MILITARY DIVORCE MISTAKES

I. FAILURE TO DETERMINE THE ACTIVE MILITARY STATUS OF THE PARTIES

In every petition for dissolution of marriage, if the petitioner or respondent is on active duty in the Uniformed Services, including the Army, Navy, Marine Corps, both active duty and reserves, members of the National Guard activated for more than 30 days, and commissioned officers of the Public Health Service and the National Oceanic and Atmospheric Administration then the military status of the member should be pled in the petition. This is so because if the servicemember, after being served with process, fails to file any response, then the court, before entering judgment, must require the plaintiff to file an affidavit with the court showing whether or not the defendant is in the military service and showing necessary facts to support the affidavit. 50 U.S.C. Appx. s521(a)-(b)(1)(B). The knowing filing of a false affidavit with respect to the respondent's military service is a federal crime. 50 U.S.C. Appx. 521(c). The affidavit should be signed by a person with personal knowledge, not the attorney representing the petitioner. In *Kaufman v. Kaufman*, 453 F.2d 206 (2d. Cir. 1971), a criminal case, the defendant was found guilty of filing 90 fraudulent affidavits of non-military service in connection with doing collection work for numerous New York retail stores and commercial companies. Default judgments were obtained, based on the false non-military affidavits. Defendant's convictions were affirmed.

If the petition fails to disclose the respondent's military status, it is possible that a default could be inadvertently entered. Such a default judgment is subject to being set aside if the servicemember has a meritorious defense to the action or some part of it, and his military service "materially affected" his ability to defend the action. The judgment is not void, but voidable. 50 U.S.C. Appx. 521(g)(1). This could occur many years later, after the member has left active service as the act tolls the time for such a motion to be filed while the member is on active service. Since the Servicemember's Civil Relief Act is liberally construed to effectuate the congressional purpose of protecting servicemember's who may be deployed in connection with national defense, a default judgment entered in violation of the act will likely be set aside. The act is to be liberally construed in favor of the member. Obviously the attorney who represented the plaintiff in such a matter was not familiar with the Act.

For a non-military affidavit see *Florida Family Law Form 12.912 (b). The form states that the affiant has inquired of the armed forces and the public health service to determine whether or not defendant is on active duty and that certificates stating that respondent is not on active service are attached. The affidavit is filed under penalties of perjury.*

For adoption practitioners, see *D and L.P. v. C.L.G. and A.R.L. 37 So. 3d 897 (Fla. 1 DCA 2010)* wherein the court, in dicta found that the tolling provisions of the Servicemember's Civil Relief Act are unconditional in the sense that they apply wherever the service member is deployed and regardless of his knowledge of the proceedings; once military service is shown, tolling is automatic. Thus the statute requiring an unmarried biological father to file a notarized claim of paternity in order to preserve the right to notice and consent to an adoption may be invalid against an active duty service member. *Servicemember's Civil Relief Act sec. 206(a), 50 App. U.S.C.A. sec. 526(a).*

PRACTICE POINTER:

It is a good idea to write to the Military Locator Service for each branch of military service involved, and the U.S. Public Health Service to obtain a certificate of non-military service and file this in the court file, if the parties have been physically separated for some time and you have any suspicion that an active duty member is the respondent.

II. FAILURE TO PIERCE THE SERVICEMEMBER'S CIVIL RELIEF ACT IN THE APPROPRIATE CASE

In many cases there is no question but that the respondent is on active duty in the armed forces or national guard but there are minor children involved and child support is not being paid after service of process of proper pleadings. In such a case the service member is most likely not entitled to a stay of proceedings due to bad faith. The Servicemember's Civil Relief Act is a shield, not a sword and failure to comply with family responsibilities is presumptive evidence of bad faith justifying denial of a motion for stay. *Robbins v. Robbins,* 193 So.2d. 471 (Fla. 2 DCA, 1967). Even so, the court must take care to make findings that the member's active service did not "materially affect" his ability to defend the action. In a temporary hearing regarding child support, the ability of the member to use technology, for example to appear by calling in or on videotape, is a pertinent consideration. *Massey v. Kim,*, 216 Ga. App.591, 455 SE 2d 306 (Ga. Ct. App. 1995), *Keefe v. Spangenberg*, 533 F. Supp. 49 (W.D. Okla. 1981). The parties should present to the court the military pay tables, which are a public record available at the DFAS website.

In the event of a custody dispute, the service member may very likely be entitled to a delay if he/she has filed a proper motion supported by affidavits showing material effect and the inability to take leave to attend the court proceeding. The court must make factual findings regarding the service member's ability to defend and the material affect of military service. Failure to do so is reversible error. *Coburn v. Coburn,* 412 So. 2d 947 (Fla. 3 DCA 1982), *Coleman v. Geathers,795 So. 2d 1092 (Fla. 4 DCA 2001).*

PRACTICE POINTER:

Each branch of service has regulations requiring member's to support their families. If the member is not providing any support, a letter should be written to the member's commanding officer detailing the facts and circumstances and the amount of support that has been provided. Car payments and credit card payments being made by the member on joint family obligations should be noted, to the extent that they may be considered current support. The member will be counseled, and in an extreme case, non-support can be "service discrediting" conduct warranting disciplinary action. The MILPERSMAN expresses a preference that family disputes be settled by agreement, or that the parties resolve these issues in court. The member should be encouraged to file his/her case in a court of law, if the marriage is irretrievably broken or to determine the

correct support amount, particularly if the member has a secret clearance or security position

PRACTICE POINTER NUMBER TWO:

In computing the amount of child support, normally you should include "allowances" under F.S. 61.30 such as BAH AND BAS. BAH is a monthly sum paid to members of the military who do not reside in government-supplied housing. *37 USC sec. 403 (a)(1), Army Regulation 37-104-4, sec. 12-1.* The amount of BAH, which is intended to offset the cost of civilian housing, varies according to the member's pay grade, geographic location, and dependency status. BAS is an additional monthly sum paid to active duty members to subsidize the cost of meals purchased for the benefit of the individual member on or off base. *37 USC sec. 402 (a)(1), Army Regulation 37-104-4, sec. 11-3.* The amount of BAS is based upon average food costs as determined by the federal government. BAH and BAS are tax free and normally should be included in the calculation of child support, unless in a particular case such as an extremely high housing cost area where the amount of income included perhaps should be less, in the discretion of the court. *Massey v. Evans, 886 N.Y.S. 2d 280, (NY App. Div. 4th Dept. 2009).* To my knowledge, there is no Florida case on point.

III. FAILURE TO PLEAD LONG-ARM JURISDICTION WHEN THE RESPONDENT IS PERSONALLY SERVED OUT OF THE STATE OF FLORIDA

This error can occur in any case where the respondent is being served with process out of state. FS 48.193 subjects certain persons, whether or not a resident of Florida to the jurisdiction of Florida courts if the do certain acts either personally or through an agent in Florida. In family law matters:

(c) Owning, using, possessing, or holding a mortgage or other lien on any real property within this state.

(e) With respect to a proceeding for alimony, child support, or division of property in connection with an action to dissolve a marriage or with respect to an independent action for support of dependents, maintaining a matrimonial domicile in this state at the time of the commencement of the action, or, if the defendant resided in this state preceding the commencement of the action, whether cohabiting during that time or not.

(h) With respect to a proceeding for paternity, engaging in the act of sexual intercourse within this state with respect to which a child may have been conceived.

(4) If the defendant in his pleadings demands affirmative relief on causes of action unrelated to the transaction forming the basis of the plaintiff's claim, the defendant shall thereafter in that action be subject to the jurisdiction of the court for any cause of action, regardless of its basis, which the plaintiff by amendment may assert against the defendant.

The long-arm statute has been construed to require the respondent's residence to proximately precede commencement of the action, and that proximity is to be determined in light of the totality of the circumstances. *Garrett v. Garrett,* 652 So. 2d 378 (Fla 1 DCA 1995, *approved* 668 So. 2d 991, *Shammay v. Shammay,* 491 So. 2d 284 (Fla. 3 DCA, 1986).

PRACTICE POINTER:

When a military family moves out of the state of Florida, one spouse, after separation, may not return to Florida and thus obtain personal jurisdiction over the other spouse based on the "prior residence" section of the long arm statute. When the military family moves from Florida, normally they have abandoned Florida as their state of residence and each spouse loses the protection of the long arm statute. *Garret v. Garret,* 668 So. 2d 991 (Fla. 1996).

PRACTICE POINTER #2:

There is a very good chance that the parties are involved in a "race to the courthouse". This scenario plays out with cases pending in two jurisdictions that have concurrent power or authority to resolve the family dispute.

In the event plaintiff fails to plead the long arm statute or the respondent's status as a Florida resident preceding the commencement of the action, service of process out of state is subject to a motion to quash as being void. *McCabe v. McCabe,* 600 So. 2d 1181 (Fla. 5 DCA 1992). In such a circumstance, the party who properly invoked the jurisdiction of the court will have won the race to the courthouse and that court will have jurisdiction over the case, because one attorney properly pled the case, and the other did not.

Given the nature of military service and the geographic moves military families make, this is a common scenario.

IV. FAILURE TO UNDERSTAND THE CIRCUMSTANCES IN WHICH A FLORIDA COURT CAN EXERCISE JURISDICTION OVER AN OUT OF STATE RESPONDENT

Often it is not a simple matter to determine whether or not the courts of the State of Florida can exercise jurisdiction over an out of state respondent. The analysis starts with the statute, 48.193 *supra,* and case law.

If the respondent owns a marital home in the state of Florida and the family resides there, and the custodial parent seeks relief with respect to the home and the minor children, there will in most

cases be long-arm jurisdiction and the respondent's residence in Florida will "proximately precede" the filing of the action under the "totality of circumstances test" even if the respondent relocated to another state as much as seven years prior to the filing of the action (as in *Durand v. Durand*, 569 So. 2d 838 (Fla. 3 DCA, 1990) or nearly twenty years in Farrell v. Farrell, 710 So.2d 151, (Fla. 3 DCA 1998) where a matrimonial domicile was established by the non-resident husband who visited the family on holidays.

However, in *Forrest v. Forrest*, 839 So. 2d 839 (Fla. 4 DCA 2003) the husband's one week stay in Florida was not sufficient to invoke jurisdiction, even though he purchased a home here and opened a bank account. The family went to Singapore to live where the husband was employed and the wife returned to Florida for knee surgery. While in Florida she filed for dissolution of marriage. She testified that the family intended to permanently reside in Florida after the husband finished his term of employment in Singapore. The wife did ask for exclusive use and possession of the home in her pleadings but still husband's connections to Florida were considered insufficient under the long arm statute.

**Query: Is there not an anomaly in the long-arm statute in that having sex in Florida provides jurisdiction over parties who may have come into the state for a few moments to conceive a child, but married persons have to establish a "matrimonial domicile" here proximately preceding the filing of the action?*

V. FAILURE TO UNDERSTAND THAT SERVICE OF PROCESS IN THE STATE OF FLORIDA IS SUFFICIENT TO CONFER PERSONAL JURISDICTION

Many practitioners are unaware that service of process on the respondent in the state of Florida is generally sufficient to confer personal jurisdiction. *Burnham v. Superior Court of California, County of Marin*, 495 U.S. 604, 110 S. Ct. 2105, 109 L.Ed. 631 (1990). However, it may not be sufficient to vest subject matter jurisdiction in the court to divide a military pension, which depends on domicile, residence unconnected to being stationed in the state, or consent by way of asking for affirmative relief.

VI. WHEN REPRESENTING THE NON-CUSTODIAL PARENT, FAILURE TO BE AWARE OF THE "LIMITED IMMUNITY" VISITATION LAW

61.510 Appearance and limited immunity

(1) A party to a child custody proceeding, including a modification proceeding, or a petitioner or respondent in a proceeding to enforce or register a child custody determination, is not subject to personal jurisdiction in this state for another proceeding or purpose solely by reason of having participated, or of having been physically present for the purpose of participating, in the proceeding.

(2) A person who is subject to personal jurisdiction in this state on a basis other than physical presence is not immune from service of process in this state. A party present in this state who is subject to the jurisdiction of another state is not immune from service of process allowable unde the laws of that state.

(3) The immunity granted by subsection (1) does not extend to civil litigation based on an act unrelated to the participation in a proceeding under this part which was committed by an individual while present in this state.

In representing, the non-custodial spouse seeking visitation with minor children residing in Florida, there is "limited immunity" under Florida's Uniform Child Custody Jurisdiction and Enforcement Act such that the non-resident parent can file an action for visitation in Florida and come to Florida for a court proceeding connected thereto. If the statute is carefully followed, the non-custodial parent can obtain his visitation order, come to Florida to pick up and return the children, and have limited immunity from service or process. For the statute to work, counsel must carefully coordinate any visit to Florida with his client to a court proceeding requesting visitation. Otherwise, the client may be served in state under *Burnham*, and jurisdiction thereby obtained.

VII. FAILURE TO EFFECT SERVICE OF PROCESS ON THE ACTIVE DUTY MEMBER IN ACCORDANCE WITH MILITARY REGULATIONS

Each branch of the uniformed services issues regulations concerning service of process upon active duty members. For example, the Manual of the Judge Advocate General (JAGMAN), Department of the Navy, provides, in summary, the following:

SERVICE OF PROCESS WITHIN THE UNITED STATES

Commanding Officers Afloat and Ashore- These commanding officers may permit service of process of federal or state courts upon members, civilian employees, dependents, or contractors residing at or located on a naval installation. Service of process shall not be made without the consent of the commanding officer. Other limitations apply:

In State Process-

Civil process originating from a state or federal court from the jurisdiction where the naval station or ship is located will ordinarily be permitted to be served, unless the base or ship is in an area under exclusive federal jurisdiction.

Out of State Process-

Civil process which originates from a state or jurisdiction other than that of where the command is located.

In such a case, the respondent is not required to accept the process. The process server need not be brought face-to-face with the respondent to be served. The respondent will be notified that the process has been issued, and the respondent can choose whether or not to accept it. See Navy JAG Manuel, section 0616 (March, 2004).

SERVICE OF PROCESS OUTSIDE THE UNITED STATES

Process of State Courts-

In this instance, the respondent will be notified and asked if he wishes to accept service of process voluntarily. If the respondent will not accept process voluntarily, the party requesting service will be notified and advised to follow the procedures prescribed by law of the foreign country concerned. See, *for example*, The Hague Convention, reprinted in Federal Rules of Procedure, after Rule 4. However, if the respondent is in a country that is not a signatory of the Hague Convention, research will have to be done to determine how to serve the respondent under the law of that nation. *See 32 CFR Ch. V (7-1-07 Edition) Department of the Army.*

VIII. NOT BEING FAMILER WITH THE HAGUE CONVENTION ON SERVICE OF PROCESS ABROAD

Attempting to by-pass the Hague Convention with respect to service of process outside of the United States constitutes mistake #8. In theory, an international incident may result.

Not many attorneys regularly use the Hague Convention. It is known as the Convention of the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters. It can be found in Martindale Hubbell, along with the necessary forms to be sent to the "Central Authority". The convention is an international treaty and was adopted at the Hague in 1965 and became effective February 10, 1969. The text of the treaty is reprinted at 28 U.S.C.A. Fed. R. Civ. P. 4 (Supp. 1985).

Under F.S 48. 194 (West, 1994) service of process on persons outside the United States may be required to conform to the requirements of the Hague Convention. Since the Hague Convention is an international treaty, it is the supreme law of the land and "trumps" procedural rules with respect to service of process. *Macivor vs. Volvo Penta of America* 471 So. 2d 187, (Fla. 3 DCA 1985), *Semet, Lickstein, Morgonstern, et. al vs. Sawada*, 643 So. 2d 1188, (Fla. 3 DCA 1994). The documents will have to be translated into German, Japanese, Italian, or other appropriate native language, even if the respondent speaks none of these.
It is error to impose via state law, additional requirements and certified mail service may be acceptable, so long as valid under the law of a signatory country. See in general *Am. Jur. 2d, Process, section 321-330.*

IX. FORGETTING TO DISTRIBUTE THE MILITARY PENSION OR PICKING THE WRONG DATE TO VALUE THE MILITARY PENSION

Surprisingly, many practitioners are not aware of the value of a military pension after twenty years or more of service. Typically, it is the most valuable asset in a long term military marriage. According to recent pay tables, an E-6 (Petty Officer First Class, Staff Sgt, Tech Sgt.)with 27 years of military service will receive about $2,147.00 per month in taxable retirement benefits, and an 0-6 (Captain, Colonel) will receive about $6,034.00 per month. Assuming the parties are 50 years old at retirement and assuming a life expectancy of another 35 years, one half of the value of the pension in the enlisted case is about $386,460.00 and $1,086,120.00, in the 0-6 case, respectively, not reduced to present value. Thus failure to properly distribute the military pension or receive proper consideration for waiving the same is a serious error that cannot be corrected after final judgment, in the great majority of cases.

In Florida, pursuant to FS 61.076 (1988) all vested and non-vested pensions or retirement benefits are marital property and must be considered in the equitable distribution scheme in court.

PRACTICE POINTER: VALUATION:

For purposes of valuation, in the absence of a valid separation agreement, section F.S.61.075(6) (2005) provides a bright line rule for setting the date to be used in determining the marital classification of assets and liabilities. The cut of date is the date of the filing of the petition for dissolution of marriage. Thus all retirement points earned on a military pension after the date of filing are non-marital. *Willman v. Willman,* 944 So.2d 1151 (Fla. 1 DCA 2006). In cases where the member is still on active duty, the pension value should be limited to the rank and years of service of the member as of the date of filing. *Lawrence, infra.*

X. DISTRIBUTING THE MILITARY PENSION BUT WITH AN UNQUALIFIED ORDER

This is a very common error that can be easily avoided. What one must remember is to distribute the pension, if possible with a FIXED DOLLAR AMOUNT OR AS A PERCENTAGE. Excepting certain formula orders in this discussion, the Former Spouse Protection Act in 10 U.S.C. sec. 1408 and FS 61.076 require FIXED DOLLAR AMOUNT OR PERCENTAGE ORDERS. A fixed dollar amount is simple but has the disadvantage of not including automatic cost of living increases, (COLA). A separate check would have to be sent say annually by the retired member or front loaded in the settlement. A percentage is advisable if all facts are known and the member is retired, in pay status. In that event COLA is automatic. But a percentage of what. What is the asset that is being divided? Or, how is the military pension defined?

HERE ARE THE MAGIC WORDS:

"DISPOSABLE RETIRED OR RETAINER PAY"

Herein DRRP. DRRP means gross pay less:

1. Debts owed to the US Government,
2. Amounts waived to receive a service connected disability,
3. Survivor Benefit Plan Premium for the spouse getting a share of the pension

See 10 U.S.C. sec. 1408 (a)(4)

Each side will pay their own taxes and be issued a 1099 at the end of the year. Each side will fill out a tax withholding form for Defense Finance and Accounting Center.

FORMULA ORDERS- DFAS has approved certain formula orders-in general the item that is not known when the member is on active duty and the pension is not in pay status is the denominator of the fraction; i.e. the total number of years and months of military service. DFAS will plug that number into the formula and an "order acceptable for processing" can be drafted prior to the member's retirement.

Failure to draft a "qualified military order" on day one or using language subject to interpretation means that the parties may litigate the meaning of their agreement after DFAS rejects the "nonqualified" military order. Such litigation can be time consuming and expensive.

Here is an example of language used by the parties creating an "unqualified order" resulting in very expensive post judgment litigation:

"Military Retirement- The husband is a beneficiary of a retirement plan with the United States National Guard. The wife is entitled (after the reduction for the SBP premium) to a 37.5 percent interest in the retirement plan as it relates to an E-7 pay scale and the Husband is entitled to the remaining payment of the retirement benefits. The marital portion of the pension accrued from the party's date of marriage, August 22, 1969, until the party's date of separation, May 1, 1994."

Note the problems-

1. Not a fixed dollar amount;
2. Not a percentage;
3. Disposable retired pay not mentioned;
4. E-7 pay scale-what year? Is it 1994 or the date the parties signed the agreement in 2000?
5. What about enhancements to the pension between 1994 and the year 2000 when the parties signed the agreement?

This language was rejected by Defense Finance and Accounting Service and the parties dispute

the meaning of the language. Motion For Summary Judgment denied. Neither party understands the language and the court suggested hiring an expert. An independent action could be filed to set aside the entire marital settlement agreement. Seven years has passed since the entry of the final judgment.

PRACTICE POINTER; SAMPLE QUALIFIED MILITARY ORDER

IN THE CIRCUIT COURT OF THE STATE OF FLORIDA, COUNTY OF ORANGE

CASE NO: 2010-0000

IN RE: THE MARRIAGE OF:

JOHN JONES,

And

MARY JONES

----------/

QUALIFIED MILITARY ORDER

THIS CAUSE came before me for trial and the court having taken the testimony of the parties and received documents into evidence finds and decides as follows:

1. The petitioner's social security number is: _____.

2. The respondent's social security number is: _____.

3. The parties were married on June 1, 1990. Their marital status was terminated on January 1, 2011 by final order of this court entered in Orange County, Florida. This order is entered incident to the aforementioned order.

4. The parties were married for a period of ten or more years during which time the petitioner performed at least ten years of creditable military service.

5. If the military member was on active duty at the time of this order, petitioner's rights under the Servicemember's Civil Relief Act, 50 U.S.C. App. 501-548 and 560-591, have been observed and honored.

6. This court has jurisdiction over the petitioner by reason of (choose those that apply) (A) his or her residence, other than because of military assignment, in the territorial jurisdiction of the

court, during the (divorce, dissolution, annulment, or legal separation) proceeding, (B) his or her domicile in the territorial jurisdiction of the court during the (divorce, dissolution, annulment, or legal separation) proceeding, or C his or her consent to the jurisdiction of the court. (*issue of state law; request for affirmative relief).

CONCLUSIONS OF LAW:

1. The court has jurisdiction over the subject matter of this action and the parties hereto.

2. Respondent is entitled to a portion of petitioner's military retired pay as set forth herein.

IT IS THEREFORE ORDERED THAT:

3. The respondent wife is hereby awarded, as equitable distribution of property 50% of the member's disposable retired pay. (Percentage awards include cost of living allowances).

OR

(Active duty formula)

4. The former spouse is awarded a percentage of the member's disposable military retired pay, to be computed by multiplying 50% times a fraction, the numerator of which is 240 months of marriage during the member's credible military service, divided by the member's total number of months of credible military service.

OR

(Reserve formula)

5. The former spouse is awarded a percentage of the member's disposable military retired pay, to be computed by multiplying 50% times a fraction, the numerator of which is _____ Reserve retirement points earned during the period of the marriage, divided by the total number of Reserve retirement points earned.

OR

(Active duty hypothetical calculated as of time of division, for all members, regardless of service entry date)

6. The former spouse is awarded ___% of the disposable military retired pay the member would have received has the member retired with a retired pay base of ____ and with ____ years of credible service on _____.

DONE AND ORDERED at Orlando, Florida this ___ day of January, 2011.

CIRCUIT JUDGE

**Complex hypothetical formulas omitted from this sample order.*

XI. NOT BEING FAMILIER WITH DEPARTMENT OF DEFENSE REGULATIONS AFFECTING EQUITABLE DISTRIBUTION AND SUPPORT ORDERS

There have been issued updated regulations significantly affecting former spouse payments from military retired pay and new forms issued. See Volume 7B, Chapter 29, DoD Financial Management Regulations, February, 2009.

BRIEF SUMMARY OF CHANGES:

Alimony: Clarified that the definition of alimony includes attorneys fees, interest, and court costs. Alimony arrearages cannot be collected from retired pay.

Child Support: Clarified that the definition includes costs for health care, arrearages, interest, penalties, and related relief.

Court Orders: Clarifies that an order termed a QDRO, if otherwise in proper form, will be accepted.

Creditable Military Service: Clarifies that CMS means service counted towards the entitlement to receive military retired pay.

*Property Division Other Than Retired Pay: A former spouse can collect a property division, other than a retired pay award, by garnishment, if the order awards it to the former spouse and if the former spouse was also awarded alimony, child support, or a division of retired pay.

Administrative Appeal Provision: If the retired member can show that the court order attempting to divide his retired pay is defective, or has been amended, appealed, or set aside, DFAS will not start the payments. Defenses would include lack of personal or subject matter jurisdiction, compliance with the 10/10 rule, and violation of the Servicemember's Civil Relief Act.

SBP Premium: The court order must state that it is being deducted from the member's retired pay. It cannot say it is being deducted from the former spouse's portion of the member's retired

pay.

Disposable Retired Pay Deductions: Clarifies that only those deductions authorized by law will be honored such as amounts owed the United States, fines and forfeitures ordered by a court-martial, amounts waived to receive compensation under Title 5 or 38 of the United States Code, SBP premiums for the spouse applying for a retired pay award. Provisions providing for other deductions such as for private life insurance premium are unenforceable.

Payment Limitations: 50% for payments of retirement benefits only. If there is a retirement division and garnishment support, up to 65% of the members disposable earnings calculated IAW 42 U.S.C.A. 659.

COLA- Automatically follows a percentage award, not a fixed dollar amount award.
Former Spouse's retired pay award cannot be garnished, even for child support owed to the member.

XII. THE VA WAIVER NIGHTMARE; NO INDEMNIFICATION PROVISION, NO ALIMONY, MEMBER RETIRES OVERSEAS

Assuming that the parties did divide "disposable retirement pay" correctly with a fixed dollar amount order or a percentage order, problems may arise post-judgment. These problems occur when the member has a service connected disability that was "latent" at the time the dissolution of marriage occurred because the member was on active duty or it did not manifest itself until several years after final judgment. In such cases, the member can apply for a "service connected disability" and receive a tax free "pension" or "disability benefit" from the Department of Veteran's Affairs. However, under the law, if the disability is less than 50%, the member must waive, dollar for dollar the "regular" pension in exchange for the "disability waiver" amount. By doing so, the former spouse will lose from her portion of the pension, one half of the amount waived by the veteran to receive his tax free disability check. The former spouse will cry foul at the reduction of her share post judgment, which constitutes a unilateral modification of the property settlement post-judgment by the member. If the marital judgment contains a indemnification clause, requiring the member to not waive the regular retirement in such a fashion as to reduce wife's share of the regular retirement, the case is solvable, particularly if alimony was awarded or jurisdiction retained to do so. *Abernethy v. Fishkin*, 699 So. 2d 235 (Fla. 1995). In the event there is no indemnification provision, more than one Florida court has granted relief to the non-military spouse. See *Longanecker v. Longanecker,* 782 So. 2d 406 (Fla. 2 DCA 2001), *Janovic v. Janovic*, 814 So. 2d 1096 (Fla. 1 DCA 2002), *Padot v. Padot,*, 891 So. 2d 1079 (Fla. 2 DCA 2004), *Blann v. Blann* (Fla. 1 DCA 2007). However, if the member has retired overseas, there may be no effective solution. For certain concurrent receipt cases, there is a solution for the non-military spouse.

XIII. TAKING A DEFAULT AND DIVIDING A MILITARY PENSION AGAINST A

RETIRED MEMBER NOT A RESIDENT OF FLORIDA

Under 10 U.S.C. sec. 1408 federal pension jurisdiction only exists if the member is:

1 A resident of the state, but not due solely to military orders,
2. A domiciliary of the state;
3. He consents to jurisdiction as by signing a marital settlement agreement or asking for affirmative relief in state court.

In a case where the retired member fails to participate in any fashion in the case and a default is taken, and the pension is distributed pursuant to the default without affirmative proof of pension jurisdiction, a most interesting problem arises. First, the member may attack jurisdiction administratively at DFAS, submitting proof, for example, that he has a New York drivers's license, real estate, and voted in New York on a regular basis. In short, he may prove he is a New York resident. The wife may then sue in New York and be met with the argument that Florida already distributed the pension pursuant to a default and that the matter has already been decided and is "res judicata". Should this argument succeed, the wife will be out of luck and have a pension division order from Florida that is not enforceable. For a similar example see *The Military Divorce Handbook, Mark Sullivan, Esquire, 2007.* (Available from the American Bar Association, Family Law Section).

Query: If Florida lacked jurisdiction, is it really res judicata?

NOTE: However, if the state in which the retired member is a resident and domiciliary lacks an "omitted asset" statute allowing partition of the military retirement, this would be another basis to deny relief to the former spouse later seeking a portion of the military retirement. *See F.S. 61.075* for Florida's "omitted asset" statute.

In any event, client will be very unhappy with all the fees spent.

XIV. USING THE WRONG COVERTURE FRACTION TO DIVIDE A MILITARY PENSION

Normally when one divides a military pension, or any pension for that matter, we divide it if, as, and when the pension participant receives it. This is known as the "deferred distribution method" and is discussed at length in *Deloach v. Deloach*, 590 So. 2d 956 (Fla. 1 DCA 1991), *disapproved on other grounds* 703 So. 2d 451. The so- called Deloach formula, which is not mandatory is as follows:

MONTHS OF MARRIAGE

MONTHS OF MILITARY SERVICE =

PERCENTAGE OF FUTURE MONTHLY RETIREMENT PAYMENTS EARNED DURING THE MARRIAGE

X

½ OF MILITARY MEMBER'S DISPOSABLE RETIRED OR RETAINER PAY AS DEFINED BY LAW

However, this formula will award to the non-military spouse a "smaller piece of a bigger pie" in a case where the member is on active duty and the pension is not in pay status. It will also award to the non-military spouse non-marital enhancements to the military pension based upon time in grade and promotions, which under Florida law, are considered non-marital. In many jurisdictions, these enhancements are considered to be the product of a "foundation of marital effort" but this theory has not been accepted by Florida courts. In Florida, the amount of a retirement plan available for equitable distribution may not include any contributions made after the date of the original judgment of dissolution of marriage. *Boyett v. Boyett*, 703 So. 2d 451 (Fla. 1998). Therefore, amounts attributable to time in grade and promotions which occur after dissolution should be excluded from equitable distribution. *Lawrence v. Lawrence*, 904 So. 2d 445 (Fla. 3 DCA, 2005). These amounts may not be insignificant. For example, according to the *2009 Retired Military Almanac*, a retired army Lt. Col. or Navy Commander with 20 years of military service receives $3,524.00 in pension benefits monthly. However a retired full army Colonel or Navy Captain with 27 years of military service receives $6,034.00 in retirement benefits per month, a difference of $2,510.00 per month or $30,120.00 per year. Thus failure to properly value a military pension can be a costly error for the military member or an unwarranted benefit for the receiving spouse.

THE CORRECT COVERTURE FRACTION IN FLORIDA IS:

50% OF THE FOLLOWING:

"DISPOSABLE RETIRED PAY" AS A LT. COL/CDR WITH 20 YRS. SERVICE TIMES A FRACTION.....

YEARS OF MARITAL PENSION SERVICE
---
20 years service (Normal vesting date)

This fraction excludes non-marital promotion and longevity enhancements consistent with *Boyett*

and Lawrence. In the event there is less than 20 years service, we still use 20 years as the denominator because 20 years is the normal vesting date.

XV. USING THE WRONG COVERTURE FRACTION IN A RESERVE PENSION DIVISION

This is another common error. There are many Army, Navy, Marine Corps, and National Guard reservists. These soldier's used to be called "weekend warriors" because they drilled one weekend per month and perhaps two weeks during the summer. They commonly earned only 60 retirement points per year and are eligible to retire after twenty "good" years but do not receive a retirement check until age 60. A soldier or sailor on active duty who enlisted at age 18 may retire after 20 years active service and receive a retirement check at age 38 for the rest of his or her natural life. However, a reservist drilling on weekends and going on active duty for two weeks per year normally receives a retirement check commencing at age 60. Nowadays, the role of the reserve component forces is greatly increased and it is not uncommon for reservists to be activated for long periods of time so that their military service can more closely resemble that of active duty forces. There may be a combination of active duty years where the reservist was on active duty 356 days per year and there may be other years where the member only earned 60 points. There may be "bad years" where the member did not earn enough points to qualify that year for retirement as a "good year" but the points themselves are added to the total of points earned by the reservist.

In dealing with a reserve retirement, you must obtain the "point record" and determine how many retirement points were earned during the marriage. Often there is a period of non-marital active duty generating 365 points a year for four or more years which must be excluded. The coverture fraction is:

MARITAL RETIREMENT POINTS
---------- DIVIDED BY TWO=
TOTAL RETIREMENT POINTS

WIFE'S PERCENTAGE OF RETIREMENT POINTS X DISPOSABLE RETIRED PAY

Thus you can see that using months of marriage and months of service would result in an inaccurate fraction, because the retirement points earned are often different in each year of service.

XVI. USING IMMEDIATE OFFSET IN AN ASSET CASE; THAT IS GIVING ONE

PARTY THE HOUSE AND OTHER ACCOUNTS IN EXCHANGE FOR THE PENSION

In many military-related dissolution of marriage cases, we are dealing with long term marriages in excess of thirty years and parties have houses, businesses, and other significant assets. Although normally we divide pensions "if, as, and when" this traditionally was done because there were no other significant offsetting assets in the case. However, if there are other assets, the preferred approach under *Deloach* and other cases historically was to separate the parties financially and for all time to prevent further litigation and to bring finality to the case. To do so, a pension had to be valued by a qualified actuary and competent evidence presented to the court or during mediation. To accomplish "immediate offset" and to "trade" a military pension for another significant asset, the pension must be reduced to present value. A senior officer's pension with say 27 years of active service (Navy Captain, Army Colonel; i.e. 06) is worth in the 1.5 million dollars range, reduced to present value. With the recent decision of *Acker v. Acker, 904 So.2d 384 (Fla. 2005)* immediate offset has to be reconsidered. *Acker* teaches that once pension assets are equitably distributed, the court may consider those assets distributed to a party in determining ability to pay alimony. Thus it is entirely possible that hard assets could be distributed to a wife, she could spend those assets, incur a medical condition, and return to court for an award of alimony payable from the military pension which was theoretically equitably distributed to the husband.
The true impact of *Acker* is yet to be tested in the reported cases and this subject needs to be debated intently by the matrimonial bar.

XVII.WHEN REPRESENTING THE MILITARY MEMBER, FAILING TO CONSIDER PENSION DEFENSES

There are several pension defenses available which should be considered, among them:

1. No jurisdiction under FSPA, discussed *supra,*
2. Your client has a bona fide disability and cannot work. He is rated at 50% disability but has not been able to secure employment and needs the pension to survive. Not he has a disability on paper and can make $30,000.00 or more annually at a civilian job. The court has discretion to not award wife a portion of the regular pension if needed for the support of the disabled veteran.
3. Your client may have ten years service and decide he has no obligation to complete twenty years of military service, only to have wife (or dependent husband) receive 25% of the disposable retired pay when he/she retires
4. Your client is a bona fide resident of Puerto Rico where they do not divide military pensions.
5. Your client lives in a foreign land and there is only 9 years of marital pension service; i.e. no direct payments possible and no contempt- should this be used as a bargaining tool?
6. Your client is dead, no pension.

XVIII. FORGETTING TO INSURE THE MILITARY PENSION AND MEMBER DIES OR INSURING THE PENSION WITH SBP BUT FAILING TO PERFECT IT

The basic point to be aware of is that a military pension stops or terminates upon the death of the retired member. Thus if it is not insured, the wife's payments will stop. If the parties were married when the member retired, federal law requires the member to elect survivor benefit plan at the maximum rate for his wife, unless the parties agree in writing to waive the benefit or elect a lesser rate of coverage. The "maximum rate" means that the surviving spouse will receive 55% of the base amount of retirement pay, plus COLA, in the event of the retired member's predeceasing his spouse.

However, upon dissolution of marriage, the spouse becomes a "former spouse" and is not covered with SBP, UNLESS YOU OBTAIN A COURT ORDER NAMING THE FORMER SPOUSE AS THE IRREVOKABLE FORMER SPOUSE BENEFICIARY OF SURVIVOR BENEFIT PLAN AT THE MAXIMUM RATE AND PERFECT THE COURT ORDER BY SERVING IT AND THE "DEEMED ELECTION" FORM ON DFAS WITHIN ONE YEAR OF THE DATE OF DISSOLUTION OF MARRIAGE. *See 10 U.S.C. sections 1447 and 1448; 10 U.S.C. 1448 (d)(3)(B).*

Note that in a case where SBP was elected at retirement, if you fail to serve the "deemed election" form within one year and the member remarries, his new wife automatically becomes the beneficiary of SBP! *10 U.S.C. 1448(a)(6); 2007 Retired Military Almanac, page 216. (YWPA; Younger Wife Protection Act or YSPA, Younger Spouse Protection Act).*

The failure to lock or secure former spouse SBP is one of the worst errors counsel can make, and one of the most frequent. Be aware that although there are often "open election" windows for SBP, they cannot be court ordered. *See Pub. L. 106-65, October, 1999.*

In the event of the premature death of the member and the new wife getting SBP, a sure case of legal malpractice exists.

If you discover the former spouse SBP error while all parties are alive, and the member violated the court order to provide former spouse SBP, reconfiguration may apply.

PRACTICE POINTER: THE REMEDY OF RECONFIGURATION

In <u>*Heldmyer v. Heldmyer*</u>, 555 So. 2d 1324 (Fla. 5 DCA, 1990), a case that was appealed several times, the court had ordered that the husband name his wife as irrevocable survivor benefit plan beneficiary after a change in federal law allowing a state court to order a husband to name his wife as beneficiary of SBP. (*10 U.S.C. sec. 1447-55; if a divorce occurs on or after November 14, 1986, a court may order a member or retiree to provide SBP protection to a former spouse).* However, while the case was on appeal the husband remarried and designated his second wife as beneficiary of SBP. The court said:

"It is now impossible for the trial court to enter an order requiring the deceased husband to

designate Nancy the survivor of the military pension. To compensate Nancy for this loss, we remand to the trial court for a determination of the valuation of Nancy's portion of the military pension, and for a full and complete reevaluation of the property distribution of the parties as of the date of the original judgment of dissolution. Nancy is to be compensated for the loss of her portion of the pension from property awarded to Harry. If the value of the marital property is insufficient to compensate Nancy for her loss of the pension, the trial court may enter a judgment for the balance, enforceable against Harry's non-marital assets, now a part of Harry's estate."

For a more recent case involving the failure or lapse of survivor benefit plan, and the authority of a trial court to reopen equitable distribution in an appropriate case see *Wise v. Wise,* 768 So. 2d 1076 (Fla. 1 DCA, 2000).

These cases stand for the proposition that a court can actually revisit the equitable distribution scheme and "reconfigure" it to compensate a former spouse for the value of the lost benefit. It may in that event be necessary to hire an actuary to value the lost SBP, using mortality tables and the like. One can be certain that convincing the court to "start over" and reconfigure equitable distribution will not be automatic, and it is possible that assets will have been transferred to third parties to avoid such reconfiguration.

PRACTICE POINTER:

Note that the one year period to serve the "deemed election" form does not necessarily run from the date of the dissolution of marriage. Rather, the one year period runs from the date of the first court order that imposes the substantive obligation to elect former spouse survivor benefit plan. Thus, if the final judgment of dissolution of marriage silent as to SBP, but a later valid court order imposes the SBP obligation in the first instance, the one year period will run from the later order.

See Matter of Colonel William F. Magill, Appeal From DFAS to U.S. Government Accountability Office, September 2, 1992.
See also Claims Appeals Board Decision no. 99102801.

BONUS PRACTICE POINTER:

If the appropriate Board For Correction of Military Records corrects the member's record to indicate that he elected former spouse SBP for his former spouse within the one-year period, that decision will be binding on all government officers, including the Claims Appeals Board. However, to do so will likely take the consent of the member's current spouse.

BONUS PRACTICE POINTER NUMBER 2:

NUNC PRO TUNC ORDERS- Which are entered to “get around” the one year deemed election rule will not be accepted. *See Sikes, Comptroller General of the United States, 1993.*

DOUBLE BONUS PRACTICE POINTER NUMBER 3:

Make sure you use the relatively new “deemed election” form instead of a letter which practitioners used for years. Make sure the certified mail receipt green card is kept in a safe place. *(DD-Form 2656-10, JUN 2008).*

XIX. IN A LONG TERM MARRIAGE, YOUR CLIENT, SPOUSE OF THE MEMBER HAS SBP BUT IN THE DIVORCE CASE SBP IS NOT CONVERTED TO “IRREVOKABLE FORMER SPOUSE SBP AT THE MAXIMUM RATE.

This is a common mistake. At the time of the member’s retirement he is married and, after March 1, 1986 is required to elect spousal SBP at the maximum rate unless his spouse agrees to a lesser amount or to waive SBP. (*See P.L. 99-145, 99 Stat. 676, 677)* The maximum SBP provides the surviving spouse with 55% of the member’s retired pay if he should predecease her and is inflation adjusted. The common error is for counsel to assume that SBP is an asset that automatically continues after the dissolution of marriage when in fact “former spouse SBP” must be ordered by the court.

XX. SBP IS ORDERED, BUT AN ATTEMPT IS MADE TO MAKE THE WIFE PAY THE PREMIUM THUS RESULTING IN A NON-QUALIFED SBP ORDER

It is often the case that the member has no objection to former spouse SBP but demands language that the wife can have SBP but she must pay the premium. The premium is, in general, 6.5% of the base amount of retired pay selected to be insured. Thus if the base amount of retired pay is $3000 per month, the SBP premium is $195.00 per month. SBP premiums must be deducted from gross retirement pay in arriving at “disposable retirement pay” and cannot be shifted to one party or the other except by manipulating the percentage of “disposable retirement pay” the wife should receive. If an attempt is made to have the wife pay the SBP premium to DFAS, the SBP order will be unacceptable for processing and have to be amended; often resulting in expensive litigation.

XXI. PRIVATE LIFE INSURANCE IS USED TO INSURE THE MILITARY PENSION WITHOUT UNDERSTANDING THE BENEFITS OF FORMER SPOUSE SBP.

During mediation or settlement negotiations, spousal SBP may be in place but the husband is arguing about the cost of the benefit. He suggests that private life insurance be used to insure the military pension. The cost of private insurance is less. The wife needs to understand that there are advantages to SBP such as:

NO QUALIFYING

PREMIUM REMAINS FIXED AND IS PAID UP AFTER 30 YEARS;

INFLATION PROTECTED WITH COLA

BACKED BY U.S. GOVERNMENT

Insurance premiums for a man of 60 years are often not affordable and pre-existing conditions may make one uninsurable.

XXII. INSURING THE MILITARY PENSION WITH SERVICEMENS'S GROUP LIFE INSURANCE (WAR INSURANCE)

Normally active duty and reserve member's have available to them $400,000.00 of SGLI providing a death benefit of $400,000.00. However, under a United States Supreme Court case this form of "war insurance" cannot be regulated by a mere state court order. Even if the member has signed a marital settlement agreement agreeing to provide SGLI, the agreement is absolutely void and lawsuits seeking to impose a constructive trust on the insurance proceeds on a theory of fraud or negligence have routinely failed. The courts have found that Congress intended service member's have the right, as a morale booster needed during the Vietnam war, to change beneficiaries on the battlefield irrespective of court orders entered back home. *Ridgway v. Ridgway*, 454 U.S. 46, 102 S. Ct. 49, 70 L. Ed. 2d 39 (1981). *Ridgway* is still good law. See *Dohnalik v. Somner*, 467 F. 3D 488 (5th Cir. 2006), *44A Am. Jur. 2d Insurance, sec. 1879 (July 2010), 6 C.J.S. Armed Services, sec. 246, Insurance (Westlaw, 2010).*

Thus the member is free to change the SGLI designation at any time, despite his agreement not to do so and a state court order. Should the member do so, and then be killed in a war zone or elsewhere, the pension is left uninsured for the former spouse. It is possible in this scenario for a new spouse to get the SBP as the surviving spouse of a soldier entitled to retirement pay who died while on active duty.

PRACTICE POINTER:

Beating *Ridgeway* is hard, but not impossible. Insurance designations require "testamentary capacity". Surely it is not rationale to leave insurance proceeds to an elderly mother rather than to a minor child. If the member was, at the time, habitually drunk or suffered from some other documented incapacity, a lawsuit to void the irrational designation due to mental incapacity should be considered. (The "greedy grandma" and the retired Navy JAG mediator war story)

XXIII. INSURING CHILD SUPPORT WITH SERVICEMAN'S GROUP LIFE INSURANCE

This is a common error made by practitioners in the Jacksonville, Pensacola, and Panama City areas which have large active duty and retirement communities.

Ridgeway strikes again. The member is free to change the beneficiary on his $400,000 SGLI policy despite a court order and marital settlement agreement that the child would be the irrevocable beneficiary of the insurance. The former wife, as next friend of the minor child, cannot impose a constructive trust on the insurance proceeds now in the hands of a paternal relative or girlfriend. Usually, the deceased member's estate is insolvent. The unhappy former spouse may seek relief against the attorney's malpractice carrier.

It is important to understand the distinction between a private life insurance policy, which can be regulated by the court, and a federal "war insurance" policy, which cannot be so regulated. In the case of a private policy, the minor children are considered third party beneficiaries of the marital settlement agreement and final judgment, and that enforcing these agreements are consistent with the public policy of the State of Florida in insuring that minor children are supported. Thus a constructive trust over the policy proceeds may be imposed. *Lowry v. Lowry*, 463 So. 2d 540 (Fla. 2 DCA 1985), *Browning v. Browning*, 784 So. 2d 1145 (Fla. 2 DCA 2001), *Holmes v. Holmes*, 463 So. 2d 578 (Fla. 1 DCA 1985).

It is true that often the soldier, sailor, or marine did not have a private life insurance policy but in that event the wife should be advised to purchase a private policy and the file well documented. A provision using SGLI can be utilized but the order should explicitly state the limitations of the state court and require the member to file in the court file annually proof that the minor child/children are covered under the SGLI policy. Even with such language, there is an unacceptable loophole or risk that the SGLI beneficiary will be changed and that risk must fall, without ambiguity, on the client, not the attorney.

PRACTICE POINTER:

If at all possible, private life insurance should be purchased to secure child support and such policy should either be assigned to the custodial parent who should pay the premiums or, if the policy is to be owned and maintained by the non-custodial parent, the insurance company should be served with a court order naming the minor children as the irrevocable beneficiaries of the

policy. The policy should also be examined to see if it excludes deaths incurred in a combat zone during time of war or conflict, or related exclusions. In such a case, dependent children still have federal dependency and indemnification benefits provided by federal law.

XXIV. NOT UNDERSTANDING THE NATURE OF MILITARY MEDICAL BENEFITS AND CLOSING THE DOOR ON AN ALMOST 20/20/20 SPOUSE

20 years or more marriage;
20 years or more active military service or a combination of active military service and reserve service producing "good" years for retirement;
20 years overlap between active/reserve service and the years of marriage means;

THE NON-MILITARY SPOUSE IS A 20/20/20 spouse entitled to full medical, commissary, exchange and theater privileges for life, under certain conditions, by federal law. See 10 U.S.C.1072 (2)(F); 32 CFR sec. 199.3(b).

CALCULATION- It is the date of final judgment of dissolution of marriage that determines whether or not one is a 20/20/20 former spouse.

CONDITIONS- Former military spouse has not remarried and does not have coverage under an employer sponsored plan.

20/20/15- Former spouse, under the same conditions, gets one year of medical benefits, for divorces occurring after September 30, 1988.

ACTIVE DUTY MILITARY COBRA- For a period of three years is available at a cost or around $900.00 per quarter for former spouses who have not remarried. 10 U.S.C. 1078a(b)(3)

CERTAIN FORMER SPOUSE'S AWARDED A PORTION OF THE MILITARY PENSION OR FORMER SPOUSE SURVIVOR BENEFITS:

It now appears that certain qualified former spouses who have been awarded a portion of the military retirement or have been named by court order as entitled to former spouse survivor benefit plan may be entitled to lifetime FEDERAL EMPLOYEE like medical benefits. Such benefits are not free and the cost thereof should be considered in any assessment of alimony needs. For an excellent discussion of this issue, its complexity and limitations, see ROLL CALL, Summer, 2008, Newsletter of the Military Committee, ABA Family Law Section., available on line.

PRACTICE POINTER:

*Many cases come up on the trial docket within a year or six months of the non-military spouse qualifying as a 20/20/20 spouse. It is important for the practitioner to negotiate a delay in the case of an "almost" 20/20/20 spouse or to factor in medical insurance costs in any alimony assessment.

XXV. ACCEPTING A MILITARY RELATED DISSOLUTION OF MARRIAGE CASE IN A LONG TERM MARRIAGE WITH PENSION, SBP, SUPPORT AND CHILD ISSUES WITHOUT ATTENDING THE 2011 MARITAL AND FAMILY LAW BOARD CERTIFCATION COURSE OR REVIEWING THE MATERIALS.

BIOGRAPHY OF PETER CUSHING

PETER CUSHING is a graduate of Syracuse University College of Law, (*cum laude).* He is a member of the New York, Florida, and Hawaii bars. He served on active duty with the United States Navy and tried courts-martial cases as a prosecutor and defense counsel onboard naval ships and shore stations in Hawaii, Japan, Guam, the Philippine Islands, and throughout Europe, the United Kingdom and the Middle East between 1978 and 1984. He remained in the naval reserve as a reserve judge advocate between 1985 and 2002 performing legal assistance for active duty members of the armed forces and their dependents throughout the State of Florida attaining the rank of Captain (0-6). Peter established a law office in Orlando, Florida in 1984 and limited his practice to military family law in 1995 accepting cases throughout the State of Florida. He is board certified in marital and family law since 1994 and is a frequent lecturer and national consultant on military related family law issues.

For more information about military divorce issues, see:

Peter Cushing, The Ten Commandments of Military Divorce: Representing The Non-Military Spouse, Parts, I and II, Fla. Bar J. , July/August, 1995, Fla. Bar J., (October, 1995), Cushing, Navigating The Former Spouse Protection Act, Fla. Bar J. (December, 1997), Cushing, The New Servicemember's Civil Relief Act, Fla. Bar Journal, (2004),Cushing, "Effects of Military Service", Adoption, Paternity, and Other Florida Family Practice, (Ninth Ed.2008 and earlier editions); see also www.militarydivorce.net , the above references are linked to the website.

Effective: July 3, 2007

West's Florida Statutes Annotated Currentness
Title VI. Civil Practice and Procedure (Chapters 45-89) (Refs & Annos)
Chapter 61. Dissolution of Marriage; Support; Time-Sharing (Refs & Annos)
Part I. General Provisions

61.076. Distribution of retirement plans upon dissolution of marriage

(1) All vested and nonvested benefits, rights, and funds accrued during the marriage in retirement, pension, profit-sharing, annuity, deferred compensation, and insurance plans and programs are marital assets subject to equitable distribution.

(2) If the parties were married for at least 10 years, during which at least one of the parties who was a member of the federal uniformed services performed at least 10 years of creditable service, and if the division of marital property includes a division of uniformed services retired or retainer pay, the final judgment shall include the following:

(a) Sufficient information to identify the member of the uniformed services;

(b) Certification that the Servicemembers Civil Relief Act was observed if the decree was issued while the member was on active duty and was not represented in court;

(c) A specification of the amount of retired or retainer pay to be distributed pursuant to the order, expressed in dollars or as a percentage of the disposable retired or retainer pay.

(3) An order which provides for distribution of retired or retainer pay from the federal uniformed services shall not provide for payment from this source more frequently than monthly and shall not require the payor to vary normal pay and disbursement cycles for retired or retainer pay in order to comply with the order.

CREDIT(S)

Laws 1988, c. 88-98, § 3. Amended by Laws 2007, c. 2007-5, § 5, eff. July 3, 2007.

HISTORICAL AND STATUTORY NOTES

Amendment Notes:

Laws 1988, c. 88-98, § 4, provides that the act "applies to all proceedings commenced after the effective date of this act."

See, also, Notes of Decisions under § 61.075.

Laws 2007, c. 2007-5, a reviser's bill, deleted obsolete and expired provisions, corrected grammatical and typo-

graphical errors, and made other similar changes.

LIBRARY REFERENCES

Divorce 252.3(4).
Labor and Employment 594.
Westlaw Topic Nos. 134, 231H.
C.J.S. Divorce §§ 508 to 511, 514, 553 to 560, 563 to 564, 571, 580 to 582.

RESEARCH REFERENCES

ALR Library

56 ALR 4th 12, Divorce: Excessiveness or Adequacy of Trial Court's Property Award--Modern Cases.

94 ALR 3rd 176, Pension or Retirement Benefits as Subject to Award or Division by Court in Settlement of Property Rights Between Spouses.

Encyclopedias

FL Jur. 2d Family Law § 838, Marital and Nonmarital Assets and Liabilities.

FL Jur. 2d Family Law § 849, Generally; Pension Plans.

FL Jur. 2d Family Law § 850, Federal Uniformed Services Retirement Pay; Payment Upon Separation from Military.

Forms

Florida Pleading and Practice Forms § 44:302, Final Judgment of Simplified Dissolution of Marriage--Providing for Alimony, Parental Responsibility, Primary Residence, Equitable Distribution, and Attorney's Fees.

Treatises and Practice Aids

23 Florida Practice Series § 11:3, Identifying Marital and Nonmarital Assets and Liabilities.

Trawick's Florida Practice and Procedure § 30:6, Dissolution of Marriage: Trial and Judgment.

NOTES OF DECISIONS

1. Marital assets

Once a pension, or other type of retirement benefit, is considered a marital asset, that asset may be treated as property subject to equitable distribution or as a source of support obligations. Diaz v. Diaz, App. 4 Dist., 970 So.2d 429 (2007). Divorce 712

A spouse's entitlement to pension or retirement benefits must be considered a marital asset for purposes of equitably distributing marital property. Diaz v. Diaz, App. 4 Dist., 970 So.2d 429 (2007). Divorce 712

If a pension with a marital portion exists, the entire marital portion must be incorporated into the scheme. Smith v. Smith, App. 2 Dist., 934 So.2d 636 (2006). Divorce 712

Since marital efforts resulted in husband's legal career culminating in an executive position that included a pension benefit subject to certain contingencies, there was a distributable marital component to the pension benefit even though it was neither vested nor matured at this time. Parry v. Parry, App. 2 Dist., 933 So.2d 9 (2006), rehearing denied. Divorce 712

Equally splitting amount by which jointly-owned retirement account increased in value during the marriage was permissible upon dissolution. Nelson v. Nelson, App. 1 Dist., 733 So.2d 603 (1999). Divorce 803

Husband's Social Security replacement plan was marital asset subject to equitable distribution upon divorce; although husband would not receive future Social Security benefits, plan was not so similar to federal Social Security to render plan exempt from equitable distribution. Johnson v. Johnson, App. 1 Dist., 726 So.2d 393 (1999). Divorce 712

For purposes of equitable distribution upon divorce, wife's future federal Social Security benefits would not be treated as offset to husband's Social Security replacement plan, which was treated as marital asset, since federal law controlled treatment of wife's federal benefits. Johnson v. Johnson, App. 1 Dist., 726 So.2d 393 (1999). Divorce 803

Wife's pension plan, resulting from wife's employment for over 18 years during marriage, was marital asset which should have been included in equitable distribution. Crockett v. Crockett, App. 1 Dist., 708 So.2d 329 (1998). Divorce 712

Marital assets subject to equitable distribution include all vested and nonvested benefits, rights, and funds accrued during marriage in retirement or pension plans and programs. Vaccaro v. Vaccaro, App. 5 Dist., 677 So.2d 918 (1996). Divorce 712

Former wife's pension which accrued during marriage was marital asset subject to equitable distribution, even though it was not vested at time of parties' separation. Vaccaro v. Vaccaro, App. 5 Dist., 677 So.2d 918 (1996). Divorce 712

Pension benefits acquired during marriage are marital assets. Childers v. Childers, App. 4 Dist., 640 So.2d 108 (1994). Divorce 712

Burden was on husband with pension rather than on nonpensioned wife to prove whether some portion of pension benefits accrued prior to marriage and therefore should not be included as marital assets. Childers v. Childers, App. 4 Dist., 640 So.2d 108 (1994). Divorce 712; Divorce 803; Divorce 876.2(2)

Spouse's entitlement to pension or retirement benefits is a marital asset for purposes of equitably distributing marital property. Johnson v. Johnson, App. 2 Dist., 602 So.2d 1348 (1992). Divorce 712

Only that portion of retirement pension which constitutes a real retirement benefit, rather than disability, may be considered as a marital asset subject to equitable distribution. McMahan v. McMahan, App. 1 Dist., 567 So.2d 976 (1990). Divorce 712

2. Entitlement to retirement benefits

Under Florida law, while ex-wife might have right to payment, under terms of dissolution court's judgment, to payment from ex-husband of portion of benefits he received from his state retirement plan, ex-wife could not have interest in retirement plan itself by virtue of statutory anti-alienation provision, and could not claim her right to payment as exempt pursuant to Florida exemption for debtor's interest in such a plan. In re Kauffman, Bkrtcy.M.D.Fla.2003, 299 B.R. 641. Exemptions 59; States 64.1(3)

Former wife was not entitled to any portion of former husband's retirement pension that was earned prior to the parties' marriage. Downey v. Downey, App. 4 Dist., 843 So.2d 932 (2003), rehearing denied , review denied 858 So.2d 330. Divorce 712

A spouse or former spouse should not be treated as the equivalent of a creditor in a dissolution proceeding in connection with the equitable distribution of other spouse's pension benefits, but rather, should be treated as the true owner of his or her portion of those pension benefits. Board of Trustees of Orlando Police Pension Plan v. Langford, App. 5 Dist., 833 So.2d 230 (2002), cause dismissed 838 So.2d 558. Divorce 803

In dissolution of parties' second marriage, wife was not entitled to military retirement earned and vested during parties' first marriage, despite wife's claim that award of percentage of military retirement to her should have been treated as lump-sum alimony; wife's counter-petition contained no request for alimony, and parties' stipulation in agreement expressly waived alimony. Herring v. Herring, App. 1 Dist., 666 So.2d 927 (1995), rehearing denied. Divorce 713

Although trial court properly found enhancement, during marriage, of husband's pension funds to be marital asset, trial court should have considered husband's pension funds when making equitable distribution of assets, since wife's presumptive share should not have been discounted on theory that she had not made monetary contribution to pension funds. Essex v. Essex, App. 3 Dist., 649 So.2d 293 (1995), rehearing denied. Divorce 712

In structuring scheme of equitable distribution, wife's adultery was not valid reason to deny her share of husband's pension plan which was marital asset. Childers v. Childers, App. 4 Dist., 640 So.2d 108 (1994). Divorce 803

Former spouse is not entitled to pension benefits acquired after dissolution of marriage. Livingston v. Livingston, App. 1 Dist., 633 So.2d 1162 (1994). Divorce 712

Final judgment of marital dissolution must be amended to specify that wife was entitled to 50 percent of value of husband's pensions attributable to parties' marriage, setting forth inclusive dates of that marriage. Eady v. Eady, App. 1 Dist., 624 So.2d 360 (1993). Divorce 891

Award to wife of minimal portion of husband's retirement benefits was abuse of discretion in light of statutory factors; parties had been married for 33 years, wife was homemaker and cared for parties' children during marriage, and wife's poor health prevented her from obtaining employment. Herman v. Herman, App. 3 Dist., 624 So.2d 342 (1993). Divorce 803

Parties continued to enjoy valid marriage after date they began living separately, for purpose of determining wife's interest in husband's military retirement pension. Days v. Days, App. 1 Dist., 617 So.2d 417 (1993). Divorce 713

Award to each party of one-half of other party's pension plan "of the accrued benefits at actual times of payment measured from the date of employment through [date of trial]" required award based only on benefits accrued during marriage, and not benefits earned after dissolution of marriage. Ennis v. Ennis, App. 5 Dist., 613 So.2d 564 (1993). Divorce 827

In awarding wife half of vested market value of husband's pension plan, trial court should have awarded the husband not only his premarital interest in the retirement fund but also passive accumulations thereon, and should have set off against wife's interest in husband's retirement account her interest in her own nonvested retirement account. Parker v. Parker, App. 1 Dist., 610 So.2d 719 (1992). Divorce 803

Fact that husband's retirement had not vested did not preclude award to wife of proportionate share. Grant v. Grant, App. 1 Dist., 603 So.2d 68 (1992). Divorce 803

Spouse is not automatically entitled to some portion of other spouse's retirement benefits. Johnson v. Johnson, App. 2 Dist., 602 So.2d 1348 (1992). Divorce 803

Trial court's distribution of marital assets was unreasonable and former wife was shortchanged when trial court denied wife's claim for equitable distribution of her husband's military retirement plan and survivor's benefit plan; husband had been in military for approximately 27 years, had been married to wife for all but approximately one year of that time, and wife could suffer unfairness if husband predeceased her. Johnson v. Johnson, App. 2 Dist., 602 So.2d 1348 (1992). Divorce 804

3. Military retirement benefits

Trial court in dissolution of marriage action could not, as part of its equitable distribution of marital assets, award wife half of husband's military retirement benefits; a portion of such benefits accrued before the parties' marriage, and only the portion that accrued during the marriage was a marital asset subject to equitable distribution. Brathwaite v. Brathwaite, App. 1 Dist., 58 So.3d 398 (2011). Divorce 713

Order awarding husband entire Navy pension based on present marital value of $26,341.00 that resulted in unequal distribution of marital assets and liabilities in husband's favor was not supported by substantial competent evidence, in action for divorce; trial court referred to $26,341 as wife's share of pension, and therefore, it was not clear from record whether trial court was aware that it excluded husband's share of pension from distribution, and determination of value was based on husband's proposed calculation and argument. Smith v. Smith, App. 2 Dist., 934 So.2d 636 (2006). Divorce 804

Lump-sum payment received by former wife upon her involuntary discharge from the Navy was not marital asset under statute governing equitable distribution of marital assets, where wife's separation from armed forces was in no way result of her effort to deprive husband of separation benefits; wife's departure from active duty in armed forces was result of official military policies under which her nonselection for promotion to next higher rank for second time triggered her involuntary discharge, and payments for such discharge was not compensation for past service, but rather, assistance to readjust to civilian life. White v. White, App. 1 Dist., 710 So.2d 208 (1998). Divorce 711

Lump-sum payment received for departure from active duty in armed forces as result of official military policies under which nonselection for promotion to next higher rank for second time triggers involuntary discharge is not akin to retirement benefits for equitable distribution purposes. White v. White, App. 1 Dist., 710 So.2d 208 (1998). Divorce 711

Fact that spouses were not married for at least ten years while husband was member of federal uniformed services did not mean that husband's military retirement plan was not marital asset subject to equitable distribution; statutory ten-year period related to requirement that certain information be included in formal judgment with respect to equitable distribution of military pension, but had no effect on wife's entitlement to equitable distribution. Anciaux v. Anciaux, App. 2 Dist., 666 So.2d 577 (1996). Divorce 713

That portion of husband's future military pension which accrued during marriage was marital asset, subject to equitable distribution. Cunningham v. Cunningham, App. 1 Dist., 623 So.2d 1243 (1993). Divorce 713

Trial court abused its discretion in awarding wife percentage of husband's military retirement payments to begin when husband was eligible to retire, even if he continued on active military duty beyond that date, where parties' stipulation provided that she would receive share of retirement after such time as husband retired, stipulation was clear, there was no finding that it needed to be clarified or modified. Bissell v. Bissell, App. 1 Dist., 622 So.2d 532 (1993). Divorce 804

4. Disability pensions

No part of military retirement pension that is received due to disability can be considered as marital property subject to equitable distribution. Fondren v. Fondren, App. 2 Dist., 605 So.2d 571 (1992). Divorce 713

Wife was not entitled to any portion of military retirement pension which constituted disability benefits, notwithstanding parties' contractual agreement to the contrary. McMahan v. McMahan, App. 1 Dist., 567 So.2d 976 (1990). Divorce 713

5. Valuation

Wife's survivorship benefits in husband's pension were marital property, subject to valuation for purposes of equitable distribution of marital property in judgment of dissolution of marriage, even though husband had option to change his designated beneficiary; although trial court could not prevent husband from designating a new beneficiary of survivor benefit, it could fashion another remedy. Diaz v. Diaz, App. 4 Dist., 970 So.2d 429 (2007). Divorce 712

Though a trial court has broad discretion in valuing a retirement account, in the context of a dissolution action, the trial court must arrive at an appropriate figure without merely resorting to an estimation. Mullen v. Mullen, App. 4 Dist., 825 So.2d 1078 (2002). Divorce 803

Trial court was required to ascertain tax consequences of wife's early liquidation of her Individualized Retirement Account (IRA) in valuing such plan for purposes of dissolution action. Mullen v. Mullen, App. 4 Dist., 825 So.2d 1078 (2002). Divorce 792; Divorce 803

Valuation of vested retirement plan could not include any contributions made after the original judgment of dissolution. Boyett v. Boyett, 703 So.2d 451 (1997), rehearing denied. Divorce 803

Present value of vested pension had to be determined without regard to any penalty for early retirement, where distribution was deferred; such valuation recognized that both spouses were entitled to share in the benefits that accrued during the marriage but could not be presently received without penalty. Boyett v. Boyett, 703 So.2d 451 (1997), rehearing denied. Divorce 803; Divorce 827

Valuation of retirement benefits is fact-intensive and varies depending upon the plan. Boyett v. Boyett, 703 So.2d 451 (1997), rehearing denied. Divorce 803

Trial court, in dissolution proceeding, erred by denying wife any interest in husband's vested retirement plan on grounds that she had not stated with definiteness what amount husband would be entitled to receive upon retirement, present value of his entitlement or any value of her entitlement; there was procedure for establishing entitlement at present time with deferred division of benefits, which could have been utilized. Robinson v. Robinson, App. 1 Dist., 652 So.2d 466 (1995). Divorce 803

Trial court could not include husband's visiting professorship in formula for deferring distribution of pension rights absent sufficient evidence showing that husband in fact received retirement benefits during his visiting professorship. Livingston v. Livingston, App. 1 Dist., 633 So.2d 1162 (1994). Divorce 712

Trial court could not include husband's postdissolution income in arriving at present value of husband's pension plan in dissolution proceeding. Reynolds v. Reynolds, App. 3 Dist., 615 So.2d 243 (1993). Divorce 803

Evidence in divorce proceeding did not establish basis for assigning present value to vested, noncontributory retirement plans that had no recoverable value absent act of retirement; although wife had proffered expert testimony as to value of parties' plans, husband's objection to such testimony had been sustained. Zachary v. Zachary, App. 2 Dist., 551 So.2d 577 (1989). Divorce 765; Divorce 803

Trial court presiding over dissolution of marriage proceeding should have made evidentiary findings as to value of spouses' pension plans and as to proper date for determining valuations, where both plans accrued during spouses' long-term marriage and vested before their separation. Carlson v. Carlson, App. 3 Dist., 549 So.2d 1160 (1989). Divorce 803; Divorce 881

6. Lump sum payments

Wife was entitled to lump-sum payment of present value pension benefits awarded to her upon dissolution of marriage, where pension was one of parties' two major assets, wife had been homemaker during most of parties' 33-year marriage, and husband would not receive benefits if he died before retirement; it was unfair and an abuse of discretion to make wife's entitlement to that marital asset contingent upon husband's survival. Rogers v. Rogers, App. 2 Dist., 622 So.2d 96 (1993), on subsequent appeal 746 So.2d 1176. Divorce 803

In dividing marital asset pension upon dissolution of marriage, court should either reduce pension benefit to present value and award lump-sum or direct that part of each pension payment be paid to recipient spouse at time of payment. Rogers v. Rogers, App. 2 Dist., 622 So.2d 96 (1993), on subsequent appeal 746 So.2d 1176. Divorce 827

7. Individual retirement accounts

Unless a marriage dissolution judgment requires a spouse to name a particular beneficiary as a condition of a dissolution of marriage, the owner of an individual retirement account (IRA) is free to name whomever desired as the beneficiary; this applies to the balance of an IRA remaining where a spouse is required to transfer part of that IRA as a condition of the dissolution. Luszcz v. Lavoie, App. 2 Dist., 787 So.2d 245 (2001). Divorce 803

The beneficiary designation in an individual retirement account (IRA) contract controls over that part of an IRA the owner was awarded in a dissolution of marriage; because an IRA is a contract with an institution, not with a spouse, this applies regardless of whether the parties to the dissolution have executed releases. Luszcz v. Lavoie, App. 2 Dist., 787 So.2d 245 (2001). Divorce 803

In marital dissolution action, trial court failed to affirmatively dispose of wife's individual retirement account IRA in its equitable distribution scheme, though wife contended trial court determined that title to the IRA should not be altered, given that judgment was silent as to how, or even if, the IRA should be divided, and there was no evidentiary basis in record nor rationale in the final judgment to support such an award. Wildtraut v. Wildtraut, App. 2 Dist., 787 So.2d 182 (2001). Divorce 889

Statutory exemption of individual retirement account (IRA) from all claims of creditors does not shield IRA assets from court order to pay obligations incurred under statutory chapter governing dissolution of marriage, support, and custody. Siegel v. Siegel, App. 4 Dist., 700 So.2d 414 (1997), rehearing denied. Exemptions 49

Individual retirement account (IRA) is not safe haven where former spouse can hoard assets while, at same time, argue that he does not have present ability to pay purge amount in contempt order arising from nonpayment of obligations due under statutory chapter pertaining to dissolution of marriage, support, and custody, and thus, trial court may look to former spouse's IRA to determine whether that spouse has ability to pay purge amount in contempt order. Siegel v. Siegel, App. 4 Dist., 700 So.2d 414 (1997), rehearing denied. Child Support 458; Divorce 1109

8. ---- Death of spouse, individual retirement accounts

Ex-husband was entitled as beneficiary to receive all of ex-wife's individual retirement account (IRA) upon her death, although wife was disabled at the time, and husband had received a portion of IRA in divorce; husband's IRA rights as a beneficiary arose out of contract with an institution, not out of marriage relationship, and wife's guardian had not changed beneficiary designation. Luszcz v. Lavoie, App. 2 Dist., 787 So.2d 245 (2001). Husband And Wife 10(1)

The rights of a spouse who has been named a beneficiary of an individual retirement account (IRA) arise from the IRA contract, not from the marital relationship. Luszcz v. Lavoie, App. 2 Dist., 787 So.2d 245 (2001). Husband And Wife 6(1); Husband And Wife 10(1)

8.5. Qualified Domestic Relations Order

A “Qualified Domestic Relations Order” (QDRO) is, in part, a domestic relations order which creates or recognizes the existence of an alternate payee's right to, or assigns to an alternate payee the right to, receive all or a portion of the benefits payable with respect to a participant under a plan. Diaz v. Diaz, App. 4 Dist., 970 So.2d 429 (2007). Divorce 810; Labor And Employment 595

8.7. Tax consequences

Although a trial court should ordinarily consider income tax consequences in the evaluation of marital assets, a court cannot be faulted for not considering the tax consequences if counsel for the parties neglect to present evidence on the subject. Diaz v. Diaz, App. 4 Dist., 970 So.2d 429 (2007). Divorce 792

Trial court's failure to consider tax consequences to husband's pension and retirement account in equitable distribution of marital assets for dissolution of marriage judgment was reversible error, and thus case would be remanded to trial court for evidentiary hearing on consequences of taxation and methods of minimizing tax consequences to both parties, where both husband and wife presented evidence regarding effect of taxes on the pension and retirement account. Diaz v. Diaz, App. 4 Dist., 970 So.2d 429 (2007). Divorce 187; Divorce 803

9. Reservation of jurisdiction

Jurisdiction should be reserved in dissolution case when distribution of pension benefits accumulated during marriage is delayed until employee-spouse retires. Kirkland v. Kirkland, App. 1 Dist., 618 So.2d 295 (1993). Divorce 154

10. Evidence

A demonstrative aid together with argument does not provide an evidentiary basis for a finding as to valuation of a pension for purposes of equitable distribution of the marital assets and liabilities. Smith v. Smith, App. 2 Dist., 934 So.2d 636 (2006). Divorce 803

Trial court's valuation, in dissolution proceeding, of marital portion of wife's Individualized Retirement Account (IRA) at $13,448.00 was not supported by competent, substantial evidence, where wife had testified that she had no documentation of value of her IRA at time of her marriage, but that she had documentation indicating that its value five years after marriage had been $14,000.00. Mullen v. Mullen, App. 4 Dist., 825 So.2d 1078 (2002). Divorce 803

Evidence supported trial court's equitable distribution of marital assets giving 50% of husband's military pension to former wife and awarding permanent periodic alimony. Brooks v. Brooks, App. 2 Dist., 602 So.2d 630 (1992). Divorce 594(4); Divorce 804

It is responsibility of counsel to present trial court with sufficient, detailed evidence concerning retirement plans so that it can accomplish equitable distribution; trial court cannot meet its burden if parties fail to provide such information as is required to support distinction between marital and nonmarital assets and to determine proper valuations. Glover v. Glover, App. 1 Dist., 601 So.2d 231 (1992), opinion clarified. Divorce 712; Divorce 803; Divorce 876.2(2); Divorce 876.2(5)

11. Remand

Final judgment of dissolution had to be remanded for consideration of wife's pension on equitable distribution scheme for marital assets. Eady v. Eady, App. 1 Dist., 624 So.2d 360 (1993). Divorce 1323(4)

West's F. S. A. § 61.076, FL ST § 61.076

Current through Chapter 236 (End) of the 2011 First Regular Session of the Twenty-Second Legislature

END OF DOCUMENT

Effective: October 28, 2009

United States Code Annotated Currentness
Title 10. Armed Forces (Refs & Annos)
Subtitle A. General Military Law (Refs & Annos)
Part II. Personnel (Refs & Annos)
Chapter 71. Computation of Retired Pay (Refs & Annos)
§ 1408. Payment of retired or retainer pay in compliance with court orders

(a) Definitions.--In this section:

(1) The term "court" means--

(A) any court of competent jurisdiction of any State, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the Virgin Islands, the Northern Mariana Islands, and the Trust Territory of the Pacific Islands;

(B) any court of the United States (as defined in section 451 of title 28) having competent jurisdiction;

(C) any court of competent jurisdiction of a foreign country with which the United States has an agreement requiring the United States to honor any court order of such country; and

(D) any administrative or judicial tribunal of a State competent to enter orders for support or maintenance (including a State agency administering a program under a State plan approved under part D of title IV of the Social Security Act), and, for purposes of this subparagraph, the term "State" includes the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, and American Samoa.

(2) The term "court order" means a final decree of divorce, dissolution, annulment, or legal separation issued by a court, or a court ordered, ratified, or approved property settlement incident to such a decree (including a final decree modifying the terms of a previously issued decree of divorce, dissolution, annulment, or legal separation, or a court ordered, ratified, or approved property settlement incident to such previously issued decree), or a support order, as defined in section 453(p) of the Social Security Act (42 U.S.C. 653(p)), which--

(A) is issued in accordance with the laws of the jurisdiction of that court;

(B) provides for--

(i) payment of child support (as defined in section 459(i)(2) of the Social Security Act (42 U.S.C. 659(i)(2)));

(ii) payment of alimony (as defined in section 459(i)(3) of the Social Security Act (42 U.S.C. 659(i)(3))); or

(iii) division of property (including a division of community property); and

(C) in the case of a division of property, specifically provides for the payment of an amount, expressed in dollars or as a percentage of disposable retired pay, from the disposable retired pay of a member to the spouse or former spouse of that member.

(3) The term "final decree" means a decree from which no appeal may be taken or from which no appeal has been taken within the time allowed for taking such appeals under the laws applicable to such appeals, or a decree from which timely appeal has been taken and such appeal has been finally decided under the laws applicable to such appeals.

(4) The term "disposable retired pay" means the total monthly retired pay to which a member is entitled less amounts which--

(A) are owed by that member to the United States for previous overpayments of retired pay and for recoupments required by law resulting from entitlement to retired pay;

(B) are deducted from the retired pay of such member as a result of forfeitures of retired pay ordered by a court-marital or as a result of a waiver of retired pay required by law in order to receive compensation under title 5 or title 38;

(C) in the case of a member entitled to retired pay under chapter 61 of this title, are equal to the amount of retired pay of the member under that chapter computed using the percentage of the member's disability on the date when the member was retired (or the date on which the member's name was placed on the temporary disability retired list); or

(D) are deducted because of an election under chapter 73 of this title to provide an annuity to a spouse or former spouse to whom payment of a portion of such member's retired pay is being made pursuant to a court order under this section.

(5) The term "member" includes a former member entitled to retired pay under section 12731 of this title.

(6) The term "spouse or former spouse" means the husband or wife, or former husband or wife, respectively, of a member who, on or before the date of a court order, was married to that member.

(7) The term "retired pay" includes retainer pay.

(b) Effective service of process.--For the purposes of this section--

(1) service of a court order is effective if--

(A) an appropriate agent of the Secretary concerned designated for receipt of service of court orders under regulations prescribed pursuant to subsection (i) or, if no agent has been so designated, the Secretary concerned, is personally served or is served by facsimile or electronic transmission or by mail;

(B) the court order is regular on its face;

(C) the court order or other documents served with the court order identify the member concerned and include, if possible, the social security number of such member; and

(D) the court order or other documents served with the court order certify that the rights of the member under the Servicemembers Civil Relief Act (50 U.S.C.App. 501 et seq.) were observed; and

(2) a court order is regular on its face if the order--

(A) is issued by a court of competent jurisdiction;

(B) is legal in form; and

(C) includes nothing on its face that provides reasonable notice that it is issued without authority of law.

(c) Authority for court to treat retired pay as property of the member and spouse.--(1) Subject to the limitations of this section, a court may treat disposable retired pay payable to a member for pay periods beginning after June 25, 1981, either as property solely of the member or as property of the member and his spouse in accordance with the law of the jurisdiction of such court. A court may not treat retired pay as property in any proceeding to divide or partition any amount of retired pay of a member as the property of the member and the member's spouse or former spouse if a final decree of divorce, dissolution, annulment, or legal separation (including a court ordered, ratified, or approved property settlement incident to such decree) affecting the member and the member's spouse or former spouse (A) was issued before June 25, 1981, and (B) did not treat (or reserve jurisdiction to treat) any amount of retired pay of the member as property of the member and the member's spouse or former spouse.

(2) Notwithstanding any other provision of law, this section does not create any right, title, or interest which can be sold, assigned, transferred, or otherwise disposed of (including by inheritance) by a spouse or former spouse. Payments by the Secretary concerned under subsection (d) to a spouse or former spouse with respect to a division of retired pay as the property of a member and the member's spouse under this subsection may not be treated as amounts received as retired pay for service in the uniformed services.

(3) This section does not authorize any court to order a member to apply for retirement or retire at a particular time in order to effectuate any payment under this section.

(4) A court may not treat the disposable retired pay of a member in the manner described in paragraph (1) unless the court has jurisdiction over the member by reason of (A) his residence, other than because of military assignment, in the territorial jurisdiction of the court, (B) his domicile in the territorial jurisdiction of the court, or (C) his consent to the jurisdiction of the court.

(d) Payments by Secretary concerned to (or for benefit of) spouse or former spouse.--(1) After effective service on the Secretary concerned of a court order providing for the payment of child support or alimony or, with respect to a division of property, specifically providing for the payment of an amount of the disposable retired pay from a member to the spouse or a former spouse of the member, the Secretary shall make payments (subject to the limitations of this section) from the disposable retired pay of the member to the spouse or former spouse (or for the benefit of such spouse or former spouse to a State disbursement unit established pursuant to section 454B of the Social Security Act or other public payee designated by a State, in accordance with part D of title IV of the Social Security Act, as directed by court order, or as otherwise directed in accordance with such part D) in an amount sufficient to satisfy the amount of child support and alimony set forth in the court order and, with respect to a division of property, in the amount of disposable retired pay specifically provided for in the court order. In the case of a spouse or former spouse who, pursuant to section 408(a)(3) of the Social Security Act (42 U.S.C. 608(a)(4)), assigns to a State the rights of the spouse or former spouse to receive support, the Secretary concerned may make the child support payments referred to in the preceding sentence to that State in amounts consistent with that assignment of rights. In the case of a member entitled to receive retired pay on the date of the effective service of the court order, such payments shall begin not later than 90 days after the date of effective service. In the case of a member not entitled to

receive retired pay on the date of the effective service of the court order, such payments shall begin not later than 90 days after the date on which the member first becomes entitled to receive retired pay.

(2) If the spouse or former spouse to whom payments are to be made under this section was not married to the member for a period of 10 years or more during which the member performed at least 10 years of service creditable in determining the member's eligibility for retired pay, payments may not be made under this section to the extent that they include an amount resulting from the treatment by the court under subsection (c) of disposable retired pay of the member as property of the member or property of the member and his spouse.

(3) Payments under this section shall not be made more frequently than once each month, and the Secretary concerned shall not be required to vary normal pay and disbursement cycles for retired pay in order to comply with a court order.

(4) Payments from the disposable retired pay of a member pursuant to this section shall terminate in accordance with the terms of the applicable court order, but not later than the date of the death of the member or the date of the death of the spouse or former spouse to whom payments are being made, whichever occurs first.

(5) If a court order described in paragraph (1) provides for a division of property (including a division of community property) in addition to an amount of child support or alimony or the payment of an amount of disposable retired pay as the result of the court's treatment of such pay under subsection (c) as property of the member and his spouse, the Secretary concerned shall pay (subject to the limitations of this section) from the disposable retired pay of the member to the spouse or former spouse of the member, any part of the amount payable to the spouse or former spouse under the division of property upon effective service of a final court order of garnishment of such amount from such retired pay.

(6) In the case of a court order for which effective service is made on the Secretary concerned on or after August 22, 1996, and which provides for payments from the disposable retired pay of a member to satisfy the amount of child support set forth in the order, the authority provided in paragraph (1) to make payments from the disposable retired pay of a member to satisfy the amount of child support set forth in a court order shall apply to payment of any amount of child support arrearages set forth in that order as well as to amounts of child support that currently become due.

(7)(A) The Secretary concerned may not accept service of a court order that is an out-of-State modification, or comply with the provisions of such a court order, unless the court issuing that order has jurisdiction in the manner specified in subsection (c)(4) over both the member and the spouse or former spouse involved.

(B) A court order shall be considered to be an out-of-State modification for purposes of this paragraph if the order--

(i) modifies a previous court order under this section upon which payments under this subsection are based; and

(ii) is issued by a court of a State other than the State of the court that issued the previous court order.

(e) Limitations.--(1) The total amount of the disposable retired pay of a member payable under all court orders pursuant to subsection (c) may not exceed 50 percent of such disposable retired pay.

(2) In the event of effective service of more than one court order which provide for payment to a spouse and one or more former spouses or to more than one former spouse, the disposable retired pay of the member shall be used to satisfy (subject to the limitations of paragraph (1)) such court orders on a first-come, first-served basis. Such court orders shall be satisfied (subject to the limitations of paragraph (1)) out of that amount of disposable retired pay which remains after the satisfaction of all court orders which have been previously served.

(3)(A) In the event of effective service of conflicting court orders under this section which assert to direct that different amounts be paid during a month to the same spouse or former spouse of the same member, the Secretary concerned shall--

(i) pay to that spouse from the member's disposable retired pay the least amount directed to be paid during that month by any such conflicting court order, but not more than the amount of disposable retired pay which remains available for payment of such court orders based on when such court orders were effectively served and the limitations of paragraph (1) and subparagraph (B) of paragraph (4);

(ii) retain an amount of disposable retired pay that is equal to the lesser of--

(I) the difference between the largest amount required by any conflicting court order to be paid to the spouse or former spouse and the amount payable to the spouse or former spouse under clause (i); and

(II) the amount of disposable retired pay which remains available for payment of any conflicting court order based on when such court order was effectively served and the limitations of paragraph (1) and subparagraph (B) of paragraph (4); and

(iii) pay to that member the amount which is equal to the amount of that member's disposable retired pay (less any amount paid during such month pursuant to legal process served under section 459 of the Social Security Act (42 U.S.C. 659) and any amount paid during such month pursuant to court orders effectively served under this section, other than such conflicting court orders) minus--

(I) the amount of disposable retired pay paid under clause (i); and

(II) the amount of disposable retired pay retained under clause (ii).

(B) The Secretary concerned shall hold the amount retained under clause (ii) of subparagraph (A) until such time as that Secretary is provided with a court order which has been certified by the member and the spouse or former spouse to be valid and applicable to the retained amount. Upon being provided with such an order, the Secretary shall pay the retained amount in accordance with the order.

(4)(A) In the event of effective service of a court order under this section and the service of legal process pursuant to section 459 of the Social Security Act (42 U.S.C. 659), both of which provide for payments during a month from the same member, satisfaction of such court orders and legal process from the retired pay of the member shall be on a first-come, first-served basis. Such court orders and legal process shall be satisfied out of moneys which are subject to such orders and legal process and which remain available in accordance with the limitations of paragraph (1) and subparagraph (B) of this paragraph during such month after the satisfaction of all court orders or legal process which have been previously served.

(B) Notwithstanding any other provision of law, the total amount of the disposable retired pay of a member payable by the Secretary concerned under all court orders pursuant to this section and all legal processes pursuant to section 459 of the Social Security Act (42 U.S.C. 659) with respect to a member may not exceed 65 percent of the amount of the retired pay payable to such member that is considered under section 462 of the Social Security Act (42 U.S.C. 662) to be remuneration for employment that is payable by the United States.

(5) A court order which itself or because of previously served court orders provides for the payment of an amount which exceeds the amount of disposable retired pay available for payment because of the limit set forth in paragraph

(1), or which, because of previously served court orders or legal process previously served under section 459 of the Social Security Act (42 U.S.C. 659), provides for payment of an amount that exceeds the maximum amount permitted under paragraph (1) or subparagraph (B) of paragraph (4), shall not be considered to be irregular on its face solely for that reason. However, such order shall be considered to be fully satisfied for purposes of this section by the payment to the spouse or former spouse of the maximum amount of disposable retired pay permitted under paragraph (1) and subparagraph (B) of paragraph (4).

(6) 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.

(f) Immunity of officers and employees of United States.--(1) The United States and any officer or employee of the United States shall not be liable with respect to any payment made from retired pay to any member, spouse, or former spouse pursuant to a court order that is regular on its face if such payment is made in accordance with this section and the regulations prescribed pursuant to subsection (i).

(2) An officer or employee of the United States who, under regulations prescribed pursuant to subsection (i), has the duty to respond to interrogatories shall not be subject under any law to any disciplinary action or civil or criminal liability or penalty for, or because of, any disclosure of information made by him in carrying out any of his duties which directly or indirectly pertain to answering such interrogatories.

(g) Notice to member of service of court order on Secretary concerned.--A person receiving effective service of a court order under this section shall, as soon as possible, but not later than 30 days after the date on which effective service is made, send a written notice of such court order (together with a copy of such order) to the member affected by the court order at his last known address.

(h) Benefits for dependents who are victims of abuse by members losing right to retired pay.--(1)(A) If, in the case of a member or former member of the armed forces referred to in paragraph (2)(A), a court order provides (in the manner applicable to a division of property) for the payment of an amount from the disposable retired pay of that member or former member (as certified under paragraph (4)) to an eligible spouse or former spouse of that member or former member, the Secretary concerned, beginning upon effective service of such court order, shall pay that amount in accordance with this subsection to such spouse or former spouse.

(B) If, in the case of a member or former member of the armed forces referred to in paragraph (2)(A), a court order provides for the payment as child support of an amount from the disposable retired pay of that member or former member (as certified under paragraph (4)) to an eligible dependent child of the member or former member, the Secretary concerned, beginning upon effective service of such court order, shall pay that amount in accordance with this subsection to such dependent child.

(2) A spouse or former spouse, or a dependent child, of a member or former member of the armed forces is eligible to receive payment under this subsection if--

(A) the member or former member, while a member of the armed forces and after becoming eligible to be retired from the armed forces on the basis of years of service, has eligibility to receive retired pay terminated as a result of misconduct while a member involving abuse of a spouse or dependent child (as defined in regulations prescribed by the Secretary of Defense or, for the Coast Guard when it is not operating as a service in the Navy, by

the Secretary of Homeland Security);

(B) in the case of eligibility of a spouse or former spouse under paragraph (1)(A), the spouse or former spouse--

(i) was the victim of the abuse and was married to the member or former member at the time of that abuse; or

(ii) is a natural or adopted parent of a dependent child of the member or former member who was the victim of the abuse; and

(C) in the case of eligibility of a dependent child under paragraph (1) (B), the other parent of the child died as a result of the misconduct that resulted in the termination of retired pay.

(3) The amount certified by the Secretary concerned under paragraph (4) with respect to a member or former member of the armed forces referred to in paragraph (2)(A) shall be deemed to be the disposable retired pay of that member or former member for the purposes of this subsection.

(4) Upon the request of a court or an eligible spouse or former spouse, or an eligible dependent child, of a member or former member of the armed forces referred to in paragraph (2)(A) in connection with a civil action for the issuance of a court order in the case of that member or former member, the Secretary concerned shall determine and certify the amount of the monthly retired pay that the member or former member would have been entitled to receive as of the date of the certification--

(A) if the member or former member's eligibility for retired pay had not been terminated as described in paragraph (2)(A); and

(B) if, in the case of a member or former member not in receipt of retired pay immediately before that termination of eligibility for retired pay, the member or former member had retired on the effective date of that termination of eligibility.

(5) A court order under this subsection may provide that whenever retired pay is increased under section 1401a of this title (or any other provision of law), the amount payable under the court order to the spouse or former spouse, or the dependent child, of a member or former member described in paragraph (2)(A) shall be increased at the same time by the percent by which the retired pay of the member or former member would have been increased if the member or former member were receiving retired pay.

(6) Notwithstanding any other provision of law, a member or former member of the armed forces referred to in paragraph (2)(A) shall have no ownership interest in, or claim against, any amount payable under this section to a spouse or former spouse, or to a dependent child, of the member or former member.

(7)(A) If a former spouse receiving payments under this subsection with respect to a member or former member referred to in paragraph (2)(A) marries again after such payments begin, the eligibility of the former spouse to receive further payments under this subsection shall terminate on the date of such marriage.

(B) A person's eligibility to receive payments under this subsection that is terminated under subparagraph (A) by reason of remarriage shall be resumed in the event of the termination of that marriage by the death of that person's spouse or by annulment or divorce. The resumption of payments shall begin as of the first day of the month in which that marriage is so terminated. The monthly amount of the payments shall be the amount that would have been paid if the continuity of the payments had not been interrupted by the marriage.

(8) Payments in accordance with this subsection shall be made out of funds in the Department of Defense Military Retirement Fund established by section 1461 of this title or, in the case of the Coast Guard, out of funds appropriated to the Department of Homeland Security for payment of retired pay for the Coast Guard.

(9)(A) A spouse or former spouse of a member or former member of the armed forces referred to in paragraph (2)(A), while receiving payments in accordance with this subsection, shall be entitled to receive medical and dental care, to use commissary and exchange stores, and to receive any other benefit that a spouse or a former spouse of a retired member of the armed forces is entitled to receive on the basis of being a spouse or former spouse, as the case may be, of a retired member of the armed forces in the same manner as if the member or former member referred to in paragraph (2)(A) was entitled to retired pay.

(B) A dependent child of a member or former member referred to in paragraph (2)(A) who was a member of the household of the member or former member at the time of the misconduct described in paragraph (2)(A) shall be entitled to receive medical and dental care, to use commissary and exchange stores, and to have other benefits provided to dependents of retired members of the armed forces in the same manner as if the member or former member referred to in paragraph (2)(A) was entitled to retired pay.

(C) If a spouse or former spouse or a dependent child eligible or entitled to receive a particular benefit under this paragraph is eligible or entitled to receive that benefit under another provision of law, the eligibility or entitlement of that spouse or former spouse or dependent child to such benefit shall be determined under such other provision of law instead of this paragraph.

(10)(A) For purposes of this subsection, in the case of a member of the armed forces who has been sentenced by a court-martial to receive a punishment that will terminate the eligibility of that member to receive retired pay if executed, the eligibility of that member to receive retired pay may, as determined by the Secretary concerned, be considered terminated effective upon the approval of that sentence by the person acting under section 860(c) of this title (article 60(c) of the Uniform Code of Military Justice).

(B) If each form of the punishment that would result in the termination of eligibility to receive retired pay is later remitted, set aside, or mitigated to a punishment that does not result in the termination of that eligibility, a payment of benefits to the eligible recipient under this subsection that is based on the punishment so vacated, set aside, or mitigated shall cease. The cessation of payments shall be effective as of the first day of the first month following the month in which the Secretary concerned notifies the recipient of such benefits in writing that payment of the benefits will cease. The recipient may not be required to repay the benefits received before that effective date (except to the extent necessary to recoup any amount that was erroneous when paid).

(11) In this subsection, the term “dependent child”, with respect to a member or former member of the armed forces referred to in paragraph (2)(A), means an unmarried legitimate child, including an adopted child or a stepchild of the member or former member, who--

(A) is under 18 years of age;

(B) is incapable of self-support because of a mental or physical incapacity that existed before becoming 18 years of age and is dependent on the member or former member for over one-half of the child's support; or

(C) if enrolled in a full-time course of study in an institution of higher education recognized by the Secretary of Defense for the purposes of this subparagraph, is under 23 years of age and is dependent on the member or former member for over one-half of the child's support.

(i) Certification date.--It is not necessary that the date of a certification of the authenticity or completeness of a

copy of a court order for child support received by the Secretary concerned for the purposes of this section be recent in relation to the date of receipt by the Secretary.

(j) Regulations.--The Secretaries concerned shall prescribe uniform regulations for the administration of this section.

(k) Relationship to other laws.--In any case involving an order providing for payment of child support (as defined in section 459(i)(2) of the Social Security Act) by a member who has never been married to the other parent of the child, the provisions of this section shall not apply, and the case shall be subject to the provisions of section 459 of such Act.

CREDIT(S)

(Added Pub.L. 97-252, Title X, § 1002(a), Sept. 8, 1982, 96 Stat. 730; amended Pub.L. 98-525, Title VI, § 643(a) to (d), Oct. 19, 1984, 98 Stat. 2547; Pub.L. 99-661, Div. A, Title VI, § 644(a), Nov. 14, 1986, 100 Stat. 3887; Pub.L. 100-26, §§ 3(3), 7(h)(1), Apr. 21, 1987, 101 Stat. 273, 282; Pub.L. 101-189, Div. A, Title VI, § 653(a)(5), Title XVI, § 1622(e)(6), Nov. 29, 1989, 103 Stat. 1462, 1605; Pub.L. 101-510, Div. A, Title V, § 555(a) to (d), (f), (g), Nov. 5, 1990, 104 Stat. 1569, 1570; Pub.L. 102-190, Div. A, Title X, § 1061(a)(7), Dec. 5, 1991, 105 Stat. 1472; Pub.L. 102-484, Div. A, Title VI, § 653(a), Oct. 23, 1992, 106 Stat. 2426; Pub.L. 103-160, Div. A, Title V, § 555(a), (b), Title XI, § 1182(a)(2), Nov. 30, 1993, 107 Stat. 1666, 1771; Pub.L. 104-106, Div. A, Title XV, § 1501(c)(16), Feb. 10, 1996, 110 Stat. 499; Pub.L. 104-193, Title III, §§ 362(c), 363(c)(1) to (3), Aug. 22, 1996, 110 Stat. 2246, 2249; Pub.L. 104-201, Div. A, Title VI, § 636, Sept. 23, 1996, 110 Stat. 2579; Pub.L. 105-85, Div. A, Title X, § 1073(a)(24), (25), Nov. 18, 1997, 111 Stat. 1901; Pub.L. 107-107, Div. A, Title X, § 1048(c)(9), Dec. 28, 2001, 115 Stat. 1226; Pub.L. 107-296, Title XVII, § 1704(b)(1), Nov. 25, 2002, 116 Stat. 2314; Pub.L. 108-189, § 2(c), Dec. 19, 2003, 117 Stat. 2866; Pub.L. 109-163, Div. A, Title VI, § 665(a), Jan. 6, 2006, 119 Stat. 3317; Pub.L. 111-84, Div. A, Title X, § 1073(a)(15), Oct. 28, 2009, 123 Stat. 2473.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

1982 Acts. Senate Report No. 97-330 and House Conference Report No. 97-749, see 1982 U.S. Code Cong. and Adm. News, p. 1555.

1984 Acts. House Report No. 98-691 andHouse Conference Report No. 98-1080, see 1984 U.S. Code Cong. and Adm. News, p. 4174.

1986 Acts. Senate Report No. 99-331, House Conference Report No. 99-1001, and Statement by President, see 1986 U.S. Code Cong. and Adm. News, p. 6413.

1989 Acts. House Report No. 101-121, House Conference Report No. 101-331, and Statement by President, see 1989 U.S. Code Cong. and Adm. News, p. 838.

1990 Acts. House Report No. 101-665, House Conference Report No. 101-923, and Statement by President, see 1990 U.S. Code Cong. and Adm. News, p. 2931.

1991 Acts. House Report No. 102-60, House Conference Report No. 102-311, and Statement by President, see 1991 U.S. Code Cong. and Adm. News, p. 918.

1992 Acts. House Report No. 102-527, House Conference Report No. 102-966, and Statement by President, see 1992 U.S. Code Cong. and Adm. News, p. 1636.

1993 Acts. House Report No. 103-200 and House Conference Report No. 103-357, see 1993 U.S. Code Cong. and Adm. News, p. 2013.

1996 Acts. House Conference Report No. 104-450, see 1996 U.S. Code Cong. and Adm. News, p. 238.

House Report No. 104-651 and House Conference Report No. 104-725, see 1996 U.S. Code Cong. and Adm. News, p. 2183.

House Report No. 104-563 and House Conference Report No. 104-724, see 1996 U.S. Code Cong. and Adm. News, p. 2948.

1997 Acts. House Conference Report No. 105-340 and Statement by President, see 1997 U.S. Code Cong. and Adm. News, p. 2251.

2001 Acts. House Conference Report No. 107-333 and Statement by President, see 2001 U.S. Code Cong. and Adm. News, p. 1021.

2002 Acts. House Report No. 107-609(Part I) and Statement by President, see 2002 U.S. Code Cong. and Adm. News, p. 1352.

2003 Acts. House Report No. 108-81, see 2003 U.S. Code Cong. and Adm. News, p. 2367.

2006 Acts. House Conference Report No. 109-360, see 2005 U.S. Code Cong. and Adm. News, p. 1678.

Statement by President, see 2005 U.S. Code Cong. and Adm. News, p. S54.

2009 Acts. House Conference Report No. 111-288, see 2009 U.S. Code Cong. and Adm. News, p. 742.

Statement by President, see 2009 U.S. Code Cong. and Adm. News, p. S38.

References in Text

The Social Security Act, referred to in text, is Act Aug. 14, 1935, c. 531, 49 Stat. 620, as amended, which is classified generally to chapter 7 (section 301 et seq.) of Title 42, The Public Health and Welfare. Part D of Title IV of such Act is classified generally to part D (section 651 et seq.) of subchapter IV of chapter 7 of Title 42. Section 454B of such Act, referred to in subsec. (d), is classified to section 654b of Title 42. For complete classification of this Act to the Code, see section 1305 of Title 42 and Tables.

The Servicemembers Civil Relief Act, referred to in subsec. (b)(1)(D), is Act Oct. 17, 1940, c. 888, as amended by Pub.L. 108-189, § 1, Dec. 19, 2003, 117 Stat. 2835, which is classified as 50 App. U.S.C.A. § 501 et seq. For complete classification, see 50 App. U.S.C.A. § 501 and Tables.

Codifications

Section 3(3) of Pub.L. 100-26 made a technical amendment to the directory language of section 644(a) of Pub.L. 99-

661 by substituting “title 10, United States Code,” for “such title”, which required no change in text. Such amendment by section 3 of Pub.L. 100-26 effective as if included in Pub.L. 99-661 when enacted on Nov. 14, 1986, see section 12(a) of Pub.L. 100-26, set out as a note under section 774 of this title.

Amendments

2009 Amendments. Subsec. (h)(2)(A). Pub.L. 111-84, § 1073(a)(15), struck out “and” at the end.

2006 Amendments. Subsec. (h)(1)(A). Pub.L. 109-163, § 665(a)(1)(A), redesignated par. (1) as (1)(A) by inserting “(A)” after “(1)”.

Subsec. (h)(1)(B). Pub.L. 109-163, § 665(a)(1)(B), added subpar. (B).

Subsec. (h)(2). Pub.L. 109-163, § 665(a)(2)(A), in the matter preceding subparagraph (A), inserted “, or a dependent child,” after “former spouse”.

Subsec. (h)(2)(B). Pub.L. 109-163, § 665(a)(2)(B), inserted “in the case of eligibility of a spouse or former spouse under paragraph (1)(A),” after “(B)”, and struck out the period at the end of subpar. (B) and inserted “; and”.

Subsec. (h)(2)(C). Pub.L. 109-163, § 665(a)(2)(C), added subpar. (C).

Subsec. (h)(4). Pub.L. 109-163, § 665(a)(3), inserted “, or an eligible dependent child,” after “former spouse”.

Subsec. (h)(5). Pub.L. 109-163, § 665(a)(4), inserted “, or the dependent child,” after “former spouse”.

Subsec. (h)(6). Pub.L. 109-163, § 665(a)(5), inserted “, or to a dependent child,” after “former spouse”.

2003 Amendments. Subsec. (b)(1)(D). Pub.L. 108-189, § 2(c), substituted “Servicemembers Civil Relief Act” for “Soldiers' and Sailors' Civil Relief Act of 1940”.

2002 Amendments. Subsec. (h)(2). Pub.L. 107-296, § 1704(b)(1), struck out “of Transportation” each place it appeared and inserted “of Homeland Security”.

Subsec. (h)(8). Pub.L. 107-296, § 1704(b)(1), struck out “of Transportation” each place it appeared and inserted “of Homeland Security”.

2001 Amendments. Subsec. (d)(6). Pub.L. 107-107, § 1048(c)(9), struck “the date of the enactment of this paragraph” and inserted “August 22, 1996,”.

1997 Amendments. Subsec. (d). Pub.L. 105-85, § 1073(a)(24)(A), instructed that the first letter of the word “to” in the heading be capitalized, which, for purposes of codification, required no change in text.

Subsec. (d)(6). Pub.L. 105-85, § 1073(a)(24)(B), redesignated the second par. (6) as par. (7).

Subsec. (d)(7). Pub.L.105-85, § 1073(a)(24)(B), (C), redesignated par. (6) [set out second] as par. (7), and as so redesignated, substituted “out-of-State” for “out-of State”.

Subsec. (g). Pub.L. 105-85, § 1073(a)(25), instructed that the first letter of the words “to” and “on” in the heading be

capitalized, which, for purposes of codification, required no change in text.

1996 Amendments. Subsec. (a)(1)(D). Pub.L. 104-193, § 362(c)(1), added subpar. (D).

Subsec. (a)(2). Pub.L. 104-193, § 362(c)(2)(A), inserted “or a support order, as defined in section 453(p) of the Social Security Act (42 U.S.C. 653(p))” preceding “which--”.

Subsec. (a)(2)(B)(i). Pub.L. 104-193, § 362(c)(2)(B), substituted reference to section 459(i)(2) of the Social Security Act for reference to section 462(b) of the Social Security Act.

Subsec. (a)(2)(B)(ii). Pub.L. 104-193, § 362(c)(2)(C), substituted reference to section 459(i)(3) of the Social Security Act for reference to section 462(c) of the Social Security Act.

Subsec. (a)(5). Pub.L. 104-106, § 1501(c)(16), substituted “section 12731” for “section 1331”.

Subsec. (b)(1)(A). Pub.L. 104-201, § 636(a), substituted “facsimile or electronic transmission or by mail” for “certified or registered mail, return receipt requested”.

Subsec. (d). Pub.L. 104-193, § 362(c)(3)(A), in heading, inserted “(or for benefit of)” preceding “spouse or”.

Subsec. (d)(1). Pub.L. 104-193, § 362(c)(3)(B), added provisions relating to payments for the benefit of such spouse or former spouse to a State disbursement unit established pursuant to section 454B of the Social Security Act or other public payee designated by a State, in accordance with part D of title IV, as directed by a court order or as otherwise directed in accordance with such part D.

Pub.L. 104-193, § 363(c)(2), added provisions authorizing the Secretary to make payments to a State consistent with an assignment to the State of rights to receive support.

Subsec. (d)(6). Pub.L. 104-193, § 363(c)(3), added par. (6).

Pub.L. 104-201, § 636(b), added par. (6) set out second.

Subsec. (j). Pub.L. 104-193, § 362(c)(4), added subsec. (j).

Subsecs. (i) to (k). Pub.L. 104-193, § 363(c)(1), added subsec. (i). Former subsecs. (i) and (j) redesignated (j) and (k), respectively.

1993 Amendments. Subsec. (b)(1)(A). Pub.L. 103-160, § 1182(a)(2)(A), substituted “subsection (i)” for “subsection (h)”.

Subsec. (f). Pub.L. 103-160, § 1182(a)(2)(A), substituted “subsection (i)” for “subsection (h)” wherever appearing.

Subsec. (h)(2)(A). Pub.L. 103-160, § 555(b)(1), inserted after “Secretary of Defense” the phrase “or, for the Coast Guard when it is not operating as a service in the Navy, by the Secretary of Transportation”.

Subsec. (h)(4)(B). Pub.L. 103-160, § 1182(a)(2)(B), substituted “of that termination of eligibility” for “of that termination eligibility”.

Subsec. (h)(8). Pub.L. 103-160, § 555(b)(2), inserted before the period at the end the phrase "or, in the case of the Coast Guard, out of funds appropriated to the Department of Transportation for payment of retired pay for the Coast Guard".

Subsec. (h)(10). Pub.L. 103-160, § 555(a)(2), added par. (10). Former par. (10) redesignated (11).

Subsec. (h)(11). Pub.L. 103-160, § 555(a)(1), redesignated former par. (10) as (11).

1992 Amendments. Subsec. (h). Pub.L. 102-484, § 653(a)(2), added subsec. (h). Former subsec. (h) redesignated (i).

Subsec. (i). Pub.L. 102-484, § 653(a)(1), redesignated former subsec. (h) as (i).

1991 Amendments. Heading. Pub.L. 102-190 inserted "or retainer" following "retired".

1990 Amendments. Subsec. (a). Pub.L. 101-510, § 555(g)(1), substituted "(a) Definitions.--" for "(a)".

Subsec. (a)(4)(A). Pub.L. 101-510, § 555(b)(1), inserted provisions specifying the payments owed by a member to the U.S. as those payments owed for previous overpayments of retired pay and for recoupments required by law resulting from entitlement to retired pay.

Subsec. (a)(4)(B). Pub.L. 101-510, § 555(b)(2), substituted provisions identifying amounts deducted from the retired pay of a member as a result of forfeitures of retired pay ordered by a court-martial or as a result of a waiver of retired pay required in order to receive compensation under Title 5 or Title 38, for provisions identifying amounts deducted from the retired or retainer pay of a member, including fines and forfeitures ordered by courts-martial, Federal employment taxes, and amounts waived in order to receive compensation under Title 5 or Title 38.

Subsec. (a)(4)(C). Pub.L. 101-510, § 555(b)(3), struck out former subpar. (C), which identified amounts properly withheld for Federal, State, or local income taxes. Former subpar. (E) redesignated (C).

Subsec. (a)(4)(D). Pub.L. 101-510, § 555(b)(3), struck out former subpar. (D), which identified amounts withheld under section 3402(i) of Title 26. Former subpar. (F) redesignated (D).

Subsec. (a)(4)(E), (F). Pub.L. 101-510, § 555(b)(4), redesignated former subpars. (E) and (F) as (C) and (D), respectively.

Pub.L. 101-510, § 555(f)(2), substituted "retired pay" for "retired or retainer pay" wherever appearing in section catchline and in subsecs. (a)(2)(C), (4), (B), (c)(1), (4), (d)(1) to (5), (e)(1), (2), (3)(A)(i), (ii), (II), (iii)(I), (II), (4)(A) to (6) and (f)(1).

Subsec. (a)(7). Pub.L. 101-510, § 555(f)(1), added par. (7).

Subsec. (b). Pub.L. 101-510, § 555(g)(2), substituted "(b) Effective service of process.--" for "(b)".

Subsec. (c). Pub.L. 101-510, § 555(g)(3), substituted "(c) Authority for court to treat retired pay as property of the member and spouse.--" for "(c)".

Subsec. (c)(1). Pub.L. 101-510, § 555(a), added provisions relating to a prohibition on a court from treating retired pay as property in any proceeding to divide or partition any amount of retired pay if a final decree of divorce, etc. was ratified and issued before June 15, 1981, and did not treat any amount of retired pay of the member as retired

pay of both the member and the member's spouse or former spouse.

Subsec. (c)(2). Pub.L. 101-510, § 555(c), inserted provisions relating to payments by the Secretary concerned under subsec. (d) to a spouse or former spouse with respect to a division of retired pay under this section not being treated as amounts received as retired pay for service in the uniformed services.

Subsec. (d). Pub.L. 101-510, § 555(g)(4), substituted “(d) Payments by Secretary concerned to spouse or former spouse.--” for “(d)”.

Subsec. (e). Pub.L. 101-510, § 555(g)(5), substituted “(e) Limitations.--” for “(e)”.

Subsec. (e)(1). Pub.L. 101-510, § 555(d)(1), substituted “payable under all court orders pursuant to subsection (c)” for “payable under subsection (d)”.

Subsec. (e)(4)(B). Pub.L. 101-510, § 555(d)(2), substituted “the amount of the retired pay payable to such member that is considered under section 462 of the Social Security Act (42 U.S.C. 662) to be remuneration for employment that is payable by the United States” for “the disposable retired or retainer pay payable to such member”.

Subsec. (f). Pub.L. 101-510, § 555(g)(6), substituted “(f) Immunity of officers and employees of United States.--” for “(f)”.

Subsec. (g). Pub.L. 101-510, § 555(g)(7), substituted “(g) Notice to member of service of court order on Secretary concerned.--” for “(g)”.

Subsec. (h). Pub.L. 101-510, § 555(g)(8), substituted “(h) Regulations.--” for “(h)”.

1989 Amendments. Subsec. (a). Pub.L. 101-189, § 1622(e)(6), inserted “The term” after the paragraph designation in each of pars. (1) to (6), and revising the first word in the term defined in quotes so that the initial letter of that word is lower case.

Subsec. (a)(4)(D). Pub.L. 101-189, § 653(a)(5)(A), struck out “(26 U.S.C. 3402(i))”.

Subsec. (a)(5). Pub.L. 101-189, § 653(a)(5)(B), inserted “entitled to retired pay under section 1331 of this title” after “a former member”.

1987 Amendments. Subsec. (a)(4)(D). Pub.L. 100-26, § 7(h)(1), substituted “Internal Revenue Code of 1986” for “Internal Revenue Code of 1954”.

1986 Amendments. Subsec. (a)(4). Pub.L. 99-661, § 644(a)(1), struck out “(other than the retired pay of a member retired for disability under chapter 61 of this title)” preceding “less amounts”.

Subsec. (a)(4)(E). Pub.L. 99-661, § 644(a)(2), added subpar. (E). Former subpar. (E), which read “are deducted as Government life insurance premiums (not including amounts deducted for supplemental coverage); or” was struck out.

1984 Amendments. Subsec. (a)(2)(C). Pub.L. 98-525, § 643(a), added “in the case of a division of property,” before “specifically provides for”.

Subsec. (b)(1)(C). Pub.L. 98-525, § 643(b), added “, if possible,” after “include”.

Subsec. (d)(1). Pub.L. 98-525, § 643(c)(1), substituted “providing for the payment of child support or alimony or, with respect to a division of property, specifically providing for the payment of an amount of the disposable retired or retainer pay from a member to the spouse or a former spouse of the member” for “with respect to the payment of a portion of the retired or retainer pay of a member to the spouse or a former spouse of the member” and substituted “in an amount sufficient to satisfy the amount of child support and alimony set forth in the court order and, with respect to a division of property, in the amount of disposable retired or retainer pay specifically provided for in the court order.” for “specifically provided for in the court order.” in the first sentence.

Subsec. (d)(5). Pub.L. 98-525, § 643(c)(2), substituted “child support or alimony or the payment of an amount of disposable retired or retainer pay as the result of the court's treatment of such pay under subsection (c) as property of the member and his spouse, the Secretary concerned shall pay (subject to the limitations of this section) from the disposable retired or retainer pay of the member to the spouse or former spouse of the member, any part” for “disposable retired or retainer pay, the Secretary concerned shall, subject to the limitations of this section, pay to the spouse or former spouse of the member, from the disposable retired or retainer pay of the member, any part”.

Subsec. (e)(2). Pub.L. 98-525, § 643(d)(1), substituted “, the disposable retired or retainer pay of the member” for “from the disposable retired or retainer pay of a member, such pay” before “shall be used to satisfy”.

Subsec. (e)(3)(A). Pub.L. 98-525, § 643(d)(2)(A), struck out “from the disposable retired or retainer pay” before “of the same member”.

Subsec. (e)(3)(A)(i). Pub.L. 98-525, § 643(d)(2)(B), substituted “from the member's disposable retired or retainer pay the least amount” for “the least amount of disposable retired or retainer pay” before “directed to be paid”.

Subsec. (e)(3)(A)(ii)(I). Pub.L. 98-525, § 643(d)(2)(C), struck out “of retired or retainer pay” before “required by any conflicting”.

Subsec. (e)(4)(A). Pub.L. 98-525, § 643(d)(3)(A), struck out “the retired or retainer pay of” before “the same member”.

Pub.L. 98-525, § 643(d), substituted “satisfaction of such court orders and legal process from the retired or retainer pay of the members shall be” for “such court orders and legal process shall be satisfied” before “on a first-come”.

Subsec. (e)(5). Pub.L. 98-525, § 643(d)(4)(A), struck out “of disposable retired or retainer pay” in two places in the first sentence.

Pub.L. 98-525, § 643(d)(4)(B), substituted “disposable retired or retainer pay” for “such pay” before “available for payment” in the first sentence.

Effective and Applicability Provisions

2006 Acts. Pub.L. 109-163, Div. A, Title VI, § 665(b), Jan. 6, 2006, 119 Stat. 3318, provided that: “A court order authorized by the amendments made by this section [amending subsec. (h) of this section] may not provide for a payment attributable to any period before the date of the enactment of this Act [Jan. 6, 2006], or the date of the court order, whichever is later.”

2003 Acts. Amendments by Pub.L. 108-189 applicable to any case that is not final before Dec. 19, 2003, see Pub.L. 108-189, § 3, set out as a note under 50 App. U.S.C.A. § 501.

2002 Acts. Amendments by Pub.L. 107-296, § 1704, effective on the date of transfer of the Coast Guard to the Department of Homeland Security, see Pub.L. 107-296, § 1704(g), set out as an Effective and Applicability Provisions note under 10 U.S.C.A. § 101.

1996 Acts. Amendments by section 362 of Pub.L. 104-193 effective 6 months after Aug. 22, 1996, see section 362(d) of Pub.L. 104-193, set out as a note under section 659 of Title 42, The Public Health and Welfare.

For effective date of Title III of Pub.L. 104-193, except as otherwise specifically provided, see section 395(a) to (c) of Pub.L. 104-193, set out as a note under section 654 of Title 42, The Public Health and Welfare.

Amendment by section 1501(c)(16) of Pub.L. 104-106 effective Dec. 1, 1994, as if included as amendments made by the Reserve Officer Personnel Management Act, Title XVI of Pub.L. 103-337, as originally enacted on Oct. 5, 1994, see section 1501(c) of Pub.L. 104-106, set out in part as a note under section 101 of this title.

1993 Acts. Section 555(c) of Pub.L. 103-160 provided that: "The amendments made by this section [amending this section] shall take effect as of October 23, 1992, and shall apply as if the provisions of the paragraph (10) of section 1408(h) of title 10, United States Code, added by such subsection [probably means section 555(a)(2) of Pub.L. 103-160 which enacted subsec. (h)(10) of this section] were included in the amendment made by section 653(a)(2) of Public Law 102-484 (106 Stat. 2426) [which was effective Oct. 23, 1992]."

1990 Acts. Section 555(e) of Pub.L. 101-510, as amended Pub.L. 102-190, Div. A, Title X, § 1062(a)(1), Dec. 5, 1991, 105 Stat. 1475, provided that:

"(1) The amendment made by subsection (a) [amending subsec. (c)(1) of this section] shall apply with respect to judgments issued before, on, or after the date of the enactment of this Act [Nov. 5, 1990]. In the case of a judgment issued before the date of the enactment of this Act [Nov. 5, 1990], such amendment shall not relieve any obligation, otherwise valid, to make a payment that is due to be made before the end of the two-year period beginning on the date of the enactment of this Act [Nov. 5, 1990].

"(2) The amendments made by subsections (b), (c), and (d) [amending this section] apply with only respect to divorces, dissolutions of marriage, annulments, and legal separations that become effective after the end of the 90-day period beginning on the date of the enactment of this Act [Nov. 5, 1990]."

1986 Acts. Section 644(b) of Pub.L. 99-661 provided that: "The amendments made by subsection (a) [amending this section] shall apply with respect to court orders issued after the date of the enactment of this Act [Nov. 14, 1986]."

1984 Acts. Section 643(e) of Pub.L. 98-525 provided that: "The amendments made by this section [amending this section] shall apply with respect to court orders for which effective service (as described in section 1408(b)(1) of title 10, United States Code, as amended by subsection (b) of this section [subsec. (b)(1) of this section]) is made on or after the date of enactment of this Act [Oct. 19, 1984]."

Savings Provisions

Reference to law replaced by Pub.L. 100-370 to refer to corresponding provision enacted by such public law; regulation, rule, or order in effect under law so replaced to continue in effect under provision enacted until repealed, amended, or superseded; and action taken or offense committed under law replaced treated as taken or committed under provision enacted, see section 4 of Pub.L. 100-370, set out as a note under section 101 of this title.

Short Title

1982 Acts. For Short Title of Pub.L. 97-252, Title X, Sept. 8, 1982, 96 Stat. 730, constituting "FORMER SPOUSES' PROTECTION" provisions, see Short Title note set out under section 1401 of this title.

Coordination of 2001 Amendments With Other Provisions of Pub.L. 107-107

For purposes of applying amendments made by provisions of the National Defense Authorization Act for Fiscal Year 2002, Pub.L. 107-107, Dec. 28, 2001, 115 Stat. 1012 [see Tables for complete classification], other than provisions of section 1048 of such Act [see Tables for complete classification], section 1048 shall be treated as having been enacted immediately before the other provisions of Pub.L. 107-107, see section 1048(j) of Pub.L. 107-107, set out as a note under 10 U.S.C.A. § 101.

Transition Provisions

Section 1006 of Pub.L. 97-252, as amended Pub. L. 98-94, Title IX, § 941(c)(4), Sept. 24, 1983, 97 Stat. 654; Pub.L. 98-525, Title VI, § 645(b), Oct. 19, 1984, 98 Stat. 2549, provided that:

"(a) The amendments made by this title [enacting this section and amending sections 1072, 1086, and 1447, 1448, and 1450 of this title and enacting provisions set out as notes under this section and section 1401 of this title] shall take effect on the first day of the first month [Feb. 1, 1983] which begins more than one hundred and twenty days after the date of the enactment of this title [Sept. 8, 1982].

"(b) Subsection (d) of section 1408 of title 10, United States Code [subsec. (d) of this section], 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 [Feb. 1, 1983], 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.

"(c) The amendments made by section 1003 of this title [amending sections 1447, 1448, and 1450 of this title] shall apply to persons who become eligible to participate in the Survivor Benefit Plan provided for in subchapter II of chapter 73 of title 10, United States Code, [section 1447 et seq. of this title], before, on, or after the effective date of such amendments [Feb. 1, 1983].

"(d) The amendments made by section 1004 of this title [amending sections 1072, 1076, and 1086 of this title] and the provisions of section 1005 of this title [set out as a note under section 1408 of this title] shall apply in the case of any former spouse of a member or former member of the uniformed services whether the final decree of divorce, dissolution, or annulment of the marriage of the former spouse and such member or former member is dated before, on, or after February 1, 1983.

"(e) For the purposes of this section--

"(1) the term 'court order' has the same meaning as provided in section 1408(a)(2) of title 10, United States Code [subsec. (a)(2) of this section] (as added by section 1002 of this title);

"(2) the term 'former spouse' has the same meaning as provided in section 1408(a)(6) of such title [subsec. (a)(6) of this section] (as added by section 1002 of this title); and

"(3) the term 'uniformed services' has the same meaning as provided in section 1072 of title 10, United States

Code [section 1072 of this title]."

Review of Federal Former Spouse Protection Laws

Section 643(a) of Pub.L. 105-85 provided that:

"(a) Review required.--The Secretary of Defense shall carry out a comprehensive review (including a comparison) of--

"(1) the protections, benefits, and treatment afforded under Federal law to members and former members of the uniformed services and former spouses of such persons; and

"(2) the protections, benefits, and treatment afforded under Federal law to employees and former employees of the Government and former spouses of such persons.

"(b) Military personnel matters to be reviewed.--In the case of members and former members of the uniformed services and former spouses of such persons, the review under subsection (a) shall include the following:

"(1) All provisions of law (principally those originally enacted in the Uniformed Services Former Spouses' Protection Act (title X of Public Law 97-252) [enacting this section, amending sections 1072, 1076, 1086, 1447, 1448, and 1450 of this title, and enacting provisions set out as notes under this section and section 2208 of this title]) that--

"(A) establish, provide for the enforcement of, or otherwise protect interests of members and former members of the uniformed services and former spouses of such persons in retired or retainer pay of members and former members; or

"(B) provide other benefits for members and former members of the uniformed services and former spouses of such persons.

"(2) The experience of the uniformed services in administering those provisions of law, including the adequacy and effectiveness of the legal assistance provided by the Department of Defense in matters related to the Uniformed Services Former Spouses' Protection Act [Pub.L. 97-252, Title X, Sept. 8, 1982, 96 Stat. 730].

"(3) The experience of members and former members of the uniformed services and former spouses of such persons in the administration of those provisions of law.

"(4) The experience of members and former members of the uniformed services and former spouses of such persons in the application of those provisions of law by State courts.

"(5) The history of State statutes and State court interpretations of the Uniformed Services Former Spouses' Protection Act and other provisions of Federal law described in paragraph (1)(A) and the extent to which those interpretations follow those laws.

"(c) Civilian personnel matters to be reviewed.--In the case of former spouses of employees and former employees of the Government, the review under subsection (a) [of this note] shall include the following:

"(1) All provisions of law that--

"(A) establish, provide for the enforcement of, or otherwise protect interests of employees and former employees of the Government and former spouses of such persons in annuities of employees and former employees under Federal employees' retirement systems; or

"(B) provide other benefits for employees and former employees of the Government and former spouses of such persons.

"(2) The experience of the Office of Personnel Management and other agencies of the Government in administering those provisions of law.

"(3) The experience of employees and former employees of the Government and former spouses of such persons in the administration of those provisions of law.

"(4) The experience of employees and former employees of the Government and former spouses of such persons in the application of those provisions of law by State courts.

"(d) Sampling authorized.--The Secretary may use sampling in carrying out the review under this section.

"(e) Report.--Not later than September 30, 1999, the Secretary shall submit to the Committee on Armed Services of the Senate and the Committee on National Security of the House of Representatives a report on the results of the review under subsection (a) [of this note]. The report shall include any recommendations for legislation that the Secretary considers appropriate."

Coordination With Other Amendments

Amendments by section 1073 of Pub.L. 105-85 to be treated as having been enacted immediately before the other provisions of Pub.L. 105-85, see section 1073(i) of Pub.L. 105-85, set out as a note under section 5315 of Title 5, Government Organization and Employees.

Payroll Deductions for Enforcement of Child Support Obligations

Section 363(c)(4) of Pub.L. 104-193 provided that: "The Secretary of Defense shall begin payroll deductions within 30 days after receiving notice of withholding, or for the first pay period that begins after such 30-day period."

Termination of Trust Territory of the Pacific Islands

For termination of Trust Territory of the Pacific Islands, see note set out preceding 48 U.S.C.A. § 1681.

Accrual of Payments

Section 653(c) of Pub.L. 102-484 provided that: "No payments under subsection (h) of section 1408 of title 10, United States Code (as added by subsection (a) [subsec. (h) of this section]), shall accrue for periods before the date of the enactment of this Act [Oct. 23, 1992]."

Study Concerning Benefits for Dependents Who are Victims of Abuse

Pub.L. 102-484, Div. A, Title VI, § 653(e), Oct. 23, 1992, 106 Stat. 2429, provided that:

"(1) The Secretary of Defense shall conduct a study in order to estimate--

"(A) the number of persons who will become eligible to receive payments under subsection (h) of section 1408 of title 10, United States Code (as added by subsection (a) [subsec. (h) of this section]), during each of fiscal years 1993 through 2000; and

"(B) for each of fiscal years 1993 through 2000, the number of members of the Armed Forces who, after having completed at least one, and less than 20, years of service in that fiscal year, will be approved in that fiscal year for separation from the Armed Forces as a result of having abused a spouse or dependent child.

"(2) The study shall include a thorough analysis of--

"(A) the effects, if any, of appeals and requests for clemency in the case of court-martial convictions on the entitlement to payments in accordance with subsection (h) of section 1408 of title 10, United States Code (as added by subsection (a) [subsec. (h) of this section]);

"(B) the socio-economic effects on the dependents of members of the Armed Forces described in subsection (h)(2) of such section [subsec. (h)(2) of this section] that result from terminations of the eligibility of such members to receive retired or retainer pay; and

"(C) the effects of separations of such members from the Armed Forces on the mission readiness of the units of assignment of such members when separated and on the Armed Forces in general.

"(3) Not later than one year after the date of the enactment of this Act [Oct. 23, 1992], the Secretary shall submit to Congress a report on the results of the study."

[For termination, effective May 15, 2000, of reporting provisions of Pub.L. 102-484, § 653(e)(3), set out above, see Pub.L. 104-66, § 3003, as amended, set out as a note under 31 U.S.C.A. § 1113, and the 2nd item on page 67 of House Document No. 103-7, which refers to § 653(c)(3), but probably means § 653(e)(3).]

Commissary and Exchange Privileges

Section 1005 of Pub.L. 97-252 which provided that Secretary of Defense prescribe regulations to provide unremarried former spouse commissary and post exchange privileges to the same extent and on the same basis as the surviving spouse of retired member of the uniformed services, was repealed by Pub.L. 100-370, § 1(c)(5), July 19, 1988, 102 Stat. 841.

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Coordination of benefits with those under this section, see 10 USCA § 1058.
Prevention of circumvention of Court order by waiver of retired pay to enhance civil service retirement annuity, see 5 USCA §§ 8332, 8411.

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CJS Husband and Wife § 281, Military Retirement, Disability, Retainer, and Separation Pay.
CJS Husband and Wife § 402, Subject Matter; Credits and Debits--Retirement Contributions or Benefits.
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56 ALR 4th 12, Divorce: Excessiveness or Adequacy of Trial Court's Property Award--Modern Cases.

93 ALR 3rd 711, Employee Retirement Pension Benefits as Exempt from Garnishment, Attachment, Levy, Execution, or Similar Proceedings.

94 ALR 3rd 176, Pension or Retirement Benefits as Subject to Award or Division by Court in Settlement of Property Rights Between Spouses.

22 ALR 2nd 1421, Pension of Husband as Resource Which Court May Consider in Determining Amount of Alimony.

174 ALR 549, Interest Necessary to Maintenance of Declaratory Determination of Validity of Statute or Ordinance.

168 ALR 342, Application of Community Property System to Problems Arising in Connection With Life Insurance Policies.

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NOTES OF DECISIONS

1. Constitutionality

Statute modifying res judicata to permit amendment of previously final dissolution decrees to allow disposition of military retirement benefits as community property, West's Ann.Cal.Civ.Code § 5124 (Repealed), did not violate due process rights of husband in light of state's paramount interest in equitable distribution of marital property and state legislature's supplementing and carrying into effect intent of federal statute [10 U.S.C.A. § 1408] allowing disposition of military retirement benefits in dissolution decrees. In re Marriage of Potter, Cal.App. 5 Dist.1986, 224 Cal.Rptr. 312, 179 Cal.App.3d 73, review denied, appeal dismissed , certiorari denied 107 S.Ct. 1262, 479 U.S. 1072, 94 L.Ed.2d 124. Constitutional Law 4386; Divorce 510(3)

Statute modifying res judicata to permit amendment of previously final dissolution decrees to allow disposition of military retirement benefits as community property did not violate due process rights of husband in light of state's paramount interest in equitable distribution of marital property and state legislature's supplementing and carrying into effect intent of federal statute allowing disposition of military retirement benefits in dissolution decrees. Mueller v. Walker, Cal.App. 4 Dist.1985, 213 Cal.Rptr. 442, 167 Cal.App.3d 600. Constitutional Law 4386; Divorce 509(3)

2. Generally

Federal Uniformed Services Former Spouses' Protection Act does not limit amount of military retirement pay which may be characterized and apportioned as community asset under Texas marital property system; Act's provisions are intended only as limit on amount of disposable retirement pay which can be garnished and paid out by service secretaries pursuant to court orders. Grier v. Grier, Tex.1987, 731 S.W.2d 931. Exemptions 37; Husband And Wife 249(3)

3. Law governing

Uniformed Services Former Spouses Protection Act allows courts to apply state divorce laws to military pensions, but does not expressly or impliedly grant any court power to adjudicate any cause or provide any substantive rule for treatment of military pensions in divorce or domestic relations context. Brown v. Harms, E.D.Va.1994, 863 F.Supp. 278. Divorce 713

Jurisdiction provision of Federal Uniformed Services Former Spouses Protection Act applied only to subject matter, and therefore state law controlled issue of personal jurisdiction in action by former wife of Army officer to partition military benefits. Lewis v. Lewis, D.Nev.1988, 695 F.Supp. 1089. Federal Courts 417

Section of Uniformed Services Former Spouses' Protection Act (USFSPA) limiting spouse's ability to seek direct payment of service member's military retirement benefits pursuant to state court divorce decree is not limitation on

divorce court's ability to award any portion, even 100%, of service member's benefits to spouse. In re MacMeeken, D.Kan.1990, 117 B.R. 642. Divorce 804

Question of whether trial court acquires jurisdiction over military member's military pension is governed not by principles of state's rules of in personam jurisdiction or procedure, but rather by specific terms of Uniformed Services Former Spouses' Protection Act (USFSPA) which, by virtue of supremacy clause of the United States Constitution, in effect preempts state rules of procedure insofar as jurisdiction to consider particular asset in dissolution proceeding is concerned. Matter of Marriage of Booker, Colo.1992, 833 P.2d 734. Divorce 871; States 18.28

Action for partition of former husband's military retirement pay is governed by law of state where action is brought; provision of Uniformed Services Former Spouses' Protection Act (USFSPA) prohibits state court from addressing military retirement unless court has jurisdiction over retired service member, and another provision requires state court to deal with property in accordance with law of its jurisdiction. Terry v. Lee, S.C.1994, 445 S.E.2d 435, 314 S.C. 420. Divorce 505

Personal jurisdiction provision of Federal Uniformed Services Former Spouses' Protection Act overrode state's long-arm statute to extent that state's law would exceed limitations of FUSFSPA. Petters v. Petters, Miss.1990, 560 So.2d 722. Armed Services 34.2(7); States 18.89

4. Preemption

Uniformed Services Former Spouses Protection Act does not preempt state law provisions restricting opening and modifying of judgments. Kenny v. Kenny, Conn.1993, 627 A.2d 426, 226 Conn. 219. ; ; ;

Federal law did not preempt state law and disallow disposition of military disability retirement pay by state court, in marital proceeding, in accordance with state community property law, where military spouse retired before dissolution of marriage and, at time he retired, was eligible for longevity and disability retirement and could have elected to receive longevity retirement benefits; in such case, nonmilitary spouse had interest in retirement benefits recognized under both federal and state law which military spouse could not destroy by electing to receive disability retirement benefits. In re Marriage of Mastropaolo, Cal.App. 4 Dist.1985, 213 Cal.Rptr. 26, 166 Cal.App.3d 953, review denied , certiorari denied 106 S.Ct. 1185, 475 U.S. 1011, 89 L.Ed.2d 301. Divorce 713; States 18.89

Federal Uniform Services Former Spouse Protection Act does not preempt state courts from awarding community property share of divorced spouse's military retirement pay based on gross benefits, rather than on net receipts. Casas v. Thompson, Cal.1986, 720 P.2d 921, 228 Cal.Rptr. 33, 42 Cal.3d 131, certiorari denied 107 S.Ct. 659, 479 U.S. 1012, 93 L.Ed.2d 713. States 18.29

Amendment to Uniformed Services Former Spouses' Protection Act (USFSPA), providing that court may not treat person's military pension benefits as community property subject to division or partition if final divorce decree regarding that person and person's spouse was issued prior to June 25, 1981, does not preempt Texas common-law doctrine of res judicata notwithstanding that it was intended to apply retroactively. Trahan v. Trahan, Tex.App.-Austin 1995, 894 S.W.2d 113, rehearing overruled, writ denied, rehearing of writ of error overruled , certiorari denied 116 S.Ct. 1542, 517 U.S. 1155, 134 L.Ed.2d 646, rehearing denied 116 S.Ct. 2515, 517 U.S. 1251, 135 L.Ed.2d 203. Divorce 890; States 18.29

Amendment to Uniformed Services Former Spouses Protection Act (USFSPA) forbidding retroactive application by states to claims of former spouses for military retirement benefits unless those claims were specifically reserved preempted classification and division of former husband's military retirement benefits as community property, and thus, wife had no claim to community portion, despite permanent injunction in judgment of separation prohibiting

husband from alienating, disposing, or mortgaging community property, where neither 1967 divorce decree nor judgment of separation made specific mention of reservation of military retirement benefits. White v. White, La.App. 1 Cir.1993, 623 So.2d 31. Divorce 510(3); States 18.29

5. Laws of the jurisdiction

Phrase "in accordance with the laws of the jurisdiction" in Federal Uniformed Services Former Spouses' Protection Act (FUSFSPA) section, defining "court order" as final decree of divorce issued by court "in accordance with the laws of the jurisdiction" of that court, does not mean "in accordance with all relevant case law" in the applicable jurisdiction. Andrean v. Secretary of U.S. Army, D.Kan.1993, 840 F.Supp. 1414.

6. Retroactive effect of section

Federal court would not order department of defense finance and accounting service to comply with terms of divorce judgment granting wife portion of past and future military retirement received by husband where decree of divorce was issued before June 25, 1981, and payments were not authorized under Uniformed Services Former Spouses Protection Act. Kemp v. U.S. Dept. of Defense, W.D.La.1994, 857 F.Supp. 32. Divorce 804

Retroactive application of the Uniformed Services Former Spouses Protection Act, which removed federal preemption interdict that had precluded state courts from considering military retirement pay as marital property subject to division as part of divorce decree, was not unduly harsh and oppressive; it was rational for Congress to permit military spouses caught in interim period following Supreme Court's decision in *McCarty* which had first held preemption existed, to approach state courts for assistance without bar of federal preemption. Fern v. U.S., Cl.Ct.1988, 15 Cl.Ct. 580, affirmed 908 F.2d 955. Divorce 510(3)

Court which entered divorce decree, after Supreme Court's *McCarty* decision, holding that military retirement benefits could not be distributed as community or marital property in state court divorce proceedings, and before Uniform Services Former Spouses' Protection Act, which overruled that decision, had no authority to divide military retirement benefits between husband and wife, absent fraud, mistake, irregularity, or clerical error justifying reopening divorce decree. Andresen v. Andresen, Md.1989, 564 A.2d 399, 317 Md. 380. Divorce 892(2)

Former wife was entitled to relief from divorce judgment which did not address equitable distribution of former husband's military pension, where judgment was entered subsequent to United States Supreme Court ruling that such pensions were not includable in marital estate for purposes of equitable distribution and prior to legislative enactment of this section which, by its terms, was retroactive to date of the Supreme Court decision and provided for inclusion of military pensions in marital estates. Castiglioni v. Castiglioni, N.J.Super.Ch.1984, 471 A.2d 809, 192 N.J.Super. 594. Divorce 892(2)

In enacting this section, Congress intended to obliterate the adverse effect of McCarty upon a divorced spouse of military personnel by making it retroactive to the date of that decision. Smith v. Smith, Del.Fam.Ct.1983, 458 A.2d 711. Divorce 508

Amendments to Federal Uniform Services Former Spouses' Protection Act (FUSFSPA) under which state court could not reopen pre-1982 dissolution judgment in order to divide omitted military retirement benefits on or after effective date of amendments limited preamendment payment orders for future benefits to two-year period beginning on date of enactment of amendments. In re Marriage of Curtis, Cal.App. 1 Dist.1992, 9 Cal.Rptr.2d 145, 7 Cal.App.4th 1, review denied. Divorce 510(3)

Federal Uniformed Services Former Spouses' Protection Act, which permits application of state divorce laws to military retired pay, did not prohibit dissolution court's division of disability retired pay and, in any event, even if it

did the Act could not be applied retroactively to an almost ten-year old dissolution decree, which awarded wife one half of husband's military retirement benefits, so as to preclude wife from recovering one half of husband's military disability retirement benefits; final dissolution judgment vesting wife's community property interest in husband's military retired pay was a property interest that could not be denied without due process; disagreeing with *In re Marriage of Costo*, 156 Cal.App.3d 781, 203 Cal.Rptr. 85. In re Marriage of Stier, Cal.App. 4 Dist.1986, 223 Cal.Rptr. 599, 178 Cal.App.3d 42, review denied. Constitutional Law 4386; Divorce 510(3); Divorce 713

For purpose of West's Ann.Cal.Civ.Code § 5124, governing modification of community property settlements to include division of military retirement benefits, term "final" as applied to judgments or decrees means final in sense of being free from further direct attack, regardless of any reservation of jurisdiction on pension issue, and, thus, statute permits modification of judgments and decrees where parties could not have sought retroactive application of curative provisions of Uniformed Services Former Spouses' Protection Act, 10 U.S.C.A. §§ 1408, 1408(c)(1), because federal legislation was not operative before time for direct attack had elapsed. In re Marriage of Van Dyke, Cal.App. 2 Dist.1985, 218 Cal.Rptr. 11, 172 Cal.App.3d 145. Husband And Wife 272(5)

This section, which allows state courts to treat disposable retired or retainer pay of retired member as community property, was retroactive to date of United States Supreme Court decision in McCarty, June 26, 1981, and was applicable to case not final on effective date of this section, Feb. 1, 1983; prior California decisions relative to treatment of military pensions as community property were controlling on all cases not yet final, whether they were filed before, on, or after June 26, 1981. In re Marriage of Hopkins, Cal.App. 2 Dist.1983, 191 Cal.Rptr. 70, 142 Cal.App.3d 350. Husband And Wife 247

Uniformed Services Former Spouses' Protection Act provision allowing retirement pay of service personnel to be treated as a marital asset [10 U.S.C.A. § 1408(c)(1)] is retroactive to June 26, 1981, the date of the United States Supreme Court's *McCarty* decision precluding state courts from awarding nonmilitary spouses a portion of military spouse's government pension. Keen v. Keen, Mich.App.1985, 378 N.W.2d 612, 145 Mich.App. 824. Divorce 510(3)

Uniform Services Former Spouses Protection Act, could be retroactively applied, so as to require husband to pay military pension proceeds to wife retroactively to date of Supreme Court decision that Act reversed rather than date on which award was reinstated. Thorpe v. Thorpe, Wis.App.1985, 367 N.W.2d 233, 123 Wis.2d 424. Divorce 510(3)

Former wife was not entitled to collect share of former husband's military retirement benefits pursuant to effective date provision of amendment to Uniform Services of Former Spouses Protection Act (USFSPA), providing that enactment would not relieve valid obligation to make payment due to be made before expiration of two-year period, as trial court had not granted wife's motion for division of benefits and, consequently, did not place husband under obligation to pay share of benefits. Johnson v. Johnson, Alaska 1992, 824 P.2d 1381. Divorce 713

Retroactive application of Uniform Services Former Spouses Protection Act [10 U.S.C.A. § 1408], permitting division of military retirement payments in final dissolution decrees, to dissolution decrees that were final and not appealed during 20-month interim period between judicial decision prohibiting distribution of military retirement payments as part of community property and passage of Act, did not divest husbands of any vested rights, particularly where husbands had been married throughout period prior to rendering of judicial decision when payments were considered community property. Flannagan v. Flannagan, Wash.App.1985, 709 P.2d 1247, 42 Wash.App. 214, review denied. Divorce 510(3)

Application of statute [10 U.S.C.A. § 1408] allowing division of military retired pay upon dissolution of marriage to case in which decree was filed prior to enactment of the statute but which was on appeal when the statute was en-

acted did not deprive husband, the former service member, of property without due process. In re Marriage of MacDonald, Wash.1985, 709 P.2d 1196, 104 Wash.2d 745. Constitutional Law 4386

Retroactive application of Uniformed Services Former Spouses' Protection Act [10 U.S.C.A. § 1408], which authorizes state courts to treat military pensions as community property, to relieve former wife from amended dissolution decree entered during 20-month period when federal law prohibited state courts from treating military pensions as community property, would not deprive former husband of substantial right without due process of law, where throughout the parties' marriage, former husband could reasonably have expected that military pension would be treated as community property and where not applying the Act retroactively would deprive former wife of substantial property interest which all other similarly situated litigants had been awarded prior to 20-month period and were awarded subsequent thereto. In re Marriage of Giroux, Wash.App.1985, 704 P.2d 160, 41 Wash.App. 315. Constitutional Law 4244

Pursuant to Uniformed Services Former Spouses Protection Act, Supreme Court will treat military retirement pay as community property to extent that it was derived from community efforts, and such treatment will be retroactive to date of *McCarty* decision which held that there were no community property rights in military retirement benefits. Edsall v. Superior Court In and For Pima County, Ariz.1984, 693 P.2d 895, 143 Ariz. 240. Courts 100(1); Husband And Wife 249(3)

This section, which allows state law to control division of military retired pay as part of property settlement in a dissolution, was intended to apply retroactively to eliminate all effects of United States Supreme Court decision holding that state courts could not divide military retired pay as part of a property division in a dissolution. Konzen v. Konzen, Wash.1985, 693 P.2d 97, 103 Wash.2d 470, reconsideration denied, certiorari denied 105 S.Ct. 3530, 473 U.S. 906, 87 L.Ed.2d 654. Divorce 510(3)

This section providing that a court may treat military retirement benefits either as property solely owned by member of uniformed services or as property of the member and his spouse in accordance with the law of the jurisdiction is subject to retroactive application to June 25, 1981. Koppenhaver v. Koppenhaver, N.M.App.1984, 678 P.2d 1180, 101 N.M. 105, certiorari denied 677 P.2d 624, 101 N.M. 11. Divorce 510(3)

This section, which allows each state to determine marital property status of military retirement benefits, applies retroactively to date of the McCarty decision, which held that federal law precluded a state court from dividing military retirement pay pursuant to state community property laws, and, hence, although act was effective one month after date of final divorce, the wife, whose husband was member of military service, was entitled to Act's benefits. Walentowski v. Walentowski, N.M.1983, 672 P.2d 657, 100 N.M. 484. Divorce 510(3)

Retrospective application of the Uniformed Services Former Spouses' Protection Act to result in reclassification of former husband's military pension would not be permitted, where the retrospective application would impair the parties' contractual rights and obligations and disturb those rights which became vested by both contract and by final divorce decree. Himes v. Himes, Va.App.1991, 407 S.E.2d 694, 12 Va.App. 966. Divorce 510(3)

Separation agreement releasing wife's claim to husband's military pension waived wife's claim to pension, even though subsequent federal Uniform Services Former Spouses' Protection Act [10 U.S.C.A. § 1408(c)(1)] provides that marital estate may include military pensions and applies retroactively to date before separation agreement, where North Carolina statute [G.S. § 50-20(b)(2)] which defines marital property to include military pensions was subsequently enacted and specifies prospective application only. Morris v. Morris, N.C.App.1986, 339 S.E.2d 424, 79 N.C.App. 386, review denied 345 S.E.2d 390, 316 N.C. 733. Divorce 925

Trial court's order in 1982 compelling husband to execute assignment of his army retirement benefits to his former wife was valid, despite fact that this section, which provides for such assignments, did not become effective until

February of 1983, since this section applies retroactively to June 26, 1981. Faught v. Faught, N.C.App.1984, 312 S.E.2d 504, 67 N.C.App. 37, review denied 317 S.E.2d 680, 311 N.C. 304. Divorce 510(3)

Congress did not intend for state courts to use the Former Spouses' Protection Act to reopen pre-*McCarty* divorces to divide military retirement benefits. Buys v. Buys, Tex.1996, 924 S.W.2d 369, rehearing overruled. Divorce 892(2)

There was no final judgment dividing husband's military retirement benefits entered prior to November 5, 1990, which was effective date of statute that precluded state courts in certain situations from treating retirement pay as marital property, and, thus, wife was not entitled to share in those retirement benefits; although trial court entered order prior to that date finding that wife was entitled to portion of monthly retirement benefits as undistributed marital property, that order was interlocutory, as terms upon which benefits would be distributed were yet to be determined, and trial court retained authority to open, amend, reverse, or vacate that order at any time before final judgment. Knox v. Born, Mo.App. E.D.1994, 879 S.W.2d 600, rehearing and/or transfer denied. Divorce 713

Purpose of amendment, to Uniformed Services Former Spouses' Protection Act, which limited ability of former spouse to sue for partition of military retirement benefits not addressed in final decree of divorce entered before 1981, was to prevent reopening of divorce cases finalized before statute was enacted. Redus v. Redus, Tex.App.-Austin 1993, 852 S.W.2d 94, rehearing overruled, writ denied , rehearing of writ of error overruled. Divorce 510(3)

The subsequent adoption of the Uniformed Services Former Spouses' Protection Act, barring state courts from treating military retirement pay waived to receive Veterans Administration disability benefits as property divisible upon divorce, could not be used to collaterally attack a divorce decree which was final prior to that law's enactment. Berry v. Berry, Tex.1990, 786 S.W.2d 672, rehearing overruled. Divorce 890

Where military retirement benefits are not allocated by express terms of divorce decree that became final during period between Supreme Court decision holding that supremacy clause precludes state court from dividing military nondisability retirement pay on divorce and passage of statute providing that divorce court could divide military retirement pay between spouses in accordance with law of jurisdiction of that court, statute negates any effect that decision had on characterization of this property at time of divorce, and parties become tenants in common with respect to this omitted community property, and property is subject to later partition; in contrast, if final divorce decree contained express language from which one could reasonably conclude that divorce court actually and expressly adjudicated ownership of military retirement benefits, res judicata would bar subsequent suit for partition of military retirement benefits. Eddy v. Eddy, Tex.App.-Austin 1986, 710 S.W.2d 783, ref. n.r.e.. Divorce 890

Uniformed Services Former Spouses' Protection Act did not give Texas courts power to modify final judgment rendered after *McCarty* but before Act, which specifically awarded spouse's military benefits to that spouse. Wright v. Wright, Tex.App.-San Antonio 1986, 710 S.W.2d 162, ref. n.r.e.. Divorce 893(6)

Federal law did not permit state courts to define military retirement pensions pursuant to divorce settlement until enactment in 1983 of Uniform Services Former Spouses' Protection Act, which is retroactive only to June 26, 1981; therefore, ex-wife, who was granted divorce in February of 1981, was not entitled to modification of divorce decree to divide military pension of ex-husband. Hendricks v. Hendricks, Ark.App.1986, 709 S.W.2d 827, 18 Ark.App. 41. Divorce 893(6)

Former wife's action for percentage of former husband's military retirement pay was not barred by doctrine of res judicata, though appellate court previously held she was not so entitled, in that enactment by Congress of Former Spouse's Protection Act created new fact, change in law and new cause of action. Powell v. Powell, Tex.App.-Waco 1985, 703 S.W.2d 434, ref. n.r.e. , appeal dismissed 106 S.Ct. 2911, 476 U.S. 1180, 91 L.Ed.2d 541, rehearing de-

nied 107 S.Ct. 11, 478 U.S. 1031, 92 L.Ed.2d 767. Divorce 890

Under present and pre-*McCarty* formula, wife in "gap" divorce case, decided between *McCarty* and effective date of Uniformed Services' Former Spouses' Protection Act [10 U.S.C.A. § 1408], was entitled to 34 percent of husband's military retirement benefits where couple had been married 179 months of total 264 months that husband had served in Air Force. O'Connor v. O'Connor, Tex.App.-San Antonio 1985, 694 S.W.2d 152, ref. n.r.e.. Divorce 804

Texas community property laws applied to husband's military retirement benefits even though, at time of divorce proceeding, such benefits could not be divided pursuant to state community property laws because of United States Supreme Court's *McCarty* decision, as Uniformed Services Former Spouses Protection Act, [10 U.S.C.A. § 1408], reached back into time and reversed effects of *McCarty*. Forsman v. Forsman, Tex.App.-San Antonio 1985, 694 S.W.2d 112, ref. n.r.e.. Husband And Wife 247

Provisions of final marriage dissolution decree could not be modified so as to reopen issue of division of husband's military retirement benefits, which wife was unable to raise at time of dissolution hearing because of existing federal law that prevented spouses from claiming an interest in military pensions, even though statute was later enacted which provided that military retired pay could be considered marital property [10 U.S.C.A. § 1408] and even though this statute was held to be retroactive. In re Marriage of Quintard, Mo.App. S.D.1985, 691 S.W.2d 950. Divorce 893(6)

Uniformed Services Former Spouses' Protection Act did not render *McCarty* a nullity as if it had never existed, for purposes of determining whether the Act applied retroactively to divorce decree that was final when the Act was signed into law. Allison v. Allison, Tex.App.-Fort Worth 1985, 690 S.W.2d 340, ref. n.r.e. 700 S.W.2d 914. Divorce 510(3)

In proceeding for legal separation, trial court did not err in treating husband's nondisability military pension as marital property and awarding portion of pension to wife in light of subsequent enactment of this section. Coates v. Coates, Mo.App. S.D.1983, 650 S.W.2d 307. Divorce 713

Operation of general principles of continuing jurisdiction will not satisfy federal statutory requirement of amendment to Uniform Services Former Spouses Protection Act forbidding retroactive application by states to claims of former spouses for military retirement benefits unless those claims were specifically reserved. White v. White, La.App. 1 Cir.1993, 623 So.2d 31. Divorce 893(1)

Purpose of amendment to Uniform Services Former Spouses Protection Act prohibiting retroactive application by states to claims of former spouses for military retirement benefits unless those claims were specifically reserved was to prevent litigation of cases concluded prior to United States Supreme Court *McCarty* decision that United States military retirement pay was personal entitlement preempting state community property laws. White v. White, La.App. 1 Cir.1993, 623 So.2d 31. Divorce 510(3)

Uniformed Services Former Spouses' Protection Act does not apply retroactively to divorces that became final prior to June 25, 1981, unless final decree of divorce, including court ordered, ratified, or approved property settlement incident to such decree either treats, or reserves judgment to treat, any amount of retired pay of member as marital property. Hollyfield v. Hollyfield, Miss.1993, 618 So.2d 1303. Divorce 510(3)

Federal statute governing military retirement pay preempted classification of former husband's military benefits as community property, for purposes of divorce settlement, where parties were divorced prior to June 25, 1981, and the separation and divorce judgments did not specifically treat or reserve jurisdiction to treat the military benefits as property of either former husband or former wife. Johnson v. Johnson, La.App. 2 Cir.1992, 605 So.2d 1157, writ denied 608 So.2d 152. Divorce 893(6)

Former wife was barred from seeking partition of former husband's military retirement benefits where divorce judgment was rendered, and community property settlement was executed, prior to June 25, 1981, and judgment and settlement did not treat or reserve jurisdiction to treat retirement pay as community property; statutory amendment, retroactively applying *McCarty* rule to cases in which divorce was rendered prior to *McCarty* decision and nonmilitary spouse did not preserve his or her claim, was applicable. Dunham v. Dunham, La.App. 1 Cir.1992, 602 So.2d 1139, writ denied 605 So.2d 1375. Husband And Wife 272(4)

Under Uniformed Services Former Spouses' Protection Act section permitting award to former wife of community share of former husband's military retirement benefits [10 U.S.C.A. § 1408] former wife's period of entitlement to benefits began on June 26, 1981, as provided by Act § 1006(b), rather than on August 1, 1980, date husband's retirement began, where there had been no prior adjudication of retirement pay. Savoie v. Savoie, La.App. 5 Cir.1986, 482 So.2d 23. Husband And Wife 249(3)

Subsec. (c)(1) of this section, which had effect of overruling United States Supreme Court decision holding that a state court was precluded from dividing military nondisability retirement pay pursuant to state community property law, was properly applied retroactive to date of the Supreme Court decision. Menard v. Menard, La.App. 3 Cir.1984, 460 So.2d 751. Divorce 510(3)

Subsec. (c)(1) of this section, which removed federal preemption of state laws on question whether military retirement benefits are community property, was properly given retroactive effect to allow state court to enter judgment finding that pursuant to state law husband's retirement benefits were community property subject to partition. Simmons v. Simmons, La.App. 3 Cir.1984, 453 So.2d 631, writ denied 458 So.2d 476. Husband And Wife 247

7. Retroactive effect of court decisions

Supreme Court decision, holding that supremacy clause precludes court from dividing military nondisability retirement pay pursuant to state's community property laws, did not apply retroactively to divorce decree that was final before decision. In re Chandler, C.A.5 (Tex.) 1986, 805 F.2d 555, rehearing denied 810 F.2d 198, certiorari denied 107 S.Ct. 2180, 481 U.S. 1049, 95 L.Ed.2d 837, rehearing denied 110 S.Ct. 531, 493 U.S. 987, 107 L.Ed.2d 530. Courts 100(1)

Supreme Court's ruling that federal law precluded state courts from dividing military retirement pay pursuant to state community property laws does not apply retroactively to render contrary state court judgments void. White v. White, C.A.9 (Cal.) 1984, 731 F.2d 1440. Courts 100(1)

This section operates retroactively as to retirement or retention pay periods beginning after June 25, 1981; therefore, superior court's order adjudging husband's military pension to be a separate property would be reversed. In re Marriage of Lockstrom, Cal.App. 1 Dist.1983, 196 Cal.Rptr. 185, 148 Cal.App.3d 675. Divorce 510(3)

Even if this section should be given prospective application only where event which triggered trial court's granting of relief, granting of certiorari in case in which Supreme Court had held that military retirement pensions were not subject to division as community property, was not itself change in law, at time motion to set aside interlocutory judgment was before trial court there was no change of law sufficient to permit husband to evade effects of his own stipulation dividing husband's military pension; thus, trial court abused its discretion in setting aside that portion of interlocutory decree dividing husband's military pension. In re Marriage of Frederick, Cal.App. 5 Dist.1983, 190 Cal.Rptr. 588, 141 Cal.App.3d 876. Divorce 944; Divorce 1284(2)

Use by Congress of date that Supreme Court decided that military retirement pensions were not subject to division

as community property upon dissolution of marriage as reference in this section evidenced legislative intent that law relative to community property treatment of military retirement pensions be as though Supreme Court holding did not exist, that is, that such pensions would be subject to division as community property before and after Supreme Court decision. In re Marriage of Frederick, Cal.App. 5 Dist.1983, 190 Cal.Rptr. 588, 141 Cal.App.3d 876. Divorce 510(3)

Although Superior Court awarded wife a one-half community interest in portion of husband's military retirement pension which accrued during years of marriage, and although, three months after final judgment of dissolution was entered, United States Supreme Court decided McCarty v. McCarty, Cal.1981, 101 S.Ct. 2728, 453 U.S. 210, 69 L.Ed.2d 589, holding that federal law prohibits division of military retirement pensions and preempts state community property law, the award of a community interest in husband's pension to his wife would not be reversed under a retroactive application of McCarty, since Congress, subsequent to McCarty, enacted this section whose purpose was to overrule McCarty, and since the law as it now stands thus supports the Superior Court's award. In re Marriage of Buikema, Cal.App. 4 Dist.1983, 188 Cal.Rptr. 856, 139 Cal.App.3d 689. Courts 100(1)

In view of Congressional overruling of the *McCarty* decision that nondisability military retirement pay could not be distributed as a marital asset the trial court, on motion to modify pre-*McCarty* decree, erred in retroactively applying *McCarty* to deny divorced wife an interest in former husband's military retirement pay. Chisnell v. Chisnell, Mich.App.1986, 385 N.W.2d 758, 149 Mich.App. 224. Courts 100(1)

Receipt and expenditure of pension benefits by husband for personal living expenses in reliance on prior divorce decree decided after issuance of *McCarty* decision which held that pension benefits were not community property was not sufficient in itself to constitute prejudicial change in conditions to preclude retroactive award of benefits to wife; deprived spouse had no knowledge that her rights were invaded based upon subsequent passage of the Uniform Services Former Spouses' Protection Act (FSPA) which overruled *McCarty*. Flynn v. Rogers, Ariz.1992, 834 P.2d 148, 172 Ariz. 62. Divorce 892(1)

Equity required court to examine former wife's request for share of her former husband's military pension, even though couple's divorce decree fell outside time period between United States Supreme Court's decision in *McCarty* and effective date of Uniform Services Former Spouses' Protection Act. In re Marriage of Samson, Mont.1990, 802 P.2d 1241, 245 Mont. 464. Divorce 893(10)

In action by wife to petition husband's military retirement benefits which were omitted at time of divorce, United States Supreme Court decision declaring military retirement benefits not subject to state court division pursuant to divorce, which was expressly overruled by federal legislation made retroactive to one day before decision, could not be retroactively applied to date of divorce to establish that wife had no interest in benefits at that time. Casas v. Thompson, Cal.1986, 720 P.2d 921, 228 Cal.Rptr. 33, 42 Cal.3d 131, certiorari denied 107 S.Ct. 659, 479 U.S. 1012, 93 L.Ed.2d 713. Courts 100(1)

The decree of dissolution awarding the wife 9/20 of the husband's military retirement pay was only effective for pay periods beginning after Feb. 1, 1983, the effective date of this section, regardless of the date of the previous dissolution order. In re Marriage of Wood, Wash.App.1983, 664 P.2d 1297, 34 Wash.App. 892. Divorce 510(3)

Arizona community property law could be applied in determining divisibility of interest in military retirement benefits earned during marriage, at least in cases still pending in trial court or on appeal at time of enactment of this section removing federal preemption of state community property laws, with regard to military retirement benefits, found by United States Supreme Court to exist under prior law. Steczo v. Steczo, Ariz.App.1983, 659 P.2d 1344, 135 Ariz. 199. Divorce 510(3)

Uniformed Services Former Spouses' Protection Act (USFSPA) did not apply retroactively and, thus, did not pre-

clude alleged division of Veteran Affairs (VA) disability benefits in divorce decree that became final before USFSPA went onto effect. Matter of Marriage of Reinauer, Tex.App.-Amarillo 1997, 946 S.W.2d 853, on rehearing in part , rehearing overruled , review denied, rehearing of petition for review overruled. Divorce 510(3)

Court which entered divorce decree after *McCarty* was decided and before the Uniformed Services Former Spouses' Protection Act had no authority to divide federal military retirement benefits between husband and wife, but it could litigate issue of who owned right to receive those benefits in accord with federal authority, and thus, benefits were before the court and were disposed of in the judgment and subsequent enactment of the Act did not alter what had been done, where divorce judgment was not then on appeal. Allison v. Allison, Tex.App.-Fort Worth 1985, 690 S.W.2d 340, ref. n.r.e. 700 S.W.2d 914. Divorce 889

Remand of divorce decree insofar as it divided property of parties, after this section took effect, did not extend marital status of the parties as to the property until the decree was final after remand, so as to allow wife to seek discovery of all business records relating to former husband's income and property acquired since the divorce and to allow her to take former husband's deposition, in view of fact that all the issues in the case, including marital status of the parties, were fairly tried and resolved in the original trial of the case except for the property issue, and division of property was clearly separable from the marital status of the parties, without any unfairness to either of them. Gordon v. Blackmon, Tex.App.-Corpus Christi 1984, 675 S.W.2d 790. Divorce 1323(4)

Failure of trial court to consider former husband's military retirement benefits in apportioning community estate was error, in light of subsequent enactment of this section, even though trial court was not at fault since law at time of divorce decree effectively precluded trial court from considering such benefits. Gordon v. Gordon, Tex.App.-Corpus Christi 1983, 659 S.W.2d 475. Divorce 713

Community property settlement agreement whereby wife was to receive 45% of husband's military retirement pay, though not incorporated in judgment of divorce, was not rescinded by subsequent decision in *McCarty* requiring states to treat military retirement benefits as separate property. Stevens v. Stevens, La.App. 2 Cir.1985, 476 So.2d 883, writ denied 478 So.2d 908. Husband And Wife 272(5)

8. Discretion of court

Uniformed Services Former Spouses Protection Act, 10 U.S.C.A. § 1408(c)(1), does not mandate that military retirement pensions be shared by its recipient and a former spouse, but leaves that issue up to the courts. In re Marriage of Habermehl, Ill.App. 5 Dist.1985, 481 N.E.2d 782, 89 Ill.Dec. 939, 135 Ill.App.3d 105.

9. Agreements

While Uniformed Services Former Spouses' Protection Act prohibits state courts and state legislatures from dividing veterans' disability benefits, Act does not preempt parties' ability to contract. In re Marriage of Stone, Mont.1995, 908 P.2d 670, 274 Mont. 331. Divorce 715; States 18.28

In view of this section giving state courts option to consider military retirement pay in effecting equitable and just property division upon dissolution of marriage, trial court did not abuse its discretion in holding that husband's military retirement pay was available for equitable division and was to be divided in accordance with terms of stipulated agreement entered into by husband and wife. Chase v. Chase, Alaska 1983, 662 P.2d 944. Divorce 713

Residuary clause of settlement agreement unambiguously included community property part of husband's military retirement benefits where it referred to all “other properties, financial assets and belongings of the parties hereto, whether separate or community, not specifically set aside to the defendant”; it thus “treated” husband's military retirement for purposes of amendment to Former Spouses' Protection Act. Buys v. Buys, Tex.1996, 924 S.W.2d 369,

rehearing overruled. Divorce 925

Court-approved separation agreement, characterizing husband's military pension as maintenance, was binding on parties even though there had been court decision, prior to date of agreement, providing that pension was marital property. Peaslee v. Peaslee, Mo.App. E.D.1992, 844 S.W.2d 569. Divorce 919(2)

Court's holding that former wife of man entitled to military retirement was not entitled to modification of divorce decree under act to protect former military spouses, 10 U.S.C.A. § 1408 et seq., where wife had agreed to receive husband's interest in parties' residence as “lump sum maintenance” in return for which she specifically waived any other claims of maintenance she might have, was proper. Bishir v. Bishir, Ky.1985, 698 S.W.2d 823.

10. Waiver

Military retirement pay that had been waived by former husband in order to receive veterans' disability benefits was not community property divisible upon divorce. Mansell v. Mansell, U.S.Cal.1989, 109 S.Ct. 2023, 490 U.S. 581, 104 L.Ed.2d 675, on remand 265 Cal.Rptr. 227, 217 Cal.App.3d 219, review denied. Divorce 713; Husband And Wife 249(3)

Federal law which permits state to treat disposable military retired or retainer pay as community property in marital dissolution action unambiguously excludes from division amounts which retiree has waived in order to receive compensation for disability contracted in line of duty or aggravation of preexisting injury or disease. In re Marriage of Costo, Cal.App. 3 Dist.1984, 203 Cal.Rptr. 85, 156 Cal.App.3d 781. ;

11. Entitlement and eligibility

“Entitlement” to payment of military retirement benefits under this section does not mean actual receipt of retirement pay, but rather eligibility, and therefore this section does not preclude distribution of any interest in military retirement benefits before actual retirement. In re Marriage of Jacobson, Cal.App. 2 Dist.1984, 207 Cal.Rptr. 512, 161 Cal.App.3d 465.

If divorcing military spouse has not served for time sufficient to have earned right to receive military retirement pay, right has not vested and there is no asset to be divided upon divorce. Christopher v. Christopher, Ark.1994, 871 S.W.2d 398, 316 Ark. 215. Divorce 713

Divorced wife was not entitled to interest in whatever military pension husband might be entitled to receive in the future where at time of divorce husband would have to serve at least seven more years before a pension would vest; no right in future benefits existed by virtue of Uniform Services Former Spouses' Protection Act as no independent property right is created in a spouse by that Act. Durham v. Durham, Ark.1986, 708 S.W.2d 618, 289 Ark. 3.

Husband's unmatured military retirement benefits were still subject to apportionment as part of community property estate, even though he retired subsequent to divorce. Southern v. Glenn, Tex.App.-San Antonio 1984, 677 S.W.2d 576, ref. n.r.e.. Divorce 713

Trial court had authority in proceeding on wife's cross action for divorce to divide the accrued, but unmatured, portion of husband's nondisability military retirement pay in that husband had originally filed action for divorce and, thus, consented to trial court's jurisdiction over him as to all matters growing out the subject matter of the divorce and, though a nonsuit was entered on husband's motion, nonsuit did not thereby prejudice the right of the wife as an adverse party to be heard on her claim for affirmative relief. Phillips v. Phillips, Tex.App.-Eastland 1984, 672 S.W.2d 610. Divorce 139

12. Ten year requirement

Requirement that marriage must have lasted at least ten years before retirement payments would be made to former spouse of military member applies only to direct payments from pension account pursuant to court order served upon Secretary of Defense, not offsetting payments by husband as part of property settlement. In re Marriage of Beltran, Cal.App. 1 Dist.1986, 227 Cal.Rptr. 924, 183 Cal.App.3d 292, review denied.

Section of the Former Spouse's Protection Act requiring parties to be married for ten years during active service of member of the armed services does not prevent a state court from dividing military retirement benefits as a marital asset; statute only bars direct payments to former spouse when the marriage is less than ten years' duration. King v. King, Ohio App. 12 Dist.1992, 605 N.E.2d 970, 78 Ohio App.3d 599.

Ten-year provision of subsec. (d)(2) of this section is merely threshold requirement to former spouse's entitlement to recover under this section, and former spouse is merely required to have been married for period of ten years while member spouse performed same number of years of creditable service, whether or not ten years are consecutive. Anderson v. Anderson, Ohio App.1984, 468 N.E.2d 784, 13 Ohio App.3d 194, 13 O.B.R. 242.

Husband's military retirement pay could not be garnished to enforce property settlement where parties had not been married for at least ten years. Bryant v. Bryant, Alaska 1988, 762 P.2d 1289.

Limitation contained in Uniformed Services Former Spouses Protection Act, pursuant to which uniformed service will not disburse direct payments to former spouse if marriage was less than ten years in duration, serves as limitation only upon direct payments and does not mandate denial of application of state law to military pensions which might otherwise summarily be applied to other kinds of retirement benefits, and does not apply to allocable obligation of spouse for payment of alimony, child support, or other payments established by state court divorce or custody decision. Parker v. Parker, Wyo.1988, 750 P.2d 1313.

Wife, who was married to husband for 13 years, only four of which could be counted as periods of military service served by husband during marriage, was nevertheless entitled to protections of the Federal Uniformed Services Former Spouses' Protection Act [10 U.S.C.A. § 1408(a)(6), (c)(1), (d)(1, 2)] inasmuch as she met definition of a "spouse or former spouse" of a member prior to date of court order directing payment of military retirement benefits and was not subject to ten-year period of limitation set forth therein. Le Vine v. Spickelmier, Idaho 1985, 707 P.2d 452, 109 Idaho 341.

The ten-year requirement of federal statute addressing former spouse's interest in other spouse's military pension only applies to military retirement pay paid directly by secretary of service branch to former spouse. Warner v. Warner, La.1995, 651 So.2d 1339, 1995-0057 (La. 3/10/95). Divorce 713

Husband could not be required to complete documentation that would permit military service to pay retirement benefit portion awarded to wife directly to wife; direct payment was not available to wife where parties were married for less than ten years of husband's service. DeLoach v. DeLoach, Fla.App. 1 Dist.1991, 590 So.2d 956.

13. Disposable benefits

In determining value of military pension, for purposes of apportioning marital assets, phrase "net pension" as used by trial court should be understood to mean "disposable retired pay" as defined by federal law. Keen v. Keen, Mich.App.1992, 486 N.W.2d 105, 194 Mich.App. 72.

Awards for attorney fees contained in divorce judgments and any subsequent modifications are subject to garnishment from a spouse's disposable military retirement pay; however, amount payable by way of direct payment as wife's interest in retirement pay, when combined with any garnishment to satisfy attorney fee awards, could not exceed 50% of disposable retirement pay. Chisnell v. Chisnell, Mich.App.1986, 385 N.W.2d 758, 149 Mich.App. 224.

Servicemen's "disposable retired pay" is the total monthly retired or retainer pay to which former member of the military is entitled, less amounts owed to the United States or deducted and, in Idaho, disposable retired pay is treated as community property; "disability pay," which may be deducted from the disposable retired pay, is strictly the separate property of the retired member. McHugh v. McHugh, Idaho App.1993, 861 P.2d 113, 124 Idaho 543.

Uniformed Services Former Spouses' Protection Act's definition of "disposable retired pay" subject to state marital property laws did not include Chapter 61 military disability benefits. Wallace v. Fuller, Tex.App.-Austin 1992, 832 S.W.2d 714.

14. Separation pay

Separation pay as a severance benefit upon involuntary discharge from military under 10 U.S.C.A. § 1174 is not disposable retired or retainer pay under Federal Uniformed Service Former Spouse's Protection Act, 10 U.S.C.A. § 1408(c)(1), permitting state court to treat disposable retired or retainer pay payable to member either as property solely of member or as property of member and his spouse and is separate property of the military service member, where unlike military benefits based upon longevity of service separation pay does not serve to compensate for past service but right to separation pay occurs only when there is involuntary discharge of service member. In re Marriage of Kuzmiak, Cal.App. 2 Dist.1986, 222 Cal.Rptr. 644, 176 Cal.App.3d 1152, review denied , certiorari denied 107 S.Ct. 276, 479 U.S. 885, 93 L.Ed.2d 252. Divorce 710

Payments to which service member became entitled, upon his voluntary separation from the armed services, pursuant to the Voluntary Separation Incentive Program (VSI) qualified as "retire or retainer pay," which was subject to equitable distribution upon service member's divorce under the Uniform Services Former Spouse's Protection Act (USFSPA). Abernethy v. Fishkin, Fla.App. 5 Dist.1994, 638 So.2d 160. Divorce 713

15. Disability benefits

Veteran's disability benefits not received in lieu of retirement pay were not precluded from being considered in spousal maintenance award. Repash v. Repash, Vt.1987, 528 A.2d 744, 148 Vt. 70.

Order which altered the percentage of former husband's military retirement pay which wife was to receive in order to ensure that she would continue to receive the same amount she had been receiving even after husband's retirement pay was reduced because of increase in his disability pay was not an improper division of his disability pay. McHugh v. McHugh, Idaho App.1993, 861 P.2d 113, 124 Idaho 543.

In arriving at equitable distribution of marital assets, courts should only consider party's military disability benefits as they affect financial circumstances of both parties; disability benefits should not, either in form or substance, be treated as marital property subject to division upon dissolution of marriage. Clauson v. Clauson, Alaska 1992, 831 P.2d 1257.

Although court may treat veteran's disposable retired or retainer pay as marital property, court is precluded from dividing veteran's disability retirement pay as marital property. In re Marriage of Franz, Colo.App.1992, 831 P.2d 917. Divorce 713

Uniformed Services Former Spouses' Protection Act precluded state court from treating Chapter 61 military disability benefits as community property subject to division in partition proceeding. Wallace v. Fuller, Tex.App.-Austin 1992, 832 S.W.2d 714.

Uniformed Services Former Spouse's Protection Act (USFSPA) does not permit state courts to treat certain military retirement pay, waived by retiree in order to receive or increase veteran's disability benefits, as property divisible upon divorce. Hapney v. Hapney, Ark.App.1992, 824 S.W.2d 408, 37 Ark.App. 100.

Simply because husband was ordered to pay wife alimony "in lieu of her right to receive said amount as a distribution of marital property" did not mean that chancellor made property division in violation of federal Uniformed Services Former Spouses' Protection Act, which excludes disability benefits from division in divorce where retiree has waived military retirement pay in order to receive disability benefits; while chancellor plainly took note of disability benefits paid to husband, he made award of alimony and nothing more, and gratuitous comment which accompanied award did not convert it from alimony to division of property. Womack v. Womack, Ark.1991, 818 S.W.2d 958, 307 Ark. 269. Divorce 715; Divorce 883

Even though husband's disability benefits received from military retirement pension were unavailable to wife for alimony payments under Former Spouses Protection Act (FSPA), and were subject to strictures of anti-attachment provision of federal statute providing for nonassignability and exempt status of benefits once husband actually received his benefits, court was not precluded from ordering husband to pay alimony, and once awarded, FSPA did not relieve husband from paying such alimony obligations. Murphy v. Murphy, Ark.1990, 787 S.W.2d 684, 302 Ark. 157.

Award to wife of portion of husband's vested military pension was proper, even though it was possible that husband would retire under disability benefit rather than longevity benefit, as wife had earned entitlement to portion of retirement pay, husband was not able to pay wife present value of her earned portion, and trial court could reconsider award if and when husband retired on disability pension. Spratling v. Spratling, Ky.App.1986, 720 S.W.2d 936. Divorce 803

Federal law governing payment of veteran's disposable retirement pay to his or her spouse as division of property does not preclude award of alimony against spouse receiving disability pay and, once awarded, does not relieve paying spouse from paying such alimony obligations, even though most of paying spouse's income consists of military retirement designated as disability. Allen v. Allen, Fla.App. 2 Dist.1994, 650 So.2d 1019, rehearing denied. Divorce 577

Former wife's special-equity interest in former husband's military retirement benefits, which former wife obtained pursuant to divorce decree, was extinguished by operation of law upon reallocation of former husband's benefits from retirement to disability. Robinson v. Robinson, Fla.App. 1 Dist.1994, 647 So.2d 160. Divorce 713

Federal statute [10 U.S.C.A. § 1408(a)(4)], which provides that disposable retired pay means total monthly retired or retainer pay to which member is entitled other than retired pay of member retired for disability under Chapter regulating early retirement of servicemen because of disability, did not require that husband's Veterans Administration disability benefits be excluded from "disposable retired or retainer pay" which was community property. Campbell v. Campbell, La.App. 2 Cir.1985, 474 So.2d 1339, writ denied 478 So.2d 148.

"Disposable retired or retainer pay" for purpose of this section governing payment of retired or retainer pay of military personnel in compliance with court orders, excludes disability pay; thus, former wife seeking partition of community property was not entitled to any portion of former husband's military service pension which constituted disability pay. Inzinna v. Inzinna, La.App. 5 Cir.1984, 456 So.2d 691, writ denied 461 So.2d 317.

16. Treatment of retired pay as income--Generally

Trial court could consider husband's potential air force pension as source of revenue for purpose of awarding alimony. Ray v. Ray, Neb.1986, 383 N.W.2d 752, 222 Neb. 324. Divorce 577

Military retirement benefit pay is analogous to any pension fund and constitutes a "marital asset," and shall be included for purposes of establishing marital estate. In re Marriage of Kecskes, Mont.1984, 683 P.2d 478, 210 Mont. 479. Divorce 713

This section permits, but does not require, state courts to consider military retirement payments as marital property. Matter of Marriage of Wallace, Or.App.1983, 671 P.2d 711, 65 Or.App. 522. Divorce 713

Under this section, Supreme Court prefers to treat military retirement fund as income and not as marital property. Brown v. Brown, S.C.1983, 302 S.E.2d 860, 279 S.C. 116. Divorce 713

Under 10 U.S.C.A. § 1408(c)(1), which provides that court may treat disposable military retired or retainer pay payable to member either as property solely of member or as property of member and his spouse in accordance with state law, and 10 U.S.C.A. § 1408(a)(4), which defines disposable retired or retainer pay, former wife was entitled to have her community interest in husband's military retirement benefits calculated on basis of husband's net pay attributable to slightly more than 17 years of service during marriage, rather than on basis of husband's gross pay. Campbell v. Campbell, La.App. 2 Cir.1985, 474 So.2d 1339, writ denied 478 So.2d 148. Husband And Wife 249(3)

17. ---- Taxes, treatment of retired pay as income

Taxpayer was owner of one-half of former military husband's retirement pay, and thus, that retirement pay was included in taxpayer's gross income, for tax purposes, where state divorce decree incorporated settlement agreement between taxpayer and husband, stating that taxpayer was owner of, and would receive, one-half of husband's disposable retired or retainer pay. Pfister v. C.I.R., C.A.4 2004, 359 F.3d 352. Internal Revenue 3587

18. Treatment of retired pay as marital property

Debtor-servicemember could not unilaterally alter the nature of payments that his former wife was receiving, pursuant to direct payment provisions of the Uniformed Services Former Spouses Protection Act (USFSPA), by ceasing to pay child support and declaring that all future USFSPA payments were in satisfaction of his nondischargeable child support obligation. In re Tidwell, Bkrtcy.S.D.Fla.1990, 117 B.R. 739.

Wife's interest in half of debtor's military retirement benefits was her sole and separate property, and not property of debtor; wife's entitlement to half of benefits was fixed prepetition in divorce decree, but debtor's entitlement to receipt of benefits did not come into being until after he had filed bankruptcy case. In re Farrow, Bkrtcy.M.D.Ga.1990, 116 B.R. 310.

Georgia divorce judgment awarding debtor's wife 38% of debtor's retirement pension, payable directly from United States to wife, granted wife nondischargeable property interest in 38% of pension. Matter of Hall, S.D.Ga.1985, 51 B.R. 1002.

Former spouse did not lose her right to claim any portion of interest she held in military pension merely because, under law at time divorce was entered, military pensions were exempted from inclusion in equitable or community property distributions; rather, Uniformed Services Former Spouses' Protection Act, which restored right of states to

include military pensions in marital property, applied. Major v. Major, Pa.Super.1986, 518 A.2d 1267, 359 Pa.Super. 344, appeal granted, judgment affirmed and remanded on other grounds 540 A.2d 529, 518 Pa. 62.

Former wife was entitled to one half of former husband's military retirement benefits which were due to husband's length of service with Air Force, after excluding that percentage of benefits awarded due to husband's disability and that percentage due to husband's military service prior to marriage; limiting *In re Marriage of Costo*, 156 Cal.App.3d 781, 203 Cal.Rptr. 85. In re Marriage of Stephens, Cal.App. 5 Dist.1986, 229 Cal.Rptr. 238, 184 Cal.App.3d 616.

Military pensions may be treated as marital property under Illinois law and are subject to division provisions of Illinois Marriage and Dissolution of Marriage Act. In re Marriage of Brown, Ill.App. 4 Dist.1992, 587 N.E.2d 648, 167 Ill.Dec. 379, 225 Ill.App.3d 733.

Former Spouse's Protection Act [10 U.S.C.A. § 1408] permits, but does not command, state courts to consider military retirement benefits as marital property; final decision concerning treatment of military retirement funds remains with the states. Koenes v. Koenes, Ind.App. 1 Dist.1985, 478 N.E.2d 1241.

Wife would be awarded approximately one third of portion of husband's "take-home" military retirement pension earned during marriage. Pendleton v. Pendleton, Neb.1993, 496 N.W.2d 499, 242 Neb. 675.

Husband's military pension represented compensation for past services, making it marital property to be divided equally by parties in dissolution proceeding. In re Marriage of Howell, Iowa 1989, 434 N.W.2d 629.

Wife was not entitled to relief from divorce judgment to subject husband's military retirement pay to property division despite post-*McCarty* change in federal law effected by Uniformed Services Former Spouses' Protection Act to allow such pay to be considered in divorce proceedings where wife waited nearly three years after Act's effective date to reopen judgment on that ground, no evidence was introduced to show value of retirement pay, and no other change of circumstances to justify the relief was shown. Watne v. Watne, N.D.1986, 391 N.W.2d 636.

Trial court was precluded from considering husband's military disability pension as a marital asset and improperly awarded wife one half of the value of the husband's military disability pension when dissolving marriage. King v. King, Mich.App.1986, 386 N.W.2d 562, 149 Mich.App. 495.

This section which precludes payments to spouse from spouse's military pension under certain circumstances operates only in event dissolution decree provides for direct payments from pension account to former spouse and does not impose limitation on court's ability to treat military pension as marital property where parties were not married for at least ten years during spouse's military career. Matter of Marriage of Wood, Or.App.1984, 676 P.2d 338, 66 Or.App. 941.

State court may treat disposable retired or retainer pay of military retiree as marital property, but military disability payments, which are not included within definition of "disposable retired or retainer pay," cannot be classified as marital property subject to distribution under state equitable distribution laws. Bishop v. Bishop, N.C.App.1994, 440 S.E.2d 591, 113 N.C.App. 725.

Where equitable distribution claim is made on military retirement pension, equitable distribution statute authorizes use of "coverture factor" to determine nonmilitary spouse's share, because statutory definition of "marital property" includes "all property and earnings acquired by either spouse during a marriage," thus contemplating that it is property or earnings accrued during marriage which form basis for marital property; coverture factor is applied once initial marital share is determined and consists of ratio of number of years parties have been married while service person has been in the military to total number of years of military service. Butcher v. Butcher, W.Va.1987, 357 S.E.2d

226, 178 W.Va. 33.

Husband's military pension was subject to equitable distribution upon an absolute divorce. Morton v. Morton, N.C.App.1985, 332 S.E.2d 736, 76 N.C.App. 295, appeal dismissed , review denied 337 S.E.2d 582, 314 N.C. 667.

Military nondisability pension benefits received for service which occurred during marriage are marital property subject to limitations placed upon their division by federal statute. Moritz v. Moritz, Mo.App. W.D.1992, 844 S.W.2d 109.

Uniformed Services Former Spouses' Protection Act precluded trial court from treating husband's military retirement pay as marital property in wife's independent equitable action brought after entry of dissolution decree that did not mention husband's retirement pay, where dissolution decree was entered prior to Act's effective date, and judgment in wife's equitable action was entered after effective date of amendment to Act limiting spouse's right to recover military retirement benefits following entry of divorce decree. Mings v. Mings, Mo.App. S.D.1992, 841 S.W.2d 267, rehearing and/or transfer denied.

Although award of one half of husband's military retirement pension to wife was proper, treating portion of pension awarded to wife as periodic maintenance rather than as a distribution of marital property was error, and decretal language was reformed to reflect correct characterization. Starrett v. Starrett, Mo.App. E.D.1985, 703 S.W.2d 544.

Former wife, who had been married less than ten years, was nevertheless entitled to percentage of one half of former husband's future military retirement pay, percentage being calculated by number of military marriage years relative to total length of military service. Warner v. Warner, La.1995, 651 So.2d 1339, 1995-0057 (La. 3/10/95). Divorce 713

Only that portion of military retirement pension that constitutes real retirement benefit, rather than disability, can be considered a marital asset subject to distribution. Robinson v. Robinson, Fla.App. 1 Dist.1994, 647 So.2d 160. Divorce 713

Uniformed Services Former Spouses' Protection Act did not apply retroactively to divorce decree entered before June 25, 1981 which neither treated nor reserved jurisdiction to treat husband's retired pay as property of husband and former wife. Hollyfield v. Hollyfield, Miss.1993, 618 So.2d 1303.

Federal Uniformed Services Former Spouses Protection Act did not vest any rights in any party in divorce proceeding, but merely removed federal bar and allowed states to treat military retirement pensions of their domiciliaries as personal property subject to state property laws. Brown v. Brown, Miss.1990, 574 So.2d 688.

19. Community property

"After-discovered property" provision of divorce judgment, which reserved jurisdiction in court to distribute property discovered after decree had been final, was not applicable to husband's military pension which was not awardable as community property at the time divorce decree became final, although subsequent legislation permitted such award. Mueller v. Walker, Cal.App. 4 Dist.1985, 213 Cal.Rptr. 442, 167 Cal.App.3d 600.

Military pension rights, earned and accruing during marriage, are community property of the spouses, without regard to whether such rights accrued before or after June 26, 1981, effective date of this section. In re Marriage of Fairfull, Cal.App. 1 Dist.1984, 207 Cal.Rptr. 523, 161 Cal.App.3d 532.

Under Uniformed Services Former Spouses Protection Act (USFSPA), states are allowed to treat military retiree's

disposable retired pay as community property. Walborn v. Walborn, Idaho 1995, 905 P.2d 1029, 127 Idaho 720. Husband And Wife 249(3)

Whether former husband's special separation benefits from military represented proceeds from retirement or was payment in lieu of retirement benefits, some portion of it was attributable to retirement funds, and court had jurisdiction to treat it as community asset and award equitable portion to former wife, who had been awarded 32 1/2 of former husband's retirement benefits at the time of divorce. In re Marriage of Crawford, Ariz.App. Div. 2 1994, 884 P.2d 210, 180 Ariz. 324, review denied. ; ;

Language in divorce decree providing that husband was to pay wife $200 per month as permanent alimony, which was to increase on pro rata basis with cost of living adjustments to husband's military retirement pay, was sufficient to satisfy statutory requirement for permanent alimony, where the payment was a substitute for wife's $217 per month interest in community property. Waltz v. Waltz, Nev.1994, 877 P.2d 501, 110 Nev. 605. Divorce 613

Provision of Federal Uniform Services Former Spouse Protection Act allowing court to treat disposable retirement pay as property of service member and his spouse did not limit spouse's community property interest in retirement benefits to portion of net rather than of gross benefits, but only restricted garnishment of those benefits in net receipts. Casas v. Thompson, Cal.1986, 720 P.2d 921, 228 Cal.Rptr. 33, 42 Cal.3d 131, certiorari denied 107 S.Ct. 659, 479 U.S. 1012, 93 L.Ed.2d 713.

Military retirement pay is vested community property right, subject to division by divorce court, and is not improper "alimony," as Uniformed Services Former Spouses' Protection Act (FSPA) allows state courts to continue to apply community property laws. Morris v. Morris, Tex.App.-Fort Worth 1995, 894 S.W.2d 859, rehearing overruled. Divorce 713; Husband And Wife 249(3)

Under Uniformed Services Former Spouses' Protection Act, 10 U.S.C.A. § 1408, military retirement benefits became subject to state community property law as of June 25, 1981. Harrell v. Harrell, Tex.App.-Corpus Christi 1986, 700 S.W.2d 645.

Under Uniformed Services Former Spouses Protection Act (USFSPA), judgment of legal separation which contained no provisions pertaining to property division did not preclude court in postdivorce proceedings from determining that husband's military retirement benefits were community property and awarding part of those benefits to wife. Meche v. Meche, La.App. 3 Cir.1994, 635 So.2d 614, 1993-1045 (La.App. 3 Cir. 4/6/94), writ denied 640 So.2d 1353, 1994-1174 (La. 6/24/94), certiorari denied 115 S.Ct. 513, 513 U.S. 1001, 130 L.Ed.2d 419. ;

Under prior law, former spouse was entitled to community share of military retirement pay when right to such benefits was acquired during marriage. White v. White, La.App. 1 Cir.1993, 623 So.2d 31.

There was no error to vitiate former husband's consent to postdivorce amendment of community property settlement agreement concerning disposition of military retirement benefits, even though he alleged that he mistakenly believed that at time of amendment they were community property. Rose v. Rose, La.App. 2 Cir.1986, 483 So.2d 181, writ not considered 484 So.2d 665.

Military retirement benefits of former husband were community, rather than separate, property, for purposes of division of retirement benefits with former wife, both under Louisiana law in effect when couple was divorced in March 1980 and under retrospective application of section of the Uniformed Services Former Spouses' Protection Act [10 U.S.C.A. § 1408]. Savoie v. Savoie, La.App. 5 Cir.1986, 482 So.2d 23. Husband And Wife 249(3)

20. Division of retired pay

Under Uniformed Services Former Spouse Protection Act (USFSPA), state divorce courts are permitted to divide military pensions. In re Potter, Bkrtcy.N.D.N.Y.1993, 159 B.R. 672. Divorce 713

State divorce court properly exercised its jurisdiction under Federal Uniform Services Former Spouses' Protection Act (FUSFSPA) to divide marital estate, which included military pension benefits, and properly required husband to pay to wife 13.6% of each monthly payment. In re Zrubek, Bkrtcy.D.Mont.1993, 149 B.R. 631. Divorce 713; Divorce 804

Military retirement pay is divisible as property in divorce proceeding under statute defining property subject to equitable division upon divorce. Blanchard v. Blanchard, N.H.1990, 578 A.2d 339, 133 N.H. 427. Divorce 713

Release provision in negotiated settlement agreement in divorce case, whereby former wife relinquished and abandoned any and all claims for future payments, did not preclude modification of the agreement to provide for equitable distribution of former husband's military pension, upon enactment and retroactive application of this section, since, due to United States Supreme Court ruling then applicable, former wife's right to an interest in former husband's military pension was not even considered. Castiglioni v. Castiglioni, N.J.Super.Ch.1984, 471 A.2d 809, 192 N.J.Super. 594. Release 32

Award of net military retirement pay to wife would be allowed provided husband set aside wife's potential share in difference between gross and disposable retirement pay in such manner as the parties would agree or court would direct to preserve that sum for wife should the Supreme Court decide the issue in her favor in pending case involving question whether Federal Uniformed Services Former Spouses' Protection Act permits division of “gross” military pension or whether jurisdiction is limited to “net” benefit remaining after deductions. In re Marriage of Castle, Cal.App. 4 Dist.1986, 225 Cal.Rptr. 382, 180 Cal.App.3d 206, review denied. Divorce 1323(4)

As Congress, by passage of this section, provided power to each state to deal with military pensions in dissolution proceedings in manner in which state saw fit, rule applying community property division to military pensions was no longer in violation of federal law, and trial court erred in modifying interlocutory judgment to declare husband's military pension to be his separate property. In re Marriage of Sarles, Cal.App. 4 Dist.1983, 191 Cal.Rptr. 514, 143 Cal.App.3d 24. Divorce 893(6); States 18.29

In light of state court's limited jurisdiction under the Uniformed Services Former Spouses' Protection Act to subject retired service member's disposable retired pay to property division, term “retirement pay,” as used in divorce judgment awarding retired navy member's former wife 36.5% of his retirement pay after deduction for federal withholding, was ambiguous, and therefore trial court properly dismissed civil contempt proceeding brought against the retired member for his alleged failure to pay former wife her share of his retirement pay, where judgment required retired member, contrary to direct government payment system, to make necessary arrangements so that retirement benefits to be paid to former wife would be by allotment. Knoop v. Knoop, N.D.1996, 542 N.W.2d 114. Divorce 1104

Trial court's allocation of 45% of military pension to former wife, as part of property settlement accompanying divorce, was not erroneous given overall property division in which bulk of other marital assets had gone to wife with husband retaining marital debts. Keen v. Keen, Mich.App.1992, 486 N.W.2d 105, 194 Mich.App. 72. Divorce 804

Trial court was required to consider husband's nonvested military pension in awarding wife $300 per month for a period of 12 months as a form of property distribution, and its failure to do so was reversible error. Delorey v. Delorey, N.D.1984, 357 N.W.2d 488. Divorce 715

Wife's share of husband's future military retirement pay did not exceed 50% of total monthly retired pay to which husband may be entitled and did not violate subsec. (e)(1) of this section where district court in divorce proceeding utilized formula in which one-half of husband's retirement pay was multiplied by a fraction consisting of number of years of marriage over number of years husband served in military. Bullock v. Bullock, N.D.1984, 354 N.W.2d 904. Divorce 804

This section grants states the authority to treat all disposable retired pay as marital property but limits direct government payments to former spouses to 50 percent of disposable retired pay and, hence, where a nonservice spouse is awarded one-half of the gross pension, the service spouse is to pay the excess over the 50 percent of disposable pension payable directly by the federal government to the other spouse. Deliduka v. Deliduka, Minn.App.1984, 347 N.W.2d 52, review denied , reargument denied. Divorce 713; Divorce 804

Trial court did not abuse its discretion in making equitable distribution of husband's military retirement benefit based upon husband's rank at retirement, rather than at time of divorce, and upon years of marriage during husband's military service. In re Marriage of Hunt, Colo.1995, 909 P.2d 525, rehearing denied. Divorce 804

Uniformed Services Former Spouses' Protection Act, granting state courts authority to treat only disposable military retirement pay as community property, did not preclude district court from incorporating into divorce decree parties' settlement agreement, under which husband, a veteran, voluntarily agreed to divide total amount of husband's military retirement pay, including his veterans' disability benefits, as maintenance; such contractual agreement did not purport to assign husband's veterans' disability benefits to wife, and parties had power to enter into settlement agreement regardless of Act. In re Marriage of Stone, Mont.1995, 908 P.2d 670, 274 Mont. 331. ; ;

Property division provisions of divorce decree could not be modified based on after-enacted spousal right to reach military retirement benefits not legally divisible at time of dissolution. Evans v. Evans, Okla.1993, 852 P.2d 145. Divorce 893(6)

Provision of Uniformed Services Former Spouses Protection Act (USFSPA) limiting direct payments of military retirement pay to service member's former spouse to 50% of such pay did not limit ability of state court to order equitable distribution of greater than 50% of disposable retirement pay. Forney v. Minard, Wyo.1993, 849 P.2d 724. Divorce 804

Uniformed Services Former Spouses' Protection Act did not require modification of postdecree property settlement to award wife share of military retirement benefits earned by husband during marriage. Clifton v. Clifton, Okla.1990, 801 P.2d 693. Divorce 893(6)

Though gross value of spouse's military retirement pension may be used in appraising total marital estate, Uniformed Services Former Spouses Protection Act prohibits state court from awarding nonmilitary spouse right to collect more than 50% of net monthly retirement pay; i.e., if equitable division of property was such that 50% of net retirement benefits would not satisfy nonmilitary spouse's share, trial court would have to make up difference by disproportionate award of other assets. Beesley v. Beesley, Idaho 1988, 758 P.2d 695, 114 Idaho 536. Divorce 804

Military pension may be joint property subject to division in divorce action; calling into doubt *Baker v. Baker*, 546 P.2d 1325 (Okl.). Stokes v. Stokes, Okla.1987, 738 P.2d 1346. Divorce 713

Husband's military retirement pay was to be classified as “separate property” where military service upon which it was based took place entirely before the marriage. Lang v. Lang, Idaho App.1985, 711 P.2d 1322, 109 Idaho 802.

Husband And Wife 249(3)

Military pensions, like similar nonmilitary pensions, are not property subject to division in a dissolution proceeding, a result not changed by passage of the federal Uniformed Services Former Spouses' Protection Act. In re Marriage of Mattson, Colo.App.1984, 694 P.2d 1285. Divorce 713

Under this section directing payment of military retirement benefits to spouse or former spouse in compliance with "final" court order, husband's military retirement benefits were not immune from execution to satisfy husband's obligation pursuant to divorce decree to pay alimony and child support, since decree did not purport to make any distribution or division of such benefits or order that child support be satisfied from benefits, but simply required husband to pay support, without designating source of payment. Ziegler v. Ziegler, Idaho App.1985, 691 P.2d 773, 107 Idaho 527. ;

Trial court did not abuse its discretion in awarding husband all of his military retirement pay by considering such pay in its division of property and in awarding child support and maintenance after determining it was not a marital asset subject to division. Grant v. Grant, Kan.App.1984, 685 P.2d 327, 9 Kan.App.2d 671. ; ;

Trial court did not abuse its discretion in dividing husband's military retirement benefits equally in distribution of marital assets, despite husband's contention that since he was married to wife only 15 years of his 20 years of military service, 50% division of his retirement pay was inequitable. In re Marriage of Kecskes, Mont.1984, 683 P.2d 478, 210 Mont. 479. Divorce 804

When family court in divorce case divided value of right of United States Public Health Service veterinarian to retire and receive benefits, it did not violate this section governing payment of retirement benefits upon court order. Wallace v. Wallace, Hawai'i App.1984, 677 P.2d 966, 5 Haw.App. 55. Divorce 712

This section which governs state's treatment of military pensions in dissolution proceeding allows court to treat military pensions as marital property in making equitable property divisions, regardless of duration of marriage which is dissolved, but before ex-spouse can receive direct payments from pension account, as opposed to offsetting award of other property, couple's marriage must have spanned at least ten years of military career. Matter of Marriage of Wood, Or.App.1984, 676 P.2d 338, 66 Or.App. 941. Divorce 713

Nondisability military retirement pay is not separate property but, rather, is community property subject to division on dissolution of marriage; reinstating LeClert v. LeClert, 80 N.M. 235, 453 P.2d 755 and superseding Espinda v. Espinda, 96 N.M. 712, 634 P.2d 1264. Walentowski v. Walentowski, N.M.1983, 672 P.2d 657, 100 N.M. 484. Divorce 713; Husband And Wife 249(3)

Where trial court considered husband's military retirement benefit in determining spousal support provisions of dissolution decree, it was proper to refuse to assign to wife, in addition, a 45 percent interest in the retirement pension. Matter of Marriage of Wallace, Or.App.1983, 671 P.2d 711, 65 Or.App. 522. Divorce 803

This section permits court to award up to 50 percent of disposable retired or retainer pay to nonmilitary spouse, provided couple was married for at least ten years during qualified service. Matter of Marriage of Smith, Wash.1983, 669 P.2d 448, 100 Wash.2d 319. Divorce 804

Trial court did not abuse its discretion by awarding wife one half of marital portion of husband's military pension. Judkins v. Judkins, N.C.App.1994, 441 S.E.2d 139, 113 N.C.App. 734, review denied 447 S.E.2d 424, 336 N.C. 781. Divorce 804

Uniformed Services Former Spouses' Protection Act did not preclude court from dividing retired pay as marital property under divorce decree which had originally treated fleet reserve pay as marital property. Sutherland v. Cobern, Tex.App.-Texarkana 1992, 843 S.W.2d 127, rehearing denied , writ denied. Divorce 713

Uniformed Services Former Spouses' Protection Act barred former wife's action seeking one half of former husband's military pension payments, where dissolution judgment was issued before June 25, 1981 and did not treat, or reserve jurisdiction to treat, any amount of former husband's retired pay as marital property. Mote v. Corser, Mo.App. S.D.1991, 810 S.W.2d 122. Divorce 883

Court granting divorce decree and dividing marital property did not impermissibly award wife one-half interest in husband's military retirement pay without conforming to requirement of federal law or specifying dollar amount where parties had agreed to so divide retirement pay and husband, in brief, merely set out some limitations on award of interest and retirement benefits under Uniformed Services Former Spouses' Protection Act. Ulmer v. Ulmer, Tex.App.-Texarkana 1986, 717 S.W.2d 665. Divorce 804; Divorce 925

Former Spouses Protection Act applied to suit to partition retirement benefits owned by former spouses as cotenants where cotenancy arose because of divorce decree's failure to divide those benefits. Barrett v. Barrett, Tex.App.-Texarkana 1986, 715 S.W.2d 110, ref. n.r.e.. Husband And Wife 272(4)

Wife's suit for partition of military nondisability retirement benefits accrued by her former spouse was not barred by res judicata, where final divorce decree did not mention or dispose of military retirement benefits and divorce became final during gap period between Supreme Court decision holding that supremacy clause precluded state court from dividing military nondisability retirement pay on divorce and statute providing that divorce court could divide military retirement pay between spouses in accordance with law of jurisdiction of that court; after passage of statute, spouses became tenants in common with respect to military retirement benefits which accrued during their marriage and thus property was subject to later partition. Eddy v. Eddy, Tex.App.-Austin 1986, 710 S.W.2d 783, ref. n.r.e.. Divorce 890

After a divorce, partition suit is proper to achieve division of military retirement benefits not already disposed of by court order, assuming the court has jurisdiction of the defendant. Kovacich v. Kovacich, Tex.App.-San Antonio 1986, 705 S.W.2d 281, dismissed. Husband And Wife 272(4)

Partition was unavailable to obtain division of military retirement benefits upon adoption of Uniform Services Former Spouses Protection Act [10 U.S.C.A. § 1408] where divorce decree, rendered after date of United States Supreme Court's *McCarty* opinion and before effective date of Act, made express disposition of husband's military retirement benefits. Allison v. Allison, Tex.1985, 700 S.W.2d 914. Divorce 889

Portion of military retirement benefits earned during marriage are community property, and retirement benefits not divided upon divorce are owned by parties as tenants-in-common. Forsman v. Forsman, Tex.App.-San Antonio 1985, 694 S.W.2d 112, ref. n.r.e.. Divorce 1360; Husband And Wife 249(3)

Divorce decree, which was entered after date as to which Uniformed Services Former Spouses' Protection Act was given retroactive effect, was subject to Texas community property laws, and thus, husband's military retirement pay, which was not mentioned in decree, was held by husband and wife as tenants in common and subject to partition action by wife. Harkrider v. Morales, Tex.App.-San Antonio 1985, 686 S.W.2d 712. Divorce 1360

In view of former wife's having a home and greater earnings, specifically, $470 per month take-home pay compared to former husband's income of $243 per month, and in view of the homeless former husband's unemployment, trial court did not err in failing to award former wife any of former husband's military retirement pay. Warner v. Warner, Mo.App. E.D.1985, 684 S.W.2d 946. Divorce 804

Husband's military retirement benefits were subject to division by the trial court. Vines v. Vines, Tex.App.-San Antonio 1984, 683 S.W.2d 117. Divorce 713

This section should be applied in case where there would be no cause of action to partition spouse's retirement benefits but for the divorce. Trahan v. Trahan, Tex.App.-Austin 1984, 682 S.W.2d 332, ref. n.r.e. , appeal dismissed 106 S.Ct. 1171, 475 U.S. 1002, 89 L.Ed.2d 291, rehearing denied 106 S.Ct. 1664, 475 U.S. 1132, 90 L.Ed.2d 206. Divorce 713

Postdivorce increases in future payments of husband's nondisability military retirement benefits do not constitute separate property of retired spouse, but, rather, both parties will share in the future “increases” and “decreases” in retirement benefits. Neese v. Neese, Tex.App.-Eastland 1984, 669 S.W.2d 388, ref. n.r.e.. Divorce 713

Community interest in former husband's military nondisability retirement benefits, for purpose of division of property in divorce action, equalled months of marriage while husband was in military, divided by number of months of creditable military service of husband. Voronin v. Voronin, Tex.App.-Austin 1983, 662 S.W.2d 102, dismissed. Divorce 713

Chancellor made adequate and specific findings to support equitable distribution of 50% of husband's military pension to wife. Pierce v. Pierce, Miss.1994, 648 So.2d 523, rehearing denied, certiorari denied 115 S.Ct. 2613, 515 U.S. 1160, 132 L.Ed.2d 856. Divorce 804; Divorce 881

Although state courts may divide military retirement pay pursuant to their respective property laws, they cannot disregard specific provision to the contrary in Federal Uniform Services Former Spouse's Protection Act. DeLoach v. DeLoach, Fla.App. 1 Dist.1991, 590 So.2d 956. Divorce 713

Former wife of retired military serviceman was entitled to interest in payments of disposable retirement pay which accrued subsequent to Feb. 1, 1983, date of this section permitting courts of individual states to treat disposable retired pay as community or separate property according to law of particular jurisdiction. Inzinna v. Inzinna, La.App. 5 Cir.1984, 456 So.2d 691, writ denied 461 So.2d 317. Husband And Wife 249(3)

In light of federal legislation which overruled Supreme Court decision prohibiting division of military retirement benefits pursuant to state community property laws, trial court did not err in awarding divorced wife 50 percent of husband's military retirement benefits under Louisiana community property law. Jett v. Jett, La.App. 1 Cir.1984, 449 So.2d 557, writ denied 458 So.2d 473, certiorari denied 105 S.Ct. 2115, 471 U.S. 1054, 85 L.Ed.2d 479. Divorce 804

Lump-sum alimony award is not a proper distribution of military retirement pay under this section which authorizes court to treat such pay as property solely of retiree or as property of retiree and his spouse. Hartzell v. Hartzell, Fla.App. 4 Dist.1983, 434 So.2d 353. Divorce 601(2)

Retired Air Force colonel could not require that nearly all his retired pay should be withheld for federal income taxes, in order to reduce amount of retired pay available for apportionment between him and his former spouse. 1984, 63 Op.Comp.Gen. 322.

21. Withholdings

Under Uniformed Services Former Spouses Protection Act (USFSPA), military retiree may not have withholdings made from his retired pay by using rate exceeding “projected effective tax rate,” which is ratio of anticipated total

income taxes to anticipated gross income; projected effective tax rate provides best estimate of ultimate tax obligation which will be imposed on retired pay. Walborn v. Walborn, Idaho 1995, 905 P.2d 1029, 127 Idaho 720. Divorce 804

22. Periodic payment method

Trial court did not err by ordering periodic payment of portion of husband's military pension to wife, as part of allocation of marital assets; periodic payment method accorded with federal statute enabling wife to receive money directly from federal government, and precluded interference with federal law requirement that wife would not be entitled to any portion of husband's retired pay after his death. Keen v. Keen, Mich.App.1992, 486 N.W.2d 105, 194 Mich.App. 72.

23. Garnishments

Statute providing that, if the former spouse of military retirees seeks payment under division of property whereby pension was treated as property of member and spouse, then former spouse must serve upon government final court order of garnishment does not require order of garnishment when retiree pay is treated as property of both spouses, but, rather, requires order of garnishment when former spouse is seeking payment for property settlements other than when pension is treated as being property of both spouses, such as when property settlement involves mere debt. Resare v. Resare, D.R.I.1993, 154 B.R. 399.

24. Offsets

In divorce proceeding, trial court did not err in awarding wife entire unpaid balance due on parties' home, which had been sold, although husband contended balance on house was awarded to wife as offset against husband's military retirement pay. Matter of Marriage of Smedley, Or.App.1982, 653 P.2d 267, 60 Or.App. 249. Divorce 863

25. Jurisdiction of state court

Divorced husband's complaint alleging that application of Former Spouse Protection Act violated his due process rights by permitting his military retirement benefits to be distributed as community property and to be paid in part directly to his former wife, though inelegant, was sufficient to state cause of action and should not have been dismissed; it was not definitely established that California court had jurisdiction over divorced husband when it distributed retirement pay as community property. Simanonok v. Simanonok, C.A.11 (Fla.) 1986, 787 F.2d 1517, on subsequent appeal 918 F.2d 947. Civil Rights 1395(1)

Divorce decree issued by Texas state court was “regular on its face,” and thus, provisions of Uniformed Services Former Spouses' Protection Act applied, and service member seeking to recover payments made to his former spouse from retired pay had no claim upon which to bring suit in Claims Court; decree was final decree of divorce issued in accordance with state law, provided for division of property in percentage figure, and was issued by court of competent jurisdiction in traditional legal forum. Goad v. U.S., Cl.Ct.1991, 24 Cl.Ct. 777, affirmed 976 F.2d 747, rehearing denied, in banc suggestion declined , certiorari denied 113 S.Ct. 814, 506 U.S. 1034, 121 L.Ed.2d 687. United States 93

Fact that husband had participated in divorce proceedings in Rhode Island did not provide basis, on theory of implied consent or otherwise, for Rhode Island court's exercise of jurisdiction over him, following his move to California, with respect to wife's petition for division of military pension. Flora v. Flora, R.I.1992, 603 A.2d 723. Divorce 871

Trial court had jurisdiction and grounds to order spousal support in 1993 even though it had terminated spousal support in 1989 with no retention of jurisdiction pursuant to wife's waiver of further support, which was undertaken as condition of receiving share of husband's military retirement benefits in partition action, as amendment to Federal Uniformed Services Former Spouse Protective Act (FUSFSPA) had retroactively deprived her of those benefits; prior order terminating support was not res judicata, and there was nothing inequitable in allowing court to set aside order which was based upon law that later evaporated. In re Marriage of Olsen, Cal.App. 2 Dist.1994, 30 Cal.Rptr.2d 306, 24 Cal.App.4th 1702, review denied. Divorce 609(1); Divorce 635(4)

Trial court lacked personal jurisdiction over husband in wife's postdissolution action to divide husband's military pension benefits where husband was no longer domiciliary or resident of state at time wife instituted action, and where husband's pension rights did not mature during his residency within state, notwithstanding that in dissolution proceeding husband had failed to list his military pension as community asset. Tarvin v. Tarvin, Cal.App. 1 Dist.1986, 232 Cal.Rptr. 13, 187 Cal.App.3d 56. Divorce 1364; Husband And Wife 272(4)

Trial court had jurisdiction to apply California law to husband's military retirement benefits, notwithstanding fact that husband was a domiciliary of Iowa and a resident of California only through military assignment, since husband, by his election to respond to wife's petition for legal separation and forego his motion to dismiss on forum non conveniens grounds, made a general appearance and thereby consented to jurisdiction of the court and the application of the substantive law of California. In re Marriage of Jacobson, Cal.App. 2 Dist.1984, 207 Cal.Rptr. 512, 161 Cal.App.3d 465. Divorce 81

Where husband appeared generally in dissolution proceeding and entered into agreement, stipulation, and waiver which included retention of jurisdiction over his military pension, state court had jurisdiction to issue order concerning military pension under this section. In re Marriage of Sarles, Cal.App. 4 Dist.1983, 191 Cal.Rptr. 514, 143 Cal.App.3d 24. Divorce 883

Domicile of military member in divorce proceeding was Massachusetts, even though he had declared Florida as his family's domicile for tax purposes and, accordingly, court had jurisdiction over member, as required under federal statute pursuant to which court could treat member's disposable retirement pay as property of both member and his spouse; throughout member's military assignments, he and spouse had returned to Massachusetts for his 30 days of annual leave, he had requested assignment in Massachusetts, and had purchased marital home there. McMahon v. McMahon, Mass.App.Ct.1991, 579 N.E.2d 1379, 31 Mass.App.Ct. 504. Divorce 871

Question of consent for purposes of Uniformed Services Former Spouses' Protection Act (USFSPA) is not whether military member simply waived his right to contest personal jurisdiction or state procedural rules; statutory language requires some form of affirmative conduct demonstrating express or implied consent to general in personam jurisdiction. Matter of Marriage of Booker, Colo.1992, 833 P.2d 734. Armed Services 34.2(6); Divorce 511

Magistrate that entered divorce decree had continuing jurisdiction to order Air Force Accounting Center to make monthly payments of former husband's military retirement benefits directly to former wife to satisfy arrearages in payments, which separation and property settlement agreement provided were “as and for” former wife's release of her community interest in those retirement benefits. Ratkowski v. Ratkowski, Idaho 1989, 769 P.2d 569, 115 Idaho 692. Husband And Wife 272(5)

Under federal law, nonresident military retirement beneficiary's prior consent to Nevada jurisdiction over divorce 30 years ago was not “consent” to new separate action filed by ex-wife seeking share of military pension benefits, notwithstanding state statute to the contrary; in light of separate nature of proceedings, serviceman's actual consent to present action was required. Messner v. Eighth Judicial Dist. Court of State of Nev., In and For County of Clark, Nev.1988, 766 P.2d 1320, 104 Nev. 759. Divorce 65

District court did not have personal jurisdiction over former husband, in former wife's action seeking declaration of her interest in his military retirement pay, though parties had been divorced in state and district court retained jurisdiction to modify decree of divorce as to custody of children and child support, where former husband was no longer resident of state and did not consent to district court's jurisdiction. Sparks v. Caldwell, N.M.1986, 723 P.2d 244, 104 N.M. 475. Divorce 893(10)

Under California law, wife of serviceman had community property interest in husband's military retirement pension at time dissolution decree was entered in 1970, and thus, where that interest was not disposed of, the Uniformed Services Former Spouses' Protection Act [10 U.S.C.A. § 1408] granted authority to state court to determine that interest. Bryant v. Sullivan, Ariz.App.1985, 715 P.2d 282, 148 Ariz. 426. Divorce 1364; Husband And Wife 249(3)

Issue whether magistrate properly retained jurisdiction over issue of husband's military retirement pay pending enactment of legislation in Congress was moot since, regardless of manner in which case was treated while appeal was pending, provisions of the Federal Uniform Services Former Spouses' Protection Act [10 U.S.C.A. § 1408(a)(6), (c)(1), (d)(1, 2)] were applicable in any event and justified magistrate's subsequent entry of memorandum decision awarding wife 11% of husband's disposable retirement pay. Le Vine v. Spickelmier, Idaho 1985, 707 P.2d 452, 109 Idaho 341. Divorce 1261(3)

Trial court obtained personal jurisdiction over member of military stationed within state, where he made general appearance by seeking affirmative relief in his answer without contesting personal jurisdiction. Judkins v. Judkins, N.C.App.1994, 441 S.E.2d 139, 113 N.C.App. 734, review denied 447 S.E.2d 424, 336 N.C. 781. Appearance 19(1)

Under federal law regarding division of military retirement benefits, only South Carolina could issue order concerning division of former husband's military retirement benefits where husband was resident of South Carolina at time former wife filed claim for share of benefits and where Texas court's previous divorce decree was silent on division of benefits. Eichor v. Eichor, S.C.App.1986, 351 S.E.2d 353, 290 S.C. 484. Divorce 1456(1)

Former wife could seek partition of former husband's military retirement benefits under Uniformed Services Former Spouses' Protection Act, even though California court issued divorce decree in 1969; California court lacked personal jurisdiction over wife, and thus, lacked jurisdiction to divide marital estate. Redus v. Redus, Tex.App.-Austin 1993, 852 S.W.2d 94, rehearing overruled, writ denied , rehearing of writ of error overruled. Divorce 1456(1)

Court could not partition former husband's military retirement benefits, where court which had granted parties a divorce failed to reserve jurisdiction to treat any amount of retired pay. Knowles v. Knowles, Tex.App.-Tyler 1991, 811 S.W.2d 709. Husband And Wife 272(4)

Trial court lacked jurisdiction, under Uniformed Services Former Spouse's Protection Act, over former husband in former wife's suit for partition of military retirement benefits, as former husband had not consented to jurisdiction, and his residence was out of state. Dunn v. Dunn, Tex.App.-Dallas 1986, 708 S.W.2d 20. Partition 42

Trial court had jurisdiction both under specific language of Armed Services' Former Spouses' Protection Act [10 U.S.C.A. §§ 1408, 1408(c)(1)] and under state's interpretation of that language to partition husband's military retirement benefits. O'Connor v. O'Connor, Tex.App.-San Antonio 1985, 694 S.W.2d 152, ref. n.r.e.. Divorce 713

Husband, who was professional soldier stationed in Germany, waived his special appearance and made general appearance in divorce proceeding by allowing trial to proceed without first obtaining a ruling on his special appearance motion; thus, husband consented to jurisdiction and satisfied requirements of federal statute [10 U.S.C.A. § 1408(c)(4)] governing ability of state courts to apportion military retirement benefits after divorce and accordingly,

trial court had jurisdiction to award wife 44% of husband's military retirement pay. Seeley v. Seeley, Tex.App.-Austin 1985, 690 S.W.2d 626. Divorce 81

Fact that defendant in action to obtain the partition of military retirement benefits meets minimum contacts test, which ordinarily would satisfy due process requirements for jurisdiction, will not prevail to establish jurisdiction in absence of jurisdiction under terms of this section regulating disposition of military retirement pay. Southern v. Glenn, Tex.App.-San Antonio 1984, 677 S.W.2d 576, ref. n.r.e.. Courts 13.5(2)

In action brought by wife to obtain military retirement benefits of husband, evidence that husband was born and raised in Mississippi and was domiciled there when he entered the military, had paid taxes there and intended to return there upon leaving the military was sufficient to support finding that his domicile remained in Mississippi and that trial court lacked the jurisdiction over the action, though parties had resided in Texas most of their married life. Southern v. Glenn, Tex.App.-San Antonio 1984, 677 S.W.2d 576, ref. n.r.e..

Only power which court had to subject husband's military retirement pay to the terms of dissolution decree were those conferred by this section. Harris v. Harris, Mo.App. W.D.1984, 670 S.W.2d 171. Divorce 713

Provision of federal law regarding state court jurisdiction to decide partition of military retirement benefits, which grants in personam jurisdiction when party to whom benefits are payable is domiciled in state, does not preclude application of state's own conflict of law principles where appropriate. Howard v. Howard, La.App. 2 Cir.1986, 499 So.2d 222. Divorce 505

Husband actively participated in judicial proceedings involving divorce, custody and support, and husband's original answer and reconventional demand, filed prior to his exception of lack of subject matter jurisdiction, requested court to determine status of his military pension; therefore, trial court properly had jurisdiction to partition husband's military pension. Deal v. Deal, La.App. 5 Cir.1986, 496 So.2d 1175. Divorce 875

Louisiana had personal jurisdiction over husband to partition his military retirement pay as incident of dissolution of marriage proceeding where husband participated in dissolution proceeding and thus impliedly consented to Louisiana's assertion of jurisdiction. Gowins v. Gowins, La.1985, 466 So.2d 32. Divorce 871

Military retirement pay was subject to adjudication by state chancery court in divorce action since federal statute vests state courts with power to allocate military retirement pay pursuant to divorce decree. Powers v. Powers, Miss.1985, 465 So.2d 1036. Divorce 713

26. Jurisdiction of federal court

Under *Rooker-Feldman* doctrine, district court lacked jurisdiction over husband's action to enjoin former wife from domesticating in Alabama state court several Georgia state court orders, which found him in contempt for his failure to make the military retirement and child support payments required by the parties' divorce decree, on grounds that the Georgia orders violated the Uniformed Services Former Spouses' Protection Act (FSPA) by requiring him to retire; although the decree did not address how the retirement payments would be affected when husband reentered the military after his initial retirement, it did address what would happen if husband became employed again by requiring him to make payments to wife in the amount she otherwise would have received, and any argument that active-duty pay should be treated differently under the state court decree than pay from civilian jobs was for the state appellate court to decide in a direct attack by husband on the validity of the contempt orders. Casale v. Tillman, C.A.11 (Ala.) 2009, 558 F.3d 1258. Courts 509

Federal district court was barred under *Rooker-Feldman* doctrine from exercising jurisdiction over action brought by

former sailor challenging award of part of his naval retirement pay to his former wife pursuant to Uniformed Services Former Spouses' Protection Act (FSPA) as part of final judgment in state court divorce action on basis that application of FSPA created unconstitutional taking; fact that constitutionality of statute was challenged did not preclude application of doctrine, and sailor had reasonable opportunity to assert claim in state court proceeding. Powell v. Powell, C.A.11 (Ga.) 1996, 80 F.3d 464. Courts 509

A divorced husband's claims for monetary damages against military officials in their official capacities arising out of distribution of military retirement benefits were frivolous, and thus district court had no Little Tucker Act jurisdiction by virtue of those monetary claims; husband was claiming that Former Spouse Protection Act (FSPA) was unconstitutional and was seeking damages against the officials for their carrying out the FSPA. Simanonok v. Simanonok, C.A.Fed. (Fla.) 1990, 918 F.2d 947. Federal Courts 974.1

Federal Uniform Services Former Spouses' Protection Act was not intended to expand subject-matter jurisdiction of federal courts, but merely empowers the court that otherwise has jurisdiction to divide spouses' marital property. Steel v. U.S., C.A.9 (Cal.) 1987, 813 F.2d 1545. Divorce 871; Federal Courts 8

Section of Uniformed Services Former Spouses' Protection Act providing "A court may not treat the disposable retired pay of a member in the manner described in paragraph (1) unless the court has jurisdiction over the member by reason of (A) his residence, other than because of military assignment, in the territorial jurisdiction of the court, (B) his domicile in the territorial jurisdiction of the court, or (C) his consent to the jurisdiction of the court" is not heightened requirement for personal jurisdiction, but is substantive requirement linked to paragraph (1). Delrie v. Harris, W.D.La.1997, 962 F.Supp. 931. Divorce 871

Uniformed Services Former Spouses Protection Act did not create federal subject matter jurisdiction in district court to partition military officer's retirement pay in action brought by retired officer's spouse following dissolution of marriage by German court. Brown v. Harms, E.D.Va.1994, 863 F.Supp. 278. Federal Courts 8

Court of Federal Claims lacked jurisdiction under the Uniformed Services Former Spouses' Protection Act over claim of military retiree that government improperly enforced a divorce decree awarding a portion of his military retirement pay to his former wife, where decree was regular on its face, and there was no evidence that government officials failed to follow procedures established by the Act or applicable regulations. Baka v. U.S., Fed.Cl.2006, 74 Fed.Cl. 692. Federal Courts 1074

Uniform Services Former Spouses Protection Act (USFSPA) does not provide for long-arm jurisdiction based on minimum contacts when spouse is petitioning the court for division of military pension. Flora v. Flora, R.I.1992, 603 A.2d 723. Divorce 871

27. Standing

Divorced service members who were required to pay a portion of their retirement pay to their former spouses lacked standing to challenge constitutionality of the Uniformed Services Former Spouses' Protection Act; plaintiffs did not show that they would again be subject to the state court's application of the Act, since their divorce decrees had already been entered. Adkins v. Rumsfeld, E.D.Va.2004, 370 F.Supp.2d 426. Constitutional Law 709

28. Limitations

Continuing claims doctrine applied to the running of the six-year statute of limitations on suits against the United States in the Court of Federal Claims to claim of military retiree that government violated the Uniformed Services Former Spouses' Protection Act every month money was deducted from his retirement pay for the benefits of former

wife, as claim could be divided into discrete wrongs, each of which accrued in the month when the government withheld a portion of his retirement pay for the benefit of his former wife. Baka v. U.S., Fed.Cl.2006, 74 Fed.Cl. 692. Federal Courts 1107

29. Court order

Regardless of whether state court's postdivorce decree dividing military retirement benefits was a modification of the original decree or independent court decree that resulted from partition of property held by tenancy in common, former spouse of military member could not avail herself of direct payment provision of Uniformed Services Former Spouses Protection Act; to come within definition of "court order" under Act, court ordered property settlement must be incident to final decree of divorce. Carmody v. Secretary of Navy, C.A.4 (Va.) 1989, 886 F.2d 678. Divorce 893(6)

Uniformed Services Former Spouse's Protection Act (USFSPA) prohibits payments of retired pay when made pursuant to court order that became effective before June 26, 1981 and did not bar United States Army Finance and Accounting Center (USAFAC) from making direct payments to retired Army officer's former wife pursuant to 1985 order of bankruptcy court. Chandler v. U.S., Fed.Cl.1994, 31 Fed.Cl. 106, affirmed 39 F.3d 1196, rehearing denied , in banc suggestion declined. Armed Services 13.5(2)

Order which increased wife's percentage of former husband's military retirement pay so that she would receive approximately the same amount that she had been receiving even after former husband's retirement pay was reduced because of increase in the amount of his disability payments was a proper clarifying order. McHugh v. McHugh, Idaho App.1993, 861 P.2d 113, 124 Idaho 543.

In dissolution proceeding, award to wife of $15,000 judgment, apparently as offsetting award, without any reference to husband's military pension, was not "court order" within meaning of this section which requires parties to have been married for ten years or more during military spouse's term of service to enable order for direct payments from pension account. Matter of Marriage of Wood, Or.App.1984, 676 P.2d 338, 66 Or.App. 941.

30. Reopening decision

Kansas district court divorce judgment directing that one third of husband's military retirement benefits were sole and separate property of his wife was one issued in accordance with the laws of the jurisdiction as required by Federal Uniformed Services Former Spouses' Protection Act (FUSFSPA), despite fact that district court order was entered about two weeks after Kansas appellate court held that military retirement income was not marital property and, thus, not subject to division in divorce decree; district court had power to decide whether retirement pay was divisible under Kansas law, fact that district court ultimately was wrong about position that appellate court took, and perhaps was ignorant of it, did not render judgment invalid for lack of subject matter jurisdiction, district court judgment became final and binding under Kansas law when ex-husband failed to appeal judgment, and Kansas would recognize district court judgment as valid. Andrean v. Secretary of U.S. Army, D.Kan.1993, 840 F.Supp. 1414. Judgment 660

Whether or not plaintiff actually did so, he had ample opportunity to challenge constitutionality of this section, which was the basis for affirmance of divorce order, either in Supreme Court of California or at show-cause hearing and he was therefore bound by decisions of those courts; thus, plaintiff was barred, on res judicata grounds, from bringing subsequent suit challenging constitutionality of this section. Hicks v. Secretary of the Air Force, D.C.Me.1984, 594 F.Supp. 690. Judgment 828.16(3)

Uniformed Services Former Spouses Protection Act does not preempt state law provisions restricting opening and modifying of judgments. Kenny v. Kenny, Conn.1993, 627 A.2d 426, 226 Conn. 219. ; ; ;

Wife's motion, in view of this section which effectively overruled McCarty by declaring that state courts can order division of military retired pay as part of a marital property distribution, to reopen Family Court decision of Nov. 30, 1981 would be granted, since decision to reopen was simply a decision to permit wife to present her case under Delaware law as it existed before McCarty, and since to do otherwise would be to carve out a category of people whose cases were decided between June 25, 1981 and Sept. 8, 1982 and deprive them of a substantial property interest which other similarly situated litigants have been awarded. Smith v. Smith, Del.Fam.Ct.1983, 458 A.2d 711. Divorce 892(2)

Amendments to Federal Uniform Services Former Spouses' Protection Act (FUSFSPA) under which state court may not reopen pre-1982 dissolution judgment in order to divide omitted military retirement benefits on or after effective date of amendments did not affect preamendment order establishing spouse's interest in past retirement benefits. In re Marriage of Curtis, Cal.App. 1 Dist.1992, 9 Cal.Rptr.2d 145, 7 Cal.App.4th 1, review denied. Divorce 510(3)

Provision of Civil Code enacted in order to allow Federal Uniformed Services Former Spouses Protection Act to be applied retroactively in California, even as to those judgments which had become final during period that Supreme Court decision determining pension benefits of military spouse to be sole and separate property of military spouse was in effect, conferred upon trial court authority to grant wife's motion to reopen judgment of dissolution to divide nondisability military retirement benefits accrued by former husband, and was not unconstitutional violation of separation of powers doctrine. In re Marriage of McDonough, Cal.App. 1 Dist.1986, 227 Cal.Rptr. 872, 183 Cal.App.3d 45. Constitutional Law 2353; Divorce 892(2)

Passage of the retroactive Uniformed Services Former Spouses Protection Act, 10 U.S.C.A § 1408(c)(1), allowing military pensions to be considered as part of marital property for divorce purposes, was insufficient to justify setting aside of agreement for nonmodification of divorce judgment, entered into pursuant to § 502(f) of the Marriage and Dissolution of Marriage Act, even though such judgment awarded husband entire interest in his military pension under prevailing law at the time, where wife was awarded substantial property settlement and court considered pension in making maintenance award, so that judgment was not unconscionable, and where there was no fraud in inducement or execution of agreement and no overreaching by husband or his attorney. In re Marriage of Habermehl, Ill.App. 5 Dist.1985, 481 N.E.2d 782, 89 Ill.Dec. 939, 135 Ill.App.3d 105. ;

Upon reopening of a dissolution decree that was issued during “window period” between issuance of *McCarty* decision holding that pension benefits were not community property and enactment of the Uniform Services Former Spouses' Protection Act (FSPA) which again made military retirement benefits subject to state community property law, court may consider equitable defense of laches in reaching its determination concerning award of retrospective benefits; however, any consideration of defense of laches must start from initial premise that deprived spouse has right to receive his or her proportionate share of all community generated pension benefits and laches is affirmative defense that must be asserted and proved by opposing spouse before deprived spouse may be divested of right to recover share of benefits previously paid. Flynn v. Rogers, Ariz.1992, 834 P.2d 148, 172 Ariz. 62. Divorce 892(6)

In light of amendment to Uniform Services of Former Spouses' Protection Act (USFSPA) prohibiting reopening of divorce decrees in order to equitably distribute previously undivided military retirement benefits, former wife was not entitled to equitable division of husband's military pension following final divorce decree which did not address husband's military retirement benefits, even though amendment was enacted during pendency of wife's appeal. Johnson v. Johnson, Alaska 1992, 824 P.2d 1381. Divorce 505

Uniformed Services Former Spouses Protection Act did not allow Nevada court to divide wife's former spouse's military benefits not mentioned in previously entered Michigan divorce decree. Tomlinson v. Tomlinson, Nev.1986,

729 P.2d 1363, 102 Nev. 652. Divorce 1456(1)

Extraordinary circumstances justified reopening of dissolution decree and retroactive application of Uniformed Services Former Spouses' Protection Act to final decree of dissolution entered subsequent to Supreme Court decision holding that federal law precluded state courts from dividing military retirement pay pursuant to state community property or equitable distribution laws, but prior to the Act, which overruled such decision, where rigid application of doctrine of finality of judgment would have worked substantial injustice and frustrated intent of congress in passing USFSPA. In re Marriage of Waters, Mont.1986, 724 P.2d 726, 223 Mont. 183. Divorce 892(2)

Wives' failure to appeal from dissolution decrees entered in 20-month interim period between judicial decision prohibiting distribution of military retirement pay as part of community property and enactment of Uniform Services Former Spouses Protection Act [10 U.S.C.A. § 1408], permitting division of military retirement pay, did not waive wives' rights to have decrees reopened for reexamination in light of Act. Flannagan v. Flannagan, Wash.App.1985, 709 P.2d 1247, 42 Wash.App. 214, review denied. Divorce 892(1)

Uniformed Services Former Spouses' Protection Act provision [10 U.S.C.A. § 1408(c)(1)] for retroactive application of rule authorizing state courts to treat military pensions as community property does not require reinstatement of earlier judgments or division of military pay, but only permits reopening of final judgments for reconsideration in light of the Act's provisions. In re Marriage of Giroux, Wash.App.1985, 704 P.2d 160, 41 Wash.App. 315. Divorce 892(2)

Where parties relied on *McCarty* decision, holding that there are no community property rights in military retirement benefits, in disposing of military retirement benefits, trial court had power to reopen final divorce decree entered into and finalized by those parties between date of *McCarty* and date of enactment of Uniformed Services Former Spouses Protection Act, considering inequity of denying nonworking military spouse right to share in fruits that his or her community labor brought community, and considering that interim period between *McCarty* and Act was short so that there was not likely to be flood of ex-spouses requesting reopening of their divorce decrees. Edsall v. Superior Court In and For Pima County, Ariz.1984, 693 P.2d 895, 143 Ariz. 240. Divorce 892(2)

The Uniformed Services Former Spouses' Protection Act, which is permissive, cannot create procedural mechanism to reopen final state court judgments. Allison v. Allison, Tex.App.-Fort Worth 1985, 690 S.W.2d 340, ref. n.r.e. 700 S.W.2d 914. Divorce 892(2)

Res judicata did not bar ex-wife from bringing action against ex-husband seeking to partition his military retirement benefits, in view of this section, promulgated subsequent to state Supreme Court decision denying her any interest in husband's retirement benefits; applying res judicata would subvert intent of Congress and plain meaning of this section which is to restore state law to what it was prior to *McCarty* decision. Trahan v. Trahan, Tex.App.-Austin 1984, 682 S.W.2d 332, ref. n.r.e. , appeal dismissed 106 S.Ct. 1171, 475 U.S. 1002, 89 L.Ed.2d 291, rehearing denied 106 S.Ct. 1664, 475 U.S. 1132, 90 L.Ed.2d 206. Divorce 890; Divorce 1364

Trial court erred in refusing to reconsider its judgment in divorce action, awarding all of husband's military retirement benefits to him, in light of change in the law restoring to the state the right to treat military retirement benefits as community property according to law of the jurisdiction, rather than requiring courts to award such benefits to the husband, in view of plenary power of the court to vacate or modify its judgment within 30 days after the judgment is signed. Miller v. Miller, Tex.App.-Hous. (1 Dist.) 1984, 671 S.W.2d 135. Divorce 892(2); Divorce 893(6)

Clear wording of amendment to Uniform Services Former Spouses Protection Act prohibiting state courts from subsequently dividing military retirement pay when final decree of divorce or legal separation did not treat this pay as community property requires specific treatment of military retirement benefits in division of community or specific reservation of jurisdiction to treat military retirement benefits as community property in order for state court to re-

open divorce case to divide military retirement pay. White v. White, La.App. 1 Cir.1993, 623 So.2d 31. Divorce 893(6)

31. Barred proceedings

Divorced service members who were required to pay a portion of their retirement pay to their former spouses had reasonable opportunity to challenge constitutionality of the Uniformed Services Former Spouses' Protection Act in state court divorce proceedings, barring exercise of federal jurisdiction pursuant to the *Rooker-Feldman* doctrine in their action raising such challenges; plaintiffs were assumably aware of and participated in their divorce proceedings, and learned of state court judgments adverse to them when judgments were entered and well within the time to file an appeal. Adkins v. Rumsfeld, E.D.Va.2004, 370 F.Supp.2d 426. Courts 509

State court divorce decree providing that husband shall pay to wife 13.6% of each monthly military pension payment was res judicata between parties and, therefore, bankruptcy court in husband's Chapter 7 case was without jurisdiction to re-write that decree, even if decree was inconsistent with Federal Uniform Services Former Spouses' Protection Act (FUSFSPA); any relief on basis of FUSFSPA should have been addressed to state court. In re Zrubek, Bkrtcy.D.Mont.1993, 149 B.R. 631.

Debtor's divorce decree obligation to pay former wife portion of military pension was ordered to be paid directly by government and thus former wife's interest in pension was not subject to debtor's bankruptcy proceedings. In re Corrigan, Bkrtcy.E.D.Va.1988, 93 B.R. 81.

Wife was entitled to bring new action to collect her community property interest in husband's vested military pension, and action was not barred by res judicata or collateral estoppel, where divorce decree failed to dispose of said pension. Casas v. Thompson, Cal.1986, 720 P.2d 921, 228 Cal.Rptr. 33, 42 Cal.3d 131, certiorari denied 107 S.Ct. 659, 479 U.S. 1012, 93 L.Ed.2d 713.

Res judicata barred former husband's collateral attack on final unappealed divorce decree, in case in which decree entitled former wife to portion of retirement pay that person with husband's rank and service period would receive, and husband responded that Uniform Services Former Spouses' Protection Act (USFSPA) prohibited disability benefits which he accepted in lieu of retirement benefits from being subject to division. Jones v. Jones, Tex.App.-San Antonio 1995, 900 S.W.2d 786, rehearing denied , writ denied. Divorce 890

Express award of military retirement benefits in a divorce decree operates as a bar to any subsequent partition suit under principles of res judicata, notwithstanding enactment of Uniformed Services Former Spouses Protection Act. Koepke v. Koepke, Tex.1987, 732 S.W.2d 299.

32. Res judicata

Claims challenging constitutionality of the Uniformed Services Former Spouses' Protection Act, made by divorced service members who were required to pay a portion of their retirement pay to their former spouses, were barred by res judicata; such constitutional attacks could have been raised in state court. Adkins v. Rumsfeld, E.D.Va.2004, 370 F.Supp.2d 426. Divorce 890

33. Declaratory judgment

Section of the Federal Uniform Services Former Spouses' Protection Act, limiting courts' ability to exercise subject-matter jurisdiction over suit to divide spouse's military retirement benefits, had no application to declaratory judgment action brought by former wife to determine relative priority of two state court divorce decrees. Steel v. U.S.,

C.A.9 (Cal.) 1987, 813 F.2d 1545.

34. Ripeness

In view of fact that former husbands, retired military officers, had to pursue in state court their claims requesting that state divorce decrees be declared invalid insofar as they required payment of retired pay to their former wives on the basis of failure to state a federal claim except as a defense, claim of former husbands that garnishment provision of subsec. (d)(5) of this section was contrary to the requirements of McCarty would not be ripe for adjudication until garnishment order was served upon the Secretaries of the Army and Air Force. Fern v. Turman, C.A.9 (Cal.) 1984, 736 F.2d 1367, certiorari denied 105 S.Ct. 1177, 469 U.S. 1210, 84 L.Ed.2d 326. Federal Courts 13

35. Sovereign immunity

Right of review section of Administrative Procedure Act (APA), providing that action seeking relief other than money damages and stating claim that agency acted in an official capacity shall not be dismissed on ground that it is against the United States, operated as waiver of sovereign immunity with respect to ex-wife's mandamus suit under Federal Uniformed Services Former Spouses' Protection Act (FUSFSPA) to compel Secretary of the United States Army to make direct payments to ex-wife of share of ex-husband's military retirement income pursuant to Kansas court order; ex-wife's suit sought review of agency action and relief other than monetary damages. Andrean v. Secretary of U.S. Army, D.Kan.1993, 840 F.Supp. 1414.

Sovereign immunity barred suit by military retiree against the United States seeking to recover amount of his retirement pay withheld for payment to his former wife pursuant to divorce decree and the Uniformed Services Former Spouses' Protection Act (USFSPA), absent showing that divorce order authorizing payment to former spouse was irregular on its face or that officials failed to follow procedures established by the USFSPA. Mora v. U.S., Fed.Cl.2003, 59 Fed.Cl. 234. United States 125(9)

36. Service of process

Husband who had already expressly subjected himself to personal and subject matter jurisdiction of Idaho courts with regard to all aspects of community and separate property division did not have to again be served with process under Uniformed Services' Former Spouses' Protection Act before portion of his military retirement pension accrued during marriage could be divided as community property. McHugh v. McHugh, Idaho 1988, 766 P.2d 133, 115 Idaho 198.

10 U.S.C.A. § 1408, 10 USCA § 1408

Current through P.L. 112-54 (excluding P.L. 112-40) approved 11-12-11

END OF DOCUMENT

FAMILY LAW INNS OF COURT, ORLANDO, FLORIDA

TEN THINGS YOU NEED TO KNOW ABOUT MILITARY RETIREMENTS IN FLORIDA IN 20 MINUTES

Peter Cushing and Natalie Martin Weech

Peter:

Natalie, we don't have a lot of time to discuss military retirement today; what do you think we would need to know in accepting a military divorce case? For example, are there any statutes that we need to know about?

Natalie: Well yes, as a matter of fact there is a federal law that applies….

Peter: Wait a minute, this is a Florida divorce case right?

Natalie: Correct, but believe it or not there is a law known as the FORMER SPOUSE'S PROTECTION ACT, or FSPA that you have to read; you can find it at 10 U. S. Code, section 1408 and it was passed way back in 1981.

Peter: Oh yeah, that's the law us guys call the Former Spouse's Victim Act…….

Natalie: Well let's not go there now; the important thing to know is that the feds said the states could divide military pensions like 30 years ago so GET OVER IT!

Peter: Well what does Florida have to say about all this?

Natalie: Well Florida has a statute also passed in 1988 found at 61.076 and that law says that all military pensions, vested or non-vested, are marital property.

Peter: Oh, well it looks like military pensions are going to be divided in Florida, in most cases; but surely there is some escape?

Natalie: Well again the federal law applies because you can only divide a military pension if there is personal and subject matter jurisdiction.

Peter: What does that mean?

Natalie:

Well the statute, 10 U.S. Code section 1408 says that the member must reside in Florida (not just because he/she is here on orders), be a domiciliary of Florida, or consent to Florida jurisdiction.

Peter: What do you mean consent?

Natalie: Usually if a person files an answer or other pleading they have consented to military pension jurisdiction.

Peter: And we know that if we serve someone in Florida with process they are subject to the jurisdiction of the Florida court.

Natalie: Yes that is true, but may or may not confer pension jurisdiction; we can't get into that point now……

Peter: OK well it looks like you got my guy nailed but I've heard that there can be valuation issues.

Natalie: Yes that's true. For example a Navy Captain with 25 years service can get a pension of around $6500 per month, which would be subject to equitable distribution.

Peter: Wait a minute, my guy is only a LCDR with 15 years service……..

Natalie:

OK well ordinarily I couldn't tell you this but it is the date of the filing of the petition that is ordinarily used to value the military pension, and years of service and promotions earned after that date are non-marital property in Florida.

Peter: You mean Florida actually wants veteran's to retire here?

Natalie: Well maybe some of our judge's are retired military or maybe they just though that was fair….

Peter: Thank God we don't live in California or Nevada; oops, us men I mean.

Peter: Well since my guy is still on active duty that means it's a non-vested pension, right?

Natalie: Well if he has less than 20 years of active service probably so but we can still award to the wife a share of that pension and come back later to clarify the award.

Peter: OK so we are talking about some sort of formula award?

Natalie: Yes, and I am attaching a form order to these materials.

Peter: That's what we wanted……

Peter: What's this I hear about a ten year rule?

Natalie:

Well that is the direct payment rule. Unless the parties were married for more than 10 years during which time the member was on active duty or reserve duty earning retirement credits, Defense Finance and Accounting Service will not send direct pension payments to the wife or payee.

Peter: OK well if my guy has less than 10 years coverture with his wife how will she get paid; what about contempt if he fails to pay?

Natalie: Well there are cases that say no contempt on failure to make equitable distribution.

Peter: How about if we order him to take out an allotment?

Natalie: Well that might work, but if he fails to do it, who knows?

Peter: Ha, well I think the wife should just waive her interest in the pension in this sort of situation.

Natalie: OK, how much will he pay?

Peter: I don't know; how do we value it?

Natalie: Well I understand an actuary or economist can tell us what the pension is worth and then we can do an offset; wife takes the house, husband takes the pension.

Peter: OK since the house has $50,000 equity in it she takes the house and we are done.

Natalie: Deal; there's no more money in my trust account.

Peter: Natalie, You know that with all the soldier's returning home from Iraq there will be a lot of cases where one of the parties **is** not on active duty but may be in the reserves.

Natalie:

That's right. Many people remain in the Army, Navy, or Coast Guard reserves, or the Army National Guard and they are drilling each month for drill credit.

Peter: Do they earn a retirement as well?

Natalie: Yes they can but do not normally get retirement pay until age 60.

Peter: Is that sort of retirement subject to equitable distribution?

Natalie:

Yes it is, and you need to get the "Annual Point Record" and figure out how many points were earned during the marriage and divide the retirement on that basis.

Peter: That sounds like trouble….

Natalie: Yes, that's why I refer those cases out….

Peter: Yeah I hear those disability cases are a nightmare too….

Natalie:

All I can tell you there is make sure there is some alimony awarded or the court may not be able to fix that one.

Peter:

Because you are being so nice, I'll share something with you. On that other case we have that we are supposed to try next month, the parties have been married 19.5 years during which time my guy has been on active service.

If you'll reduce your alimony request by $500 per month, we can delay entry of final judgment in that case and your client, the wife, will then have lifetime medical, commissary, theater and exchange benefits, by federal law.

Natalie: Wow! That's what they call the 20/20/20 rule right?

Peter: Yup, I know something about these cases as well.

Peter: There's something else. Since your client stressed my guy out so much over the years he has some sort of heart condition which I thought you should know about.

Natalie:

Yes, in fact my client was so worried about your client's health that she brought me a bunch of information about SBP.

Peter: SBP?

Natalie:

Right, Survivor Benefit Plan; SBP. It's a federal program that will provide my client with 55% of your client's pension each month after he dies, until she dies.

Peter: Well normally the maximum she could get is 50% so if he dies she gets a raise?

Natalie: Well that's right.

Peter: Is this free?

Natalie:

No there is a premium, 6.5% of the retired pay deducted from gross in arriving at "disposable retired pay".

Peter: Does the judge have to go with this?

Natalie: Well no there is some discretion under the case law.

Peter: I guess in a 20 year marriage she gets it in a 12 yr. marriage maybe not.

Natalie:

Yeah that sounds about right; you know I was thinking about marrying a military guy once and I just had to ask him about his first wife and SBP and if it was free or not……..

Peter: Not your fault, that's hot wired in.

Natalie: Oh, almost forgot about the two kids.

Peter: OK well guideline child support.

Natalie: Send over his LES.

Peter: What?

Natalie: His LES, that means leave and earnings statement.

Peter: More technical stuff?

Natalie: Well I need it to see what his BAH and BAS is.

Peter: What?

Natalie: That means his housing allowance and subsistence allowance.

Peter: Are we counting those?

Natalie:

Yes, 61.30 talks about "allowances" and there is case law that counts them. Also, they are tax free.

Peter: OK I suppose you want life insurance too…..

Natalie:

Yes and I know he has $400,000 SGLI, Serviceman's Group Life Insurance but I also know we need to be careful here.

Peter:

OK he will provide annual proof that the kid's are designated as irrevocable beneficiaries of at least $200,000 life insurance.

Natalie:

OK well I also want language that the parties are familiar with the Ridgway v. Ridgway case from the U.S. Supreme court that a court order cannot regulate SGLI and if he fails to provide the designation by Nov. 1 of each year he is responsible to purchase a private policy that the court can regulate for the benefit of the kids.

Peter: Well OK we don't have time to get into that here but thanks for the red flag….

Natalie:

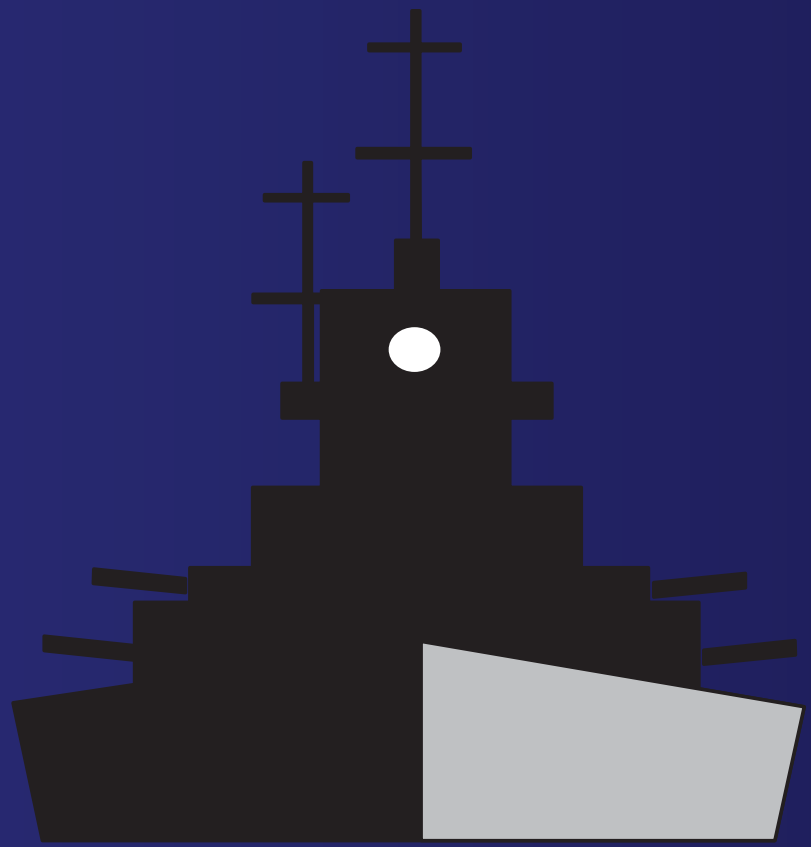
OK well we're running out of time; I can see why they say this is a specialized area of the law; are there are research materials available to people that want to learn more about military pensions and military divorce?

Peter: Sure, go to www.militarydivorce.net where materials are posted, look at FS. 61. 076, 10 U.S. Code sec. 1408, and Volume 7B, Chapter 29, DOD Financial Management Regulations, February, 2009.

ATTACHMENTS TO THIS HANDOUT:

FS. 61.076
10 U.S..C. sec. 1408
Qualified Military Order

Family law inns of court, orlando military retirEment issues



EQUITABLY DISTRIBUTE THE MILITARY PENSION

- Normally, the largest asset in a long-term military marriage
- FS 61.076- All vested and non-vested benefits…. Are marital property subject to equitable distribution
- E-6 $2,147.00 per month (27 yrs. Service)
- 0-6 $6,034.00 per month (Over 27 yrs.)
- Divided by two= presumptive share of spouse

QUALIFED MILITARY ORDER

- FS 61.076- "Disposable retired or retainer pay"
- Amount expressed as a dollar amount or a percentage of DRRP.
- Recall that percentage orders automatically gain COLA (Cost of living allowances)

WHAT IS FEDERAL PENSION JURISDICTION?

- 10 U.S.C. sec. 1408

Residence in state, but not due to military assignment

- Domicile in state
- Consent to jurisdiction
- Case law: request for affirm. relief = consent
- Ten-year rule
- Add a default and hope for "omitted asset" statute

Burnham v. Superior Ct.

- Dad's coming home for Christmas!
- Why people hate attorneys….
- Service of process in the State of Florida vests personal and subject matter jurisdiction
- But not pension jurisdiction

THE COVERTURE FRACTION

- DEFERRED DISTRIBUTION METHOD:
  Months of marriage
  Months of military service =
  % of future monthly retirement payments earned during the marriage
  X 1/2 of military member's disposable retired or retainer pay as defined by law
- Deloach v. Deloach 590 So. 2d at 964;
- Not strictly mandatory; what is equitable?

BETTER COVERTURE FRACTION

- 50% of the following:
  - "Disposable Retired Pay" as a LT. COL/CDR with 20 years of service times a fraction …
    - numerator = yrs of marital pension service
    - denominator = 20 years service (Normal Vesting date)
    - This fraction excludes non-marital promotion and longevity enhancements consistent with Boyett and Lawrence cases in materials

BETTER COVERTURE FRACTION

- Legal Malpractice Now….

USE RESERVE / GUARD COVERTURE FRACTION

- Marital years of service over total years of service; NOT!
- Marital retirement points over total retirement points
- Discovery: need points record
- Pre-marital active service?
- Age 60: present value issue

RESERVE / GUARD COVERTURE FRACTION

- LEGAL MALPRACTICE NOW

VA WAIVER NIGHTMARE

- Post judgment waiver of "regular" retirement for a Department of Veteran's Affairs tax free pension due to service connected disability
- No indemnification provision appears in marital settlement agreement
- No alimony awarded or retention to award same
- Thailand or Republic of Philippines retirement
- Very happy military client
- Concurrent receipt cure for certain cases

ADVANTAGES OF SBP

- Available without qualifying
- Income for life
- Tax-free
- Guaranteed benefit
- Cost-of-living adjustment
- Cannot be cancelled

YES WE DO INCLUDE BAH AND BAS IN CHILD SUPPORT GUIDELINES

However, the court has discretion to adjust the guidelines if including all allowances would be unfair in a particular case, such as where BAH is being used by the member to live in a high cost housing area.

See FS 61.30

Service Regulations Require Support

DISADVANTAGES OF SBP

- Inflexibility
- Premiums are expensive; may increase
- No cash value
- VA offset
- Social Security offset
- "Deemed election" problems

RIDGWAY V. RIDGWAY

- SGLI is "war insurance"
- Cannot be regulated by state court order
- No constructive trust on proceeds
- Servicemember dies without an estate and girlfriend takes cash
- Should attorneys know U.S. Supreme Court cases re family law?

MILITARY MEDICAL BENEFITS

- 20/20/20 marriage? Reserve Time Counts
- 20/20/15 marriage?
- Commissary, theater, exchange benefits
- "Military COBRA plan" now available
- Premium payment required
- TRICARE benefits for kids
- DEERS enrollment


WHAT ABOUT IT??
. . .MALPRACTICE?