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## Military Disability Election and the Distribution of Martial Property upon Divorce

Michael T. Flannery

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## ARTICLES

### MILITARY DISABILITY ELECTION AND THE DISTRIBUTION OF MARITAL PROPERTY UPON DIVORCE

*Michael T. Flannery*<sup>+</sup>

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## I. INTRODUCTION

In February 2005, the United States Army conducted an informal survey in which soldiers and their spouses or significant others rated their top concerns as a result of the soldier's deployment.<sup>1</sup> The survey revealed that soldiers and their partners had one concern that was even greater than the soldier's injury or death.<sup>2</sup> That concern was divorce.<sup>3</sup>

In the Army alone, from 2003 to 2004, the divorce rate increased 78%, which more than tripled the rate of divorce in 2002, largely because of the wars in Iraq and Afghanistan.<sup>4</sup> The increase in divorce rate has been particularly significant among officers.<sup>5</sup> Despite new and redeveloped marriage support programs in the respective services,<sup>6</sup> the divorce rate among military personnel continues to rise.<sup>7</sup>

The significance of the divorce rate in the military must be understood in the context of the lack of uniformity among state courts charged with distributing military retirement benefits upon the dissolution of marriage, particularly that portion of retired pay that is waived for disability benefits. When state courts distribute marital property of disabled military

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1. See Donna Miles, *Army Divorce Rates Drop as Marriage Programs Gain Momentum*, AMERICAN FORCES INFORMATION SERVICE, Jan. 27, 2006, [http://www.defense.mil/news/Jan2006/20060127\\_4034.html](http://www.defense.mil/news/Jan2006/20060127_4034.html).

2. See *id.*

3. See *id.*

4. See *War Swells US Army Divorce Rate*, BBC NEWS, June 8, 2005, <http://news.bbc.co.uk/2/hi/americas/4075270.stm>; see also Lisa Burgess, *Divorce Rate Among Active-Duty Army Officers, Enlisted Has Risen Dramatically*, STARS AND STRIPES, June 9, 2005, <http://estripes.com/article.asp?section=104&article=28797&archive=true>.

5. See *War Swells US Army Divorce Rate*, *supra* note 4. Between January and September 2002, the rate of divorce was 1.9% for married Army officers and 3.1% for enlisted soldiers. *Id.* After the commencement of the Iraq war in 2003, the divorce rate for officers rose to 3.3%, while the rate for enlisted soldiers stayed relatively close at 2.8%. *Id.* In 2004, the figures increased to 6% for officers and 3.5% for enlisted soldiers. *Id.* These figures may be slightly skewed because they do not account for divorced military personnel who were married to other military personnel.

6. Miles, *supra* note 1. In response to the soaring divorce rate, particularly among officers, the military implemented new marriage programs, which have evidenced some success. See *id.* For example, in 2004, 3325 Army officers (6%) got divorced; in 2005, that figure dropped to 1292 (2.3%). *Id.* Although the number of divorces for enlisted soldiers stayed roughly the same (7152 in 2004; 7075 in 2005), this was, nevertheless, a 61% drop in divorce for Army officers following the spike in 2004. *Id.* The Marine Corps and the Navy have similar marriage support programs. *Id.* The Air Force has marriage counseling programs on individual bases, but it does not have a service-wide support program. *Id.*

7. See Burgess, *supra* note 4. The divorce rate for Marine officers remained around 1.8% between 2001 and 2004, while the divorce rate for enlisted Marines remained at around 3.5%. *Id.* In the Air Force, between 2001 and 2004, the divorce rate for officers went from 1.2% to 1.5%, while the divorce rate for enlisted personnel went from 3% to 3.8%. *Id.* In the Navy, between 2001 and 2004, the divorce rate for officers increased from 1.5% to 2.5%, and the divorce rate for enlisted personnel increased from 3.2% to 3.9%. *Id.*

retirees, there are basically two categories of property that must be considered: (1) military retired pay, which is subject to the federal payment scheme (Box A); and (2) other marital property that is subject to equitable or community property distribution under the respective state property distribution schemes (Box B). (See Table 1).

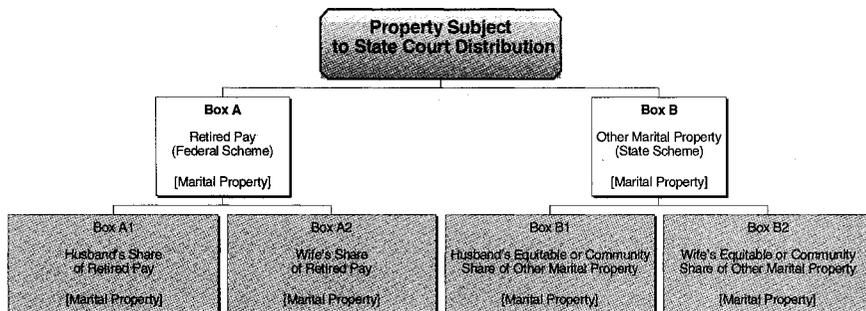


Table 1<sup>8</sup>

The federal military payment scheme follows specific guidelines. Military personnel who serve for at least twenty years may retire with retired pay.<sup>9</sup> The amount of retired pay is determined by the number of years served and the rank at which the member retires.<sup>10</sup> For example, if the wife is an officer with an active duty base salary of \$2,000 per month, retired pay is calculated by multiplying her active duty base pay by her years of service by 2.5%. Thus, the wife's retired pay would be \$2,000 x 20 years x 2.5%, or \$1,000 per month. Pursuant to the Uniformed Ser-

8. Key for Tables 1-6:

- Marital property
- Each party's respective separate share of marital property
- Separate property

9. See 10 U.S.C. § 3911 (2000) (Army); *id.* § 6323 (Navy and Marine Corps); *id.* § 8911 (Air Force).

10. See *id.* §§ 3929, 3991 (Army); *id.* §§ 6325-27 (Navy and Marine Corps); *id.* § 8929, 8991 (Air Force). There are several different methods by which retired pay may be calculated depending on a variety of variables that might affect any given formulaic application, all of which are beyond the scope of this Article. Therefore, any calculations offered in this Article are generally derived for purposes of demonstration.

vices Former Spouses' Protection Act (USFSPA),<sup>11</sup> specifically 10 U.S.C. § 1408(a)(4), this amount is categorized as "disposable retired pay."<sup>12</sup>

Upon the dissolution of marriage, state courts have the authority to distribute disposable retired pay as marital property.<sup>13</sup> But the USFSPA imposes limitations on state court authority to distribute this category of property.<sup>14</sup> Sections 1408(d)(1) and 1408(d)(5) allow for a former spouse to obtain his or her interest in such an award directly from the government;<sup>15</sup> however, § 1408(e)(1) limits the direct payment from the government to 50% of the disposable retired pay.<sup>16</sup> This limitation assures that the military retiree will actually acquire at least half of the retired pay, with limited exceptions.<sup>17</sup> Thus, in Table 2 below, if the wife receives

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11. Uniformed Services Former Spouses' Protection Act (USFSPA), Pub. L. No. 97-252, 96 Stat. 730 (1982).

12. 10 U.S.C. § 1408(a)(4) (2000) ("The term 'disposable retired pay' means the total monthly retired pay to which a member is entitled [other than the retired pay of a member retired for disability under Title 38]."). Note that, prior to 1990, § 1408(a)(4) referred to the term "retired or retainer pay." In 1990, Congress substituted the term "retired pay" for "retired or retainer pay" and added subsection (a)(7), which provides that the term "retired" pay includes retainer pay. See National Defense Authorization Act for Fiscal Year 1991, Pub. L. No. 510, § 555(f), 104 Stat. 1485, 1570 (1990). Thus, when discussing pre-1990 references to the language of § 1408(a)(4), this Article sometimes refers to "retired or retainer pay." All other references are to "retired pay" in accordance with the current language of that provision.

13. *Id.* § 1408(c)(1) ("Subject to the limitations of this section, a court may treat disposable retired pay payable to a member for pay periods beginning after June 25, 1981, either as property solely of the member or as property of the member and his spouse in accordance with the law of the jurisdiction of such court.").

14. See *id.* § 1408(e).

15. 10 U.S.C.A. § 1408(d)(1) (West Supp. 2006) ("After effective service on the Secretary concerned of a court order providing for the payment of child support or alimony or, with respect to a division of property, specifically providing for the payment of an amount of the disposable retired pay from a member to the spouse or a former spouse of the member, the Secretary shall make payments . . . from the disposable retired pay of the member to the spouse or former spouse . . . in an amount sufficient to satisfy the amount of child support and alimony set forth in the court order and, with respect to a division of property, in the amount of disposable retired pay specifically provided for in the court order."); *id.* § 1408(d)(5) ("If a court order described in [§ 1408(d)(1)] provides for a division of property (including a division of community property) in addition to an amount of child support or alimony or the payment of an amount of disposable retired pay as the result of the court's treatment of such pay under [§ 1408(c)] as property of the member and his spouse, the Secretary concerned shall pay . . . from the disposable retired pay of the member to the spouse or former spouse of the member, any part of the amount payable to the spouse or former spouse under the division of property upon effective service of a final court order of garnishment of such amount from such retired pay.").

16. 10 U.S.C. § 1408(e)(1) (2000) ("The total amount of the disposable retired pay of a member payable under all court orders pursuant to [§ 1408(c)] may not exceed 50 percent of such disposable retired pay.").

17. See *id.* § 1408(e)(4)(B) (providing for a 65% maximum garnishment limit respecting child support and alimony awards); 15 U.S.C. § 1673 (2000) (maximum allowable garnishment).

\$1,000 of disposable retired pay (Box A), the husband may obtain—through state court order—up to 50% (\$500) to satisfy his marital interest in the wife's retired pay (Box A1). The remaining 50% is not subject to state court orders invoking § 1408(d)(5) and § 1408(e)(1) for direct payment, but it remains marital property that accrued during the marriage, and, thus, despite limitations on distribution, remains marital property (Box A2). In addition to this property, state courts have the authority to distribute all other marital property in accordance with their respective property distribution schemes (Box B). (See Table 2).

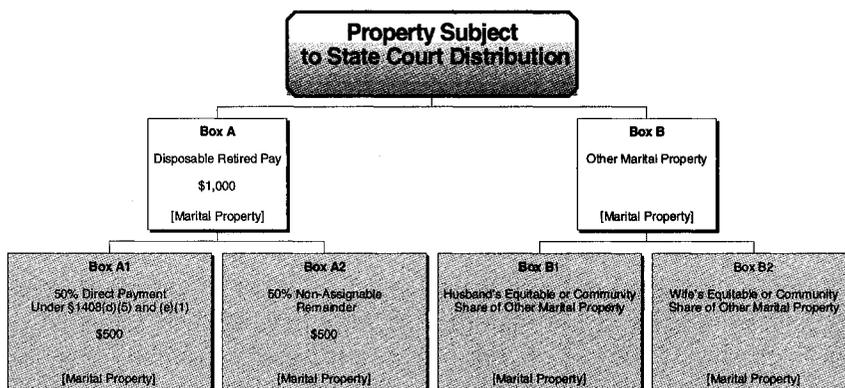


Table 2

Disability benefits are available to veterans who became disabled as a result of their military service.<sup>18</sup> The amount of disability is dependent upon the seriousness of the disability and the degree to which the disability impairs a veteran's ability to earn a living.<sup>19</sup> In the example diagrammed above, a disability rating of 40% would make the wife's disability pay \$2,000 x 40%, which is \$800. Disability pay is the separate property of the participant. However, if a veteran is to receive disability benefits, to avoid double-dipping, he or she must waive a corresponding amount of retired pay.<sup>20</sup> Thus, assuming the parties have \$10,000 of other marital property, if the wife is 40% disabled and opts to waive a portion of her retired pay for disability benefits, a state court distributing property would consider the following:

18. 38 U.S.C. § 1110 (2000) (basic entitlement).

19. See 38 U.S.C.A. § 1114 (West Supp. 2006).

20. *Id.* § 5305. Many military personnel take advantage of this option because of the tax benefits—retirement pay is taxable, whereas disability pay is exempt from federal, state, and local taxation—and because of its ancillary benefits, such as medical care provided by the Veterans Administration. See *id.* § 5301(a); see also *Bewley v. Bewley*, 780 P.2d 596, 597 (Idaho Ct. App. 1989) (describing benefits of disability waivers).

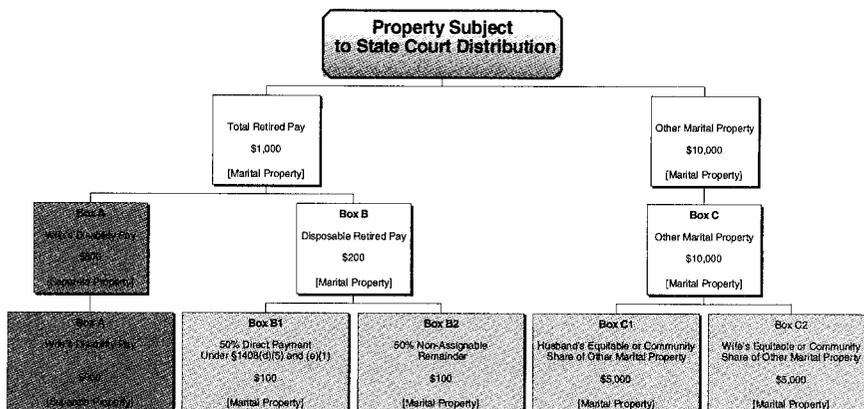


Table 3

The wife's total retired pay would still be \$1,000. Upon unilaterally waiving a portion of retired pay for disability pay, the wife's retired pay would consist of \$800 tax-exempt, separate property disability pay (Box A), plus \$200 in disposable retired pay (Box B). Pursuant to § 1408(d)(5) and § 1408(e)(1), a state court may order only \$100 of the wife's disposable retired pay to be paid directly to the husband (Box B1). Thus, the wife will receive \$100 of disposable retired pay as the non-assignable remainder (Box B2), plus \$800 of tax-exempt, separate property disability pay (Box A), while the husband receives only \$100 of disposable retired pay (Box B1)—\$400 less than what he would receive absent the unilateral waiver by his wife. Of course, the state court is free to distribute all other marital property (Box C) according to its own property distribution scheme. Assuming a 50/50 distribution, each spouse would receive \$5,000 (Boxes C1 and C2, respectively).

Thus, when a disabled military retiree waives a portion of his or her retired pay to receive disability benefits, the former spouse is effectively deprived of a portion of distributable marital property that he or she otherwise would have received as a marital interest in retired pay if that portion had not been waived for disability benefits.

*Share Upon Divorce Without Disability Waiver*

|                  | <u>Share of Retired Pay</u> | <u>Share of Other Marital Property</u> | <u>Total</u> |
|------------------|-----------------------------|--|--------------|
| Military Member: | \$500                       | \$5,000                                | \$5,500      |
| Former Spouse:   | \$500                       | \$5,000                                | \$5,500      |

*Share Upon Divorce With 40% Disability Waiver*

|                  | <u>Share of Retired Pay</u> | <u>Share of Disability Pay</u> | <u>Share of Other Marital Property</u> | <u>Total</u> |
|------------------|-----------------------------|--------------------------------|--|--------------|
| Military Member: | \$100                       | \$800*                         | \$5,000                                | \$5,900      |
| Former Spouse:   | \$100                       | 0                              | \$5,000                                | \$5,100      |

\* Tax-exempt

Because of the distinct natures of retired and disability pay and the purposes behind the federal military payment scheme, such a seemingly inequitable distribution of marital property is allowed under the definitions of the USFSPA. There is much inconsistency among state courts, however, with respect to whether state courts may remedy this resulting inequity by offsetting the waived portion of retired pay—the amount allocated to Box A—with other distributable marital property from Box C.<sup>21</sup> It is within these categories that state courts must facilitate equity for the parties without jeopardizing the objectives of the federal military payment scheme.

The issue of state court authority to offset nondistributable federal benefits has arisen in various other contexts. In considering the distribution of Social Security benefits, some state courts<sup>22</sup> prohibit offsetting based on the United States Supreme Court's decision in *Hisquierdo v. Hisquierdo*,<sup>23</sup> in which the Court held that state courts are preempted by federal law from either distributing directly or offsetting in marital dissolution proceedings benefits provided under the Federal Railroad Retirement Act.<sup>24</sup> Other state courts have offset nondistributable portions of Social Security benefits by considering those benefits in distributing marital property under their respective equitable distribution or community property distribution schemes.<sup>25</sup> Thus, among state courts considering

21. See, e.g., *Eickelberger v. Eickelberger*, 638 N.E.2d 130, 135 (Ohio Ct. App. 1994) (offsetting by considering the military spouse's income as part of an equitable scheme); see also *infra* note 317 (listing all state property distribution provisions).

22. See, e.g., *In re Marriage of James*, 950 P.2d 624, 628-29 (Colo. Ct. App. 1997); *Johnson v. Johnson*, 726 So. 2d 393, 395-96 (Fla. Dist. Ct. App. 1999); *In re Marriage of Crook*, 813 N.E.2d 198, 201-06 (Ill. 2004); *In re Marriage of Boyer*, 538 N.W.2d 293, 294-95 (Iowa 1995); *In re Marriage of Berthiaume*, No. C5-90-2392, 1991 WL 90839, at \*1-2 (Minn. Ct. App. June 4, 1991); *Webster v. Webster*, 716 N.W.2d 47, 54-56 (Neb. 2006); *Olson v. Olson*, 445 N.W.2d 1, 6-7, 11 (N.D. 1989); *Reymann v. Reymann*, 919 S.W.2d 615, 616-17 (Tenn. Ct. App. 1995).

23. 439 U.S. 572 (1979).

24. *Id.* at 586-90.

25. See, e.g., *Rimel v. Rimel*, No. 605-MDA-2005, 2006 WL 3526777, at \*1-2 (Pa. Super. Ct. Dec. 8, 2006); see also *Kelly v. Kelly*, 9 P.3d 1046, 1048-49 (Ariz. 2000); *Panetta*

offsetting, there is no more uniformity in one context of federal benefits than there is in any other.

Now the issue of offsetting is ripe within the context of military retirement benefits. Within this context, some courts and commentators have charged Congress to amend the USFSPA to specifically authorize state courts to offset with other distributable marital property the portion of retired pay that is waived for disability pay under 38 U.S.C. § 5305.<sup>26</sup> Arguably, in doing so, Congress would bring uniformity to state courts charged with distributing military retirement benefits upon the dissolution of marriage. Congress also would do equity for former spouses who contributed during the marriage to the acquisition of those retirement benefits but who are deprived of the benefit of that contribution because the military spouse unilaterally opted to waive a portion of that contribution to obtain disability benefits for himself or herself. This Article proposes, however, that while the objectives of uniformity and equity must be accomplished, they need not be accomplished by an act of Congress. Instead, pursuant to the USFSPA, Congress has already sufficiently structured the federal payment scheme for military retirement funds to allow state courts to accomplish the equitable distribution of marital property through the respective state community property or equitable distribution schemes, while still accomplishing the objectives underlying the federal payment scheme. For Congress to act to remedy the inconsistency among state courts with respect to offsetting the waived portion of military retired pay, Congress necessarily would have to preempt state courts from *any* distribution of marital property of disabled military retirees. Such a remedy is neither equitable nor necessary to accomplish the objectives of the federal military retirement payment scheme. In fact,

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v. Panetta, 851 A.2d 720, 727-29 (N.J. Super. Ct. App. Div. 2004); *Eickelberger*, 638 N.E.2d at 134-35; *Cornbleth v. Cornbleth*, 580 A.2d 369, 371-73 (Pa. Super. Ct. 1990).

26. See, e.g., *Mansell v. Mansell*, 490 U.S. 581, 594 (1989); *McCarty v. McCarty*, 453 U.S. 210, 236 (1981); *Hisquierdo*, 439 U.S. at 575; see also Mary Elizabeth Hammerstrom, *Equitable Distribution of Military Pensions? Re-thinking the Uniformed Services Former Spouses Protection Act*, 9 LAW & INEQ. 315, 319 (1991) (suggesting that Congress amend the USFSPA "to authorize division of the gross amount of military pensions as marital property upon divorce").

As will be discussed in Part VII, there is much discrepancy over what is meant by "offsetting." There is clear consensus that offsetting by awarding a direct and calculable figure from non-distributable property is impermissible. See, e.g., *Webster*, 716 N.W.2d at 54. Courts disagree, however, as to whether offsetting by considering nondivisible property in a distribution award and indirectly awarding a proportionate amount of other marital property is permissible, or whether this is simply an empty distinction and the equivalent of awarding non-distributable property. See, e.g., *In re Marriage of Hillerman*, 167 Cal. Rptr. 240, 244 (Cal. Ct. App. 1980); *Crook*, 813 N.E.2d at 204-06; *Webster*, 716 N.W.2d at 56 (citing *Cox v. Cox*, 882 P.2d 909 (Alaska 1994)); *Wolff v. Wolff*, 929 P.2d 916, 921 (Nev. 1996); *English v. English*, 879 P.2d 802, 807-08 (N.M. Ct. App. 1994); *Olson*, 445 N.W.2d at 11; *In re Marriage of Swan*, 720 P.2d 747, 751 (Or. 1986); *Reymann*, 919 S.W.2d at 617.

such an act of Congress would contradict the very purpose for which it created the USFSPA.

Part II of this Article describes the posture of state courts distributing military retirement benefits prior to the USFSPA and prior to the United States Supreme Court's decision in *McCarty v. McCarty*.<sup>27</sup> In *McCarty*, the Court held that federal law preempted state law with respect to the distribution of federal military retirement benefits.<sup>28</sup> The *McCarty* Court based its decision on its earlier decision in *Hisquierdo*.<sup>29</sup> Thus, until 1981, state courts were free to distribute federal military retirement monies according to their respective state distribution schemes. After the *McCarty* decision, however, state courts were subject to federal law regarding such distributions. Part III describes the *McCarty* decision and its effect on state courts after 1981.

In 1982, in direct response to the *McCarty* decision, Congress enacted the USFSPA.<sup>30</sup> Under the USFSPA, Congress superseded the *McCarty* decision by expressly authorizing state courts to distribute disposable retired pay upon the dissolution of marriage.<sup>31</sup> The USFSPA and its effect on state court authority to distribute military retirement benefits is discussed in Part IV.

Despite Congress' authorization for state court authority under the USFSPA, state courts varied in their interpretations of the scope of their authority under the USFSPA. In 1989, the United States Supreme Court attempted to clarify the application of the USFSPA by holding in *Mansell v. Mansell*<sup>32</sup> that, under the USFSPA, the scope of state court authority to distribute military retirement pay is limited to disposable marital property, which does not include that portion of retired pay that is waived under 38 U.S.C. § 5305 to obtain disability benefits.<sup>33</sup> The Court held that portion of retired pay to be the separate property of the disabled military retiree.<sup>34</sup> The *Mansell* decision is discussed in Part V.

After 1989, as a result of the limitations placed upon state courts after the *Mansell* decision, some state courts distributing military retirement benefits began to offset with other disposable marital property that portion of military retired pay that was waived to receive disability benefits.<sup>35</sup> Other state courts, however, specifically provided that the Supremacy

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27. *McCarty*, 453 U.S. at 210.

28. *Id.* at 236.

29. *Cf. Hisquierdo*, 439 U.S. at 583-84, 588-90.

30. USFSPA, Pub. L. No. 97-252, 96 Stat. 730 (1982) (codified as amended at 10 U.S.C. § 1408 (Supp. IV 2004)).

31. 10 U.S.C. § 1408(a)(2)(C), (a)(4) (2000).

32. 490 U.S. 581 (1989).

33. *Id.* at 594-95.

34. *Id.*

35. *See supra* note 25.

Clause of the United States Constitution<sup>36</sup> and the anti-assignment clause within the USFSPA prohibited state courts from offsetting marital property in this way.<sup>37</sup> This discontinuity is described in Part VI.

State court inconsistency in offsetting military retired pay, as well as Social Security benefits, has come to the forefront of the application of state law. Historically, Congress has been called upon to resolve such inconsistencies.<sup>38</sup> However, this Article proposes that, although, on its face, the USFSPA opens the door to inequitable results for former spouses with respect to disability pay, Congress has already afforded state courts the authority to remedy this inequity through the application of the respective state property distribution schemes. In Part VII, this Article demonstrates why the application of state property distribution schemes to the division of military retired pay does not interfere with the objectives of the federal payment scheme.

This Article concludes that Congress need not act to provide uniformity among state courts regarding the distribution of military retired pay. Instead, state courts must act to offset with other marital property, through the application of their respective property distribution schemes, that portion of military retired pay that is waived for disability pay. For state courts to overlook this remedy and wait for Congress to amend the USFSPA to allow offsetting of disability benefits in the distribution of property upon divorce is to overlook the authority that Congress has already afforded state courts through the USFSPA.

## II. STATE LAW PRIOR TO THE USFSPA

Prior to 1981, state courts considering the distribution of military retired pay upon divorce were free to employ their own applicable property distribution schemes. Some state courts held that military retirement payments constituted present income by categorizing retired pay as salary that was paid monthly and earned by remaining a member of the armed forces subject to recall to active duty.<sup>39</sup> As such, retired pay was not con-

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36. U.S. CONST. art. VI, § 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority 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.").

37. See *supra* note 24.

38. *Mansell*, 490 U.S. at 594; *McCarty v. McCarty*, 453 U.S. 210, 236 (1981); *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 575 (1979); *In re Marriage of Crook*, 813 N.E.2d 198, 205-06 (Ill. 2004); see also *Hammerstrom*, *supra* note 26, at 319.

39. See *Watson v. Watson*, 424 F. Supp. 866, 868-70 (E.D.N.C. 1976); *Cose v. Cose*, 592 P.2d 1230, 1231-32 (Alaska 1979), *superseded by statute*, Uniformed Services Former Spouses' Protection Act, Pub. L. No. 97-252, 96 Stat. 730 (1982), *as recognized in Johnson v. Johnson*, 824 P.2d 1381, 1382-83 (Alaska 1992); *Fenney v. Fenney*, 537 S.W.2d 367, 367 (Ark. 1976); *In re Marriage of Ellis*, 538 P.2d 1347, 1349-50 (Colo. Ct. App. 1975), *aff'd*,

sidered marital property.<sup>40</sup> As a practical matter, however, most state courts generally held that, to the extent that such benefits were acquired during marriage, retired pay was an accrued property right earned by years of service on active duty, much like private pension benefits, and, therefore, constituted marital property that was subject to equitable distribution<sup>41</sup> or alimony.<sup>42</sup> Although some courts required that the retired

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552 P.2d 506 (Colo. 1976); *see also* French v. French, 112 P.2d 235, 236-37 (Cal. 1941) (holding that retainer pay compensation was for demands as member of the reserve, not a pension for services already performed, and therefore, nonvested pensions—as mere expectancies—were not community property subject to distribution upon divorce), *overruled by In re Marriage of Brown*, 544 P.2d 561, 562 (Cal. 1976). *Brown* disapproved of cases relying on *French* and held nonvested pension rights not as expectancies, but as contingent interests in property. *Brown*, 544 P.2d at 562-63. *Brown* held that the *French* rule “compels an inequitable division of rights acquired through community effort.” *Id.* at 562. The husband in *Brown* agreed that the rule in *French* was inequitable but argued that the court had discretion to offset that inequity with alimony. *Id.* at 567. The court said that a wife “should not be dependent on the discretion of the court . . . to provide her with the equivalent of what should be hers as a matter of absolute right.” *Id.* (omission in original) (quoting *In re Marriage of Peterson*, 115 Cal. Rptr. 184, 191 (Cal. Ct. App. 1974)).

40. *See Cose*, 592 P.2d at 1232; *Fenney*, 537 S.W.2d at 367; *Ellis*, 552 P.2d at 507.

41. *See Neal v. Neal*, 570 P.2d 758, 761 (Ariz. 1977) (holding that a military pension earned during marriage is divisible as marital property); *In re Marriage of Fithian*, 517 P.2d 449, 451 (1974) (finding that a military pension is divisible if vested during the marriage, even though it does not mature until later), *abrogated by Brown*, 544 P.2d at 562-63 (ruling that contingent pension interest, whether vested or not, is property interest); *Ramsey v. Ramsey*, 535 P.2d 53, 59 (Idaho 1975) (recognizing that military retired pay is divisible as community or separate property, depending upon whether the service upon which it was earned occurred before or during the marriage); *In re Marriage of Musser*, 388 N.E.2d 1289, 1291 (Ill. App. Ct. 1979); *Swope v. Mitchell*, 324 So. 2d 461, 464 (La. Ct. App. 1975) (affirming division of military retired pay as community property); *In re Marriage of Weaver*, 606 S.W.2d 243, 244 (Mo. Ct. App. 1980) (determining that military pensions are marital property subject to division upon dissolution); *In re Marriage of Miller*, 609 P.2d 1185, 1187 (Mont. 1980) (holding that military retired pay is divisible as marital property), *vacated and remanded sub nom. Miller v. Miller*, 453 U.S. 918 (1981) (remanding to Supreme Court of Montana for further consideration in light of intervening *McCarty* decision); *Kruger v. Kruger*, 375 A.2d 659, 663 (N.J. 1977); *LeClert v. LeClert*, 453 P.2d 755, 757 (N.M. 1969) (ruling that military pensions are divisible as community property); *Mora v. Mora*, 429 S.W.2d 660, 662 (Tex. Civ. App. 1968) (characterizing the portion of military retired pay earned during marriage as community property); *Kirkham v. Kirkham*, 335 S.W.2d 393, 394 (Tex. Civ. App. 1960); *Wilder v. Wilder*, 534 P.2d 1355, 1357 (Wash. 1975) (holding that nonvested pension is divisible); *Payne v. Payne*, 512 P.2d 736, 737-38 (Wash. 1973) (awarding the wife a portion of the husband’s military pension, which would not mature until one year after divorce decree); *Kinne v. Kinne*, 510 P.2d 814, 817 (Wash. 1973) (upholding property settlement agreement providing for monthly payments from husband’s military pension); *Edwards v. Edwards*, 444 P.2d 703, 704 (Wash. 1968); *Morris v. Morris*, 419 P.2d 129, 130-31 (Wash. 1966) (finding that military pension is an asset acquired during coverture); *DeRevere v. DeRevere*, 491 P.2d 249, 252 (Wash. Ct. App. 1971) (holding that the husband’s contingent right to nonmatured pension should be considered in making property division).

42. *See, e.g., Kabaci v. Kabaci*, 373 So. 2d 1144, 1146-47 (Ala. Civ. App. 1979) (allowing military retirement benefits to be considered as a source from which to pay periodic

pay be vested,<sup>43</sup> most courts held that even nonvested pensions were marital property.<sup>44</sup>

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alimony but not alimony in gross or property settlement), *overruled by Ex parte Vaughn*, 634 So. 2d 533 (Ala. 1993) (holding that disposable military retirement benefits accumulated during marriage are divisible as marital property); *Andrews v. Andrews*, 543 N.E.2d 31, 32 (Mass. App. Ct. 1989) (affirming alimony award from military retired pay, and noting that it could have awarded the retired pay as property); *Powers v. Powers*, 465 So. 2d 1036, 1036-37 (Miss. 1985) (affirming award of permanent alimony equal to half of the husband's military pension); *Roach v. Roach*, 432 P.2d 579, 581 (Wash. 1967) (determining that federal military pension is income resource to be considered in fixing alimony).

43. See *French*, 112 P.2d at 236-37 (requiring certainty of receipt to be community property); *Williamson v. Williamson*, 21 Cal. Rptr. 164, 167 (Cal. Ct. App. 1962) (requiring certainty of receipt to be community property); *Davis v. Davis*, 495 S.W.2d 607, 613-14 (Tex. Civ. App. 1973) (denying the wife an interest in the husband's Air Force pension rights because they had not yet vested); *Miser v. Miser*, 475 S.W.2d 597, 597, 600 (Tex. Civ. App. 1971) (holding that an enlisted man serving eighteen years had vested pension right that he was not eligible to receive until after twenty years).

Although courts would remain split on the issue of vesting, see *infra* note 45, some courts after 1981 held that nonvested interests were not marital property. See, e.g., *Burns v. Burns*, 847 S.W.2d 23, 26 (Ark. 1993) (determining that nonvested property is not divisible because it lacks "cash surrender value, loan value, redemption value, lump sum value, and value realizable after death"); *Durham v. Durham*, 708 S.W.2d 618, 619 (Ark. 1986) (holding that military retired pay is not divisible as marital property when military member had not served at least twenty years at the time of the divorce because the pension was not yet vested); *Balderson v. Balderson*, 896 P.2d 956, 960 (Idaho 1995) (noting that there is no authority in USFSPA to award benefits before retirement); *Griggs v. Griggs*, 686 P.2d 68, 72 (Idaho 1984) (concluding that property accrued during marriage is marital property; property awarded after divorce is separate property); *Kirkman v. Kirkman*, 555 N.E.2d 1293, 1294 (Ind. 1990) (excluding nonvested national guard pension from marital property); *Messenger v. Messenger*, 827 P.2d 865, 867, 873-74 (Okla. 1992) (finding that only a vested pension at the time of divorce is divisible).

44. See *Van Loan v. Van Loan*, 569 P.2d 214, 216 (Ariz. 1977) (holding that nonvested military pension earned during marriage is divisible as marital property); *Brown*, 544 P.2d at 562-63 (finding that pension interest is divisible community property, overruling, on this point, *Fithian*, 517 P.2d at 457, which had held that military pension must vest during the marriage to be divisible).

Many courts after 1981 would also hold that nonvested interests are marital property. See, e.g., *Laing v. Laing*, 741 P.2d 649, 656 (Alaska 1987) (holding that nonvested retirement benefits are divisible upon divorce); *In re Marriage of Gallo*, 752 P.2d 47, 54 (Colo. 1988) (overruling *Ellis v. Ellis*, 552 P.2d 506, 507 (Colo. 1976), which had held that retired pay is not marital property or subject to division); *In re Marriage of Jacobson*, 207 Cal. Rptr. 512, 517 (Cal. Ct. App. 1984) (stating that "entitlement" does not mean actual receipt; rather, it means eligibility); *In re Marriage of Riley-Cunningham*, 7 P.3d 992, 994 (Colo. Ct. App. 1999) (noting that nonvested interest is marital property); *In re Marriage of Beckman*, 800 P.2d 1376, 1378-79 (Colo. Ct. App. 1990) (finding that both vested and nonvested military pensions are divisible as marital property); *Memmolò v. Memmolò*, 576 A.2d 181, 182 (Del. 1990) (concluding that pensions that accrue during marriage, whether vested or not at the time of divorce, are marital property); *Barbour v. Barbour*, 464 A.2d 915, 919 (D.C. 1983) (suggesting, in dicta, that nonvested pensions are divisible as marital property); *In re Marriage of Korper*, 475 N.E.2d 1333, 1336 (Ill. App. Ct. 1985) (finding that pension is marital property, even if it is not vested); *Poe v. Poe*, 711 S.W.2d 849, 855 (Ky. Ct. App. 1986) (determining that nonvested military retirement benefits are marital

In 1979, an important parallel to the law regarding military retirement benefits was the United States Supreme Court's decision in *Hisquierdo*, in which the Court considered state court authority to distribute benefits received under the Federal Railroad Retirement Act of 1974.<sup>45</sup> In *His-*

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property); *Little v. Little*, 513 So. 2d 464, 469-70 (La. Ct. App. 1987) (holding that nonvested and nonmatured military retired pay is marital property); *Ohm v. Ohm*, 431 A.2d 1371, 1375 (Md. Ct. Spec. App. 1981) (ruling that nonvested pensions are divisible); *Janssen v. Janssen*, 331 N.W.2d 752, 754-56 (Minn. 1983) (holding that nonvested pensions are divisible); *Fairchild v. Fairchild*, 747 S.W.2d 641, 643 (Mo. Ct. App. 1988) (determining that nonvested and nonmatured military retired pay are marital property); *Taylor v. Taylor*, 348 N.W.2d 887, 890 (Neb. 1984) (holding that nondisability military retired pay is divisible); *Forrest v. Forrest*, 668 P.2d 275, 279 (Neb. 1983) (concluding that all retirement benefits—whether vested and matured or not—are divisible marital property); *Whitfield v. Whitfield*, 535 A.2d 986, 991-92 (N.J. Super. Ct. App. Div. 1987) (finding that nonvested military retired pay is marital property); *Damiano v. Damiano*, 463 N.Y.S.2d 477, 481 (App. Div. 1983) (dividing nonvested pension); *Delorey v. Delorey*, 357 N.W.2d 488, 490 (N.D. 1984) (recognizing that nonvested property is marital); *Bullock v. Bullock*, 354 N.W.2d 904, 910 (N.D. 1984) (holding that nonvested military pension is divisible as marital property); *Lemon v. Lemon*, 537 N.E.2d 246, 249 (Ohio Ct. App. 1988) (ruling that nonvested pensions are divisible as marital property); *In re Marriage of Richardson*, 769 P.2d 179, 184 (Or. 1989) (finding that nonvested pension plans are marital property); *Major v. Major*, 518 A.2d 1267, 1270 (Pa. Super. Ct. 1986) (concluding that nonvested military retired pay is marital property); *Tiffault v. Tiffault*, 401 S.E.2d 157, 158 (S.C. 1991) (overruling *Brown v. Brown*, 302 S.E.2d 860, 861 (1983), and finding that vested retired pay is marital as compensation for past services as joint investment by both parties); *Ball v. Ball*, 430 S.E.2d 533, 535 (S.C. Ct. App. 1993) (holding that nonvested military retirement benefits are subject to equitable distribution); *Caughron v. Caughron*, 418 N.W.2d 791, 793 (S.D. 1988) (determining that present cash value of nonvested retirement benefit is marital property); *Towner v. Towner*, 858 S.W.2d 888, 891-92 (Tenn. 1993) (approving separation agreement dividing nonvested pension as marital property); *Kendrick v. Kendrick*, 902 S.W.2d 918, 926 (Tenn. Ct. App. 1994) (stating that nonvested military pension should be valued and distributed using same principles as other public and private pensions, except for limitations of USFSPA); *Wilder v. Wilder*, 534 P.2d 1355, 1357-58 (Wash. 1975) (holding nonvested pension to be divisible); *DeRevere*, 491 P.2d at 252 (determining that nonvested retirement plan constitutes “property” divisible by court); *Butcher v. Butcher*, 357 S.E.2d 226, 230-31 (W. Va. 1987) (recognizing that vested and nonvested military retired pay are both subject to equitable distribution); *Parker v. Parker*, 750 P.2d 1313, 1314-15 (Wyo. 1988) (finding that nonvested military retired pay is marital property).

45. *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 581 (1979). In *Hisquierdo*, the husband and wife were married for fourteen years before separating. *Id.* at 577. During the marriage, the husband worked for thirty years at various positions in the railroad industry and was entitled to receive Railroad Retirement benefits. *Id.* at 578. The relevant portion of the husband's Railroad Retirement benefits corresponded to what the husband would have received if covered by the Social Security Act. *Id.* at 574-75. The wife, who also worked during the marriage, was entitled to receive Social Security benefits. *Id.* at 579. Although both parties agreed that the wife's expectation of Social Security benefits was not divisible as community property, the wife claimed, under California law, an equal marital interest in the husband's Railroad Retirement benefits. *Id.* at 578. The trial court divided the parties' marital property but excluded from the divisible community property the husband's expectation of receiving Railroad Retirement benefits. *Id.* at 572. The Supreme Court of California reversed, holding that, because the benefits flowed from

*quierdo*, the California Court of Appeal held that Congress had the power to determine the characterization of federal pension benefits and that, under the Federal Railroad Retirement Act, pension benefits were the separate property of the retiree.<sup>46</sup> Thus, a spouse had no community property interest in railroad pension benefits upon divorce. There were two bases for this holding. First, 45 U.S.C. § 231d(c)(3) provided that, upon divorce, only the retiree held an interest in the pension benefits; any interest of an employee's spouse in that property terminated upon divorce.<sup>47</sup> The court in *Hisquierdo* reasoned that, in providing for the distribution of benefits, Congress fixed an amount that it believed was appropriate to support the retiree in his or her old age and to encourage the employee to retire.<sup>48</sup> Any diminution of that interest by a former spouse upon divorce would interfere with the scheme that Congress had constructed under the Act.

Second, 45 U.S.C. § 231m, which prohibited the attachment and anticipation of benefits, assured that the retiree actually received the benefits to which he or she was entitled, without subjecting the benefits to garnishment from other legal processes.<sup>49</sup> Accordingly, benefits received under the Act were the personal entitlement of the retiree, alone.<sup>50</sup>

The Supreme Court of California reversed the court of appeal, however, by holding that the benefits derived from the Railroad Retirement Act flowed from the marriage and, thus, were community property.<sup>51</sup> The court held that, by terminating a spouse's interest in benefits upon divorce under § 231d(c)(3), Congress intended that those rights would then be secured by state courts through the application of respective state property distribution schemes.<sup>52</sup> Further, the court held that, by awarding compensatory property or offsetting with other marital property, it "could avoid any infringement on the Act's designation of [the retiree] as the 'individual' recipient."<sup>53</sup>

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employment during the marriage, the benefits were community property and, thus, were divisible upon divorce. *Id.* at 580 (citing *In re Hisquierdo*, 566 P.2d 224 (Cal. 1977)).

46. *Id.* at 579.

47. *Id.* at 584-85; see 45 U.S.C. § 231d(c)(3) (1976) ("The entitlement of a spouse of an individual to an annuity . . . shall end on the last day of the month preceding the month in which . . . the spouse and the individual are absolutely divorced . . .").

48. *Hisquierdo*, 439 U.S. at 585.

49. *Id.* at 583-84. The Court analogized the Railroad Retirement Act and the Social Security Act and determined that, like 42 U.S.C. § 659(i)(3)(B)(ii) (enacted under the Social Security Act), the Railroad Retirement Act provided a flat prohibition against the attachment of benefits in other proceedings. *Id.* at 585-87.

50. *Id.* at 583.

51. *Id.* at 580.

52. *Id.*

53. *Id.* at 581. By offsetting with other property, the retiree still received all of the retirement benefits to which he or she was entitled.

However, the United States Supreme Court reversed the California Supreme Court and held that benefits payable under the Railroad Retirement Act may not be divided under state community property laws.<sup>54</sup> The Court determined that preempting state law in the context of Railroad Retirement benefits “prevent[ed] the vagaries of state law from disrupting the national scheme, and guarantee[d] a national uniformity that enhance[d] the effectiveness of congressional policy.”<sup>55</sup> In rejecting the wife’s argument that depriving her of the division of property to which she contributed during the marriage was “manifestly unjust,” the Court held that the wife’s argument was “a child of equity, not of law.”<sup>56</sup> Alternatively, therefore, the wife claimed that the state court could compensate for her nondistributable interest in the husband’s benefits with other property available for distribution, but the Court further held that state courts may not award an offset for the expected value of the wife’s interest in the benefits.<sup>57</sup> In rejecting the wife’s argument that offsetting Railroad Retirement benefits would provide equity without interfering with the federal benefit scheme, the Court stated that:

An offsetting award . . . would upset the statutory balance and impair [the ex-spouse’s] economic security just as surely as would a regular deduction from his benefit check. The harm might well be greater. [The Railroad Retirement Act] provides that payments are not to be “anticipated.” . . . [A] prohibition against anticipation is commonly understood to mean that “the interest of a sole beneficiary shall not be paid to him before a certain date.” . . . If that definition is applied here, then the offsetting award . . . would improperly anticipate payment by allowing her to receive her interest before the date Congress has set for any interest to accrue.<sup>58</sup>

The Court further held that offsetting “would frustrate the explicit and detailed terms of the Act that grant the employee a benefit separate and

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54. *Id.* at 591. The Court recognized, however, that such benefits were distributable to satisfy alimony and child support awards. *Id.* at 586-87.

55. *Id.* at 584.

56. *Id.* at 586.

57. *Id.* at 588. *But see In re Marriage of Milhan*, 528 P.2d 1145, 1146-47 (Cal. 1974) (allowing state court to offset with other property a spouse’s interest in National Service Life Insurance policy determined to be separate property since offset did not interfere with federal objective of affording military spouse the absolute right to select beneficiary or beneficiary’s right to retain all proceeds from policy).

58. *Hisquierdo*, 439 U.S. at 588-89. Significantly, in August 2006, Congress enacted the Pension Protection Act of 2006, which expanded the marital property entitlement of former spouses derived under the Act. *See infra* notes 280-86 and accompanying text. An offset approach to military retirement benefits is consistent with this expansive view of the marital interest of former spouses in pension and retirement benefits.

distinct from the nonemployee spouse's benefit that terminates upon absolute divorce."<sup>59</sup> However, the Court added:

The approach must be practical. The federal nature of the benefits does not by itself proscribe the entire field of state control. . . . The pertinent questions are whether the right as asserted conflicts with the express terms of federal law and whether its consequences sufficiently injure the objectives of the federal program to require nonrecognition.<sup>60</sup>

With respect to Railroad Retirement benefits, the Court in *Hisquierdo* held that, by either directly distributing or offsetting benefits, state courts *did* sufficiently injure federal objectives. Accordingly, federal law preempted state law in this context.<sup>61</sup> With respect to military retirement benefits, however, the *Hisquierdo* decision stood simply as a parallel context.<sup>62</sup> Despite *Hisquierdo*, many state courts held that military benefits were community property and that Congress intended to rely on traditional state property distribution schemes to distribute such property.<sup>63</sup> Therefore, prior to 1981, federal law did not preempt state laws that permitted the distribution of property interests in military retired pay.<sup>64</sup>

### III. *MCCARTY V. MCCARTY*

Until 1981, state courts considering the distribution of military retirement benefits were free to apply their respective statutory schemes for the distribution of marital property upon the dissolution of marriage. However, in 1981, the United States Supreme Court decided *McCarty v. McCarty*.<sup>65</sup> In *McCarty*, the Court relied on its decision in *Hisquierdo* and held that the federal military retirement pay scheme at the time preempted state community property laws and that, therefore, the Supremacy Clause of the United States Constitution prohibited state courts from distributing military retired pay upon the dissolution of marriage.<sup>66</sup>

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59. *Hisquierdo*, 439 U.S. at 579-80.

60. *Id.* at 583.

61. *Id.* at 582. Subsequently, state courts considering the characterization and distribution of Social Security benefits would rely on *Hisquierdo*, which drew parallels between the Railroad Retirement Act and the Social Security Act. See *supra* note 49.

62. See *Milhan*, 528 P.2d at 1147. Federal law preempts state law in this area of the law only when state law application interferes with the specific objectives of individual federal statutes. *Id.* Thus, the federal nature of military retired pay does not necessarily prohibit state courts from characterizing it as marital property or from applying state law to equitably distribute marital property; state law is only preempted if the application of state law frustrates federal objectives. *Id.* at 1146-47.

63. See, e.g., *In re Marriage of Fithian*, 517 P.2d 449, 451, 453 (Cal. 1974).

64. See *In re Marriage of Miller*, 609 P.2d 1185, 1187 (Mont. 1980) (holding that military retired pay is divisible as marital property), *vacated and remanded sub nom.* *Miller v. Miller*, 453 U.S. 918 (1981); see also *Czarnecki v. Czarnecki*, 600 P.2d 1098 (Ariz. 1979).

65. 453 U.S. 210 (1981).

66. *Id.* at 218-21.

In *McCarty*, Richard John McCarty and Patricia Ann McCarty were married in 1957.<sup>67</sup> After two years of marriage, the husband began active duty in the United States Army.<sup>68</sup> In December 1976, the husband filed for divorce.<sup>69</sup> By that time, the husband had obtained the rank of colonel and had served eighteen of the twenty years required to obtain retired pay.<sup>70</sup> In California—a community property state—the wife was entitled to one half of all property earned by either spouse during the marriage.<sup>71</sup> The wife claimed that the husband’s military retired pay was part of the marital property in which she had an interest; the husband claimed that his retired pay was his separate property.<sup>72</sup>

In November 1977, the Superior Court of California included the husband’s military pension and retirement rights as part of the quasi-community property in which the wife held an interest and awarded her approximately 45% of her proportionate share of that interest.<sup>73</sup> The husband sought review of this award.<sup>74</sup> Distinguishing the United States Supreme Court’s decision in *Hisquierdo*,<sup>75</sup> and instead relying on the Supreme Court of California’s decision in *In re Marriage of Fithian*, in which the court held that the application of California community property law did not interfere in any way with the federal military retired pay scheme,<sup>76</sup> the California Court of Appeal held that the Supremacy Clause of the United States Constitution did not preclude the court from distributing the husband’s military retired pay, and, therefore, affirmed the Superior Court’s award to the wife.<sup>77</sup> The husband appealed to the United States Supreme Court.<sup>78</sup>

The question for the United States Supreme Court in *McCarty* was whether federal law prohibited “a state court from dividing military non-disability retired pay pursuant to state community property laws.”<sup>79</sup> Rec-

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67. *Id.* at 216.

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.* at 217 (citing *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 577-78 (1979)).

72. *Id.*

73. *Id.* at 218. Because the husband’s pension had not yet vested at the time he filed for divorce, the wife was awarded

“that portion of [the husband’s] total monthly pension or retirement payment which equals one-half (1/2) of the ratio of the total time between marriage and separation during which [the husband] was in the United States Army to the total number of years he has served with the . . . Army at the time of retirement.”

*Id.* (omission in original) (quoting the Superior Court’s decision in *McCarty*).

74. *Id.*

75. *Hisquierdo*, 439 U.S. at 572.

76. *In re Marriage of Fithian*, 517 P.2d 449, 453 (Cal. 1974).

77. *McCarty*, 453 U.S. at 218.

78. *Id.* at 219 n.12.

79. *Id.* at 211.

ognizing that domestic relations issues historically are left to state courts, the Court nevertheless held that federal law at the time preempted state law and that the Supremacy Clause prohibited state courts from distributing military retired pay pursuant to their respective statutory distribution schemes.<sup>80</sup> There were several bases by which the *McCarty* Court reached this decision. First, the Court compared the language and history of the military retirement scheme to the language and history of several other federal benefit schemes, namely the Retired Serviceman's Family Protection Plan (RSFPP)<sup>81</sup> and the Survivor Benefit Plan (SBP).<sup>82</sup> Second, the Court compared the limitations of the military retirement scheme to the broader scope of the Social Security Act,<sup>83</sup> the Civil Service Retirement Act (CSRA),<sup>84</sup> and the Foreign Service Act (FSA).<sup>85</sup> Third, the Court relied on its previous decision in *Hisquierdo* to analogize the military retirement payment scheme to the payment scheme employed under the Railroad Retirement Act.<sup>86</sup> Finally, notwithstanding these reasons, the Court in *McCarty* held that allowing state courts to distribute federal military retirement benefits severely damaged the application of the military retirement payment scheme; therefore, federal law preempted state law and, under the Supremacy Clause of the United States Constitution, state courts could not distribute federal retirement benefits under their respective property distribution schemes.<sup>87</sup>

### 1. *The Retired Serviceman's Family Protection Plan and the Survivor Benefit Plan*

In *McCarty*, the Court compared the military retirement payment scheme to the payment schemes under the RSFPP and the SBP. For example, the RSFPP, established in 1953, allowed for the military member to elect "to reduce his or her retired pay . . . to provide [at death] an annuity for the surviving spouse or children."<sup>88</sup> Participation in the plan was

80. *Id.* at 220, 232-35.

81. *See id.* at 226. *See generally* Uniformed Services Contingency Option Act of 1953, Pub. L. No. 239, 67 Stat. 501 (codified as amended at 10 U.S.C. §§ 1431-46 (2000)).

82. *See McCarty*, 453 U.S. at 226. *See generally* Act of Sept. 21, 1972, Pub. L. No. 92-425, 86 Stat. 706 (1972) (codified as amended at 10 U.S.C. §§ 1447-55 (2000)).

83. *See McCarty*, 453 U.S. at 230. *See generally* Tax Reduction and Simplification Act of 1977, Pub. L. No. 95-30, § 501(d), 91 Stat. 126, 159-61 (repealed 1996); Social Services Amendments of 1974, Pub. L. No. 93-647, § 101(a), 88 Stat. 2337, 2351-58 (1975) (codified as amended at 42 U.S.C. §§ 659 (2000)).

84. *See McCarty*, 453 U.S. at 230-32. *See generally* Act of Sept. 15, 1978, Pub. L. No. 95-366, § 1(a), 92 Stat. 600, 600 (codified as amended at 5 U.S.C. § 8345(j)(1) (2000)).

85. *See McCarty*, 453 U.S. at 230-32. *See generally* Foreign Service Act of 1980, Pub. L. No. 96-465, § 814, 94 Stat. 2071, 2113-16 (codified as amended at 22 U.S.C. § 4054 (2000)).

86. *See McCarty*, 453 U.S. at 226. *See generally* 5 U.S.C. § 231-231v (2000).

87. *See McCarty*, 453 U.S. at 234-36.

88. *McCarty*, 453 U.S. at 226; *see* 10 U.S.C. § 1434(a) (2000).

voluntary, and any beneficiary election under the plan could be revoked “to reflect a change in the marital or dependency status of the member or his family that [was] caused by death, divorce, annulment, remarriage, or acquisition of a child.”<sup>89</sup> Furthermore, “deductions from [the service person’s] retired pay automatically cease[d] upon the death or divorce of the service [person’s] spouse.”<sup>90</sup> Thus, the *McCarty* Court reasoned that Congress intended the benefits paid under the RSFPP to be personal to the service person and not subject to any interest of a spouse that was not authorized by the service person.<sup>91</sup>

Similarly, under the SBP, service members could provide, at death, an annuity for spouses and children.<sup>92</sup> Under the SBP, although annuity payments did not automatically cease upon divorce, the benefits under the plan were “not assignable or subject to execution, levy, attachment, garnishment, or other legal process.”<sup>93</sup> Furthermore, under both the RSFPP and the SBP, the service member was free to elect no annuity for a spouse and to retain all retired pay for himself or herself, or to elect an annuity only for his or her children and not his or her spouse.<sup>94</sup> The *McCarty* Court reasoned that, if Congress intended retired pay to be treated as community property, it would not have provided for a service member to “deprive the spouse of his or her interest in the property” in this manner.<sup>95</sup> Instead, Congress intended that the decision to leave an annuity be solely the decision of the service member.<sup>96</sup> Thus, it seemed clear that Congress intended benefits under the plans to be retained as the personal entitlement of the service person and not subject to the interest of a spouse. The Court analogized Congress’ intent here to the context of military retired pay and determined that Congress intended military retired pay to be a personal entitlement of the military member as well.<sup>97</sup>

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89. 10 U.S.C. § 1431.

90. *McCarty*, 453 U.S. at 215; *see* 10 U.S.C. § 1434(c).

91. *See McCarty*, 453 U.S. at 226-27.

92. *See id.* at 226. The RSFPP provided for annuities that were financed by the service person through significant reductions from retired pay, and, thus, “only about 15% of eligible military retirees participated in the plan.” *Id.* at 215. “Participation in [the SBP was] automatic unless the service member” opted out, and the government made contributions to the annuities; thus, the SBP was “less expensive for the service member” and generated greater participation than the RSFPP. *Id.* at 215-16.

93. 10 U.S.C. § 1450(i). The RSFPP includes this same restrictive language. *See* 10 U.S.C. § 1440 (indicating that annuities are not subject to legal process).

94. *See* 10 U.S.C. § 1434 (RSFPP); 10 U.S.C. § 1450 (1976) (SBP).

95. *McCarty*, 453 U.S. at 226.

96. *Id.* at 227 & n.20.

97. *Id.* at 226-27.

2. *The Social Security Act, the Civil Service Retirement Act, and the Foreign Service Act*

The *McCarty* Court further reasoned that state court distribution of military retired pay was contrary to federal law at the time because of the anti-assignment provisions respecting military retired pay.<sup>98</sup> “Congress intended that military [retirement benefits] ‘actually reach the beneficiary.’”<sup>99</sup> The *McCarty* Court explained that, “[i]n enacting the SBP, Congress [had] rejected [proposed] provision[s] . . . allow[ing] attachment of up to 50% of military retired pay to comply with a court order in favor of a spouse, former spouse, or child.”<sup>100</sup> Subsequently, however, in 1975, Congress amended the Social Security Act to provide that all federal benefits, including military retired pay, may be subject to legal process to enforce child support or alimony obligations.<sup>101</sup> In 1977, Congress restricted the definition of “alimony” pursuant to 42 U.S.C. § 659(a) by excluding from the term “any payment or transfer of property . . . in compliance with any community property settlement, equitable distribution of property, or other division of property between spouses or former spouses.”<sup>102</sup> Thus, in an important distinction, Congress allowed for garnishment of retired pay for the support of the family’s needs, but not for the settlement of property distribution claims.<sup>103</sup> Indeed, Congress *had* allowed for other retirement benefits to be subject to property distribution awards, but chose not to do so in this context. For example, Congress had required that Civil Service Retirement benefits be paid to an ex-spouse according to “the terms of any court order or court-approved property settlement agreement incident to any court decree of divorce, annulment, or legal separation.”<sup>104</sup> Additionally, under the Foreign Service Act, Congress provided that, as a matter of federal law, a former spouse may be “entitled to a pro rata share of up to 50% of [a service member’s Foreign Service] retirement benefits.”<sup>105</sup> Thus, under these

98. See *id.* at 228-29 & n.2 (referring to 37 U.S.C. § 701(c) (1976)).

99. *Id.* at 228 (quoting *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 584 (1979)).

100. *Id.* at 228-29.

101. See Social Services Amendments of 1974, Pub. L. No. 93-647, § 101(a), 88 Stat. 2337, 2351-58 (codified as amended at 42 U.S.C. § 659 (2000)); see also *Rose v. Rose*, 481 U.S. 619 (1987) (upholding the Tennessee court’s authority over a military veteran for failure to pay alimony and child support when disability pay was the only form of income derived from retirement, finding that VA benefits were intended to take care of not just the veteran; thus, a state court order to pay child support from disability benefits was not preempted by federal law).

102. Tax Reduction and Simplification Act of 1977, Pub. L. No. 95-30, § 501(d), 91 Stat. 126, 159-61 (repealed 1996).

103. *McCarty*, 453 U.S. at 230-32 (relying on *Hisquierdo*, 439 U.S. at 587).

104. See Act of Sept. 15, 1978, Pub. L. No. 95-366, § 1(a), 92 Stat. 600, 600 (codified as amended at 5 U.S.C. § 8345(j)(1) (2000)).

105. *McCarty*, 453 U.S. at 230-31. See generally Foreign Service Act of 1980, Pub. L. No. 96-465, § 814, 94 Stat. 2071, 2113-16 (codified as amended at 22 U.S.C. § 4054 (2000)).

programs, Congress had provided for state court authority over Civil Service Retirement benefits and limited federal recognition of Foreign Service benefits as community property. The *McCarty* Court reasoned, however, that with respect to federal military retirement benefits, Congress had enacted no such legislation.<sup>106</sup> Instead, Congress continued to view military retired pay as the personal entitlement of the service member.<sup>107</sup>

### 3. *The Railroad Retirement Act and Hisquierdo*

In *Hisquierdo*, the United States Supreme Court held that benefits under the Federal Railroad Retirement Act of 1974 could not be distributed as marital property or offset under state community property laws.<sup>108</sup> In considering *Hisquierdo*, the *McCarty* Court first recognized that, in *Hisquierdo*, the Railroad Retirement Act “included provisions establishing ‘a specified beneficiary protected by a flat prohibition against attachment and anticipation,’ and a limited [recognition of] community property . . . that terminated upon divorce.”<sup>109</sup> The wife in *McCarty* argued that there were no such provisions in the military retirement context, and, thus, *Hisquierdo* was inapposite.<sup>110</sup> But the *McCarty* Court relied on its further holding in *Hisquierdo* that, while domestic relations issues historically are governed by state law, federal law will preempt state law if the application of state law creates “major damage” to “clear and substantial” federal interests.<sup>111</sup> The *Hisquierdo* Court determined that application of California’s community property laws with respect to Railroad Retirement benefits created such damage to federal interests.<sup>112</sup> In assessing whether subjecting military retired pay to state distribution provisions sufficiently violated the federal retirement scheme, the *McCarty* Court relied on its previous decision in *Hisquierdo*.

In *McCarty*, the husband argued that application of California’s community property laws to federal military retirement benefits frustrated the federal military retirement benefit scheme for two reasons. First, he argued that California’s community property laws recognized military retired pay as “deferred compensation for services performed during the marriage,” whereas federal law treated “military retired pay . . . [as] current compensation for reduced, but currently rendered services [in re-

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106. *McCarty*, 453 U.S. at 231-32.

107. *See id.*

108. *See Hisquierdo*, 439 U.S. at 587-90.

109. *McCarty*, 453 U.S. at 220 (quoting *Hisquierdo*, 439 U.S. at 582-85). Both of these concepts have since been rejected by the enactment of the Pension Protection Act of 2006. *See infra* notes 280-86 and accompanying text.

110. *McCarty*, 453 U.S. at 220.

111. *See id.* at 220; *Hisquierdo*, 439 U.S. at 581.

112. *Hisquierdo*, 439 U.S. at 590.

irement] earned after the dissolution of the marital community.”<sup>113</sup> Thus, he argued that, under the federal payment scheme, military retired pay must be characterized as separate property.<sup>114</sup> However, the *McCarty* Court declined to decide that specific issue because it held that, regardless of how federal military retired pay was characterized, application of state law concepts frustrated the federal military retirement scheme.<sup>115</sup> First, it held that, unlike the Railroad Retirement Act considered in *Hisquierdo*, the federal military retirement scheme did not entitle a spouse “to a separate annuity that terminated upon divorce” and, therefore, did not employ any sort of community property concept to military retired pay.<sup>116</sup> Instead, it viewed retired pay purely as a personal entitlement of the service member.<sup>117</sup> The Court found support for this in the fact that “the service member may designate a beneficiary to receive any unpaid arrearages in retired pay upon his [or her] death,”<sup>118</sup> and the designated beneficiary may be someone other than the service member’s spouse.<sup>119</sup> Further, the Court recognized that the federal statute expressly provided that “[a] payment under this section bars recovery by any other person of the amount paid.”<sup>120</sup> Significantly, the Court held that “[i]f retired pay were community property, the retiree could not thus summarily deprive his wife of her interest in the arrearage.”<sup>121</sup> Thus, because the Court accepted the view that military retirement benefits were not marital property but were the personal entitlement of the service member,

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113. *McCarty*, 453 U.S. at 221. Reduced services in retirement refers to the fact that retired officers remain members of the Armed Services

who may wear its uniform, whose names shall be borne upon its register, who may be assigned by their superior officers to specified duties by detail as other officers are, who are subject to the rules and articles of war, and may be tried, not by a jury, as other citizens are, but by a military court-martial, for any breach of those rules, and who may finally be dismissed on such trial from the service in disgrace.

*Id.* at 221-22 n.13 (quoting *United States v. Tyler*, 105 U.S. 244, 246 (1881)). The *McCarty* Court further recognized that retired officers continue to be subject to the Uniform Code of Military Justice, may forfeit all or part of their retired pay by engaging in certain enumerated activities, and remain subject to recall to active duty at any time. *Id.* at 221-22 nn.13-14.

114. *Id.* at 221.

115. *Id.* at 223.

116. *Id.* at 224.

117. *Id.*

118. *Id.* (citing 10 U.S.C. § 2771 (1976)).

119. *Id.* at 224-25.

120. *Id.* at 225 (alteration in original) (quoting 10 U.S.C. § 2771(d)).

121. *Id.* at 226 (quoting B. Abbott Goldberg, *Is Armed Services Retired Pay Really Community Property?*, 48 CAL. B. J. 12, 17 (1973)). This observation is significant because subsequently, the Court would hold that military retired pay *is* marital property; thus, even under the reasoning of *McCarty* and *Hisquierdo*, a military spouse could not deprive the spouse of his or her interest in that property.

state law that viewed the benefits as divisible community property directly conflicted with the federal payment scheme.

In addition to this conflict, the Court held that the application of state law concepts to federal military retirement benefits was sufficiently injurious to the objectives of the federal program to be preempted.<sup>122</sup> In so holding, the Court recognized two primary objectives of the federal military retirement payment scheme: “to provide for the retired service member, and to meet the personnel management needs of the active military forces.”<sup>123</sup>

With respect to the first objective, the Court held that state community property laws would reduce the amount of retired pay that Congress afforded solely to the retired member, and if a service member were subject to a reduction in retired pay, this “may disrupt the carefully balanced scheme Congress ha[d] devised to encourage a service member to set aside a portion of his or her retired pay as an annuity for a surviving spouse or dependent children.”<sup>124</sup>

Second, the Court held that the application of state law concepts disrupted military personnel management.<sup>125</sup> The Court recognized that “the military retirement system is designed to serve as an inducement for enlistment and re-enlistment, to create an orderly career path, and to ensure ‘youthful and vigorous’ military forces.”<sup>126</sup> The Court’s concern was that military personnel, unlike civilian beneficiaries, are not free to select their state of residence.<sup>127</sup> “The value of retired pay as an inducement for enlistment or re-enlistment is obviously diminished to the extent that the service member recognizes that he or she may be involuntarily transferred to a State that will divide that pay upon divorce.”<sup>128</sup> Thus, a lack of uniformity among the states was a factor in the Court’s reasoning. Furthermore, the Court was concerned that, by reducing the retired pay available to the service member, community property laws not only discouraged retirement but offered an incentive for the aging service member to continue serving on active duty, thereby frustrating the federal objective of maintaining a “youthful and vigorous” military.<sup>129</sup>

Thus, the Court held that, because the application of state community property laws sufficiently frustrated federal interests and objectives, the Supremacy Clause required that federal law preempt state law and prohibited state courts from treating retired pay as distributable marital

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122. *Id.* at 232.

123. *Id.* at 232-33.

124. *Id.* at 233.

125. *Id.* at 234.

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*

property.<sup>130</sup> What was significant, however, was that the Court held that it was not necessarily unconstitutional to allow for state law to apply, but simply that federal law at the time did not allow for it. In fact, the *McCarty* Court expressed its concern as to the effectiveness of the federal payment scheme in accomplishing these specific objectives.<sup>131</sup> The Court stated: "Of course, the questions whether the retirement system should be amended so as better to accomplish its personnel management goals, and whether those goals should be subordinated to the protection of the service member's ex-spouse, are policy issues for Congress to decide."<sup>132</sup> The Court specifically recognized that "the plight of an ex-spouse of a retired service member is often a serious one," and furthermore, the Court noted:

Congress may well decide, as it has in the Civil Service and Foreign Service contexts, that more protection should be afforded a former spouse of a retired service member. This decision, however, is for Congress alone. . . . [I]n no area has the Court accorded Congress greater deference than in the conduct and control of military affairs. Thus, the conclusion that we reached in *Hisquierdo* follows *a fortiori* here: Congress has weighed the matter, and "[i]t is not the province of state courts to strike a balance different from the one Congress has struck."<sup>133</sup>

Thus, while the *McCarty* Court held that federal law at the time preempted state property distribution laws with respect to military retired pay, it left the door open for Congress to amend federal law in this area to better protect former spouses of military retirees and allow for state courts to include military retired pay in the division of marital property.

#### IV. THE UNIFORMED SERVICES FORMER SPOUSES PROTECTION ACT

In direct response to the *McCarty* decision, Congress enacted the USFSPA, which specifically authorized state courts to treat as community property "disposable retired or retainer pay."<sup>134</sup> Under the USFSPA, up to 50% of disposable retired pay may be paid directly to former spouses with state court orders awarding such pay.<sup>135</sup> Congress specifically defined disposable retired pay as "the total monthly retired or retainer pay

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130. *See id.* at 235.

131. *See id.* at 234 & n.26. The Court referenced a Presidential Commission report that questioned whether "the military retirement system actually accomplish[ed] these goals." *Id.*

132. *Id.*

133. *Id.* at 235-36 (second alteration in original) (quoting *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 590 (1979)) (citation omitted).

134. 10 U.S.C. § 1408(c)(1) (1988). The text of the current version of § 1408(c)(1) is provided *supra* note 13; *see also supra* note 12.

135. 10 U.S.C. § 1408(d)(5), (e)(1) (2000). The text of § 1408(d)(5), (e)(1) is provided *supra* notes 15-16.

to which a member is entitled (*other than the retired pay of a member retired for disability*).<sup>136</sup> The USFSPA effectively superseded the *McCarty* Court's prohibition of state court authority to dispose of military retired pay according to respective state property distribution schemes.

As a result of Congress' authorization for state court distribution of military retired pay, many state courts acted to apply their state laws to distribute military retired pay,<sup>137</sup> while other state courts rekindled case law that effectively had been overruled by *McCarty*.<sup>138</sup> For example, prior

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136. 10 U.S.C. § 1408(a)(4)(B) (1988) (emphasis added), *amended* by National Defense Authorization Act for Fiscal Year 1991, Pub. L. No. 510, § 555(b), 104 Stat. 1485, 1569 (1990); *see also* *McHugh v. McHugh*, 861 P.2d 113, 114 n.2 (Idaho Ct. App. 1993) (recognizing that "disposable retired pay" is total monthly retired or retainer pay minus amounts owed to the United States or deducted); *Keen v. Keen*, 486 N.W.2d 105, 106 (Mich. Ct. App. 1992) (determining pension value for purposes of apportioning marital property, and finding that "net pension" means disposable retired pay, as defined by the USFSPA).

137. *See Chase v. Chase*, 662 P.2d 944, 946 (Alaska 1983) (holding that the superior court has discretion to consider military retired pay in the distribution of marital assets); *Casas v. Thompson*, 720 P.2d 921, 925 (Cal. 1986); *In re Marriage of Harrison*, 769 P.2d 678, 680 (Kan. Ct. App. 1989) (overruling prior case law prohibiting division of military retired pay); *Campbell v. Campbell*, 474 So. 2d 1339, 1341-42 (La. Ct. App. 1985) (finding that a spouse is entitled to disposable retired pay, not gross retired pay, and not VA disability benefits paid in lieu of military retired pay); *Lunt v. Lunt*, 522 A.2d 1317, 1318 (Me. 1987) (ruling that a military pension is divisible); *Powers v. Powers*, 465 So. 2d 1036, 1037 (Miss. 1985) (determining that the USFSPA authorizes courts to divide military pension as property); *Moon v. Moon*, 795 S.W.2d 511, 514 (Mo. Ct. App. 1990) (concluding that only disposal retired pay is divisible); *Coates v. Coates*, 650 S.W.2d 307, 310 (Mo. Ct. App. 1983) (finding that the USFSPA nullified *McCarty*, and, therefore, military pension may be divided as property); *In re Marriage of Weaver*, 606 S.W.2d 243, 244 (Mo. Ct. App. 1980) (ruling that military pensions are divisible marital property); *In re Marriage of Kecskes*, 683 P.2d 478, 480 (Mont. 1984) (holding that military retired pay is included in marital estate); *In re Marriage of Miller*, 609 P.2d 1185, 1187 (Mont. 1980) (determining that military retired pay is divisible as marital property), *vacated and remanded sub nom.* *Miller v. Miller*, 453 U.S. 918 (1981); *Majauskas v. Majauskas*, 463 N.E.2d 15, 20-21 (N.Y. 1984) (dividing a vested but nonmature pension); *Lydick v. Lydick*, 516 N.Y.S.2d 326, 327 (App. Div. 1987) (finding that military pension is marital property); *Gannon v. Gannon*, 498 N.Y.S.2d 647, 649 (App. Div. 1986) (dividing military pension as marital property); *Stokes v. Stokes*, 738 P.2d 1346, 1348 (Okla. 1987) (holding that military pension may be divided as jointly acquired property); *In re Marriage of Manners*, 683 P.2d 134, 136 (Or. Ct. App. 1984) (finding that military pensions are divisible); *Tiffault v. Tiffault*, 401 S.E.2d 157, 158 (S.C. 1991) (characterizing vested military retirement benefits as subject to equitable distribution); *Gibson v. Gibson*, 437 N.W.2d 170, 171 (S.D. 1989) (determining that military retired pay is divisible); *Greene v. Greene*, 751 P.2d 827, 831 (Utah Ct. App. 1988) (holding that military retirement benefits accrued in whole or in part during the marriage are marital property); *Sawyer v. Sawyer*, 335 S.E.2d 277, 280 (Va. Ct. App. 1985) (concluding that military retired pay should be subject to equitable division); *Konzen v. Konzen*, 693 P.2d 97, 100 (Wash. 1985) (affirming division of military pension as property).

138. *See Coates*, 650 S.W.2d at 310; *Miller*, 609 P.2d at 1187 (retired pay is divisible as marital property); *Castiglioni v. Castiglioni*, 471 A.2d 809 (N.J. Super. Ct. Ch. Div. 1984); *Walentowski v. Walentowski*, 672 P.2d 657, 659 (N.M. 1983) (reinstating the law under *LeClert v. LeClert*, 453 P.2d 755, 757 (N.M. 1969), which held retired pay as divisible). *But*

to 1981, Arizona had treated vested and nonvested retired pay as community property, to the extent that it was acquired during the marriage.<sup>139</sup> *McCarty* effectively overruled this application of state law. As a result of the USFSPA, however, the Supreme Court of Arizona, in *De Gryse v. De Gryse*, resurrected former case law that authorized state distribution of retired pay.<sup>140</sup> In *De Gryse*, the superior court awarded to the wife, as community property upon divorce, one-third of the husband's United States Marine Corps military retired pay.<sup>141</sup> The husband requested that the court modify the divorce decree in light of the *McCarty* decision.<sup>142</sup> However, the court noted that Congress had recently passed the USFSPA and, as a result, held that case law in effect prior to *McCarty* "once again govern[ed] the question of the division of military retirement benefits upon divorce."<sup>143</sup> The court explained the effect of the USFSPA on *McCarty*:

"The purpose of [10 U.S.C. § 1408(c)(1)] is to place the courts in the same position that they were in on June 26, 1981, the date of the *McCarty* decision, with respect to treatment of non-disability military retired or retainer pay. The provision is intended to remove the federal pre-emption found to exist by the United States Supreme Court and permit State and other courts of competent jurisdiction to apply pertinent State or other laws in determining whether military retired or retainer pay should be divisible [sic]. Nothing in this provision requires any division; it leaves that issue up to the court applying community property, equitable distribution or other principles of marital property determination and distribution. The power is returned to the courts retroactive to June 26, 1981. This retroactive application will at least afford individuals who were divorced (or had decrees modified) during the interim period between June 26, 1981 and the effective date of this legislation the opportunity to return to the courts to take advantage of this provision."<sup>144</sup>

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see *Delucca Roman v. Colon Nieves*, 119 P.R. Dec. 720, 728 (1987) (reestablishing retirement as separate property, consistent with earlier decision in *MalDONADO v. Superior Court*, 100 P.R.R. 370 (1972), and overruling the earlier decision of *Torres Reyes v. Robles Estrada*, 115 P.R. Dec. 765, 765 (1984), which held it as divisible); *Carrero Quiles v. Santiago Feliciano*, 133 P.R. Dec. 727, 732 (1993) (citing *Delucca* with approval).

139. See *Neal v. Neal*, 570 P.2d 758, 761 (Ariz. 1977); *Van Loan v. Van Loan*, 569 P.2d 214, 216 (Ariz. 1977).

140. See *De Gryse v. De Gryse*, 661 P.2d 185, 187 (Ariz. 1983).

141. *Id.* at 186.

142. *Id.*

143. *Id.* at 187 (referring to *Van Loan* and *Neal*).

144. *Id.* (quoting S. REP. NO. 97-502, at 16 (1982), reprinted in 1982 U.S.C.A.N. 1596, 1611); see also *Edsall v. Superior Court*, 693 P.2d 895, 898 (Ariz. 1984) (recognizing Congress' intent to wipe out the effects of *McCarty* on persons divorced between *McCarty* and the passage of the USFSPA); *Berry v. Berry*, 265 Cal. Rptr. 338, 341 (Cal. Ct. App. 1989)

Similarly, in Idaho, prior to 1981, the court in *Ramsey v. Ramsey* held that military retired pay was divisible as community property if the service for which it was earned occurred during the marriage.<sup>145</sup> In 1982, after the *McCarty* decision, the court in *Rice v. Rice* overruled *Ramsey* by holding that:

However much we may disagree with the decision in *McCarty*, we are nevertheless bound to follow and apply it. Hence, we are required to overrule *Ramsey v. Ramsey*, insofar as it conflicts with *McCarty*, and we reluctantly conclude in the instant case that military retirement pay must be held to be the separate property

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(finding that USFSPA was retroactively applicable so as to obliterate *McCarty*); *In re Marriage of Hopkins*, 191 Cal. Rptr. 70, 77 (Cal. Ct. App. 1983) (holding that the USFSPA was applicable to cases not final on February 1, 1983, which was the effective date of the USFSPA); *In re Marriage of Frederick*, 190 Cal. Rptr. 588, 590 (Cal. Ct. App. 1983) (stating that Congress' use in the USFSPA of retroactive application date of June 26, 1981—the same date as *McCarty* decision—evidenced intent that military retirement pensions be treated as though *McCarty* decision did not exist); *Sherrill v. Sherrill*, 639 So. 2d 794, 797 (La. Ct. App. 1994) (reasoning that Congress intended to apply USFSPA retroactively so as to totally eliminate the effect of *McCarty*, even for decrees issued during the “window” between *McCarty* and the enactment of the USFSPA); *O'Connor v. O'Connor*, 694 S.W.2d 152, 154 (Tex. App. 1985) (determining that the USFSPA reinstated state law as it existed prior to *McCarty*); *Neese v. Neese*, 669 S.W.2d 388, 389 (Tex. App. 1984) (recognizing that the purpose of the USFSPA was to reverse the effect of *McCarty* and to put courts in the same position they were in before *McCarty* was decided); *Konzen v. Konzen*, 693 P.2d 97, 99 (Wash. 1985) (holding that the USFSPA was intended to apply retroactively to eliminate the effects of *McCarty*). However, the effect was not to reopen divorce decrees issued prior to *McCarty* that held that retired pay was not community property. But if such a decree were issued after *McCarty*, the USFSPA's effect on *McCarty* would allow for a court to subsequently treat the property as marital, even if it had not before. See *In re Marriage of Lyons*, No. C034544, 2002 WL 1825437, at \*4 (Cal. Ct. App. Aug. 9, 2002) (holding that 1991 amendment to § 1408(c)(1) prohibits state courts from reopening pre-*McCarty* cases in which “decrees neither divided military retirement pay nor reserved jurisdiction to do so”); *Hollyfield v. Hollyfield*, 618 So. 2d 1303, 1305 (Miss. 1993) (finding that the USFSPA did not apply retroactively to divorces finalized before June 25, 1981, unless decree treated retired pay as marital property); *Porter v. Porter*, 542 N.W.2d 448, 450 (S.D. 1996) (holding that divorce decree may be reopened and the USFSPA may retroactively apply where final decree entered subsequent to *McCarty* but prior to the USFSPA); *Trahan v. Trahan*, 894 S.W.2d 113, 117-18 (Tex. App. 1995) (ruling that the USFSPA retroactivity did not preempt common law doctrine of *res judicata*); *Redus v. Redus*, 852 S.W.2d 94, 96 (Tex. App. 1993) (concluding that the purpose of the USFSPA was to prevent the reopening of divorce cases finalized before statute was enacted). *But see* *Kenny v. Kenny*, 627 A.2d 426, 430 (Conn. 1993) (holding that state law regarding retroactivity of the USFSPA is not preempted by federal law, but application of state law may still prohibit state court from reopening and modifying decree); *Morris v. Morris*, 339 S.E.2d 424, 427 (N.C. Ct. App. 1986) (holding that state law, which defines marital property to include military pensions and which was enacted consequent to retroactivity of the USFSPA, applies prospectively); *Flannagan v. Flannagan*, 709 P.2d 1247, 1253 (Wash. Ct. App. 1985) (determining that a court may consider effect of reopening case on parties' reliance on the finality of dissolution decree).

145. *Ramsey v. Ramsey*, 535 P.2d 53, 59 (Idaho 1975).

of [the military spouse] and not subject to division between the parties in this divorce action.<sup>146</sup>

After Congress enacted the USFSPA, however, the Supreme Court of Idaho, in *Griggs v. Griggs*, reinstated *Ramsey*.<sup>147</sup> In *Griggs*, the husband had served in the United States Air Force for 18 years during the marriage.<sup>148</sup> After being injured in Vietnam, he was declared disabled.<sup>149</sup> At the time of the divorce, the husband was receiving both retired and disability pay.<sup>150</sup> The magistrate first determined that both forms of pay were community property, but subsequently held the husband's disability pay to be his separate property.<sup>151</sup> The district court then reversed the amended order and held that the disability pay was community property.<sup>152</sup> After the magistrate court and the district court rendered their decisions, *McCarty* was decided, and the husband moved the Idaho Supreme Court to hold that his entire retired and disability pay was his separate property.<sup>153</sup> Upon reconsideration, the district court held that the husband's retired pay was community property but that his disability pay was his separate property, based on the decision in *McCarty*.<sup>154</sup> The husband appealed from that order.<sup>155</sup>

The court in *Griggs* recognized that it had already determined that the USFSPA effectively overruled *McCarty*.<sup>156</sup> The court stated that "[b]ecause our holding [in *Rice*] was premised solely on the basis of *McCarty*, which has been effectively overruled, we overrule *Rice* and reinstate our holding in *Ramsey* as the law of Idaho."<sup>157</sup>

With respect to the husband's disability pay, however, the court held that disability pay was indistinguishable in character from workmen's compensation benefits, which it held to be payment for lost earning power and, therefore, held that it was his separate property.<sup>158</sup> Although the court recognized that this holding "may result in substantial injustice in some cases," it was compelled to hold this way because of the resulting

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146. *Rice v. Rice*, 645 P.2d 319, 321 (Idaho 1982) (citation omitted).

147. *Griggs v. Griggs*, 686 P.2d 68, 71 (Idaho 1984).

148. *Id.* at 69.

149. *Id.*

150. *Id.* at 69-70.

151. *Id.* at 70.

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.* Although the district court held that only the issue of how to characterize the husband's disability pay was raised on appeal, the Supreme Court of Idaho exercised its plenary authority to address that question. *Id.* While its decision did not affect the nature of the characterization in that case, the court deemed the issue one of such import after the *McCarty* decision that it needed to be addressed. *Id.* at 70 n.1.

156. *Id.* at 71 n.2 (citing *Nieman v. Nieman*, 673 P.2d 396 (Idaho 1983)).

157. *Id.* at 71.

158. *Id.* at 72 (citing *Cook v. Cook*, 637 P.2d 799, 801 (Idaho 1981)).

tax benefits that Congress intended through the characterization of a proportion of retired pay as disability pay.<sup>159</sup> Thus, notwithstanding the USFSPA's overruling of *McCarty*, there remained a clear distinction between how state courts would dispose of military retired pay and how they would characterize and dispose of that portion of retired pay that was waived for disability pay.

#### V. DISPARATE STATE COURT TREATMENT OF DISABILITY PAY UNDER THE USFSPA

With the enactment of the USFSPA, Congress attempted to provide uniformity among the states with respect to how military retired pay was to be distributed upon divorce. However, state courts differed in their respective interpretations of the USFSPA and varied with respect to whether, in distributing retired pay upon divorce, they could consider the retired pay that was waived for disability benefits.<sup>160</sup>

Because, after the enactment of the USFSPA, states were again free to apply their respective state property distribution laws, some courts, like those in Puerto Rico, opted not to treat military retired pay as marital property.<sup>161</sup> For example, prior to *McCarty* in 1981, Puerto Rico treated military retired pay as separate property.<sup>162</sup> After the USFSPA was enacted, the court in *Torres Reyes v. Robles Estrada* held that military retired pay was divisible as marital property.<sup>163</sup> However, in 1987, the court in *Delucca Roman v. Colon Nieves* overruled *Torres* and, consistent with pre-1981 case law, reestablished retirement pensions as separate property.<sup>164</sup> Thus, the USFSPA was not a mandate to treat retired pay as divisible marital property, but rather, it was an authorization for state courts to apply their respective distribution schemes to such property, regardless of how such property may be characterized. Pursuant to the USFSPA, most state courts treated retired pay as marital property that was subject to division upon divorce.<sup>165</sup> The issue with which states differed in their interpretation of the USFSPA was whether a court could

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159. *Id.* at 73.

160. *See, e.g., In re Marriage of Fithian*, 517 P.2d 449, 455 (Cal. 1974) ("Thus, a disabled serviceman's option to receive a pension instead of retirement pay has no relevance to the issue whether the states may treat either type of benefit as community property.").

161. *See Delucca Roman v. Colon Nieves*, 119 P.R. Dec. 720, 728 (1987); *see also Carrero Quiles v. Santiago Feliciano*, 133 P.R. Dec. 727, 732 (1993) (approving *Delucca*).

162. *See Maldonado v. Superior Court*, 100 P.R. Dec. 370, 376 (1972).

163. *Torres Reyes v. Robles Estrada*, 115 P.R. Dec. 765, 766-67 (1984).

164. *Delucca*, 119 P.R. Dec. at 722-23; *see also Carrero*, 133 P.R. Dec. at 728 (approving *Delucca*).

165. *See, e.g., Stroshine v. Stroshine*, 652 P.2d 1193, 1194 (N.M. 1982); *In re Marriage of Smith*, 669 P.2d 448, 451 (Wash. 1983).

consider gross retired pay (which would include disability pay) when dividing property.<sup>166</sup>

Some courts provided that disability pay was distributable because it was earned during coverture, just as retired pay was earned.<sup>167</sup> For example, the court in *Stroshine v. Stroshine* held that the fact that the property in question was disability retirement funds did not prevent the state court from dividing that asset if the spouse contributed to the marital community's effort to acquire that property.<sup>168</sup> The court held that "*McCarty* [did] not serve to upset the presumption that disability retirement pay is a community property asset."<sup>169</sup> Instead, the court found that *McCarty* "specifically restricted its holding only to military nondisability retirement pay."<sup>170</sup>

In *Cameron v. Cameron*, the court awarded the wife 35% of the husband's gross retirement payments after the effective date of the USFSPA.<sup>171</sup> The parties in *Cameron* were divorced on March 29, 1979.<sup>172</sup> Finding in 1982 that "[t]he purpose of the [USFSPA] was to reverse the effect of the *McCarty* decision," the court awarded the wife her interest in the husband's gross retired pay, but not during the period between their divorce and the effective date of the USFSPA.<sup>173</sup>

In *Deliduka v. Deliduka*, the court held that it could award a share of gross retired pay to the former spouse because the scope of the USFSPA simply limited the amount that the government could pay directly to the spouse.<sup>174</sup> In *Deliduka*, the husband and wife were married for twenty-three years.<sup>175</sup> During the marriage, the husband was an officer in the United States Air Force and had a vested interest in a pension.<sup>176</sup> The

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166. See *Beesley v. Beesley*, 758 P.2d 695, 699 (Idaho 1988); *Deliduka v. Deliduka*, 347 N.W.2d 52, 55-56 (Minn. Ct. App. 1984).

167. See *Stroshine*, 652 P.2d at 1194 (holding that the disability portion of retired pay is divisible community property because it was earned during coverture); see also *White v. White*, 734 P.2d 1283, 1286-87 (N.M. Ct. App. 1987) (awarding a share of gross retired pay).

168. *Stroshine*, 652 P.2d at 1194.

169. *Id.*

170. *Id.*

171. *Cameron v. Cameron*, 641 S.W.2d 210, 213 (Tex. 1982).

172. *Id.* at 213.

173. *Id.* at 212-13; see also *Grier v. Grier*, 731 S.W.2d 931, 932 (Tex. 1987) (awarding a share of gross retired pay, but holding that post-divorce pay increases constituted separate property). But see *Radigan v. Radigan*, 465 N.W.2d 483, 487 (S.D. 1991) (ruling that the husband must share with the wife any increase in retired benefits resulting from his own post-divorce efforts).

174. *Deliduka v. Deliduka*, 347 N.W.2d 52, 55-56 (Minn. Ct. App. 1984) (finding that a court may award share of gross retired pay); see also *White v. White*, 734 P.2d 1283, 1286-87 (N.M. Ct. App. 1987) (awarding a share of gross retired pay).

175. *Deliduka*, 347 N.W.2d at 54.

176. *Id.*

trial court awarded the wife 50% of the gross pension.<sup>177</sup> The husband argued that 10 U.S.C. § 1408 authorized payment of only disposable retired pay, which is gross pay minus authorized deductions.<sup>178</sup> However, the court held that § 1408(c) “grants states the authority to treat *all* disposable retired pay as marital property, . . . but limits *direct government payments* to former spouses to 50 percent of disposable retired pay.”<sup>179</sup> Thus, if a state court chose to do so, it could award 50% of a retiree’s gross retired pay by limiting the amount received directly from the government to 50% of disposable pay<sup>180</sup> and awarding nondisposable pay (or the difference between gross retired pay and disposable retired pay) through the distribution of other marital property in the dissolution proceedings.<sup>181</sup>

Other courts held that, although retired pay was distributable as community property, a spouse was not entitled to an interest in gross retired pay, but rather only disposable pay.<sup>182</sup> Thus, even after the USFSPA, there was a clear lack of uniformity among state courts with respect to the distribution of disability pay.

#### VI. *MANSELL V. MANSELL*

To clarify the lack of uniformity in the application of the USFSPA, in 1989, the United States Supreme Court decided *Mansell v. Mansell*.<sup>183</sup> In *Mansell*, the husband “received both Air Force retirement pay and, pursuant to a waiver of a portion of that pay, disability benefits.”<sup>184</sup> The parties entered into a pre-*McCarty* property settlement agreement, which provided, in part, that the husband would pay to his former wife 50% of his total military retired pay, including that portion that was waived to receive disability benefits.<sup>185</sup> The parties were divorced in 1979, and the divorce decree incorporated the parties’ property settlement agreement.<sup>186</sup>

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177. *Id.*

178. *Id.* at 55. The federal government will make direct payments to a former spouse, up to 50% of disposable retired pay, provided the former spouse was married to the military member “for a period of 10 years or more during which the member performed at least 10 years of service creditable in determining the member’s eligibility for retired pay.” 10 U.S.C. § 1408(d)(2), (e)(1) (2000).

179. *Deliduka*, 347 N.W.2d at 55 (citing 10 U.S.C. § 1408(c) (1982)).

180. 10 U.S.C. § 1408 (e)(1) (2000).

181. *Deliduka*, 347 N.W.2d at 54.

182. *See Beesley v. Beesley*, 758 P.2d 695, 699 (Idaho 1988) (suggesting that the 50% limit in § 1408 is not a limit on direct payment by the government, but is a limit on the total receipt by the spouse); *In re Marriage of Smith*, 669 P.2d 448, 451 (Wash. 1983).

183. *Mansell v. Mansell*, 490 U.S. 581, 583 (1989).

184. *Id.* at 585.

185. *Id.* at 585-86.

186. *Id.*

In 1983, after the adoption of the USFSPA, the husband petitioned the Superior Court of California to modify the divorce decree by removing the provision that required him to share his total retired pay.<sup>187</sup> The superior court denied his request.<sup>188</sup> The husband appealed to the California Court of Appeal, claiming that the Act and the anti-attachment clause that protects a veteran's receipt of disability benefits<sup>189</sup> precluded the court from treating waived military retired pay as community property.<sup>190</sup> The court of appeal rejected his argument.<sup>191</sup> The husband petitioned the Supreme Court of California for review, but the court denied his petition.<sup>192</sup> The husband then appealed to the United States Supreme Court, which reversed the court of appeal's decision and held that the USFSPA does not grant state courts the power to treat as marital property divisible upon divorce the portion of military retired pay that is waived to receive disability benefits.<sup>193</sup>

The Court recognized that, historically, when Congress passes general legislation, it "rarely intends to displace state authority" to decide issues within the domestic relations area.<sup>194</sup> But the Court said that this was one of the "rare instances where Congress had directly and specifically legislated in the area of domestic relations."<sup>195</sup> The Court said that it is clear, by the language of the USFSPA and by legislative history that Congress intended to "change the legal landscape created by the *McCarty* decision."<sup>196</sup> The wife claimed that the USFSPA completely restored to states the pre-*McCarty* power to distribute retired pay; the husband claimed that the Act was only a partial rejection of *McCarty*.<sup>197</sup>

The Supreme Court held that § 1408(c)(1) affirmatively granted state authority to divide military retired pay, but further held that the "lan-

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187. *Id.* at 586.

188. *Id.*

189. See 38 U.S.C. § 5301(a)(1) (Supp. III 2004). The anti-attachment clause provides that veterans' benefits "shall not be assignable except to the extent specifically authorized by law, and . . . shall be exempt from the claim[s] of creditors, and shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, either before or after receipt by the [veteran]." *Id.*

190. *Mansell*, 490 U.S. at 586. Because the Court in *Mansell* held that the Act precluded states from treating as community property waived retired pay, it did not decide the anti-attachment clause issue. *Id.* at 587 n.6.

191. *Id.* at 586.

192. *Id.* at 587.

193. *Id.* at 583.

194. *Id.* at 587 (citing *Rose v. Rose*, 481 U.S. 619, 628 (1987); *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 581 (1979)).

195. *Id.*

196. *Id.* The Court further noted that it was not by coincidence that Congress chose June 25, 1981—the day before the *McCarty* decision—as the applicable date for the pertinent provisions of the Act. *Id.* at 588 n.7.

197. *Id.* at 588.

guage was both precise and limited.”<sup>198</sup> The language was precise in providing that “a court may treat disposable retired or retainer 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.”<sup>199</sup> But the USFSPA limited disposable retired pay by excluding military retired pay waived to receive disability benefits.<sup>200</sup> Thus, the Court in *Mansell* held that the plain language of the USFSPA allowed state courts to treat only *disposable* retired pay as community property, not *total* retired pay.<sup>201</sup>

In so holding, the Court observed:

We realize that reading the statute literally may inflict economic harm on many former spouses. But we decline to misread the statute in order to reach a sympathetic result when such a reading requires us to do violence to the plain language of the statute and to ignore much of the legislative history. Congress chose the language that requires us to decide as we do, and Congress is free to change it.<sup>202</sup>

Thus, after *Mansell*, state court authority to directly distribute military retired pay under state property law was limited to disposable retired pay, exclusive of that portion of retired pay waived to receive disability pay.

#### VII. STATE COURT RESPONSES TO *MANSELL*: A LACK OF UNIFORMITY

Despite Congress' effort through the USFSPA to define the scope of state court authority to distribute military retired pay, and despite the United States Supreme Court's effort to clarify the scope of that authority, state courts after *Mansell* continue to vary in their interpretation of the USFSPA and, more specifically, in determining to what extent disability pay may be considered in distributing marital property. Many state courts hold that, although *Mansell* prohibited the direct distribution of disability pay as marital property, disability pay may still be considered under state equity provisions by offsetting with *other* marital property that portion of retired pay that is waived for disability pay, provided there is not a direct offset.<sup>203</sup> Other courts expressly provide that the distinction between direct and indirect offsetting is meaningless and, there-

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198. *Id.*

199. *Id.* at 588-89 (omission in original) (citing 10 U.S.C. § 1408(c)(1) (1982)).

200. *Id.* at 589 (citing 10 U.S.C. § 1408 (a)(4)(B) (1982)).

201. *Id.*

202. *Id.* at 594.

203. *See, e.g., Kelly v. Kelly*, 9 P.3d 1046, 1048-49 (Ariz. 2000); *see also Sellers v. Sellers*, No. E2005-02867-COA-R3-CV, 2006 WL 2567517, at \*6 (Tenn. Ct. App., Sept. 7, 2006) (rejecting alimony claim to make up for reduction due to disability election but acknowledging that relief is possible through property award).

fore, “considering” disability pay, which is separate property, by offsetting with marital property, is specifically prohibited.<sup>204</sup>

### 1. Considering Offsetting in Other Federal Benefit Contexts

#### A. Social Security

When the Court in *McCarty* considered the divisibility of federal benefits in the military retirement context, it relied on its prior decision in *Hisquierdo*, in which it held that state courts may not directly distribute or offset benefits derived under the Railroad Retirement Act.<sup>205</sup> The *Hisquierdo* Court found relevant analogies between the Railroad Retirement Act and the Social Security Act.<sup>206</sup> Likewise, in considering the issue of offsetting, the Social Security context is a significant parallel for courts considering offsetting military disability benefits. But the United States Supreme Court has not addressed specifically whether a state court can indirectly offset or otherwise consider the parties’ respective Social Security benefits in dividing marital property. And there is significant disparity among state courts with respect to whether state courts have the authority to consider disproportionate Social Security benefits in the distribution of marital property by offsetting that property with other distributable marital property. The disparity in this context stems from the applicability of *Hisquierdo*. State courts that prohibit offsetting of Social Security benefits rely on the decision in *Hisquierdo*;<sup>207</sup> state courts that allow Social Security benefits to be offset with other marital property find *Hisquierdo* to be inapposite.<sup>208</sup>

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204. See *supra* note 26.

205. *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 590 (1979).

206. *Id.* at 575-76. The Court noted the similarities between Railroad Retirement benefits and Social Security benefits, specifically that the Railroad Retirement Act and Social Security Act expressly prohibited the assignment of benefits through legal process such as garnishment and attachment. *Id.* The Court said that Congress made an exception for support and alimony out of concern for spouses and children. *Id.* at 576. But the Social Security Act specifically provided that alimony “does not include any payment or transfer of property or its value by an individual to his spouse or former spouse in compliance with any community property settlement, equitable distribution of property, or other division of property between spouses or former spouses.” *Id.* at 577 (quoting Tax Reduction and Simplification Act of 1977, Pub. L. No. 95-30, § 501(d), 91 Stat. 126, 160). Thus, “[t]he Social Security Act provides a specific limited avenue for divorced persons to obtain a share of the former spouse’s benefits.” *Webster v. Webster*, 716 N.W.2d 47, 55 (Neb. 2006) (citing 42 U.S.C. § 402 (b)(1)(A)-(D), (c)(1)(A)-(D) (2000)).

207. See, e.g., *In re Marriage of Boyer*, 538 N.W.2d 293, 294-95 (Iowa 1995); *Olson v. Olson*, 445 N.W.2d 1, 7 (N.D. 1989).

208. See, e.g., *Boyer*, 538 N.W.2d at 296 (examining Social Security benefits in arriving at an equitable distribution of marital assets); *In re Marriage of Brane*, 908 P.2d 625, 628 (Kan. Ct. App. 1995) (finding that although anti-assignment clause of Social Security Act precludes trial court from dividing Social Security income, court may consider Social Security income when dividing marital property); *Pongonis v. Pongonis*, 606 A.2d 1055, 1058

For example, in *Webster v. Webster*, the Supreme Court of Nebraska held that the anti-assignment clause of the Social Security Act and the Supremacy Clause of the United States Constitution prohibit a direct offset to adjust for disproportionate Social Security benefits between spouses upon divorce.<sup>209</sup> In *Webster*, the trial court awarded 50% of the marital portion of the wife's employee retirement trust fund to the husband.<sup>210</sup> The court awarded the wife 50% of the husband's retirement plan as well.<sup>211</sup> The husband did not contribute to Social Security during his employment, and, thus, all of his pension was divisible as marital property.<sup>212</sup> But the wife regularly contributed to Social Security, the benefits from which are considered separate property.<sup>213</sup> Thus, despite his contribution during the marriage, the husband's half interest in his wife's retirement was exclusive of that portion used to derive the wife's separate property Social Security benefits.<sup>214</sup> Furthermore, the husband

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(Me. 1992) (considering anticipated Social Security benefit as a relevant factor in dividing marital property); *Pleasant v. Pleasant*, 632 A.2d 202, 206-07 n.3 (Md. Ct. Spec. App. 1993) (ruling that Social Security benefits are not subject to direct distribution in a divorce proceeding; however, in certain situations, "it may be that a court could consider the fact that a party is receiving, or will receive, social security benefits, as 'any other factor' in determining whether to make a monetary award"); *Mahoney v. Mahoney*, 681 N.E.2d 852, 856-57 (Mass. 1997) (concluding that a court could consider anticipated Social Security benefits as a factor in determining an equitable distribution of marital assets); *Rudden v. Rudden*, 765 S.W.2d 719, 720 (Mo. Ct. App. 1989) (concluding that while unassignable as marital or separate property, current or potential Social Security "benefits are economic factors to be considered" in disposition of marital property); *Eickelberger v. Eickelberger*, 638 N.E.2d 130, 134-35 (Ohio Ct. App. 1994) (determining that although future Social Security benefit cannot be divided as a marital asset, it must be evaluated and considered by the trial court in effecting an equitable distribution of the parties' marital assets); *Holland v. Holland*, 588 A.2d 58, 60 (Pa. Super. Ct. 1991) (finding that the divorce court properly considered potential Social Security benefits when awarding portion of future government pension); *In re Marriage of Zahm*, 978 P.2d 498, 502-03 (Wash. 1999) (considering Social Security benefits for purposes of making equitable distribution of property); *see also* *Walker v. Walker*, 677 N.E.2d 1252, 1253 (Ohio Ct. App. 1996). *But see* *Jones v. Jones*, 780 P.2d 581, 584 (Haw. Ct. App. 1989) (comparing *Hisquierdo* and holding that a state court that distributes property may not "change . . . disability pay into retirement or some other kind of pay" or penalize a person for making such a waiver; however, the court found that federal law does not preclude state courts, when dividing property in a divorce case, from considering as one of the relevant circumstances governing division of property a party's right to receive disability pay "in the same way that a family court considers each party's ability or lack of ability to earn and receive income post divorce"); *Bewley v. Bewley*, 780 P.2d 596, 598 (Idaho Ct. App. 1989) (finding *Hisquierdo* to be controlling, but nevertheless allowing a partial offset of disability benefits via unequal distribution of other marital assets based on "bona fide considerations other than dissatisfaction with the federal scheme").

209. *Webster*, 716 N.W.2d at 55-56.

210. *Id.* at 49.

211. *Id.*

212. *Id.* at 49-51.

213. *Id.* at 49, 56.

214. *See id.* at 50, 56.

retired early and was in “pay status,” whereas the wife continued to work and did not yet receive any monthly payments.<sup>215</sup> Accordingly, the wife was entitled to \$1,121.24 of the husband’s monthly pension payment, and had the wife been receiving pension payments, the husband would have been entitled to \$527 per month of the wife’s pension—a difference of approximately \$594.<sup>216</sup> The husband argued that he should be able to offset the inequity attributable to the difference in Social Security benefits received by the parties.<sup>217</sup>

The court reasoned that “[u]nder 42 U.S.C. § 407(a) (2000), the transfer or assignment of Social Security benefits is forbidden.”<sup>218</sup> Sections 659(a) and 659(i)(3)(B)(ii) specifically exclude from the child support and alimony exceptions to § 407 “payment obligations arising from a community property settlement, equitable distribution of property, or other division of property between spouses or former spouses.”<sup>219</sup> But what the husband wanted was not a direct division of the wife’s nondivisible Social Security benefits, but rather an indirect “offset” of the wife’s marital share of his “pension by an amount reflecting the marital share of the difference between [his] spousal share of [the wife’s] Social Security and [her] share of her Social Security benefit.”<sup>220</sup> In other words, the husband claimed that their shares of Social Security should be equalized by awarding him half of the difference between what the wife derived from her Social Security and what he derived from her Social Security.

The court in *Webster* held that offsetting Social Security is prohibited by the anti-assignment clause of the Social Security Act and the Supremacy Clause of the United States Constitution.<sup>221</sup> Although many courts, particularly in equitable distribution states, have taken a more generalized consideration of Social Security benefits as a factor in making a property division upon divorce (i.e., they consider such benefits in the application of their respective state property distribution schemes),<sup>222</sup>

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215. *Id.* at 51.

216. *Id.* at 50.

217. *Id.*

218. *Id.* at 53-54; *see also In re Marriage of Crook*, 813 N.E.2d 198, 201 (Ill. 2004). The court in *Webster* noted that “[c]ourts generally agree that [42 U.S.C.] § 407(a) preempts state law that would authorize distribution of Social Security benefits, and that Social Security benefits themselves are not subject to . . . division.” *Webster*, 716 N.W.2d at 53-54 (citing *Philpott v. Essex County Welfare Bd.*, 409 U.S. 413, 417 (1973)) (discussing § 407).

219. *Webster*, 716 N.W.2d at 54.

220. *Id.*

221. *Id.* at 56.

222. *See id.* at 55 (citing *In re Marriage of Morehouse*, 121 P.3d 264 (Colo. App. 2005); *see also In re Marriage of Boyer*, 538 N.W.2d 293, 296 (Iowa 1995); *In re Marriage of Brane*, 908 P.2d 625, 626 (Kan. Ct. App. 1995); *Bradbury v. Bradbury*, 893 A.2d 607, 609 (Me. 2006); *Mahoney v. Mahoney*, 681 N.E.2d 852, 856-57 (Mass. 1997); *Rudden v. Rudden*, 765 S.W.2d 719, 720 (Mo. Ct. App. 1989); *Neville v. Neville*, 791 N.E.2d 434, 437

other courts have held that the distinction between equitable distribution and a specific calculation with an offset is meaningless.<sup>223</sup>

For example, the court in *In re Marriage of Crook* stated:

Instructing a trial court to “consider” Social Security benefits . . . either causes an actual difference in the asset distribution or it does not. If it does not, then the “consideration” is essentially without meaning. If it does, then the monetary value of the Social Security benefits the spouse would have received is taken away from that spouse and given to the other spouse to compensate for the anticipated difference. This works an offset meant to equalize the property distribution.<sup>224</sup>

Under the reasoning of *Hisquierdo*, this offsetting is held to be improper because it diminishes the value of property that was intended by Congress to be the personal entitlement of the recipient.<sup>225</sup> Thus, some courts hold that state courts may not transform separate property disability pay into marital property to cause such a diminution.<sup>226</sup> As stated by the court in *Wolff v. Wolff*, “[c]alling a duck a horse does not change the fact that it is still a duck. ‘Considering’ [the spouse’s] social security benefits does not change the fact that this is still an offset, and therefore, error.”<sup>227</sup>

However, other courts take a different view of offsetting under the theory that “just because a horse might walk like a duck does not mean it is one.” That is to say that a state court’s offset of *other* marital property, through the application of its respective equitable distribution provisions, does not necessarily mean that separate property disability pay is being transformed into marital property to be distributed. Indeed, by offsetting other marital property, actual disability pay is still being distributed only to the military retiree—the party intended by Congress to receive the

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(Ohio 2003) (holding that “benefits may be considered . . . under the catchall category as a relevant and equitable factor in making an equitable distribution,” especially when a spouse’s benefits have been increased due to the work of the other spouse and the non-employed spouse loses spending power after a divorce through the inability to use the other spouse’s benefits); *In re Marriage of Zahm*, 978 P.2d 498, 502 (Wash. 1999) (finding that if there is not a specific calculation and offset, then *Hisquierdo* does not apply; anti-assignment clause did not preclude consideration of Social Security benefits “within the more elastic parameters of the court’s power to formulate a just and equitable division of the parties’ marital property”).

223. See, e.g., *In re Marriage of Hillerman*, 167 Cal. Rptr. 240, 243-46 (Cal. Ct. App. 1980); *In re Marriage of Crook*, 813 N.E.2d 198, 204-05 (Ill. 2004); *Webster*, 716 N.W.2d at 56 (citing *Cox v. Cox*, 882 P.2d 909 (Alaska 1994)); *Wolff v. Wolff*, 929 P.2d 916, 921 (Nev. 1996); *English v. English*, 879 P.2d 802, 807-08 (N.M. Ct. App. 1994); *Olson v. Olson*, 445 N.W.2d 1, 7 (N.D. 1989); *In re Marriage of Swan*, 720 P.2d 747, 749 (Or. 1986); *Reymann v. Reymann*, 919 S.W.2d 615, 616-17 (Tenn. Ct. App. 1995).

224. *Crook*, 813 N.E.2d at 205.

225. See *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 590 (1979).

226. See, e.g., *Jones v. Jones*, 780 P.2d 581, 584 (Haw. Ct. App. 1989).

227. *Wolff*, 929 P.2d at 921.

pay. Allocating to the former spouse the value of the retired pay that was waived to obtain the disability pay, to which the former spouse would have been entitled absent the waiver, allows the court to put the parties in a position with respect to their interest in retired pay similar to the position they were in prior to the waiver. Congress has never expressly provided that a marital or community entitlement to retirement benefits, once accrued by a spouse during the marriage, should be subject to a unilateral transformation into the separate property of the other spouse without compensation.<sup>228</sup> Although, in its effort to accomplish specific federal objectives, Congress provided for just such a transformation by providing for disability waiver in 38 U.S.C. § 5305, and although Congress set limitations on the distribution of that property through the USFSPA, Congress also provided a means for state courts to remedy any inequity resulting from the waiver. Congress intended the means for providing such equity to be the state court's authority to distribute disposable retired pay with other marital property.<sup>229</sup>

Although several courts have held that the restrictions of *Mansell* in limiting state court authority to dispose of disability benefits cannot be circumvented by offsetting,<sup>230</sup> these cases rely on the reasoning of the Court in *Hisquierdo*, which concerned itself with the "conflict between federal and state rules for the allocation of a federal entitlement"<sup>231</sup> but took the view of that entitlement as a personal one belonging solely to the military spouse. Other courts, which now view retired pay as a community entitlement in which the former spouse has accrued an equal interest, find reliance on *Hisquierdo* to be inapposite.<sup>232</sup> With respect to offsetting, courts distinguish *Hisquierdo* because, by offsetting with other marital property, state courts are not allocating the federal entitlement—they are allocating other marital property, over which Congress has never restricted state court authority. In fact, Congress has already expressly provided for it.

For example, in *Kelly v. Kelly*, the husband and wife were married in 1984 and divorced in 1997.<sup>233</sup> During the marriage, both were employed

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228. One court has noted:

[A]n employee has a vested right with respect to pension benefits from the date of his employment, where a pension plan is in effect and is part of the compensation which he earns, and . . . this right cannot be altered by the legislative body to his disadvantage unless the change is accompanied by corresponding advantages.

*Wilder v. Wilder*, 534 P.2d 1355, 1357-58 (Wash. 1975) (supporting offsetting).

229. See 10 U.S.C. § 1408 (c)(1) (2000).

230. See, e.g., *Jones*, 780 P.2d at 584; *Mosier v. Mosier*, 830 P.2d 1175, 1177 (Idaho 1992); *Walborn v. Walborn*, 817 P.2d 160, 164-65 (Idaho 1991); *Bewley v. Bewley*, 780 P.2d 596, 597 (Idaho Ct. App. 1989).

231. *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 582 (1979) (emphasis added).

232. See *supra* note 208.

233. *Kelly v. Kelly*, 9 P.3d 1046, 1047 (Ariz. 2000).

by the federal government.<sup>234</sup> The wife participated in the Federal Employees Retirement System, which included a Social Security component.<sup>235</sup> The husband, however, participated in the Civil Service Retirement System (CSRS), which did not participate in Social Security.<sup>236</sup> Thus, the husband's entire pension benefit package was considered marital property for purposes of distribution.<sup>237</sup> However, federal law prohibits state courts from dividing Social Security.<sup>238</sup> Thus, since federal law prohibited the division of the wife's Social Security portion of her pension benefits, the husband motioned the court "to consider a portion of his CSRS benefits as separate property in order to compensate for the inequity."<sup>239</sup>

Relying on *Van Loan v. Van Loan*,<sup>240</sup> the court held that, as a form of deferred compensation for services rendered during the marriage, the portion of retirement benefits earned during the marriage may be divided as community property.<sup>241</sup> Like military retirement benefits, the court held that Social Security "would ordinarily be considered community property under state law principles," but federal law prohibiting the garnishment of these benefits prevented this application.<sup>242</sup> The court held Social Security to be the separate property of the participating spouse.<sup>243</sup> The CSRS, however, allowed the court to treat benefits under that plan as marital or community property<sup>244</sup> and provided an exception to the garnishment prohibition for "any court order or court-approved property settlement agreement incident to any court decree of divorce, annulment, or legal separation."<sup>245</sup>

Thus, the court held that an inequity resulted from the fact that a portion of the wife's salary was paid into the Social Security system, and that salary was community property in which the husband held an interest.<sup>246</sup> The resulting benefit from that contribution, but for federal law, would be divisible as community property. But under the federal scheme, those benefits were to be enjoyed only by the wife. Thus, "[t]o the extent individuals with Social Security benefits enjoy an exemption of that 'asset' from equitable distribution . . . those individuals participating in the

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234. *Id.*

235. *Id.*

236. *Id.*

237. *Id.*

238. 42 U.S.C. § 407(a) (2000).

239. *Kelly*, 9 P.3d at 1047.

240. 569 P.2d 214 (Ariz. 1977).

241. *Kelly*, 9 P.3d at 1047.

242. *Id.*

243. *Id.*

244. *Id.* (citing Act of Sept. 15, 1978, Pub. L. No. 95-366, 92 Stat. 600).

245. *Id.* (quoting 5 U.S.C. § 8345(j)(1)(A) (1996)).

246. *Id.* at 1048.

CSRS must, likewise, be so positioned."<sup>247</sup> The court summarized by stating that "community funds have been diverted to the separate benefit of one spouse. . . . [T]his situation compels an equitable response."<sup>248</sup> The equitable response afforded by the court in *Kelly* was to set aside as the husband's separate property a portion of the husband's retirement fund, which was distributable marital property, just as was done with Social Security benefits for the wife.<sup>249</sup> Thus, the court treated both spouses as if they had participated in Social Security contributions (See Table 4).<sup>250</sup>

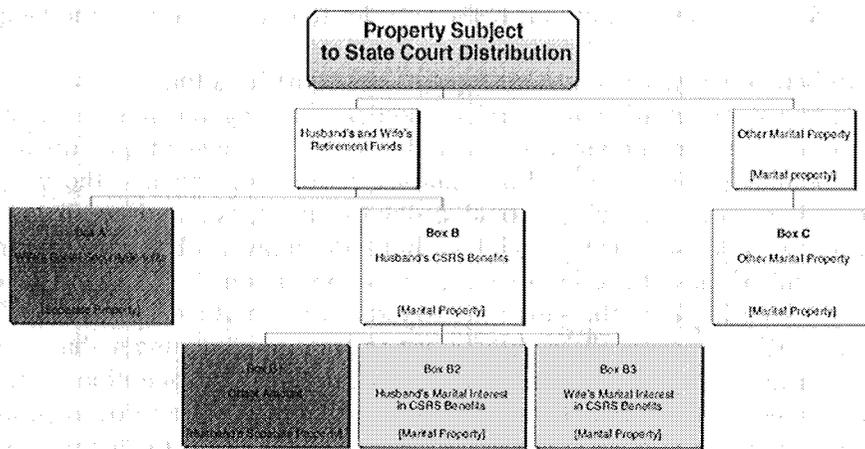


Table 4

What distinguishes the offsetting that was prohibited in *Hisquierdo* from the distribution allowed in cases like *Kelly* is the nature of the property from which the offsetting award is derived. In *Hisquierdo*, the property from which the disallowed offsetting award was derived was not marital property that the state court was authorized to distribute; it was property on which the federal payment scheme placed limitations.<sup>251</sup> But in *Kelly*, the court was not dividing or directly offsetting Social Security

247. *Id.* (alteration in original) (quoting *Cornbleth v. Cornbleth*, 580 A.2d 369, 371 (Pa. Super. Ct. 1990)).

248. *Id.*

249. *Id.*

250. *Id.*

251. See *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 587-89 (1979) (relying on the anti-attachment clause prohibiting the anticipation of benefits); see also *Kelly*, 9 P.3d at 1049 (citing *Wolff v. Wolff*, 929 P.2d 916, 921 (Nev. 1996); *Olson v. Olson*, 445 N.W.2d 1, 11 (N.D. 1989); *In re Marriage of Swan*, 720 P.2d 747, 751 (Or. 1986)). In each of the cases cited in *Kelly*, the courts relied on *Hisquierdo* to hold that Social Security cannot be divided in any way. *Id.*

benefits or any other benefits limited by the federal payment scheme.<sup>252</sup> Instead, the court devalued marital property (Box B) to attribute it to the husband as his separate property (Box B1), just as the federal scheme had done with the wife's Social Security benefits (Box A).<sup>253</sup> If the husband had no similar pension that could be devalued, there would be no difference in devaluing other marital property to be set aside or offset to the husband (Box C). The *Kelly* court held that such a distribution did not violate *Hisquierdo*.<sup>254</sup>

Similarly, in *Panetta v. Panetta*, the court allowed an offset of disproportionate Social Security benefits to balance the retirement benefits accrued by each party during the marriage.<sup>255</sup> In *Panetta*, the parties were married in 1958 and divorced in 1994.<sup>256</sup> The parties executed a qualified domestic relations order (QDRO) for the distribution of their respective pensions.<sup>257</sup> The husband was employed by the federal government from 1977 to 2000.<sup>258</sup> The husband participated in the federal civil service employees' pension system, through which he did not contribute to or receive Social Security benefits.<sup>259</sup> The wife participated in a private pension, through which she did contribute to and receive Social Security benefits.<sup>260</sup> The judgment of divorce provided:

[T]he evaluation of [the husband's] pension reflects an adjustment for imputed social security benefits, as it is a civil service pension. This reduced valuation shall be utilized for division of [the husband's] pension and the applicable Qualified Domestic Relations Order unless New Jersey Courts dictate law to the contrary prior to [the husband's] retirement.<sup>261</sup>

Subsequently, the court entered an amended judgment, which provided that, upon the husband's retirement, the wife's portion of the husband's pension benefits would be adjusted by decreasing her portion by an amount equal to the value of the husband's imputed Social Security benefits.<sup>262</sup> But the husband retired in 2000 and "designated his new wife as

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252. *Kelly*, 9 P.3d at 1047.

253. *Id.* at 1048.

254. *Id.* at 1049.

255. *Panetta v. Panetta*, 851 A.2d 720, 728 (N.J. Super. Ct. App. Div. 2004), *certification denied*, 866 A.2d 984 (N.J. 2005).

256. *Id.* at 722.

257. *Id.*

258. *Id.*

259. *Id.* at 722 n.1, 727. Federal pensions are distributable upon divorce, Social Security benefits are not. *Id.* at 727.

260. *Id.* at 722.

261. *Id.* at 722-23. The husband's pension order was subsequently identified as a court order approved for processing (COAP), which is the order used for "distribution of the marital share of a federal pension," rather than a QDRO, which is the order used for the "distribution of the marital share of a private pension." *Id.* at 723 & nn.2-3, 725.

262. *Id.* at 723.

the survivor beneficiary of his federal pension,” which irrevocably precluded his former wife from the benefits under the agreed order.<sup>263</sup> In 2002, the trial court issued an order denying the husband’s motion to have the wife’s share of his federal pension “reduced by an imputed social security benefit.”<sup>264</sup> On appeal, the Superior Court of New Jersey held that the wife’s Social Security benefit should be offset against her share of the husband’s federal pension.<sup>265</sup> The court stated:

[A] federal employee may be entitled to an offset against a private employee’s share of the federal pension because only the private employee would benefit from social security earned during the marriage. Clearly, the purpose of the offset is to balance the retirement benefits accrued by each of the parties during the marriage.<sup>266</sup>

Thus, similar to the distribution derived in *Kelly*, the *Panetta* court was not offsetting by devaluing the wife’s separate property Social Security benefits, which *Hisquierdo* expressly prohibited.<sup>267</sup> Her interest in those benefits remained intact.<sup>268</sup> Instead, the court offset the wife’s Social Security benefits by devaluing the wife’s interest in distributable marital property in which both parties held an interest and over which the court was not prohibited from exercising equitable authority.<sup>269</sup> As stated in *Kelly*, such a distribution posed no violation of *Hisquierdo*.<sup>270</sup>

In *Eickelberger v. Eickelberger*, the husband was a public employee and participated in a police and fireman’s pension plan under the Public Employee Retirement System (PERS), which does not include a Social Security component.<sup>271</sup> The husband also participated in a deferred compensation plan from the State of Ohio.<sup>272</sup> The wife was a private employee and was entitled to Social Security upon retirement.<sup>273</sup> In dividing marital property upon divorce, the trial court ordered the husband to transfer his entire deferred compensation plan to the wife; this division awarded each party approximately half of the entire available pension and retirement benefits.<sup>274</sup> Pursuant to federal law, the wife’s Social Security interest was not distributable.<sup>275</sup> The court noted that “a particular pension or retire-

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263. *Id.* at 723-24.

264. *Id.* at 724.

265. *Id.* at 728.

266. *Id.*

267. *See id.* at 728-29; *see also Kelly v. Kelly*, 9 P.3d 1046, 1049 (Ariz. 2000).

268. *Panetta*, 851 A.2d at 728.

269. *Id.* at 729.

270. *Kelly*, 9 P.3d at 1049.

271. *Eickelberger v. Eickelberger*, 638 N.E.2d 130, 134 (Ohio Ct. App. 1994).

272. *Id.*

273. *Id.*

274. *Id.*

275. *Id.*

ment fund may not necessarily be subject to direct division but is subject to evaluation and consideration in equitably distributing both parties' marital assets."<sup>276</sup> The court recognized that in such cases, "public employees who do not participate in the Social Security system are penalized because the value of their pensions are considered marital property while a private employee's contributions to Social Security may not be considered marital property under federal statute."<sup>277</sup> The court pointed out that, without such an offset, the husband was "being penalized for working in the public sector."<sup>278</sup> In the same respect, to deny an offset of disability pay would penalize a nonmilitary spouse, who contributed to and accrued a property interest in retired pay, for a military spouse's unilateral decision to acquire disability pay for himself or herself. As in *Kelly* and *Panetta*, the court in *Eickelberger* considered separate property (the wife's potential future monthly Social Security benefits) by offsetting with distributable marital property, over which the court had authority (the husband's potential future PERS monthly benefits), when equitably apportioning the balance of the parties' marital assets.<sup>279</sup>

Thus, within the context of Social Security benefits, state courts may consider the inequity of disproportionate Social Security benefits when considering whether to offset those benefits with other distributable marital property. *Hisquierdo* is not violated by such a consideration because, by indirectly offsetting with other property, the property that the federal payment scheme excludes from distribution remains intact and reaches the beneficiary that Congress designates. Furthermore, the Court in *Hisquierdo* viewed the federal benefit as a personal entitlement solely of the participating spouse. In the Social Security and military retirement pay contexts, however, the former spouse contributes to and accrues an interest in the federal entitlement. The USFSPA was created to protect this entitlement.

### B. Railroad Retirement Benefits

The consideration of Railroad Retirement benefits in property distribution, particularly in light of the Pension Protection Act of 2006,<sup>280</sup> also marks the trend toward expanding spousal rights in federal retirement

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276. *Id.* (citing *Hoyt v. Hoyt*, 559 N.E.2d 1292, 1296 (Ohio 1990)); *see also* *Smith v. Smith*, 632 N.E.2d 555, 558 (Ohio Ct. App. 1993); *Stovall v. Stovall*, No. 15335, 1992 WL 236770, at \*3 (Ohio Ct. App. Sept. 23, 1992) (upholding order to deduct the present value of one spouse's hypothetical Social Security account from the present value of the other spouse's teacher's pension); *Streeter v. Streeter*, No. 91AP-14, 1991 WL 151215, at \*2 (Ohio Ct. App. July 30, 1991).

277. *Eickelberger*, 638 N.E.2d at 135.

278. *Id.*

279. *Id.*

280. Pub. L. No. 109-280, 120 Stat. 780.

property. There are two components to the Railroad Retirement System. Tier I of the system is financed by taxes imposed on employers and employees equal to the Social Security payroll tax and provides benefits akin to Social Security benefits.<sup>281</sup> Tier II of the system is akin to a private pension plan system in which employers and employees contribute a certain percentage of pay toward the system to finance defined benefits, but the federal government collects the Tier II payroll contributions and discharges the benefits.<sup>282</sup> Until August 2006, the former spouse of a railroad employee could not receive benefits from either tier until the railroad employee actually retired and began receiving benefits.<sup>283</sup> Also, upon the death of the railroad employee, a former spouse of a deceased railroad employee was eligible for survivors' benefits under Tier I of the system but was not eligible for any otherwise allowable benefits under Tier II.<sup>284</sup> However, in August 2006, Congress passed the Pension Protection Act of 2006, which amended the Railroad Retirement Act to entitle former spouses to Tier I or Tier II Railroad Retirement benefits notwithstanding the actual entitlement of the employee spouse.<sup>285</sup> It also provided that a surviving spouse receiving Tier II Railroad Retirement benefits pursuant to a divorce decree may continue to receive his or her annuity after the death of the participant spouse.<sup>286</sup>

Thus, the Pension Protection Act of 2006 expanded the marital property entitlement of former spouses derived under the Act. An offset approach to military retirement benefits is consistent with this expansive view of the marital interest of former spouses in pension and retirement benefits, which Congress intended to be protected.

## 2. Considering Offsetting Military Disability Pay

State courts agree, and it is clear from the USFSPA, that disability pay is the separate property of the disabled military retiree.<sup>287</sup> Most state courts also agree that, prior to disability waiver, retired pay was marital property to which the spouse contributed during the marriage and the value of which the spouse maintains an interest in.<sup>288</sup> Even the *McCarty*

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281. See 45 U.S.C.A. §§ 231a(a)(1), 231b(a)(1) (West 2000 & Supp. 2006).

282. See *id.* §§ 231f, 231n.

283. See *id.* § 231a(c).

284. See *id.*

285. Pension Protection Act § 1002.

286. *Id.* at § 1003.

287. See 10 U.S.C. § 1408(c) (2000); *e.g.*, *West v. West*, 475 N.Y.S.2d 493, 494-95 (App. Div. 1984).

288. See *West*, 475 N.Y.S.2d at 494-95 (holding that disability payments are separate property as matter of law, but disability pension is marital property to the extent it reflects deferred compensation). Pension plans are a form of deferred compensation to employees for services rendered. See *Van Loan v. Van Loan*, 569 P.2d 214, 215 (Ariz. 1977). The benefits are derived from contractual rights under the terms of the employment contract.

Court held that if retired pay were community property, which it was not then but is now considered, the retiree could not summarily deprive a spouse of his or her interest in the property.<sup>289</sup> The expanding concept of community entitlement to federal benefits supports this premise. It is clear from many other federal benefit contexts, particularly the Social Security and Railroad Retirement contexts, that Congress intends for spouses to accrue during the marriage a marital interest in the federal retirement property to which they contribute during the marriage. Congress may place limitations on the right of state courts to redistribute the actual federal benefit property depending on the specific objectives of the federal payment scheme, but Congress has not mandated that the value of the property interest, once acquired, be taken away at the whim of the retiree and inequitably redistributed as the separate property of only one spouse. Quite to the contrary, Congress has authorized state divorce courts to distribute that property according to the community property or equitable distribution schemes of that jurisdiction.<sup>290</sup> As stated by the court in *In re Marriage of Fithian*:

It is not incongruous for Congress to supply a program to aid widows, who no longer have husbands to provide sustenance, and omit to do so for ex-wives who can rely on state family law concepts of support, alimony, and community property for a source of income.<sup>291</sup>

Under the equitable authority afforded to state courts in this context, state courts are charged with distributing the value of property so as to place the parties in equitable, if not equal, positions, without interfering with the objectives of the federal payment scheme. It is not the obligation of state courts to distribute the actual property, per se, but to distribute the value of the property to which each party is entitled under the respective distribution schemes. In the federal benefit contexts that have been described herein, if state courts are authorized to distribute the ac-

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*Id.* at 216. As such, any portion earned during the marriage is marital property, not merely an expectancy of some future right or interest. *Id.* at 215; *see also* Walker v. Walker, 368 S.E.2d 89, 90 (S.C. Ct. App. 1988) (requiring that the spouse actually contribute to acquisition of property right).

289. *McCarty v. McCarty*, 453 U.S. 210, 226 (1981) (quoting Goldberg, *supra* note 121, at 17).

Underlying the community treatment of retirement benefits is the concept that they do not derive from the beneficence of the employer, but are properly part of the consideration earned by the employee. Thus whether an employee is required to make contributions to the retirement fund is irrelevant to the ultimate characterization of the benefits as community property. Furthermore, the principle that retirement benefits are community property has been held to apply whether the source of the retirement fund lies in a state, federal, military, or private employment relationship.

*In re Marriage of Fithian*, 517 P.2d 449, 451 (Cal. 1974) (citations omitted).

290. 10 U.S.C. § 1408(c)(1) (2000).

291. *Fithian*, 517 P.2d at 454.

tual federal benefit in question to a non-participating spouse, then Congress will have authorized such a distribution in the respective statutes. If state courts are preempted from distributing the actual property, then Congress will have either preempted or placed limitations on the authority of state courts to distribute the property. Outside of any such congressional direction, however, the duty of state courts is to distribute property according to the equitable principles prescribed through each state's respective statutory distribution scheme.

In the context of military retired pay, under the USFSPA, Congress has already directed state courts with respect to the authority to distribute military retired pay. By enacting the USFSPA, Congress removed the federal preemption instituted by *McCarty* and placed specific but limited restrictions on state court authority to distribute retired pay. First, Congress has directed that state courts are to categorize retired pay according to the application of state law.<sup>292</sup> Within this scope, Congress has directed that state courts may treat retired pay as marital property if that is what state law prescribes, but that disability pay must remain the separate property of the military retiree.<sup>293</sup> Furthermore, the scope of state court authority to distribute retired pay has one relevant limitation—the state, through an appropriate divorce and property distribution order, may direct the government to pay directly to a former spouse no more than 50% of retired pay to satisfy a property distribution award.<sup>294</sup> The primary exception to this restriction is that a state court may award up to 65% of retired pay to be paid directly to the former spouse to satisfy alimony or child support awards.<sup>295</sup> By default, any further authority over this prop-

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292. 10 U.S.C. § 1408(c)(1).

293. *Id.* § 1408(e).

294. *Id.* § 1408(d)(5), (e)(1).

295. *Id.* § 1408(e)(4)(B). In 1975, Congress amended the Social Security Act to allow for federal benefits to be used to satisfy child support and alimony obligations, thereby creating an exception to all federal benefit provisions that prohibited the anticipation or assignment of benefits. *See Hisquierdo v. Hisquierdo*, 439 U.S. 572, 576 (1979) (citing 42 U.S.C. § 659 (1976)).

Notwithstanding any other provision of law, effective January 1, 1975, moneys (the entitlement to which is based upon remuneration for employment) due from, or payable by, the United States or the District of Columbia (including any agency, subdivision, or instrumentality thereof) to an individual, including members of the armed services, shall be subject, in like manner and to the same extent as if the United States or the District of Columbia were a private person, to legal process brought for the enforcement, against such individual of his legal obligations to provide child support or make alimony payments.

42 U.S.C. § 659 (1976). Two years later, Congress defined the term "alimony" to exclude any payment issuing from the equitable distribution of property. *See Hisquierdo*, 439 U.S. at 577 (citing Tax Reduction and Simplification Act of 1977, Pub. L. No. 95-30, § 501(d), 91 Stat. 126, 160).

The term "alimony", when used in reference to the legal obligations of an individual to provide the same, means periodic payments of funds for the support and mainte-

erty is derived under the authority of state courts to apply their own state property distribution schemes. Many courts have held that the authority of a state court to consider the portion of retired pay waived for disability pay and to offset that value with other marital property falls within the scope of this latter authority.

For example, in *Hadrych v. Hadrych*, the wife had been awarded 50% of the husband's retired pay.<sup>296</sup> The husband subsequently retired from the military after being injured in a helicopter accident.<sup>297</sup> The husband waived 100% of his retired pay for disability pay, thereby reducing his wife's payments.<sup>298</sup> The court ordered the husband to pay directly to the wife the amount that she was previously awarded under the original court order.<sup>299</sup> Recognizing the majority view, the court held that federal law does not prohibit state courts from offsetting with other property retired pay converted to disability pay, provided the relief does not directly divide disability pay as marital property.<sup>300</sup> Expanding on its holding in *Scheidel v. Scheidel*, in which the court held that a party may not unilaterally reduce another party's interest in military retired pay that was established in a marital settlement agreement,<sup>301</sup> the court held that the

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nance of the spouse (or former spouse) of the individual, and (subject to and in accordance with State law) includes separate maintenance, alimony pendente lite, maintenance, and spousal support, and includes attorney fees, interest, and court costs when and to the extent that the same are expressly made recoverable as such pursuant to a decree, order, or judgment issued in accordance with applicable State law by a court of competent jurisdiction. . . . *Such term does not include . . . any payment or transfer of property or its value by an individual to the spouse or a former spouse of the individual in compliance with any community property settlement, equitable distribution of property, or other division of property between spouses or former spouses.*

42 U.S.C. § 659(i)(3) (2000) (emphasis added).

296. *Hadrych v. Hadrych*, No. 25,456, 2006 WL 3913768, at \*1 (N.M. Ct. App. Oct. 4, 2006).

297. *Id.*

298. *Id.*

299. *Id.* at \*6.

300. *Id.* at \*4; *see also* *Danielson v. Evans*, 36 P.3d 749, 755-56 (Ariz. Ct. App. 2001) (finding that a court could enforce a divorce decree and order by instructing the husband to "make up" payments that the wife lost after the husband converted retirement benefits into disability benefits); *In re Marriage of Lodeski*, 107 P.3d 1097, 1107 (Colo. Ct. App. 2004) ("In light of the [Colorado Supreme Court's] reluctance to afford a party to a dissolution action the unilateral ability to defeat his or her spouse's interest in military retired pay, we align ourselves with those states, representing the majority view, that enlist equitable theories to prevent such a result."); *Black v. Black*, 842 A.2d 1280, 1285 (Me. 2004) (finding that federal law "does not limit the authority of a state court to grant postjudgment relief when military retirement pay previously divided by a divorce judgment is converted to disability pay, so long as the relief awarded does not itself attempt to divide disability pay as marital property"); *Johnson v. Johnson*, 37 S.W.3d 892, 895-97 (Tenn. 2001) (ruling that the husband could not unilaterally reduce the wife's share of military retired pay determined in the parties' final divorce decree).

301. *Scheidel v. Scheidel*, 4 P.3d 670, 673-75 (N.M. Ct. App. 2000).

*Scheidel* rule applied even without such an agreement, stating: “[W]e cannot accept the inequity and unfairness that results when one party is allowed to unilaterally reduce the other’s benefits established either under an agreement or a final decree.”<sup>302</sup> The court held that this majority rule was “not at odds with *Mansell*,” which “only applies to the division of payments at the time of divorce and does not preclude a court from ordering the spouse who has adversely impacted the other spouse, by converting retirement benefits to disability benefits, to pay the other spouse directly.”<sup>303</sup> The court held that its order did not violate *Mansell* because it “does not specifically require that disability benefits provide the source of the funds paid to the non-military spouse.”<sup>304</sup> Thus, although the scope of its holding was limited to postjudgment orders, the court held that federal law does not prohibit state courts from granting relief by utilizing other marital property to offset the portion of retired pay that is waived for disability pay in which the nonmilitary spouse has an interest.<sup>305</sup>

Thus, there is a very significant distinction between direct and indirect offsetting that courts refusing to allow offsetting overlook. The distinction is found in whether the offsetting interferes with the federal payment scheme set out in the USFSPA. (See Table 5).

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302. *Hadrych*, 2006 WL 3913768, at \*3; *see also* *Resare v. Resare*, 908 A.2d 1006, 1007-08, 1010 (R.I. 2006) (holding the husband to the terms of the property settlement agreement, which gave the wife a 35% interest in gross military pension, after husband unilaterally converted retired pay to disability pay).

303. *Hadrych*, 2006 WL 3913768, at \*4.

304. *Id.* (citing *Scheidel*, 4 P.3d at 674); *see also* *Resare*, 908 A.2d at 1010 (citing *Dexter v. Dexter*, 661 A.2d 171 (Md. Ct. Spec. App. 1995); *Krapf v. Krapf*, 786 N.E.2d 318 (Mass. 2003); *Johnson v. Johnson*, 37 S.W.3d 892 (Tenn. 2001)).

305. *Hadrych*, 2006 WL 3913768, at \*2-4.

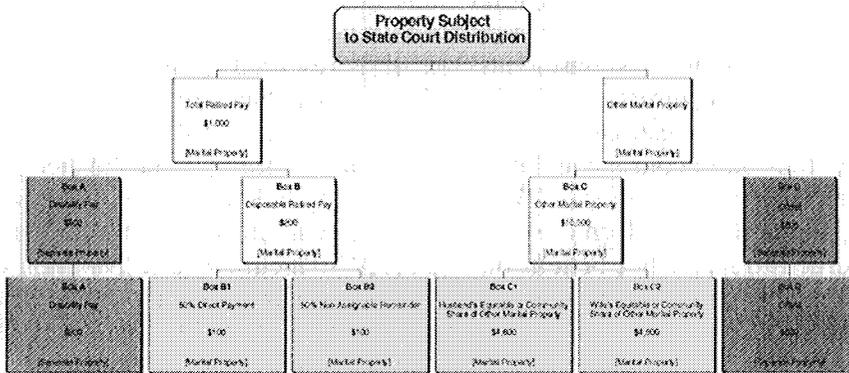


Table 5

Table 5 represents the distribution of military retired pay, which includes disposable or retired pay of \$1,000, a portion of which is waived for disability pay (Box A), with the remainder being distributed according to the limitations set out in the federal payment scheme under the USFSPA (Boxes B1 and B2). Assuming \$10,000 of other marital property, an offset of the disability award (Box D) is derived from other disposable marital property (Box C), the remainder of which is distributed according to the appropriate state property distribution scheme, assuming a 50/50 split (Boxes C1 and C2).

The distinction between a direct and indirect offset is created by identifying which payment scheme the offset is derived from. A direct offset would necessarily utilize retired pay (funds from Box B2) to compensate for a specific amount of disability pay transformed from Box B to Box A. Such utilization of retired funds may be (but is not necessarily) contrary to the limitations on the payment scheme set out in the USFSPA. The USFSPA allows a state court to distribute to the former spouse only the marital property from Box B1 and Box C. As demonstrated here and as recognized by many courts, although these limitations may be inequitable for the former spouse, it may be contrary to the federal payment scheme for a state court to offset by utilizing funds from unauthorized boxes. This is quite poignantly expressed by the court in *In re Marriage of Crook*, when it recognized, correctly, that “it is not the province of this court—or of any state court—to interfere with the federal scheme, no matter how unfair it may appear to be. . . . Accordingly, it is up to Con-

gress, and not the state courts, to correct any inequity in the federal system.”<sup>306</sup> The federal payment scheme relevant to military retired pay is designed simply to assure that the military spouse acquires the maximum property interest from Box A and Box B2; Box A is the separate property of the military spouse, and Box B2 is reserved as marital property not subject to direct distribution. If Congress had provided only that state courts are restricted to these limitations in the distribution of retired pay, then state courts could consider military retired pay no further. In part, such was the effect of *McCarty*. But the federal scheme is not designed to deprive a former spouse of property interests that have already accrued to his or her benefit or to assure the inequitable distribution of marital property. Instead, Congress specifically provided in the USFSPA that, subject to these limitations, states are free to distribute military retired pay according to their own state property distribution schemes.

Thus, indirect offsetting utilizes other marital property (Box C) to compensate for property transformed from marital property (Box B) to separate property (Box A) for the sole benefit of one spouse. The USFSPA, 10 U.S.C. § 1408(c)(1), specifically authorizes state courts to make such compensatory distributions if their respective property distribution schemes provide for them to do so.<sup>307</sup> Thus, utilizing funds from Box C to implement equitable considerations does no harm to the federal scheme. Property that Congress intends to be acquired by the military spouse is left intact. Within the authorized distribution scheme of state courts, state courts are not manipulating property in any way that is different from what Congress authorized through the federal payment scheme or what is authorized through the application of state court provisions, even when federal benefits are not being considered. With respect to the authority of state courts to implement equity in this way, the court in *Crook* further recognized that the issue of whether persons receiving benefits in lieu of Social Security must be placed in a position similar to that of the other spouse whose Social Security will be exempt from equitable distribution is left “for another day.”<sup>308</sup> But this “other day” has already arrived. Congress has already provided for this authority in § 1408(c)(1) by providing that, with respect to the distribution of military retired pay, state courts are free to consider military retired pay when equitably distributing other marital property, provided that state courts respect the scope of the limitations of the federal payment scheme under the USFSPA.

Thus, disability pay, although characterized as separate property of the participating spouse, is not immune from the consideration of state courts

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306. *In re Marriage of Crook*, 813 N.E.2d 198, 205-06 (Ill. 2004).

307. 10 U.S.C. § 1408(c)(1) (2000).

308. *Crook*, 813 N.E.2d at 206.

when applying the community or equitable property distribution schemes relevant to that court or jurisdiction, any more than any other separate property may be considered under such schemes. Generally, state courts may consider a party's future separate property earnings in equitably distributing marital property.<sup>309</sup> More specifically, many courts have held that separate property disability pay may be considered in effectuating equitable awards of alimony and child support, even when disability pay is the only source of available income.<sup>310</sup> Some courts have held that, in applying relevant equitable distribution provisions, disability pay may be

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309. See *Krize v. Krize*, Nos. S-11842, S-11862, 2006 WL 2458571, at \*6-8 (Alaska Aug. 25, 2006) (determining that prospective inheritance may be considered in ascertaining financial condition for property division purposes); *Atkinson v. Atkinson*, 32 S.W.2d 41, 45-46 (Ark. Ct. App. 2000) (using discretionary power under property division statute to fashion unequal division of marital property in favor of wife based in part on consideration of husband's separate property future inheritance); *In re Marriage of Smith*, 427 N.E.2d 1262, 1266 (Ill. App. Ct. 1981) (considering, under property division statute, the wife's separate property vested interest in future inheritance in order to fashion equitable distribution of marital property and support payments); *In re Marriage of Rhinehart*, 704 N.W.2d 677, 683 (Iowa 2005) (considering the wife's separate property future interest in multi-million dollar trust in awarding the husband full value of marital property in the form of money in a bank account); *In re Marriage of Harris*, 132 P.3d 502, 508 (Mont. 2006) (remanding for consideration of future inheritance to determine equitable distribution of marital assets, although the husband's interest in trust fund was separate property not subject to division); *Dorton v. Dorton*, 336 S.E.2d 415, 421-22 (N.C. Ct. App. 1985) (considering, in a divorce action, the husband's separate property in the form of a dental license when determining equitable distribution of marital property under state's property division statute); *Hussey v. Hussey*, 312 S.E.2d 267, 271 (S.C. Ct. App. 1984) (holding that even though the husband's inherited property is separate property not subject to division, the court may consider it as a factor in determining equitable division of marital property); *Hailey v. Hailey*, 176 S.W.3d 374, 379-82 (Tex. App. 2004) (determining equitable division of community property in part by considering each party's separate estates in the form of the wife's stocks and employee profit-sharing plan weighed against the husband's equity in his separate home and earning capacity based on his formal education); *Grumbeck v. Grumbeck*, No. 2005AP2512, 2006 WL 2612857, at \*2-3 (Wis. Ct. App. Sept. 13, 2006) (holding that gifted assets cannot be split in half to make even unless "financial privation" results); see also *Searcy v. Searcy*, 627 S.E.2d 572, 574 (Ga. 2006) (awarding wife, as alimony, a portion of the husband's separate interest in estates of deceased parents); *Demman v. Demman*, 489 N.W.2d 161, 163-64 (Mich. Ct. App. 1992) (awarding the wife a portion of the husband's separate inheritance where equitable division of marital assets was insufficient to maintain wife).

310. See *Allen v. Allen*, 650 So. 2d 1019, 1020 (Fla. Dist. Ct. App. 1994) (considering disability pay for alimony, even if "most of the paying spouse's income consists of military retirement designated as disability"); *In re Marriage of Anderson*, 522 N.W.2d 99, 102 (Iowa Ct. App. 1994) (holding that the court can force veteran to pay child support, "even if the veteran's only means of satisfying his obligation is to use veteran's benefits received as compensation for a service connected disability"); *In re Marriage of Strong*, 8 P.3d 763, 769-70 (Mont. 2000) (finding that a court could consider disability pay in the case of spousal or child support, or unequal property distribution); *Kramer v. Kramer*, 567 N.W.2d 100, 113 (Neb. 1997) (considering disability pay as income for purposes of changed circumstances to modify fixed alimony, not as part of the estate); *Wingard v. Wingard*, 11 Pa. D. & C.4th 343, 345 (1991) (ruling that disability pay is income for spousal and child support).

considered as income for purposes of determining the future economic circumstances of the parties.<sup>311</sup> Courts have even considered disability waivers when the waiver occurred after the dissolution of the marriage, insofar as it affected the equitable distribution of property to which the other spouse had acquired an interest.<sup>312</sup> There are many courts that have enforced agreements between parties in which the military spouse agreed to distribute separate property disability pay to the non-participating spouse.<sup>313</sup> Such enforcement has been held not to violate the scope of the restrictions set out in *Mansell*.<sup>314</sup>

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311. See *Kabaci v. Kabaci*, 373 So. 2d 1144, 1146-47 (Ala. Civ. App. 1979) (allowing retirement benefits to be used as a source of income from which to pay periodic alimony, but prohibiting the use of retirement benefits for alimony in gross or property settlement), *overruled by Ex parte Vaughn*, 634 So. 2d 533 (Ala. 1993) (holding that disposable military retirement benefits accumulated during marriage are divisible as marital property); *State ex rel. D.F. v. L.T.*, 934 So. 2d 687, 691, 694 (La. 2006) (including military housing and subsistence allowance in gross income for purposes of calculating child support); *Sward v. Sward*, 410 N.W.2d 442, 444 (Minn. Ct. App. 1987); *In re Marriage of Kraft*, 832 P.2d 871, 877 (Wash. 1992) (regarding disability pay as future income for economic circumstances of parties and basis for equity).

312. *In re Krempin*, 83 Cal. Rptr. 2d 134, 143 (Cal. Ct. App. 1999) (determining that post-dissolution waivers can be considered); *Black v. Black*, 842 A.2d 1280, 1286 (Me. 2004) (holding that the wife could get what she would have gotten absent waiver); *Troxell v. Troxell*, 28 P.3d 1169, 1171 (Okla. Civ. App. 2001) (finding that a court can enforce property division award where retirement was divided but then subsequently waived to avoid award); see also *Harris v. Harris*, 991 P.2d 262, 265 (Ariz. Ct. App. 1999) (proscribing transformation to disability once decree is final); *Gatfield v. Gatfield*, 682 N.W.2d 632, 637-38 (Minn. Ct. App. 2004) (finding that the USFSPA does not preclude veteran from contracting not to waive and to indemnify if he does); *Radigan v. Radigan*, 465 N.W.2d 483, 486-87 (S.D. 1991) (ruling that the husband must share with ex-wife the increase in retired benefits that results from post-divorce efforts); *Neese v. Neese*, 669 S.W.2d 388, 390 (Tex. App. 1984) (considering post-divorce increases in the future payments of a husband's non-disability military retirement benefits).

313. See *Gatfield*, 682 N.W.2d at 637; *Hoskins v. Skojec*, 696 N.Y.S.2d 303, 305 (App. Div. 1999) (determining that a court cannot divide disability pay but can enforce parties' agreement to divide); *Ingalls v. Ingalls*, 624 N.E.2d 368, 375 (Ohio Ct. App. 1993) (affirming division of nonvested military retirement benefits consistent with agreement of the parties expressed at trial); *Cherry v. Figart*, 620 N.E.2d 174, 176-77 (Ohio Ct. App. 1993) (dividing nonvested pension when parties agreed to divide retirement benefits and suit was brought for enforcement); see also *Towner v. Towner*, 858 S.W.2d 888, 891-92 (Tenn. 1993) (affirming approval of separation agreement of nonvested retirement payments). *But see Abernethy v. Fishkin*, 699 So. 2d 235, 240 (Fla. 1997) (finding that a court cannot enforce agreements but may enforce judgments with indemnification clauses, as long as disability portion is not used); *Goodson v. Goodson*, 744 A.2d 828, 831 (R.I. 2000) (determining that as a component of property settlement agreement, family court may divide only a spouse's disposable retired pay under USFSPA in effect at time of divorce decree).

314. See *Owen v. Owen*, 419 S.E.2d 267, 270 (Va. Ct. App. 1992) (holding a settlement agreement's guarantee or indemnification clause requiring the retiree to pay the same amount of support, despite beginning to collect VA disability pay, does not violate *Mansell*); see also *Abernethy*, 699 So. 2d at 239-40.

### A. *The Authority to Offset*

In 10 U.S.C. § 1408(c)(1), Congress specifically authorized state courts to categorize and distribute military retired pay according to the application of state law.<sup>315</sup> Many states statutorily provide within their own state distribution scheme for the limits of such distribution.<sup>316</sup> Even if not specifically expressed, however, in making such distributions, every state employs property distribution provisions upon the dissolution of marriage that are applicable to a state court's authority to consider military disability pay.<sup>317</sup> When equitably distributing marital property within

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315. 10 U.S.C. § 1408(c)(1) (2000).

316. See, e.g., MD. CODE ANN., FAM. LAW § 8-203(b) (LexisNexis 2006) (defining military retired pay as marital property); MASS. GEN. LAWS ANN. ch. 208, § 34 (West 1998) (defining vested and nonvested pensions as marital property subject to division); MICH. COMP. LAWS ANN. § 552.18(1) (West 2005) (providing that vested or nonvested retirement benefits may be divided); MINN. STAT. ANN. § 518.54(5) (West 2006) (defining vested or nonvested pensions as marital property); NEB. REV. STAT. § 42-366(8) (2004) (stating that military pensions—vested or not—are part of marital estate and may be divided as property or alimony); N.H. REV. STAT. ANN. § 458:16-a (LexisNexis Supp. 2005) (including vested and nonvested pensions as marital property); N.J. STAT. ANN. § 2A:34-23 (West Supp. 2006) (including pensions in equitable distribution of marital property); N.C. GEN. STAT. § 50-20(b)(1) (2005) (providing that marital property includes all vested and nonvested pension, retirement, and other types of deferred compensation rights; vested and nonvested military pensions eligible under USFSPA); TENN. CODE ANN. § 36-4-121(b)(1)(B) (2005) (defining vested and nonvested pensions as marital property).

317. ALA. CODE § 30-2-51 (LexisNexis 1998) (stating that a court may consider the separate estates of each spouse in determining distribution of property upon divorce); ALASKA STAT. § 25.24.160(a)(4) (2004) (giving courts the discretion to consider joint or separate property acquired during marriage as well as discretion to invade non-marital property if equity so requires); ARIZ. REV. STAT. ANN. § 25-318(C) (2000) (providing courts with the discretion to impress a lien upon separate property for equitable purposes such as alimony or child support); ARK. CODE ANN. § 9-12-315 (2002) (stating that a court shall distribute marital property equally—unless the division would be inequitable—based on consideration of several factors including other sources of income); CAL. FAM. CODE § 2550 (West 2004) (requiring courts to divide community property equally); COLO. REV. STAT. § 14-10-113(1) (2005) (stating that a court has discretion to divide marital property in such proportions as it deems just after considering several factors including the economic circumstances of each party and value of their separate property); CONN. GEN. STAT. ANN. § 46b-81 (West 2004) (granting courts the discretion to assign all or any part of one spouse's estate to other spouse after considering several factors including amount and sources of income and each party's prospects for future acquisition of assets or income); DEL. CODE ANN. tit. 13, § 1513 (1999) (stating that a court shall equitably divide marital property into just proportions upon considering several factors including amount and sources of income and opportunity for future acquisition of assets or income); D.C. CODE § 16-910 (Supp. 2006) (requiring courts to distribute marital property in just and equitable manner upon consideration of several factors including sources of income and opportunity for future acquisition of assets and income); FLA. STAT. ANN. § 61.075 (West 2006) (providing that a court must begin with premise for equal distribution unless unequal distribution is justified based upon several factors including discretion to consider any other factor necessary for equity); GA. CODE ANN. § 19-6-5 (2004) (stating that a court may grant permanent alimony to either party upon consideration of several factors including separate

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estates of each party and any other factors court deems equitable and proper); HAW. REV. STAT. ANN. § 580-47 (LexisNexis 2005) (providing that a court may divide estate of parties whether mixed, joint, or separate, in just and equitable manner); IDAHO CODE ANN. § 32-906 (2006) (stating that all property acquired after marriage by either party is community property); 750 ILL. COMP. STAT. ANN. 5/503(d) (West Supp. 2006) (requiring a court to divide marital property in just proportions considering several factors including each party's amount and sources of income and opportunity for future acquisition of assets and income); IND. CODE ANN. § 31-15-7-5 (LexisNexis 2003) (stating that a court presumes equal division of marital property unless equal division would not be just and reasonable after consideration of each spouse's separate property and each party's future earning capacity); IOWA CODE ANN. § 598.21 (West Supp. 2006) (mandating that the courts divide all marital property equitably upon consideration of several factors including separate property of each party, earning capacity of each party, and any other factor the court determines to be relevant); KAN. STAT. ANN. § 60-1610(b)(1) (Supp. 2003) (stating that a court shall divide all property upon consideration of several factors including earning capacity of each party and any other factors the court considers necessary for just and reasonable division of property); KY. REV. STAT. ANN. § 403.190(1) (LexisNexis 1999) (requiring a court to divide marital property in just proportions upon consideration of several factors including value of property set aside to each spouse); LA. CIV. CODE ANN. art. 2336 (1985) (stating that each party owns an undivided one-half interest in community property); ME. REV. STAT. ANN. tit. 19-A, § 953(1) (1998) (providing that a court shall divide marital property in just proportions upon consideration of several factors including value of property set apart to each spouse); MD. CODE ANN., FAM. LAW § 8-205 (LexisNexis 2006) (authorizing courts to divide marital property in accordance with equities and rights of parties upon consideration of several factors including value of each party's property interests and any other factor necessary for fair and equitable distribution); MASS. GEN. LAWS ANN. ch. 208, § 34 (West 1998) (allowing a court to assign to spouse all or any part of estate of other spouse upon consideration of several factors including amount and sources of income and capacity for future acquisition of assets and income); MICH. COMP. LAWS ANN. § 552.19 (West 2005) (stating that a court may divide marital property in such parts as it deems just and reasonable); MINN. STAT. ANN. § 518.58 (West 2006) (providing that a court shall make just and equitable division of marital property upon consideration of several factors and may apportion up to half of a party's non-marital property if marital property division is inadequate); MISS. CODE ANN. § 93-5-23 (West 2005) (giving courts the discretion to make just and equitable allowance); MO. ANN. STAT. § 452.330 (West 2003) (stating that a court shall divide marital property in just proportions upon consideration of several factors including value of each spouse's non-marital property); MONT. CODE ANN. § 40-4-202 (2005) (requiring a court to equitably apportion property and assets, whether joint or separate, upon consideration of several factors including each party's amount and sources of income and opportunity of each for future acquisition of assets and income); NEB. REV. STAT. § 42-365 (2004) (permitting court to order reasonable division of property to make equitable distribution); NEV. REV. STAT. ANN. § 125.150 (LexisNexis 2004) (mandating that courts make equal disposition of community property upon consideration of several factors, and allowing discretion to apportion a part of one spouse's separate property as the court deems just and equitable); N.H. REV. STAT. ANN. § 458:16-a (LexisNexis Supp. 2005) (allowing a court to order equitable division of property upon consideration of several factors including separate property of each party, sources of income, opportunity for future acquisition of assets and income, and any other factor a court deems relevant); N.J. STAT. ANN. § 2A:34-23 (West Supp. 2006) (stating that a court shall make equitable distribution of property upon consideration of several factors including income and earning capacity of each party and any other factors court deems relevant); N.M. STAT. ANN. § 40-4-7 (LexisNexis 2006) (providing that a court shall apportion property in just and proper manner upon consideration of several factors

these provisions, state courts may be expressly authorized to consider the separate property of parties, which would include disability pay, or may

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including value of amount of property awarded to each spouse and type and nature of respective spouse's assets); N.Y. DOM. REL. LAW § 236(B)(5) (McKinney Supp. 2006) (requiring a court to distribute marital property equitably upon consideration of several factors including future financial circumstances of each party and any other factor court finds to be just and proper); N.C. GEN. STAT. § 50-20 (2005) (stating that a court shall make equitable division of property upon consideration of several factors including income of each party, expectation of various types of deferred compensation, and any other factor court finds just and proper); N.D. CENT. CODE § 14-05-24 (2004) (ordering a court to make equitable distribution of property); OHIO REV. CODE ANN. § 3105.171(B)-(C) (LexisNexis 2000) (providing that a court shall make equitable division of marital property upon consideration of several factors including assets of each spouse and any other factor court finds relevant and equitable); OKLA. STAT. ANN. tit. 43, § 121 (West 2001) (requiring a court to make just and reasonable division of property); OR. REV. STAT. § 107.105(1)(f) (2005) (stating that a court shall divide marital property as may be just and proper upon consideration of all circumstances); 23 PA. CONS. STAT. ANN. § 3502(a) (West Supp. 2006) (ordering courts to equitably divide marital property in just manner upon consideration of several factors including amount and sources of income, future acquisition of assets and income, and value of property set apart to each party); R.I. GEN. LAWS § 15-5-16.1 (Supp. 2005) (authorizing court to assign to either party portion of estate of other spouse upon consideration of several factors including amount and sources of income, future acquisition of assets and income, and any factor court finds just and proper); S.C. CODE ANN. § 20-7-472 (Supp. 2005) (mandating a court to make equitable apportionment of parties' marital property giving weight to several factors including non-marital property of each spouse and any other factor court deems relevant); S.D. CODIFIED LAWS § 25-4-44 (1999) (allowing court to make equitable division of marital property considering equity and circumstances of parties); TENN. CODE ANN. § 36-4-121 (2005) (requiring court to equitably distribute marital property upon consideration of several factors including value of each party's separate property and any other factor necessary to consider equities between the parties); TEX. FAM. CODE ANN. § 7.001 (Vernon 2006) (stating that the court shall order division of estate of parties in manner that the court deems just and right); UTAH CODE ANN. § 30-3-5(1) (Supp. 2006) (permitting court to make equitable orders pertaining to property of parties); VT. STAT. ANN. tit. 15, § 751 (1998) (requiring court to equitably divide and assign property upon consideration of several factors including source and amount of income and future acquisition of assets and income); VA. CODE ANN. § 20-107.3 (Supp. 2006) (stating that a court shall determine division of marital property upon consideration of several factors including any other factors necessary to arrive at a fair and equitable monetary award); WASH. REV. CODE ANN. § 26.09.080 (West 2005) (providing that a court shall divide property in just and equitable manner upon consideration of several factors including nature and extent of separate property); W. VA. CODE ANN. § 48-5-610 (LexisNexis 2004) (requiring a court to order just and equitable distribution of property and that it may consider separate estates of each party); WIS. STAT. ANN. § 767.255 (West 2001) (granting court the discretion to divide community property in equitable manner upon consideration of several factors including whether one party has substantial assets not subject to division and any other factors court deems relevant); WYO. STAT. ANN. § 20-2-114 (2005) (requiring a court to make a just and equitable disposition of property); see also P.R. LAWS ANN. tit. 31, §§ 381, 385 (1993 & Supp. 2003) (stating that a divorce requires division of all property, and court may grant alimony upon consideration of several factors including financial wealth of each party and any other factor deemed appropriate); V.I. CODE ANN. tit. 16, § 109 (Supp. 2006) (allowing a court to order monetary award to party upon consideration of needs).

be authorized more generally to consider separate property through a catch-all provision that enables a court to use its discretion to distribute property equitably. Notwithstanding the language of individual provisions, every state has authority to distribute marital property, and within that authority, courts must include some distribution of military retired pay.

Within this context (see Table 6), a significant distinction must be recognized.

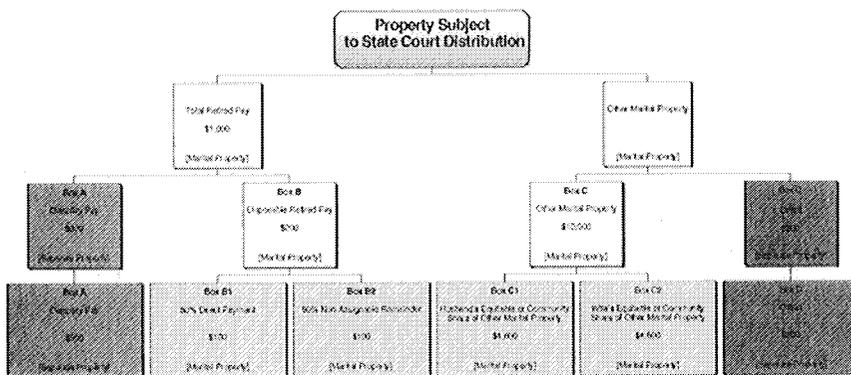


Table 6

Many courts hold that what Congress authorized in § 1408(c)(1) was that state courts may distribute, within the 50% limitation prescribed in § 1408(d)(5) and § 1408(e)(1) (Boxes B1 and B2), only disposable retired pay (Box B).<sup>318</sup> This view excludes disability pay as a consideration under

318. See *Ex parte Billeck*, 777 So. 2d 105, 109 (Ala. 2000) (finding that an award of a portion of disability pay violates USFSPA); *Hapney v. Hapney*, 824 S.W.2d 408, 409 (Ark. Ct. App. 1992) (prohibiting distribution of disability pay); *In re Marriage of Costo*, 203 Cal. Rptr. 85, 88-89 (Cal. Ct. App. 1984) (excluding disability pay by definition); *In re Marriage of Riley-Cunningham*, 7 P.3d 992, 994-95 (Colo. Ct. App. 1999) (determining that a distribution of disability pay was not allowed); *McMahan v. McMahan*, 567 So. 2d 976, 978 (Fla. Dist. Ct. App. 1990) (holding that no portion of disability may be subject to distribution); *In re Marriage of Strunck*, 570 N.E.2d 1, 2 (Ill. App. Ct. 1991) (finding that disability pay is separate property, and the excess is marital property); *In re Marriage of Pierce*, 982 P.2d 995, 998 (Kan. Ct. App. 1999) (rejecting direct or indirect offsetting); *Rearden v. Rearden*, 568 So. 2d 1111, 1115 (La. Ct. App. 1990) (holding that a court may not consider total retired pay); *Tarver v. Tarver*, 557 So. 2d 1056, 1061 (La. Ct. App. 1990) (finding that disability benefits are excluded); *King v. King*, 386 N.W.2d 562, 564 (Mich. Ct. App. 1986) (ruling that disability pay is not included in definition); *Bishop v. Bishop*, 440 S.E.2d 591,

the authority of a state court to apply its state property distribution scheme to other marital property. If the scope of state authority to distribute marital property were restricted to the limitations of the USFSPA and the distribution of military retired pay (Box B), this view would be accurate. But state courts also have authority to distribute *other* marital property within the scope of state statutory limitations (Box C). Even if disability pay is expressly excluded from the scope of state court authority to distribute disposable retired pay, Congress did not preempt the authority of state courts to apply state law with respect to the distribution of other marital property.<sup>319</sup> Thus, within the USFSPA, § 1408(c)(1) must not be read to preempt the application of state law respecting other property. Instead, it must be read to be inclusive in that it authorizes state courts to include disposable retired pay as part of their normal application of state property distribution law, albeit with specific limitations prescribed by § 1408(d)(5) and § 1408(e)(1), in conjunction with the distribution of other marital property. For state courts to interpret the authority afforded under § 1408 to exclude other equitable considerations, including the separate property of the parties, when state law otherwise authorizes state courts to make such considerations, is to interpret the USFSPA as preempting state law and the authority of state courts to distribute *any* other marital property within Box C. Such an application of federal law is not just a return to *McCarty*, in which states were preempted from distributing non-disability military retired pay (Box B), but it surpasses *McCarty* in scope in that it necessarily restricts the authority of state courts to apply state law to other marital property (Box C) in a way that Congress neither provided for nor intended.

In her dissent in *Mansell*, Justice O'Connor, with whom Justice Blackmun joined, asserted that *McCarty* did not preclude states from characterizing as marital property the portion of retired pay waived for disability pay.<sup>320</sup> Instead, she asserted that, by enacting the USFSPA, Congress intended to give the states the authority "to treat military pensions in the

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597 (N.C. Ct. App. 1994) (concluding that disability pay is separate and must be treated as distributional factor); *Hisgen v. Hisgen*, 554 N.W.2d 494, 498 (S.D. 1996) (ruling that disability is specifically excluded from definition); *Lambert v. Lambert*, 395 S.E.2d 207, 209 (Va. Ct. App. 1990) (excluding disability); *In re Marriage of Jennings*, 980 P.2d 1248, 1256 (Wash. 1999) (prohibiting distribution of disability).

319. See *Mansell v. Mansell*, 490 U.S. 581, 597 (1989) (O'Connor, J., dissenting) (declaring that the Act does not "positively require" preemption). Rather, the whole purpose of the Act was to restore the states to their traditional authority and to assist former spouses, not hinder them. The USFSPA is "primarily a remedial statute creating a mechanism whereby former spouses armed with State court orders may enlist the Federal Government to assist them in obtaining some of their property entitlements upon divorce." *Id.*

320. *Id.* at 596-97.

same manner as they treat other retirement benefits.”<sup>321</sup> Justice O’Connor claimed that the majority in *Mansell* was wrong to conclude that states “can apply their community property laws to military retirement pay only to the extent that the [USFSPA] affirmatively grants them authority to do so.”<sup>322</sup> Even the majority in *Mansell* recognized that the savings clause under § 1408(e)(6)<sup>323</sup> “serves the limited purpose of defeating any inference that the federal direct payments mechanism [(under Boxes B1 and B2)] displaced the authority of state courts to divide and garnish property not covered by the mechanism [(under Box C)].”<sup>324</sup> What Justice O’Connor asserted was that § 1408(a)(4)—which defines disposable retired pay as excluding disability pay—and its incorporation into the marital property provision of § 1408(c)(1) only limits the garnishment remedy created by the Act; it does not limit the states’ authority to characterize the waived portion as marital property.<sup>325</sup> Justice O’Connor reasoned that Congress included the waiver provision under the garnishment provision because if Congress did not include it, then the government could garnish disability pay, thereby eviscerating the anti-assignment clause of 38 U.S.C. § 3101(a).<sup>326</sup> Thus, she argued, it should not be read to preclude state authority to characterize the pay as marital, but only to preclude the use of the federal direct payment or garnishment mechanism.<sup>327</sup> Many state courts have applied this reasoning to the ten-year marriage requirement of § 1408(d)(2),<sup>328</sup> by holding that if the ten-

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321. *Id.* at 596 (quoting S. REP. NO. 97-502, at 10 (1982), reprinted in 1982 U.S.C.A.N. 1596, 1604-05).

322. *Id.*

323. 10 U.S.C. § 1408(e)(6) (2000) (“Nothing in this section shall be construed to relieve a member of liability for the payment of alimony, child support, or other payments required by a court order on the grounds that payments made out of disposable retired pay . . . have been made in the maximum amount permitted under [§ 1408(e)(1)] . . . . Any such unsatisfied obligation of a member may be enforced by any means available under law other than the means provided under this section . . .”).

324. *Mansell*, 490 U.S. at 590.

325. *Id.* at 597-98 (O’Connor, J., dissenting).

326. *Id.* at 598.

327. *Id.* at 599; see also *Ex parte* Smallwood, 811 So. 2d 537, 541 (Ala. 2001); *Deliduka v. Deliduka*, 347 N.W.2d 52, 55-56 (Minn. Ct. App. 1984); *In re Marriage of Bocanegra*, 792 P.2d 1263, 1268 (Wash. Ct. App. 1990); *Forney v. Minard*, 849 P.2d 724, 730 (Wyo. 1993). *But see* *Chisnell v. Chisnell*, 385 N.W.2d 758, 761-62 (Mich. Ct. App. 1986); *Coon v. Coon*, 614 S.E.2d 616, 617-18 (S.C. 2005) (finding that state court has jurisdiction but is preempted from granting more than 50% combined), *cert. denied*, 126 S. Ct. 1025 (2006); *In re Marriage of Smith*, 669 P.2d 448, 450-51 (Wash. 1983); *Kelly v. Kelly*, 78 P.3d 220, 223-24 (Wyo. 2003).

328. 10 U.S.C. § 1408(d)(2) (“If the spouse or former spouse to whom payments are to be made under this section was not married to the member for a period of 10 years or more during which the member performed at least 10 years of service creditable in determining the member’s eligibility for retired pay, payments may not be made under this section to the extent that they include an amount resulting from the treatment by the court

year requirement is not met, it does not limit a state court's authority to distribute disposable retired pay; it merely limits the state court's authority to garnish it directly from the government.<sup>329</sup> Thus, with regard to the garnishment provision:

[W]hile a former spouse may not receive community property payments that exceed 50 percent of a retiree's disposable retirement pay through the direct federal garnishment mechanism, § 1408(e)(1), a state court is free to characterize gross retirement pay as community property depending on the law of its jurisdiction, and former spouses may pursue any other remedy "available under law" to satisfy that interest. "Nothing" in the Former Spouses' Protection Act relieves military retirees of liability under such law if they possess other assets equal to the value of the former spouse's share of the gross retirement pay.<sup>330</sup>

However, the majority in *Mansell* determined that it was more plausible that Congress would not authorize state courts to remedy the inequity resulting from this application of the USFSPA, reasoning that if Congress intended this inequity to be remedied, it would have affirmatively authorized it. Even Justice O'Connor agreed that, as a result of the majority holding in *Mansell*, "[i]t is now once again up to Congress to address the inequity created by the Court in situations such as this one."<sup>331</sup> The problem in this is that, even after *Mansell*, state courts are no closer to uniformity in applying this interpretation of the USFSPA than they were between 1981 and 1989, before *Mansell*. In fact, state courts are less uniform on this issue than they were prior to 1981, when the Court decided *McCarty*. The reason for this continuing lack of uniformity is that some state courts are awaiting explicit authorization from Congress, but Congress has already authorized state courts to remedy the inherent inequity of the USFSPA through their own discretion to offset with other marital

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under subsection (c) of disposable retired pay of the member as property of the member or property of the member and his spouse.").

329. *See id.*; *see also In re Marriage of Beltran*, 227 Cal. Rptr. 924, 927 (Cal. Ct. App. 1986) (holding that the requirement of a ten-year marriage in § 1408(d)(2) only regards direct payment from the government, not offsetting payments under state court property settlement); *Warren v. Warren*, 563 N.E.2d 633, 635 (Ind. Ct. App. 1990) (finding that even if the parties are not married ten years, the court can still make an award, but not directly from the Department of Defense—the remainder can come from spouse); *Carranza v. Carranza*, 765 S.W.2d 32, 33-34 (Ky. Ct. App. 1989); *Warner v. Warner*, 651 So. 2d 1339, 1340 (La. 1995); *Deason v. Deason*, 611 N.W.2d 369, 371-72 (Minn. Ct. App. 2000); *Pacheco v. Quintana*, 730 P.2d 1, 5 (N.M. Ct. App. 1985); *Canales v. Canales*, No. 88-CA-52, 1989 WL 24187, at \*2 (Ohio Ct. App. Mar. 17, 1989); *In re Marriage of Wood*, 676 P.2d 338, 340 (Or. Ct. App. 1984); *Chandler v. Chandler*, 991 S.W.2d 367, 401-02 (Tex. App. 1999); *Konzen v. Konzen*, 693 P.2d 97, 99 (Wash. 1985); *Parker v. Parker*, 750 P.2d 1313, 1314-15 (Wyo. 1988).

330. *Mansell*, 490 U.S. at 601 (O'Connor, J., dissenting).

331. *Id.* at 604.

property that portion of retired pay that is waived for disability pay. It is state courts, not Congress, that are responsible for this lack of uniformity "because . . . Congress has already expressed its intention that the States have the authority to characterize waived retirement pay as property divisible upon divorce."<sup>332</sup>

*B. The Effect of Offsetting on the Objectives of the Federal Payment Scheme*

Many courts, including the United States Supreme Court, have recognized the inequity that the USFSPA creates for former spouses when military spouses waive retired pay for disability pay. The issue that remains unresolved among state courts with respect to the distribution of military retired pay is whether Congress has already afforded state courts the authority to remedy any inequity resulting from the federal payment scheme, or whether Congress must amend the USFSPA to authorize such a remedy.

Congress created the USFSPA to accomplish specific objectives, which courts also recognize: (1) to provide for the security of military personnel; (2) to accommodate the personnel management needs of the military with respect to recruitment and retirement; and (3) to protect former spouses.<sup>333</sup> Congress was aware that achieving these objectives through the USFSPA, on its face, would result in inequity for former spouses. This Article proposes that Congress did not conclude that such an inherently inequitable result could not be remedied without interfering with the objectives of the federal payment scheme.<sup>334</sup> If it had, it would not have provided for state law to apply pursuant to § 1408(c)(1). The *McCarty* Court did come to this conclusion when it held that federal law preempted state law because it interfered with the federal payment scheme and objectives at that time. But by creating the USFSPA, specifically § 1408(c)(1), Congress created a federal payment scheme for mili-

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332. *Id.* This point is supported by other case law described in this article. *See, e.g.*, *Stroshine v. Stroshine*, 652 P.2d 1193, 1195 (N.M. 1982); *White v. White*, 734 P.2d 1283, 1286-87 (N.M. Ct. App. 1987); *Deliduka*, 347 N.W.2d at 55-56. However, this does not necessarily mean that a state court should order actual disability pay (from Box A) to be awarded to a nonmilitary spouse to satisfy a property distribution award. Justice O'Connor recognized that garnishing actual disability benefits would eviscerate the anti-assignment clause of § 3101(a). *Mansell*, 490 U.S. at 598 (O'Connor, J., dissenting). Rather, Justice O'Connor refers to the use of "state-law garnishment remedies to attach the value of [that] portion of [the] community property." *Id.* at 601. What Justice O'Connor discusses in this respect throughout her dissent, without actually using the term, is "offsetting."

333. *See McCarty v. McCarty*, 453 U.S. 210, 232-33 (1981).

334. *See Mansell*, 490 U.S. at 603 (O'Connor, J., dissenting) ("It is inconceivable that Congress intended the broad remedial purposes of the statute to be thwarted in such a way.").

tary retired pay that allowed for state courts to apply state property distribution laws in a way that did not interfere with federal objectives underlying the scheme. Congress thereby determined that federal law need not preempt state law on this issue, and the effect of the USFSPA was to supersede *McCarty*. The question for state courts considering the scope of their authority under the USFSPA, then, is whether the application of state law, which treats the portion of military retired pay waived for disability pay as marital property subject to equitable considerations, does damage to relevant federal objectives. It does not; because, by offsetting the waived portion of retired pay with other marital property, state courts can provide for the security of military personnel while protecting the interests of former spouses, without jeopardizing military personnel objectives. A permissible offset of disability benefits could be achieved by awarding the nonmilitary spouse, as separate property, a portion of marital property other than disability payments, in lieu of the marital portion he or she would have received if marital retired pay had not been unilaterally waived for disability pay. (See Table 6).

First, such a distribution does not interfere with the security that Congress intended to provide to the military retiree. What Congress intended by allowing military retirees to waive a portion of retired pay for disability pay was to provide disabled military retirees with tax relief and to assure that disabled retirees actually acquire their disability pay and their marital interest in disposable retired pay. Congress did not intend to benefit military retirees at the expense of former spouses by allowing military retirees to unilaterally transform a former spouse's marital interest into his or her own separate property interest without equitable compensation if it were warranted. By authorizing state courts to treat waived retired pay as they would any other marital property, Congress afforded state courts the opportunity to employ their own discretion to determine whether such a waiver was inequitable to a former spouse. If the state court determined that such a waiver was inequitable, then offsetting the value of that property with other marital property would effectuate the following: (1) The military retiree would still acquire the maximum disability benefit that Congress intended him or her to have; since offsetting would be accomplished with other marital property, the actual disability pay that Congress calculated as necessary for the security of the retiree would remain intact and would go to the retiree as separate property; (2) Because such an offset assures that the military retiree may still acquire the maximum disability benefit provided under the USFSPA, the military retiree will still enjoy the tax benefit that Congress intended by allowing such a waiver; (3) Offsetting does not deprive the military spouse of any entitlement or interest that he or she would not have been deprived of had he or she not opted for a disability waiver; the portion of retired pay that was waived for disability would remain marital property as disposable retired pay, subject to distribution upon divorce; (4) Offset-

ting does not cause the military retiree to be deprived of any interest that Congress intended him or her to have under the federal payment scheme; any interest in other marital property that a military retiree must waive through an offset is gained in disability pay and the resulting tax benefit. Furthermore, an offset would only be warranted if the state court determined that equity required it; thus, with respect to their respective interests in distributable marital property, offsetting puts both parties in the same position they would have been in had there been no waiver. The military retiree's intended benefits remain intact.

Second, by offsetting, state courts can provide uniformity, which may positively affect military personnel management. One of the concerns of the Court in *McCarty* was that state court authority to categorize and distribute retired pay according to state property distribution principles caused military personnel, who are subject to deployment and unstable domicile, to be involuntarily subject to the laws of a state that distributes retired pay. However, every state court that awards an offset of other marital property in providing equity would still be subject to the limitations prescribed by the federal payment scheme. Therefore, regardless of the jurisdiction distributing the property, federal law would still dictate the scope of state court authority. Additionally, because offsetting provides uniformity, even among community property states, and places military personnel in the same economic position they would be in if they did not opt for disability waiver, offsetting does not hinder personnel management. Since an offset award would provide the former spouse with the value of the waived retired portion, the interest in which accrues during the marriage, even post-dissolution waivers would not circumvent a state's authority to treat such portion as marital. Thus, there is no particular incentive to postpone retirement in an effort to alter or delay a former spouse's entitlement to the value of the property. Furthermore, even the *McCarty* Court recognized that the federal payment system is questionable as an inducement for enlistment and re-enlistment in the armed services or as a means of ensuring a "youthful and vigorous" military.<sup>335</sup> Any effect on these considerations is minimal, and the USFSPA itself has subordinated these concerns to the protection of the former spouse.

Third, offsetting provides equity for former spouses by assuring that they receive the value of the entitlement to which they contributed during the marriage. As Justice O'Connor stated in *Mansell*:

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335. *McCarty*, 453 U.S. at 234 n.26 (suggesting that a congressional amendment to the military retirement system to better accomplish its personnel management goals and perhaps to subordinate those goals to the protection of former spouses was on the horizon in the USFSPA).

[T]he main purpose of the statute . . . is to recognize the sacrifices made by military spouses and to protect their economic security in the face of a divorce. . . . Retirement pay, moreover, is often the single most valuable asset acquired by military couples. . . . Reading the [USFSPA] as not precluding States from characterizing retirement pay waived to receive disability benefits as property divisible upon divorce is faithful to the clear remedial purposes of the statute in a way that the Court's interpretation is not.<sup>336</sup>

#### VIII. CONCLUSION

Congress created the USFSPA to protect the economic security of former spouses of military personnel. One of the most significant property interests affording economic security to former spouses is the marital interest in retired pay to which both spouses contributed during the marriage. However, after the United States Supreme Court's decision in *Mansell v. Mansell*, many state courts interpreted the USFSPA to operate to allow a military retiree who waives a portion of retired pay for disability pay to unilaterally deprive a former spouse of his or her interest in that property and thereby obtain the benefit of the property for him or herself. Courts that interpret the USFSPA as prohibitive of state court authority to remedy this inequity by characterizing the waived portion of retired pay as marital property subject to equitable consideration under state property distribution law facilitate this inequity by not acting on the remedial authority that Congress already afforded under the Act.

By authorizing state courts to treat disposable retired pay as any other marital property under state property distribution principles, Congress necessarily intended that state courts would consider the waived portion of retired pay in distributing other marital property and remedy any resulting inequity by offsetting with other marital property the portion of retired pay that was waived for disability pay. The developments in federal policy regarding many other federal benefits, including Social Security and Railroad Retirement benefits, support an interpretation of the USFSPA that allows for state courts to offset in this manner. Offsetting with other marital property in accordance with state property law promotes equity between the parties, ensures economic security for both parties, and does no damage to military personnel management or other federal objectives underlying the purpose of the USFSPA.

Thus, Congress need not amend the USFSPA to authorize state courts to remedy this inequitable consequence of the federal military payment scheme. Instead, state courts need only to act under the authority that

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336. *Mansell*, 490 U.S. at 602-03 (O'Connor, J., dissenting).

Congress has already afforded under the USFSPA by offsetting with other marital property that portion of retired pay that is waived for disability pay. In so doing, state courts will uniformly provide equity for military spouses and still adhere to the federal objectives underlying the USFSPA.