, the information posted by DFAS, while technically accurate, is somewhat misleading to a practitioner trying to find a simple route to collect a child support order. For example, the DFAS web site<sup>242</sup> giving instructions for collecting "child and/or spousal support" from "active, reserve, and retired members of the military" (and civilian employees of the Federal government) does not mention the simple process above for collecting child support from military retired pay.

Instead, it speaks only to the Social Security law permitting garnishments, a much more cumbersome procedure.<sup>243</sup> The DFAS guidance notes that the order cannot be the divorce

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<sup>239</sup> Application for Former Spouse Payments From Retired Pay, DD Form 2293 (DD-2293). Again, this form can be filled out and then printed as an interactive pdf form by going to: <http://www.dtic.mil/whs/directives/infomgt/forms/eforms/dd2293.pdf>.

<sup>240</sup> See 42 U.S.C. §§ 659-662.

<sup>241</sup> See 5 C.F.R. Part 581.

<sup>242</sup> <http://www.dod.mil/dfas/militarypay/garnishment/childsupportandalimony.html>.

<sup>243</sup> 42 U.S.C. § 659; implementing regulation at 5 C.F.R. Part 581.

decree or other order requiring the *member* to make the payment, but must direct the government, “as the employer,” to withhold and remit payments to satisfy the support obligation. It helpfully adds that such a specific “federal-government-must-withhold” order must be served on DFAS, and must include the obligor’s full legal name and social security number, but need not name the specific government office in which the obligor is employed.

No mention is made of the apparent requirement that the “wage withholding or similar process” may only be initiated by an “authorized person” by sending the support order to the DFAS – or that such a person must normally be a District Attorney or other person with Title IV-D enforcement authority, not a private attorney.<sup>244</sup> In other words, the process discussed is even more cumbersome than indicated, normally requiring a trip through the State’s child support enforcement bureaucracy before even *starting* the military process.

These omission are unfortunate, as is the lack of any actual practical analysis and guidance for attorneys seeking the simplest routes to enforce such orders as they happen to have. For example, there is no known posted guidance of the practicalities of trying to enforce both child support and a property award against a military member when the size of the required monthly payment exceeds 50% of the disposable retired pay that can be reached by direction application to DFAS.

**PRACTICE TIP:** When money is owed for both retired pay and for child support, it is usually wise to get the retired pay as property started first (even if it means sending in two DD-2293 forms, a couple weeks apart). The reason to do so is that retired pay arrears *cannot* be garnished from future retired pay, but arrears in child support *can* – through the above-described Social Security garnishment order, a support obligee can get up to 65% of total retired pay, not just the 50% available under a DD-2293 direct payment procedure. So a practitioner taking the long-term approach should get the stream of property payments established quickly, and can always go back and slowly collect the support arrears by getting a garnishment order against an additional 15%. Note that, once established, such a garnishment order can remain in place for the long haul, even if the child emancipates, and the elimination of “current” support frees up in that 65% total that allows for payment of the arrears.

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<sup>244</sup> See 32 C.F.R. § 54.3(a).

## H. Death Benefits in the Military Retirement System<sup>245</sup>

### 1. Introduction

From a retirement benefits point of view, the death of one party or the other is merely another “value-altering possibility” to be anticipated and structured into the disposition of the retirement benefits upon divorce.

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

This is an essential concept, which practitioners ignore at their considerable peril in malpractice. As noted at the beginning of these materials, there are malpractice dangers in all retirement-related cases; they most severe relating to survivorship matters. The potential losses to the client are catastrophic, and the resulting risks to counsel are enormous.<sup>246</sup>

Perhaps most unsettling, from a malpractice perspective, is the length of time such a claim can lay dormant. Several courts have adopted a “discovery rule” for attorney malpractice cases.<sup>247</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.

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<sup>245</sup> The topic of military death benefits is also too large to be comprehensively addressed in the space available here. This discussion should be taken as an overview, and those seeking more complete discussion, authorities, or quotations are encouraged to reference other materials. *See, e.g.,* MILITARY RETIREMENT BENEFITS IN DIVORCE, *supra* n.1; Willick, *Death, Disability, and Related Subjects of Cheer (Part One – Death)*, at [http://willicklawgroup.com/published\\_works](http://willicklawgroup.com/published_works).

<sup>246</sup> While there is not much appellate authority in this area, and virtually no statutory authority anywhere, I have been hired as an expert witness in several such cases in the past several years, in which liability was sought against practitioners who were alleged to have not properly seen to securing survivorship benefits for a spouse. Edwin Schilling, Esq., of Aurora, Colorado, has estimated that 90% of his malpractice consultations involve failure to address survivor beneficiary issues. Lawyer’s Weekly USA, Oct. 18, 1999, at 22 (99 LWUSA 956).

<sup>247</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).

It is worth pausing to note that the various different retirement schemes, public and private, have a dizzying array of survivorship vehicles, which range from going into effect automatically unless specific steps are timely taken to prevent it,<sup>248</sup> to being lost forever by silence unless very specific steps are timely taken to preserve them.<sup>249</sup>

There are similarly large disparities in how the cost of survivorship benefits is paid. Some retirement plans, like the Civil Service system, allow one party or the other,<sup>250</sup> or both parties together,<sup>251</sup> to bear the cost of the survivorship benefits, so long as they are paid by way of reduction in the monthly retirement payments.<sup>252</sup> Other plans, like those governed by ERISA, give no real choice in the matter; if the benefits are not waived by the spouse, then the sum payable during life is actuarially adjusted to compensate for the cost of the survivorship interest.

Whether a survivorship interest for the non-employee spouse is in place – and who pays for it – has a major impact on the net benefits flowing to each of the parties to a divorce involving any form of retirement benefit.

Arguably, the military retirement system provides the most arcane, convoluted, and illogical of the death and survivorship interests of any major retirement system. These materials deal with what benefits are in issue, sketches how they work, and makes some suggestions for dealing with those assets before they become liabilities, specifically addressing how the practitioner can achieve cost-shifting in one direction or the other as might be appropriate in a given case.

There appear to be five separate possible effects of a death on a couple in which one party is or was a member of the armed forces, depending upon whether death is before or after retirement, and before or after divorce, and which of the parties has died. Nothing stated below has any effect on service life insurance, which is discussed separately below.

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<sup>248</sup> For example, the standard death benefit payable after retirement and after the death of the employee in an ERISA-governed plan is a “qualified joint and survivor annuity,” or (unpronounceably) “QJSA.” *See, e.g.*, Marvin Snyder, *VALUE OF PENSIONS IN DIVORCE* (3d. ed., Panel Publishers 1999), at 22.

<sup>249</sup> In military cases, to initiate a “deemed election” of the Survivor’s Benefit Plan, the former spouse must file a written request with the appropriate Service Secretary requesting that the election be deemed to have been made within one year of the date of the court order. 10 U.S.C. § 1450(f)(3)(B).

<sup>250</sup> If the intent is to have the former spouse only pay the premium, then the OPM should be directed to divide the “self only” annuity, defined as the total monthly benefit before deduction of any survivorship premium, and deduct the entire premium from the former spouse’s share.

<sup>251</sup> If the intent is to have the parties both pay part of the premium, the OPM should be directed to divide the “gross” annuity, defined as the total monthly benefit after deduction of any survivorship premium.

<sup>252</sup> 5 C.F.R. § 838.807.

## 2. Death of Member Before Retirement and Before Divorce

Whether everyone is living happily together or not, if the member dies before a divorce is final,<sup>253</sup> the spouse is the recipient of certain benefits made available for the survivors of active duty military personnel, under 38 U.S.C. § 1311(a), which created a program called Dependency and Indemnity Compensation (“DIC”). DIC payments have been payable to the survivors of any veteran who died after December 31, 1956, from a service-connected or compensable disability.<sup>254</sup> DIC payments are not made to persons divorced from members.<sup>255</sup>

If a person happens to be a recipient of both DIC payments and payments under the Survivor’s Benefit Plan (“SBP”) explained below, all DIC payments are subtracted from the SBP payments.<sup>256</sup> However, certain supplements to the DIC benefits, for support of a dependent child or because of certain disabilities, do *not* get offset against SBP.<sup>257</sup> DIC payments are not taxed, and are therefore more valuable than the (taxable) SBP payments that would otherwise go the survivor.

Previously, the rule was that if the survivor remarried, DIC payments were permanently terminated,<sup>258</sup> even if the second marriage ended by death or divorce.<sup>259</sup> However, a rule effective December 16, 2003, permitted former spouses receiving DIC to retain the benefits despite their remarriage – so long as they were at least 57 years old at the time of remarriage. Those that remarried, over 57 years old but prior to December 16, 2003, could have their DIC benefits restored, so long as they applied for it by December 15, 2004.

Further, if the former spouse was receiving both DIC and SBP, and the remarriage occurred when the former spouse was over 55 years, the SBP payment is apparently increased to the

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<sup>253</sup> This scenario could lead to different results in those States in which separation or the filing for divorce has a greater legal effect.

<sup>254</sup> 38 U.S.C. § 410(a). *See* Pub. L. No. 84-881, 70 Stat. 862, 867 (Aug 1, 1956).

<sup>255</sup> *See* 38 U.S.C. §1311(a)(2).

<sup>256</sup> 10 U.S.C. § 1451(c)(2).

<sup>257</sup> *See* 38 U.S.C. § 411(b)-(d).

<sup>258</sup> Pub. L. No. 101-508, § 8004, 104 Stat. 1388-343 (Nov. 5, 1990).

<sup>259</sup> Remarriage has been defined as “The triumph of hope over experience.” Samuel Johnson, *Life of Boswell*, vol. 2, at 128 (1770).

full amount (in other words, the DIC offset is replaced by additional SBP dollars, leaving the only effect one of taxation).<sup>260</sup>

### 3. Death of Member Before Retirement and After Divorce

This is a most dangerous situation for a former spouse. As noted in the section above, spouses lose DIC eligibility upon divorce. And as set out below, there is normally no SBP coverage until after retirement. In other words, the former spouse risks total divestment if the member dies during the period between divorce and the member's actual retirement.

The only practical method of ameliorating this risk would appear to be through private insurance.<sup>261</sup> The problem is that few service members carry significant sums of secondary private insurance.

It is worth pausing for a moment to clarify that any former spouse who will be the recipient of retirement benefit payments if her former spouse lives, but will not get such money if he dies, *definitionally* has an "insurable interest" in the life of the member (this is true for military or non-military cases). The matter is one of fact, not a matter of discretion, award, or debate.<sup>262</sup> Anecdotal accounts indicate that some insurers are reluctant to issue private policies of insurance without some court order indicating that the intended beneficiary (the former spouse) is entitled to insure the life of the other party. Attorneys for former spouses should therefore make a point of reciting the fact of such an interest on the face of the decree.

The survivor of a member who died while still on active duty is not *necessarily* excluded from receiving SBP benefits. The Finance Centers will honor a member's election to treat a former spouse as the SBP beneficiary if the member died after: (1) becoming eligible to receive retired pay; (2) qualifying for retired pay but not yet having applied for or been granted that pay; or (3) completing twenty years of service, but not yet completing ten years of active *commissioned* service needed for retirement as a commissioned officer.<sup>263</sup> The procedural requirements are the same as in other cases.

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<sup>260</sup> See, generally, Benjamin Franklin, *In Praise of Older Women*.

<sup>261</sup> *Not* through SGLI, as set out in the last subsection of this section, since it is not secure.

<sup>262</sup> "Insurable interest" survivorship provisions are found throughout various federal regulations, as an *alternative* to covering a spouse or former spouse (i.e., if no such person exists); it refers to any person who has a valid financial interest in the continued life of the member. See, e.g., 10 U.S.C. §§ 1448(b) & 1450(a)(1); 10 U.S.C. § 1450(a)(4).

<sup>263</sup> 10 U.S.C. § 1448(d)(1).

Additionally, the 2002 Defense Authorization Act included a provision, retroactive to September 10, 2001, making survivors of members who die in the line of duty<sup>264</sup> eligible to receive SBP. This has apparently created a pre-retirement survivor annuity, for spouses or former spouses, but there is not yet a body of published authority dealing with the details of this benefit.

#### 4. Death of Member After Retirement and Before Divorce

This was apparently the scenario contemplated when the SBP was created in 1972, to provide a monthly annuity to spouses and dependents of retired members of the Uniformed Services. It largely replaced an earlier survivor's plan known as the RSFPP,<sup>265</sup> which is of little importance here. All members entitled to retired pay are eligible to participate in the SBP,<sup>266</sup> under which a survivor's annuity is payable after a member's death.<sup>267</sup>

Some members retired *before* 1972 are nevertheless participants in the SBP, since Congress has provided a number of "open enrollment periods" or "open seasons" during which non-participants could join the program, and those who had selected less than the full amount of benefits could increase their level of participation. Those choosing to begin or increase their participation in the SBP program during an open season are also faced with paying an additional retroactive premium.

The SBP is not divisible. It can be made to cover more than one person in certain circumstances (as in a spouse and dependent child), but it cannot be divided between a spouse and former spouse, or between two former spouses.<sup>268</sup>

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<sup>264</sup> Essentially defined as virtually any cause of death not experienced while AWOL or otherwise at odds with the military authorities.

<sup>265</sup> The Retired Serviceman's Family Protection Plan (RSFPP) was originally known as the Uniformed Services Contingency Option Plan of 1953, enacted by Pub. L. No. 83-239, 67 Stat. 501 (Aug. 8, 1953). The name was changed by Pub. L. No. 87-381, 75 Stat. 810 (Oct. 4, 1961). The RSFPP is described at 10 U.S.C. § 1431, *et seq.* That program was generally considered a failure due to the very low participation rate of eligible members.

<sup>266</sup> 10 U.S.C. § 1448(a)(1)(A).

<sup>267</sup> 10 U.S.C. § 1447 *et seq.*

<sup>268</sup> The military retirement system has no provision for division of a survivorship interest. The absence of such a provision works hardships of unjust enrichment and dispossession. Members' political pressure groups, former spouses' political pressure groups, and the American Bar Association have all stated that this requires correction, and the Department of Defense has recommended that the SBP be made divisible among multiple beneficiaries. See *A Report to Congress Concerning Federal Former Spouse Protection Laws*, *supra*. Congress has taken no action to date.

The SBP applies automatically to a member who is married or has at least one dependent child at the time the member becomes entitled to retired pay, unless the member affirmatively elects not to participate in the SBP.<sup>269</sup> The member's spouse must be notified of any attempt by a member to not designate a spousal SBP interest,<sup>270</sup> and must consent to any election not to participate in the SBP, to provide an annuity for that spouse at less than the maximum level, or to provide an annuity for a dependent child but not for the spouse.<sup>271</sup>

Where the spouse did not consent to non-coverage, and no "special circumstances" are present, the spouse can petition for "instatement" of the benefits later, even after the member's death.<sup>272</sup> The spouse can be named SBP beneficiary even where he or she has little or no time-rule percentage of the retired pay itself.<sup>273</sup>

A dependent child can only be an SBP beneficiary if the child is also one of the following: (1) the child of the former spouse who is the beneficiary; or (2) the child of a current spouse who is the beneficiary, or who has consented to provide the benefit to the child only; or (3) if the previously-named former spouse beneficiary is no longer still alive.<sup>274</sup>

The SBP is funded by contributions taken out of the member's retired pay. For members entering service before March 1, 1990, premiums are the lesser of the amount computed by two tests. First, 2.5% of the first \$572<sup>275</sup> of the base amount, plus 10% of the remaining base amount. Second, 6.5% of the base amount. For members entering service on or after March 1, 1990, SBP premiums are 6.5% of the base amount. Premiums continue indefinitely.

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<sup>269</sup> 10 U.S.C. § 1448(a)(2).

<sup>270</sup> Spousal notification is mandatory. *Hart v. United States*, 910 F.2d 815 (Fed. Cir. 1990), citing 10 U.S.C. § 1448(a)(3)(A) (1976) (holding, however, that the relevant statute of limitations for making such a claim had expired). "The military's failure to notify the member's spouse voids the member's election not to participate in the SBP." *Id.*, citing *Barber v. United States*, 676 F.2d 651 (Ct. Cl. 1982); *Trone v. United States*, 230 Ct. Cl. 904 (1982).

<sup>271</sup> 10 U.S.C. § 1448(a)(3)(A).

<sup>272</sup> See *McCarthy v. United States*, 10 Cl. Ct. 573 (1986), *aff'd*, 826 F.2d 1049 (Fed. Cir. 1987).

<sup>273</sup> See *Matthews v. Matthews*, 647 A.2d 812 (Md. Ct. App. 1994); *In re Marriage of Ziegler*, 207 Cal. App. 3d 788, 255 Cal. Rptr. 100 (1989) (spouse with no interest in the military retirement benefits could be ordered maintained as SBP beneficiary as security for member's support obligation).

<sup>274</sup> 10 U.S.C. § 1448(b)(4). In any event, for "child only" designations, the benefits continue only until the child is 18 years old (or 22, if a full-time student). 10 U.S.C. § 1447(5).

<sup>275</sup> Amount effective as of January 1, 2003. It is adjusted annually.

Beginning October, 2008, however, SBP premiums stop, with benefits still fully payable, once premiums have been paid for 30 years *and* the member reaches the age of 70.<sup>276</sup>

The maximum amount of the standard SBP annuity for a beneficiary under age 62 or a dependent child is 55 percent of the elected amount of the member's base retired pay<sup>277</sup> as adjusted from time to time for cost of living increases.<sup>278</sup>

Previously, SBP payments were reduced for a beneficiary who was 62 or older, although an expensive supplement was developed which, if purchased, eliminated the reduction.<sup>279</sup> Continued political pressure resulted in elimination of the Social Security offset, phased in over three and a half years starting in October, 2005, and ending April, 2008.<sup>280</sup> The SSBP premiums were phased out; at the end of the adjustment period, all SBP recipients should receive 55% of the base amount indefinitely, regardless of age.

The bottom line is that it is possible for a military member to provide for survivorship benefits for a spouse after retirement, almost automatically. This was its original purpose.

## 5. Death of Member After Retirement and After Divorce

This is the classic divorce scenario – whether divorce occurs before or after retirement, it is usually expected that both parties will continue to live until after the member retires from active duty.

Former spouse coverage was not possible before 1983, and has evolved considerably over the years, as it was made no more expensive than current spouse coverage, and then stipulations to provide such coverage were made enforceable.

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<sup>276</sup> Pub. L. No. 105-261, § 641 \_\_\_ Stat. \_\_\_ (Oct. 17, 1998).

<sup>277</sup> As computed under 10 U.S.C. §§ 1401-1401a.

<sup>278</sup> 10 U.S.C. § 1451(a)(1)(A).

<sup>279</sup> Criticism of the lowering of benefits at age 62 led to the development of a “high option” supplement known as the “Supplemental Survivor Benefit Plan,” or SSBP. *See* Pub. L. No. 101-189, 103 Stat. 1352 (Nov. 29, 1989). Under the supplement program, payment of additional premiums could increase the survivor's benefits by five percent for each SSBP unit purchased. Unlike the SBP itself, which the government theoretically subsidizes to the extent of 40%, the SSBP was designed to be actuarially neutral – i.e., to neither save nor cost the government any money. Thus, the increased coverage came at a significantly increased cost.

<sup>280</sup> Pub. L. No. 108-375 § 644, \_\_\_ Stat. \_\_\_ (2005).

In 1986, Congress amended the USFSPA so that State courts could **order** that former spouses be members' beneficiaries.<sup>281</sup> If a member elects, or is "deemed" by a court to have elected, to provide the SBP to a **former** spouse, the member's current spouse and children of that spouse cannot be beneficiaries.<sup>282</sup> Generally, an election to make a former spouse an SBP beneficiary is not revocable; if the election was pursuant to court order, a superseding court order is necessary to change it.<sup>283</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>284</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>285</sup> Unfortunately, and counter-intuitively, that results in the parties each bearing a portion of the survivorship premium in exact proportion to their shares of the retirement itself. In other words, if the retirement is being split 50/50, then the parties share the cost of the SBP premium equally, but if the spouse is entitled to only 25% of the monthly retired pay, then the member effectively pays 75% of the SBP premium.

It **is** possible to effectively cause the member, or the spouse, to bear the full financial burden of the SBP premium, but doing so requires indirectly adjusting the percentage of the monthly lifetime benefits each party receives. An explanation of why such shifting might be appropriate, and how to actually do so, is set out below.

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<sup>281</sup> Pub. Law No. 99-661 (Nov. 15, 1986).

<sup>282</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>283</sup> 10 U.S.C. § 1450(f)(1)-(2).

<sup>284</sup> 10 U.S.C. § 1450(f)(3)(B).

<sup>285</sup> The Department of Defense also asked Congress to change **this** aspect of the SBP program in the *Report to Congress, supra*, requesting that court orders, or stipulations, could specify who was to pay the premium. As noted above, Congress has not acted.

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.

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>286</sup> 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>287</sup>

As a practical matter, however, the Services have been quite liberal in granting “administrative corrections” upon the requests of members, even years after a divorce, when spouse coverage was in effect rather than “former spouse” coverage, but premiums were paid and the members claimed that they “mistakenly assumed that [the former spouse] remained the covered beneficiary following the divorce since SBP costs continued to be withheld.”<sup>288</sup>

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 prior 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.

Subsequent developments, however, made this rule slightly more flexible, much more complicated, and a bit illogical in application.

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<sup>286</sup> 10 U.S.C. § 1448(b)(3)(A).

<sup>287</sup> 10 U.S.C. § 1448(b)(5).

<sup>288</sup> *See, e.g.*, Memorandum dated February 20, 1997, from Gary F. Smith, Chief, Army Retirement Services, on behalf of the Secretary of the Army, to Director, DFAS, re: “Administrative Correction of SBP Election – Johnson, Alfred H. III” (on file with author) noting a 1994 divorce decree requiring him to maintain coverage for his former spouse and the member’s 1997 request for a change in the SBP election from “spouse” to “former spouse,” and directing collection of the cost refund that was paid to the member be collected, and that the records be corrected to show former spouse coverage.

The spouse might be able to extend the period within which he or she can request a deemed election by returning to court after the divorce and obtaining an order stating that the spouse is to be deemed the SBP beneficiary. This is because the *member* is obliged to make the election “within one year after the date of the decree of divorce, dissolution, or annulment,”<sup>289</sup> whereas the *former spouse* must make the request “within one year of the date of the court order or filing involved.”<sup>290</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>291</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>292</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>293</sup>

This is where the complications and illogic come in. Presume three identical divorces on the same day. In the first case, the attorney, who knew almost nothing about military retirement benefits law, did not even know there was an SBP to allocate. The second knew that something had to be done, and so put a statement in the Order verifying that the former spouse was to be the beneficiary. The third not only knew to secure the right, but knew about the deemed election procedure, sent the required notice in, etc.

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<sup>289</sup> 10 U.S.C. § 1448(b)(3)(A).

<sup>290</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>291</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>292</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>293</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.

One year and one day after the divorce, the *third* former spouse's rights would be secure. The *first* former spouse could go back to court at any time (prior to the member's death) to get a valid order for SBP beneficiary status, and then serve the pay center. The *second* former spouse, however, whose rights were supposed to be "secured" by the judgment, would be entirely without a remedy (except a malpractice claim against the divorce attorney).

It makes little sense for the law to protect the putative rights of those who do not even try to secure rights upon divorce, while denying any protection to those who believe they have already litigated and received a valid court order protecting those same rights, but that is the bottom line of the law as it now stands.<sup>294</sup> Even the Department of Defense has recognized the unnecessarily harsh results that are produced by the current law,<sup>295</sup> but Congress has not yet taken any action to correct the situation.

In addition to the conditions and difficulties mentioned above, practitioners should keep in mind (and advise their clients) when dealing with the SBP, that an annuity payable to a widow, widower, or former spouse is suspended if the beneficiary remarries before age 55.<sup>296</sup> In other words, the client should be advised to *not* remarry prior to the relevant age, unless willing to forgo continuing payment of the SBP benefits.<sup>297</sup>

Notably, none of the various time limits and statutes of limitations appear to be applicable to proceedings in the Board for Correction of Military Records, which has "broad remedial and discretionary powers to correct records."<sup>298</sup>

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<sup>294</sup> "The life of the law has not been logic; it has been experience." Oliver Wendell Holmes, *The Common Law* (1881).

<sup>295</sup> See *A Report to Congress, supra* (recommending repeal of the one-year limitation). This is not a new position. A memorandum to Congress in 1991 recommended extending the period in which application could be made from one year to five. See "DoD Report on The Survivor Benefit Plan, August, 1991," under cover entitled "A Review of the Uniformed Services Survivor Benefit Plan (SBP) and Report on the Pending Supplemental Plan and Open Enrollment Period, Prepared by Department of Defense, October, 1991," in turn attached to correspondence dated October 1, 1991, from Christopher Jehn, Assistant Secretary of Defense, to Hon. Les Aspin, Chairman, House Armed Services Committee. Congress took no action then, either.

<sup>296</sup> 10 U.S.C. § 1450(b). Before November 14, 1986, benefits were suspended if the former spouse was not yet age 60.

<sup>297</sup> This is strictly a legal analysis, and I take no position herein on the moral or other ramifications of cohabitation, unlike some pundits: "A fate worse than marriage. A sort of eternal engagement." Alan Ayckbourn, *Living Together* (1975).

<sup>298</sup> *Bates v. United States*, 453 F.2d 1382 (Ct. Cl. 1972), citing 10 U.S.C. § 1552(b); *Pride v. United States*, \_\_\_ Fed. Cl. \_\_\_ (No. 97-394C, May 18, 1998) (time period for widow of member to apply for correction of records to name her as SBP beneficiary did not run from the member's death in 1979, but from 15 years later when benefits payable to the children stopped and she obtained an order correcting designation to name her as beneficiary, when she had not been notified of member's failure to name her upon retirement).

## 6. Death of Spouse

In marked contrast to the multiple line-drawing and subtle distinctions discussed above regarding the death of a member, the death of a spouse has a very simple effect – the member is freed from all relevant restrictions, claims, and costs.

If the spouse dies before retirement (whether the parties are married or divorced), no spousal consent is needed to waive the SBP. If the spouse dies during marriage but after retirement, SBP premium deduction stops as soon as the military pay center is informed of the spouse's death.

If the former spouse dies after retirement and divorce, both the spousal share of current military retired pay and any SBP benefits in the spouse's name revert to the member – they may not be left to anyone by will or intestate succession.<sup>299</sup> As of 2006, Congress permitted a member to elect a new survivor beneficiary for the SBP upon the death of a current beneficiary.<sup>300</sup>

And, finally, if the former spouse dies after divorce, retirement, *and* after the death of the member, the benefits simply stop.

## 7. Mathematical Mechanics of the SBP – Who Gets How Much If the Other Party Dies

The mathematics of what happens to one party if the other should die is actually pretty straightforward.<sup>301</sup>

Suppose a couple who have been married for the entire military career. Using artificial numbers, if the retirement was exactly \$1,000, each party would receive \$500. If there was no SBP, if the member dies, the spouse would receive nothing thereafter. If the spouse dies, though, the member would receive his \$500 *and* her \$500 – a total of \$1,000 for life. This would clearly be inequitable result in any property division scheme requiring an equal division of property upon divorce.

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<sup>299</sup> 10 U.S.C. § 1408(c)(2).

<sup>300</sup> John Warner National Defense Authorization Act for Fiscal Year 2007 (H.R. 5122, 109 Cong. 2d Sess. (2006); 10 U.S.C. § 1448(b)(1).

<sup>301</sup> Some folks get lost in the math; if this happens, step through the nine flowcharts posted at [http://www.willicklawgroup.com/military\\_retirement\\_benefits](http://www.willicklawgroup.com/military_retirement_benefits) under the title “Exhibits to Death and Related Subjects of Cheer” and it will be rendered easy.

With an SBP at the full maximum amount, the total retired pay is reduced by \$65. The remaining \$935 would be equally divided between the parties for life (\$467.50 per month per party in lifetime benefits). If the spouse dies, the premiums end, and member gets his \$500, *plus* the full amount of the spousal share (another \$500), totaling \$1,000, for life. If the member dies, the spouse would receive 55% of the base amount, for life – \$550. In other words, the member will *always* have superior rights, and a greater upside, even if the parties exactly split the premium. It is built into the system. He gets a \$500 increase on her death; her maximum increase is \$50.<sup>302</sup>

Such a retirement division would treat the parties equally, at least as to cost. The member's benefit is still vastly superior to that of the spouse, so while they share the cost equally, the member gets a whole lot more out of that cost than the spouse does.

The equities are not much different even where the marriage and service overlap for less than the full time of the marriage. Again, the military member *always* has the much better deal.

Suppose the same retirement as discussed above (\$1,000), but a marriage of exactly half the length of the military career; the spousal share would be 25%, and with no SBP in effect, the former spouse would receive \$250 per month out of a \$1,000 total retirement.

If the former spouse predeceased the member, then the following month the member's share of the benefit would increase by one hundred percent of what the spouse was receiving, and instantly, automatically, and without the payment of any premium would gain an increase to \$1,000 per month, for the remainder of the member's life. This is the member's "cost free" automatic survivorship interest in the former spouse's life. It is built in to the structure of the retirement system. But on these facts, if the member died first, the former spouse would receive nothing further.

As with the prior hypothetical, during life, with an SBP at the full maximum amount, the total retired pay is reduced by \$65. But since the premium is paid off the top, the parties effectively bear the premium in accordance with their lifetime share of the benefit. In this hypothetical, since the former spouse receives 25% of the lifetime benefit, she effectively pays 25% of the premium – \$16.25, while the member effectively pays 75% of the premium – \$48.75. They would actually respectively receive \$701.25 (member) and \$233.75 (spouse).

This is the scenario focused upon by those who insist the former spouse should pay the entire SBP premium. But the math reveals that it is not really disproportionate to the benefits received, even if left to the "default" premium-payment.

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<sup>302</sup> If that \$50 increase to the spouse was for some reason problematic, it would be a simple matter to reduce the base amount to \$909, so that 55% yielded \$499.95. The member and the spouse would share in the saved \$5.92 per month in premium cost during their mutual lives, and the member would still have vastly superior results if the former spouse died first (a \$500 increase) while the former spouse would continue receiving exactly the same amount if the member died first.

Specifically, if the spouse dies, the premiums end, and the member thus gets his \$701.25 increased to \$750, *plus* the full amount of the spousal share (another \$250), totaling \$1,000, for life (an increase of \$298.75). Whereas, if the member dies, the spouse still can only receive 55% of the base amount – \$550 (an increase of \$316.25). In other words, the spouse does get an increase, but the total increase the member would get for the premium paid during life is about the same size.

Rather, the equitable problem in this scenario is that the parties have not been treated equally for that equal benefit to be received upon the death of the other, because the member is paying more but only getting about the same result.

But that is easily fixed (as detailed two sections below) – by simply altering the lifetime spousal share downward from 25% to 23.262%. Each party would effectively be paying \$32.50 of the \$65 premium, and each would get an approximately-equal several hundred dollar bump-up upon the death of the other.<sup>303</sup>

## **8. Why it Might Be Appropriate to Re-allocate the SBP Premium – and Who Should Pay for it**

As explained elsewhere in these materials, the military system does not permit the creation of a divided interest to the spouse, but only a divided payment stream. As detailed in the section immediately below, there is an automatic reversion of the spousal share of those payments to the member, should the spouse die first.

In other words, the member essentially has an automatic, cost-free, survivorship benefit built into the law that automatically restores to him the *full amount of the spouse's share* of the lifetime benefit if she should die before him. No matter what any court might order, if the former spouse dies first, the member not only continues to get *his* share of the benefits, but he will *also* get *her* share, for as long as he lives.

There is little case law guidance as to what would be an appropriate weighing of risks and burdens, or why. Several courts have ruled that the SBP be kept in effect for protection of the former spouse's interest, using one theory or another, but their reasoning has often been sketchy, or faulty.

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<sup>303</sup> And for those who could not accept the possibility that upon the member's death, the spouse would receive *any* increase (although those making that protest never seem to have a problem with the *member* getting an increase if the former spouse dies first), the base amount could be simply and easily lowered from \$1,000 to \$454.55. This would lower the premium to \$29.55. If the member died first, the spousal share would remain exactly the same – \$235.22. Of course, if the spouse died first, the member's share would still jump – on these facts, from \$735.23 to \$1,000 per month (about a \$265 bump-up upon the former spouse's death).

One court that did explain why it was ruling as it did was the Colorado Court of Appeals, in *In re Marriage of Payne*.<sup>304</sup> The court held that ordering the member to pay for the wife's SBP gave the wife a right already enjoyed by husband, that is "the right to receive her share of the marital property awarded to her." The court adopted the "default" position for distribution of the premiums (discussed in the next section), observing that:

The cost of the Survivor Benefit Plan is deducted from the husband-retiree's gross pension income of \$2200 per month before the net remainder is divided between the parties pursuant to the permanent orders. Thus, the expense is shared equally by both parties.<sup>305</sup>

The military member had appealed in *Payne*, claiming that the SBP should be funded solely by the former spouse because it is "a court-created asset for her benefit alone." The appellate court rejected that argument, holding instead that the SBP is "an equitable mechanism selected by the trial court to preserve an existing asset – the wife's interest in the military pension."<sup>306</sup> Several other courts have reached the same conclusion, but most of the decisions so holding did not fully discuss the math involved in the text of their decisions, or explain the policy choices for who should bear what expense.<sup>307</sup>

The courts holding that the SBP should be maintained seem to impliedly realize, but not explicitly state, that the members' survivorship interest in the former spouse's benefits is automatic and free, while the spousal survivorship in the member's benefits requires payment of a premium. None of the decisions goes into detail, comparing what the member or the

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<sup>304</sup> 897 P.2d 888, 889 (Colo. App. 1995).

<sup>305</sup> *Id.*

<sup>306</sup> *Id.*

<sup>307</sup> *Marriage of Smith* 148 Cal. App. 4th 1115, 1123, 56 Cal. Rptr. 3d 341 (2007) (trial court had jurisdiction to order the husband to elect a survivor benefit plan for the wife's benefit); *Potts v. Potts*, 790 A.2d 703 (Md. Ct. Spec. App. 2002) (survivorship interest falls within the definition of marital property); *Harris v. Harris*, 621 N.W.2d 491 (Neb. 2001); *Zito v. Zito*, 969 P.2d 1144 (Alaska 1998) ("Barring an express understanding to the contrary, an agreement for equitable division of retirement benefits earned during a marriage presumptively encompasses survivor benefits"); *Kramer v. Kramer*, 510 N.W.2d 351, 356 (Neb. Ct. App. 1993) (affirming award of SBP, reasoning that requiring the purchase of an SBP "gives the division of a nondisability military pension more of the attributes of a true property division"); *Smith v. Smith*, 438 S.E.2d 582 (W. Va. 1993) (ordering husband in dissolution action to purchase and pay for SBP for wife to avoid unfairness of wife's receiving nothing if husband predeceases her); *Haydu v. Haydu*, 591 So. 2d 655 (Fla. App. 1991) (trial courts have discretion to order spouse to maintain annuity for former spouse under SBP); *In re Marriage of Bowman*, 734 P.2d 197, 203 (Mont. 1987) (court recognized that "to terminate [wife's] survivor's benefits jeopardizes her 29 year investment in the marital estate"); *Matthews v. Matthews*, 647 A.2d 812 (Md. 1994) (court order requiring party to designate a former spouse as a plan beneficiary does not constitute a transfer of property); *In re Marriage of Lipkin*, 566 N.E.2d 972 (Ill. App. Ct. 1991) (survivor's benefit is a separate and distinct property interest).

spouse would actually receive in the event of the death of the other, or whether the results fit into the theory of equitable or community property and debt division.

The *only* person for whom a survivorship interest has any cost is that of the former spouse. If both parties are to share benefits, and burdens, of the assets and liabilities distributed, they must equally (or as equally as possible) bear this cost as well, just as they share the zero cost of the member's survivorship interest in the spouse's life. Otherwise one of them gets a survivorship benefit for free, and the other gets a survivorship benefit at significant cost – which would appear to violate the law all States having divorce law requiring the presumptively equal division of property.

Unless one believes that upon divorce one party is entitled to a greater share of the benefits, and a lesser share of the burdens, accrued during marriage, then it is necessary to deal with the structure of any retirement system so that the parties benefit, and are burdened, as nearly equally as may be made true.

In the military system, that would seem to require dividing the burden of the only survivorship benefit that *has* a cost – the one for the benefit of the spouse – between the parties, either equally, or per the default percentage-of-lifetime benefit method built into the system.

It cannot be said that even the default approach is inequitable, at least until the lifetime spousal share is less than 25%. This is so because the member has a far superior survivorship benefit, without cost, automatically, and for 100% of the spousal share. So if the member pays a greater percentage of the premium during the parties' mutual lifetimes, the member receives a superior benefit in return for that cost.

For those that can't see justification of an increased cost to the member to compensate for that superior, bumped-up survivorship benefit, it is possible to adjust the math (as detailed in the following section) to make sure the parties effectively bear any premiums equally.

Mathematically, the "default" position discussed in the following section distributes the premium debt proportionally to the parties' respective shares of the benefits taken – *not* equally, as some of the courts say they do.

Having the member bear the entire premium would only appear to be a correct result if the court determined, based on the entirety of the parties' economic positions, that the result was mandated as a matter of disparity of income. Similarly, it would be improper to have the former spouse bear the entirety of the SBP premiums, at least in those States in which the courts are required to equally distribute marital property and debts, because the benefit being accorded to the member in the event of the spouse's death is *greater*, and there is no cost to that survivorship interest.

As a matter of logic and math, where the member has a *free* survivorship interest in the spouse's life, in addition to his own benefits, it seems most appropriate to either have the parties equally divide the premium, or adopt the default position for proportional payments toward that premium.

## 9. How to Allocate the SBP Premium – Cost-Shifting

If the former spouse dies first, then the member automatically gets back the entirety of the monthly spousal share, for the rest of his life. There are nine basic possibilities, however, as to what the *spouse* should receive in the event that the *member* dies first. Each carries with it a different weighing of equities, rights, and responsibilities.<sup>308</sup>

First, there could be no SBP award to the former spouse. The lifetime benefit stream will be divided as the court indicates, but the parties will be left in an unequal position as to *risk*, because if the member dies, the former spouse gets nothing, but if the former spouse dies, the member gets his share of the benefits, plus hers.

Second, there is the “default” – what would happen if the court deemed the former spouse to be the SBP beneficiary, at the full base amount, but took no steps to alter the ramifications of that election. The spouse would be “over-secured,” to a greater or lesser extent.<sup>309</sup> The smaller the lifetime interest of the former spouse happened to be, the larger the share of the premium that the member would pay.<sup>310</sup> If the member died first, payments to the spouse would increase from \$233.75 to \$550. If the spouse died first, payments to the member would increase from \$701.25 to \$1,000.

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<sup>308</sup> To make this somewhat easier to visualize, I've set out nine flowcharts illustrating the math done at each step of the following nine scenarios; they are posted under the heading “Exhibits to Death and Related Subjects of Cheer” at [http://www.willicklawgroup.com/military\\_retirement\\_benefits](http://www.willicklawgroup.com/military_retirement_benefits). Each presumes the division is done in a State following the “time rule,” and presumes a ten-year marriage during service, out of a 20-year military career, yielding a presumptive spousal share would be 25%. The scenarios presume that the military retired pay is exactly \$1,000.

<sup>309</sup> Since the SBP program pays 55% of the base amount, and the maximum spousal share is 50%, the spouse would receive at least *some* more money in SBP than her lifetime share. If the marriage did not completely overlap the service time, then under any “time rule” formula, the spousal interest would be *less* than 50%. In the hypothetical 10 year marriage out of a 20-year military career, if the SBP was in place at the maximum base amount, then the death of the member would cause a jump in payments to the former spouse from 25% to 55%.

<sup>310</sup> In the hypothetical case where the marriage exactly overlapped the last 10 years of a 20-year career, and the gross retirement was exactly \$1,000, the 6.5% SBP premium would be \$65. After taking it “off the top,” the military pay center would divide the remaining \$935 in “disposable retired pay” 75% (\$701.25) to the member, and 25% (\$233.75) to the spouse. The member would effectively pay \$48.75 of the premium, and the spouse would effectively pay \$16.25.

The third scenario would have the former spouse pay the entire SBP premium. Using the same hypothetical facts, reducing the spousal share from 25% to 19.7861% would free the member from paying any portion of the premium, directly or indirectly.<sup>311</sup> The former spouse is still over-secured, as in the prior scenario, and the parties are still left in an unequal position regarding risks and burdens, since the member still has an entirely free survivorship interest on the spouse's life, and she is paying the entire premium for the survivorship interest on the member's life.

The fourth scenario imposes the SBP premium payment entirely on the member, by increasing the spousal share to 26.7380%.<sup>312</sup> The former spouse remains over-secured, as above. The entire premium falls to the member, who still has the free survivorship on the spouse's life. Shifting the premium in this way is analogous to making a spousal support award.

The fifth scenario presumes that the court wants to "equally divide" the premium, which would be accomplished by decreasing the spousal share to 23.2620%.<sup>313</sup> This requires decreasing the spousal share somewhat from the default, and increasing the member's share somewhat, to cause a sufficient dollar adjustment so that each pays exactly the same amount toward the premium cost that the military will take "off the top." There is some equitable logic in this idea, although it still leaves the former spouse over-secured, in that the possible survivorship that each party might receive is maximized, and they equally share both the cost of the survivorship benefit that the member has on the spouse's life (i.e., none), *and* the cost of the survivorship benefit that the spouse has on the member (the only survivorship benefit that has a cost associated with it).

As discussed above, it *is* possible to restrict the SBP to *only* secure the former spouse's lifetime interest – i.e., to arrange things so that she would get the same amount if the member died that she received while he remained alive. Notably, it is *not* possible to similarly restrict the *member's* interest; no matter what the court does, the member will retain an automatic

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<sup>311</sup> The 6.5% SBP premium would still be \$65. After taking it "off the top," the military pay center would divide the remaining \$935 in "disposable retired pay" 80.2139% (\$750) to the member, and 19.7861% (\$185) to the spouse. The member would effectively pay nothing, and the spouse would effectively pay \$65.

<sup>312</sup> Again, the 6.5% SBP premium would be \$65. After taking it "off the top," the military pay center would divide the remaining \$935 in "disposable retired pay" 73.2620% (\$685) to the member, and 26.7380% (\$250) to the spouse. The member would effectively pay \$65, and the spouse would effectively pay nothing.

<sup>313</sup> The 6.5% SBP premium is, of course, still \$65. After taking it "off the top," the military pay center would divide the remaining \$935 in "disposable retired pay" 76.7380% (\$717.50) to the member, and 23.2620% (\$217.50) to the spouse. The member would effectively pay \$32.50, and the spouse would effectively pay \$32.50.

reversion of all the money paid to the former spouse, if she dies first.<sup>314</sup> In the next four scenarios, then, if the spouse dies first, the member gets the full gross military retirement benefits, but if the member dies first, the spouse continues to get only her share of the benefits.

Scenario six therefore is the same “default” as set out in scenario two, the only difference being that the base amount is lowered, from the entire retirement benefit, to only that portion of which 55% would equal the former spouse’s lifetime interest, in this hypothetical case, \$454.55.<sup>315</sup> Since the 6.5% premium is reduced to only \$29.55, the member’s 75% of the \$970.45 of remaining “disposable retired pay” yields \$727.84, and the spouse’s 25% yields \$242.61. The member effectively pays \$22.16 toward the premium cost, and the spouse pays \$7.39.

Scenario seven shifts that reduced SBP premium to the spouse by reducing her percentage of the lifetime benefit.<sup>316</sup>

Scenario eight shifts the reduced premium the other way, to the member, for the same reasons, and to the same effect, as set out in scenario four, but with smaller totals, since the spousal survivorship interest has been reduced.<sup>317</sup>

And in scenario nine, the reduced burden is equally divided between the parties, for the same reasons as set out in scenario five, but without over-securing the former spouse.<sup>318</sup>

Again, if the spouse dies first, the member gets the full gross military retirement benefits, but if the member dies first, the spouse continues to get only her share of the benefits. Under 10 U.S.C. § 1408(e)(1), it is not possible to directly pay the former spouse more than 50% of the monthly lifetime military retired pay. Thus, if it is intended that the former spouse

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<sup>314</sup> There have been several cases of members taking action to accelerate that reversion by trying to kill former spouses.

<sup>315</sup> This is because 55% of \$454.55 would be \$250 – the sum awarded to the spouse.

<sup>316</sup> To 22.7163%, so that she receives \$220.45. The member’s share, increased to 77.2837%, yields the full \$750 that he would have received if there had been no SBP, and the spouse thus effectively pays the entire \$29.55 SBP premium.

<sup>317</sup> To 25.7613% of the \$970.45 remaining “disposable retired pay” after deduction of the SBP premium, in this scenario, so that she continues to receive \$250. The member’s share, decreased to 74.2387%, yields \$720.45, so that he effectively pays the entire \$29.55 SBP premium.

<sup>318</sup> Making the spousal interest 24.2382% yields \$235.22; increasing the member’s share to 75.7618% increases his share to \$735.23. Both parties pay \$14.77 (actually, there is an odd penny, which for no good reason I allocated to the former spouse, who pays \$14.78).

receive more than about 46 percent, and that the member is to pay the SBP premium, some mechanism other than the cost-shifting set forth above will be needed to effect that end.

The math looks harder than it really is. For those who wish to shift the premium between member and former spouse in any way, we have designed, and posted, a simple-to-operate calculator that allows the operator to calculate what the lifetime percentages of retired pay should be to effectuate any intended distribution of the premium cost, at any intended level of SBP benefit for the former spouse.<sup>319</sup>

## 10. Reserve-Component SBP

The Reserve Component Survivor Benefit Plan (RC-SBP) was established to provide annuities to beneficiaries of reservists who completed the requirements for eligibility for retired pay at age sixty but died before reaching that age.<sup>320</sup>

Before 1978, reservists could not elect participation in their SBP program until they were eligible to draw retired pay (that is, at age sixty). That year, legislation granted them the power to elect participation upon notification of eligibility for retirement, which generally is before they reach age sixty.<sup>321</sup>

There are three options available to reservists upon notification for eligibility. Option A declines coverage until age sixty; if the member dies before that age, there is no benefit. Presuming survival to that time, this option has the same costs and benefits as the active-duty SBP program.

Option B provides coverage so that payments begin on the later of (1) the date of the retiree's death, or (2) the date the retiree would have turned sixty. Benefits are actuarially reduced from the sum provided in Option A.

Option C provides coverage so that payments begin immediately after the retiree dies, regardless of age. Benefits are actuarially reduced from the sum provided in Option A.

The premiums for Option A work like normal SBP premiums, in that they come "off the top" of benefits payable. Premiums for Options B and C are paid by way of that reduction, *plus* an actuarial reduction in the benefits paid. This is how the system accounts for coverage being in existence years before eligibility for retirement benefits is reached.

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<sup>319</sup> See "Universal SBP Premium-Shifting Calculator," posted for free public access and use at [http://www.willicklawgroup.com/military\\_retirement\\_benefits](http://www.willicklawgroup.com/military_retirement_benefits).

<sup>320</sup> See Pub. L. No. 95-397, 92 Stat. 843 (1978).

<sup>321</sup> See *id.*

As of 1983, it was possible for reservists to designate former spouses as their SBP recipients,<sup>322</sup> and the 1986 amendments presumably gave courts the same power to deem beneficiary designations in Reservist cases as in any others. SBP benefits based on reserve-component service had a reduction similar to that for regular retirement SBP benefits after a beneficiary turns age sixty-two, which presumably is being phased out on the same schedule.

The RC-SBP was amended as of January 1, 2001, to require written spouse concurrence for taking any benefit less than Option C. Thus, the order of events for retirement and divorce make a difference as to whether the former spouse will have any input into the option selected.

## **11. Choosing Between A Spouse and A Former Spouse as the Proper Beneficiary of the SBP**

The United States Congress determined that as of November 14, 1986, a court with jurisdiction is explicitly empowered to order members to elect to provide SBP annuities to former spouses, irrespective of the date of divorce, or retirement.<sup>323</sup> The only limitation is that if the member refuses to submit the required paperwork, the former spouse must file a written request with the appropriate Service Secretary requesting that the election be deemed to have been made. The written request must be filed within one year of the date of the court order.<sup>324</sup>

While courts have been uncertain how to characterize the nature of the SBP,<sup>325</sup> those squarely addressing the question have concluded that a spouse is “to be awarded a proper share of *both* the former husband’s military retirement plan and the survivor benefit plan,” because of the “‘potential unfairness’ to the wife should her former husband predecease her, thereby extinguishing pension rights.”<sup>326</sup>

As detailed above, a military member has no risk of loss in a division of military retirement benefits, because the member enjoys a built-in survivorship interest in the former spouse’s

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<sup>322</sup> See Pub. L. No. 98-94, 97 Stat. 614 (1983).

<sup>323</sup> Pub. L. No. 99-661 (Nov. 14, 1986).

<sup>324</sup> 10 U.S.C. § 1450(f)(3)(B).

<sup>325</sup> See *Matthews v. Matthews*, *supra*, 647 A.2d 812 (Md. Ct. App. 1994) (divorce court could not tell if SBP was a property right, an alimony allocation, or some kind of insurance, but in any event it was valuable, and the benefit was to be secured to the former spouse).

<sup>326</sup> *Johnson v. Johnson*, 602 So. 2d 1348, 1350 (Fla. Dist. Ct. App. 1992) (emphasis added); *Matthews*, *supra*.

life – if the former spouse dies first, her entire interest reverts to him automatically. The former spouse has no such protection – she stands to lose the entire flow of benefits if he should predecease her, unless the SBP is in place.<sup>327</sup> Many courts have recognized that survivorship interests accrued during marriage are a valuable property right that are part of the pension to be divided.<sup>328</sup>

If the parties divorce *after* retirement, the spouse is still generally secured, because the SBP will have gone into effect automatically; for it to *not* go into effect, a specific waiver of the SBP must be signed by the non-member spouse.<sup>329</sup> In such cases, the SBP must merely change form from “spouse” to “former spouse.” Where fully-informed counsel negotiate the matter in good faith at the time of divorce, this is a straight-forward subject to negotiate, or litigate. Usually, the SBP is left in place for the soon-to-be former spouse; if the member wishes to name some other as beneficiary, some other provision is typically made to secure her insurable interest.

When the parties divorce while the member is still on active duty, however, they do so prior to the time of making an election regarding the SBP. If the matter remains unaddressed at divorce – by the machinations of the member-spouse, or innocently,<sup>330</sup> the now-former spouse does not have the waiver right of a current spouse. It is therefore possible for the member to cancel the SBP entirely, or to name some third party (usually, a later-acquired spouse) as beneficiary.

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<sup>327</sup> See, e.g., *In Re Payne, supra*, 897 P.2d 888 (Colo. Ct. App. 1995) (Divorce court did not err when, after awarding wife 48% of military retirement, it adopted “default” position and had premiums deducted from gross before disposable pay was divided. The court rejected the husband’s position that the SBP should be funded solely by the wife because it is “a court-created asset for her benefit alone.” The court stated that SBP is “an equitable mechanism selected by the trial court to preserve an existing asset – the wife’s interest in the military pension”).

<sup>328</sup> See, e.g., *Carlson v. Carlson*, 108 Nev. 358, 832 P.2d 380 (1992); *Wolff v. Wolff*, 112 Nev. 1355, 929 P.2d 916 (1996). *Wolff* held that trial courts are required to balance the property and debts attributable to both spouses in making awards. 112 Nev. at 1360-61. It is impossible under the current federal set-up to precisely balance the prospective benefits and burdens imposed by the survivorship scheme – the member will always have a “better deal” than the spouse could possibly get because of the nature of the SBP program. This is one of the ways in which the military retirement system is skewed in favor of the member spouse. The closest that courts can do is elect to provide some survivorship coverage each way – with the member getting such coverage automatically, and naming the former spouse the deemed beneficiary of the SBP.

<sup>329</sup> See generally 10 U.S.C. § 1447-1450.

<sup>330</sup> Unless divorce counsel were alert to the existence and mechanics of the SBP, they might not address the issue at all, as a matter of mutual mistake.

That is the set-up for the kind of dispute discussed here.<sup>331</sup> As a technical matter, a divorce court clearly has the authority under the USFSPA to order that the former spouse be deemed the beneficiary of the SBP.<sup>332</sup> The question is left to the court's discretion,<sup>333</sup> with the only issue being whether it *should* do so – which also is not much of an issue in any community property or equitable distribution regime that attempts to treat spouses as equally as possible as to the property acquired during marriage.

When the member has remarried by the time the court is looking at the issue, however, there can be competing equities – protection of the former spouse from divestment, on the one hand, and the member's presumptive desire to name his later spouse, on the other. The conflict is created by the fact that there can only be a single named survivor beneficiary.

Normally, in such cases, courts are keen to determine whether the former spouse or the later-acquired spouse has the larger legitimate interest to protect. This is a simple matter of comparing the marriage/service overlap of each spouse – exactly the same analysis as is done in determining the “time rule” percentage of the retirement that would be allocated to each successive spouse.

For example, if the member was married to the former spouse for 15 out of 20 years of total service, and he married the later spouse a year after the divorce from the former spouse, then the equities would seem to clearly favor the former spouse, who would have a 75% marriage/service overlap, compared to the later spouse's 20%.

Put another way, the legitimate insurable interest to be secured is much higher for the former spouse. If the retirement was worth \$1,000 per month, then the former spouse would have an insurable interest of \$375 per month for her lifetime to secure, while the interest of the later spouse was only \$100. It would thus be much easier for the member (and he would typically be much more inclined) to provide substitute security for the later spouse than for the former spouse.

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<sup>331</sup> In legalese, it could be stated that at the time of divorce the SBP was a potential future asset, the right to which accrued during the marriage, but which had not yet matured at the time of divorce. Courts typically allow for post-divorce recovery of such unmatured assets post-divorce. *See Amie v. Amie*, 106 Nev. 541, 796 P.2d 233 (1990) (permitting spouse to recover a portion of the proceeds of a lawsuit that was not completed until after the parties divorced, because the facts giving rise to the suit had occurred during the marriage, making those proceeds potential property “omitted” from distribution upon divorce. This has been the holding of most, but not all, cases addressing the issue. *See, e.g., Buchanan v. Buchanan*, 207 P. 3d 478 (Wash. Ct. App. 2009) (SBP not in original Decree is an “omitted asset” that may be awarded upon later discovery); *but see Hayes v. Hayes*, 208 P.3d 1046 (Or. Ct. App. 2009) (divorce decree silent as to survivorship benefit barred division of those benefits in enforcement action filed years later).

<sup>332</sup> Pub. Law No. 99-661 (Nov. 15, 1986).

<sup>333</sup> *See, e.g., Fowler v. Fowler*, 636 So. 2d 433 (Ala. Ct. App. 1994) (lower court erred in determining that it did not have discretion to award SBP, which it termed “marital property”).

This is a discretionary (as opposed to strictly legal) decision, but it does not seem reasonable for a trial court to get dragged into a dispute as to which of the two potential beneficiaries is most “deserving” of the SBP – a dispute that would almost certainly devolve into a conflict over the causes of the original divorce, with all of the fault-based overtones that modern divorce practice tries to avoid.

Instead, it would seem to make more sense to inquire into the economics of the question, and in the absence of some compelling reason to do otherwise, provide the insurable interest security that is the SBP to the spouse with the larger insurable interest to be secured. This serves the interest of securing to each spouse to the original divorce their respective rights to the benefit stream divided upon divorce, unaffected by decisions the other makes, whether to marry, divorce, live, or die.<sup>334</sup>

## **12. Taking Advantage of “Free” Survivorship During Active Duty**

As noted above, the 2002 Defense Authorization Act included a provision, retroactive to September 10, 2001, making survivors of members who die in the line of duty eligible to receive SBP. However, also as detailed above, the military system does not begin charging premiums for SBP coverage until the actual retirement of the member.<sup>335</sup> This provides a planning opportunity.

Specifically, it provides a means of providing SBP coverage, without cost to the member or to the former spouse, for the duration of the member’s military service. Since that designation can be changed by further court order at least through the date of actual retirement, security can be provided during service even when the former spouse is not to be designated as the post-retirement SBP beneficiary, by reserving jurisdiction to alter the designation, and then getting the amended court order entered and served on DFAS before the member’s retirement.

In a situation where a court would have ordered the member to maintain a policy of life insurance for any reason (for example, to secure a child or spousal support award), the SBP might be sufficient to secure all interests in question, making the purchase of separate insurance unnecessary.

This is not without risks, of course, depending on what the parties’ (and court’s) intentions were. If the spouse was not intended to be the post-retirement survivor beneficiary, it may

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<sup>334</sup> See *In Re Payne, supra*, 897 P.2d 888 (Colo. Ct. App. 1995) (seeking to “preserve an existing asset” for each party – their respective interests in the military pension).

<sup>335</sup> At least in the active-duty setting. Reserve Component cases are more complex because of the actuarial reductions built into the RC-SBP system.

not be possible to alter that designation if the member leaves service before securing the amended order.

### 13. Service Member's Life Insurance

A mistake frequently made in the course of negotiation or litigation is the effort to compel (or trade assets in order to receive) beneficiary status for a former spouse in a member's Veteran's Group Life Insurance (VGLI, previously known as National Service Life Insurance, or NSLI), or its active-duty counterpart, Serviceman's Group Life Insurance (SGLI).

This is a mistake because any such stipulation or court order is simply unenforceable – a court order compelling beneficiary status *cannot be enforced*. Under the laws setting up these insurance plans,<sup>336</sup> the former spouse cannot be made the owner of the policy, and the insured has complete freedom to designate or re-designate the intended beneficiary of the program. The federal courts, early and forcefully, held that the programs were “the congressional mode of affording a uniform and comprehensive system of life insurance for members and veterans of the armed forces of the United States,” and the resulting benefits were therefore immune from State court division or allocation, even when community property was the source of the premiums paying for the policy.<sup>337</sup> A host of similar programs have been established, and expired, since 1919.

A former spouse who negotiated beneficiary status for SGLI in exchange for giving up other rights, or even obtained an order to receive beneficiary status under that plan, thus has no direct remedy if the member dies having named someone else anyway; a member is free to change beneficiaries, and such a named beneficiary is free from suits from the former spouse for a portion of the proceeds.<sup>338</sup>

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<sup>336</sup> See 38 U.S.C. § 1917, Pub. L. No. 85-857, 72 Stat. 1152, § 717 (Sept. 2, 1958), as amended.

<sup>337</sup> See *Wissner v. Wissner*, 338 U.S. 655 (1950); see also *Estate of Allie*, 50 Cal. 2d 794, 329 P.2d 903 (Cal. 1958); C.J.S. *Armed Services* § 226.

<sup>338</sup> The key case is *Ridgway v. Ridgway*, 454 U.S. 48 (1981). Cases since then have cited it for the proposition that there is simply nothing they can do for defrauded former spouses. See, e.g., *Kaminski v. Kaminski*, 1995 WL 106497 (Del. Chanc. Ct. 1995). In that case, the member had promised in his stipulated divorce decree to name his daughter from his first marriage as his irrevocable beneficiary. When he died leaving his second wife as sole beneficiary, the first wife's action seeking a constructive trust for the daughter was dismissed. The court said that the “narrow exception” for fraud was restricted to “extreme factual situations” unlike simple breach of contract. The case law presents opportunities for unjust enrichment in all directions. See *Dohnalik v. Somner*, \_\_\_ F.3d \_\_\_ (5<sup>th</sup> Cir. No. 05-50072, Oct. 6, 2006) (where member died right after entry of divorce decree which purported to divest the spouse of her beneficiary interest, but he had not yet submitted the beneficiary-change form, the ex-wife got the proceeds anyway; the appellate court distinguished ERISA-based cases in which such divorce decree waivers were recognized, based on the United States Supreme Court's “clear guidance” that only the formal beneficiary designation would be followed).

There is apparently no prohibition, however, against a former spouse who has been thus deceived proceeding against the member (at least while everyone is still alive). Such a suit would not be interfering with the protected insurance policy, but punishing the contemptuous act of duplicity by the member. As with similar matters involved in these cases, the key is adequate vigilance, especially by the former spouse, to be sure that what was negotiated or ordered was actually put into place, and that no one attempts to fraudulently evade the orders, *before* anyone dies.<sup>339</sup>

Far better than trying to fix such problems would be to avoid them altogether, of course. Preferable mechanisms by which payments after the member's death could be accomplished include private life insurance (with the intended beneficiary as owner),<sup>340</sup> or beneficiary status under the Survivor's Benefit Plan, discussed above.

The "bottom line" to all of the cases addressing early retirement, late retirement, disability, partition, bankruptcy, and death benefits, is that it is incumbent upon the attorneys, especially the attorney for the spouse, to anticipate post-divorce status changes and build that anticipation into the decree. Any failure to do so is an invitation to further litigation in some forum, between the parties, or directed at the attorney.

## **VII. MEDICAL AND OTHER ANCILLARY MILITARY BENEFITS TO CONSIDER**

### **A. Medical Benefits<sup>341</sup>**

Another thing to watch closely in military cases is the time restrictions for former spouse qualification for ancillary benefits (medical, commissary, theater, etc.) For full 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>342</sup>

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<sup>339</sup> "Mendacity is a system that we live in.  
Liquor is one way out an' death's the other."  
Tennessee Williams, *Cat on a Hot Tin Roof* (1955), act 2.

<sup>340</sup> "I detest life-insurance agents; they always argue that I shall some day die, which is not so."  
Stephen Leacock, *Literary Lapses* (1910).

<sup>341</sup> This discussion goes only to spousal benefits. As with other topics, and discussed in part elsewhere in these materials, the benefits available to the member operate under different rules, always making the benefits to the member superior to those of a former spouse. For example, if a person's insurance would otherwise end because that person enters into active military duty, that member could elect to continue insurance (including dependent coverage) in accordance with the Uniformed Services Employment and Reemployment Rights act of 1994 (USERRA).

<sup>342</sup> See 10 U.S.C. § 1072(2)(F) and (G).

“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>343</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, from CHAMPUS (“Civilian Health and Medical Program of the Uniformed Services”) to “US-VIP,” to “TRICARE.” The specifics of coverage have changed over the years, sometimes rapidly, and are beyond the scope of these materials.

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.

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

- The former spouse must not remarry. Eligibility for health benefits ceases upon remarriage and is *not* regained even if the subsequent marriage terminates.
- The former spouse must not be covered by an employer-sponsored health care plan. If there is such a plan, however, and coverage thereunder is terminated (voluntarily or otherwise), eligibility for benefits is restored.
- The former spouse must not yet be age 65. Upon eligibility for Medicare (Part A), CHAMPUS eligibility ends. Some continuing benefits for former

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<sup>343</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.

spouses may be available under the “TRICARE-for-life” program effective October 1, 2001.<sup>344</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>345</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>346</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.

## **B. Accrued Leave**

Military members accrue thirty days of leave each year. If not used, it accrues throughout service, and is worth its monthly equivalent pay, although newer regulations limit the amount of leave that can be accrued to 60 days, with some exceptions. States vary on whether or not unused vacation or sick pay (and thus, by analogy, accrued but unused military leave)

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<sup>344</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>345</sup> Implementing regulations are at 32 C.F.R. § 199.20, but they are not very clear.

<sup>346</sup> As of 2008, \$933 per quarter, or \$3,732 annually.

constitutes “property” for equitable or community property division. Various citations are extremely supportive of the idea<sup>347</sup>; others are just as vehement that vacation or sick pay is not any kind of marital property.<sup>348</sup>

## VIII. MILITARY RESERVISTS

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

To be entitled to a “year” of creditable service, the reservist must obtain at least 50 “retirement points.” A point is awarded for each day of active service, or for full-time service while performing annual active duty for training or attending required training. A point is awarded for each drill performed adequately, or for each three hours of military correspondence or extension courses that are successfully completed. There are various other

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<sup>347</sup> See, e.g., Mark Sullivan, “Hidden money in Military Divorce Cases,” 20 Nev. Fam. L. Rep. 4 (Fall, 2007) at 4; *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); 2 Gary N. Skoloff, et al., *Valuation and Distribution of Marital Property* § 23.04A (2002); *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); 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>348</sup> See *In re Marriage of Abrell*, \_\_\_ N.E.2d \_\_\_ (Ill., Feb. 4, 2010, 2010 WL 376398), *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).

ways of acquiring points. A maximum of 365 points may be earned each year. Any year in which the 50-point minimum is not reached does not count toward retirement, although the points earned in such years eventually factor into the retired pay paid.

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

Figuring reserve retirement pay is complex. The total retirement points earned is divided by 360 to yield “years of service” for retired pay purposes. That figure is multiplied by 2½ percent; the resulting percentage is multiplied by the active duty basic pay payable to an active duty member with the same grade and number of years creditable for retirement.

As with active duty members, there is a distinction between reservist retirees depending on the date they entered service. For members who first entered service before September 8, 1980, the figure for “base pay” in the above calculation is the active duty basic pay in effect for the retiree’s grade and years of service in effect *when the retired pay begins*. For members who first served after September 8, 1980, “base pay” is the *average* basic pay for the member’s grade in the last three years that the member served.

And even when the total points earned are known, the totals could be misleading. Total career points *might* not be equal to all points credited for retirement, because of the “sixty-point rule,” where a member can get no more than a combined 60 points in one year for Inactive Duty Training (IDT), extension courses, and membership, in addition to any active duty points earned. In 1996, this was changed to 75 points, in 2000 to 90 points, and in 2007 to 130 points. The only points relevant for retirement benefits are the Total Points for Retired Pay, as any points earned over the limits set are of no value.

Practitioners therefore must be careful in all reservist cases; they should be wary in a case involving reserve component service of any calculations that presuppose the typical “years of marriage divided by years of service” formula. Since point accumulation might have been intermittent, significantly different spousal percentages could be obtained by the two methods of figuring. Note that the amended (prior) regulations in 32 C.F.R. § 63.6 specifically directed dividing reservist’s retirements by points accrued during marriage, rather than duty time during marriage. That directive appears to have remained in all subsequent military guidelines, including the 2009 regulations.<sup>349</sup>

Special care is required for reservists who entered service after September 8, 1980, since the formula for figuring their retirement will be altered. If the retirement at issue involves both

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<sup>349</sup> See DoDFMR 7000.14-R, Vol. 7B, Ch. 29 Sec. 290211(B) (“For members retiring from Reserve duty, the fraction must be expressed in Reserve points rather than months . . . .”)

reserve and active-duty service, the practitioner must be especially careful to allocate the components properly (i.e., points for reserve time, and time for the active-duty period).

## **IX. TAX NOTES AS TO MILITARY RETIREMENT BENEFITS**

When military retired pay is used as a source for child support or alimony payments, the usual tax consequences remain true (i.e., child support is non-deductible to the payor and non-taxable to the recipient, whereas alimony is deductible to the payor and taxable to the recipient).<sup>350</sup>

Non-disability retired pay is treated as wages and is subject to federal income tax withholding.<sup>351</sup> The division of military retired pay as property is not a taxable event.<sup>352</sup>

There was significant confusion in prior years; eventually, the Tax Court ruled that a community property share of the retirement to the former spouse, whether received from the government or the member, was income to the former spouse.<sup>353</sup> This was consistent with the position evolved within the IRS that classified payments of military retirement benefits as not qualifying under section 1041.<sup>354</sup>

Since the 1989 decision of the United States Supreme Court in *Mansell* and the 1990 amendments to the USFSPA, it has seemed increasingly clear that the intent of Congress was for the former spouse to bear all responsibility for taxes on sums actually paid to the spouse, while the member is responsible for taxes on sums actually paid to the member.

This is of course the logical result, and what most judges thought had been happening all along. There appears to be a political reason it took ten years for the statute to be altered to produce that result.

Before the effective date of the 1990 amendments (February 4, 1991), amounts deducted for payment to a former spouse were still considered wages of the retired member for

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<sup>350</sup> IRC §§ 71, 215. See also *Proctor v Comm'r* 129 TC 92, 97 (2007) .

<sup>351</sup> IRC § 3401.

<sup>352</sup> IRC § 1041.

<sup>353</sup> *Barbara E. Seaman*, 2007 T.C. Memo No.189; *Eatinger v. Commr.*, 1990 T.C. Memo No. 310 (June 20, 1990); see also *Proctor v. Commr.*, 2007 T.C. No. 12, 2007 U.S. Tax Ct. LEXIS 31 (#2813-06, U.S. Tax Court 2007).

<sup>354</sup> See IRS Letter Ruling 8813023.

withholding purposes.<sup>355</sup> The member had income withheld on the entire gross amount, the resulting “disposable” pay was divided, and the member was entitled to a refund of taxes withheld on amounts paid to the former spouse. The former spouse then owed full taxes on whatever she received. Any percentage divisions of retirement benefits under the former law increased property distribution to the member and reduced them to the former spouse as a matter of course.<sup>356</sup>

The amounts withheld were based on the member’s pay period and exemptions. This led to widespread anecdotal accounts of abuse by members, who manipulated their tax status so as to maximize withholding and minimize disposable income available for division with former spouses. There has been an administrative ruling from the Comptroller General prohibiting this practice since 1984, but enforcement of the prohibition was uneven, since the pay centers had no uniform policy on how to handle accusations of such manipulation.<sup>357</sup>

Eventually, the pay center developed internal reviews, requiring that in calculating the amount of disposable retired pay subject to apportionment with a former spouse, the deductions of federal income tax withholdings from gross retired pay may not be fixed at a percentage rate exceeding the member’s projected effective tax rate (i.e., the ratio of the member’s anticipated total income tax to his anticipated total gross income from all sources).<sup>358</sup>

For divisions of retired pay as property pursuant to decrees entered on or after February 4, 1991, the tax consequences are much simpler, and much more similar to those in other retirement systems. Portions of a member’s retired pay awarded to a former spouse explicitly “may not be treated as amounts received as retired pay for service in the uniformed services.”<sup>359</sup> Therefore, there is no withholding of taxes (before division of retired pay) on amounts paid to a former spouse when the divorce occurred after February 4, 1991.

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<sup>355</sup> Treas. Reg. § 31.3401(a)-(1)(b)(5).

<sup>356</sup> Reports by the General Accounting Office and Congressional Research Service in 1984 and 1989 found that court orders purporting to divide military retirement benefits on a “50/50” basis actually effected a split of “55.4%/44.6%” to “58.4%/41.6%” – always in favor of the former military member – after the impact of tax withholdings was considered. CRS Report For Congress: “Military Benefits for Former Spouses: Legislation and Policy Issues,” March 20, 1989.

<sup>357</sup> Matter of: Uniformed Services Former Spouses Protection Act, April 25, 1984 (*In re Flynn*), 63 Comp. Gen. 322 (1984) (Comptroller General’s Decision No. B-213895, April 25, 1984). A retired Air Force Colonel had nearly all his retired pay withheld for federal income taxes, thus reducing the sums available as “disposable pay” for division with his former spouse. The ruling found that practice impermissible, and withholding for purposes of figuring “disposable pay” was limited to amounts necessary to cover the retired pay itself and amounts for which the member “presents evidence of a tax obligation which supports such withholding.”

<sup>358</sup> *In re Krone*, Comptroller General’s Decision No. B-271052, August 6, 1996, at 3-4.

<sup>359</sup> 10 U.S.C. § 1408(c)(2).

The former spouse is taxed on Survivor's Benefit Plan payments as he or she would be for other payments from an annuity.<sup>360</sup> The payments to the former spouse are taxable income.

## **X. INTERACTIONS BETWEEN MILITARY AND CIVIL SERVICE RETIREMENTS**

These materials will look at the interplay between military and civil service retirements, where a service member leaves military service and begins a second career in the civil service.

### **A. Effects on Military Retirement Benefits from Civil Service Employment**

The "dual receipt" prohibition in federal law was long a source of troubling inequities in military retirement benefits cases, and led to a large number of "dual comp" cases involving waiver of military retirement benefits. Those inequities were (apparently) solved when Congress repealed the "dual compensation" law, effective October 1, 1999.<sup>361</sup> Most of this section is therefore of primarily historical interest, or for purpose of analogies drawn to other areas still litigated (such as disability offsets).

The full history of the dual compensation rules are beyond the scope of these materials.<sup>362</sup> The short version is that military retired pay was reduced for members who retired from the military and began civilian work for the federal government. Obviously, any reduction in the amount of retired pay payable to a member affected the spousal interest as well. Court decisions did not appear to follow any clear theoretical model.

Two Texas cases primarily distinguished what a court (in Texas, anyway) should do when faced with a current divorce proceeding, on the one hand, versus a contempt enforcement proceeding, on the other. A North Dakota case focused on the necessity, in a contempt proceeding, for the underlying decree to specify just what it is that the former spouse was to receive. Finally, a case from Arizona represented a maturing of the analysis on this point.

In Texas, a court found that the trial court could neither divide the retired pay waived for VA benefits, nor divide the sums waived under the dual compensation law, in an attempt to comply with the United States Supreme Court's directives in *Mansell*.<sup>363</sup>

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<sup>360</sup> 26 U.S.C. § 72.

<sup>361</sup> Pub. L. 106-65, § 651(a)(1), 113 Stat. 664.

<sup>362</sup> 5 U.S.C. § 5532(b); 10 U.S.C. § 1408(a)(4)(B).

<sup>363</sup> *Gallegos v. Gallegos*, 788 S.W.2d 158 (Tex. Ct. App. 1990).

The same court later ruled, however, that the same result could be reached indirectly, by way of a contempt action against a husband for non-payment of a portion of military retirement benefits which he claimed were exempt by reason of his waiver of retired pay in favor of disability benefits.<sup>364</sup> In that case, the wife was ultimately allowed to collect from the husband all sums called for by the decree but which he had sought to recharacterize as disability. The Texas court sided with the clear majority of courts in so holding.

In *Knoop v. Knoop*,<sup>365</sup> the North Dakota appellate court attempted to steer a course allowing the former spouse to collect the sums intended while claiming to respect the dual-compensation restrictions.<sup>366</sup>

The Arizona Court of Appeals was more direct in *In re Gaddis*,<sup>367</sup> when it held that divorce courts were only required to find reductions in military pay benefitting the member to bar compensation to the spouse if those reductions in retired pay existed **when the award to the former spouse was made**. The court saw the proscription of *Mansell* – that the USFSPA “does not grant state courts the power to treat as property divisible upon divorce military retired pay that has been waived to receive veterans’ disability payments” – as a call to essentially take a snapshot when the award to the spouse is made. If sums of disposable retired pay had been waived up to that point, they were not divisible. Where a member sought a post-divorce reduction in retired pay, however, his efforts at re-characterization were seen as attempting a “de facto modification” of a final property award, which State law did not permit.<sup>368</sup>

These cases collectively stand for the proposition that actual division of the retired pay at divorce was limited to disposable pay, with any shortfall to the spouse to be compensated by other means. Once an award was made, however, in post-decree enforcement, the spouse could be compensated for any action taken by the member that lowered sums payable to the spouse.

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<sup>364</sup> *Jones v. Jones*, 900 S.W.2d 786 (Tex. Ct. App. 1995).

<sup>365</sup> 542 N.W.2d 114 (N.D. 1996).

<sup>366</sup> See also *Vitko v. Vitko*, 524 N.W.2d 102 (N.D. 1994) (*Mansell* is to be “construed narrowly to allow trial courts to consider parties’ ultimate economic circumstances in dividing their marital property”).

<sup>367</sup> 957 P.2d 1010 (Ariz. Ct. App. 1997).

<sup>368</sup> See also *Crawford v. Crawford*, 884 P.2d 210 (Ariz. Ct. App. 1994) (same result in SSB case). The court in *In re Gaddis*, 957 P.2d 1010 (Ariz. Ct. App. 1997) specifically quoted and analogized to *In re Marriage of Strassner*, 895 S.W.2d 614 (Mo. Ct. App. 1995), which is discussed in the section addressing disability benefits. The Arizona court held that in this situation, like that one, the spousal interest had been “finally determined” on the date of the decree, and enforcing that order in the face of a post-decree recharacterization by the member did not violate *Mansell*.

This provides a nice “bright line” for practitioners, and highlights the cautions expressed in these materials. First, if there has been any waiver of divisible benefits by a member, counsel for the spouse should consider whether an alimony or other award to compensate the spouse is appropriate. Second, counsel for the spouse must safeguard any award made to allow for compensation in the event the member attempts to reduce the benefits by post-divorce recharacterization.

## **B. Military Retirement Benefits Component of a Civil Service Retirement**

It is possible for a military retiree to simply continue receiving military retired pay, and then go to work for, qualify for, and begin receiving retirement benefits through the Civil Service system. It is also possible for a military retiree to “roll over” the accrued years of military service into a civil service retirement. Which is the better choice depends on the rank and grade achieved by the member in each system. If the member had a relatively low military rank, but achieved a high “GS” rating in the Civil Service, then the years of military credit might well be most valuable if treated as additional service credits in the Civil Service calculation. Obviously, the calculations will vary case by case.

Perhaps ironically, there have been situations in which the dual receipt rules resulted in former spouses receiving shares of military retirement benefits from which they otherwise would have been barred. In one post-*McCarty* gap case, brought under a State window statute, the court “traced” the spousal share of the military service, even though the member had been awarded all of the interest in the retirement in a divorce during the *McCarty* gap, *and* had subsequently obtained a 100% VA disability rating, since he waived all of those awards in order to roll his military service into a later (divisible) Civil Service retirement.<sup>369</sup>

This approach, known as the “source of the benefit” method, would be repeated in later years by courts trying to decide whether former spouses had an interest in SSB or VSI benefits. The reasoning is that if one spouse derives an economic benefit attributable to services performed during the marriage, and there is not a specific legal prohibition on sharing that benefit with the former spouse, then the benefit should be divided in accordance with normal marital property law.

Notably, Congress itself appears to have adopted the reasoning of this theory in the amendments to the USFSPA that went into effect in 1997 (for both CSRS and FERS retirements, but only as to waivers made on or after January 1, 1997). Under those rules, if a military member waives military retired pay in order to take a Civil Service retirement, the

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<sup>369</sup> *Leatherman v. Leatherman*, 833 P.2d 105 (Idaho 1992).

former spouse must be paid what she would have received from the military in order for the waiver to be accepted by the Office of Personnel Management.<sup>370</sup>

The Office of Personnel Management (“OPM”) *Handbook for Attorneys* includes a model paragraph entitled “Protecting a former spouse entitled to military retired pay” (paragraph 111). It reads:

Using the following paragraph will protect the former spouse interest in military retired pay in the event that the employee waives the military retired pay to allow crediting the military service under CSRS or FERS. The paragraph should only be used if the former spouse is awarded a portion of the military retired pay. “If [Employee] waives military retired pay to credit military service under the Civil Service Retirement System, [insert language for computing the former spouse’s share from 200 series of this appendix.]. The United States Office of Personnel Management is directed to pay [former spouse]’s share directly to [former spouse].

Where a post-military Civil Service career seems likely, allocation of the retirement benefits from that service should probably be explicitly set out in the original divorce decree. Where (as in most cases) it is only one possibility among many, the standard form clauses (allowing for issuance of a further order tracing the military retired pay and entry of a further order) are probably adequate.

## **XI. THE THRIFT SAVINGS PLAN**

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

As of October 8, 2001,<sup>371</sup> military members were authorized to begin participating in the TSP. 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>372</sup>

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<sup>370</sup> See Pub. L. 104-201, Div. A, Title VI, Subtitle D, § 637, 110 Stat. 2579 (Sept. 23, 1996).

<sup>371</sup> Per Pub. L. No. 106-398 (Oct. 30, 2000); the regulations are found at 5 C.F.R. § 1600-1690.

<sup>372</sup> For military members, some forms of tax-exempt special compensation can be contributed, which then accrue investment returns that are also tax-exempt.

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>373</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>374</sup>

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

The TSP is expressly *excluded* from the regulations governing the Civil Service defined benefit plans.<sup>375</sup> It is administered by a Board (the Federal Retirement Thrift Investment

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<sup>373</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>374</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.

<sup>375</sup> 5 C.F.R. § 838.101(d).

Board),<sup>376</sup> entirely separate from the OPM, and has its own governing statutory sections and regulations.<sup>377</sup> The TSP Board has its own finance center.<sup>378</sup>

#### **A. Withdrawal and Borrowing of Money from the TSP During Service**

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

Withdrawal of TSP funds by a participant is normally limited to those separating from service, but in-service withdrawals may be made in two categories: “age-based” withdrawals<sup>379</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>380</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>381</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.

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<sup>376</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>377</sup> 5 U.S.C. § 8435(d)(1)-(2), 8467; 5 C.F.R. Part 1653, Subpart A.

<sup>378</sup> Thrift Savings Plan Service Office, National Finance Center, P.O. Box 61500, New Orleans, LA 70161-1500 (TSP Service Office fax number: (504) 255-5199). The TSP Service Office is the primary contact for participants who have left federal service, and it also handles questions about loans, contribution allocations, interfund transfers, designations of beneficiaries, and withdrawals for all participants.

<sup>379</sup> In-service withdrawals for participants who are 59½ or older. There should be very few of these in military cases.

<sup>380</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>381</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.

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>382</sup>

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

## **B. Withdrawal and Borrowing of Money from the TSP After Retirement**

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

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

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>383</sup> It is also possible in some circumstances to obtain a joint life annuity with someone other than the spouse.<sup>384</sup>

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<sup>382</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.

<sup>383</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>384</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.

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

### C. Court-Ordered Divisions of the TSP

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

No QDRO is required for a TSP distribution; the TSP will honor any order that expressly relates to the TSP account of the participant, has a clearly determinable entitlement to be paid, and provides for payment to some person other than the TSP participant. This includes payments directly to the attorney for the former spouse. Attorneys drafting TSP orders should note that plan balances are always calculated on the last day of the month.

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.

#### D. Survivorship Benefits for the TSP

There are no “survivorship” benefits, *per se*, for a TSP account, as it is a cash plan like a 401(k). However, plan participants can and should designate beneficiaries to receive the account balance in the event of the participant’s death.<sup>385</sup> In the absence of the form, regular intestate succession rules determine the distribution of the TSP account.

## XII. THE SERVICEMEMBERS CIVIL RELIEF ACT OF 2003

In light of ongoing military actions and the greatly-increased number of deployed active-duty and Guard and Reserve personnel, it is necessary for any practitioner approaching a military divorce case to have at least some familiarity with the Servicemembers Civil Relief Act of 2003 (“SCRA”).<sup>386</sup>

In 1940, the United States enacted the “Soldiers’ and Sailors’ Civil Relief Act” to provide that those serving in World War II would have protections against default judgments, exorbitant interest rates, and the ability to stay ongoing civil court cases while they were on duty. The law was substantially revised in 1991 after the Gulf War, and then scrapped entirely in December, 2003, in favor of the replacement SCRA.

Contrary to belief in some circles, the SCRA does affect divorce, custody, and paternity cases,<sup>387</sup> but it only applies if the opposing party is on active duty.<sup>388</sup> If the member is on active duty, but has not made an appearance, the court *may* stay the proceedings for at least 90 days on application of counsel or the court’s own motion – *if* the court determines that

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<sup>385</sup> By means of Form TSP-U-3 (“Designation of Beneficiary”).

<sup>386</sup> 50 U.S.C. § 501 *et seq.* (Dec. 19, 2003).

<sup>387</sup> Ongoing concern in Congress that State courts might not be giving adequate deference to the Act in child custody matters led to insertion in the 2008 Defense Authorization Act of Section 584, entitled “Protection of Child Custody Arrangements for Parents Who Are Members of the Armed Forces Deployed In Support of a Contingency Operation,” which added the words “including any child custody proceeding,” in the sections of the SCRA dealing with defaults and stays. The conference report included language urging “judges who must decide such cases not to consider the mere absence of a service member who is performing military duty to constitute the sole or even a major factor in a court’s determination about what is in the best interests of a child.”

<sup>388</sup> The Department of Defense (“DoD”) is required to verify this, one way or the other, if contacted at Defense Manpower Data Center, 1600 Wilson Blvd., Ste. 400, Attn: Military Verification, Arlington, VA 22209-2593; (Ph) 703-696-6762 (or -5790); (fax) 703-696-4156. They also have a website, <https://www.dmdc.osd.mil/scra>. A name and Social Security number will be needed.

there might be a defense which cannot be presented in the absence of the member, or if the member has not been contacted and it can't be determine if a meritorious defense exists.<sup>389</sup>

When the member *does* have notice, the court may grant the stay anyway if the member requests it. That minimum 90-day stay becomes mandatory if the request includes four items, with no formality requirement:<sup>390</sup>

- a letter or other communication that says how the member's military duties materially affect his ability to appear.
- a statement of when the member *will* be available.
- a communication from the member's commanding officer, stating that the member's military duties prevent his appearance.
- A statement from the commanding officer that military leave cannot be granted at that time.

Notably, the federal law provides that such a stay request does *not* constitute the making of a general appearance and does not waive or relinquish *any* defenses otherwise available, whether substantive or procedural.<sup>391</sup>

In that original request, or later, the member can ask for a further stay, providing the same information; however, such further stay is discretionary, and depends on the court's finding that the ability of the member to prosecute or defend is "materially affected" by his or her active duty service,<sup>392</sup> but it should last only until the end of the "military necessity" which required the stay – usually until leave is available in good faith and with due diligence.<sup>393</sup>

If the court declines to allow a stay of proceedings, it is required to appoint counsel to represent the member,<sup>394</sup> but the SCRA is silent as to the duties of the appointed attorney, or how such a lawyer should get paid, if at all.

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<sup>389</sup> 50 U.S.C. App. § 521(d).

<sup>390</sup> 50 U.S.C. App. § 522.

<sup>391</sup> 50 U.S.C. App. § 522(c).

<sup>392</sup> 50 U.S.C. App. § 522 (d)(2).

<sup>393</sup> Members seeking stays for the entirety of their careers have been denied any stay at all. *See Ensley v. Carter*, 538 S.E.2d 98 (Ga. Ct. App. 2000); *Palo v. Palo*, 299 N.W.2d 577 (S.D. 1980) (case proceeded to judgment in absence of member where court found unwillingness, rather than inability, to attend the proceedings). Servicemembers accrue 30 days of leave each year, at the rate of 2.5 days per month. But they still may not be able to leave particular training or duty postings for various periods of time.

<sup>394</sup> 50 U.S.C. App. § 522(d)(2).

Where a defendant has not made an appearance in an action, a default judgment (for temporary or permanent orders) may only be obtained upon affidavit stating that the person against whom default is requested is *not* in the military.<sup>395</sup> If it appears that a person against whom default is sought *is* a member of the armed services, default may not be entered against the member until the court appoints an attorney for the member, who is then charged with the duty to “not waive any defense” until the member is located.<sup>396</sup>

A default against the member is voidable – apparently forever – if the court did not appoint an attorney for the member before entering the order. The act grants a member the ability to reopen and set aside a default, or even prevent execution on a judgment, by applying to the court that entered the order within 90 days of leaving military service, if the member can demonstrate that military service prejudiced the member’s ability to defend, and that there was a meritorious defense.<sup>397</sup> A period of military service apparently tolls all statutes of limitations for the duration of military service.<sup>398</sup>

### **XIII. SPECIAL PROBLEMS AND CONSIDERATIONS IN INTERNATIONAL MILITARY-RELATED CASES**

#### **A. Preliminary Issues: Location and Service upon Servicemembers Outside the Country<sup>399</sup>**

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

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<sup>395</sup> 50 U.S.C. App. § 521.

<sup>396</sup> 50 U.S.C. App. § 521(b)(2).

<sup>397</sup> See *Davidson v. Gen. Fin. Corp.*, 295 F. Supp. 878 (N.D. Ga. 1968); *Bell v. Niven*, 35 S.E.2d 182 (N.C. 1945); 50 U.S.C. App. § 524.

<sup>398</sup> 50 U.S.C. App. § 526 (the period of military service shall not be included in computing any limitation period for filing suit, either by or against any person in military service; this also includes suit by or against the heirs, executors, administrators, or assigns of the member, when the claim accrues before or during the period of service).

<sup>399</sup> Much of the information here, and in the next several sections, was derived directly from the excellent and comprehensive treatise by Mark E. Sullivan, *THE MILITARY DIVORCE HANDBOOK: A PRACTICAL GUIDE TO REPRESENTING MILITARY PERSONNEL AND THEIR FAMILIES* (ABA 2006) with the permission of the author.

It is possible that a spouse may not even know how to *find* a member stationed elsewhere. With a full name and Social Security Number, however, some footwork may be able to track a reassigned member from the last known duty station to a current posting. The Legal Assistance Attorney at the military installation nearest the spouse (or the member's last posting) may be able to provide the necessary information.<sup>400</sup> There is also a Worldwide Military Locator Service<sup>401</sup> for each branch of service, which may help locate a member or forward written documents to a member (some States permit written service in this matter of certain pre- or post-divorce pleadings, notices, or other documents).

Where child support is involved, the federal rules requiring tracking of all federal employees<sup>402</sup> provides a list of designated agents for income and address verification.<sup>403</sup> There are multiple layers of regulations governing service on military personnel.<sup>404</sup>

In all domestic relations cases, traps abound relating to service of process.<sup>405</sup> Where a member is located within the United States, the authorities controlling the installation will normally allow the member the choice of accepting service of process, or not (apparently except the Air Force, which allows process servers on federal installations). Where refused, accommodation is typically made by ordering the member to be at a designated place at a designated time to be served, where that does not interfere with the operation of the military facility, but it would appear that there is significant variation and can be significant delay and difficulty.

Matters are even worse outside the U.S. Where the member refuses to consent to service, all the procedures set out in the Hague Convention on the Service Abroad of Judicial and

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<sup>400</sup> A list of worldwide armed forces legal assistance offices is posted at <http://assistance.law.af.mil/>. Attorney Chaim Steinberger of New York has contributed the practice tip that Army Regulations require that a letter from counsel to a the legal office requires forwarding to the member's command, and has the force of a "command inquiry" requiring a response in a timely fashion, under AR 608-99.

<sup>401</sup> [Http://www.defenselink.mil/people\\_records.html](http://www.defenselink.mil/people_records.html).

<sup>402</sup> Executive order 12953, <http://www.worldnetdaily.com/resources/govdocs/eos/eo12953.html>.

<sup>403</sup> In Appendix A to 5 C.F.R. § 581, again broken down service by service.

<sup>404</sup> *See, e.g.*, 32 C.F.R. § 720.20 (Service of Process on U.S. military bases and ships for Navy and Marines).

<sup>405</sup> *See* W. Mark C. Weidemaier, *Service of Process and the Military* (North Carolina School of Government, Dec., 2004), at <http://www.ncbar.com/home/lamp.htm> [click on "other Publications/Resources," and go to "Administration of Justice – Service of Process and the Military"].

Extrajudicial Documents<sup>406</sup> may come into play; the U.S. has been a signatory since February 10, 1969. As framed by the United States Department of State circular on the topic:

SERVICE ON U.S. MILITARY PERSONNEL ABROAD: We understand that the general position of the military departments is that the service of civil process on military personnel stationed abroad (or at sea) is not a proper military function. Thus, governing military regulations expressly prohibit commanders from serving civil process upon their personnel unless the individual agrees to accept the process voluntarily. Generally, commanders or other officials in charge when contacted about service of process on an employee will bring the matter to the attention of the individual and will determine whether he or she wishes to accept service voluntarily. If the individual does not desire to accept service, the party requesting such service will be notified and will be advised to follow the procedures prescribed or recognized by the laws of the foreign country. In countries party to the Hague Service Convention or Inter-American Service Convention, the foreign Central Authority may attempt to accomplish service under the applicable Convention if the prevailing Status of Forces (SOFA) agreement permits access to the base. Installation commanders may impose reasonable restrictions upon persons who enter their installations to serve process. It may therefore be necessary for the foreign Central Authority to effect service on the individual outside the installation. Some foreign Central Authorities may decline jurisdiction over cases involving U.S. military personnel depending on the SOFA agreement applicable (if any). Likewise, a request for service on U.S. military personnel pursuant to a letter rogatory may prove difficult as the foreign court may decline jurisdiction. It may be necessary to retain the services of a private attorney or other agent to effect service on the individual outside the U.S. military installation. Service by registered mail is also another option. You may wish to consult the Judge Advocate General's office for the appropriate branch of the U.S. military at the Pentagon for further guidance. See also, *A Guide to Child Support Enforcement Against Military Personnel, Serving the Soldier*, (February 1996), Administrative and Civil Law Department, Legal Assistance Branch, The Judge Advocate General's School, U.S. Army, Charlottesville, VA 22093-1781 and Barber, *Soldiers, Sailors and the Law*, Family Advocate, ABA Family Law Section, Vol. 9, No. 4, 38, 41 (Spring 1987).<sup>407</sup>

The "bottom line," really, is that where actual physical service is not going to be voluntarily accepted, the practitioner is required to either become completely conversant with the details of the treaty, personally or by hiring another professional or service company, or risk the

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<sup>406</sup> Hague Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, 20 U.S.T. 361 T.I.A.S. No. 6638, 658 U.N.T.S. 163, *reprinted in* 28 U.S.C.A., Fed. R. Civ. P. 4; *see also* O.C.G.A. Sec. 9-11-4(f)(3) (essentially, incorporating the Hague Convention for Service Abroad for military personnel).

<sup>407</sup> "Service of Legal Documents Abroad" Circular, Dept. of State circular 2003. A bit ironically, it was the research for the article cited in the quote above, written by former ABA Family Law Section Michael Barber, that sparked his interest in the field, ultimately leading to the commissioning of my 1998 textbook on military retirement benefits, and later to Mr. Sullivan's MILITARY HANDBOOK.

entire lawsuit being thrown out on a very technical basis. This goes for the individual rules of individual countries, over and beyond the Treaty itself, because many imposed specific conditions when they signed on to the Treaty.<sup>408</sup> On the other hand, many U.S. courts have expressed the thought that if service of a U.S. citizen is adequate under State and federal law, wherever accomplished, they do not consider the views of the country where process is actually served to be of much importance.

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

## **B. Custody, Visitation and Temporary Support Issues**

The policy considerations of the SCRA pretty much directly collide with federal and State policies requiring the expedited process of child custody and support orders. The components of active duty military pay, and how to figure child support (which are necessarily State-specific), are beyond the scope of these materials.

Since military pay tables are readily discoverable, in print or even on the Internet,<sup>409</sup> the ability of the member to appear may not be relevant to a child support determination, although there could be exceptions.<sup>410</sup> So it may be possible to defeat claims for an SCRA stay of child support proceedings. It is also possible to get support in advance of a formal court order. Each branch of the military service has its own rules regarding support of family members in the *absence* of a court order, and the rules govern both child support and spousal support (alimony).

The Air Force "expects" that its members will support their families, and will recoup BAH<sup>411</sup> payments if it concludes that the member is receiving the "with-dependent" rate but not

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<sup>408</sup> See, e.g., *Vorhees v. Fischer & Krecke*, 697 F.2d 574 (4<sup>th</sup> Cir. 1983) (quashing service against German defendant on ground that Germany has imposed conditions in its accession to the Treaty, including that papers served bear a German translation and that service not be made by direct mail). Mr. Sullivan's book takes a heroic swing at setting out all the ways in which service may have to be accomplished in most of the places that American servicemembers are actually posted – today – at pages 19-93 of his HANDBOOK.

<sup>409</sup> Start with <http://www.dod.mil/dfas>, and follow the links.

<sup>410</sup> See *Smith v. Davis*, 364 S.E.2d 156 (N.C. Ct. App. 1988) (support order set aside on the basis of affidavit from member that he had not been paid in several months and was unable to comply with the order).

<sup>411</sup> Basic Allowance for Housing.

supporting dependents, but basically pushes the matter to the civilian courts.<sup>412</sup> The Marine Corps is more specific, requiring its members to provide the greater of a specific sum per dependent or a specified percentage of the BAH and certain other benefits.<sup>413</sup> The Navy has its own chart of percentages,<sup>414</sup> as does the Coast Guard.<sup>415</sup> The Army has an extensive, complex regulation governing the support of dependents in the absence of agreement or a court order.<sup>416</sup>

In light of the family support regulations, often a letter to the commanding officer of the member can initiate at least some support payments pending issuance of a court order. Once an order is obtained, support may be enforced by way of garnishment.<sup>417</sup> Accrued arrears may also be recovered if they are specified in the order.<sup>418</sup> An “involuntary allotment” can be initiated by an “authorized person” by sending the support order to the DFAS – but such an “authorized person” must be a District Attorney or other person with Title IV-D enforcement authority, not a private attorney.<sup>419</sup>

Normally, when parents live in different places, child support is set in accordance with the law of the residence of the obligor.<sup>420</sup> But a military member may have an anomalous status under the Uniform Interstate Family Support Act; if the member maintains his residence or domicile elsewhere than where he is stationed, that State might maintain exclusive

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<sup>412</sup> A.F. 36-2906 ¶ 3.1.2.

<sup>413</sup> U.S. Marine Corps Order P5800.16a, MARINE CORPS MANUAL FOR LEGAL ADMINISTRATION ch. 15 (Dependent Support and Paternity) § 15001 (2003).

<sup>414</sup> U.S. Dep’t of Navy, NAVAL MILITARY PERSONNEL MANUAL art. 1754-030 (Support of Family Members) ¶ 4 (Aug. 22, 2002).

<sup>415</sup> U.S. Dep’t of Homeland Security, U.S. COAST GUARD COMMANDANT INSTR. M1000.6A, ch. 8M (Supporting Dependents) (May 3, 2001).

<sup>416</sup> AR 608-99.

<sup>417</sup> See 42 U.S.C. §§ 659-662.

<sup>418</sup> See 5 C.F.R. Part 581.

<sup>419</sup> See 32 C.F.R. § 54.3(a).

<sup>420</sup> See *Vaile v. District Court*, 118 Nev. 262, 44 P.3d 506 (2002) (“Simply because a court might order one party to pay child support to another in the exercise of its personal jurisdiction over the parties does not permit the court to extend its jurisdiction to the subject matters of child custody and visitation.” 118 Nev. at 275, 44 P.3d at 515); see also *Kulko v. California*, 436 U.S. 84, 91-92, 56 L. Ed. 2d 132, 98 S. Ct. 1690 (1978) (where a defendant is subject to a State’s jurisdiction, his rights in the matters ancillary to divorce may be determined by its courts); Prof. John J. Sampson, “UIFSA: Ten Years of Progress in Interstate Child Support Enforcement” (Legal Education Institute National CLE Conference on Family Law, Aspen, Colorado, 2003) at 184.

modification jurisdiction, and the law of that State might control child support awards and modifications.<sup>421</sup>

The public-policy disconnect is even more visible where the SCRA meets matters of child custody. Matters involving active-duty military personnel and custody proceedings are inherently problematic.

Where the military member is the custodial parent, there is authority indicating that the member can use the SCRA to stave off change-of-custody or contempt proceedings, even where the non-military parent is thus deprived of contact with the subject child for months, or even years.<sup>422</sup> Denial of contact has, however, been deemed important when it is the member making that assertion, requesting a stay of proceedings under the SCRA when the non-military spouse is the child's custodian.<sup>423</sup>

It is difficult to generalize. Courts have focused on the apparent tactics of the non-military spouse,<sup>424</sup> or on the apparent bad-faith conduct of the member<sup>425</sup> in reaching their decisions. The cases are – necessarily – very fact-specific.

As a theoretical matter, tactical filing of an SCRA request would apparently prevent a court from making a preliminary custody order, leaving no order in place for custody of a child for months at a time. Courts put in such situations have generally erred on protecting children,<sup>426</sup> but the statutory conflict is obvious.

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<sup>421</sup> *Amezquita v. Archuleta*, 101 Cal. App. 4<sup>th</sup> 1415; 124 Cal. Rptr. 2d 887 (Ct. App. 2002) (finding that New Mexico retained exclusive child support modification jurisdiction over member who had been stationed in California for five years).

<sup>422</sup> *See, e.g., Kline v. Kline*, 455 N.E.2d 407 (Ind. Ct. App. 1983); *Coburn v. Coburn*, 412 So. 2d 947 (Fla. Dist. Ct. App. 1982).

<sup>423</sup> *See, e.g., Williams v. Williams*, 552 So. 2d 531 (La. Ct. App. 1989).

<sup>424</sup> *Chaffey v. Chaffey*, 382 P.2d 365, 31 Cal. Rptr. 325 (Cal. 1963) (reversing trial court order changing custody where the non-custodian served a restraining order the day before a remote deployment, which put the member in an “impossible situation” of disobeying either the court order or his military orders). The court apparently did not consider viable the option that the member could have obeyed both, leaving the children with his former spouse while deploying, and seeking a restoral of custody when his military duties permitted.

<sup>425</sup> *Hibbard v. Hibbard*, 431 N.W.2d 637 (Neb. 1988) (member's long-standing violation of orders in denying visitation to former spouse substantiated denial of stay and granting of change of custody motion, where facts indicated that he could have participated in court action if he had wished to do so).

<sup>426</sup> *See, e.g., Ex Parte K.N.L.*, 872 So. 2d 868 (Ala. Civ. App. 2003) (refusing stay to member who placed child with new spouse immediately before deploying overseas and filing a stay motion, holding that the other parent's rights also merited protection, and that members should not be permitted to use the law enacted for their protection as “a vehicle of oppression or abuse” to deprive the other parent of custody).

Some courts have refused to permit the member to effectively transfer non-reviewable custody to a third party while staying the non-military parent's access to the courts for child custody.<sup>427</sup> In other contexts, courts have been much less sympathetic to arguments based on the parental preference doctrine.<sup>428</sup>

And the law is even more inclined to err in favor of the member in disputes relating to visitation and the substitution of third parties for the member's usual time. In Illinois, since World War II, the courts have decided that the SSCRA permitted granting fit relatives (at least grandparents) to exercise the child visitation previously enjoyed by a deployed military member.<sup>429</sup> Other States have similar case law.<sup>430</sup>

Some States have made such results a matter of statute. In Texas, Family Code Title 5, § 153.3161 explicitly permits a military member to designate a "stand-in" to take the member's place for parenting time scheduled for a time during which the member is deployed outside the U.S.; but § 156.105 describes such deployment as a "material and substantial change of circumstances sufficient to justify modification of an existing court order."

In Kentucky, the legislature decided in 2006 that any custodial change premised on member's deployment or activation is only a temporary order which "reverts" to the prior order upon return of the member; the Kentucky Supreme Court apparently approves of the statute.<sup>431</sup> Louisiana has enacted a "compensatory visitation" statute.<sup>432</sup> California prohibits use of military activation and deployment out of State from being used against a member in a custody or visitation case.<sup>433</sup>

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<sup>427</sup> *Lebo v. Lebo*, 886 So. 2d 491 (La. Ct. App. 2004).

<sup>428</sup> See, e.g., *Rayman v. Rayman*, 47 P.3d 413 (Kan. 2002) (in post-divorce context, leaving children in custody of step-mother while father went on unaccompanied tour to Korea).

<sup>429</sup> *Solomon v. Solomon*, 49 N.E.2d 807 (Ill. App. 1943); *IRMO Sullivan*, 795 N.E.2d 392 (Ill. App. 2003).

<sup>430</sup> See *McQuinn v. McQuinn*, 866 So. 2d 570 (Ala. Civ. pp. 2003) (permitting member to designate any member of his extended family while he was absent on active duty, and barring the non-military parent's right to interfere, at least where her complaints were made "without any particular reason"); *Webb v. Webb*, \_\_\_ P.3d \_\_\_, 2006 IDAHO LEXIS 152 (Idaho Opinion No. 106, Nov. 29, 2006) (approving delegation of visitation rights thru power of attorney to member's parents while member was deployed).

<sup>431</sup> See *Crouch v. Crouch*, 201 S.W.3d 463 (Ky. 2006) (discussing in part KRS 403.340(5)).

<sup>432</sup> LA R.S. 9:348 "Loss of visitation due to military service; compensatory visitation."

<sup>433</sup> Cal. Fam. Code § 3047 ("A party's absence, relocation, or failure to comply with custody and visitation orders shall not, by itself, be sufficient to justify a modification of a custody or visitation order if the reason for the absence, relocation, or failure to comply is the party's activation to military service and deployment out of state").

North Carolina went further than any other State in 2007 when it passed fairly sweeping legislation designed to “protect servicemembers.”<sup>434</sup> The new law allows expedited hearings upon the request of a servicemember, lets a court use electronic testimony when the servicemember is unavailable, allows a court to delegate the visitation rights of the servicemember to another family member, and requires that any temporary custody order entered upon a member’s deployment end within ten days of the member’s return, and that his or her absence due to deployment may not be used against the servicemember in a change of custody hearing. Other States are considering and passing similar laws.

The spate of State statutory enactments appear rooted in the patriotic fervor attendant to the U.S. wars in Afghanistan and Iraq, and the huge number of people affected by the rounds of deployments and activation of Reserve and Guard units. But such enactments take the focus off of the *child* involved in such cases, in apparent contradiction of the judicial policy that in making custody determinations, the court’s sole consideration is the best interest of the child,<sup>435</sup> which provides “the polestar for judicial decision.”<sup>436</sup>

For example, suppose parents divorced while a child was an infant, and had joint custody, but the military parent was subsequently deployed for a year or two, and then returned. A court required to indulge the fiction that the absence of that parent “may not be used against the servicemember” would be required to restore joint custody of an infant to a parent who would be a complete stranger to the child, irrespective of the child’s best interest.

Notwithstanding the protections for members, courts have been less than indulgent of attempts to use the SCRA as a tactical weapon. In *Lenser v. Lenser*,<sup>437</sup> the parties had separated, but did not yet have a custody order; the child was primarily living with the non-military spouse, but visiting briefly with the member. The Arkansas Supreme Court was unimpressed by the attempt of the member to transfer custody to the child’s grandmother by dropping her off there and seeking a stay.

The trial court entered a temporary custody order in favor of the other parent, but stayed the remainder of the case, over the objection of the member and the grandmother, who argued that the stay was “automatic” and prevented entry of a temporary custody order. The Supreme Court of Arkansas held that an SCRA stay does not “freeze” a case, leaving it in limbo indefinitely and allowing no authority for the trial court to act. Rather, the court found that a trial court could properly entertain the issue of temporary custody, even if the stay was in place when the issue was considered, on the basis that a child’s life cannot be put in

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<sup>434</sup> North Carolina House Bill 1634 (S.L. 2007-175).

<sup>435</sup> See *Ellis v. Carucci*, 123 Nev. Adv. Op. No. 18 (June 28, 2007).

<sup>436</sup> *Schwartz v. Schwartz*, 107 Nev. 378, 382, 812 P.2d 1268, 1272 (1991).

<sup>437</sup> 2004 Ark. LEXIS 490 (Ark. Sept. 16, 2004).

“suspended animation” awaiting the member’s return. For the same reason, the trial court was able to consider issues such as support.<sup>438</sup>

The availability of military Family Care Plans, which are required by military regulations to designate guardians for a child, also may not generally be used offensively, to cut off the right of a natural parent to seek or obtain temporary custody, at least until the member returns from deployment.<sup>439</sup>

There are mechanisms for dealing with members who legitimately have custody of dependent children outside the United States, but fail or refuse to return the children to the U.S. pursuant to a court order.<sup>440</sup> The various services have their own implementations of the directive, but the purpose and effect is to obtain compliance with court orders requiring the return to the United States of minor children who are the subject of court orders regarding custody or visitation.<sup>441</sup>

In some circumstances, such as where both parties have resided overseas for a substantial period of time, or the children were born in a foreign country, the best route to obtaining a legitimate order for custody might be through the courts of the foreign country. The Uniform Child Custody Jurisdiction and Enforcement Act recognizes many foreign countries as “States,”<sup>442</sup> and such orders may generally be registered and enforced in the United States.

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<sup>438</sup> *Id.*, citing *Jelks v. Jelks*, 207 Ark. 475, 181 S.W.2d 235 (1944) (in which the court stayed the divorce proceeding at the member’s request, but granted maintenance to the spouse pending trial).

<sup>439</sup> *See, e.g., Diffin v. Towne*, 3 Misc. 3d 1107A, 2004 N.Y. Misc. LEXIS 622 (May 21, 2004, unpublished) (a stay of proceedings is simply intended as a shield to protect servicemembers, not as a sword with which to deprive others of their rights); *In re Marriage of Grantham*, 698 N.W.2d 140 (Iowa 2005) (similarly, granting application of a stay under the SCRA but allowing placement or temporary custody of the child on an interim basis).

<sup>440</sup> DoD Instruction 5525.09 (Feb. 10, 2006); 32 C.F.R. Part 146.

<sup>441</sup> *See also* the International Parental Kidnapping Crime Act of 1993, 18 U.S.C. § 1204. Matters pertaining to “The Convention on the Civil Aspects of International Child Abduction, done at the Hague on 25 Oct. 1980” [commonly referred to as “the Hague Convention”], and its implementing legislation, the International Child Abduction Remedies Act (“ICARA”), 42 U.S.C. §§ 11601-11610, are beyond the scope of these materials.

<sup>442</sup> Basically, when the law of that country provide reasonable notice, the law in that country is substantially similar to the UCCJEA, and there is opportunity to be heard afforded to all affected persons. *See, e.g., Dorrity v. Dorrity*, 695 So. 2d 411 (Fla. Dist. Ct. App. 1997) (Germany was the proper venue to grant a custody order where the child had been born there, and mother and child had lived in Florida only six weeks before returning to Germany).

### C. The Special Problem of Divorce Decrees Entered in Foreign Countries as to Division of Military Retirement Benefits

Military-related divorce cases involving a court of some other country, as well as the federal and State law applicable to these cases, illustrate the principle of “the danger of unintended consequences.”<sup>443</sup> Given the enormous number of American service personnel stationed abroad in the past 50 years,<sup>444</sup> it seems almost certain that the number of actual persons affected is far higher than the relatively few published cases would indicate. Examining the facts of such a case can be highly instructive.

Jill Prevost married Tom Harms, a career military officer, in 1967. By 1984, when their marriage ended, they were living separately in Germany. Jill filed for divorce in Illinois (Tom’s legal residence) in March, 1984.<sup>445</sup> In May, Tom requested a stay pursuant to the Soldiers’ and Sailors’ Civil Relief Act. Tom filed a new action in the German court with jurisdiction over divorce actions at about that time, and the German court proceeded to judgment on questions of custody, visitation, support, and property division.

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

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

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

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<sup>443</sup> The principle that the ultimate application of any action or rule, however well-intentioned, may be to create a worse harm than the rule was itself designed to address. This is sometimes referred to as a branch of “applied Murphology.”

<sup>444</sup> Even in the post-cold war, post-draw-down world, there were about 295,000 personnel in foreign countries, and over 10,000 in U.S. territories or “special locations.” Given these numbers – which change constantly with policy shifts and changing world events – it would be remarkable if there were *not* a large number of marriages, and divorces, involving persons from more than one country, and possibly involving the courts of more than one country.

<sup>445</sup> Champaign County, Illinois, Case no. 84-C-290.

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

Jill appealed. The intermediate appellate court affirmed the lower court's dismissal on February 20, 1992.<sup>446</sup> That court found that under the Illinois constitution, the lower courts could only hear actions for division of property where the State legislature had explicitly given authority to do so, and that judgments of foreign countries could not be registered under the Uniform Enforcement of Foreign Judgments Act. The court rebuffed Jill's claim of jurisdiction under the USFSPA, without clearly explaining its reasoning. It expressed "concern" that its decision "leads to an inequitable result," but advocated only that "those who prepare uniform law proposals" should consider an enactment for undivided military retirement benefits.<sup>447</sup> Jill did not, or could not, appeal to the Illinois Supreme Court.

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

In 1994, Jill filed a federal court action through counsel in Virginia,<sup>448</sup> which is where both she and Tom then lived. The federal district court found "no federal jurisdiction, expressed or implied," to adjudicate the partition action Jill had brought.<sup>449</sup> The district court judge, obviously reluctant to say anything that might even imply an expansion of the role of the federal courts, held that the USFSPA "only allows courts to apply state divorce laws to military pensions." The court distinguished *Kirby v. Mellenger*<sup>450</sup> (discussed elsewhere at some length) as having been decided "in circumstances quite different from those at bar" because it was a diversity case instead of a federal question case. The court rather obliquely remarked that the result it reached "may be lamentable," but found dismissal was required as a matter of federal question jurisdiction.<sup>451</sup>

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<sup>446</sup> *In re Brown*, 587 N.E.2d 648 (Ill. Ct. App. 1992).

<sup>447</sup> Obviously unknown to the court, the officials at NCUSL (National Commission on Uniform State Laws) had refused to do any such thing when asked to do so in 1988, claiming that the problem was too "state specific" to be the subject of any uniform law proposal, and that State courts "clearly" had the power to deal with such situations.

<sup>448</sup> Phillip Schwartz, Esq., now of Schwartz & Associates, LLC, Attorneys and Counselors of International Law, 8221 Old Courthouse Road, Suite 101, Fairfax, VA 22182-3831 USA; (703) 883-8035.

<sup>449</sup> *Brown v. Harms*, 863 F. Supp. 278 (E.D. Va. 1994).

<sup>450</sup> *Kirby v. Mellenger*, 830 F.2d 176 (11th Cir. 1987).

<sup>451</sup> The same result has been reached by other federal district courts in reasonably similar circumstances. See, e.g., *Miller v. Umfleet*, No. SA-88-CA-769 (W.D. Tex., Sep. 1, 1991, slip opinion) (where military member had been transferred from Texas to another State by military orders, federal district court found no subject

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

The Virginia Supreme Court affirmed the "no written contract" finding, but reversed the lower court's finding that litigation was barred by the statute of limitations on the oral contract embodied in that decree, finding that the Illinois court simply lacked subject matter jurisdiction, and that the breach had not occurred until Tom retired in 1992.<sup>452</sup> The case was remanded.

On remand, through other counsel,<sup>453</sup> the case was transformed back into a domestic relations and equity case; motions were filed in chancery seeking specific performance of the oral contract expressed in the German decree, and in law, seeking damages. At that point, it disappeared from published authority.

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

*Harms* is remarkable, among other things, for the sheer tenacity of its litigants. Many similar cases are apparently resolved quickly and quietly, at least where one party does not oppose a correction to what is apparently conceded to be an inequitable result. For example, in *Stewart v. Gomez*,<sup>454</sup> the parties had been divorced in 1987 in England. The member, who arranged for the British divorce, had specifically assured the former spouse that he "was looking out for the best interest of" the spouse and their children and "specifically promised that when he retired" the former spouse "would receive a portion of the military retirement

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matter to exist under USFSPA or the Federal Declaratory Judgments Act, 28 U.S.C. § 2201, and a failure of "complete diversity"; the court further opined that the case would fit within the domestic relations exception to federal jurisdiction even if such jurisdiction had been established, although dismissal was self-described as done "not lightly").

<sup>452</sup> *Brown (Harms) v. Harms*, 467 S.E.2d 805 (Va. 1996).

<sup>453</sup> By the time of the appeal, Jill was represented by Timothy Hyland, Esq., of Lefler, Hyland & Thompson, 11320 Random Mills Road, Ste. 540, Fairfax, VA 22030-7499, (703) 293-9300. On remand, she was represented by David L. Duff, Esq., 11320 Random Hills Road, Ste. 525, Fairfax, VA 22030.

<sup>454</sup> Case No. D 156799, Eighth Judicial District Court, Clark County, Nevada, November 22, 1992.

benefits.” The member subsequently retired and moved to Nevada, but did nothing to ensure payments to the former spouse. The former spouse moved to South Carolina.

She filed a “Complaint for Partition of Omitted Property and Enforcement of Express Contract” in the Nevada courts. The member essentially ignored the action; default was granted, and the former spouse began receiving the promised share of the military retirement benefits.<sup>455</sup>

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

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

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

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

#### XIV. CONCLUSION

Military retirement benefits are so central to any divorce involving those assets that practitioners cannot afford to *not* know a great deal of the detail required to provide for their adequate disposition. It has become increasingly important for domestic relations

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<sup>455</sup> Mr. Sullivan has opined that such a judgment is not an “Order Incident to Decree” under the USFSPA. See HANDBOOK, *supra*, at 528 & n.283, citing *Carmody v. Secretary of the Navy*, 886 F.2d 678, 681 (4<sup>th</sup> Cir. 1989). That has not been my experience, however; if pleaded as set out here, such judgments have been accepted and enforced.

practitioners to learn all aspects of relevant retirement plans, and to develop appropriate valuations for those assets, with thoughtful written contingencies for all matters that could vary, including tax, survivorship, and related issues. Only then can counsel intelligently negotiate – or litigate – their clients’ interests in such retirement benefits.

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