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DIVIDING MILITARY RETIREMENT AND DISABILITY PAY: A MORE EQUITABLE APPROACH

A Thesis

Presented to

The Judge Advocate General's School, United States Army

The opinions and conclusions expressed herein are those of the author and do not necessarily represent the views of either The Judge Advocate General's School, the United States Army, or any other governmental agency.

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DIVIDING MILITARY RETIREMENT AND DISABILITY PAY: A MORE EQUITABLE APPROACH

By Captain Mark E. Henderson

ABSTRACT: This thesis examines the historical development and current treatment of the divisibility of military retirement pay, disability pensions, and disability retirement pay. This examination identifies two major unresolved areas concerning the treatment of military retirement pay as property upon divorce. The first area of dispute is whether the present value or the retained jurisdiction approach should be used when dividing military retirement pay pursuant to a divorce. The second area concerns what portion of the military retirement pay should be considered marital property and when should the former spouse begin receiving his or her share. Finally, this thesis examines whether military disability pay or retired pay waived in order to receive disability pay should be considered marital property upon divorce. This thesis concludes that the retained jurisdiction approach should be used and describes what portion of the military retirement pay the former spouse should receive and when he or she should receive it. This thesis also concludes that military disability pay should not be divisible. But, when a service member waives retirement pay to receive disability pay, state courts should be allowed to consider the amount of retirement pay waived as marital property.

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I. INTRODUCTION

There has been a dramatic change during the past twenty years in the treatment of military retirement pay as property that is divisible pursuant to a divorce.[1] In some ways, these changes parallel the changes taking place in other pensions. Military retirement pay, however, is different than other pensions because it is a creation of the Federal government. As a result, the developments leading to the divisibility of military retirement pay have followed a somewhat different course than other civilian pensions.

In 1981 the Supreme Court held in McCarty v. McCarty,[2] that the federal preemption doctrine prohibited the states from dividing military retirement pay. The inequity that this decision caused to former spouses of service members led Congress to enact the Uniformed Services Former Spouses' Protection Act (USFSPA).[3]

Although the USFSPA returned the ability to divide military retirement pay to the states, it also contained certain limitations restricting the states'

ability to divide military retirement pay. These limitations were the result of concern over national defense requirements and being equitable to service members.[4] Several of these limitations caused some controversy and resulted in litigation. Although some of the controversy and confusion generated by these limitations has already been resolved either by litigation or by legislation, two major areas of controversy remain.

The first major area of controversy concerns what method of dividing retirement pay should be applied to military retirement pay. Using one approach, the court would determine the value of the pension at the time of divorce and award each of the parties one-half. Unfortunately, this is infinitely more complex than it sounds. Using another approach, the court could retain jurisdiction of the matter and divide the pension between the parties as it is received by the service member. While this approach solves some of the problems of the first approach, it also has disadvantages.

The second area of controversy is what portion of military retirement pay the former spouse should

receive and when should he or she begin receiving it. One issue is whether the former spouse should share in post-divorce adjustments, such cost of living increases and promotions that occur after the divorce. The major issue involved in when the former spouse should begin receiving retired pay is whether the service member should begin paying while he or she is still serving on active duty.

Another major area of controversy concerning military benefits is whether military disability pay should be subject to division by the state courts. The United States Supreme Court held in Mansell v. Mansell[5] that neither military disability pay nor the retired pay waived in order to receive disability pay can be subject to division.

This article examines all three of these major areas of controversy and makes a recommendation as to the proper resolution of each. The final result is one that is, on balance, more equitable to both the former spouse and the service member.

II. HISTORY OF DIVIDING MILITARY RETIREMENT PAY

A. Dividing Military Retirement Pay Prior to USFSPA.

Prior to the Supreme Court Decision in McCarty v. McCarty,[6] the historical development of the divisibility of military retirement pay was very similar to other pensions. First, courts found that military retirement pay was not subject to division because it was not marital property.[7] Like other pensions, the most frequently used rationale consisted of either the impossibility of establishing a present value for the pension or the speculative nature of the pension.[8]

Subsequently, courts began to recognize that vested military retirement plans should be considered marital property and, as such, be subject to division upon divorce.[9] While recognizing the divisibility of vested military pensions, courts initially refused to consider unvested pensions as marital property subject to division.[10] Subsequently, courts began to consider military pensions marital property subject to division whether or not they were vested.[11]

Thus, prior to 1981, some states were dividing military retirement pay the same way they divided other pensions. Because military pensions are a creation of the Federal Government, however, some states concluded that federal preemption precluded them from considering military retirement pensions as marital property.[12] The result was that these states treated military retirement pay differently from civilian pensions because they believed they were compelled to do so.[13] On June 26, 1981, the Supreme Court of the United States decided the landmark case of McCarty v. McCarty[14] and held that division of military retirement pay was foreclosed under the preemption doctrine.[15] The court also made clear that state courts could not make offsetting awards of other community property to compensate the former spouse for his or her interest in the military retirement benefits.[16]

McCarty was a decisive point in the development of the divisibility of military retirement pay. McCarty caused states already dividing military retirement pay to overrule prior case law and stop awarding military retirement pay as property.[17] Thus, states were required to treat military pensions different from

other civilian pensions.

Because McCarty represented a major change in the way in which some states were dividing military pensions, the issue naturally arose as to whether McCarty should be applied retroactively. Nearly every state that considered the issue determined that McCarty should not be applied retroactively.[18]

Despite the prohibition on the divisibility of retirement pay, however, some states determined that McCarty did not prohibit them from considering the service members' military retirement pay in determining an appropriate level of alimony.[19] Still, awarding alimony in lieu of dividing military retirement pay as property was not a sufficient remedy to resolve the inequity of a former military spouse being deprived of a portion of the service member's pension while a similarly situated civilian spouse was entitled to a portion of the employee spouse's pension. When military retirement pay is divided as property, the former spouse receives either a lifetime annuity, if the court uses the retained jurisdiction method, or a large lump sum cash payment, if the court uses the present cash value method. In contrast, when military

retirement pay is considered in an award of alimony, the award may be subject to reduction or termination upon a change of circumstances related to either party's earning power or remarriage of the former spouse.

B. The USFSPA.

To resolve the inequity to the military spouse, Congress enacted the Uniformed Services Former Spouses' Protection Act.[20] This 1982 Act was intended to overrule McCarty and allow for the divisibility of military retirement pay.[21] The Act went even further and provides a mechanism that allows for the direct payment of military retirement pay to the former spouse under certain circumstances.[22]

Not surprisingly, this reversion of the power to divide military retirement pay to the states caused some convulsions in many states. Those states that were dividing military retirement pay prior to McCarty had to decide whether the Uniformed Services Former Spouses Protection Act (USFSPA) was retroactive within their jurisdiction. The USFSPA contained language

which stated that a court may treat disposable retired pay for pay periods beginning after June 25, 1981, either as property solely of the member or as property of the member and his or her spouse in accordance with the law of the jurisdiction of each state court.[23] The legislative history of the USFSPA also suggests that Congress intended that the USFSPA would permit spouses to reenter state courts to obtain new divisions of military retirement pay.[24]

Despite the clear intent of Congress, applying the USFSPA retroactively was not a simple matter. The doctrine of res judicata prohibited the relitigation of cases that became final during the nineteen month period between the date of the McCarty decision and the effective date of the USFSPA. Nonetheless, the majority of states that considered military retirement pay as divisible prior to the Supreme Court's decision in McCarty decided that the statute was to be applied retroactively and allowed numerous cases that were decided between June 26, 1981 and February 1, 1983 to be reopened.[25] To reach this result, some states relied upon state rules of procedure analogous to Federal Rules of Civil Procedure 60(b), which permits

modification of otherwise final judgments.[26] Other states solved the problem through legislation.[27] In contrast, most states that had considered military retirement pay not to be divisible as property prior to the McCarty decision decided that the USFSPA was not to be applied retroactively.[28] The primary rationale for this position was that when the state courts did begin allowing the division of military retirement pay it represented a fundamental change in the law.

Another group of litigants lost any opportunity to receive any advantages that the retroactive application of the USFSPA might have afforded them because they had obtained divorces pursuant to separation agreements which gave the service member the sole right to the military pension. Consider the spouse receiving legal advice concerning his or her property rights during the period from June 25, 1981 until February 1, 1983. Many were likely being advised that they had no right to their spouse's military pensions. As a result, many entered into property settlement agreements that awarded the military retirement pension to the service member as his or her sole property. In some of these cases, the USFSPA provided no remedy for these former

spouses because some of the state courts concluded that a final divorce obtained pursuant to a separation agreement was not subject to modification.[29]

The difficulty that the states encountered in applying the USFSPA retroactively is indicative of the problems Congress has in implementing a change in an area traditionally controlled by state law. Despite the retroactivity provision in the USFSPA that indicated Congress' clear intent that the states be allowed to divide military retirement pay effective June 26, 1981, that was not the final result. Nonetheless, the retroactivity issue has now been resolved in all states by either case law or legislation. Perhaps the best resolution of the issue has been the passage of time. The retroactivity issue is now a moot point to anyone seeking a divorce today.

Since the USFSPA did not require the states to divide military retirement pay, states were still left to decide whether they would treat military retirement pay as property. Initially, several states decided that, despite the USFSPA, military retirement pay was not divisible as marital property as a matter of state law.[30] The rationale for not dividing military

retirement pay was similar to the rationale being applied to other civilian pensions that were not vested. For example, in Grant v. Grant[31] the Kansas Court of Appeals held that because the plaintiff's military retirement pay had no present determinable value, it could not qualify as marital property subject to division. This ruling does not reflect that military retirement pay was being treated differently than other pensions. It reflected the law in Kansas as to all pensions.

During the six years following the enactment of USFSPA, the decisions prohibiting the divisibility of military retirement pay were subsequently overturned either by case law[32] or statute.[33] For example, following the court's decision in Grant,[34] the Kansas Legislature amended the Kansas statute to specifically include the present value of any vested or unvested military retirement pay as marital property subject to division by the court during a divorce.[35] Not surprisingly, states finding for the first time that military retirement pay was divisible would initially find that only vested military retirement pensions were subject to division.[36] Eventually, all military

retirement pensions would be considered as divisible in these states regardless of whether they were vested or unvested.[37] Currently, all states except one[38] treat military retirement pay as divisible property upon the dissolution of a marriage.[39]

Although virtually all states now treat military retirement pay as marital property, some states still require that the military retirement pay be vested prior to being treated as property.[40] This result is simply a reflection of state law regarding the divisibility of pensions in general and does not reflect that the divisibility of military retirement pay is more restrictive than other pensions.[41]

C. USFSPA Limitations Placed on Dividing Military Retirement Pay.

While the divisibility of military retirement pay began to once again parallel the development of civilian pensions, a separate area of law was at the same time being carved out concerning military retirement pay. This was because the USFSPA did not represent a total reversion to the states of the

ability to divide military retirement pay. The USFSPA sets out certain limitations on the divisibility of military retirement pay.

These limitations on the divisibility of military retirement pay reflect Congress' resolution of the competing interests involved in deciding to enact the USFSPA. On the one hand, Congress was very concerned with the inequity facing former spouses of service members.[42] Congress was concerned that after these former spouses experienced great hardship as military spouses, they were being unfairly treated when their marriages ended in divorce.[43]

At the same time, Congress was also concerned with the impact the USFSPA would have on the military's ability to meet national defense requirements by maintaining a ready force during both peace and combat.[44] Military retirement was identified as the most important factor in building and retaining a career All-Volunteer force to meet National Defense objectives. Thus, these limitations on the divisibility of military retirement pay were deemed necessary to protect the personnel management requirements of the military services.[45]

One major limitation is that the states can only divide "disposable retirement pay" and not gross retirement pay. Despite the plain language in the USFSPA,[46] some states divided gross pay anyway.[47] Although the Supreme Court has never directly addressed the issue, dicta in the Mansell case suggests that only disposable retirement pay is divisible.[48] This position is supported by the language of the statute.[49]

One of the major criticisms of the states being limited to dividing disposable pay is that the former spouse receives less than his or her fair share of retirement pay. The following example demonstrates the validity of this complaint. Assume that the service member receives $1600 per month as retirement pay. If the service member is in the fifteen percent tax bracket, the service member's disposable retirement pay would be $1360. If the former spouse had been married to the service member during his or her entire military career, the former spouse would be entitled to fifty percent or $680. This would represent a fair division of the property. Unfortunately, the former spouse may have to pay taxes on the $680. If that is the case, the former spouse will only receive $578, assuming the

former spouse is also in the fifteen percent bracket.

This inequity has hopefully been resolved. A recent amendment to the USFSPA directs that payments made directly to the former spouse will not be considered the retired pay of the service member.[50] The result of this change will be that taxes will be withheld by the finance center from the individual who is receiving the pay. Thus, in the above example the service member and the former spouse would each have $120 in taxes withheld and would each receive $680 net income.

Another limitation of the USFSPA requires the former spouse to be married to the service member for at least ten years to be eligible for direct payment from the finance center.[51] This limitation has caused some confusion because some have misunderstood the provision as requiring that the former spouse must be married to the service member for ten years in order to be entitled to a share of the retirement pay. Several service members have argued that the former spouse must be married for at least ten years, but every case that has considered this issue has ruled that there is no such requirement.[52] These rulings are

consistent with the legislative history of the USFSPA. Despite the House version of the Act containing a ten year marriage requirement in order for retired pay to be divisible and the Senate version containing a five year requirement, the conference committee rejected both these limitations on the divisibility of military retirement pay.[53] Thus, the state courts have resolved this issue.

It is now clear that as a result of the USFSPA military retirement pay is divisible. Still, the legislative history of the USFSPA indicates a recognition that there are some differences between military retired pay and other pensions.

As a result of this and other factors, which will be discussed shortly, there are two major unresolved issues concerning the divisibility of military retired pay. The first issue is whether the present cash value or the retained jurisdiction method should be used when dividing military retired pay. Second, what portion of retired pay should be awarded to the former spouse and when should he or she begin receiving it?

III. PRESENT VALUE VERSUS RETAINED JURISDICTION

A. The Difficulty of Valuating Pensions Generally.

In order to understand the advantages and disadvantages of the two approaches to dividing pensions, it is necessary to have an understanding of some pension definitions and concepts. The definitions, concepts and difficulties involved in dividing pensions are applicable to military as well as civilian pensions.

Because of its impact on the historical development of the divisibility of pensions, the first important concept discussed is vesting. A pension is considered to be vested when an employee completes the required period of service in order to have an indefeasible entitlement to a pension payable upon retirement.[54] Once a pension vests, an employee may leave his or her job for any reason and still receive benefits when he or she eventually becomes eligible to receive them.[55] Thus, an individual may have a vested right to receive a pension, but have no right to receive any pension benefits at the present time.

A second important concept is when a pension is considered to be matured. Generally, maturing occurs only after all the conditions precedent to the payment of the benefits have taken place.[56] Thus, when a pension matures an employee has an immediate right to receive benefits.

The following example explains the difference between vesting and maturing. Assume that an employee has a right to retirement pay after working with a company for thirty years and the employee can start receiving this retirement pay after reaching the age of sixty. Now assume that one of the employees has served thirty years and is retiring at the age of 56. At this time, the employee's pension is vested because he or she has served the required thirty years. But, the pension has not matured because the employee has no right to receive any benefits under the pension because he or she has not yet reached the age of sixty. When the employee reaches the age of sixty, the pension will have matured and the employee will have an immediate right to receive benefits under the plan. Thus, after the employee is sixty years old, the pension would be both vested and matured.

Another concept relevant to understanding the difficulties in dividing pensions is valuation. Placing a value on a pension is a very complex process involving the consideration of a variety of factors. The difficulty of this process can best be explained by providing an example and looking at how some commonly encountered contingencies affect the example.

Assume that a husband and wife are married for thirty years. During that thirty years, the husband works at the same place of employment while the wife works in the home. Assume also that, as a result of that thirty years of employment, the husband has earned a pension that will pay him $1000 a month for twenty years and he has an immediate right to receive this pension. Therefore, the pension is vested and matured. For simplification, assume further that there is no inflation and thus the first $1000 received will be worth the same as the last $1000. In this simplified fact pattern the value of the pension is very easy to ascertain. The pension is worth $240,000, which is the sum of 240 times $1000. Therefore, to divide the pension equally each party would receive $120,000.

The first complicating variable or risk factor is

that of inflation. Inflation causes the last $1000 received twenty years from now to be worth much less than the $1000 received next month. Although both parties can have experts testify about the likely potential rates of future inflation, there is still a degree of uncertainty in this process. The question then becomes who assumes the risk of this uncertainty. With inflation as the only factor both parties assume some risk. If the court assumes an annual rate of inflation of four percent, the present value of the pension will be $165,021.86.[57] If the court is wrong and inflation over the next twenty years averages three percent, the value of the pension should have been $180,310.90.[58] On the other hand, if the rate of inflation is five percent over the next twenty years, the value of the pension should have been $151,525.30.[59] Therefore, if the court assumes an annual rate of inflation of four percent, the wife would be awarded $82,510.93 as her share of the pension. But if the annual rate of inflation is three percent, the value of the pension that the wife should have been awarded would be $90,155.45. As a result, the risk that inflation is lower than the court

anticipated is placed on the wife. Conversely, if the annual rate of inflation is five percent, then the wife should only have been awarded $75,762.65. Since the wife would have already been awarded $82,510.93, the husband bears the risk that inflation will be higher than the court determines. In sum, the wife assumes the risk that inflation will be lower than the court anticipates and the husband assumes the risk that inflation will be higher. If this were the only risk and it was evenly divided between the parties, there would not necessarily be anything inequitable about this distribution. But there are many other risks and not all of them can be divided equally between the parties.

Returning to our original example and ignoring inflation, assume that instead of receiving $1000 a month for twenty years the husband is to receive $1000 a month for the rest of his life. This creates another contingency or risk factor that must be evaluated in order to determine the present cash value of the pension. Of course, expert testimony could again be used regarding the life expectancy of a man this age in general or regarding this man in particular if he had

some indication that his life expectancy will be different from normal.

Nonetheless, the financial risk of an earlier or later than expected death will be placed on the parties when placing a value on the pension. For example, if the man is sixty years old and has a life expectancy of seventy-two, then the pension would be worth $144,000 (144 months times $1000). Thus, each party would be awarded $72,000. But, if he were to die after only one year, then the actual value of the pension was only $12,000 and his former spouse should have only been awarded $6000. On the other hand, if he lives to be 92, then the pension was worth $384,000 and his former spouse should have been awarded $192,000. Thus, valuing this type of pension at the time of divorce places the financial risk associated with a premature death entirely on the husband and the financial risk associated with a long life entirely on the wife. Naturally, the effects of inflation would only exacerbate this problem.

Another variable that will affect this example involves the question of when the pension is matured. If the husband retires after thirty years of service at

the age of fifty-five, but has no right to receive any benefits under the pension plan, the pension is vested, but not matured. If a court were to divide the pension at this point at time, they would have to calculate the possibility that the pension would never mature. This calculation would also be based on actuarial tables, which would indicate the likelihood of whether the husband would ever receive his pension. Thus, the financial risk that the pension will never mature is placed entirely on the husband. From the wife's perspective, she would have her share of the pension reduced in value because of the risk the pension will never mature. If the pension does mature, then the wife would have received less than her fair share of the pension.

A final variable worth discussing involves the concept of vesting. Assume in our example that the husband has only worked for twenty years and the pension does not vest until he has worked thirty. Under these circumstances, it is virtually impossible to determine the value of the pension. Determining whether the husband will ever have a vested right in the pension involves nothing more than pure

speculation. First, will the husband live long enough? Second, will his employment be terminated prior to vesting? If the court were to award a portion of the pension to the wife, it would place on the husband the entire risk that the pension will never vest. On the other hand, if the court does not award the wife a portion of the pension, it would most likely be depriving her of the greatest asset that the parties have accumulated during their twenty year marriage. It is because of the speculative nature of this pension as property that courts initially would only divide vested pensions as marital property.[60]

Because of these difficulties in valuing pensions, only vested and matured pensions were initially treated as marital property. Courts generally took the position that unvested pensions were merely an expectancy that had no present determinable value. An example of this position is found in the California case of French v. French.[61] In French, the husband served in the navy for sixteen years prior to being transferred into the reserves. Under the then existing law, he had to serve another fourteen years in the reserves to receive retirement pay. The court

concluded that only vested pensions were subject to division because unvested pensions were merely an expectancy and not a property right.[62]

In spite of the difficulty in valuating a pension, there has been a growing trend in this country to treat all pensions as marital property subject to division upon the dissolution of a marriage regardless of whether or not they are vested.[63] This development has coincided with the increased use of the retained jurisdiction approach to dividing pensions. The retained jurisdiction approach alleviates the need to determine the present value of a pension and will be explained later.

Not all courts follow the trend toward dividing pensions regardless whether or not they are vested or matured. Some states still require that a pension be vested before it is divisible upon divorce.[64] The case Skirvin v. Skirvin[65] provides an example of the harsh results of taking this approach. After more than twenty-four years of marriage, the court in Skirvin ruled that a wife was not entitled to a share of her husband's police pension because the pension would not vest until thirty-two days after the date of the

divorce. Although this decision is based on an interpretation of a state statute and not on an analysis of the difficulties of valuation, this case serves as an example of the hardship this approach places on the non-employee spouse.

It is apparent that there are a variety of difficulties in valuating pensions. Some of the problems, like inflation, can be resolved by using expert testimony and placing the risk of the court making an incorrect determination on both of the parties. Other problems, like vesting and death, can be somewhat resolved by expert testimony, but the risk of the court improperly determining the proper value of the pension falls on one party or the other depending on future events. The question is which method of dividing pensions best deals with these problems.

B. Retained Jurisdiction Versus Present Cash Value.

1. Present Cash Value.

Courts have traditionally used one of two approaches in determining how to divide pensions.[66]

One of the methods is the present cash value method. The court, frequently through expert testimony, calculates the present value of the pension and divides it between the parties. Usually this is done by awarding the non-employee spouse other property to offset the value of the pension.

The primary advantage to the present cash value approach is that it immediately results in a final resolution of a divorcing couple's financial affairs and the relationship between the parties and the court is terminated at the conclusion of the divorce proceedings.[67] Because of this advantage some states have a clear preference for this approach.[68]

There are some obvious problems with the present cash value method of distributing pensions as marital property. As previously demonstrated, determining the present value of a pension can be extremely difficult, if not impossible.

In addition to the previously discussed problems of inflation, mortality, vesting and maturing that affect the valuation of all pensions, there are additional problems in valuating military retired pay. The very nature of military retirement pay makes it

difficult, if not impossible, to determine a present value. When the present value approach is used, the service member assumes a greater risk that he or she will never receive any retirement pay because the pension never vests. This could be the result of death or being separated prior to serving the necessary twenty years required for the pension to vest. The risk of the military pension not vesting is greater because military pensions do not vest until after twenty years, while many civilian pensions vest after only a few years.[69] Further, the military has an up or out promotion system that forces many service members out of the service prior to serving twenty years.

An additional risk that the court would have to evaluate is the risk that the service member could be recalled to active duty in time of national emergency. If this happens, the service member does not receive retired pay during this period of activation. It is virtually impossible to calculate the likelihood of this occurrence and its influence on the overall value of military retired pay.

Another complicating factor in determining the present cash value of military retirement pay is the

fact that it is subject to the whims of Congress. While Congress has historically increased the value of the pensions by the cost of living each year, there is no legal requirement that it do so. Again, it is virtually impossible to calculate the risks involved here.

Another problem with the present cash value method that is applicable to all pensions is that the parties may not have enough assets to offset one-half the value of the pension. This renders the present division of the pension impossible.

One final criticism of the present cash value approach is that it increases the cost of divorce.[70] Both parties must pay for expert testimony and the additional expenses that result from the additional time spent in court.

2. Retained Jurisdiction.

Some courts, recognizing the difficulties with the present cash value method, prefer an alternative method, which is frequently called the retained jurisdiction method.[71] Depending on how this approach

is applied, it can eliminate the need to determine a present cash value of the pension. In cases where the pension has not vested at the time of divorce, the retained jurisdiction method also divides equally the risk that the pension will fail to vest.[72] Using this method, the court retains jurisdiction and awards the pension using one of two methods.

First, in the case of a pension that has not vested, the court can retain jurisdiction until the pension vests. Then the court can determine the present cash value of the pension with a greater degree of accuracy. Still, this method involves many of the risk allocation factors previously discussed concerning the valuation of pensions. The only factor that the court has really removed is the virtually incalculable risk of whether the pension will ever vest. As a result, this approach is not a pure retained jurisdiction approach. It is a hybrid between the present cash value approach and the retained jurisdiction approach.

A second approach is for courts to retain jurisdiction and award the former spouse a dollar amount or a percentage of the pension as it is

received.[73] This approach can be used regardless whether the pension is vested or unvested at the time of divorce. Since the pension is divided as it is received, this method eliminates the need to ever place a value on the pension.

In our previous example, where the employee's pension is $1000 a month, the court could award the spouse fifty percent of the husband's pension to be paid to the wife as it is received by the husband. The effects of inflation would be the same on both parties. If the pension has not vested, the former spouse would receive the fifty percent only if the employee spouse receives the pension. Therefore, the risks that the pension will not vest or mature fall equally on both parties.

One criticism of the retained jurisdiction approach is that it creates a permanent relationship between the court and the parties and is therefore adverse to the interests of finality in court decisions. This criticism is more theoretical than practical. At the time of divorce the court can divide the pension and order it to be paid to the former spouse as it is received. Therefore, as long as the

parties comply with the court order, there is no further litigation of the matter.[74]

This criticism is also less applicable to the military because the USFSPA contains a provision that minimizes the administrative burden that the retained jurisdiction approach might otherwise place on the court. The USFSPA provides that the former spouse can receive payment directly from the respective service's financial center under certain circumstances.[75]

The only other criticism of the retained jurisdiction approach is that it the nonemployee spouse's interest is subject to a variety of risks until the employee spouse begins to receiving the pension. From the perspective of the employee spouse, this is only fair because his or her pension is subject to these same risks. Still, the result of using the retained jurisdiction approach is that the amount of the nonemployee spouse's share remains within the control of the employee spouse to some extent. The major way the employee spouse can exercise this control is by continuing to work at the same job after the pension has vested. This keeps the pension from maturing and becoming payable. Despite this criticism,

the reserved jurisdiction approach is still preferable to the present cash value approach.[76]

Because of the numerous disadvantages of the present cash value approach and the relative ease of application of the retained jurisdiction approach, many states now prefer the retained jurisdiction method.[77] In fact, some states require that courts use the retained jurisdiction approach and prohibit the use of the present cash value approach.[78] Because of the additional difficulties in determining a present cash value for military retirement pensions, many states recognize that the retained jurisdiction method should be used.[79]

Despite the conclusion that the retained jurisdiction method should be used, there should not be any prohibition on the use of the present cash value method. If the parties agree on the value of the pension and have the necessary assets, courts should not preclude them from making a final distribution of their marital assets. Nonetheless, because most parties will either not agree on a value or will lack the current assets to make an immediate disposition of their marital assets, the retained jurisdiction method

will most often be used.

IV. WHAT SHOULD THE FORMER SPOUSE RECEIVE AND WHEN SHOULD PAYMENT BEGIN

A. What Should the Former Spouse Receive?

The division of military retirement pay presents several unique problems. One major issue is what to do with post divorce adjustments such as promotions and cost of living increases.

Unlike many retirement plans, military pensions are increased each year to offset the increased cost of living because of inflation. The cost of living increase is usually equal to the consumer price index. Thus, the first issue is how this increase in the value of the pension should be divided between the parties. Since cost of living increases are part of the military pension, they are routinely divided between the parties in proportion to their contribution to the pension.[80]

More controversy has surrounded how the court should divide increases in the value of the pension as the result of the efforts of the service member. Some

courts have concluded that former spouses should only be entitled to share in the retirement pay that the service member would have received had he retired at the grade held at the time of divorce.[81] In fact, in Grier v. Grier[82] a Texas Court of Appeal applied this rule so rigidly that it awarded the spouse a portion of the retirement pay that the service member would have received if he were retired at the rank of major even though the service member was on the promotion list to lieutenant colonel at the time of the divorce.[83]

Similarly, in In re Marriage of Castle[84] a California Court of Appeal apportioned the property based on the rank that the service member could retire at the time of the divorce and awarded the wife a portion of a captain's retirement pay rather than the higher rank of major even though the service member had been promoted to the rank of major prior to the divorce.[85] The court reached this conclusion based on the fact that the service member was not eligible to retire at the rank of major at the time of divorce.[86]

The rationale of these cases is that the former spouse only contributed to the service member making the rank held at the time of divorce and should not be

entitled to increases in the value of the pension that were solely the result of the service member's work.

The results reached in these two cases fail to take into account the fact that the former spouse contributed to the service member's promotion. In Castle, it is clear that the wife contributed to the service member obtaining the rank of major because he was a major at the time of divorce. Therefore, this method fails to take into account the wife's contribution to a higher rank by distinguishing between the rank that she helped her husband attain and the rank at which the service member is eligible to retire on the date of the divorce.

Other courts reject the distinction between increases in rank that occur after divorce and hold that former spouses should receive a percentage share of the service member's retirement pay based on their contribution to the pension.[87] Under this approach, the former spouse is given a percentage of the service member's retirement pay regardless of the service member's final retirement rank. Thus, if a service member were to serve for twenty-six years and during that service he or she was married for thirteen years,

the former spouse would receive one half times 13/26ths times the service member's eventual retirement pay. This formula renders it irrelevant that the marriage was during the first thirteen years, the last thirteen years, or some thirteen year period in between. The rationale for this formula is that the former spouse's contribution to the pension should not be considered any less because she was married to the service member in the middle or at the beginning of the service member's career rather than at the end of his or her career.[88]

Unfortunately, the courts following this approach ignore the realities of a military career. The simple fact is that it is much easier to stay in the service and obtain rank during the first ten years than it is during later years. Department of Defense promotion guidelines and limitations make it more difficult to obtain the higher ranks. While the Army will be used as an example, this illustration is applicable to all services. Assume that there are approximately 100,000 officers on active duty, since this is the approximate end strength for September 30, 1991.[89] With this force structure the Army is allowed to have 17,112 majors,

11,049 lieutenant colonels and 4,548 colonels.[90] Therefore, only sixty-four percent of the majors will be promoted to lieutenant colonel and forty-one percent of lieutenant colonels will be promoted to colonel.[91] Further reducing this promotion rate is the fact that the military is expected to be much smaller by 1995.[92] Therefore, there will be a corresponding reduction in all officer ranks.[93] Thus, it seems logical that promotions will be even more difficult to obtain.

A proper resolution of this issue falls somewhere between these two approaches. The argument that a former spouse should not be entitled to the enhancement of value that occurs as a result of the service member's efforts after the divorce has some merit. The previously cited cases, however, draw the line too far on the side of the service member. For example, it is clear that the service member in Castle had obtained the rank of major at the time of divorce. Thus, the wife had contributed to that service member making the rank of major. Similarly, the wife in Grier clearly contributed to her husband making the rank of lieutenant colonel because he was already on the promotion list. A further inequity was imposed on the

former spouse in Grier because the Texas courts use the present cash value approach and determine the present value of the retirement pay without considering future cost of living increases.[94] Thus, the former spouse did not receive her share of the future cost of living increases that are part and parcel of the military pension.

Since the court in Castle was supposedly using the retained jurisdiction approach, the court could have divided the pension based on the service member's eventual ability to retire at the rank that the former spouse had helped him or her obtain. Thus, the court could have waited until the service member was eligible to retire at the rank of lieutenant colonel and then given the former spouse a proportion of the difference based on the former spouse's amount of contribution to the rank of lieutenant colonel. For example, assume that it took the service member six years to be promoted from the rank of major to the rank of lieutenant colonel. Assume further that the former spouse and service member were divorced at the four year point in this process. Thus, the former spouse would be entitled to a share of what the service member

would have received had the service member retired as a major plus two-thirds (four divided by six) of the difference between a lieutenant colonel's retirement pay and a major's retirement pay. While this would certainly involve more complex formulas than the approach of basing the former spouse's share on the service member's eligible retirement rank at the date of divorce, the amount of complexity involved is not overwhelming and should not excuse the court from seeking to achieve this more equitable result. Further, this method would not impose any additional administrative burden because the court could order the formula to be used and the numbers would simply be filled into the formula when the service member retires.

B. When Should Payment Begin?

When the retained jurisdiction approach is used, military retirement pay is paid to the former spouse as it is received. Since some courts use the present cash value approach and some use a hybrid approach, a question arises as to when the former spouse should

begin receiving retirement pay.

The controversy concerns requiring the service member to pay the former spouse while the service member is still on active duty. One issue is whether the courts can force the service member to retire so that the former spouse can begin receiving his or her share of military retirement pay. Congress was very clear in enacting the USFSPA that a court could not force a service member to retire.[95]

The other issue involves whether the courts can order the service member to begin paying the former spouse a portion of his or her military retirement pay after he or she has served twenty years but is still serving on active duty. California courts have decided that they can do so because to conclude otherwise would allow the service member to deprive the former spouse of the present use of her property interest in the retirement pay simply by remaining on active duty.[96]

California courts also allow the former spouse to elect when he or she begins to receive the military retirement pay.[97] Thus, in the above example the spouse would be able to choose between fifty percent of the retirement pay of a major beginning immediately or

forty percent of the retirement pay of a lieutenant colonel with payment beginning in five years. Again, the rationale behind this approach is that the service member should not be allowed to deprive his or her former spouse of community property by remaining on active duty.

This rationale is flawed for several reasons. First, it ignores the limitations placed on state courts' ability to order a service member to retire.[98] While the court is not actually ordering the service member to retire, it is ignoring the intent of this limitation on the divisibility of military retirement pay. As previously discussed, the limitations placed on the divisibility of military retirement pay were designed to protect national defense requirements by maintaining a ready force.[99] This approach gives senior service members an incentive to leave the military after twenty years because they will be paying a portion of their retirement pay to their former spouse even though they are not receiving retirement pay.

Second, this approach has been criticized because it is not a pure reserve jurisdiction approach.[100] The

court is reserving jurisdiction until the pension vests and then using the present cash value approach. As a result, all of the problems of the present cash value method are still present except the problem of vesting.[101] Therefore, this approach is inequitable to the service member for several reasons. It ignores the possibility that the service member could be recalled to active duty at some time in the future. If this were to happen, the service member would receive active duty pay for services being currently performed and would not be receiving military retirement pay. Thus, the risk that the retirement pay will be lost because of national defense requirements is placed entirely on the service member. Further, the risk that the military retirement pension will never mature is placed entirely on the service member. As a result, both advantages of the retained jurisdiction approach are frustrated. The risks of future contingencies are not evenly divided between the parties and the court must now use expert testimony and place a value on the pension.

Therefore, the argument that the service member should not be allowed to deprive the former spouse of

her share of the military pension is not compelling. Using the retained jurisdiction method of dividing pensions, a pension is not payable until it is vested and matured. When a service member has served for twenty years, the military retirement pension is vested, but it has not matured. The only way to make the pension mature is for the service member to retire and Congress has determined that the states cannot order a service member to retire.[102] Therefore, the former spouse should not receive his or her share until the service member begins receiving his or her own share.

The impact on the former spouse can be more easily off-set with military retirement pay. This is because it is easy to distinguish longevity increases from merit increases in the military. Therefore, a former spouse's percentage can be locked at the point of vesting and this percentage can be applied to the retirement pay of the rank, or portion thereof, achieved during marriage. This eliminates the service member's ability to reduce the former spouses percentage of retirement pay by remaining on active duty.

The following example will clarify this issue. Assume the service member and former spouse are married for twenty years and the service member is on active duty during the entire marriage. Assume at this point the service member is a lieutenant colonel. If they divorce a this time, the former spouse would be entitled to fifty percent (1/2 times 20/20) of the service members retirement pay at the current rank of the service member. Thus, if the service member remains on active duty six more years and retires at the rank of lieutenant colonel, the former spouse would receive fifty percent of the retirement pay of a lieutenant colonel with twenty-six years of service and not fifty percent of the retirement pay of a lieutenant colonel with twenty years. As a result, the former spouse will receive a higher monthly amount when the service member retires because of the service member's additional service time. In addition, if the service member were to have been promoted following the marriage, the former spouse would be entitled to a percentage of this increased pension to the extent that the former spouse contributed to it during the marriage.

A review of post-divorce adjustments leads to the conclusion that former spouses should share in the portion of the highest rank to which they contributed. Further, the review of when payment should begin leads to the conclusion that military retirement pay should be paid to the former spouse as it is received by the service member.

A final example will demonstrate how the combination of these two principles works. Assume that the service member divorces his or her spouse after sixteen years of marriage that overlapped with sixteen years of military service. Assume further that the service member obtained the rank of major after serving twelve years. Subsequent to the divorce the service member attains the rank of lieutenant colonel after serving a total of eighteen years and subsequently retires at that pay grade after serving twenty four years.

The former spouse would not receive any money until the service member retires after serving twenty four years. At that time she would receive forty percent (16/20 times 1/2) of a base retirement pay figure. The base retirement pay figure would be the

retirement pay of a major plus sixty-seven percent (4/6) of the difference between the retirement pay of a major and the retirement pay of a lieutenant colonel. Since the former spouse's share of the military retirement pay is expressed as a percent, the former spouse will receive an increase in the amount he or she receives as the service member's retirement pay is increased as a result of annual cost of living raises.

This approach balances the interests of the former spouse, the interests of the service member, and the military's interest in retaining its senior officers and noncommissioned officers after they have served twenty years.

V. DISABILITY PAY

A. Disability Pay Generally.

The states are more divided on the issue of the divisibility of disability pay than they are on the issue of the divisibility of retired pay. Part of the difficulty with determining whether to divide disability pay is the complex nature of disability pay.

Disability pay has the characteristics of three different types of classifiable property: pensions, workers' compensation, and personal injury recoveries.[103]

Thus, disability pay is designed to replace lost wages like workers' compensation and some portions of a personal injury award. Disability pay may also be intended to compensate for pain and suffering.[104] Unlike workers' compensation and personal injury causes of action, however, disability pay may be earned by marital effort. As a result, disability pay has been variously classified as pensions, workers' compensation, and personal injury recoveries. In fact, disability pay is often variously classified within the same jurisdiction.[105]

One approach to determining whether disability pay should be considered marital property is to focus on the source of the coverage. If the source of the coverage is marital labor, then disability pay should be divided as marital property.[106] Another approach is to focus on the extent to which disability pay displaces retirement pay. Some states classify post-coverture retirement pay as marital property and post-

coverture disability pay as separate property. As a result, the divorcing employee who has a choice between disability and retirement pay has an incentive to opt for disability pay. In such cases, several jurisdictions have held that the portion of disability pay displacing retirement benefits earned during marriage, to which the employee would otherwise be entitled, is marital property.[107] Thus, this approach focuses on the extent to which disability pay displaces retirement pay. By combining these two approaches, a majority view has emerged. This approach divides disability pay to the extent that it is similar to retirement pay because it is earned by the spouses during marriage.[108]

B. Military Disability Pay.

1. Types of Military Disability Pay.

The United States has provided some form of a military disability pension in this country since August 26, 1776.[109] There are currently two different statutory provisions for military disability pensions.

It is important to have some understanding of these two types of benefits because courts have distinguished the two in determining whether they should be divisible as marital property upon the dissolution of a marriage.

First, there are disability pension benefits pursuant to Title 38 of the United States Code. Under Title 38 there are two subcategories of benefits. There are compensation benefits, which are paid by the Department of Veteran's Affairs for injuries sustained in the line of duty,[110] and pension benefits, which are paid for similar injuries according to a subsistence standard based on need.[111] It should be noted that only compensation benefits are available to peacetime service members.[112]

The second type of military disability pension is disability retirement pay. Disability retirement pay is paid under basically two circumstances. First, it is paid when a service member has a disability of a permanent nature, which renders him or her unfit to perform assigned duties and the service member has served at least twenty years. Second, it is paid when a service member has a disability of a permanent nature, which renders him or her unfit to perform

assigned duties, and the disability is at least thirty percent and the member has either served eight years, or when the disability is the proximate result of performing active duty.[113] Another form of disability pay should also be mentioned here because the USFSPA also excludes it from the definition of disposable retired pay that is subject to distribution by the states.[114] This disability pay is compensation under Title 5, which deals with compensation for civil service injuries.

Disability compensation and pension benefits are determined by the Department of Veteran's Affairs based on the severity of the disability and the degree to which the veteran's ability to earn a living has been impaired.[115] If the service member is otherwise already receiving or eligible to receive retirement benefits, the service member must waive so much of that retired pay as would be equal to such compensation or pension.[116]

The service member obtains several advantages by waiving his retirement pay in exchange for disability pension benefits. First, disability pension benefits are not taxable.[117] Therefore, the service member will

increase his after tax income by exchanging retirement pay income for disability pension income. A second advantage to disability pension benefits is that they are protected from creditors.[118]

Disability retired pay is determined based on a formula in which the member elects the greater of two and one-half percent times the number of years of service times a retired pay base, or the percentage of disability times the same retired pay base.[119] Thus, service members may increase the value of this pension the longer they remain on active duty. In fact, this first method of determining the service member's disability retired pay is identical to the method of determining a service members regular retirement pay.[120]

Thus, a major who has served twelve years on active duty and is injured on active duty with a forty percent disability, which renders him or her unfit to perform assigned duties, would receive the greater of $1279.68 (forty percent of $3199.20) or $959.76 (two and one-half percent times twelve times $3199.20).[121] Under these circumstances, there would be no waiver of retirement pay because the service member has no right to any retirement pay, since he or she has not served

for twenty years.

Another situation involves service members who are injured and determined to have a disability rendering them unfit for service after serving twenty years. Under these circumstances, the service member is entitled to disability retirement pay under 10 U.S.C. Section 1201 using the same formulas as before. Since the service member has also served over twenty years, the service member would also be entitled to retirement pay if he or she were not suffering from any disability.[270] The service member, however, can only be retired once. Therefore, the service member is either retired for disability[271] or he or she is retired regularly.[272]

Thus, a service member who is currently retired after twenty years with a disability under fifty percent is simply having his or her ordinary retirement pay displaced by the disability pay because a service member who currently retires after serving twenty years is entitled to fifty percent of his or her base retirement pay.[273]

2. The Divisibility of Military Disability Pay

Because of the similarity between calculating disability retired pay and regular retired pay, some courts have long held that disability retired pay is marital property subject to division.[274] In Busby v. Busby,[275] the court had to determine whether disability retired pay should be divisible as marital property. After comparing disability retirement pay with regular retirement pay, the court concluded that disability retirement pay was divisible as marital property. The court analyzed disability retirement and regular retirement and concluded that disability retirement pay should be treated the same as regular retirement pay because the disability retirement benefits accrued during marriage.[276]

In contrast, virtually all states that have considered the issue have concluded that disability pension benefits under Title 38 are the separate property of the service member.[277] But Title 38 disability pay can be awarded to service members who have served only a few years as well as those who have served twenty years and are otherwise eligible to

receive retirement pay.[278] The service member who is otherwise eligible to receive military retirement pay, however, must waive a portion of that retirement pay that is equal to the amount of disability pay he is entitled to receive under Title 38.[279]

As a result, while the states have generally concluded that disability pensions under Title 38 are not marital property subject to division, they are not in agreement as to how to treat the retirement pay that the service member has waived so that he or she can receive the disability pension. When a service member waives a portion of retirement pay to receive a disability pension under Title 38, several courts have concluded that the retirement pay waived should be treated as marital property.[280] These courts based their conclusion on the belief that the service member should not be allowed to unilaterally defeat a former spouse's property right to his or her share of the retirement pay.

California typifies this approach. When a service member had served the requisite amount of time needed to receive retirement pay, a California Court of Appeal ruled that the service member could not defeat the

community interest in a spouse's right to the retired pay by electing to receive a disability pension.[281] In contrast, a California Court of Appeal concluded that disability retirement pay awarded before a service member's retirement benefit had in any way vested on a longevity basis was not community property.[282]

Other courts have reached the same result and determined that the retirement pay that is waived in order to receive disability pension benefits is marital property subject to division.[283] Thus, prior to McCarty and the USFSPA, the predominant issue was whether the service member was waiving or giving up a portion of his or her retirement pay, in which his or her spouse had an interest, in exchange for disability pay. If the service member was, courts would find that the former spouse was still entitled to a share of the retirement pay that the service member had waived.[284]

The USFSPA, which was effective February 1, 1983, and arguably allowed for retroactive application back to June 26, 1981, appeared to represent a change in this area of the law.[285] When initially enacted, the USFSPA exempted disability retired pay and retired pay waived to receive disability pensions under either

title 5 or title 38.[138] The USFSPA was subsequently amended in 1986 to remove the exclusion of all disability retirement pay. The amendment provided that only the amount of disability retirement pay computed using the member's percent of disability would be excluded and not the amount of disability pay determined based on the years of service.[139] Of course, if the amount of disability retirement pay based on the percent of disability exceeds the amount of disability retirement pay based on years of service, then the disability retirement pay is not divisible. Thus, disability retirement pay is divisible only to the extent that the amount of disability retired pay based on years of service exceeds the amount of disability retired pay based on the percent of disability.

Following the enactment of the USFSPA, almost all of the states that considered the issue concluded that disability pay was not divisible as marital property.[140] Nonetheless, some states concluded that retirement pay waived in order to receive disability pay was marital property and, as such, was divisible upon the dissolution of the marriage.[141]

The issue was resolved by the Supreme Court in

Mansell v. Mansell.[142] The Court held that military disability pay was not to be subject to division by the states and went further by holding that retirement pay waived in order to receive disability pay was also not subject to division.[143] Although some courts have expressed their dissatisfaction with the result of the Mansell decision, they have complied with it.[144]

Ironically, Gerald Mansell, the appellant in the Mansell case, obtained no relief when his case was remanded to the California courts. Gerald Mansell fell victim to the same fate that befell many former spouses who entered into separation agreements between June 26, 1981 and February 1, 1983 and waived their right to their service members' military retirement pension. The California court on remand concluded that while the award of a portion of Mansell's disability pay may have exceeded the jurisdiction of the court, Gerald Mansell waived any right to raise this assertion because he had consented to the court awarding a portion of his disability pay in the separation agreement that he had voluntarily signed.[145] Thus, Mrs. Mansell continues to be entitled to a portion of Gerald Mansell's disability pay.

The result of the Supreme Court's decision in Mansell is clear. Neither disability retirement pensions nor the retirement pay waived in order to receive them is marital property that is subject to division. Further, the USFSPA is similarly clear that disability retirement pay that can be directly attributable to a service member's disability is also not divisible.[146]

C. Should Disability Pay Be Divisible?

By far the biggest controversy surrounding what should be subject to division concerning military pay and benefits is military disability pay. As previously discussed, veterans' disability benefits under Title 38 have always been excluded from divisibility.[147] Thus, the primary issue to be resolved regarding Title 38 benefits is whether the disability benefits waived to receive Title 38 benefits should be considered marital property subject to division upon dissolution of the marriage. A related issue is whether disability retirement benefits should be subject to division upon dissolution of the marriage.

A review of the historical development of the divisibility of retirement pay and the divisibility of disability pay reveals several similarities. Prior to McCarty, many states were dividing military retirement pay as marital property. Similarly, prior to Mansell, many states were dividing the military retirement pay waived in order to receive disability benefits under Title 38. Subsequent to McCarty, the USFSPA was enacted and state courts were again allowed to divide military retirement pay pursuant to state law. It is not unreasonable to believe that congressional action will lead to an overruling of Mansell and allow states to treat military retirement pay that is waived in order to receive military disability pay as marital property.

The basic rationale of the courts that consider the military retirement pay waived in order to receive disability pay to be marital property is compelling. The basic premise is that the service member should not be allowed to unilaterally dispose of his or her former spouse's property. One party cannot unilaterally dispose of another party's property without consent in any other circumstance in the area of divorce law. For

example, one party cannot sell the marital home and then dispose of the proceeds by giving them to a third party. The party selling the marital home would still be liable to the former spouse for her one-half interest in the home.

Thus, state courts now find themselves in much the same situation as they did after the Supreme Court decided McCarty. The theories that they use to divide marital property are inapplicable to the division of military disability pay. Thus, they must ignore their property distribution rules in this area of the law until Congress acts. The result is that military spouses are treated differently than all other spouses who reside within that state's borders.

As can be seen by the problems caused by the USFSPA regarding retroactivity, Congress will not be able to resolve all the damage caused by delay in amending the USFSPA's definition of disposable retirement pay to include military retirement pay waived to receive disability pay. The lessons of McCarty and the USFSPA teach that Congress should act quickly to avoid the injustices caused by delay.

The issue of disability retirement pay has been

adequately resolved by the 1986 amendment to the USFSPA.[148] This approach allows the service member to retain the portion of disability retirement pay directly relating to his or her disability as separate property. At the same time, it allows the former spouse to obtain a share of the disability retirement pay that is related to longevity (i.e. marital contribution).

VI. CONCLUSION

Dividing pensions is an inherently difficult process because of the many variables that can affect the actual value of the pension. This is even more true in the military setting where service members may not receive retirement pay because of various factors such as the failure of the pension to vest and the possibility that the service member will be recalled to active duty in the event of a national emergency. While the retained jurisdiction approach is fairer when dividing all pensions, it is even more so when dividing military pensions.

State courts should be allowed to treat military

spouse's rights to property the same as they treat other citizens to the greatest extent possible without sacrificing national defense interests. The primary concern is that the military spouse's property rights do not have a negative impact on the military's ability to perform its mission.

Therefore, a former spouse should be able to share in the retirement pay of a service member when the service member retires. In addition, the former spouse should be able to share in the retirement pay at the rank or percentage of rank that he or she helped the service member attain. The former spouse should not be strictly limited to the rank that the service member could retire at on the date of the divorce.

Further, a former spouse should receive a share of the retirement pay as the service member receives it. Therefore, former spouses should not be entitled to a share of retirement pay until the retirement pay is vested and matured. This approach is consistent with the retained jurisdiction approach. This approach is also necessary for the national defense interest of retaining a viable fighting force. Allowing courts to order service members to pay retirement pay while they

are still on active duty, places pressure on the service member to leave military service when he or she has reached the peak of his or her career. This approach is also inequitable to the service member. It places all the risks associated with the present cash value approach on the service member. It also places the risk that the service member will be recalled to active in time of national emergency and forfeit his or her retirement pay entirely on the service member. In addition, this approach also increases the cost of divorce because of the difficulty in determining the present cash value of the pension.

Finally, courts should be able to award former spouses retirement pay that the service member waives in order to receive disability pay. No significant national security interest would be compromised and it would not be inequitable to the service member. The service member is simply being required to pay the former spouse the share of the military retirement pay that the former spouse earned through his or her marital efforts.

Therefore, Congress should act immediately and make two amendments to the USFSPA. First, states

should not be permitted to order service members to pay a portion of their retirement pay until it is received by the service member. The only exception to this rule would be if both the former spouse and the service member agreed to an alternative disposition. A suggested amendment to bring about this change in the law is attached at Appendix A. Second, states should be permitted to divide retirement pay that a service member waives in order to receive disability pay. A suggested amendment to correct this inequity is attached as Appendix B.

1. Blumberg, Marital Property Treatment of Pensions, Disability Pay, Workers' Compensation, and Other Wage Substitutes: An Insurance, or Replacement, Analysis, 33 UCLA L. Rev. 1250 (1986).

2. 453 U.S. 210 (1981).

3. 10 U.S.C. § 1408 (1982).

4. S. Rep. No. 97-502, 97th Cong., 2d Sess., reprinted in 1982 U.S. Code Cong. & Admin. News 1596 (1983).

5. 490 U.S. 581 (1989).

6. 453 U.S. 210 (1981).

7. In re Marriage of Ellis, 36 Colo. App. 234, 538 P.2d 1347 (1975).

8. Hiscox v. Hiscox, 179 Ind. App. 378, 385 N.E.2d 1166, (1979); Paulson v. Paulson, 269 Ark. 523, 601 S.W.2d 873 (1980).

9. In re Marriage of Fithian, 10 Cal. 3d 592, 517 P.2d 449, 111 Cal. Rptr. 369, cert. denied, 419 U.S. 825 (1974); Ramsey v. Ramsey, 96 Idaho 672, 535 P.2d 53 (1975); Kruger v. Kruger, 139 N.J. Super. 413, 354 A.2d 340 (1976), modified on appeal, 73 N.J. 464, 375 A.2d 659 (1977); LeClert v. LeClert, 80 N.M. 235, 453 P.2d 755 (1969); Mora v. Mora, 429 S.W.2d 660 (Tex. Civ. App. 1968).

10. Durham v. Durham, 289 Ark. 3, 708 S.W.2d 618 (1986); Wilson v. Wilson, 409 N.E.2d 1169 (Ind. Ct. App. 1980); Ratcliff v. Ratcliff, 586 S.W.2d 292 (Ky. Ct. App. 1979); Boyd v. Boyd, 116

Mich. App. 774, 323 N.W.2d 553 (1982); Copeland v. Copeland, 91 N.M. 409, 575 P.2d 99 (1978) (although pension involved was vested, court stated in dicta that unvested pension "cannot be said to constitute a property right because the benefits rest upon the whim of the employer.").

11. Laing v. Laing, 741 P.2d 649 (Alaska 1987); Van Loan v. Van Loan, 569 P.2d 214 (Ariz. 1977); In re Marriage of Brown, 15 Cal. 3d 838, 544 P.2d 561, 126 Cal. Rptr. 633 (1976); Linson v. Linson, 1 Haw. App. 272, 618 P.2d 748 (1980); In re Marriage of Hunt, 78 Ill. App. 3d 653, 397 N.E.2d 511 (1979); Ohm v. Ohm, 49 Md. App. 392, 431 A.2d 1371 (1981); Janssen v. Janssen, 331 N.W.2d 752 (Minn. 1983); Weir v. Weir, 173 N.J. Super 130 (1983); Damiano v. Damiano, 94 A.D.2d 132, 463 N.Y.S.2d 477 (1983); Cearley v. Cearley, 544 S.W.2d 661 (Tex. 1976); Wilder v. Wilder, 85 Wash. 2d 364, 534 P.2d 1355 (1975); Leighton v. Leighton, 81 Wis. 2d 620, 261 N.W.2d 457 (1978).

12. Cose v. Cose, 592 P.2d 1230 (Alaska 1979), cert. denied, 453 U.S. 922 (1981).

13. Id.

14. 453 U.S. 210 (1981).

15. Id. at 211.

16. Id. at 212-16.

17. Jacanin v. Jacanin, 124 Cal. App. 3d 67, 177 Cal. Rptr. 86 (1981).

18. L. Golden, Equitable Distribution of Property (1983).

19. Stumpf v. Stumpf, 249 Ga. 759, 294 S.E.2d 488 (1982).

20. Department of Defense Authorization Act, 1983, Pub. L. No. 97-252, §§ 1001 - 1006, 96 Stat. 718, 730-737 (1982) (codified at 10 U.S.C. § 1408).

21. H.R. Conf. Rep. 97-749, 97th Cong., 2d Sess., reprinted in 1982 U.S. Code Cong. & Admin. News 1569 (1983); S. Rep. No. 97-502, 97th Cong., 2d Sess., reprinted in 1982 U.S. Code Cong. & Admin. News 1596 (1983).

22. 10 U.S.C. § 1408(d) (1982).

23. 10 U.S.C. § 1408(c)(1) (1982).

24. H.R. Conf. Rep. 97-749, 97th Cong., 2d Sess., reprinted in 1982 U.S. Code Cong. & Admin. News 1569 (1983); S. Rep. No. 97-502, 97th Cong., 2d Sess., reprinted in 1982 U.S. Code Cong. & Admin. News 1596 (1983).

25. Campbell and McKelvey, Partitioning Military Retirement Benefits: Mapping the Post-McCarty Jungle, Tex. B. J. (Oct. 1986).

26. Id.

27. Id.

28. Wiles v. Wiles, 289 Ark. 340, 711 S.W.2d 789 (1986); In re Marriage of Wolford, 789 P.2d 459 (Colo. Ct. App. 1989).

29. Habermehl v. Habermehl, 135 Ill. App. 3d 105, 481 N.E.2d 782 (1985).

30. In re Marriage of Mattson, 694 P.2d 1285 (Colo. Ct. App. 1984); Grant v. Grant, 9 Kan. App. 2d 671, 685 P.2d 327, rev. denied, 236 Kan. 875 (1984); Koenes v. Koenes, 478 N.E.2d 1241 (Ind. Ct. App. 1985).

31. 9 Kan. App. 2d 671, 685 P.2d 327, rev. denied, 236 Kan. 875 (1984).

32. Chase v. Chase, 662 P.2d 944 (Alaska 1983); Gallo v. Gallo, 752 P.2d 47 (Colo. 1988); Pastore v. Pastore, 497 So.2d 635 (Fla. 1986); Powers v. Powers, 465 So.2d 1036 (Miss. 1985).

33. Fla. Stat. § 61.075(3)(a)4 (1988); Ind. Code § 31-1-11.5 -2(d)(3) (1985); Kan. Stat. Ann. § 23-201(b) (1987).

34. 9 Kan. App. 2d 671, 685 P.2d 327, rev. denied, 236 Kan. 875 (1984).

35. Kan. Stat. Ann. § 23-201(b) (1987).

36. In re Marriage of Gallo, 752 P.2d 47 (Colo. 1988); Jones v. Jones, 680 S.W.2d 921 (Ky. 1984).

37. In re Marriage of Beckman, 800 P.2d 1376 (Colo. Ct. App. 1990); Poe v. Poe, 711 S.W.2d 849 (Ky. Ct. App. 1986).

38. Tinsley v. Tinsley, 431 So. 2d 1304 (Ala. Civ. App. 1983).

39. Note, Uniformed Services Former Spouses'Protection Act Update, June 1990 The Army Lawyer at 58.

40. Wilson v. Wilson, 409 N.E.2d 1169 (Ind. Ct. App. 1980); Bickel v. Bickel, 533 N.E.2d 593 (Ind. Ct. App. 1989).

41. Skirvin v. Skirvin, 560 N.E.2d 1263 (Ind. Ct. App. 1990).

42. S. Rep. No. 97-502, 97th Cong., 2d Sess., reprinted in 1982 U.S. Code Cong. & Admin. News 1596 (1983).

43. Id. at 1601.

44. Id. at 1601-1602.

45. Id. at 1612.

46. 10 U.S.C. § 1408(a)(4) (1982).

47. Casas v. Thompson, 42 Cal. 3d 131, 720 P.2d 921, 228 Cal. Rptr. 33 (1986).

48. 490 U.S. 581, 583 (1989).

49. 10 U.S.C. § 1408(c)(1) (1982).

50. Defense Authorization Act For Fiscal Year 1991, Pub. L. No. 101-510, § 555, 104 Stat. 1485, 1569 (1990).

51. 10 U.S.C. § 1408(d) (1982).

52. Parker v. Parker, 750 P.2d 1313 (Wyo. 1988); Scott v. Scott, 519 So.2d 351 (La. Ct. App. 1988); Carranza v. Carranza, 765 S.W.2d 32 (Ky. Ct. App. 1989); In re Marriage of Wood, 66 Or. App. 941, 676 P.2d 338, 340 (1984); Oxelgren v. Oxelgren, 670 S.W.2d 411 (Tex. Ct. App. 1984); Konzen v. Konzen, 103 Wash.2d

470, 693 P.2d 97 (1985).

53. H.R. Conf. Rep. No. 97-749, 97th Cong., 2d Sess., reprinted in 1982 U.S. Code Cong. & Admin. News 1569, 1572 (1983).

54. B. Goldberg, Valuation of Divorce Assets (1984); L. Golden, Equitable Distribution of Property (1983).

55. B. Goldberg, Valuation of Divorce Assets (1984); L. Golden, Equitable Distribution of Property (1983).

56. In re Marriage of Fithian, 10 Cal. 3d 592, 596, 517 P.2d 449, 451, 111 Cal. Rptr. 369, 371, cert. denied, 419 U.S. 825, reh'g denied, 419 U.S. 1060 (1974).

57. Welsh, Zlatkovich, and Harrison, Intermediate Accounting, at 190 (1979).

58. Id.

59. Id.

60. B. Goldberg, Valuation of Divorce Assets (1984).

61. 17 Cal. 2d 775, 112 P.2d 235 (1941).

62. Id. at 236.

63. Blumberg, supra note 1.

64. Ind. Code § 31-1-11.5-11 (1978).

65. 560 N.E.2d 1263 (Ind. Ct. App. 1990).

66. L. Golden, Equitable Distribution of Property (1983).

67. Johnson v. Johnson, 131 Ariz. 38, 638 P.2d 705 (1981); Taylor v. Taylor, 329 N.W.2d 795 (Minn. 1983); Kuchta v. Kuchta,

636 S.W.2d 663 (Mo. 1982); Kikkert v. Kikkert, 177 N.J. Super. 471, 427 A.2d 76, aff'd, 438 A.2d 317 (N.J. 1981); Holbrook v. Holbrook, 103 Wis. 2d 327, 309 N.W.2d 343 (Wis. Ct. App. 1981).

68. Miller v. Miller, 140 Ariz. 520, 683 P.2d 319 (Ariz. Ct. App. 1984); Dewan v. Dewan, 506 N.E.2d (Mass. 1987).

69. 29 U.S.C. § 1053 (1990).

70. Sterling, Division of Pensions: Reserved Jurisdiction Approach Preferred, 11 Community Prop. J. 17 (1984).

71. B. Goldberg, supra note 60, at 254.

72. In re Marriage of Brown, 15 Cal. 3d 838, 544 P.2d 561, 126 Cal. Rptr. 633 (1976).

73. B. Goldberg, supra note 60, at 254.

74. Note, Pension Rights as Marital Property: A Flexible Approach, 48 Mo. L. Rev. 245, 254 (1983).

75. 10 U.S.C. § 1408(d)(1) (1982).

76. Sterling, Division of Pensions: Reserved Jurisdiction Approach Preferred, 11 Community Prop. J. 17 (1984).

77. Laing v. Laing, 741 P.2d 649 (Alaska 1987); In re Marriage of Gallo, 752 P.2d 47 (Colo. 1988); In re Marriage of Korper, 131 Ill. App. 3d 753, 475 N.E.2d 1333 (1985); Tarr v. Tarr, 570 A.2d 826 (Me. 1990).

78. In re Marriage of Dooley, 137 Ill. App. 3d 401, 484 N.E.2d 894 (1985); Wagner v. Wagner, 4 Va. App. 397, 358 S.E.2d 407

(1987).

79. Johnson v. Johnson, 131 Ariz. 38, 638 P.2d 705 (1981); Taylor v. Taylor, 329 N.W.2d 795 (Minn. 1983); Kuchta v. Kuchta, 636 S.W.2d 663 (Mo. 1982); Kikkert v. Kikkert, 177 N.J. Super. 471, 427 A.2d 76, aff'd, 438 A.2d 317 (N.J. 1981); Holbrook v. Holbrook, 103 Wis. 2d 327, 309 N.W.2d 343 (Wis. Ct. App. 1981).

80. Moore v. Moore, 114 N.J. 147, 553 A.2d 20 (1989); Koelsch v. Koelsch, 148 Ariz. 176, 713 P.2d 1234 (1986); In re Marriage of Castle, 180 Cal. App. 3d 206, 225 Cal. Rptr. 382 (1986); In re Marriage of Scott, 156 Cal. App. 3d 251, 202 Cal. Rptr. 716, cert. denied, 469 U.S. 1035 (1984).

81. Grier v. Grier, 713 S.W.2d 213 (Tex. Ct. App. 1986).

82. 713 S.W. 213 (Tex. Ct. App. 1986).

83. Castle v. Castle, 180 Cal. App. 3d 206, 225 Cal. Rptr. 382 (1986).

84. 180 Cal. App. 3d 206, 225 Cal. Rptr. 382 (1986).

85. Id.

86. Id.

87. Askins v. Askins, 288 Ark. 333, 704 S.W.2d 632 (1986).

88. Id. at 634.

89. Defense Authorization Act For Fiscal Year 1991, Pub. L. No. 101-510, § 401, 104 Stat. 1485, 1543 (1990).

90. 10 U.S.C. § 523 (1985).

91. Id.

92. Defense Authorization Act For Fiscal Year 1991, Pub. L. No. 101-510, § 401, 104 Stat. 1485, 1543 (1990).

93. 10 U.S.C. § 523 (1985).

94. Berry v. Berry, 644 S.W.2d 945 (Tex. 1983).

95. 10 U.S.C. § 1408(c)(3) (1982).

96. In re Marriage of Gilmore, 29 Cal. 3d 418, 629 P.2d 1, 174 Cal. Rptr. 493 (1981); In re Marriage of Scott, 156 Cal. App. 3d 251, 202 Cal. Rptr. 716, cert. denied, 469 U.S. 1035 (1984).

97. In re Marriage of Castle, 180 Cal. App. 3d 206, 225 Cal. Rptr. 382 (1986).

98. 10 U.S.C. § 1408(c)(3) (1982).

99. S. Rep. No. 97-502, 97th Cong., 2d Sess., reprinted in 1982 U.S. Code Cong. & Admin. News 1596, 1612 (1983).

100. Sterling, Division of Pensions: Reserved Jurisdiction Approach Preferred, 11 Community Prop. J. 17, 27 (1984).

101. Id.

102. 10 U.S.C. § 1408(c)(3) (1982).

103. Blumberg, supra note 1.

104. Id. at 1266.

105. Id. at 1267.

106. Id. at 1268.

107. Id. at 1271.

108. Morrison v. Morrison, 286 Ark. 348, 692 S.W.2d 601 (1985); In re Marriage of Smith, 84 Ill. App. 3d 446, 405 N.E.2d 884 (1980); Kruger v. Kruger, 73 N.J. 464, 375 A.2d 659 (1977); See also, Blumberg, supra note 1.

109. W. Glasson, History of Military Pension Legislation in the United States (1900).

110. 38 U.S.C. § 310 (1981) (wartime disability); 38 U.S.C. § 331 (1981) (peacetime disability).

111. 38 U.S.C. §§ 501-503 (1981).

112. 38 U.S.C. § 521 (1981).

113. 10 U.S.C. § 1201 (1985).

114. 10 U.S.C. § 1408(a)(4)(B) (1982).

115. 38 U.S.C. § 314 (1981); 38 U.S.C. § 355 (1981).

116. 38 U.S.C. § 3105 (1981).

117. 38 U.S.C. § 3101(a) (1981).

118. Id.

119. 10 U.S.C. § 1401 (1985).

120. Id.

121. Based on 1991 military pay (Source: DoD Compensation Office).

122. 10 U.S.C. § 3911 (1981) (Army); 10 U.S.C. § 6321 (1981) (Navy and Marine Corps); 10 U.S.C. § 8911 (1981) (Air Force).

123. 10 U.S.C. § 1201 (1985).

124. 10 U.S.C. § 3911 (1981) (Army); 10 U.S.C. § 6321 (1981) (Navy and Marine Corps); 10 U.S.C. § 8911 (1981) (Air Force).

125. 10 U.S.C. § 1401 (1985).

126. Luna v. Luna, 125 Ariz. 120, 608 P.2d 57 (Ariz. Ct. App. 1980); Busby v. Busby, 457 S.W.2d 551 (Tex. 1970).

127. 457 S.W.2d 551 (Tex. 1970).

128. Id. at 554.

129. 94 A.L.R.3d 176 (1979).

130. 38 U.S.C. § 310 (1985).

131. 38 U.S.C. § 3105 (1985).

132. In re Marriage of Stenquist, 21 Cal. 3d 779, 582 P.2d 420, 148 Cal. Rptr. 9 (1975); In re Marriage of Milhan, 27 Cal. 3d 765, 613 P.2d 812, 166 Cal. Rptr. 533 (1980); In re Marriage of Kosko, 125 Ariz. 517, 611 P.2d 104 (Ariz. Ct. App. 1980).

133. In re Marriage of Stenquist, 21 Cal. 3d 779, 582 P.2d 96, 148 Cal. Rptr. 9 (1978).

134. In re Marriage of Jones, 13 Cal. 3d 457, 531 P.2d 420, 119 Cal. Rptr. 108 (1975).

135. Dominey v. Dominey, 481 S.W.2d 473 (Tex. Civ. App.), cert. denied, 409 U.S. 1028 (1972).

136. In re Marriage of Stenquist, 21 Cal. 3d 779, 582 P.2d 420, 148 Cal. Rptr. 9 (1975); In re Marriage of Milhan, 27 Cal. 3d 765, 613 P.2d 812, 166 Cal. Rptr. 533 (1980); In re Marriage of

Kosko, 125 Ariz. 517, 611 P.2d 104 (Ariz. Ct. App. 1980).

137. 10 U.S.C. § 1408 (1982).

138. Id.

139. National Defense Authorization Act For Fiscal Year 1987, Pub. L. No. 99-661, § 644(a)(1)-(2), 100 Stat. 3816, 3887 (1986).

140. 194 A.L.R.3d 176, (1979 & Supp. 1987).

141. In re Marriage of Stenquist, 145 Cal. App. 3d 430, 193 Cal. Rptr. 587, (1983); In re Marriage of Mastropaolo, 166 Cal. App. 3d. 953, 213 Cal. Rptr. 26 (1985); Campbell v. Campbell, 474 So.2d 1339 (La. App. 1985), writ denied, 478 So.2d 148 (La. 1985).

142. 490 U.S. 581 (1989).

143. Id. at 583.

144. Bewley v. Bewley, 116 Idaho 845, 780 P.2d 596 (1989).

145. In re Marriage of Mansell, 216 Cal. App. 3d 937, 265 Cal. Rptr. 227 (1990).

146. National Defense Authorization Act For Fiscal Year 1987, Pub. L. No. 99-661, § 644(a)(1)-(2), 100 Stat. 3816, 3887 (1986).

147. 194 A.L.R.3d 176 (1979).

148. National Defense Authorization Act For Fiscal Year 1987, Pub. L. No. 99-661, § 644(a)(1)-(2), 100 Stat. 3816, 3887 (1986).

10 U.S.C. § 1408(c)(3) currently reads:

"(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."

The following should be added to the above section:

"Further, absent the consent of a member, this section does not authorize any court to order a member to begin paying a portion of disposable retired pay until the member retires and becomes eligible to receive said disposable retired pay."

APPENDIX A

10 U.S.C. § 1408(a)(4)(B) currently reads:

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

This section should be amended to read as follows:

"(B) are deducted from the retired pay of such member as a result of forfeitures ordered by court-martial."

APPENDIX B