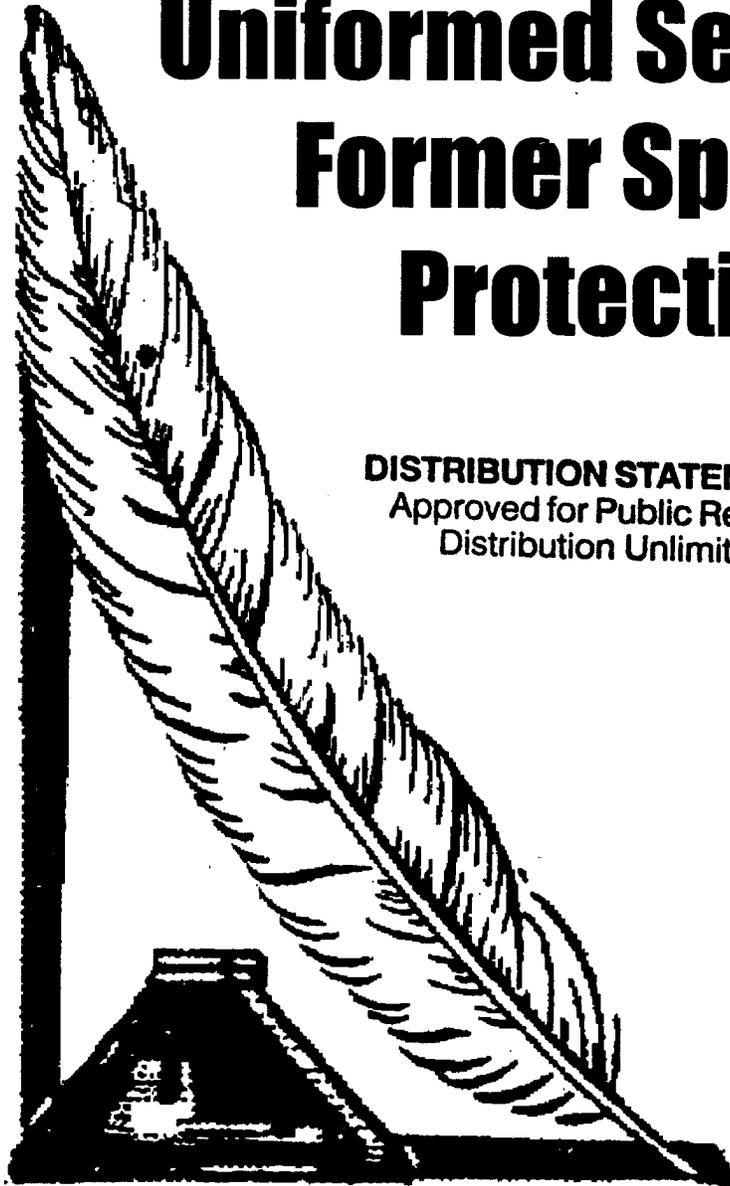


Uniformed Services Former Spouses' Protection Act



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| JA 269 | Legal Assistance Federal Income Tax Information Series |
| JA 271 | Legal Assistance Office Administration Guide |
| JA 272 | Legal Assistance Deployment Guide |
| JA 274 | Uniformed Services Former Spouses' Protection Act Guide |
| JA 275 | Model Tax Assistance Program |
| JA 276 | Preventive Law Series |

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This publication does not promulgate Department of the Army policy and does not necessarily reflect the views of The Judge Advocate General or any government agency.

UNIFORMED SERVICES FORMER SPOUSES' PROTECTION ACT (USFSPA)

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UNIFORMED SERVICES FORMER SPOUSES' PROTECTION ACT

I. INTRODUCTION.

A. What the USFSPA Does:

1. Allows states to treat disposable military retired pay as marital property or community property.
2. Allows former spouses in some cases to receive their share of military retired pay directly from military finance centers.
3. Allows some former spouses to continue to receive military benefits (commissary and PX/BX privileges as well as health care).
4. Allows former spouses to be designated as SBP beneficiaries.

B. What the USFSPA Does Not Do:

1. Does not require courts to divide military retired pay.
2. Does not establish a formula or award a predetermined share of military retired pay to former spouses.
3. Does not require an overlap of military service and marriage as a prerequisite to division of military retired pay as property.

II. HISTORY.

A. McCarty v. McCarty, 453 U.S. 210 (1981) (states are preempted from dividing nondisability military retired pay)

B. Congress Acts--the Uniformed Services Former Spouses' Protection Act, Pub. L. 97-252, 96 Stat. 730 (1982), as amended, and codified at 10 U.S.C. §§ 1072, 1076, 1086, 1408, 1447, 1448, 1450, & 1451; see 32 C.F.R. Part 63 (rules regarding direct payment from military finance centers).

1. The USFSPA overrules McCarty by providing that state courts may treat disposable retired pay as marital property. 10 U.S.C. § 1408(c)(1)
2. Effective date: 1 Feb. 83.

C. Gross Pay vs. Disposable Pay

1. What pay is divisible--gross retired pay or "disposable retired pay?"

a) Significance :

[In the following table, assume retired pay is divided equally by the court and that neither party has any other income or are claiming any withholding exemptions]

| | <u>Retiree</u> | <u>Spouse</u> |
|------------------------|----------------|---------------|
| Gross retired pay | \$ 2,000 | |
| VA Disability pay | \$361 | |
| Waived retired pay | (\$361) | |
| Disposable retired pay | \$1,638 | |
| Division of D.R.P | \$819 | \$819 |
| Tax (15% rate) | (\$123) | (\$ 123) |
| Net after taxes | \$ 1,057 | \$696 |

b) The arguments:

- (1) Disposable: McCarty said courts cannot divide military retired pay, but the USFSPA then said states could divide "disposable retired pay" (DRP); thus, there is no authority to divide anything except the DRP amount.
- (2) Gross: notwithstanding the language about DRP, Congress intended to fully overrule McCarty, and thus states are free to do as they please.

c) The result--several jurisdictions developed case law upholding authority to divide gross pay.

D. Mansell v. Mansell, 490 U.S. 581 (1989).

1. Retired soldiers who are moderately disabled can receive disability benefits from the Veterans Administration; in order to receive these VA benefits, however, they must first waive an equivalent amount of military retired pay.
 - a) These VA benefits are not taxable.
 - b) The VA benefits are not retired pay or "disposable retired pay." See 10 U.S.C. §1408 (a)(4).
 - c) The money waived to receive the VA benefits is excluded from the term "disposable retired pay."
2. Facts of Mansell : Major Mansell divorced his wife in California prior to the McCarty decision. After 23 years of marriage and service, the trial court split the military retirement 50/50. When MAJ Mansell retired, he elected to receive VA disability pay, and therefore he waived a portion of his military retired pay. Following USFSPA, Major Mansell went to court trying to use the act to limit the amount paid to his former spouse.
3. U.S. Supreme Court Holding: the language of 10 U.S.C. § 1408(c)(1) preempts states from dividing the value of the waived military retired pay because it is not "disposable retired pay" as defined by the statute.
4. Dissent.
 - a) This is unfair to former spouses because it allows members unilaterally to shift money from the spouse to the member.
 - b) This is too narrow a view of the USFSPA; it was intended to completely overrule McCarty and restore to states full authority to divide military benefits in any manner they felt appropriate.

III. JURISDICTION.

- A. Courts that can divide military retired pay.
 1. A court of competent jurisdiction of any state, DC, PR, Guam, Am. Samoa, the Virgin I., N. Mariana I., & the Trust Terr. of the Pacific.
 2. Any federal court of competent jurisdiction.
 3. Any foreign court of competent jurisdiction IF there is a treaty requiring the U.S. to honor court orders of such nation.

--But no such treaty is in force regarding court orders of any nation.

B. Special jurisdictional requirements.

1. There is no USFSPA limitation on a court's jurisdiction in awarding a portion of retired pay for child support or alimony purposes.
2. If retired pay is to be divided as a matter of property settlement, jurisdiction is limited to jurisdiction based on one of the following:
 - a) Domicile in the territorial jurisdiction of the court, or
 - b) Residence within the state other than because of military assignment, or
 - c) Consent to jurisdiction.
 - (1) A general appearance constitutes "consent"; the member need not specifically consent to jurisdiction to divide the pension. See, e.g., Kildea v. Kildea, 420 N.W.2d 391 (Wis. Ct. App. 1988).
 - (2) Continuing jurisdiction may also constitute "consent."
 - (a) Bumgardner v. Bumgardner, 521 So.2d 668 (La. Ct. App. 1988) Court retained continuing jurisdiction to partition military retired pay after the divorce.
 - (b) McDonough v. McDonough, 183 Cal. App. 3d 45, 227 Cal. Rptr. 872 (1986) Court found that it had continuing jurisdiction to partition military retired pay.
 - (c) But Note Tarvin v. Tarvin, 187 Cal. App. 3d 56, 232 Cal. Rptr. 13 (1986) No continuing jurisdiction over a nondomiciliary, nonresident retiree to partition military retired pay after the decree is final.

IV. DIVISIBILITY OF RETIRED PAY.

A. What Law Controls?

1. No federal right to a portion of retired pay is created; within broad limitations set by the USFSPA, state law controls whether and how much to divide military retired pay.
 - a) Division to enforce child support obligations.
 - b) Division to enforce alimony obligations.

- c) Division for property settlement purposes.
 - 2. With the release of significant decisions from the Alabama and Mississippi Supreme Courts in 1993 and 1994, every state has now clearly ruled that military retired pay is divisible for property settlement purposes (as well as alimony and child support in appropriate cases). The primary exception to the rule is Puerto Rico, although several states continue to impose a vesting requirement
- B. What is the significance of "vesting"?
 - 1. In some states vesting is a prerequisite to division and vesting can occur at different points in the military career (e.g., 18 or 20 years).
 - 2. The majority of the states will generally divide vested or nonvested pensions. Some states require vesting in some form as a prerequisite to division (e.g., Arkansas, and Indiana).
 - a) North Carolina had a stringent vesting requirement. Because of the number of military assigned to North Carolina, this had a significant impact on military retirement division. The legislature did away with vesting in North Carolina for all actions in equitable distribution **filed after 1 October 1997.**
- C. Disposable Retired Pay.
 - 1. 10 U.S.C. § 1408(c)(1): "... a court may treat disposable retired pay . . . 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."
 - 2. USFSPA, 10 U.S.C. § 1408(a)(4): "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-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;
 - 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 under 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 [10 U.S.C.S. § 1431 et seq.] to provide an annuity to a spouse of former spouse to whom a payment of a portion of such member's retired or retainer pay is being made pursuant to a court order under this section.

- 3. "Typical" formula for dividing retired pay is a creation of state law - THERE IS NO FORMULA PROVIDED IN FEDERAL LAW!!!.

$$\frac{1}{2} \times \frac{\text{Length of overlap of marriage and service}}{\text{Time in service}} \times 100 = \%$$

Variations on the standard formula:

$$\frac{1}{2} \times \frac{\text{Length of time the marriage overlaps with military service}}{\text{Length of military service at separation or divorce}} \times 100 = \text{spouse's } \%$$

$$\frac{\text{Spouse's } \% \text{ using standard formula}}{\text{X retired pay for rank held at time separation/divorce}} \times \text{Actual Retired Pay} = \%$$

V. DIRECT PAYMENT TO THE FORMER SPOUSE.

- A. For all direct payment orders, there must be:
1. A final decree of divorce, dissolution, legal separation, or court approval of a property settlement agreement.
 2. A statement in the order that the soldier's Soldiers' and Sailors' Civil Relief Act rights were observed (if he or she was not represented in court).
- B. The maximum amount of money directly payable to the former spouse is 50% of the retiree's disposable retired pay.
1. This is a limit on how much retired pay must be paid to satisfy judgments awarding a share of military retired pay as property.
 2. Single or multiple judgments awarding military retired pay as property are considered to be fully satisfied by payments that total 50% of "disposable retired pay."
- C. For direct payment of retired pay awarded as property, the following additional requirements apply.
1. A "10 year" test has to be met; there must be at least 10 years of marriage which overlap with 10 years of service creditable toward retirement.
 2. The court order must provide for payment from military retired pay, and the amount must be a specific dollar figure or a specific percentage of disposable retired pay.
 3. The order must show that the court has jurisdiction over the soldier in accordance with USFSPA provisions.
- D. Note - there are no special requirements for a former spouse to receive direct payment of child support and alimony awards.
- E. Tax Treatment of Divisions.
1. As a result of 1992 amendments to the USFSPA, amounts paid directly to a former spouse by a military finance center will not be treated as retired pay earned by the retiree by the military services. Direct payments of retired pay received from finance by the former spouse are now subject to withholding.
 2. Withholding - The finance center will withhold taxes on amounts paid directly to ex-spouses. Separate W-2 forms are issued to the retiree and the former spouse.

VI. PAYMENT OF RETIRED PAY TO FORMER SPOUSE.

A. When Does Payment Begin?

1. State Law Question.
 - a) Payment upon ELIGIBILITY for retirement.
 - b) Payment upon RETIREMENT.
2. Payment upon Eligibility.
 - a) Some states will impose an obligation on the service member to begin paying the former spouse's share of retirement at the date of eligibility for retirement (i.e. 20 years of service) despite the service member's ability and intent to remain on active duty past retirement eligibility.
 - b) In this situation, any accrual of a spousal interest in later advances in retirement pay due to rank or time in service is forfeited.
 - c) Leading cases in this area: In re Marriage of Gillmore, 629 P.2d 1 (Cal. 1981), and In re Marriage of Luciano, 164 Cal. Rptr. 93 (Ct. pp. 1980); Balderson v. Balderson, 896 P.2d 956 (Ida. 1995).
 - d) This type of order by the court imposes an obligation on the service member to pay--DFAS will not pay anything to a former spouse, even if eligible under the direct payment rules, until actual retirement of the service member.
3. Payment upon retirement.
 - a) Majority of courts still award retirement pay based on the state formula and the former spouse must wait until the actual retirement to begin receiving payments.
 - b) This approach often leaves the service member with a great deal of control over the final disbursement and leaves the former spouse without the use of his property interest.
4. Smaller Slice of the Larger Pie Debate.
 - a) Generally, always better for the former spouse to receive payment as soon as possible.
 - b) In a normal career progression the "pie grows" at about the same rate as the "slice shrinks."

- c) An exception would be in rare circumstances where extraordinary changes in rank are anticipated.
- B. Effect of Mansell in Practice.
1. Divorce **before** disability determination.
 - a) Most divorces occur before retirement benefits are being received and before VA disability determination or election.
 - b) Courts will go to great lengths to “equalize” the impact of the disability determination on the former spouses share of retirement.
 - c) Constructive Trust Theory: Once the divorce goes through the service member essentially holds in constructive trust that portion awarded the former spouse and cannot take action to convert or change that interest without indemnifying the former spouse. See In re Strassner, 895 S.W.2d 614 (Mo. Ct. App. 1995)
 - d) Contract Theory. Many divorces include a separation agreement between the parties forming the basis for the property settlement. Where these exist, the courts have been very willing to impose a contractual obligation to essentially make whole the former spouse for portions of retirement waived to receive disability payments. See Dexter v. Dexter, 661 A.2d 171 (Md. App. 1995); McHugh v. McHugh, 861 P.2d 113 (Ida. App. 1993); Clauson v. Clauson, 831 P.2d 1257 (Alas. 1992); In re the Marriage of Stone, 908 P.2d 670 (Mont. 1995); Owen v. Owen, 419 S.E.2d 267 (Va. App. 1992).
 - e) Not universal, however. Consider Kutzke v. Kutzke, No. 95 CA66, 1996 WL 173399 (Ohio App. 2 Dist. Apr. 12, 1996).
 2. Divorce **after** disability determination.
 - a) Many thought after Mansell that disability awards existing at the time of divorce could not be considered by the courts.
 - b) Most courts take into account the disability award and its affect on the former spouse’s share of retirement pay.
 - c) Courts will consider this a factor in the economic circumstances of the parties and may award spousal support or simply distribute other marital assets in a seemingly inequitable manner. See In re Kraft, 808 P.2d 1176 (Wash. App. 1991), *affd.*, 832 P.2d 871 (Wa. 1992); In re Brown, 892 P.2d 572 (Mont. 1995).
 3. Dual Compensation Act Impact On Military Retirement.

- a) Dual Compensation Act, 5 U.S.C. § 5532(b), applies to federal employees in the civil service who were **officers** in the armed forces.
- b) The Dual Compensation Act requires a civil service employee to waive a portion of military retirement pay in order to collect his full civil service salary. This waiver then has a similar effect on disposable military retirement pay as VA disability pay.
- c) Courts are treating DCA cases as an inequity just like VA disability. See, Gaddis v. Gaddis, 957 P.2d 1010 (Ct. App. Ariz. 1997).

VII. USFSPA AND DOMESTIC ABUSE CASES.

- A. 10 U.S.C. §1408(h). Allows for former spouses to collect their portion of retirement pay (and other benefits) even though the service member does not retire due to domestic abuse.
- B. Requirements to qualify.
 - 1. Court order awarding as property settlement a portion of disposable retired pay.
 - 2. Military member is eligible by years for retirement but loses right to retire due to misconduct involving dependent abuse.
 - a) Date for determining the years of service is the date of final action by the convening authority (if a court-martial) or approval authority (if a separation action).
 - b) Does not apply to early retirement programs.
 - 3. The person with the court order was either the victim of the abuse or the parent of the child who was the victim of the abuse.
- C. Benefits.
 - 1. Retirement pay as certified by the Secretary of the Service determined by amount member would have received if retired upon date eligible.
 - 2. PX.
 - 3. Commissary.
 - 4. Medical and Dental.
 - 5. Legal Assistance.

6. These benefits terminate upon remarriage but can be revived by divorce, annulment or death of the subsequent spouse.
- D. Procedures.
1. DFAS treats these just like any other direct payment request.
 2. Must meet the requirements for direct payment of property settlement, remember the 10 year test.
 3. Use the same USFSPA application for payment as any other former spouse.

VIII. ADDITIONAL BENEFITS FOR FORMER SPOUSES.

A. Commissary and PX/BX.

1. 10 U.S.C. §1062: "...an unremarried former spouse...is entitled to commissary and post exchange privileges to the same extent and on the same basis as the surviving spouse of a retired member of the uniformed services."
2. Requirements to qualify.
 - a) Unremarried means "unmarried" for these benefits; termination of a subsequent marriage does revive them.
 - b) 20/20/20 test.
 - (1) 20 years of creditable service by the member, and
 - (2) 20 years of marriage, and
 - (3) 20 years of overlap between marriage and the creditable service.
 - c) The date of the divorce is irrelevant

B. Medical Benefits.

1. 10 U.S.C. §§ 1072, 1078 & 1086.
2. Three categories of health care.
 - a) Full military health care program, including CHAMPUS coverage (up to age 62) and in-patient and out-patient care at military treatment facilities.

- b) Transitional health care: full coverage for one year after the divorce, with the possibility of limited coverage for an additional year.
 - c) The DOD Continued Health Care Benefit Program (CHCBP) insurance plan that has been negotiated by DOD.
3. Requirements to qualify for full military health care program.
- a) Unremarried; termination of a subsequent marriage by divorce or death of the second spouse does not revive health care benefits, but an annulment does.
 - b) 20/20/20 test (or, 20/20/15 test and divorce dated before 1 April 1985).
 - c) Not enrolled in an employer-sponsored health insurance plan.
 - d) As in the case of commissary and PX benefits, the date of the divorce is irrelevant.
4. Requirements for transitional health care.
- a) Unremarried; termination of a subsequent marriage by divorce or death of the second spouse does not revive health care benefits, but an annulment does.
 - b) 20/20/15 test.
 - (1) 20 years of creditable service by the member, and
 - (2) 20 years of marriage, and
 - (3) 15 years of overlap between marriage and the creditable service.
 - c) Not enrolled in an employer-sponsored health insurance plan.
 - d) To qualify for the second year of limited coverage, the spouse must have enrolled in the DOD Continued Health Care Benefit Program (CHCBP).
5. Requirements for DOD Continued Health Care Benefit Program (CHCBP).
- a) Eligibility: anyone who loses entitlement to military health care (e.g., former spouses, non-career soldiers and their family members, etc.)

- b) Concept: premium based temporary health care coverage program designed to mirror the benefits offered under the basic CHAMPUS program (it is not, however, part of CHAMPUS).
 - (1) Facilitates retention of medical insurance coverage until alternative coverage can be obtained (former spouses and others who no longer qualify as dependents qualify for 36 months coverage).
 - (2) Primary advantage: guaranteed eligibility for most people if they enroll within 60 days of losing CHAMPUS benefits.
 - (3) Not free to the individual - premiums must be paid three months in advance; rates are set for two rate groups, individual and group, by the Assistant Secretary of Defense (Health Affairs).

IX. SURVIVORS' BENEFIT PLAN.

A. Original USFSPA provisions.

- 1. Member could designate a former spouse as an SBP beneficiary, but only on the basis of a person with an insurable interest.
- 2. The designation had to be voluntary: "Nothing in this chapter [USFSPA] authorizes any court to order any person to elect under [10 U.S.C. § 1448(b)]...to provide an annuity to a former spouse unless such person has voluntarily agreed in writing to make such an election."

B. Amendments to the original provisions.

- 1. Now a former spouse can be designated an SBP beneficiary in the same category that applies to current spouses, so the "natural person with an insurable interest" offset does not apply.
- 2. Additionally, a court can now order a retiring soldier to designate the former spouse as an SBP beneficiary--the election need not be voluntary.
 - a) This "deemed" election is not automatic; it must be triggered by a request from the former spouse, and the request must be sent to the appropriate military finance center not later than 1 year after the date of the court order. 10 U.S.C. § 1450(f)(3)(A).

- b) Once a timely request is made, the finance center will flag the service member's records. Upon the member's retirement, the former spouse will be designated as an SBP beneficiary.

X. USFSPA AND SEPARATION INCENTIVES.

- A. In addition to involuntary separation benefits and voluntary 15 year retirement, some soldiers are being offered annual payments (voluntary separation incentive or VSI) or a lump sum (special separation benefit or SSB) if they elect to leave active duty voluntarily. Are these payments divisible as marital property?
 1. Clearly they are not "disposable retired pay" and therefore do not fall under the USFSPA.
 2. Trend is to divide these benefits using rationale of USFSPA cases.
 - a) Marsh v. Wallace, 924 S. W.2d 423 (Tex. Ct. App. 1996). Texas court divided lump sum SSB payment giving former spouse the same percentage of the SSB she would have received of retirement pay. The court found that the SSB was "in the nature of retirement pay, compensating him now for the retirement benefits he would have received in the future."
 - b) Kelson v. Kelson, 675 So. 2d 1370 (Fla. 1996), rehearing denied. Overruling an earlier ruling in this case, the court divided VSI benefits with former spouse. While specifically finding the VSI payments were not covered by the USFSPA, the court did find that as a practical matter VSI payments "are the functional equivalent of the retired pay in which [the former spouse] has an interest."
 - c) But See McClure v. McClure, 647 N.E. 2d 832 (Ct. App. Ohio 1994). The court found VSI payments to be like severance pay and since the VSI payments came after the divorce proceedings began they were separate property of the husband. See also Homer v. Homer, Pa. Sup. Ct. #J-113-97, decided 23 Dec 1997, revised 10 Feb 98. (As yet an unpublished opinion but finds that VSI/SSB is not retirement pay).

XI. RECENT CHANGES TO USFSPA.

- A. Service on DFAS.
 1. Original provisions required return receipt requested certified mail for all service on DFAS.
 2. Now amended to allow for regular mail, e-mail, fax, or certified mail service on DFAS. This will ease communications between former spouses, service members and DFAS.

B. Multiple Court Orders.

1. New amendments prohibit DFAS from honoring an out of state modification of an order upon which 1408 payments are based unless the out of state court has jurisdiction over both the military member and the spouse or former spouse by domicile, residence other than by military assignment or consent.
2. Prohibits forum shopping and confusion resulting in delay of payments administered by DFAS.

C. Civil Service and Federal Retirement.

1. Amendments to 5 U.S.C. §8332 (Civil Service Retirement Act) and 5 U.S.C. §8411 (Federal Employees Retirement Act).
2. Can no longer count your years of military service towards a civilian federal retirement unless you authorize the Office of Personnel Management (OPM) to deduct an amount for the former military spouse.
3. OPM must promulgate rules for execution of this provision.

XII. CONCLUSION.

APPENDIX A

| Uniformed Services Former Spouses' Protection Act¹ | Length of Time that Marriage Overlaps with Service Creditable for Retirement Purposes³ | | | |
|--|--|-------------------------|-------------------------|-----------------------|
| | Number of Years | | | |
| Benefits for Former Spouses² | 0 to <10 | 10 to <15 | 15 to <20 | 20 or more |
| Division of Retired Pay ⁴ | X | X | X | X |
| Designation as an SBP Beneficiary ⁵ | X | X | X | X |
| Direct Payment ⁶ | | | | |
| Child Support | X | X | X | X |
| Alimony | X | X | X | X |
| Property Division ⁷ | | X | X | X |
| Health Care ⁸ | | | | |
| Transitional ⁹ | | | X | |
| Full ¹⁰ | | | | X |
| Insurance ¹¹ | X | X | X | X |
| Commissary ¹² | | | | X |
| PX ¹² | | | | X |
| Dependent Abuse | | | | |
| Retired Pay Property Share Equivalent ¹³ | | X | X | X |
| Transitional Compensation ¹⁴ | X | X | X | X |

FOOTNOTES

- ¹ Pub. L. 97-252, Title X, 96 Stat. 730 (1982), as amended. This chart reflects all changes to the Act through the amendments in the National Defense Authorization Act, Fiscal Year 1994, Pub. L. 103-160 (1993).
- ² For guidance on obtaining a military identification card to establish entitlement for health care, commissary, and PX benefits, see appropriate service regulations (e.g., AR 640-3). Former spouses of reserve component members may be entitled to these benefits; see the following notes for applicable benefits.
- ³ Except for Dependent Abuse Victims Transitional Compensation payments, this chart assumes that the member serves long enough to retire from an active duty component or reserve component of the Armed Forces (generally this will mean (s)he has twenty years of service creditable for retirement purposes, but can mean fifteen years in the case of the Voluntary Early Release and Retirement Program [statutory authority for this program expires in 1999]).
- ⁴ At least one court has awarded a portion of military retired pay to a spouse whom the retiree married after he retired, Konzen v. Konzen, 103 Wash.2d 470, 693 P.2d 97, cert denied, 473 U.S. 906 (1985).
- ⁵ Federal law does not create any minimum length of overlap for this benefit; the parties' agreement or state law will control a former spouse's entitlement to designation as an SBP beneficiary.
- ⁶ See 10 U.S.C. §§ 1408(d) & 1408(e) and 32 C.F.R. part 63 for further guidance on mandatory language in the divorce decree or court-approved separation agreement. The former spouse initiates the direct payment process by sending a written request to the appropriate finance center.
- ⁷ While eligibility for direct payment does not extend to former spouses whose overlap of marriage and service is less than ten years, this is not a prerequisite to award of a share of retired pay as property to the former spouse (see Note 4).
- ⁸ To qualify for any health care provided or paid for by the military, the former spouse must be unremarried and must not be covered by an employer-sponsored health care plan; see 10 U.S.C. §§ 1072(2)(F), 1072(2)(G) & 1072(2)(H). Department of the Army interpretation of this provision holds that termination of a subsequent marriage by divorce or death does not revive this benefit, but an annulment does. These remarriage and employer-insurance restrictions do not limit eligibility to enroll in the civilian health care insurance plan discussed in Note 11.

⁹. "Transitional health care" was created by Pub. L. 98-625, § 645(c) (not codified), as a stop-gap measure while a civilian health care plan was negotiated for former spouses and other who lose an entitlement to receive military health care (see Note 11). The program subsequently was modified and narrowed by the National Defense Authorization Act, Fiscal Year 1989, Pub. L. 100-456, Title VI, § 651, 102 Stat. 1990 (1988). Current program benefits are described at 10 U.S.C. § 1078a, titled "Continued Health Benefits Coverage." Qualifying former spouses are those who are unremarried, who have no employer-sponsored health insurance, and who meet the "20/20/15" requirement (i.e., married to the member for at least 20 years, and the member has at least 20 years of service that are creditable for retirement purposes, and the marriage overlaps at least 15 years of the creditable service). Transitional health care now includes full military health care for 1 year after the date of the divorce, and during this period the former spouse is eligible to enroll in the civilian group health care plan negotiated by DOD (see Note 11).

Note that for health care purposes, 10 U.S.C. § 1072(2)(G) treats a 20/20/15 former spouse as if he or she were a full 20/20/20 former spouse (20 years of marriage, 20 years of service, and 20 years of overlap) if the divorce decree is dated before April 1, 1995. A 20/20/15 former spouse of a reserve component retiree with a divorce decree prior to April 1, 1985, can receive full health care too, but only if the member survives to age 60 or if he or she elected to participate in the Reserve Component Survivor Benefit Program upon becoming retirement eligible.

¹⁰. "Full health care" includes health care at military treatment facilities and that provided through the TRICARE insurance program. A former spouse of a reserve component retiree is eligible for this benefit upon the retiree's 60th birthday (or on the day the retiree would have been 60 if (s)he dies before reaching age 60) if (s)he meets the normal qualification rules (i.e., an unremarried 20/20/20 former spouse who is not covered by an employer-sponsored health care plan); see 10 U.S.C. § 1076(b)(2).

¹¹. Implementation of the Department of Defense Continued Health Care Benefit Program (CHCBP) was directed by Congress in the National Defense Authorization Act for Fiscal Year 1993 (see 10 U.S.C. § 1078a). It is a premium based program of temporary continued health benefits coverage available to eligible beneficiaries. Medical benefits mirror those available under the standard TRICARE program, but CHCBP is not part of TRICARE. For further information on this program, contact a military medical treatment facility health benefits advisor, or contact the CHCBP Administrator, P.O. Box 1608, Rockville, MD 20849-1608 (1-800-809-6119). The CHCBP replaces the Uniformed Services Voluntary Insurance Program (USVIP).

¹² Pursuant to statute and service regulations, commissary and PX benefits are to be available to a former spouse "to the same extent and on the same basis as the surviving spouse of a retired member..." Pub. L. 97-252, Title X, § 1005, 96 Stat. 737 (1982); see Army Regulation 640-3. The date of the divorce is no longer relevant for commissary and PX purposes. See Pub. L. 98-525, Title IV, § 645, 98 Stat. 2549 (1984) (amending Uniformed Services Former Spouses' Protection Act § 1006(d)). The former spouse must be "unmarried," and, unlike the rules for health care, any termination of a subsequent marriage revives these benefits. Qualified former spouses of reserve component retirees receive commissary and PX benefits when the retiree reaches age 60 (or when (s)he would have reached age 60 if the retiree dies before that time, but in such cases the entitlement arises only if the retiree elected to participate in the Reserve Component Survivor Benefit Plan when (s)he became retirement eligible; see AR 640-3). Notwithstanding the provision of the Act and the regulation, however, the extent of commissary and exchange privileges in overseas locations may be restricted by host-nation customs law.

¹³ When a retirement-eligible member receives a punitive discharge via court-martial, or is discharged via administrative separation processing, the member's retirement benefits are lost. In certain cases where the court-martial or separation action was based on dependent abuse, eligible spouses may receive their court-ordered share of retired pay (divided as property) as if the member had actually retired. Authority for these payments was created in the National Defense Authorization Act, Fiscal Year 1993, § 653, Pub. L. 103-484. An overlap of marriage and service of at least ten years is a prerequisite to receipt of payments. The National Defense Authorization Act, Fiscal Year 1994, § 555, Pub. L. 103-160, clarifies that eligibility begins on the date the sentence is approved and does not have to wait until the member is actually discharged.

¹⁴ The National Defense Authorization Act, Fiscal Year 1994, § 554, Pub. L. 103-160, also creates authority for monthly transitional compensation to dependents of a non-retirement eligible member separated from the service by reason of dependent abuse.

APPENDIX B

State-by-State Guide to Divisibility of Military Retired Pay

Former Spouses' Protection Act Update

Almost all judge advocates, no matter where they work, will at some point be asked about the Uniformed Services Former Spouses' Protection Act (USFSPA).¹ Enacted in 1983, the Act continues to be a source of discussion, litigation, and even amendment to this day. Why such heightened interest? And why, given the Act's age, isn't the area more settled?

Part of the heightened interest in the USFSPA is undoubtedly attributable to the emotional attachment military members have for military retired pay. Many link retired pay to difficult duty experiences, sometimes served in combat zones. Despite an emotional attachment, most military members understand that the USFSPA authorized states to divide military retired pay as property.² Almost as many realize that in most of the United States, military retired pay has been divided as marital or community property.³ As a result, the critical point of significance today is probably value.

Military retired pay is frequently the most significant asset acquired during a military member's marriage. This should not be a surprise - military pensions

¹Pub. L. No. 97-252, 96 Stat. 730 (1982)(codified as amended at 10 U.S.C. §§ 1072, 1076, 1086, 1408, 1447, 1448, 1450, 1451 (1994)).

²*Id.* at §1408(c).

³The primary exception is now Puerto Rico. See the State-by-State Guide that follows.

often have much greater value than nonmilitary pension interests. This stems from the point in life at which payments begin; for those leaving active duty, retired pay begins immediately. It is not unusual for members to retire from the military at age forty, or even earlier. Compare this with nonmilitary pension interests which may not begin paying out until age fifty-five or sixty.⁴

How much and when retired pay will be paid are questions of federal law. Subject to some limitations, the question of how much retired pay is marital property and how it will be divided at divorce are questions of state law. As a result, legal assistance attorneys (LAAs) must not only fully understand the federal law, but must be capable of addressing nuances in the law of our more than fifty states and territories. Failing to appreciate these differences in state law, even if the same asset is being addressed, can affect property interests to the tune of hundreds of thousands of dollars. Fortunately, in addition to direct research in the cases and statutes of each of these forums, there are resources available to make this job easier.

A resource LAAs should keep at hand is the TJAGSA Practice Notes section of The Army Lawyer. Although notes cover a full range of legal assistance topics, the USFSPA has been the specific focus of notes on a regular

⁴Active component military retirement pay can have a present value of tens of thousands of dollars, several hundred thousand dollars, on up to a million dollars. Present value determinations are dependent on rank, years of service at time of retirement, life expectancy, and discount rate used. Estimates of present value can be obtained using the LAAWS Separation Agreements program pension value calculator. Counsel with clients who want/need an accurate valuation for purposes of trading part or all of their pension should consider using the services of a pension valuation expert. Firms specializing in this work regularly advertise in bar journals.

basis. The discussion of formula clauses in the June 1995 issue is a significant example.⁵ Other recent notes have discussed the status of retired pay as property,⁶ the impact of VA disability pay on retired pay,⁷ the Survivor Benefit Plan (SBP),⁸ and the impact of the Dual Compensation Act on retired pay.⁹ In addition to The Army Lawyer, the USFSPA is the subject of training at TJAGSA's biannual legal assistance courses. For those unable to attend this training, or for a refresher, a videotape of this instruction can be obtained from TJAGSA's Video Information Library.¹⁰ The outline and handouts for this instruction, and additional reference materials of interest, are available in TJAGSA's Legal Assistance Branch publication, JA 274, A Guide to the Uniformed Services Former Spouses'

⁵See *TJAGSA Practice Notes, Legal Assistance Items, USFSPA Update - Using Formula Clauses to Define the Former Spouse's Share of Disposable Retired Pay*, ARMY LAW., Jun. 1995, at 53.

⁶ARMY LAW., Sep. 1995, at 28.

⁷ARMY LAW., Oct. 1995, at 28.

⁸ARMY LAW., Dec. 1995, at 71.

⁹ARMY LAW., Mar. 1996, at 133.

¹⁰Interested personnel should consult the current Videotape Bulletin of The Judge Advocate General's School for information on how to get tape copies, or contact the School's Visual Information Branch at (804) 972-6317. The videotape referenced is #96-0033A, "Uniformed Services Former Spouses' Protection Act," Parts I, II (Block, Feb 96).

Protection Act.¹¹ Finally, given the significance of state law in division of military retired pay, LAAs will find the updated state-by-state analysis of the divisibility of military retired pay that follows an invaluable reference.¹² Major Block.

¹¹This publication is new in June 1996, and is available in electronic format through the LAAWS Bulletin Board Service (BBS). See the back of this issue for information on downloading files from the BBS.

¹²Future updates to this state-by-state analysis will be published electronically to TJAGSA's JA 274; *See note 11*.

*State-by-State Analysis of the Divisibility
Of Military Retired Pay*¹³

On 30 May 1989, the United States Supreme Court announced its decision in Mansell v. Mansell.¹⁴ In Mansell, the Court ruled that states cannot divide the value of Department of Veterans Affairs (VA) disability benefits that are received in lieu of military retired pay.¹⁵ The Court's decision clarifies that states are limited to dividing disposable retired pay, as defined in 10 U.S.C. § 1408(a)(4).¹⁶ When using the following materials, remember that Mansell effectively overrules some of the listed caselaw predating the decision, at least to the extent a case suggests state courts have the authority to divide more than disposable retired pay. Since Mansell, courts have generally recognized the limitations of the disposable retired pay definition found in Title 10. For example, in Torwich v. Torwich, a New Jersey appellate court wrestled with the impact that waiver of military retired

¹³This note updates the Note, "State-by-State Analysis of the Divisibility of Military Retired Pay," ARMY LAW., Jul. 1994, at 41. It was developed with the assistance of military attorneys, active and reserve, and civilian practitioners located throughout the country. In a continuing effort to foster accuracy and timeliness, updates and suggested revisions from all jurisdictions are solicited. Please send your submissions to the Administrative and Civil Law Department, The Judge Advocate General's School, ATTN: JAGS-ADA-LA, Charlottesville, Virginia 22903-1781.

¹⁴490 U.S. 581 (1989).

¹⁵Id. at 594.

¹⁶Id. at 589.

pay associated with receipt of VA benefits has on disposable retired pay.¹⁷ Also, in Knoop v. Knoop,¹⁸ the North Dakota Supreme Court addressed a situation involving the impact of the Dual Compensation Act¹⁹ on disposable retired pay.²⁰

¹⁷660 A.2d 1214 (N.J. Super. 1995). See also TJAGSA Practice Note, *Reductions in Disposable Retired Pay Triggered by Receipt of VA Disability Pay: A Basis for Reopening a Judgment of Divorce*, Army Law., Oct. 1995, at 28.

¹⁸542 N.W.2d 114 (N.D. 1996).

¹⁹5 U.S.C.A. §§ 5531-5404.

²⁰See also, TJAGSA Practice Note, *Reductions in Disposable Retired Pay Triggered by the Dual Compensation Act*, Army Law., Mar. 1996, at 133.

Alabama

Divisible as of August 1993 when the Alabama Supreme Court held that disposable military retirement benefits accumulated during the course of the marriage are divisible as marital property, Vaughn v. Vaughn, 634 So.2d 533 (Ala. 1993). Kabaci v. Kabaci, 373 So. 2d 1144 (Ala. Civ. App. 1979) and cases relying on it that are inconsistent with Vaughn are expressly overruled. Note that Alabama has previously awarded alimony from military retired pay, Underwood v. Underwood, 491 So. 2d 242 (Ala. Civ. App. 1986) (wife awarded alimony from husband's military disability retired pay); Phillips v. Phillips, 489 So. 2d 592 (Ala. Civ. App. 1986) (wife awarded 50% of husband's gross military pay as alimony).

Alaska

Divisible. Chase v. Chase, 662 P.2d 944 (Alaska 1983), overruling Cose v. Cose, 592 P.2d 1230 (Alaska 1979), cert. denied, 453 U.S. 922 (1982). Non-vested retirement benefits are divisible. Lang v. Lang, 741 P.2d 649 (Alaska 1987). Note also Morlan v. Morlan, 720 P.2d 497 (Alaska 1986) (the trial court ordered a civilian employee to retire in order to ensure the spouse received her share of a pension--the pension would be suspended if the employee continued working; on appeal, the court held that the employee should have been given the option of continuing to work and periodically paying the spouse the sums she would have received from the retired pay; in reaching this result, the court cited the California Gillmore decision). Also see Clausen v. Clausen, 831 P.2d 1257 (Alaska 1992) which held that while Mansell precludes division of disability benefits received in lieu of retirement pay, it does not preclude consideration of these payments when making an equitable division of marital assets.

Arizona

Divisible. DeGryse v. DeGryse, 135 Ariz. 335, 661 P.2d 185 (1983); Edsall v. Superior Court of Arizona, 143 Ariz. 240, 693 P.2d 895 (1984); Van Loan v. Van Loan, 116 Ariz. 272, 569 P.2d 214 (1977) (a nonvested military pension is community property). A civilian retirement plan case (Koelsch v. Koelsch, 148 Ariz. 176, 713 P.2d 1234 (1986)) held that if the employee is not eligible to retire at the time of the dissolution, the court must order that the spouse begin receiving the awarded share of retired pay when the employee becomes eligible to retire, whether or not he or she does retire at that point.

Arkansas

Divisible, but watch for vesting requirements. Young v. Young, 288 Ark. 33, 701 S.W.2d 369 (1986); but see Durham v. Durham, 289 Ark. 3, 708 S.W.2d 618 (1986) (military retired pay not divisible where the member had not served 20 years at the time of the divorce, and therefore the military pension had not "vested"). Also see Burns v. Burns, 31 Ark. 61, 847 S.W.2d 23 (1993) (In accord with Durham, but strong dissent favors rejecting 20 years of service as a prerequisite to "vesting" of a military pension).

California

Divisible. In re Fithian, 10 Cal. 3d 592, 517 P.2d 449, 111 Cal. Rptr. 369 (1974); In re Hopkins, 142 Cal. App. 3d 350, 191 Cal. Rptr. 70 (1983). A non-resident servicemember did not waive his right under the USFSPA to object to

California's jurisdiction over his military pension by consenting to the court's jurisdiction over other marital and property issues, Tucker v. Tucker, 226 Cal. App. 3d 1249 (1991) and Hattis v. Hattis, 242 Cal. Rptr. 410 (Ct. App. 1987). Nonvested pensions are divisible; In re Brown, 15 Cal. 3d 838, 544 P.2d 561, 126 Cal. Rptr. 633 (1976). In re Mansell, 265 Cal. Rptr. 227 (Cal. App. 1989) (on remand from Mansell v. Mansell, 490 U.S. 581 (1989), the court held that gross retired pay was divisible since it was based on a stipulated property settlement to which res judicata had attached). State law has held that military disability retired pay is divisible to the extent it replaces what the retiree would have received as longevity retired pay (In re Mastropaolo, 166 Cal. App. 3d 953, 213 Cal. Rptr. 26 (1985); In re Mueller, 70 Cal. App. 3d 66, 137 Cal. Rptr. 129 (1977), but the Mansell case raises doubt about the continued validity of this proposition. If the member is not retired at the time of the dissolution, the spouse can elect to begin receiving the award share of "retired pay" when the member becomes eligible to retire, or anytime thereafter, even if the member remains on active duty. In re Luciano, 104 Cal. App. 3d 956, 164 Cal. Rptr. 93 (1980); see also In re Gillmore, 29 Cal. 3d 418, 629 P.2d 1, 174 Cal. Rptr. 493 (1981) (same principle applied to a civilian pension plan).

Colorado

Divisible. In re Marriage Of Beckman and Holm, 800 P.2d 1376 (Colo. 1990) (nonvested military retirement benefits constitute marital property subject to division pursuant to § 14-10-113, C.R.S. (1987 Repl.Vol. 6B)). See also In re Hunt, 909 P.2d 525, (Colo. 1996), reversing a previous decision of its own, the Colorado Supreme Court holds that post-divorce increases in pay resulting from promotions are marital property subject to division and approves use of a formula

to define the marital share. In the formula discussed, final pay of the member at retirement is multiplied a percentage defined by 50% of a fraction wherein the numerator equals the number of years of overlap between marriage and service, and the denominator equals the number of years of total service of the member.

Connecticut

Probably divisible. Conn. Gen. Stat. 46b-81 (1986) gives courts broad power to divide property. Note Thompson v. Thompson, 183 Conn. 96, 438 A.2d 839 (1981) (nonvested civilian pension is divisible).

Delaware

Divisible. Smith v. Smith, 458 A.2d 711 (Del. Fam. Ct. 1983). Nonvested pensions are divisible; Donald R.R. v. Barbara S.R., 454 A.2d 1295 (Del. Sup. Ct. 1982).

District of Columbia

Divisible. See Barbour v. Barbour, 464 A.2d 915 (D.C. 1983) (vested but unmatured civil service pension held divisible; dicta suggests that nonvested pensions also are divisible).

Florida

Divisible. As of October 1, 1988, all vested and nonvested pension plans are treated as marital property to the extent that they are accrued during the

marriage. Fla. Stat. § 61.075(3)(a)4 (1988); see also § 3(1) of 1988 Fla. Sess. Law Serv. 342. These legislative changes appear to overrule the prior limitation in Pastore v. Pastore, 497 So. 2d 635 (Fla. 1986) (only vested military retired pay can be divided). This interpretation was recently adopted by the court in Deloach v. Deloach, 590 So.2d 956 (Fla. Dist Ct. App. 1991).

Georgia

Probably divisible. Cf. Courtney v. Courtney, 256 Ga. 97, 344 S.E.2d 421 (1986) (nonvested civilian pensions are divisible); Stumpf v. Stumpf, 249 Ga. 759, 294 S.E.2d 488 (1982) (military retired pay may be considered in establishing alimony obligations) see also Hall v. Hall, 51B.R. 1002 (1985) (Georgia divorce judgment awarding debtor's wife 38% of debtor's military retirement, payable directly from the United States to the wife, granted the wife a nondischargeable property interest in 38% of the husband's military retirement); Holler v. Holler, 257 Ga. 27, 354 S.E.2d 140 (1987) (the court "[a]ssum[ed] that vested and nonvested military retirement benefits acquired during the marriage are now marital property subject to equitable division," citing Stumpf and Courtney, but then decided that military retired pay could not be divided retroactively if it was not subject to division at the time of the divorce).

Hawaii

Divisible. Linson v. Linson, 1 Haw. App. 272, 618 P.2d 748 (1981); Cassiday v. Cassiday, 716 P.2d 1133 (Haw. 1986). In Wallace v. Wallace, 5 Haw. App. 55, 677 P.2d 966 (1984), the court ordered a Public Health Service employee (who is covered by the USFSPA) to pay a share of retired pay upon reaching

retirement age whether or not he retires at that point. He argued that this amounted to an order to retire, violating 10 U.S.C. § 1408(c)(3), but the court affirmed the order. In Jones v. Jones, 780 P.2d 581 (Haw. Ct. App. 1989), the court ruled that Mansell's limitation on dividing VA benefits cannot be circumvented by awarding an offsetting interest in other property. It also held that Mansell applies to military disability retired pay as well as VA benefits.

Idaho

Divisible. Ramsey v. Ramsey, 96 Idaho 672, 535 P.2d 53 (1975) (reinstated by Griggs v. Griggs, 197 Idaho 123, 686 P.2d 68 (1984)). Courts cannot circumvent Mansell's limitation on dividing VA benefits by using an offset against other property. Bewley v. Bewley, 780 P.2d 596 (Idaho Ct. App. 1989). See Leatherman v. Leatherman, 122 Idaho 247, 833 P.2d 105 (1992). A portion of husband's civil service annuity attributable to years of military service during marriage was divisible military service benefit and thus subject to statute relating to modification of divorce decrees to include division of military retirement benefits. Also see Balderson v. Balderson, 896 P.2d 956 (Idaho Sup. Ct. 1995)(cert. denied by the U.S. Supreme Court, 116 S.Ct. 179 (mem.) (affirming a lower court decision ordering a servicemember to pay spouse her community share of the military pension, even though he had decided to put off retirement), Mosier v. Mosier, 122 Idaho 37, 830 P.2d 1175 (1992), and Walborn v. Walborn, 120 Idaho 494, 817 P.2d 160 (1991).

Illinois

Divisible. In re Brown, 225 Ill. App. 3d 733, 587 N.E.2d 648 (1992); the Court cites Congress' enactment of the Spouses' Protection Act (Pub.L. No. 97-252, 96 Stat, 730-38 (1982) as the basis to permit the courts to treat pay of military personnel in accordance with the law of the jurisdiction of the court (In re Dooley, 137 Ill. App. 3d 407, 484 N.E.2d 894 (1985)). The court in Brown held that a military pension may be treated as marital property under Illinois law and is subject to the division provisions of 5/503 of the Illinois Marriage and Dissolution of Marriage Act (Dissolution Act). See In re Korper, 131 Ill. App. 3d 753, 475 N.E.2d 1333 (1985). Korper points out that under Illinois law a pension is marital property even if it is not vested. In Korper, the member had not yet retired, and he objected to the spouse getting the cash-out value of her interest in retired pay. He argued that the USFSPA allowed division only of "disposable retired pay," and state courts therefore are preempted from awarding the spouse anything before retirement. The court rejected this argument, thus raising the (unaddressed) question whether a spouse could be awarded a share of "retired" pay at the time the member becomes eligible for retirement (even if he or she does not retire at that point); see In re Luciano, 104 Cal. App. 3d 956, 164 Cal. Rptr. 93 (1980) for an application of such a rule. Note also Ill. Stat. Ann. ch. 40, para. 510.1 (Smith-Hurd Supp. 1988) (allows modification of agreements and judgments that became final between 25 June 1981 and 1 February 1983 unless the party opposing modification shows that the original disposition of military retired pay was appropriate).

Indiana

Divisible, but watch for vesting requirements. Indiana Code § 31-1-11.5-2(d)(3) (1987) (amended in 1985 to provide that "property" for marital dissolution purposes includes, inter alia, "[t]he right to receive disposable retired pay, as defined in 10 U.S.C. § 1408(a), acquired during the marriage, that is or may be payable after the dissolution of the marriage"). The right to receive retired pay must be vested as of the date the divorce petition in order for the spouse to be entitled to a share (Kirkman v. Kirkman, 555 N.E.2d 1293 (Ind. 1990)), but courts should consider the nonvested military retired benefits in adjudging a just and reasonable division of property. In re Bickel, 533 N.E.2d 593 (Ind. Ct. App. 1989). See also Arthur v. Arthur, 519 N.E.2d 230 (Ind. Ct. App. 1988) (Second District ruled that § 31-1-11.5-2(d)(3) cannot be applied retroactively to allow division of military retired pay in a case filed before the law's effective date, which was 1 September 1985). But see Sable v. Sable, 506 N.E.2d 495 (Ind. Ct. App. 1987) (Third District ruled that § 31-1-11.5-2(d)(3) can be applied retroactively).

Iowa

Divisible. See especially In re Howell, 434 N.W.2d 629 (Iowa 1989). In Howell, the member had already retired in this case, but the decision may be broad enough to encompass nonvested retired pay as well. The court also ruled that disability payments from the Veterans Administration, paid in lieu of a portion of military retired pay, are not marital property. Finally, it appears the court intended to award the spouse a percentage of gross military retired pay, but it actually "direct[ed] that 30.5% of [the husband's] disposable retired pay, except

disability benefits, be assigned to [the wife] in accordance with section 1408 of Title 10 of the United States Code..." (emphasis added). The U.S. Supreme Court's Mansell decision may have overruled state court decisions holding courts have authority to divide gross retired pay.

(Note: A disabled veteran may be required to pay alimony and/or child support in divorce actions, even where his only income is veterans' disability and supplemental security income. See In re Marriage of Anderson, 522 N.W.2d 99 (Iowa App. 1994), applying Rose v. Rose, 481 U.S. 619, 107 S.Ct. 2029, 95 L.Ed.2d 599 (1987). The Iowa Court of Appeals ruled: "It is clear veteran's benefits are not solely for the benefit of the veteran, but for his family as well.")

Kansas

Divisible. Kan. Stat. Ann. § 23-201(b) (1987), effective July 1, 1987 (vested and nonvested military pensions are now marital property); In re Harrison, 13 Kan. App. 2d 313, 769 P.2d 678 (1989) (applies the statute and holds that it overruled the previous case law that prohibited division of military retired pay).

Kentucky

Divisible. Jones v. Jones, 680 S.W.2d 921 (Ky. 1984); Poe v. Poe, 711 S.W.2d 849 (Ky. Ct. App. 1986) (military retirement benefits are marital property even before they "vest"); Ky. Rev. Stat. Ann. § 403.190 (1994), expressly defines marital property to include retirement benefits.

Louisiana

Divisible. Swope v. Mitchell, 324 So. 2d 461 (La. 1975); Little v. Little, 513 So. 2d 464 (La. Ct. App. 1987) (nonvested and unmatured military retired pay is marital property); Warner v. Warner, 651 So. 2d 1339 (La. 1995) (confirming that 10-year test found in 10 U.S.C. § 1408(d)(2) is a prerequisite to direct payment, but not to award of a share of retired pay to a former spouse); Gowins v. Gowins, 466 So. 2d 32 (La. Sup. Ct. 1985) (soldier's participation in divorce proceedings constituted implied consent for the court to exercise jurisdiction and divide the soldier's military retired pay as marital property); Jett v. Jett, 449 So. 2d 557 (La. Ct. App. 1984); Rohring v. Rohring, 441 So. 2d 485 (La. Ct. App. 1983). See also Campbell v. Campbell, 474 So.2d 1339 (Ct. App. La. 1985) (a court can award a spouse a share of disposable retired pay, not gross retired pay, and a court can not divide VA disability benefits paid in lieu of military retired pay; this approach conforms to the dicta in the Mansell concerning divisibility of gross retired pay).

Maine

Divisible. Lunt v. Lunt, 522 A.2d 1317 (Me. 1987). See also Me. Rev. Stat. Ann. tit. 19, §722-A(6) (1989) (provides that the parties become tenants-in-common regarding property a court fails to divide or to set apart).

Maryland

Divisible. Nisos v. Nisos, 60 Md. App. 368, 483 A.2d 97 (1984) (applies Md. Fam. Law Code Ann. § 8-203(b), which provides that military pensions are to

be treated the same as other pension benefits; such benefits are marital property under Maryland law; see Deering v. Deering, 292 Md. 115, 437 A.2d 883 (1981)). See also Ohm v. Ohm, 49 Md. App. 392, 431 A.2d 1371 (1981) (nonvested pensions are divisible). "Window decrees" that are silent on division of retired pay cannot be reopened simply on the basis that Congress subsequently enacted the USFSPA. Andresen v. Andresen, 317 Md. 380, 564 A.2d 399 (1989).

Massachusetts

Divisible. Andrews v. Andrews, 27 Mass. App. 759, 543 N.E.2d 31 (1989). Here, the spouse was awarded alimony from military retired pay; she appealed, seeking a property interest in the pension. The trial court's ruling was upheld, but the appellate court noted that "the judge could have assigned a portion of the pension to the wife [as property]."

Michigan

Divisible. Keen v. Keen, 160 Mich. App. 314, 407 N.W.2d 643 (1987); Giesen v. Giesen, 140 Mich. App. 335, 364 N.W.2d 327 (1985); McGinn v. McGinn, 126 Mich. App. 689, 337 N.W.2d 632 (1983); Chisnell v. Chisnell, 82 Mich. App. 699, 267 N.W.2d 155 (1978). Note also Boyd v. Boyd, 116 Mich. App. 774, 323 N.W.2d 553 (1982) (only vested pensions are divisible, but what is a vested right is discussed broadly and discretion over what is marital property left to the trial court).

Minnesota

Divisible. Military retired pay not specifically addressed in statute. Case law has treated it as any other marital asset, subject to equitable division. Deliduka v. Deliduka, 347 N.W.2d 52 (Minn. Ct. App. 1984). This case also holds that a court may award a spouse a share of gross retired pay, but Mansell may have overruled state court decisions that they have the authority to divide gross retired pay. Note also Janssen v. Janssen, 331 N.W.2d 752 (Minn. 1983) (nonvested pensions are divisible).

Mississippi

Divisible. Powers v. Powers, 465 So. 2d 1036 (Miss. 1985). In July, 1994, a deeply divided Mississippi Supreme Court formally adopted the equitable distribution method of division of marital assets. Ferguson v. Ferguson, 639 So. 2d 921 (Miss. 1994), and Hemsley v. Hemsley 639 So. 2d 909 (Miss. 1994). Marital property for the purpose of a divorce is defined as being "any and all property acquired or accumulated during the marriage." This includes military pensions which are viewed as personal property and while USFSPA does not vest any rights in a spouse, a military pension is subject to being divided in a divorce. Pierce v. Pierce, 648 So. 2d 523 (Miss. 1995). In Pierce, the Court expressly held that a claim for division of property can only be viewed as separate and distinct from a claim for alimony. Since property division is made irrespective of fault or misconduct, military pensions may be divided even where the spouse has committed adultery, assuming that the facts otherwise justify an equitable division of property.

Missouri

Divisible. Only disposable retired pay is divisible. Moon v. Moon, 795 S.W.2d 511 (Mo. Ct. App. 1990). Fairchild v. Fairchild, 747 S.W.2d 641 (Mo. Ct. App. 1988) (nonvested and nonmatured military retired pay are marital property); Coates v. Coates, 650 S.W.2d 307 (Mo. Ct. App. 1983).

Montana

Divisible. In re Marriage of Kecskes, 210 Mont. 479, 683 P.2d 478 (1984); In re Miller, 37 Mont. 556, 609 P.2d 1185 (1980), vacated and remanded sub. nom. Miller v. Miller, 453 U.S. 918 (1981).

Nebraska

Divisible. Ray v. Ray, 222 Neb. 324, 383 N.W.2d 756 (1986); Neb. Rev. Stat. § 42-366(8) (1993) (military pensions are part of the marital estate whether vested or not and may be divided as property or alimony).

Nevada

Divisible. All retirement benefits are divisible community property, whether vested or not, and whether matured or not. Forrest v. Forrest, 608 P.2d 275 (Nev. 1983). The spouse has the right to elect to receive his or her share when the employee spouse becomes retirement eligible, whether or not retirement occurs at that point. Gemma v. Gemma, 778 P.2d 429 (Nev. 1989); Sertic v. Sertic, 901 P.2d 148 (Nev. 1995). Partition of previously undivided benefits was

considered doubtful, under a case that held a silent decree to be *res judicata* of non-division of the retirement benefits. Tomlinson v. Tomlison, 729 P.2d 1303 (Nev. 1986). However, without mentioning that opinion, the Nevada Supreme Court has since held that the parties to a divorce remain tenants in common of all assets omitted from the decree, whether by fraud or simple mistake. Amie v. Amie, 796 P.2d 233 (Nev. 1990); Williams v. Waldman, 836 P.2d 614 (Nev. 1992).

New Hampshire

Divisible. "Property shall include all tangible and intangible property and assets...belonging to either or both parties, whether title to the property is held in the name of either or both parties. Intangible property includes...employment benefits, [and] vested and non-vested pensions or other retirement plans.... [T]he court may order an equitable division of property between the parties. The court shall presume that an equal division is an equitable distribution...." N.H. Rev. Stat. Ann. § 458:16-a (1987) (effective Jan 1, 1988). This provision was relied on by the New Hampshire Supreme Court in Blanchard v. Blanchard, 578 A.2d 339 (N.H. 1990), when it overruled Baker v. Baker, 120 N.H. 645, 421 A.2d 998 (1980) (military retired pay not divisible as marital property, but it may be considered "as a relevant factor in making equitable support orders and property distributions").

New Jersey

Divisible. Castiglioni v. Castiglioni, 192 N.J. Super. 594, 471 A.2d 809 (N.J. 1984); Whitfield v. Whitfield, 222 N.J. Super. 36, 535 A.2d 986 (N.J. Super. Ct. App. Div. 1987) (nonvested military retired pay is marital property); Kruger v. Kruger, 139 N.J. Super. 413, 354 A.2d 340 (N.J. Super. Ct. App. Div. 1976), aff'd, 73 N.J. 464, 375 A.2d 659 (1977). Post-divorce cost-of-living raises are divisible; Moore v. Moore, 553 A.2d 20 (N.J. 1989) (police pension).

New Mexico

Divisible. Walentowski v. Walentowski, 100 N.M. 484, 672 P.2d 657 (N.M. 1983)(USFSPA applied); Stroshine v. Stroshine, 98 N.M. 742, 652 P.2d 1193 (1982); LeClert v. LeClert, 80 N.M. 235, 453 P.2d 755 (1969). See also White v. White, 105 N.M. 800, 734 P.2d 1283 (Ct. App. 1987) (court can award share of gross retired pay; however, Mansell may have overruled state court decisions holding courts have authority to divide gross retired pay). In Mattox v. Mattox, 105 N.M. 479, 734 P.2d 259 (1987), in dicta the court cited the California Gillmore case with approval, suggesting that a court can order a member to begin paying the spouse his or her share when the member becomes eligible to retire - even if the member elects to remain in active duty.

New York

Divisible. Pensions in general are divisible; Majauskas v. Majauskas, 61 N.Y.2d 481, 463 N.E.2d 15, 474 N.Y.S.2d 699 (1984). Most lower courts hold that nonvested pensions are divisible; see, e.g., Damiano v. Damiano, 94 A.D.2d

132, 463 N.Y.S.2d 477 (N.Y. App. Div. 1983). Case law seems to treat military retired pay as subject to division; e.g., Lydick v. Lydick, 130 A.D.2d 915, 516 N.Y.S.2d 326 (N.Y. App. Div. 1987); Gannon v. Gannon, 116 A.D.2d 1030, 498 N.Y.S.2d 647 (N.Y. App. Div. 1986). Disability payments are separate property as a matter of law, but a disability pension is marital property to the extent it reflects deferred compensation; West v. West, 101 A.D.2d 834, 475 N.Y.S.2d 493 (N.Y. App. Div. 1984).

North Carolina

Divisible but watch for vesting requirements. N.C. Gen. Stat. § 50-20(b) (1988) expressly declares vested military pensions to be marital property; the pension must be vested as of the date the parties separate from each other. In Milam v. Milam, 373 S.E.2d 459 (N.C.App. 1988), the court ruled that a warrant officer's retired pay had "vested" when he reached the 18-year "lock-in" point. In George v. George, 444 S.E.2d 449 (N.C.App. 1994), the court held that an enlisted member's right to retirement benefits vests when he/she has completed twenty years of service. In Lewis v. Lewis, 350 S.E.2d 587 (N.C.App. 1986) the court held that a divorce court can award a spouse a share of gross retired pay, but, because of the wording (at that time) of the state statute, the amount cannot exceed 50% of the retiree's disposable retired pay; Mansell, 490 U.S. at 589, may have overruled the court's decision in part as to dividing gross pay. The parties are not, however, barred from a consensual division of military retired pay, even though it is "nonvested" separate property, and an agreement or court order by consent that divides such pension rights will be upheld. Hoolapa v. Hoolapa, 412 S.E.2d 112 (N.C.App. 1992). Attorneys considering valuation issues should also review Bishop v. Bishop, 440 S.E.2d 591 (N.C.App. 1994), which held that

valuation must be determined as of the date of separation and must be based on a present value of pension payments that the retiree would be entitled to receive if he or she retired on the date of marital separation, or when first eligible to retire, if later. Subsequent pay increases attributable to length of service or promotions are not included.

North Dakota

Divisible. Delorey v. Delorey, 357 N.W.2d 488 (N.D. 1984). See also Morales v. Morales, 402 N.W.2d 322 (N.D. 1987) (equitable factors can be considered in dividing military retired pay, so 17.5% award to 17-year spouse is affirmed), and Knoop v. Knoop, 542 N.W.2d 114 (N.D. 1996) (confirms that definition of "disposable retired pay" as defined in 10 U.S.C. § 1408 provides a limit on what states are authorized to divide as marital property, but holds that the USFSPA does not require the term "retirement pay" to be interpreted as "disposable retired pay." Knoop is also of interest because it addresses a waiver of retirement pay associated with the Dual Compensation Act, and the court acknowledges that once 50% of "disposable retired pay" is paid out in satisfaction of one or more orders dividing military retired pay as property, the orders are deemed satisfied by federal law (referencing 1990 amendment to 10 U.S.C. § 1408(e)(1)).

Ohio

Divisible. See Lemon v. Lemon, 42 Ohio App. 3d 142, 537 N.E.2d 246 (1988) (nonvested pensions are divisible as marital property **where some evidence of value demonstrated**). But also see, King v. King, 78 Ohio App. 3d

599, 605 N.E.2d 970 (1992) (Trial court abused its discretion by retaining jurisdiction to divide a military pension that would not vest for nine years where no evidence of value demonstrated); Cherry v. Figart, 86 Ohio App. 3d 123, 620 N.E.2d 174 (1993) (distinguishing King by affirming division of nonvested pension where parties had agreed to divide the retirement benefits and suit was brought for enforcement only - the initial judgment incorporating the agreement had not been appealed); and Ingalls v. Ingalls, 624 N.E.2d 368 (Ohio 1993) (affirming division of nonvested military retirement benefits consistent with agreement of the parties expressed at trial).

Oklahoma

Divisible. Stokes v. Stokes, 738 P.2d 1346 (Okla. 1987) (based on a statute that became effective on 1 June 1987). The state Attorney General had earlier opined that military retired pay was divisible, based on the prior law. Only a pension vested at the time of the divorce, however, is divisible, Messinger v. Messinger, 827 P.2d 865 (Okla. 1992). A former spouse is entitled to retroactive division of retiree's military pension pursuant to their property settlement agreement that provided that the property settlement was subject to modification if the law in effect at the time of their divorce changed to allow such a division at a later date.

Oregon

Divisible. In re Manners, 68 Or. App. 896, 683 P.2d 134 (1984); In re Vinson, 48 Or. App. 283, 616 P.2d 1180 (1980). See also In re Richardson, 307

Or. 370, 769 P.2d 179 (1989) (nonvested pension plans are marital property). The date of separation is the date used for classification as marital property.

Pennsylvania

Divisible. Major v. Major, 359 Pa. Super. 344, 518 A.2d 1267 (1986) (nonvested military retired pay is marital property).

Puerto Rico

Not divisible as marital property. Delucca v. Colon, 119 P.R. Dec. 720 (1987) (citation to original Spanish version; English translation can be found at 119 P.R.Dec. 765), overruling Torres v. Robles, 115 P.R. Dec. 765 (1984), which had held that military retired pay is divisible. In overruling Torres, the court in Delucca reestablished retirement pensions as separate property of the spouses consistent with its earlier decision in Maldonado v. Superior Court, 100 P.R.R. 369 (1972). Also see Carrero v. Santiago, 93 JTS 103 (1993) (citation to original Spanish version; English translation not yet available), which cites Delucca v. Colon with approval. Note that pensions may be considered in setting child support and alimony obligations.

Rhode Island

Divisible. R.I. Pub. Laws § 15-5-16.1 (1988) gives courts very broad powers over the parties' property to effect an equitable distribution. Implied consent by the soldier cannot be used, however, to satisfy the jurisdictional requirements of 10 U.S.C. § 1408(c)(4). Flora v. Flora, 603 A.2d 723 (R.I. 1992).

South Carolina

Divisible. Tiffault v. Tiffault, 401 S.E.2d 157 (S.C.1991), holds that vested military retirement benefits constitute an earned property right which, if accrued during the marriage, is subject to equitable distribution. Nonvested military retirement benefits are also subject to equitable division, Ball v. Ball, 430 S.E.2d 533 (S.C. Ct. App. 1993) (NCO acquired a vested right to participate in a military pension plan when he enlisted in the army; this right, which is more than an expectancy, constitutes property subject to division). But see Walker v. Walker, 368 S.E.2d 89 (S.C. Ct. App. 1988) (wife lived with parents during entire period of husband's naval service; since she made no homemaker contributions, she was not entitled to any portion of the military retired pay).

South Dakota

Divisible. Gibson v. Gibson, 437 N.W.2d 170 (S.D. 1989) (the court states that military retired pay is divisible--in this case, it was reserve component retired pay where the member had served 20 years but had not yet reached age 60); Radigan v. Radigan, 17 Fam. L. Rep. (BNA) 1202 (S.D. Sup. Ct. Jan. 23, 1991) (husband must share with ex-wife any increase in his retired benefits that results from his own, post divorce efforts); Hautala v. Hautala, 417 N.W.2d 879 (S.D. 1987) (trial court awarded spouse 42% of military retired pay, and this award was not challenged on appeal); Moller v. Moller, 356 N.W.2d 909 (S.D. 1984) (the court commented approvingly on cases from other states that recognize divisibility but declined to divide retired pay here because a 1977 divorce decree was not appealed until 1983). See generally Caughron v. Caughron, 418 N.W.2d

791 (S.D. 1988) (the present cash value of a nonvested retirement benefit is marital property); Hansen v. Hansen, 273 N.W.2d 749 (S.D. 1979) (vested civilian pension is divisible); Stubbe v. Stubbe, 376 N.W.2d 807 (S.D. 1985) (civilian pension divisible; the court observed that "this pension plan is vested in the sense that it cannot be unilaterally terminated by [the] employer, though actual receipt of benefits is contingent upon [the worker's] survival and no benefits will accrue to the estate prior to retirement").

Tennessee

Divisible. Tenn. Code Ann. § 36-4-121(b)(1) (1988) specifically defines all vested pensions as marital property. In 1993, the Tennessee Supreme Court affirmed a trial court's approval of a separation agreement after determining that the agreement divided a non-vested pension as marital property. Towner v. Towner, 858 S.W.2d 888 (Tenn. 1993). In 1994, the Tennessee Court of Appeals held that the Tennessee code's reference to vested pensions was illustrative and not exclusive. As a result, the court determined that non-vested military pensions can properly be characterized as marital property. Kendrick v. Kendrick, 902 S.W.2d 918 (Tenn.Ct.App. 1994).

(Note: A disabled veteran may be required to pay alimony and/or child support in divorce actions, even where his only income is veterans' disability and supplemental security income. See Rose v. Rose, 481 U.S. 619, 107 S.Ct. 2029, 95 L.Ed.2d 599 (1987)(Supreme Court upheld exercise of contempt authority by Tennessee court over veteran who would not pay child support, finding that VA benefits were intended to take care of not just the veteran. Justice White in dissent argued unsuccessfully that the state's authority was preempted by the bar

to garnishing VA disability payments, and federal discretion to divert some of the VA benefits to family members in certain cases.))

Texas

Divisible. Cameron v. Cameron, 641 S.W.2d 210 (Tex. 1982). See also Grier v. Grier, 731 S.W.2d 936 (Tex. 1987) (a court can award a spouse a share of gross retired pay, but post-divorce pay increases constitute separate property; Mansell may have overruled Grier in part). Pensions need not be vested to be divisible. Ex Parte Burson, 615 S.W.2d 192 (Tex. 1981), held that a court cannot divide VA disability benefits paid in lieu of military retired pay; this ruling is in accord with Mansell.

Utah

Divisible. Greene v. Greene, 751 P.2d 827 (Utah Ct. App. 1988). The case clarifies that non-vested pensions can be divided under Utah law, and in dicta it suggests that only disposable retired pay is divisible, not gross retired pay. But see Maxwell v. Maxwell, 796 P.2d 403 (Utah App. 1990) (because of a stipulation between the parties, the court ordered a military retiree to pay his ex-wife one-half the amount he had overwithheld from his retired pay for taxes).

Vermont

Probably divisible. Vt. Stat. Ann. tit. 15, § 751 (1988) provides that "The court shall settle the rights of the parties to their property by...equit[able] divi[sion]. All property owed by either or both parties, however and whenever

acquired, shall be subject to the jurisdiction of the court. Title to the property . . . shall be immaterial, except where equitable distribution can be made without disturbing separate property." The Connecticut Supreme Court recently held in Krafik v. Krafik, 21 Fam. Law Rep. 1536 (1995), that vested pension benefits are divisible as marital property in divorce. Although the issue was not raised in Krafik, the court noted that the legislative and logical basis for dividing vested pension benefits would apply to unvested pension benefits as well.

Virginia

Divisible. Va. Ann. Code § 20-107.3 (1988) defines marital property to include all pensions, whether or not vested. See also Mitchell v. Mitchell, 4 Va. App. 113, 355 S.E.2d 18 (1987); Sawyer v. Sawyer, 1 Va. App. 75, 335 S.E.2d 277 (Va. Ct. App. 1985) (these cases hold that military retired pay is subject to equitable division). Also see Owen v. Owen, 419 S.E.2d 267 (Va.Ct.App. 1992) (settlement agreement's guarantee/indemnification clause requires the retiree to pay the same amount of support to the spouse despite the retiree beginning to collect VA disability pay - held not to violate Mansell).

Washington

Divisible. Konzen v. Konzen, 103 Wash. 2d 470, 693 P.2d 97, cert. denied, 473 U.S. 906 (1985); Wilder v. Wilder, 85 Wash. 2d 364, 534 P.2d 1355 (1975) (nonvested pension held to be divisible); Payne v. Payne, 82 Wash. 2d 573, 512 P.2d 736 (1973); In re Smith, 98 Wash. 2d 772, 657 P.2d 1383 (1983).

West Virginia

Divisible. Butcher v. Butcher, 357 S.E.2d 226 (W.Va. 1987) (vested and nonvested military retired pay is marital property subject to equitable distribution, and a court can award a spouse a share of gross retired pay; however, Mansell may have overruled state court decisions holding courts have authority to divide gross retired pay)

Wisconsin

Divisible. Thorpe v. Thorpe, 123 Wis. 2d 424, 367 N.W.2d 233 (Wis. Ct. App. 1985); Pfeil v. Pfeil, 115 Wis. 2d 502, 341 N.W.2d 699 (Wis. Ct. App. 1983). See also Leighton v. Leighton, 81 Wis. 2d 620, 261 N.W.2d 457 (1978) (nonvested pension held to be divisible) and Rodak v. Rodak, 150 Wis. 2d 624, 442 N.W.2d 489, (Wis. Ct. App. 1989) (portion of civilian pension that was earned before marriage is included in marital property and subject to division).

Wyoming

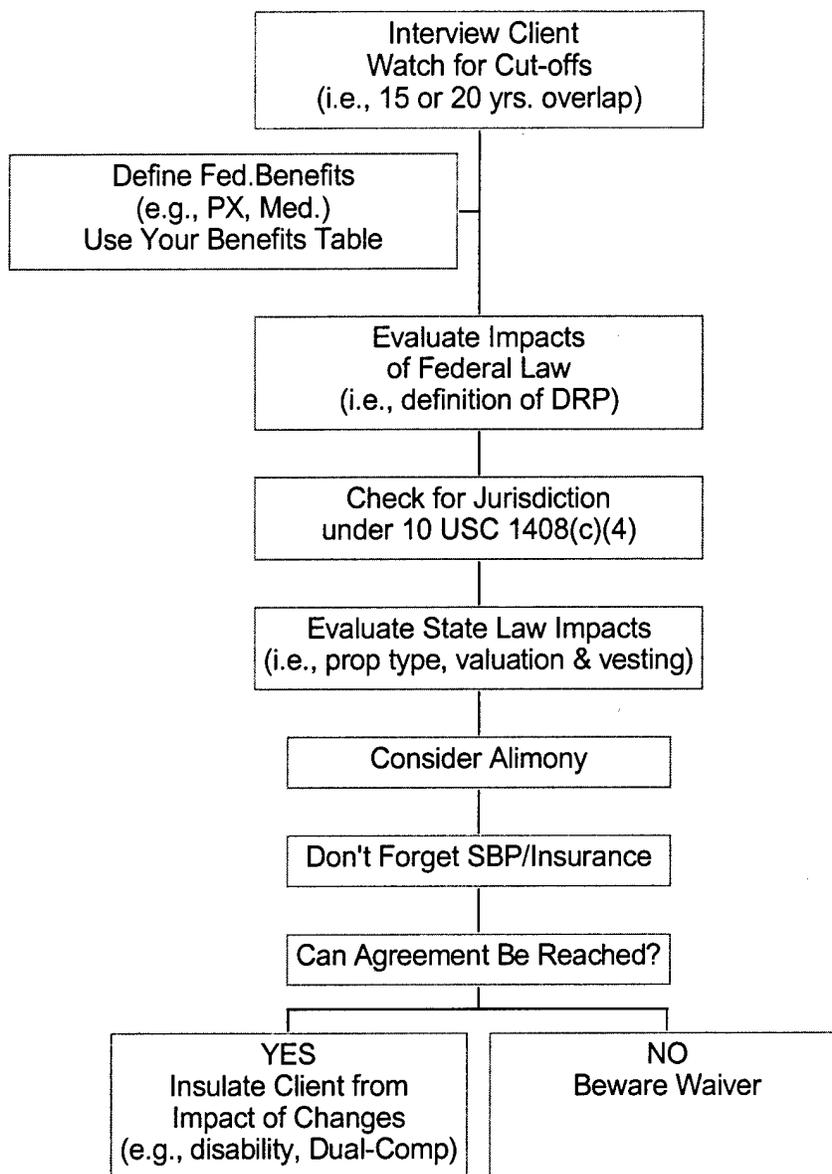
Divisible. Parker v. Parker, 750 P.2d 1313 (Wyo. 1988) (nonvested military retired pay is marital property; 10-year test is a prerequisite to direct payment of military retired pay as property, but not to division of military retired pay as property). See also Forney v. Minard, 849 P.2d 724 (Wyo. 1993) (Affirms award of 100% of "disposable retired pay" to former spouse as property, but acknowledges that only 50% of this award can be paid directly. Note that this holding is inconsistent with 1990 amendment to USFSPA at 10 USC § 1408(e)(1) which deems all orders dividing military retired pay as property satisfied once a

threshold of 50% of the "disposable retired pay" is reached - see the discussion in Knoop v. Knoop referenced under the North Dakota section of this guide.)

Canal Zone

Divisible. Bodenhorn v. Bodenhorn, 567 F.2d 629 (5th Cir. 1978).

A Roadmap to the USFSPA



APPENDIX D

UNIFORMED SERVICES FORMER SPOUSES PROTECTION ACT QUICK REFERENCE GUIDE TO FORMER SPOUSE LEGISLATION AS CODIFIED IN TITLE 10

RETIRED PAY

10 U.S.C. 1408.....Payment of retired pay in compliance with court orders

The Uniformed Services Former Spouses' Protection Act

10 U.S.C. 1408(a)...Definitions

Sets out key definitions including ones for "court," "court order," "final decree," and "disposable retired pay".

10 U.S.C. 1408(b)...Effective service of process

Sets out requirements for an effective service of court orders pertaining to disposable retired pay.

10 U.S.C. 1408(c)...Authority for court to treat retired pay as property of the member and spouse.

Establishes the ability for state courts to divide disposable retired pay in accordance with state law. Sets the effective date as 25 June 1981. Lays out the jurisdictional requirements for a court to divide disposable retired pay.

10 U.S.C. 1408(d)...Payments by secretary concerned to spouse or former spouse

Establishes right for direct payment to a former spouse who meets the 10 year overlap of marriage and creditable service. Sets termination of these payments upon the death of either the member or the former spouse.

10 U.S.C. 1408(e)...Limitations

Limits the total amount of disposable retired pay payable under any and all court orders to 50% of disposable retired pay. In the event of several court orders, disposable retired pay is paid on a first-come, first-served basis.

10 U.S.C. 1408(f)...Immunity of officers and employees of United States

Gives immunity to employees paying out disposable retired pay to retirees, spouses or former spouses if acting pursuant to a court order regular on its face.

10 U.S.C. 1408(g)...Notice to member of service of court order on secretary concerned

Requires the service member be provided a copy of the court order within 30 days of receipt.

10 U.S.C. 1408(h)...Benefits for dependents who are victims of abuse by members losing right to retired pay

Provides for benefits to spouses or former spouses who are victims of abuse and the service member loses his right to retirement pay as a result of misconduct. Service member must be retirement eligible on the basis of years of service. Remarriage terminates right to 1408(h) benefits. Benefits can resume if the second marriage is terminated by death, annulment, or divorce. Exchange and commissary privileges are included.

EXCHANGE AND COMMISSARY BENEFITS

10 U.S.C. 1059.....Dependents of members separated for dependent abuse: transitional compensation; commissary and exchange benefits

Provides for up to 36 months of transitional benefits (see 10 U.S.C. 1078a) to a spouse or former spouse of a member separated administratively or judicially for a dependent-abuse offense. Cannot receive payment as a spouse under this section and 1408(h)(1)--if both apply the former spouse chooses which to receive. These payments cease upon remarriage. Maintain exchange and commissary privileges while receiving these transitional benefits.

10 U.S.C. 1062.....Certain former spouses

Provides exchange and commissary privileges to former spouse who is married and meets the 20/20/20 test.

HEALTH AND DENTAL BENEFITS

10 U.S.C. 1072.....Definitions

Provides for full medical and dental care privileges for unremarried former spouse who meets 20/20/20 and is not covered by an employer-sponsored health plan or who meets 20/20/15 AND date of divorce is 1 April 85 or before.

10 U.S.C. 1078a.....Continued health benefits coverage

Provides for continued coverage of health benefits, under a pay as you go insurance program similar to CHAMPUS (but it is NOT CHAMPUS). Requires an election by the former spouse.

10 U.S.C. 1086a.....Certain former spouses: extension of period of eligibility for health benefits

Provides for opportunity for purchase of additional 2 years of health coverage under 10 U.S.C. 1078a.

SURVIVOR'S BENEFIT PLAN AND FORMER SPOUSES

10 U.S.C. 1447.....Definitions

Defines former spouse for purposes of the Survivor Benefit Plan (SBP).

10 U.S.C. 1448.....Application of plan

Defines eligibility of former spouses as beneficiaries of SBP.

10 U.S.C. 1450.....Payment of annuity: beneficiaries

Designates payments to begin day after death of covered service member. Provides that the election of the former spouse cannot be changed without the consent of the former spouse or court order modification.

10 U.S.C. 1451.....Amount of annuity

Sets out computation rules for determining annuity amount.

10 U.S.C. 1452.....Reduction in retired pay

Provides for reduction of annuity.

10 U.S.C. 1455.....Regulations

Provides for notice of elections and effects of such elections.

10 U.S.C. 1456.....Supplemental spouse coverage: establishment of plan; definitions

Provides ability to purchase supplemental SBP for former spouse coverage.

10 U.S.C. 1457.....Supplemental spouse coverage: payment of annuity; amount

Provides calculation of additional annuity.

10 U.S.C. 1458.....Supplemental spouse coverage: eligible participants; elections of coverage

Makes supplemental coverage optional to the service member to provide for a former spouse.

10 U.S.C. 1459.....Former spouse coverage: special rules

Sets out provision for former spouse to file divorce decree entitling former spouse to SBP designation with DFAS within one year of the court order awarding SBP designation.

10 U.S.C. 1460.....Supplemental spouse coverage: reductions in retired pay

Provides for reductions in retired pay for those electing supplemental spouse coverage.

Appendix E

Uniformed Services Former Spouses' Protection Act

Frequently Asked Questions and Answers

1. ***The court awarded me 50% of my former spouse's retired pay which had accrued as of the date of our divorce. Why do I need to get a clarifying order to have my award enforced under the Uniformed Services Former Spouses' Protection Act (USFSPA)?***

Without a clarifying order, there is no way to determine the amount of what your award should be under the Act. Military retired pay is an entitlement based on the service member's rank and number of years of creditable service at the time of retirement. It is paid on a monthly basis and as such is not a fund which can be valued or divided as of some point in time, either before or after the member's retirement. Thus, it is not comparable to a company's private retirement plan, which can be identified as a specific amount and can be divided as of a particular date. The USFSPA requires that an award of a portion of a member's retired pay as property must be expressed in dollars or as a percentage of disposable retired pay. 10 U.S.C. 1408(a)(2)(C). Therefore, a clarifying order would be necessary in those cases where the award is not so expressed.

2. ***My award of a portion of the member's military retired pay as property is expressed as a formula with the numerator as the number of years we were married while the member performed military service creditable for retirement. I was told I had to get a clarifying order because this "number" was not provided in the court order. Why is this the case when our marriage and divorce dates, and the member's service entry date, were given in the court order?***

An award of military retired pay as property expressed as a formula or hypothetical retired pay amount may be enforced under the USFSPA without a clarifying order only if the requirements of the proposed regulations (60 Fed. Reg. 17,507 (1995)(to be codified at 32 CFR pt. 63)(proposed April 6, 1995) are met. With regard to an award expressed as a formula, the only number supplied by DFAS will be the number of years of creditable service. All other information must be contained in the court ordered formula. With regard to a hypothetical for payment of a retired pay amount, the award must be based on at least 15 years of creditable service, and the only information DFAS will supply is the date of retirement. All other information, such as the member's hypothetical rank or years of creditable service at hypothetical retirement, must be contained in the court order.

3. ***Why does it take so long for me to begin to receive payments under the Act after I apply?***

The USFSPA requires that your payments must begin not later than 90 days after effective service of your application for payments on the designated agent. 10 U.S.C. 1408(d)(1). This 90 day requirement gives DFAS enough time to process your application, and provide the member with the notice that the Act requires.

The member has 30 days from the date the notice was mailed to provide evidence

as to why payments should not begin. No payments can be made until after the 30 day notice period. Also, since payments of military retired pay are only made once each month, the commencement of your payments must be coordinated with the monthly retired pay cycle.

4. ***I applied for enforcement of both my child support and retired pay property awards under USFSPA. My application for child support was honored, but my application for property payments was not. I was told that the reason was that the court lacked jurisdiction over the member. What's the problem? My divorce decree stated that the court had jurisdiction over the member.***

The USFSPA has a separate jurisdiction requirement for enforcement of property awards. The Act states that the court must have had 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. 10 U.S.C. 1408(c)(4). The court may have had jurisdiction over an absent member by reason of some state statute, but that type of jurisdiction may not be the type that legally satisfies the requirement for purposes of the USFSPA. This special jurisdiction requirement does not apply to enforcement of alimony and child support awards.

5. ***I was married to my former spouse for 8 years while my former spouse was performing military service creditable for retirement. I was awarded a portion of my former spouse's military retired pay as property in our divorce decree. My application for property payments under the USFSPA was turned down, even though my former spouse waived the ten year requirement in our divorce decree. Why?***

In order for a division of retired pay as property award to be enforced under the USFSPA, the former spouse must have been married to the military member for ten years or more during which the member performed at least 10 years of service creditable in determining the member's eligibility for retirement. 10 U.S.C. 1408(d)(2). This is a requirement to receive payments under the USFSPA, which cannot be waived by either party. However, retired members may always make the payment themselves. This requirement does not apply to enforcement of awards for alimony or child support.

6. ***My former spouse has been receiving military retired pay for several years, and has not paid me any of my portion of his retired pay as a property award. Can I collect any of the arrearages under USFSPA?***

No, the USFSPA does not provide for the collection of arrearages of retired pay as property or alimony. Payments under the Act are prospective only 5 CFR 63.6.(h)(10)

However, child support arrearages set forth in the pertinent court order may now be collected under the Act. 10 U.S.C. 1408(d)(6). Regulations to implement this statute have not been published yet. Alimony and child support arrearages may also be collectible by garnishment under a different statute, 42 U.S.C. 659. A former spouse should consult his or her attorney for additional assistance regarding garnishments. This website also contains information regarding this topic.

7. ***What are the current requirements for service of documents, and certification***

of documents?

Court orders no longer need to be served by registered or certified mail, return receipt requested. They may now be served by facsimile or electronic transmission or by regular mail. Court orders must be copies of documents certified by the clerk of courts as to their authenticity within 90 days of effective service. Photocopies of certified documents are acceptable. Certified copies of court orders to enforce child support under USFSPA need not have been certified within 90 days of service.

APPENDIX F

| | |
|--|--|
| <p align="center">APPLICATION FOR FORMER SPOUSE PAYMENTS FROM RETIRED PAY</p> <p align="center"><i>(Please read instructions on reverse before completing this form.)</i></p> | <p align="center"><i>Form Approved OMB No. 0704-0182 Expires Jan 31,</i></p> |
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1994

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| <p>Public reporting burden for this collection of information is estimated to average 1.2 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to Department of Defense, Washington Headquarters Services, Directorate for Information Operations and Reports, 1215 Jefferson Davis Highway, Suite 1204, Arlington, VA 22202-4302, and to the Office of Management and Budget, Paperwork Reduction Project (0704-0182), Washington, DC 20503. PLEASE DO NOT RETURN YOUR FORM TO EITHER OF THESE ADDRESSES. SEND COMPLETED FORM TO THE APPROPRIATE SERVICE ADDRESS LISTED ON BACK.</p> | <p>FOR OFFICIAL USE</p> |
|--|--------------------------------|

PRIVACY ACT STATEMENT

AUTHORITY: Title 10 USC § 1408; EO 9397.

PRINCIPAL PURPOSE(S): To request direct payment through a Uniformed Service designated agent of court ordered child support, alimony, or division of property to a former spouse from the retired pay of a Uniformed Service member.

ROUTINE USE(S): Information provided will be disclosed to the retired member for verification and comment. Additionally, it may be disclosed to state social service agencies for human services benefit entitlement purposes; to the Internal Revenue Service, and state and local taxing authorities for income tax purposes.

DISCLOSURE: Voluntary; however, failure to provide requested information may delay or make impossible processing this direct payment request.

| | |
|--|--|
| 1. APPLICANT IDENTIFICATION | 2. SERVICE MEMBER IDENTIFICATION |
| a. NAME <i>(As appears on court order) (Last, First, Middle Initial)</i> | a. NAME <i>(Last, First, Middle Initial)</i> |
| b. CURRENT NAME <i>(Last, First, Middle Initial)</i> | b. SOCIAL SECURITY NUMBER |
| c. SOCIAL SECURITY NUMBER | c. BRANCH OF SERVICE |
| d. ADDRESS <i>(Street, City, State, Zip Code)</i> | d. ADDRESS <i>(Street, City, State, Zip Code) (if known)</i> |

3. REQUEST STATEMENT

I request direct payment from the retired pay of the above named Uniformed Service member based on the enclosed court order:

I request payment of:

- Child support in the amount of \$ _____ per month.
- Alimony, spousal support or maintenance in the amount of \$ _____, or _____ percent of disposable retired pay per month.
- A division of property in the amount of \$ _____, or _____ percent of disposable retired pay per month.

I certify that any request for current child and/or spousal support is not being collected under any other wage withholding or garnishment procedure authorized by statute. Furthermore, I certify that the court order has not been amended superseded or set aside and is not subject to appeal. As a condition precedent to payment, I agree to refund all overpayments and that they are otherwise recoverable and subject to involuntary collection from me or my estate, and I will notify the Uniformed Service if the operative court order, upon which payment is based, is vacated, modified, or set aside. I also agree to notify the Uniformed Service of a change in eligibility for payments. This includes notice of my remarriage, if under the terms of the court order or the laws of the jurisdiction where it was issued, remarriage causes the payments to be reduced or terminated; or notice of a change in eligibility for child support payments by reason of the death, emancipation, adoption, or attainment of majority of a child whose support is provided through direct payments from retired pay. I hereby acknowledge that any payment to me cannot lawfully exceed 50 percent of the member's disposable retired pay which is gross retired pay minus deductions such as those authorized or required for income tax, Federal indebtedness, or disability reasons; that my payments may not exceed any lesser amount or percentage specified by court order; and that any court-ordered percentage must be construed as a percentage of disposable retired pay.

APPENDIX G

U.S. Department
of Transportation

United States
Coast Guard

Application Information for Direct Payments under UNIFORMED SERVICES FORMER SPOUSES' PROTECTION ACT

1. Complete the enclosed application form, CG PPC-2293. DD Form 2293 issued by the Department of Defense is also acceptable.
2. Enclose a certified copy of your final decree of divorce, dissolution, annulment, or legal separation. It is required that the court order be authenticated or certified within 90 days immediately preceding its service on the Coast Guard. It must furthermore be issued by a court that had jurisdiction over your former spouse by virtue of his or her residence within the territorial jurisdiction of the court for purposes other than military assignment, or his or her domicile within the territorial jurisdiction of the court, or his or her consent to the court's exercise of jurisdiction over him.
3. Enclose a certified copy of the court order - if not included in your divorce, dissolution, annulment or separation decree - directing that you receive a specific percentage or dollar amount of your former spouses' retired pay. This may be in the form of a court ordered, ratified or approved property settlement incident to such final decree.
4. Provide sufficient identifying information about your former spouse to permit processing of your request including his or her full name and social security number. Additional identifying information may be included in block 4e of the application form (CG PPC-2293).
5. If the court order does not specify that you were married to your former spouse for ten years during the course of which he or she performed ten years of service creditable in determining eligibility for retired pay, you must provide sufficient evidence for the Coast Guard to verify that this requirement has been met.
6. If the court order was issued while your former spouse was on active duty and he or she was not represented in court, the court order must specify or be accompanied by documents that certify that the former spouse's rights under the Soldiers' and Sailors' Civil Relief Act of 1940, 50 U.S.C. Appendix 501-591, were met.
7. This material must be sent by certified or registered mail, return receipt requested, to:

COMMANDING OFFICER (LGL)
COAST GUARD PAY AND PERSONNEL CENTER
444 SE QUINCY ST
TOPEKA KS 66683-3591

PRIVACY ACT STATEMENT

Authority: Title 10 U.S. Code Section 1408; EO 9397, November 1943 (SSN).
 Principal Purpose: To request direct payment from the Coast Guard or NOAA Corps of court ordered child support, alimony, or division of property for a former spouse from the retired pay of a Coast Guard or NOAA member.
 Routine Uses: Information provided will be disclosed to the retired member for verification and comments. It may be disclosed to state social services agencies for benefit entitlement purposes; and to the Internal Revenue Service and state and local taxing authorities for tax purposes.
 Disclosure: Voluntary; however, failure to provide requested information may delay or make impossible the processing of this request.

| | |
|-----------------------------|----------------------------------|
| 1. Applicant Identification | 2. Service Member Identification |
| a. Name | a. Name |
| b. Social Security Number | b. Branch of Service c. SSN |
| c. Postal address | c. Postal address (if known) |

3. REQUEST STATEMENT

I request direct payment from the retired pay of the above named Coast Guard or NOAA Corps member based on the enclosed court order, as follows:

- Child support in the amount of \$ _____ per month.
- Alimony, spousal support or maintenance in the amount of \$ _____ or _____ per cent of disposable retired pay.
- A division of property in the amount of \$ _____ or _____ per cent of disposable retired pay.

I certify that my request for child support and/or alimony is not being collected by any other statutory withholding or garnishment procedures. I further certify that the enclosed court order has not been superseded or set aside and is not under appeal.

In consideration for the direct payments that I am to receive from a Coast Guard or NOAA retired pay account under the Uniformed Services Former Spouses' Protection Act (FSPA), I hereby agree: (1) To voluntarily reimburse the Coast Guard for any future overpayments that I receive from the retired pay account; (2) to allow the Coast Guard to collect any overpayment from me or my estate if I fail to provide reimbursement on my own accord; and (3) to promptly notify the Coast Guard if the court order submitted on my behalf to obtain direct payments is vacated, modified, or set aside. This shall include notice of my remarriage if all or a part of the payment is for alimony or notice of a change in eligibility for child support payments under circumstances of the death, emancipation, adoption, or attainment of majority of a child whose support is provided through direct payment to me from retired pay.

4. I have enclosed all pertinent documentation to include: (X as applicable)

a. A certified copy of my final decree of divorce, dissolution, annulment, or legal separation. The divorce decree must be authenticated or certified by a court official within 90 days preceding this application.

b. A certified copy of the court order - if not included in my divorce, dissolution, annulment, or separation decree - directing that I receive a specific percentage or dollar amount of child support, alimony, or as a division retired pay as marital property. This court order must also be authenticated or certified by a court official within 90 days preceding this application.

c. Evidence of the date(s) of my marriage to the member if not included in enclosed court orders. (Required only if direct payment is based on a division of the member's disposable retired pay as marital property.)

d. If payment request includes child support, give name(s) and birth date(s) of children:

(1) Name of Child (Last, First, Middle Initial)

(2) Date of Birth

e. Other information (please identify) or remarks.

Applicant's Signature

Date Signed

SERVICE OF APPLICATION. The application must be served by certified or registered mail with return receipt requested or by personal service delivered to the designated agent of the Coast Guard and NOAA Corps, as follows:

COMMANDING OFFICER (LGL)
COAST GUARD PAY AND PERSONNEL CTR
444 SE QUINCY ST
TOPEKA KS 66683-3591

IMPORTANT NOTE. Making a false statement or claim against the U.S. Government is punishable. The penalty for willfully making a false claim or false statement is a maximum fine of \$10,000 or maximum imprisonment of 5 years or both (18 U.S.C. 287 and 1001).

APPENDIX H

INFORMATION PAPER

JAGS-ADA-LA

1 June 1998

SUBJECT: SBP in Marital Dissolution Actions

1. The Survivor Benefit Plan is an annuity that allows retired members of the Armed Forces (both active duty and reserve components) to provide continued income to named beneficiaries in the event of the retiree's death. The Plan's provisions are codified at 10 U.S.C. § 1447-1455.

a. SBP participation is optional, but in most cases a married member on active duty cannot elect out of the program without his or her spouse's consent (10 U.S.C. § 1448(a)(3)(A)). A member of a reserve component can choose not to participate without spousal concurrence, but if he or she does decide to enroll, then the spouse must consent to participation at less than the maximum level (10 U.S.C. § 1448(a)(3)(B)).

b. For married members on active duty, the SBP election must be made before retirement (10 U.S.C. § 1448(a)(2)(A)). For members of reserve components, the election can take place upon completion of 20 years of service, and the member has a second chance to elect to participate upon reaching age 60 (10 U.S.C. § 1448(a)(2)(B)). Other than this second chance for those in the reserve components, once the election to participate or not to participate is made, it is only revocable between the second and third anniversary from the date the service member makes the election and begins receiving retirement pay.

2. An election to participate involved two choices--the naming of beneficiaries and a determination of the amount of the annuity. Beneficiaries can include the member's spouse, a former spouse, the member's dependent children, a spouse or former spouse together with the dependent children, or in some cases an individual qualifying as a natural person with an insurable interest in the member's life. The member also decides how much the annuity will pay the beneficiaries by choosing a level of participation. This is done by designating a "base amount;" the minimum base amount is \$300, and a member can select this level or any amount above \$300, in \$100 increments, up to the full amount of his or her military retired pay.

a. The cost will depend on the beneficiary and the base amount selections. The monthly premiums are automatically deducted from military retired pay, and there is a tax break since the amount of SBP premiums are deducted from retired pay before taxes are calculated (thus, SBP premiums are paid with tax-free dollars).

b. The annuity for a spouse or former spouse will be 55% of the base amount. This payment drops when the beneficiary reaches age 62, and the amount of the reduction for

elections previously made (and those made in the future by members who were retirement eligible on or before 2 Oct 85) is controlled by a fairly complex set of rules. The rule is simple for most future elections, however; if the member was not retirement eligible as of 2 Oct 85, the annuity goes down to 35% of the base amount when the beneficiary reaches age 62.

c. The annuity stops altogether if the beneficiary remarries before reaching age 55. Payments are revived, however, if the subsequent marriage is terminated in any manner.

(1) It may not be wise to designate a former spouse as an SBP beneficiary in cases where he or she has reasonable prospects for remarriage.

(2) Life insurance or a commercial annuity may provide better protection for a younger former spouse who may remarry (assuming that state law would require the member to provide continuing income protection for such a former spouse).

3. The Uniformed Services Former Spouses' Protection Act initially authorized members to designate a former spouse as a beneficiary, but only if the member voluntarily elected to do so and only in the category of a natural person with an insurable interest.

a. Congress subsequently amended the SBP provisions to allow a former spouse to be treated the same as a current spouse for SBP purposes.

b. In 1986, Congress authorized state courts to order members to designate former spouses as SBP beneficiaries. State law controls whether such an order will be issued. Congress also authorized the member and former spouse to enter into a voluntary written agreement making the former spouse a beneficiary.

c. There is one important procedural aspect regarding former spouses designation. A member may be "deemed" to have designated a former spouse as an SBP beneficiary even if the member did not provide the agreement or court order to finance. (10 U.S.C. § 1450(f)(3)(A)).

(1) This "deemed" election is not automatic; it must be triggered by a request from the former spouse, and the request must be sent to the appropriate military finance center not later than 1 year after the date of the court order (10 U.S.C. § 1450(f)(3)(B)) or for voluntary agreements, the date of the divorce (10 U.S.C. § 1448(b)(3)(A)).

(2) Once a timely request is made, the finance center will flag the member's records, and upon his or her retirement the former spouse will be designated as an SBP beneficiary.

4. A member is allowed only one SBP plan; a second spouse cannot be named as an SBP beneficiary as long as a former spouse holds that designation. A second spouse can be substituted as the beneficiary in place of the former spouse under limited circumstances.

a. If the original designation was pursuant to a court order, then the request for substitution will not be honored without an amending court order that allows the change.

b. If the original designation was pursuant to a written agreement, then the request for substitution will not be honored without the written agreement of the former spouse.

5. Special rules apply when the marriage ends after the member has retired. If the member elected not to participate at the time of retirement (or at the time of marriage after retirement), the dissolution does not revive the option of electing to participate. Thus, courts should not order retirees to provide SBP protection for former spouses in these cases because the retiree cannot do so.

6. Survivors should report retiree deaths to the DFAS Cleveland Center casualty office at 1-800-269-5170. Annuitants should address questions regarding their SBP to the DFAS Denver Center at:

DFAS-DE/FRB
6760 East Irvington Place
Denver, CO 80279-6000
(303) 676-6552
1-800-435-3396
Email: DFAS-DE-FRB@cleveland.dfas.mil

MAJ Richard Rousseau/(804) 972-6351

APPENDIX I

DIVISIBILITY OF SSB AND VSI IN DIVORCE CASES

A. Special Separation Benefit (SSB; 10 U.S.C. § 1174a). SSB is a one-time payment of a sum calculated by multiplying 15% times the member's annualized basic pay at time of separation (monthly basic pay x 12), times the number of years of active service. For example, in 1995, an E-6 with 10 years service would have an annualized basic pay of \$20,422.80 (\$1701.90 x 12); times 15% = \$3,063.42; times 10 years service yields a single lump-sum payment at separation of \$30,634.20.

B. Voluntary Separation Incentive (VSI; 10 U.S.C. § 1175). VSI is an annuity, paid annually for twice the number of years of active duty service; the annual payment is calculated by multiplying 2.5% times final annualized base pay times the number of years of active service. For example, in 1995 an E-6 with 10 years service would have an annualized base pay of \$20,422.80 (\$1701.90 x 12); times 2.5% = \$510.57; times 10 years in service equals \$5,105.70 (this is the amount paid annually on the date of separation and on the next 19 anniversaries), for a total payout of \$102,114 over the life of the annuity. There are no "COLAs" on VSI annuity payments.

C. Divisibility of SSB and VSI.

1. Military "disposable retired or retainer pay" is divisible in most states by the combined effect of the Uniformed Services Former Spouses' Protection Act (USFSPA), 10 U.S.C. § 1408(c)(1), and the individual state's marital dissolution laws. However, neither SSB nor VSI are military "retired or retainer" pay; thus, whether applying a basic canon of statutory construction or Justice Scalia's more blunt jurisprudential philosophy (the law means what it says), USFSPA does not on its face provide a basis for dividing SSB or VSI as marital property.

2. Nevertheless, trial-level courts, and several appellate courts, treat SSB & VSI as the "functional equivalent of retired pay" and divide it. *Abernethy v. Fishkin*, 638 So. 2d 160 (Fla. Ct. App., 1994); *In re Crawford*, 884 P.2d 210 (Ariz. Ct. App. 1994); *Blair v. Blair*, 894 P.2d 958 (Mont. 1995); *Kulscar v. Kulscar*, 896 P.2d 1206 (Okla. Ct. App. 1995); *In re Huepel*, 936 P.2d 561 (Colo. 1997); *Marsh v. Wallace*, 924 S.W.2d 423 (Tex. Ct. App. 1996); *Fisher v. Fisher*, 462 S.E.2d 303 (S.C. Ct. App. 1995). The Crawford opinion determined that division of SSB was not inconsistent with congressional intent to provide SSB as part of "a comprehensive package of transition benefits to assist separating personnel and their families," H.R. Rep. No. 665, 101st Cong., 2d Sess. (1990) (emphasis added). Further, the Crawford court applied a basic principle of community property law that a party should not be permitted, by unilateral action (such as foregoing retirement to accept separation benefits), to transmute community property into separate property, and held without further analysis "that the trial court had jurisdiction to treat Michael's SSB payment as a community asset under 10 U.S.C. § 1408 and award an equitable portion of it to Leslie." (Leslie had been awarded a 32½ percent share of Michael's retired pay when the parties divorced in 1989, two years before Congress even enacted the "readjustment benefits" program. Michael elected to separate with SSB in 1992, after more than

19 years of military service.) Courts holding that VSI/SSB payments are not marital assets subject to distribution include *McClure v. McClure*, 647 N.E. 2d 832 (Ohio Ct. App. 1994); *In re Marriage of Anderson*, 1995 WL 551241 (unpublished opinion), *Homer v. Homer*, Pa. Sup. Ct. #J-113-97, decided Dec. 1997, revised Feb. 1998 (unreported opinion).

3. Various arguments and theories may be constructed on why SSB or VSI payments should or should not be considered as divisible marital property. Here are some of them:

a. Acquisition of benefit during the marriage. If, as of the date of release from active service, the marriage exists (and if marital separation or other pre-dissolution event that terminates the relevant period for acquiring marital property has not occurred), the loss of employment is likely to be considered a marital loss, and the readjustment benefit acquired thereby might be considered marital property. See, e.g., *Chotiner v. Chotiner*, 829 P.2d 829 (Alaska 1992) [Military severance payment under 10 U.S.C. § 667, received during the marriage, is marital property only to the extent attributable to work performed during the marriage, but separate property to the extent attributable to work performed prior to the marriage]. Characterization as marital property may be particularly strong when SSB is involved, the entire bonus has been received during the marriage, and the SSB has been commingled with other marital property such as savings accounts, investments, or purchases prior to the divorce or pre-dissolution separation. Refuting this argument may be difficult, likely requiring recognition of the readjustment benefit as separate property of the member under state law, and perhaps also including separate maintenance of the benefit after acquisition - i.e., no commingling or "conveyance to the marital estate." See *Chotiner*, supra at 832-833. Also, the preemption argument of *McCarty* (see below) may require that SSB or VSI be treated as non-divisible separate property of the member, regardless of whether the benefit is received during or after the marital period.

If a servicemember intends marital dissolution and is also facing a voluntary separation, accelerate the divorce (or pre-dissolution separation) and delay the service separation to best position the member to preserve the readjustment benefit as separate property. However, this tactic may fail; the Court may not "allow one party to retain all the compensation for unilaterally altering a retirement plan asset in which the other party has a court-decreed interest." *Kulscar v. Kulscar*, Okla.Ct.App., No. 82558, 2 May 95.

Conversely, the spouse in such a situation would be well advised to delay the divorce (or pre-dissolution separation) until after the member's release from active duty and receipt of the readjustment benefit.

b. Acquisition after the marriage - divisible. If separation and acquisition of SSB or VSI occurs after divorce (or pre-dissolution separation), but the marital period and the dates of military service overlapped, the benefit payment (or, in the case of VSI, payments) might be divisible marital property if characterized as additional compensation for past military service. *Chotiner*, supra. In another context, the IRS has ruled exactly that for "lump-sum readjustment payments" under a 1950's statute, finding that the payment was based upon and had a direct relation to the number of years of active service. Rev. Rul. 58-496 (1958 - 2 C.B. 20); Rev. Rul.

67-350 (1967 - 2 C.B. 58); Priv. L. Rul. 561009515OA (Oct. 9, 1956). Cf. *Felman v. C.I.R.*, 49 T.C. 599 (1968). VSI and SSB are similarly computed.

c. Acquisition after the marriage - not divisible. Even though the marital period and the dates of military service overlapped, if service separation and acquisition of SSB or VSI occurs after divorce (or pre-dissolution separation) it can be argued that the benefit payment (or, in the case of VSI, payments) is separate property and is not divisible because its purpose is to assist the divorced (separated) member's forthcoming adjustment to civilian life, and not to compensate the member for past services. *In re the Marriage of Kuzmiak*, 222 Cal. Rptr. 644 (Cal. App. 1986); *Perez v. Perez*, 587 S.W.2d 671 (Tex. 1979) [both cases so holding for the involuntary separation payment under 10 U.S.C. § 1174]. Alternatively, SSB or VSI would be separate property if viewed as compensation for lost future earnings that would have been realized by continued service wholly outside the marital period.

d. Not divisible - McCarty preemption. *McCarty v. McCarty*, 453 U.S. 210 (1981), invalidated California's attempt to divide military pensions after finding that allowing such treatment would "do clear damage to important military personnel objectives" and "that Congress intended that military retirement pay reach the veteran and no one else." *Mansell v. Mansell*, 490 U.S. 581, 584 (1989). Of course, Congress accepted the Supreme Court's offer to change things, and passed USFSPA to permit states to treat a military pension as marital property. In enacting the laws creating the SSB and VSI, however, Congress did not include in either statute a section permitting states to treat the benefits as marital property. While one could argue that such an authorization really necessary, since domestic relations law is wholly "state law" in character, the Supreme Court found such an authorization necessary in *McCarty* because of the conflict between the federal benefit program (military retirement system) and state action concerning divisibility. Applying the same rationale, absent authorization in Federal law to divide SSB and VSI, states should be precluded from making such divisions. The argument, identical to that raised in *McCarty*, is that allowing states to divide either SSB or VSI has the potential to disrupt military personnel management and significantly interfere with the goal of achieving orderly downsizing to a smaller force; further, it reduces the amount Congress thought the member should receive to facilitate transition to civilian life, discourages separation, and encourages retention (since current income realized after divorce would not be divisible as marital property). The language of the Supreme Court in *McCarty* lends itself easily to the SSB/VSI issue: "Congress has determined that a younger [smaller] military is essential to the national defense; it is not for the States to interfere with that goal by lessening the incentive to retire [separate] created by the military retirement [readjustment benefits] system." *McCarty*, at 235 [substituting readjustment benefits language in the brackets]. The Crawford opinion does not squarely address this issue, but summarily holds that USFSPA provides the basis for dividing SSB. The Colorado Supreme Court addresses this issue and finds no preemption in the Huepel opinion.