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McCARTYISM IN NEW MEXICO: *McCarty v. McCarty* and the Uniformed Services Former Spouses' Protection Act

On June 26, 1981, the United States Supreme Court decided *McCarty v. McCarty,*[1] in which it precluded the division of federal military retirement benefits as community property under California's community property laws.[2] In response to the *McCarty* decision, New Mexico, along with a number of states across the nation, attempted to realign its traditional community property approach to the division of military retirement benefits upon divorce.[3] This effort was short lived. In August of 1982, the Congress sent to President Reagan Public Law 97-252—the Uniformed Services Former Spouses' Protection Act.[4] Title X of that law effectively

1. 453 U.S. 210 (1981).

2. Community property is a system of shared ownership of property acquired by a couple during the marriage. This system is present in Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, and Washington. Generally, under this system, property obtained during the marriage by either spouse belongs equally to both. Excepted from this communal ownership are inheritances, gifts, property the spouse owned prior to the marriage, and proceeds from this separate property. Thus, each spouse has a vested and present right in a one-half share ownership interest in property acquired during coverture. Because the right to ownership is a vested right, upon divorce the property belongs to each by half.

The early common law developed the concept that the right to property in the possession of the couple belonged to the husband. Common law jurisdictions in the United States modified this concept to provide that the spouse purchasing or possessing title to the property owned the property. Thus, if the husband had purchased, or was listed as the title holder of the property owned by the couple, as was often the case, he retained the property upon divorce. Modern common law jurisdictions have employed equitable principles to offset this result and have divided the marital property between the spouses. *See generally,* W. Reppy Jr. & C. Samuel, Community Property In The United States (2d ed. 1982).

3. References to the *McCarty* decision have appeared in both community and common law jurisdictions. Some states, New Mexico among them, have limited the applicability of *McCarty* to the facts of that case, that is, to nondisability military retirement benefits under state community property laws. Hughes v. Hughes, 96 N.M. 719, 634 P.2d 1271 (1981). Others have seen the case as expressing the concern of the United States Supreme Court for federal retirement benefits in general, whenever they are considered as property in a divorce settlement. This view holds that *McCarty* preempts states from characterizing military retirement benefits as property subject to division upon divorce, regardless of the type of property law applied. For examples of common law cases see, e.g., Employees Savings Plan of Mobil Oil Corp. v. Geer, 535 F. Supp. 1052 (S.D. N.Y. 1982); *In re* Marriage of Jones, 309 N.W.2d 457 (Iowa 1981); Duren v. Duren, 627 S.W.2d 585 (Ky. 1982); Hill v. Hill, 291 Md. 615, 436 A.2d 67 (Ct. App. 1981); Kis v. Kis, ___ Mont. ___, 639 P.2d 1151 (1982); *In re* Marriage of McGill, ___ Mont. ___, 637 P.2d 1182 (1981); Herrick v. Herrick, 316 N.W.2d 72 (N.D. 1982); Webber v. Webber, 308 N.W.2d 548 (N.D. 1981); Carter v. Carter, ___ S.C. ___, 286 S.E.2d 139 (1982); Bugg v. Bugg, ___ S.C.___, 286 S.E.2d 135 (1982); Whitehead v. Whitehead, 627 S.W.2d 944 (Tenn. 1982).

4. Pub. L. No. 97-252, §§ 1001 to 1006, 96 Stat. 730 (1982) [hereinafter sometimes referred to as the Act].

overruled *McCarty* by allowing states to treat military retirement benefits according to their specific property laws.[5] The President signed the law on September 9, 1982, and it became effective on February 1, 1983.

Nevertheless, during the fourteen months between the *McCarty* decision and the passage of the Act, several states, including New Mexico, used the impetus of the *McCarty* decision to reconsider their traditional concepts of spousal support and property division upon divorce. Part I of this Comment describes the *McCarty* case and several New Mexico decisions which followed it and attempted to apply its doctrine. Part II presents an analysis of the various New Mexico cases described in Part I. Part III describes the Uniformed Services Former Spouses' Protection Act.

PART I. BACKGROUND

In *McCarty,* the United States Supreme Court considered a California appellate court decision which had affirmed the award of one-half of a commissioned officer's military retirement benefits to the wife upon their divorce. The officer had argued that the federal scheme of military retirement benefits preempted state community property laws, and that the supremacy clause of the United States Constitution[6] precluded the trial court from awarding to the wife a portion of his retirement pay. The California appellate court rejected this contention. It followed precedent[7] and included the military retirement benefits in the community estate and divided them according to California's community property principles. The California Supreme Court denied the husband's petition for review. The husband then sought review by the United States Supreme Court.

The United States Supreme Court analyzed *McCarty* in terms of a conflict between state law and the federal military retirement scheme.[8]

5. See *infra* text accompanying notes 95–137 for a description of the Act.

6. U.S. Const. art. VI, cl. 2. The supremacy clause provides that "the Laws of the United States . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

7. *In re* Marriage of Fithian, 10 Cal. 3d 592, 517 P.2d 449, 111 Cal. Rptr. 369, *cert. denied,* 419 U.S. 825 (1974).

8. Retirement from the armed services is controlled by the service in which the prospective retiree served. Funding for retiree pay is an individual budget item for each armed service. Thus, Army officer retirements are governed by the provisions of 10 U.S.C. § 3911 (1976). In general, however, the services are alike both in the procedures for obtaining retirement as well as the amount of payments received. There are three categories of retirements: regular or nondisability (the form at issue in *McCarty*), reserve, and disability. Disability was the form at issue in Miller v. Miller, 96 N.M. 497, 632 P.2d 732 (1981). *See infra* text accompanying notes 12–18. Regular retirement requires that the person have completed 20 years of military service before he is eligible to retire. Disability retirement, on the other hand, allows a service to retire a serviceman with more than a certain minimum disability after having completed as little as eight years of active service, regardless of the cause of the disability. The amount of disability retirement pay received varies with the amount of service completed. In addition, depending on the degree of disability found by the service, a

The analysis proceeded along the lines of the rationale previously expressed by the Court in *Hisquierdo v. Hisquierdo*.[9] *Hisquierdo* was a railroad retirement benefits case. The Supreme Court developed a two-part test to determine whether California had the right to consider railroad retirement benefits guaranteed under a federal program as community property upon the divorce of a recipient of those benefits. The test stated by the Court was "whether the right as asserted [by the state] conflicts with the express terms of federal law and whether its consequences sufficiently injure the objectives of the federal program [so as] to require nonrecognition."[10] Applying this rationale to the federal railroad retirement program and the community property principles in effect in California, the *Hisquierdo* Court concluded that the railroad retirement benefits could not be apportioned according to those principles. In *McCarty,* although the federal program at issue was dissimilar to the program in *Hisquierdo,*[11] the Court came to the same conclusion: federal law precluded California from apportioning, upon divorce, the military retirement benefits paid to the serviceman.

The first opportunity that New Mexico had to apply the holding of *McCarty* occurred in August of 1981 in *Miller v. Miller.*[12] *Miller* concerned the divorce of a retired serviceman who had maintained Texas as his home of record during his military career. After his retirement from the United States Army in 1977, the serviceman and his wife settled in New Mexico. Shortly thereafter, the husband converted his retirement from a program paid by the Army to one paid by the Veterans Administration ("V.A.").[13] The couple were divorced two years later. As a part of the property settlement, the trial court characterized the husband's V.A. retirement benefits as community property and awarded a portion of them

percentage of pay equal to the percentage of the disability is tax-free. Also, once retired for disability reasons, the serviceman can elect to waive his benefits from his parent service, have his disability recomputed by the Veterans Administration ("V.A."), and receive his benefits from this latter organization. The general tendency of the V.A. to compute disability at a higher percentage than the services provides the incentive for electing the V.A. benefits. The recomputation results in a greater amount of tax-free retired pay. The husband in *Miller* followed this procedure. *See generally* 10 U.S.C. §§ 1201, 1208, 1401 (1976), and 38 U.S.C. § 3105 (1976), for a description of the disability retirement program and the disability provisions of the V.A.

9. 439 U.S. 572 (1979).

10. *Id.* at 583.

11. In *McCarty,* the federal program, as outlined *supra* note 8, aside from being governed by different statutes, was different in concept from the *Hisquierdo* program. The *Hisquierdo* program was a contributory program, wherein the employers and employees contributed to a fund which was used to pay the benefits to retired railroad employees. In this aspect the *Hisquierdo* program was like social security. Military retirement, however, is noncontributory. The United States Supreme Court in *McCarty* specifically noted that military retirement has been held to be compensation for reduced present service performed by the retiree. *McCarty,* 453 U.S. at 222.

12. 96 N.M. 497, 632 P.2d 732 (1981).

13. *See supra* note 8.

to the wife. This apportionment of the retirement benefits constituted the major complaint of the husband upon appeal.

The Supreme Court decided *McCarty* while *Miller* was before the New Mexico Supreme Court. Nevertheless, the *Miller* court, following New Mexico precedent,[14] characterized the husband's V.A. benefits according to the law of Texas, the state in which the husband had earned the benefits. The Texas Supreme Court had considered the characterization of V.A. disability retirement benefits in two previous decisions.[15] In both cases the Texas court concluded that the benefits could not be characterized or apportioned as community property. In view of this precedent, and the controlling effect of the Texas decisions, the *Miller* court concluded that it could not characterize or divide as community property the benefits at issue in that case.[16]

Having decided the question of the character and divisibility of the retirement benefits, the *Miller* court next considered whether it could award alimony where the only source for payment was the V.A. disability benefits of the husband. Here the court turned to *McCarty*. After briefly reviewing that decision, the *Miller* court stated that:

> [T]he [United States Supreme] Court went on to address the question whether federal benefits could be subject to legal process for spousal support. . . . The . . . Supreme Court concluded that "Congress . . . thought that a family's need for support could justify garnishment, even though it deflected other federal benefits from their intended goals, but that community property claims, *which are not based on need,* could not do so."[17]

Noting that the "public policy concerns which led the Congress to adopt the amendments to the Social Security Act [which allowed for garnishment of the federal benefits] . . . are no less operative at the state level,"[18] the *Miller* court held the husband's V.A. disability retirement benefits could be a source for alimony payments.

Espinda v. Espinda, decided by the New Mexico Supreme Court in September of 1981,[19] was the first case to apply *McCarty* to the question of the characterization and apportionment of military retirement benefits as community property. In *Espinda,* the serviceman had maintained Hawaii as his home of record during active duty. As in *McCarty,* the ser-

14. Otto v. Otto, 80 N.M. 331, 455 P.2d 642 (1969). *See infra* note 55.

15. The Texas court considered this issue in *Ex parte* Burson, 615 S.W.2d 192 (Tex. 1981), and *Ex parte* Johnson, 591 S.W.2d 453 (Tex. 1979). In both cases the court found that the federal law had preempted state action. *Burson,* 615 S.W.2d at 196; *Johnson,* 591 S.W.2d at 456.

16. 96 N.M. at 498, 632 P.2d at 733.

17. *Id.* at 499, 632 P.2d at 734 (emphasis by the court).

18. *Id.*

19. 96 N.M. 712, 634 P.2d 1264 (1981).

viceman retired after serving the statutorily required period of active duty and the retirement was for nondisability reasons.

Upon retirement, the serviceman and his wife moved to New Mexico and thereafter sought a divorce. The final decree was entered by the trial court in August of 1979. In that final decree, the trial court found that the "husband's military retirement benefits were community property" and awarded one-half of those benefits to the wife.[20]

On appeal, the husband attacked the trial court's characterization and apportionment of the retirement benefits. The New Mexico Supreme Court first considered the characterization of the retirement benefits,[21] as it had done in *Miller*. However, instead of applying the law of Hawaii to characterize the retirement benefits as the court had done with Texas law in *Miller*, the *Espinda* court stated that "[t]he character of nondisability military retirement has been preempted by federal law. *McCarty v. McCarty* . . . ."[22] The court held that *McCarty* overruled prior New Mexico law which had allowed apportionment of such benefits as community property upon divorce.[23] Mirroring the *McCarty* result, the *Espinda* court held that military nondisability retirement benefits could not be apportioned as community property upon divorce.[24]

Although it held that federal law preempted New Mexico law, the *Espinda* court took pains to state that the "result in *McCarty* is limited to the type of retirement involved in that case; namely, nondisability military retirement pay."[25] The supreme court remanded *Espinda* to the trial court "for further consideration of the request by wife for alimony. . . . See *Miller v. Miller*. . . ."[26]

Hughes v. Hughes[27] followed the *Espinda* decision by less than one month and confirmed the New Mexico Supreme Court's intention to limit the effect of *McCarty* to the particular benefits addressed both in *McCarty* and *Espinda*. In *Hughes*, the wife sought apportionment of the husband's future federal civil service disability benefits. The husband, rather than arguing to extend *McCarty* to cover federal benefits in general, analogized his civil service benefits to personal injury benefits or workmen's com-

20. *Id.* at 713, 634 P.2d at 1265.

21. *Id.*

22. *Id.*

23. The court cited LeClert v. LeClert, 80 N.M. 235, 453 P.2d 755 (1969), for the proposition that military retirement pay is community property, the proposition which *McCarty* overruled.

24. 96 N.M. at 714, 634 P.2d at 1266.

25. *Id.* at 713, 634 P.2d at 1265.

26. *Id.* at 714, 634 P.2d at 1266.

27. 96 N.M. 719, 634 P.2d 1271 (1981). For a further discussion of *Hughes*, see Note, *Community Property—Spouse's Future Federal Civil Service Disability Benefits are Community Property to the Extent the Community Contributed to the Civil Service Fund During Marriage: Hughes v. Hughes*, 13 N.M.L. Rev. 193 (1983).

pensation. The New Mexico Supreme Court previously had characterized such benefits as the separate property of the recipient.[28]

Nevertheless, the *Hughes* court considered whether *McCarty* applied. The court concluded that:

> The implications of *McCarty* for the case at bar are limited in that *McCarty* appears to be a narrow holding. . . . There is no indication that Congress intended that the federal benefits involved in this case be treated as separate property [as had been held by the United States Supreme Court with respect to the benefits in *McCarty*].[29]

Because the *Hughes* court concluded that the benefits at issue were not the separate property of the husband, they could be characterized and apportioned as community property.[30] Thus, although accepting *McCarty*'s preemption of New Mexico law with respect to nondisability retirement benefits, the court again limited its application strictly to those particular benefits.

Common law courts have not been so restrictive. Tennessee, in *Whitehead v. Whitehead*,[31] stated that "[t]he holding [of *McCarty*], and the bases given therefor, limit the inclusion of military retired pay in property subject to equitable distribution upon divorce in a non-community property state as well."[32] Similarly, in *Bugg v. Bugg*,[33] the South Carolina Supreme Court agreed with the wife when she withdrew her claim for an equitable interest in the husband's military retirement on the ground that *McCarty* controlled that claim and precluded any interest on her part. The court gave no reason other than to note that the *McCarty* decision held that "one's military retirement pay was not subject to division between the parties. . . ."[34] The supreme court of South Carolina went one step further in *Carter v. Carter*.[35] After reviewing the *McCarty* decision, the court applied it to federal civil service disability retirement benefits. The court, holding that such benefits were not divisible, reiterated the rationale of the *McCarty* Court that a "grave harm to clear and substantial federal interests" might result from a contrary result.[36]

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28. *See, e.g.*, Richards v. Richards, 59 N.M. 308, 283 P.2d 881 (1955).

29. 96 N.M. at 722, 634 P.2d at 1274.

30. *Id.*

31. 627 S.W.2d 944 (Tenn. 1982).

32. *Id.* at 945. The court in *Whitehead* did not go on to define the equitable considerations which required the application of *McCarty* to military retired pay in a non-community property state. Evidently the court felt that the underlying rationale of *McCarty*, that the apportionment of military retirement would do damage to the intent of the Congress, applied as well in Tenessee.

33. ___ S.C. ___, 286 S.E.2d 135 (1982).

34. *Id.* at ___, 286 S.E.2d at 136. The *Bugg* court did note in its cite to *McCarty* that that case applied to community property states. Nevertheless, without further explanation, the court agreed with the wife's withdrawal.

35. ___ S.C. ___, 286 S.E.2d 139 (1982).

36. *Id.* at ___, 286 S.E.2d at 140. The *Carter* court, while holding that *McCarty* prevented South Carolina from apportioning the civil service benefits under its "marital" property scheme, did not

In *Webber v. Webber,*[37] the North Dakota Supreme Court, applying the same rationale used by the South Carolina Supreme Court in *Carter v. Carter,* held that military retirement benefits were not divisible as property but a court could consider them when awarding alimony. In *Hill v. Hill,*[38] the Maryland Court of Appeals reviewed in some detail the post-*McCarty* decisions by the United States Supreme Court, as those decisions addressed equitable distribution of property upon divorce.[39] The Maryland court concluded that those decisions implied that *McCarty* should be extended to the equitable distribution situation as well.

These decisions from other juridictions which considered the effect of *McCarty* are in sharp contrast to the approach of the New Mexico Supreme Court. Although these jurisdictions sought to extend *McCarty,* pointing to the possible harm that might otherwise result to "substantial federal interests," New Mexico in *Espinda* and *Hughes* emphasized the limited applicability of *McCarty.*

Espinda, by implication, raised the issue of the retroactive effect which would be given to the *McCarty* doctrine in New Mexico. In *Espinda,* the final decree had been entered in 1979, well before the *McCarty* decision. Thus, it could be inferred that the New Mexico Supreme Court would apply *McCarty* retroactively.[40] *Whenry v. Whenry,*[41] the next major New

interfere with the trial court's consideration of those benefits in determining alimony. This willingness to achieve substantially the same result through the use of alimony is a common approach in those jurisdictions which have felt constrained by the *McCarty* doctrine. Texas does not recognize alimony as a divorce settlement doctrine, and routinely held before *McCarty* that military nondisability benefits were divisible upon divorce. Texas might have modified its law in this area had the recent legislation to overrule *McCarty* not been enacted. But see Eichelberger v. Eichelberger, 582 S.W.2d 395 (Tex. 1979), in which the Texas Supreme Court refused to change its law with respect to alimony in a case in which the wife was denied any share in her husband's railroad retirement as a result of the *Hisquierdo* decision.

37. 308 N.W.2d 548 (N.D. 1981).

38. 291 Md. 615, 436 A.2d 67 (Ct. App. 1981).

39. The *Hill* court stated:

> We note that subsequent to its decision in *McCarty,* the Supreme Court denied certiorari in Russell v. Russell, 605 S.W.2d 33 (Ky. 1980), . . . and Cose v. Cose, 592 P.2d 1230 (Alaska 1979). . . . Both of these cases involved a division of property in "equitable distribution" states. . . . In each it was held that military nondisability retired pay was not divisible. In addition, the Supreme Court vacated the judgment of the Supreme Court of Montana in *In re Marriage of Miller,* ___ Mont. ___, 609 P.2d 1185 (1980) . . . in which it was held in an "equitable distribution" state that military nondisability retired pay was divisible. . . . The case was remanded "for further consideration in light of *McCarty.* . . ."

Id. at ___ n.4, 436 A.2d at 70 n.4.

40. The retroactive effect to be given to *McCarty* was a subject of concern both to state courts elsewhere and to the lower federal benches. The United States Supreme Court declined to clarify this aspect of the *McCarty* decision, a result which led to some inconsistency in the holdings of other jurisdictions. For instance, Erspan v. Badgett, 659 F.2d 26 (5th Cir. 1981), *cert. denied,* 455 U.S. 945 (1982), declined to give the doctrine retroactive effect, while *In re* Marriage of McGill, ___ Mont. ___, 637 P.2d 1182 (1981), applied the doctrine retroactively to a decree entered in 1980. New Mexico, as noted in the text accompanying notes 80–89, attempted to clarify the *Espinda* holding and limit the retroactive effect of *McCarty.*

41. 98 N.M. 737, 652 P.2d 1188 (1982).

Mexico case to consider *McCarty,* sought to answer that question.[42] In *Whenry,* the New Mexico Supreme Court stated:

> We limit *McCarty* in its application to New Mexico cases which, when *McCarty* was decided, were pending in the district court and in which no final judgment had been entered, cases in which a final judgment had been entered but the time for appeal had not expired, cases on appeal, and cases which are filed in the future. . . .[43]

The *Whenry* court considered decisions from several other jurisdictions in reaching this result. The narrowness of the issue addressed in *Whenry,* however, allowed reference to these other decisions without the need to analyze them in any great detail.[44] Thus, while *Whenry* cited two federal, three California, one Idaho, one Kentucky, and one Texas decision,[45] the only use that was made of the cases was to note that New Mexico "join[s] in the result reached by a vast majority of courts which have considered this issue [of retroactivity] and . . . *McCarty* and *Espinda* are not to be applied retroactively. . . ."[46]

PART II. ANALYSIS

The New Mexico cases described in Part I exemplify three distinct applications of *McCarty. Miller v. Miller*[47] did not use *McCarty* to characterize the husband's V.A. disability retirement benefits as community or separate property, but instead used *McCarty* to justify an award of alimony to the wife from those retirement benefits. *Espinda v. Espinda*[48] applied *McCarty* directly to New Mexico, overruling previous New Mexico decisions which had divided military retirement benefits as community property. *Whenry v. Whenry*[49] sought to define the parameters under which the *McCarty* and *Espinda* holdings could be applied retroactively to New Mexico decisions. This division of the New Mexico Supreme Court's application of *McCarty* provides a convenient framework in which to analyze the New Mexico cases.

The *Miller* court used *McCarty* in only a limited sense. The husband had argued that his V.A. benefits "should be considered in the same light

42. *Id.* at 738, 652 P.2d at 1189.

43. *Id.* at 741, 652 P.2d at 1192.

44. *Whenry* was a consolidation of six cases. According to the *Whenry* court, the dispositive issue in all of the cases was whether courts should apply the rule announced in *McCarty* and *Espinda* retroactively. *Id.* at 738, 652 P.2d at 1189.

45. *Id.* at 738–39, 652 P.2d at 1189–90.

46. *Id.* at 738, 652 P.2d at 1189. The *Whenry* court correctly noted that the vast majority of the state and federal courts which considered retroactivity concluded, in much the same way that the *Whenry* court did, that *McCarty* should not be applied retroactively. *Id.*

47. 96 N.M. 497, 632 P.2d 732 (1981).

48. 96 N.M. 712, 634 P.2d 1264 (1981).

49. 98 N.M. 737, 652 P.2d 1188 (1982).

as proceeds from any accident or health insurance policy, and as such should be held exempt under New Mexico law from attachment or garnishment. . . ."[50] In response, the supreme court noted that "Congress has seen fit to create an exemption to the general provision of nonassignability of benefits received under [the V.A. disability payment statute], to allow for spousal support."[51] As stated by the *McCarty* Court, the fear of some members of the Congress was that the retirees would use the anti-attachment language contained in the governing statutes to avoid the payment of spousal support.[52] After much debate, "comprehensive legislation was enacted. In 1975, Congress amended the Social Security Act to provide that all federal benefits, including those payable to members of the Armed Services, may be subject to legal process to enforce child support or alimony obligations."[53] The *Miller* court felt this language in *McCarty* authorized an award of alimony from benefits which were otherwise the separate property of the retired servicemember.

The reasoning of the *Miller* court is apparent. The United States Supreme Court had limited the application of the *McCarty* holding to nondisability military retirement benefits.[54] Because the retirement benefits at issue in *Miller* were V.A. benefits, the *Miller* court could ignore *McCarty* and characterize the V.A. benefits according to Texas law.[55] Under Texas law, the supremacy clause of the United States Constitution precluded the division of V.A. disability retirement benefits as community property.[56] The *Miller* court honored that precedent. Alimony, on the other hand, was a matter completely under the control of the New Mexico court and had not been preempted by the *McCarty* decision.[57]

A distinction between the 1975 amendment to the Social Security Act[58]

50. 96 N.M. at 499, 632 P.2d at 734.

51. *Id.*

52. 453 U.S. at 228–30.

53. *Id.* at 230.

54. The Court identified the issue presented by *McCarty* as "whether, upon the dissolution of a marriage, federal law precludes a state court from dividing military nondisability retired pay pursuant to state community property laws." 453 U.S. at 211. In addition, the Court, in discussing the various forms of military retirement, noted that: "For our present purposes, only the first of these three forms [nondisability retirement] is relevant." *Id.* at 213.

55. The *Miller* court resorted to New Mexico precedent expressed in Otto v. Otto, 80 N.M. 331, 455 P.2d 642 (1969). *Otto* established that the law of the state in which the member earned the benefits determined the character of retirement benefits.

56. *See supra* note 15.

57. In *McCarty*, the United States Supreme Court, before considering the legislative history associated with the 1975 and 1977 amendments to the Social Security Act, addressed the intent expressed by Congress that the military retired pay "actually reach the beneficiary." 453 U.S. at 228 (quoting Hisquierdo v. Hisquierdo, 439 U.S. 572, 584 (1979)). After noting that enlisted men could not assign their retired pay, and that the pay could not be attached, the Court stated: "it is clear that the injunction against attachment is not to be circumvented by the simple expedient of an offsetting award." 453 U.S. at 229 n.22. The Court made no further elaboration as to what "offsetting awards" would be inadmissible. Arguably, an award of alimony could be such an "offsetting award."

58. 42 U.S.C. § 659 (1976).

and the 1977 amendment to the same Act,[59] highlighted in *McCarty,*[60] affected the New Mexico Supreme Court's decision that the husband's V.A. disability retirement benefits could be used as a source for the payment of alimony. The 1975 amendment allowed all federal benefits to be subject to legal process to enforce alimony; the 1977 amendment specifically excluded from the definition of "alimony" any transfer of property under a state's community property laws.[61] Commenting on these amendments in *McCarty,* the United States Supreme Court restated its conclusion from *Hisquierdo* that it was "logical to conclude that Congress . . . thought that a family's need for support could justify garnishment, even though it deflected other federal benefits from their intended goals, but that community property claims . . . could not do so."[62] Referring again to this conclusion, the *McCarty* Court "recognize[d] that the plight of an ex-spouse of a retired service member is often a serious one. . . . That plight may be mitigated to some extent by the ex-spouses's right to . . . garnish military retired pay for the purposes of support."[63]

These statements by the United States Supreme Court, and the amendment separating out transfers of property under community property laws from the definition of alimony, indicated to the *Miller* court that the V.A. benefits could be used for alimony. The court stated that "the disability compensation benefits which husband receives from the VA fall within those 'federal benefits' which the Congress contemplated in its 1975 amendments to the Social Security Act, and which the U.S. Supreme Court held could be subject to attachment for spousal support."[64] The court found "no federal bar to the award of alimony where the source for its payment is disability compensation payable under federal programs."[65] Further, "[t]he public policy concerns which led the Congress to adopt the amendments to the Social Security Act . . . are no less operative at the state level."[66] With this rationale, the court remanded the case to the trial court with instructions to "recompute the property settlement [to exclude the division of the retirement benefits as community property], and if deemed necessary . . . to reassess the wife's need for alimony. . . ."[67]

The *Miller* decision is notable because, although it was decided after *McCarty* and concerned military retirement benefits, it did not apply the

59. 42 U.S.C. § 662(c) (Supp. III 1979).
60. 453 U.S. at 230.
61. *Id.*
62. *Id.*
63. *Id.* at 235.
64. 96 N.M. at 499, 632 P.2d at 734.
65. *Id.*
66. *Id.*
67. *Id.* at 500, 632 P.2d at 735.

holding of *McCarty* in the characterization of those benefits. The *Miller* court could have avoided the use of Texas law by holding that the *McCarty* decision preempted the New Mexico decision. This approach was taken later by the *Espinda* court with respect to nondisability retired pay.[68] It must be assumed that the *Miller* court felt that *McCarty* should be confined to the factual setting of that case and not be extended to military retirement pay in general. This conclusion is borne out by later comments, particularly in *Espinda,* that the court would not give wide application in New Mexico to the *McCarty* decision.[69]

Miller is also notable because the court relied on dicta in *McCarty,* relating to whether military retirement benefits could be attached for payment of spousal support, to justify the use of federal benefits for alimony although those benefits could not be apportioned as community property. The supreme court used this approach again in *Espinda* without further elaboration.

Of the New Mexico cases which have relied upon or referred to *McCarty, Espinda v. Espinda*[70] is the most appropriate for an analysis of the New Mexico Supreme Court's interpretation of *McCarty. Espinda* was the first New Mexico case containing a factual setting which approximated that of *McCarty.* Appellant husband in *Espinda* retired under a nondisability program and he received his retirement pay from the same service in which he had spent his active duty.

The court's approach in *Espinda* is notable because it departed from the customary method of analyzing divorce cases involving retirement benefits which a servicemember earned in another state. According to New Mexico precedent,[71] the *Espinda* court should have used Hawaii law to determine the character of the retirement benefits. Hawaii is a common law jurisdiction which uses a concept of equitable distribution to divide property upon divorce. Therefore, the court should have characterized the retirement benefits according to equitable distribution principles.[72]

After this characterization, a narrow reading of *McCarty* would have led the *Espinda* court to conclude that *McCarty* was inapposite, and the question of preemption would never have arisen. Such a result would not be surprising in light of the statement in *Espinda* that "[t]he Supreme Court of the United States specifically limited *McCarty's* effect."[73] There-

68. 96 N.M. at 713, 634 P.2d at 1265.

69. *Id.*

70. 96 N.M. 712, 634 P.2d 1264 (1981).

71. Otto v. Otto, 80 N.M. 331, 455 P.2d 642 (1969). *See supra* note 55.

72. Hawaii Rev. Stat. § 580-47 (Supp. 1982), states in part: "(a) Upon granting a divorce, the court may make such further orders as shall appear just and equitable . . . (3) finally dividing and distributing the estate of the parties, real, personal, or mixed, whether community, joint, or separate. . . ."

73. 96 N.M. at 713, 634 P.2d at 1265.

fore, if the court had followed its traditional approach in analyzing these kinds of cases, it could have allowed division of the retirement benefits under Hawaii's equitable apportionment scheme.[74]

The *Espinda* court may have concluded that the entire question of the characterization of military nondisability retirement benefits had been settled by *McCarty,* regardless of the state property laws where the benefits were earned. *McCarty* did not mandate this conclusion, however. *McCarty* specifically addressed benefits which were apportioned under a community property regime. The community property concept which the United States Supreme Court found disturbing, at least in part, was the insistence that property acquired during marriage vested equally in both spouses. The *McCarty* Court went on to state: "[W]e need not decide . . . whether federal law prohibits a State from characterizing retired pay as deferred compensation, since we agree . . . that the application of community property law conflicts with the federal military retirement scheme. . . ."[75] If the *Espinda* court had followed its own precedent and classified the retirement benefits according to Hawaii law, the court would not have been required to "[apply] community property law," and thereby "[conflict] with the federal military retirement scheme."

Furthermore, there are other approaches the *Espinda* court could have used. In addition to the alternative described previously, the *Espinda* court could have followed the Texas Supreme Court's approach noted in *Miller v. Miller.*[76] In *Ex parte Burson*[77] and *Ex parte Johnson,*[78] the Texas Supreme Court had analyzed *Hisquierdo v. Hisquierdo,*[79] compared the similarities of the federal statute governing the railroad retirement benefits at issue in the Texas cases, and found federal preemption. The *Espinda* court could have undertaken an equally thorough analysis of *McCarty.* Such an analysis might have reached the same result, that the governing federal law controls military nondisability retirement benefits, regardless of the state in which earned. This would have been a far more satisfying

74. The court had previously used the approach of looking to the law of another state to determine the division of property in Hughes v. Hughes, 91 N.M. 339, 573 P.2d 1194 (1978). *Hughes* involved the divorce of a military couple who had used money earned while the couple were domiciled in Iowa to purchase New Mexico property. The court determined that the law of Iowa controlled the characterization of the property and therefore it was the separate property of the husband. However, the court noted, "separate" has a different meaning when applied in Iowa and when applied in New Mexico. Under Iowa law, the wife had certain "incidents of ownership, claims, rights and legal relations" which gave her protection that she did not enjoy under the New Mexico definition of that term. *Id.* at 346, 573 P.2d at 1201. The *Hughes* court held that it would apply Iowa law both to characterize the property and to determine the wife's benefits. *Id.* at 347, 573 P.2d at 1202.

75. 453 U.S. at 223.

76. 96 N.M. 497, 632 P.2d 732 (1981).

77. 615 S.W.2d 192 (Tex. 1981).

78. 591 S.W.2d 453 (Tex. 1979).

79. 439 U.S. 572 (1979).

foundation upon which to base the *Espinda* result. Under this approach, the *Espinda* decision would not be subject to the criticism that it was a seemingly inexplicable departure from the precedent established by the New Mexico Supreme Court in its previous decisions.

Whenry v. Whenry[80] represents the New Mexico Supreme Court's attempt to set out guidelines for determining when and if *Espinda* and *McCarty* would be applied retroactively.[81] The *Whenry* court derived the guidelines from the United States Supreme Court's decision in *Chevron Oil Co. v. Huson*.[82] The *Whenry* court listed the guidelines as: (1) reliance on the overruled clear past precedent; (2) purpose of the new rule and effect of retroactive application on the rule's operation; and (3) the effect retroactive application might have on the administration of justice.[83]

To support its decision not to apply *McCarty* retroactively, the court identified the several New Mexico cases which had followed *LeClert v. LeClert,*[84] as evidence of reliance on overruled past precedent.[85] These cases, as the court noted, had been relied upon to characterize retirement benefits as community property and to determine questions of property division upon divorce. The doctrine set out in *McCarty* and *Espinda* was a new principle which overruled the clear precedent of these former cases. Therefore, a fully retroactive application of *McCarty* would be "unjust and inequitable."[86]

With regard to the second guideline, the *Whenry* court identified the major purpose of the *McCarty* doctrine as protecting the " 'clear and substantial federal interest' which the Congress has in maintaining a military force and in protecting the goals of the military retirement system. . . ."[87] The determination that *McCarty* should not be applied retroactively "does not frustrate this purpose."[88] With respect to the third guideline, administration of justice, the court noted that the area of marriage and family law was one in which the need for "stability and finality" was paramount.[89] Thus, in the absence of any different direction from the United States Supreme Court, the *Whenry* court limited the retroactive application of *McCarty* and *Espinda*.

Although addressing most situations expected to arise in the application of the *Espinda* and *McCarty* holdings, the rules laid out in *Whenry* over-

80. 98 N.M. 737, 652 P.2d 1188 (1982).
81. *Id.* at 738, 652 P.2d at 1189.
82. 404 U.S. 97 (1971).
83. 98 N.M. at 739-40, 652 P.2d at 1190–91.
84. 80 N.M. 235, 453 P.2d 755 (1969).
85. 98 N.M. at 739, 652 P.2d at 1190.
86. *Id.* at 739–40, 652 P.2d at 1190–91.
87. *Id.* at 740, 652 P.2d at 1191.
88. *Id.*
89. *Id.*

looked one area of ambiguity. The rules called for limiting the application to cases in which "a final judgment had been entered but the time for appeal had not expired . . ." on the date of the *McCarty* decision.[90] This provision did not make clear whether a case in which the final judgment had been entered before the date of the *McCarty* decision (June 26, 1981), but in which the time for appeal was still running, could have the doctrine applied at some later date. Thus, for example, a case in which judgment was entered on June 1, 1981, and in which no appeal was taken, would theoretically qualify as a case in which final judgment had been entered but in which the time for appeal had not expired on the date of the *McCarty* decision. The question then is, if the case is reopened at some later date, can *McCarty* be applied? In deriving the rules for retroactive application, the court borrowed language from *Barker v. Barker*.[91] In that case, however, the New Mexico Supreme Court used the wording "the time for appeal *has* not expired."[92] This latter wording avoids the ambiguity cited. No New Mexico cases tested this difference in the two wordings.[93]

PART III. LEGISLATION

This section describes the legislation designed to overcome the effects of *McCarty* upon the characterization of military nondisability retirement benefits. On September 9, 1982, President Reagan signed the Department of Defense Authorization Act of 1983. Title X of that Act, the Uniformed Services Former Spouses' Protection Act,[95] represents Congress' reaction to the *McCarty* decision. The Act allows a state to characterize and apportion military retirement pay in accordance with that state's property laws.[96] The Act also authorizes direct payments to former spouses of awards from the retirement pay of the ex-servicemember spouse, and sets out the eligibility requirements which must be met by the former spouse

90. *Id.* at 741, 652 P.2d at 1192.

91. 93 N.M. 198, 598 P.2d 1158 (1979).

92. 93 N.M. at 199, 598 P.2d at 1159 (emphasis added).

93. Federal legislation designed to overcome the effects of *McCarty*, described in Part III, has obviated the need for any further concern about the retroactivity or applicability of *McCarty*.

94. The provisions of the legislation, and the problem which it is designed to overcome, have no relation to the issue presented to the New Mexico Supreme Court in *Miller v. Miller*. *Miller* involved the characterization of V.A. benefits, a category of benefits which Congress specifically excluded from the legislation. *See infra* note 102 and accompanying text. Nevertheless, the author included the *Miller* discussion in order to present a more complete picture of New Mexico's characterization of military retirement benefits.

95. Pub. L. No. 97-252, §§ 1001 to 1006, 96 Stat. 730 (1982); 1982 U.S. Code Cong. & Ad. News (96 Stat.) 730-38 (to be codified in scattered sections of 10 U.S.C.). Subsequent cites will be to U.S.C.A.

96. 10 U.S.C.A. § 1408(c)(1) (West Supp. 1983).

in order to receive the direct payments.[97] The Department of Defense promulgated proposed rules to implement the Act on January 28, 1983.[98] This section will describe the Act and the rules proposed for its implementation.

A. Description

This short act consists of six sections. Section 1002 adds a new section, 1408, to Chapter 71 of Title 10 (entitled "Armed Forces") of the United States Code and comprises the major part of the Act. Sections 1003 and 1004 make small changes to sections 1447, 1448, 1450 and 1072 of the same title of the United States Code. Section 1005 addresses certain military exchange and commissary privileges, and section 1006 establishes the effective date of the Act.

Section 1002 allows state courts to apportion military retirement benefits incident to a divorce.[99] In addition, it sets out procedural guidelines and certain limitations upon the power of the courts to award these benefits. Relevant subsections are:

1408(a). This subsection defines certain terms used throughout the Act. In particular, for purposes of the Act, "final decree" means a decree "from which no appeal may be taken or from which no appeal has been taken within the time allowed for taking such appeals. . . ."[100] Also, the subsection defines the "disposable retired or retainer pay" which a court may apportion. This pay is the total monthly retired or retainer pay to which a member is entitled, with certain exceptions.[101] "Disposable retired or retainer pay" does not include any disability retirement pay received by the member from the V.A.[102]

1408(b). This subsection defines proper service of a court order for purposes of the Act. The Act allows the secretary of the military service managing the retired pay account of the member to make direct payments

97. *Id.* § 1408(d). The former spouse must have been married to the member for a period of at least ten years during which the member performed at least 10 years of service.

98. 48 Fed. Reg. 4003 (1983) (to be codified at 32 C.F.R. § 63).

99. 10 U.S.C.A. § 1408(c)(1) (West Supp. 1983) states that a court "may treat disposable retired or retainer pay payable to a member for pay periods beginning after June 25, 1981, either as property solely of the member or as property of the member and his spouse in accordance with the law of the jurisdiction of such court."

100. 10 U.S.C.A. § 1408(a)(3) (West Supp. 1983). "Final decree" includes "a decree from which timely appeal has been taken and such appeal has been finally decided under the laws applicable to such appeals."*Id.*

101. *Id.* § 1408(a)(4). Exceptions are for amounts owed to the United States, amounts required to be deducted because of fines or forfeitures, amounts deducted for taxes, life insurance premiums (if the policy is a government insurance policy), amounts witheld for Survivor Benefits Program payments, and amounts waived in order to receive disability pay.

102. Section 1408(a)(4) specifically excepts the retirement pay received "for disability under chapter 61 of this title." That chapter covers, inter alia, disability pay received from the V.A.

of the awarded amount to the former spouse. To make such direct payments, the Act requires that the secretary be "properly served" with a "lawful court order." The subsection requires that the court order or other documents served with the court order "certify that the rights of the member under the Soldiers' and Sailors' Civil Relief Act of 1940 . . . were observed."[103]

1408(c). This subsection contains the specific authorization for the state courts to treat disposable retired or retainer pay as property,[104] subject to certain limitations.[105]

The remaining subsections contain procedural rules designed to limit the total amount of retired or retainer pay which may be made subject to the Act and resolve the situation where the member is subject to more than one divorce decree in which the court apportioned retired pay. In addition, there are provisions for automatic payment of court awards directly to the former spouse.[106]

The three remaining substantive sections of the Act add the Act to other parts of Title 10 dealing with spousal benefits. Section 1003 incorporates the Act into the Survivor's Benefit Plan.[107] Section 1004 ex-

103. 10 U.S.C.A. § 1408(b)(1)(D) (West Supp. 1983).

104. *See supra* note 99.

105. Limitations in § 1408 applicable to the authority of a state court are:

> (c)(2) . . . [no] right, title or interest which can be sold, assigned, transferred, or otherwise disposed of . . . by a spouse or former spouse [is created].
>
> (c)(3) . . . [t]his section does not authorize any court to order a member to apply for retirement . . . in order to effectuate any payment. . . .
>
> (c)(4) [a] court may not treat the disposable retired . . . pay . . . [as property] unless the court has jurisdiction over the member. . . .
>
> (e)(4)(B) . . . the total amount of the disposable retired . . . pay of a member payable . . . under all court orders pursuant to this section and all legal processes pursuant to [the Social Security Act] . . . may not exceed 65 percent of the disposable retired . . . pay payable to such member.
>
> (e)(5) [a] court order which itself or because of previously served court orders provides for the payment of an amount . . . which exceeds the amount . . . available for payment because of the limit set forth [above] . . . shall not be considered to be irregular on its face solely for that reason. However, such order shall be considered to be fully satisfied for purposes of this section by the payment . . . of the maximum amount . . . permitted [subject to the limit].

106. 10 U.S.C.A. § 1408(d) (West Supp. 1983).

107. 10 U.S.C. §§ 1447 to 1455 (1976). The Survivor Benefits Plan is an annuity scheme whereby members of the armed forces may elect to contribute a part of their retired or retainer pay to the Plan, under the guarantee that, upon the death of the retiree, his or her beneficiary (as designated by the retiree subject to certain restrictions), will continue to receive a portion of the retired pay.

108. *See supra* note 103. Section 1408(a) would not affect the type of retired benefits at issue in Miller v. Miller, 96 N.M. 497, 632 P.2d 732 (1981); therefore, the outcome of an appeal based upon the kind of situation addressed in *Miller* should lead to the same result as that case. *But see* Stroshine v. Stroshine, 98 N.M. 742, 652 P.2d 1193 (1982). In *Stroshine*, the New Mexico Supreme Court addressed the issue of the divisibility of V.A. military retirement benefits. This case was factually similar to *Miller*, but was decided under New Mexico law rather than Texas law. *See supra* text accompanying notes 12–16. The court, however, held that *Miller* was not "apposite to New Mexico community property law with regard to division of disability retirement pay. *Miller* is not, therefore,

tends medical benefits to a former spouse, and section 1005 directs the services to extend to a former spouse commissary and exchange privileges.

B. Discussion

10 U.S.C. § 1408(a), created by section 1002 of the Act, defines the retired pay which may be apportioned as property. The section excludes benefits which a servicemember receives from the V.A. under a disability retirement plan.[108] The services themselves, however, can also award retired pay based upon disability. After the service awards the member disability retirement pay, he may elect to receive it either from the awarding service or from the V.A.[109] Because the disability retired pay which he receives from the V.A. is immune from the application of this Act, most members who qualify for disability can be expected to elect the V.A. variety.

Section 1408(a) also excludes from the definition of "disposable retirement or retainer pay" any amounts paid for federal, state, or local income taxes. This exclusion is applied "if the withholding of such amounts is authorized or required by law and to the extent such amounts withheld are not greater than would be authorized if such member claimed all dependents to which he was entitled."[110] This exclusion raises two concerns for the former spouse seeking to ascertain what amount will be available for apportionment. First, the amount will depend upon the subsequent marital and dependancy status of the servicemember. Paradoxically, the larger the number of dependants which the retiree acquires after a divorce in which a percentage of his retired pay is awarded under this Act, the more the former spouse stands to gain.[111] Second, the Act implies that the former spouse will be taxed for the amount received.[112]

Section 1408(c) contains the express authorization to treat disposable retired pay as propery. In addition, it contains limitations upon that au-

dispositive of the case at bar." *Id.* at 743, 652 P.2d at 1194. The *Stroshine* court did not engage in an analysis of the underlying federal statutes governing the type of retirement pay at issue. In *Ex parte* Burson, 615 S.W.2d 192 (Tex. 1981), and *Ex parte* Johnson, 591 S.W.2d 453 (Tex. 1979), the Texas Supreme Court undertook such an analysis. These cases formed the basis for the *Miller* decision. *See supra* note 15.

109. *See supra* note 8.

110. 10 U.S.C.A. § 1408(a)(4)(C) (West Supp. 1983).

111. This situation arises because "take home" pay increases as the taxpayer's number of dependents increases. It is this amount (minus any other deductions and exemptions required by the Act) which forms the basis for the apportionment. Thus, if the former retiree spouse has remarried and qualifies for additional dependant exemptions, the new amount available for division is greater than if he or she had remained single and subject to a larger tax liability.

112. 10 U.S.C.A. § 1408(a)(4)(C) (West Supp. 1983) defines the amount subject to apportionment as an amount from which only the retiree's tax liability has been deducted. Therefore, the amount remitted to the former spouse appears to be in the nature of gross income, akin to alimony, for purposes of the Internal Revenue Code.

thorization. Section 1408(c)(2) states that the Act creates no "right, title, or interest which can be sold, assigned, transferred, or otherwise disposed of (including by inheritance) by a spouse or former spouse."[113] Further, the Act does not "authorize any court to order a member to apply for retirement or retire at a particular time in order to effectuate any payment under this [Act]."[114] Finally, section 1408(c)(4) requires that any court which attempts to dispose of retired or retainer pay under the authority of the Act must meet certain requirements in order to establish jurisdiction over the servicemember.[115]

10 U.S.C. § 1408(d) contains provisions dealing with the eligibility of the former spouse to receive direct payments under the Act and the procedures to be followed by the services in effecting those payments. Section 1408(d)(2) provides that, if the former spouse was not married to the member for a period of ten years or more, "during which the member performed at least 10 years of service creditable [for eligibility for retirement purposes]," the former spouse cannot receive direct property awards.[116] This provision refers only to the direct payments to the former spouse under section 1408(d)(1). It does not affect the ability of a court to award any portion of a member's retired or retainer pay to a former spouse, as property, regardless of how long the couple were married or how many years the member served on active duty during the marriage.[117] Section 1408(d)(4) provides that the payments made to a former spouse under the Act will terminate upon the death of the member, the former spouse, or as provided in the applicable court order, whichever occurs first.

10 U.S.C. § 1408(e) limits the maximum amount of retired or retainer pay payable under the Act to fifty percent. Once again, this provision limits the amount which can be paid directly to the former spouse. It does not appear to limit the ability of a court to award any percentage of the retired or retainer pay of a retired member as the property of the former spouse. The limitation refers rather to the amount that the service secretaries will pay directly to the former spouse pursuant to a court order.[118] This section also addresses the situation of multiple former spouses

113. 10 U.S.C.A. § 1408(c)(2) (West Supp. 1983).

114. *Id.* § 1408(c)(3).

115. *Id.* § 1408(c)(4). The Act requires that the court establish jurisdiction over the member either by "(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." *Id.*

116. *Id.* § 1408(d)(2).

117. The regulations promulgated to implement the Act repeat this limitation. *See supra* note 98. The regulations state that a former spouse is eligible to receive "direct payment . . . [only if] the former spouse [was] . . . married to the member for ten years or more. . . ." 48 Fed. Reg. 4005 (1983) (to be codified at 32 C.FR. § 63.6). Both the Act and the regulations condition only the provision of direct payment.

118. 10 U.S.C.A. § 1408(e)(1) (West Supp. 1983).

who obtain court orders apportioning the retired pay of the member. The Act allows for a "first-come, first-served" approach, limiting the total amount which the service will pay directly to all claimants to fifty percent.[119] The remaining subsections of section 1408 address payments made under more than one statute or court order, immunity from liability for officers of the United States for payments under the Act, and requirements for the promulgation of regulations for the administration of the Act.[120]

Sections 1003, 1004, and 1005 of the Act effect changes in preexisting sections of Title 10 of the United States Code. Section 1003 incorporates the provisions of the Act into the Survivor Benefits Plan.[121] The changes introduced by section 1003 allow the member to designate a former spouse as the beneficiary under the Plan. The change specifies that any election by the member to include a former spouse must be the voluntary act of the member. Once that voluntary act is made, however, the member cannot thereafter change the election unless he first shows the service that the change is valid.[122]

Sections 1004 and 1005 of the Act grant to the former spouse certain privileges with respect to military commissaries and exchanges, and extend to the former spouse medical benefits. Section 1004 of the Act, granting medical benefits, requires that the former spouse meet three criteria:

1. the former spouse cannot remarry;
2. the former spouse, on the date of the final decree of divorce, dissolution, or annulment, had to have been married to the member for a period of at least twenty years during which the member performed at least twenty years of service creditable for retirement purposes; and
3. the former spouse cannot have medical coverage under an employer-sponsored health plan.[123]

These criteria are stringent requirements for any former spouse to meet. Section 1002, it is true, requires ten years "vesting" in order to obligate the services to pay the amounts apportioned directly to the former spouse. But that section does not prevent a court from awarding a part of the retired pay as property when the former spouse had been married for less than ten years. By comparison, section 1004 requires that the former spouse have been married to the member for the full twenty-year period before the former spouse can continue to receive medical benefits after divorce. Such a limitation is not surprising, however. The services have

119. *Id.* § 1408(e)(2).

120. *Id* §§ 1408(e)(3), (e)(4), (f), and (g).

121. *See supra* note 107.

122. 10 U.S.C.A. § 1450 (f) (West Supp. 1983). The member can show the validity of the change by a concurrence of the former spouse in the case where the original designation was the result of an agreement between the parties, or a valid modification to a court order, in the case where the original designation was made a part of the court order upon divorce.

123. *Id.* § 1072(2)(F).

traditionally been short of medical resources for dependents of military personnel.[124] It is probable that the limitation imposed by this section was designed to minimize the impact upon the services in an area of chronic shortages.

Section 1005 of the Act requires that the services develop regulations which will extend commissary and exchange benefits to former spouses, but with the same limitations as medical benefits.[125] Finally, section 1006 sets the effective date of the Act as February 1, 1983, and makes the payments authorized by 10 U.S.C. § 1408(d) applicable only to:

> payments of retired or retainer pay for periods beginning on or after the effective date of this title, but without regard to the date of any court order. However, in the case of a court order that became final before June 26, 1981, payments under such sub-section may only be made in accordance with such order as in effect on such date and without regard to any subsequent modifications.[126]

Subsection (d) of 10 U.S.C. § 1408 refers to the direct payment of portions of retired or retainer pay awarded to former spouses in a court order. Therefore, while a court now may apportion retired pay paid since June 25, 1981, as property, the amount attributable to the period between June 25, 1981, and February 1, 1983, cannot be remitted directly to the former spouse by the service concerned. Again, the administrative impact upon the services may have dictated the result.

C. Proposed Rules

On January 28, 1983, the Department of Defense promulgated proposed regulations to carry out the provisions of the Act.[127] The proposed regulations treat only the requirements of new section 1408 to Title 10 of the United States Code.[128] Still to be promulgated are the regulations governing the extension of exchange and commissary privileges to former spouses as authorized by section 1005 of the Act.

The regulations, while generally repeating the language of the Act, contain certain additions and amplifications. The following list includes the significant regulations.

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124. *See, e.g.*, H.R. Rep. No. 90, 96th Cong., 2d Sess., *reprinted in* 1980 U.S Code Cong. & Ad. News 1722. The report states in part:

> The hearings and studies [of the Subcommittee on Military Compensation] pointed clearly to the conclusion that there are serious deficiencies in the capability of the medical departments [of the military services] to provide the quantity and quality of care to which the beneficiaries of the military care system are entitled.

1980 U.S. Code Cong. & Ad. News 1722.

125. *See supra* note 124.

126. 10 U.S.C.A. § 1408 note (West Supp. 1983).

127. 48 Fed. Reg. 4003 (1983) (to be codified at 32 C.F.R. § 63).

128. The summary of the regulations states that the "proposed rule implements section 1002 of the [Act]." 48 Fed. Reg. 4003 (1983) (to be codified at 32 C.F.R. § 63).

1. Applicability and scope.[129] The regulations are made applicable to members retired from the active and reserve components of the uniformed services who are subject to court orders awarding a division of retired pay as property, alimony, or child support.[130]

2. Definitions.[131] The regulations amplify the definitions contained in the Act in the following important areas:

a. Member. "A person originally appointed or enlisted in, or conscripted into, a Uniformed Service who has retired and is now carried on one of the lists of retired personnel from the regular or reserve components of the Uniformed Services."[132]

b. Retired pay:
The gross entitlement due a member based on conditions of the retirement law, pay grade, years of service for basic pay, years of service for percentage multiplier, if applicable, and date of retirement (transfer to the Fleet Reserve or Fleet Marine Corps Reserve); also known as retainer pay. It does not include benefits paid to a member for disability under 10 U.S.C. Chapter 61.[133]

c. Uniformed Services. "The Army, Navy, Air Force, Marine Corps, Coast Guard, Public Health Service, and the commissioned corps of the National Oceanic and Atmospheric Administration."[134]

The rules also clarify the eligibility requirements for a former spouse to receive direct payments under section 1408(d). The rules state that "[i]f a court order specifies payment to the former spouse for only child support [or] alimony, there is no 10 year marriage requirement."[135] Other parts of the rules spell out the necessary procedures for establishing eligibility, method of application, requirements for court orders, garnishment orders, limitations, notification of the member, and method of payment.

PART IV. CONCLUSION

The amount of litigation which *McCarty v. McCarty* produced was significant, not only in those states adhering to the community property

129. 48 Fed. Reg. 4004 (1983) (to be codified at 32 C.F.R. § 63.2).

130. 48 Fed. Reg. 4004 (1983) (to be codified at 32 (C.F.R. § 63.2).

131. 48 Fed. Reg. 4004 (1983) (to be codified at 32 C.F.R. § 63.3).

132. 48 Fed. Reg. 4004 (1983) (to be codified at 32 C.F.R. § 63.3). The Act does not set out the definition of the term "member."

133. 48 Fed. Reg. 4005 (1983) (to be codified at C.F.R. § 63.3).

134. 48 Fed. Reg. 4005 (to be codified at C.F.R. § 63.3).

135. 48 Fed. Reg. 4005 (1983) (to be codified at 32 C.F.R. § 63.6). 10 U.S.C.A. § 1408(d)(1) (West Supp. 1983) directs that the secretary of the appropriate service shall "make payments to the spouse or former spouse . . ." subject to the limitations of section 1408. Section 1408(d)(2) describes the effect of the 10-year requirement. It states that if the former spouse was not married to the member for at least 10 years, "payments may not be made . . . to the extent that they include an amount resulting from the treatment by the court under subsection (c). . . ." Subsection (c) refers to the characterization of the retirement pay as property.

concept, but in several common law jurisdictions as well. New Mexico's reaction was at best mixed. The New Mexico Supreme Court's application of alimony to overcome the effect of the doctrine was in keeping with that employed by several other states.

The court's handling of the characterization of retirement benefits as property, and the determination of the retroactivity of the *McCarty* doctrine, indicated some inconsistency. Given the mobile society which characterizes modern America and the continuing increase in New Mexico's population, it must be assumed that the state will continue to receive people who have acquired significant property rights in the form of retirement benefits earned elsewhere. Therefore, the New Mexico Supreme Court must engage in a more thorough and careful analysis of those rights in relation to New Mexico's community property law. In particular, the court should review its approach to the characterization of military retirement benefits and determine whether it will refer to the state in which those benefits were earned in order to classify them. This approach warrants consideration, in light of the new legislation, because that legislation allows a state to characterize military retirement benefits according to its own property laws. Should an ex-servicemember who had earned retirement elsewere seek a divorce in New Mexico, the characterization of those benefits will still be an important first step in their apportionment.

It is too soon after the effective date of the Uniformed Services Former Spouses' Protection Act to comment meaningfully about its treatment in the courts. There is little doubt, however, that disappointed servicemembers will attack the law. Many consider their retirement pay to be reduced compensation for reduced continuing service, a view which mirrors the United States Supreme Court's.[136] Under that characterization, the pay is not a return in the form of money for the investment of time and effort which the servicemember contributed over the length of his career. A retirement benefit of that nature has been considered property and its division upon divorce is not unusual. Compensation in the form of pay for continuing service, however, is arguably salary. Salary generally is not divisible upon divorce. Thus, the "salary" characterization of military retirement pay appears to be inconsistent with the characterization implied by the Act. It is this inconsistency, and its implications on the relationship between the retiree and the military, that some commentators see as the subject of future attacks upon the legislation.[137]

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136. *See supra* note 11.

137. Shoemaker, *Due Process and Your Pay: A Constitutional Puzzler?* Navy Times, Oct. 25, 1982, at 14, col. 2. The *Navy Times* article also reiterated the belief of many retirees that military retirement pay was reduced compensation for reduced present service and therefore salary, and not a retirement benefit in the usual sense of the word.