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Community Property—Deferred Compensation: Disposition of Military Retired Pay upon Dissolution of Marriage—Payne v. Payne, 82 Wn. 2d 573, 512 P.2d 736 (1973)

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COMMUNITY PROPERTY—DEFERRED COMPENSATION: DISPOSITION OF MILITARY RETIRED PAY UPON DISSOLUTION OF MARRIAGE—*Payne v. Payne*, 82 Wn. 2d 573, 512 P.2d 736 (1973).

Petitioner-wife and respondent-husband were married a year after he entered the military service, and divorced in Washington a year before he became eligible to retire. In a property distribution provision of its divorce decree, the trial court awarded the wife \$65 per month of the \$360 per month military retired pay¹ which the husband expected to receive incident to his prospective retirement from the United States Air Force. The court of appeals, reversing, held that such an interest could not be distributed as property under a divorce decree.² The Washington Supreme Court, however, reinstated the decree of the trial court, holding that an interest in military retired pay and the anticipated future benefits therefrom are distributable as property in a divorce proceeding. *Payne v. Payne*, 82 Wn. 2d 573, 512 P.2d 736 (1973).

After brief consideration of the pre-*Payne* cases, in which the Washington Supreme Court diversely treated military retired pay in the context of divorce, this note dissects the court's opinion in the principal case. The court's holding in *Payne* is found to be based upon inadequate analysis proceeding from a misunderstanding of the issue. The precedential value of the case would have been significantly enhanced had the court provided a fully-reasoned analysis of the following issues:

- (1) Is military retired pay property?
- (2) To what extent is military retired pay community property?

1. "Military retired pay" will be used throughout this note to identify the federal benefits paid to service personnel retired for age or length of service pursuant to U.S.C. tit. 10 (1970). Retirement for physical disability under 10 U.S.C. ch. 61 (1970) will not be discussed. Neither the service person nor the federal government makes periodic contributions to any fund identifiable to the individual during the course of active service. The following chapters of Title 10 set forth the circumstances under which personnel may or must retire, and authorize monthly disbursements to one so retired in an amount dependent upon length of service and retired grade (the latter term usually equivalent to rate or rank at the time of separation from active duty): Warrant officers of all services, chs. 63, 65, 69, 71; Army officer and enlisted personnel, chs. 365, 367, 369, 371; Navy and Marine Corps officer and enlisted personnel, chs. 571, 573; Air Force officer and enlisted personnel, chs. 865, 867, 869, 871.

2. *Payne v. Payne*, 7 Wn. App. 338, 498 P.2d 882 (1972).

(3) What disposition of military retired pay is appropriate upon dissolution?

The note answers the first question in the affirmative, presents a mathematical solution to the second problem and identifies the factors to be considered by a court in reaching an equitable resolution of the third problem. The solutions suggested herein necessarily focus on the particular characteristics of military retired pay. However, the property analysis propounded is of broader significance and of interest to a wider readership because of its applicability to retirement plans generally.³

I. BACKGROUND—AN ERRATIC HISTORY

Inconsistency has marked the disposition of military retired pay in Washington divorce proceedings. Addressing issues similar to that in *Payne*, the Washington Supreme Court produced irreconcilable results in three prior decisions, all involving former servicemen who were already receiving military retired pay.⁴ In *Loomis v. Loomis*⁵ the trial court had awarded the husband his military retired pay, "subject however to specific reservation of jurisdiction by this court to review and to possibly change this award in any subsequent controversy between the parties regarding alimony."⁶ Remanding the case for reconsideration

3. As one attorney observed:

While the opinion in *Payne* only discussed military retirement plans, its rationale should apply *a fortiori* to retirement benefits from private corporations. Private plans are more closely analogous to traditional property concepts, since they are (1) funded and (2) not subject to annual Congressional appropriations or other statutory variations.

Riddell, *Three Special Problems: Retirement Plan Benefits, Child Support Beyond Age 18, Interstate Enforcement, Modification Matters*, in CONTINUING LEGAL EDUCATION COMM., WASH. STATE BAR ASSN. CONVENTION 1973 (addendum at 1) [hereinafter cited as Riddell].

4. *Loomis v. Loomis*, 47 Wn. 2d 468, 288 P.2d 235 (1955); *Morris v. Morris*, 69 Wn. 2d 506, 419 P.2d 129 (1966); *Roach v. Roach*, 72 Wn. 2d 144, 432 P.2d 579 (1967). In addition, military retired pay has been involved in other Washington decisions wherein its classification as property was not in issue. See, e.g., *Weiss v. Weiss*, 75 Wn. 2d 596, 452 P.2d 748 (1969) (although extensively argued in both parties' briefs, the propriety of trial court's disposition of reserve retired pay as property was not discussed by the supreme court); *Morse v. Morse*, 42 Wn. 2d 229, 254 P.2d 720 (1953) (military retired pay treated as resource bearing on husband's ability to pay alimony).

5. 47 Wn. 2d 468, 288 P.2d 235 (1955).

6. Conclusion of Law IV, King County Superior Court No. 463185 (June 24, 1954), quoted in Brief for Appellant at 19, *Loomis v. Loomis*, 47 Wn. 2d 468, 288 P.2d 235 (1955).

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tion of the property division and alimony award, the supreme court indicated that military retired pay is divisible property, in that it “is not in the nature of ‘future earnings,’ but is an asset acquired during coverture”⁷

The Washington court next considered military retired pay in *Morris v. Morris*.⁸ In that case the trial court, treating the retired pay as “a gratuity to the husband from the federal government and not a community asset,”⁹ awarded it entirely to the retired serviceman. On appeal, the supreme court quoted with approval the *Loomis* classification of the retired pay as divisible property, but announced:¹⁰

[I]t is not necessary at the present time to reach and dispose of the problem as to the appropriate legal characterization or classification

7. 47 Wn. 2d at 479, 288 P.2d at 241. This indication that military retired pay ought to be divided as property (and thus not subject to modification as alimony, see notes 10, 20 & 25 *infra*) is not supported in the court's opinion by any discussion which might disclose the underlying reasoning or analysis.

8. 69 Wn. 2d 506, 419 P.2d 129 (1966).

9. *Id.* at 507, 419 P.2d at 130.

10. 69 Wn. 2d at 508–09, 419 P.2d at 131. The questionable validity of this conclusion is discussed in the text accompanying notes 39–42, 84–89 *infra*.

WASH. REV. CODE § 26.08.110 (1963) provides in pertinent part that when the court determines that a divorce or annulment should be granted, it shall enter a decree accordingly:

making such disposition of the property of the parties, either community or separate, as shall appear just and equitable, having regard to the respective merits of the parties, to the condition in which they will be left by such divorce or annulment, to the party through whom the property was acquired, and to the burdens imposed upon it for the benefit of the children Such decree as to alimony . . . may be modified, altered and revised by the court from time to time as circumstances may require. Such decree, however, as to . . . the custody, management and division of property shall be final and conclusive upon both parties subject only to the right to appeal as in civil cases

Compare WASH. REV. CODE § 26.09.080 (Supp. 1973), which replaces the property division portions of the above quoted statute and provides that under similar circumstances:

the court shall, without regard to marital misconduct, make such disposition of the property and the liabilities of the parties, either community or separate, as shall appear just and equitable after considering all relevant factors including, but not limited to:

- (1) The nature and extent of the community property;
- (2) The nature and extent of the separate property;
- (3) The duration of the marriage; and

- (4) The economic circumstances of each spouse at the time the division of property is to become effective, including the desirability of awarding the family home or the right to live therein for reasonable periods to a spouse having custody of any children.

In discussing cases decided under the former statute, the terms “divorce” and “alimony” will be retained; in other contexts, the terms “dissolution” and “maintenance”—appropriate under the current statute—will be used.

which should be accorded military pensions [because Washington law subjects all] property of divorce litigants, whether it be separate or community in nature, . . . to fair, reasonable and equitable disposition by the divorce court.

After expressing its disinclination to displace the trial court's judgment in such a case and approving the trial court's decree as reasonable and equitable,¹¹ the court nevertheless reclassified the trial court's alimony award of \$125 per month, explaining:¹²

However, in our opinion, the wife would have been provided more of an element of security if the arrangements worked out by the trial judge had given her an interest in a specific amount of the military pension. Consequently, we have concluded that the wife should be accorded an interest in the military pension in the specific amount of \$100 per month; that, in addition, she should be awarded \$25 per month alimony for a period of 5 years, *all subject to further order of the court*, or until such time as she remarries or becomes employed and earning \$250 per month, or more.

The court's subsequent attempts to interpret this ambiguous expression¹³ have produced incompatible results in *Roach v. Roach*¹⁴ and *Payne*.

The *Roach* court reasoned that the language in *Morris*, "all subject to further order of the court,"¹⁵ must logically refer to more than one provision of the award, and that if the wife's interest in the retired pay were thus subject to modification, the *Morris* court did not treat it as property, despite having called it "an asset acquired during coverture."¹⁶ The court in *Roach* noted that military retired pay is subject to

11. 69 Wn. 2d at 509-10, 419 P.2d at 131. The Washington Supreme Court has repeatedly asserted that it will not substitute its judgment for that of the trial court in divorce-related property dispositions unless the latter reflects a manifest abuse of discretion. *See, e.g.,* Thoren v. Thoren, 73 Wn. 2d 671, 440 P.2d 182 (1968). In some cases, however, the court has responded to a showing of some discretionary abuse (less than "manifest") by correcting the divorce decree to ameliorate or remove the inequities fostered by it. DeRuwe v. DeRuwe, 72 Wn. 2d 404, 433 P.2d 209 (1967); Stacy v. Stacy, 68 Wn. 2d 573, 414 P.2d 791 (1966).

12. 69 Wn. 2d at 510, 419 P.2d at 131-32 (emphasis added).

13. The equivocal manner in which the court expressed its order does not indicate clearly whether in fact (rather than in form) the wife was awarded property in the military retired pay, or alimony to be paid from it.

14. 72 Wn. 2d 144, 432 P.2d 579 (1967).

15. 69 Wn. 2d at 510, 419 P.2d at 131-32 (emphasis added).

16. *Id.* at 508, 419 P.2d at 131.

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federal statutory contingencies, and declared that such pay “is not a fixed asset but is an emolument or economic advantage of office. It is an income resource which should be considered by the court in fixing the amount of the alimony award.”¹⁷ Consistent with this classification and with its interpretation of *Morris*, the *Roach* court supplemented the trial court’s alimony award of \$150 per month for 4 years to provide that thereafter the former wife should receive “a ‘specific amount’ of the military pension in the sum of \$70 per month,” subject to several contingencies¹⁸ and future modification by the court.¹⁹ This decree—treating the retired pay only as a factor bearing on the alimony award—is clearly inconsistent with the court’s earlier classification of military retired pay in *Loomis* as property.²⁰

II. THE *PAYNE* DECISION

Faced with its erratic history of handling military retired pay, the Washington Supreme Court should have welcomed *Payne* as an opportunity²¹ to analyze carefully problems which it had ignored or evaded in the past. However, after attempting to reconcile *Loomis*, *Morris* and *Roach*, the *Payne* court addressed the wrong issue, avoided some much-needed analysis and reached a conclusion which has minimal precedential value.²²

At the time of the divorce and property disposition in *Payne*,²³ the husband was on active duty and not yet eligible to draw retired pay.²⁴

17. 72 Wn. 2d at 147, 432 P.2d at 581 (citation omitted).

18. The former wife was to receive \$70 per month until she remarried or became employed, earning \$150 per month or more. 72 Wn. 2d at 147, 432 P.2d at 581.

19. *Id.* The trial court had made no disposition of the military retired pay.

20. Washington law clearly specifies that alimony awards are modifiable, whereas the disposition of property is final. WASH. REV. CODE § 26.08.110 (1963), § 26.09.170 (Supp. 1973). See notes 10 *supra* & 130 *infra*.

21. A case could hardly be conceived that would be more amenable to a thorough analysis of military retirement pay than *Payne*; the correctness of the divorce court’s disposition of retired pay was the sole issue on appeal.

22. Compare *Fithian v. Fithian*, 10 Cal. 3d 592, 517 P.2d 449, 111 Cal. Rptr. 369 (1974), in which the California Supreme Court considered California law settled—which, as already noted, Washington law is not—with respect to property rights in retirement benefits. Yet it carefully examined and resolved problems with proportional ownership, enforcement, federal supremacy and the power of testation over the nonearning spouse’s share of the retirement benefits.

23. The Washington Supreme Court has previously recognized that it must consider the situation “as it existed at the time the divorce decree was entered.” *Edwards v. Edwards*, 74 Wn. 2d 286, 288, 444 P.2d 703, 704 (1968).

24. The supreme court quoted the language of the trial court’s decree (entered

Yet the issue was apparently mistaken, and definitely misstated, by the supreme court: "In this divorce action the sole issue on appeal is whether the trial court erred in awarding the wife a property interest in her *retired* husband's military pension."²⁵ By expressing the issue in terms of an accrued property right, the court treated as distributable property military retired pay which the serviceman had no present right to receive. Since the previous decisions of the Washington court involved husbands who were already drawing military retired pay at the time of divorce,²⁶ the *Payne* court effected—without acknowledgment or explanation—a significant extension of prior case law.

The court recited from *Loomis* the classification of military retired pay as "'an asset acquired during coverture.'"²⁷ The court then examined the *Morris* holding and dismissed the *Roach* court's interpretation²⁸ as a misconstruction.²⁹ Considering the contradictory classifica-

March 1, 1971) acknowledging the husband's anticipated "retirement in or about April of 1972." 82 Wn. 2d at 575, 512 P.2d at 737.

25. 82 Wn. 2d at 574, 512 P.2d at 736 (emphasis added). The court of appeals' articulation was more accurate: "The primary question presented by this appeal is whether or not an interest in a military retirement program and future benefits expected to be received thereunder constitute property distributable in a divorce proceeding." 7 Wn. App. at 338, 498 P.2d at 882.

Washington appellate courts generally use the term "pension" instead of the correct statutory language, "retired pay." See note 1 *supra*.

26. See cases cited in note 3 *supra*. All of the cases from other jurisdictions cited by the *Payne* court involved servicemen retired at the time of divorce. *Berkey v. United States*, 361 F.2d 983 (Ct. Cl. 1966); *In re Karlin*, 24 Cal. App. 3d 25, 101 Cal. Rptr. 240 (1972); *Kirkham v. Kirkham*, 335 S.W.2d 393 (Tex. Civ. App. 1960), or separated from receipt of military retired pay only by the personal decision not to retire. *LeClert v. LeClert*, 80 N.M. 235, 453 P.2d 755 (1969); *Mora v. Mora*, 429 S.W.2d 660 (Tex. Civ. App. 1968).

Not relied upon by the *Payne* court were two appellate court decisions which divided property interests in retirement benefits for which the employee spouse was unqualified at the time of divorce. Part of a nonmilitary retirement plan was awarded to the employee's spouse in the second hearing of *DeRevere v. DeRevere*, 5 Wn. App. 446, 488 P.2d 763, *modified*, 5 Wn. App. 741, 491 P.2d 249 (1971). The military retired pay of a serviceman who was ineligible for retirement, but obligated to serve sufficient time to qualify, was similarly treated in *Miser v. Miser*, 475 S.W.2d 597 (Tex. Civ. App. 1972).

27. 82 Wn. 2d at 575, 512 P.2d at 737.

28. See text accompanying notes 12-16 *supra*.

29. Apparently depreciating *Roach* because it was "a departmental decision," the *Payne* court attached controlling significance to the punctuation in *Morris*, rather than to the use of the adjective "all." 82 Wn. 2d at 576, 512 P.2d at 737. Therefore, the semicolon separating the \$100 per month share of retired pay from the \$25 per month alimony award indicated to the *Payne* court that the former was being distributed as property and only the latter was subject to modification as alimony. *Id.* at 576, 512 P.2d at 738. This interpretation of *Morris* is more consonant than is the

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tions of military retired pay in *Morris* and *Roach*, and sharing the former's preference for distribution as property, the *Payne* court might well have been expected to overrule *Roach*. Instead it equivocated:³⁰

The statement in *Roach* that a military pension is 'not a fixed asset but is an emolument or economic advantage of office' does not preclude the court from treating certain aspects of that pension as property, regardless of the fact that there are inherent limitations that make it different from fixed assets.

Although that particular statement in *Roach* may not preclude the court's treatment of military retired pay as property in *Payne*, the clear disparity in treatment should have compelled a detailed discussion of those "certain aspects of that pension [treatable] as property"³¹ and the "inherent limitations"³² of such treatment. Not feeling so compelled, however, the court attempted to attenuate its earlier vacillations and simply concluded that military retired pay is "an earned property right which accrues by reason of a specified number of years of service in a particular branch of the armed services."³³ The court observed that division of this right as property is consistent with other community property states' treatment of military retired pay.³⁴

By using the device of conclusory labeling and consequent disposition, the court allowed taxonomy to replace reasoning and analysis as the basis for its decision. Thorough analysis could have provided

Roach reading with the court's stated objective in *Morris* to provide the wife the greater security afforded by a property division. 69 Wn. 2d at 510, 419 P.2d at 131. However, the *Payne* court's conclusion in that regard should have been based upon such consonance rather than upon a preference for divisive punctuation over an inclusive adjective.

30. 82 Wn. 2d at 576, 512 P.2d at 738.

31. *Id.* To the extent that a Washington practitioner must rely on this and previous pronouncements of the state's highest court, "certain aspects" are neither certain, nor named, nor even known.

32. *Id.*

33. 82 Wn. 2d at 577, 512 P.2d at 738. This statement overlooks the federal statutory prerequisite of actual retirement to the accrual of a present, matured right to military retired pay. See note 56 *infra*. However, the statement does suggest the difficult problem of vesting which the court ignored. Compare *Miser v. Miser*, 475 S.W.2d 597 (Tex. Civ. App. 1972), in which the vesting problem was discussed in the context of a similar factual situation.

34. Although other community property jurisdictions have approved this treatment of military retired pay where the service person has retired or is eligible to retire at the time of divorce, only one other court has yet done so where, as in *Payne*, the service person is neither retired nor eligible to retire. See *Miser v. Miser*, 475 S.W.2d 597 (Tex. Civ. App. 1972).

much needed guidance for the future conduct of the bench,³⁵ bar³⁶ and spouses contemplating dissolution. The necessity for that guidance will become particularly acute if Washington's new dissolution law³⁷ achieves one of its expected results: concurrence in property settlement agreements by a larger proportion of parties to impending dissolutions.³⁸ In order to negotiate such an agreement effectively, the parties and their counsel must be able to ascertain with some confidence their respective interests in all assets—including military retired pay—prior to dissolution. The *Payne* opinion, however, will not be mistaken for cynosure. Thus, the remainder of this note is devoted to illuminating the considerations which the court should have addressed.

III. IS MILITARY RETIRED PAY PROPERTY?

The Washington Supreme Court has been unwilling to answer this question plainly. Although in *Payne* the court held that retired pay may be distributed as property, the unsupported assertion in *Loomis* that such pay is "an asset acquired during coverture"³⁹ is as close as the court has come to classifying it expressly. Nevertheless, classification is a prerequisite to any disposition. If the court does *not* classify military retired pay as property, the statute⁴⁰ does not authorize its disposition as property. If retired pay *is* classified as property, the court *must* dispose of it in a dissolution (divorce) decree.⁴¹ This classification should be accomplished uniformly so that it does not continue

35. Unaided by the inconsistency of the supreme court decisions referred to in note 4 *supra*, it is not surprising that the court of appeals sought to fill the void of uncertainty by declaring positively (prior to the supreme court's decision in *Payne*) in *Kinne v. Kinne*, 7 Wn. App. 350, 355, 498 P.2d 887, 890 (1972): "[O]ur decision in [*Payne*] lays to rest the contention that military retirement benefits constitute property divisible by a divorce court." *Accord*, *Mose v. Mose*, 4 Wn. App. 204, 480 P.2d 517 (1971).

36. \$100,000 was the price one attorney recently paid in a malpractice suit involving his ignorance of this area of the law. *Smith v. Lewis*, 13 Cal. 3d 349, 530 P.2d 589, 118 Cal. Rptr. 621 (1975).

37. WASH. REV. CODE ch. 26.09 (Supp. 1973).

38. *Id.* § 26.09.070. See Rieke, *The Dissolution Act of 1973: From Status to Contract?*, 49 WASH. L. REV. 375, 393-99 (1974). Professor Rieke, as Executive Secretary of the Washington Judicial Council, was the principal draftsman of the Washington version of the Uniform Marriage and Divorce Act.

39. 47 Wn. 2d at 479, 288 P.2d at 241.

40. WASH. REV. CODE §26.08.110 (1963).

41. See *Biehn v. Lyon*, 29 Wn. 2d 750, 189 P.2d 482 (1948).

to be treated in some cases only as income bearing on the amount of maintenance (alimony) and in others as property subject to division.⁴²

Although *Payne* was intended to resolve the problem of uniform determination, it did not:⁴³ its holding is susceptible to at least three inconsistent interpretations. Viewed as a response to the stated issue,⁴⁴ the *Payne* holding is limited to the proposition that the retired pay being received by a service person already retired is property subject to division by a dissolution court.⁴⁵ However, the court's conclusion that military retired pay is "an earned property right which accrues by reason of a specified number of years of service"⁴⁶ indicates that the retired pay of those who are eligible, but have not yet elected, to re-

42. *But see* *Edwards v. Edwards*, 74 Wn. 2d 286, 444 P.2d 703 (1968) (non-military pension). It is possible, of course, that after specifically awarding military retired pay to the service person as property, its effect on his or her ability to pay maintenance (where appropriate) could be considered. Such consideration would not be alternative to, but subsequent to, disposition of the retired pay as property.

43. *But see* Rieke, *The Dissolution Act of 1973: From Status to Contract?*, 49 WASH. L. REV. 375, 403-04 n.124 (1974), where the author states with reference to *Payne*:

The Washington Supreme Court has recently reduced much of the confusion [over how to classify retirement benefits] by holding that even a military pension, though not available to the husband for another 13 months, was property which could be divided.

44. *See* text accompanying note 25 *supra*.

45. That the court did not intend *Payne* to stand for any broader proposition is suggested not only by its statement of the issue, but also by its failure to even acknowledge the significant extension of prior holdings that would result from the two interpretations which follow this note in the text.

46. 82 Wn. 2d at 577, 512 P.2d at 738. Characterization of military retired pay as deferred compensation for past services necessarily implies a rejection of two competing characterizations: (1) as a gift or gratuity from the federal government to the individual service person; and (2) as contemporaneous compensation for duties or obligations of the service person after retirement. Implicit in the concept of a gift or gratuity is an element of discretion in the donor; he is not obliged to give. By contrast, the federal statutes delineate certain requirements, the completion of which entitles the service person to military retired pay. The ever-present power of Congress to alter or eliminate these statutory provisions does not make a gratuity of the entitlements which arise while the statutes continue in effect. *In re Karlin*, 24 Cal. App. 3d 25, 101 Cal. Rptr. 240 (1972).

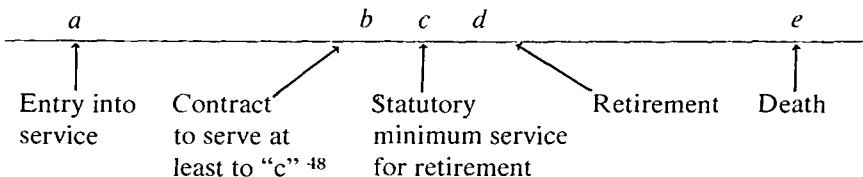
The principal burden on a retiree is his susceptibility to recall in case of war or national emergency. *See, e.g.*, 10 U.S.C. §§ 6481-82 (1970). However, should recall occur, the retiree (like the many nonretirees who would likewise be called to serve under such circumstances) will be fully compensated for service based upon the then current active duty rates of pay. While awaiting such a recall, the retiree (unlike a reservist) is not required to perform periodic drills in order to maintain the acuity of martial skills. *See French v. French*, 17 Cal. 2d 775, 112 P.2d 235 (1941).

Thus, the court's characterization of military retired pay as deferred compensation is more consistent with the nature of the pay than are the notions of gratuity or compensation for future services. *See* Comment, *The Unsettled Question of the Military Pension: Separate or Community Property?*, 8 CAL. W.L. REV. 522, 525-28 (1972).

tire is also divisible as property. Finally, the broadest interpretation of *Payne* is derived from application of the result to the facts of the case itself: Military retired pay is property even when a right to it has not been earned by the statutory minimum period of service.

A. Vesting

In Washington, the concept of property has ample elasticity to include even the broadest or exclude all but the narrowest interpretations of *Payne*. The Washington court has described property as "a term of broad significance, embracing everything that has exchangeable value, and every interest or estate which the law regards of sufficient value for judicial recognition."⁴⁷ The question must then be asked: When does an interest in military retired pay attain "sufficient value for judicial recognition"? If a service person's life is represented by a time line, several possible answers are identifiable:



From entry into the service (*a*) until actual retirement (*d*), retired pay is being earned.⁴⁹ Beginning at retirement, an interest in military retired pay can be described as "matured," *i.e.*, there is a present right to receive the pay.⁵⁰ At the service person's election, this right to receive retired pay may commence immediately upon completion of

47. *York v. Stone*, 178 Wash. 280, 285, 34 P.2d 911, 913 (1934), *quoted with approval*, *Lee & Eastes, Inc. v. Public Serv. Comm'n*, 52 Wn. 2d 701, 704, 328 P.2d 700, 702 (1958) (declaring right to operate a business to be property).

48. Although periodic contracts define the service obligations of all enlisted personnel (*see, e.g.*, U.S. NAVY, BUREAU OF NAVAL PERSONNEL MANUAL, arts. 1040100-1050300 (1969)), they are inapplicable to a large number of officers who serve "at the pleasure of the President." *E.g., id.*, arts. 3830340, 3830220.

49. In most cases, a service person's retired pay will be 2½% of active duty base pay (at retired grade) for each year of active duty service completed: *e.g.*, 50% at 20 years service, and 75% at 30 years. After 30 years of service the dollar amount of retired pay may increase with advancement in grade, but the proportion of active duty pay receivable will remain 75%. 10 U.S.C. chs. 371, 571, 573, 871 (1970) & ch. 71 (Supp. II, 1972).

50. *See* statutes cited note 1 *supra*.

the statutory minimum service for retirement (c),⁵¹ but in any event the right will be extinguished at his death (e).⁵²

The point of demarcation between classification as an expectancy and judicial recognition as property may be termed "vesting."⁵³ Each of the proffered interpretations of *Payne*⁵⁴ would locate vesting at a different point along the time line. The first and narrowest alternative would regard vesting as coincident with actual retirement (point *d* on the time line).⁵⁵ Although such a view is arguably most consistent with the federal statutory language,⁵⁶ it has been judicially rejected in those jurisdictions which have confronted the vesting problem.⁵⁷

51. Twenty years' service is frequently the statutory minimum for retirement. 10 U.S.C. chs. 65, 367, 571, 867 (1970). *But see* 10 U.S.C. chs. 63, 365, 573, 865 (1970), providing for retirement upon the attainment of specified ages.

52. Service personnel may personally elect to receive a reduced amount of retired pay in order to provide an annuity after death for a surviving (not former) spouse. 10 U.S.C. §§ 1431-55 (Supp. II, 1972).

53. *See* H. Cross, Community Property 83 (1973) (mimeographed materials in University of Washington Law Library). Prior to such time, the expectancy cannot be awarded as property; after that time the vested interest must be so awarded. *See* text accompanying notes 40-41 *supra*. This definition of "vesting" is intentionally altered from the meaning it frequently bears with respect to more conventional forms of property: that time when the right to present or future possession or enjoyment becomes fixed and alienable. This more general definition is inapplicable to military retired pay to which rights are arguably never fixed, even after the service person's retirement. "It is obvious that Congress may grant, increase, or decrease benefits subject to the due process limitations against patently arbitrary action, utterly lacking in rational justification." *Hoffman v. Dodd*, 331 F. Supp. 393, 394 (N.D. Ill. 1971) (involving the Railroad Retirement Act). *See Goodley v. United States*, 441 F.2d 1175 (Ct. Cl. 1971); *Abbott v. United States*, 287 F.2d 573 (Ct. Cl. 1961), *cert. denied*, 368 U.S. 915 (1961); *cf. Bell v. United States*, 366 U.S. 393 (1961) (entitlement to military pay statutory, not contractual); *Flemming v. Nestor*, 363 U.S. 603 (1960) (no vested right to social security payments terminated when Congress changed statutes); *Stouper v. Jones*, 284 F.2d 240 (D.C. Cir. 1960) (no vested right to civil service annuity terminated by change in statute, although mandatory contributions had been made by claimant to the retirement fund). The federal reluctance to recognize vested interests is in marked contrast to Washington's adherence to the "contract of employment-vested right" theory relative to public pension systems." *Weaver v. Evans*, 80 Wn. 2d 461, 475, 495 P.2d 639, 648 (1972).

The inequities which may result from determinations based on the vested-unvested dichotomy have been decried by many commentators. *See, e.g., Comment, The Identification and Division of Intangible Community Property: Slicing the Invisible Pie*, 6 U.C.D.L. REV. 26, 28-32 (1973).

54. *See* text accompanying notes 43-46 *supra*.

55. The service persons in previous cases considered by the Washington Supreme Court would come within this narrowest view of vesting. *See* cases cited note 4 *supra*.

56. If federal statutes ever recognize a vested right to military retired pay, *see* note 53 *supra*, it is only after the service person has actually retired. Retired pay is not described as accruing with years of service, but as being payable after retirement in amounts computed with reference to length of service. *See* statutes cited note 1 *supra*.

57. Typical of the judicial attitude is the response of a California court to a

Most community property jurisdictions, unwilling to defer vesting until the serviceman's retirement, have settled upon the second suggested interpretation of *Payne*: that vesting occurs upon completion of the minimum service required by statute for retirement (point *c* on the time line).⁵⁸ This rule recognizes that a service person has at that time acquired a statutory right to receive military retired pay, conditioned only upon the voluntary election to retire. In *Miser v. Miser*,⁵⁹ a Texas appellate court extended this rule somewhat to treat retired pay as vested when a serviceman had contractually obligated himself to complete the statutory minimum service for retirement (point *b* on the time line). With divorce occurring 18 months prior to eligibility for retirement, the facts of *Miser* were very similar to those of *Payne* (where the divorce occurred 13 months prior to the husband's eligibility for retirement).

Although the *Miser* court expressly limited its holding to the partic-

serviceman who, at the time of his divorce, was eligible to retire but had not elected to do so:

[T]he only condition to the payment of pension benefits is a condition entirely within Major Bensing's control and this is not the type of uncertainty which precludes division upon divorce. . . . [If it were,] a spouse could be deprived of any share of matured pension rights by the decision of the employee to delay retirement until after the divorce proceedings were concluded.

Bensing v. Bensing, 25 Cal. App. 3d 889, 893, 102 Cal. Rptr. 255, 257 (1972).

One unsuccessful argument in support of this alternative was that a right to the receipt of military retired pay is contingent upon the service person's neither dying nor being dishonorably discharged before actual retirement. A Texas court, unconvinced, decided that those contingencies "merely make his [or her] interest subject to divestment. It is, nevertheless, a property interest and not a mere expectancy." *Mora v. Mora*, 429 S.W.2d 660, 662 (Tex. Civ. App. 1968). See *Bensing v. Bensing*, *supra*; *Busby v. Busby*, 457 S.W.2d 551 (Tex. 1970) (disability retirement pay was treated the same as voluntary military retired pay; however, a strongly worded dissent would not have recognized a vested right until actual retirement). New Mexico also rejected actual retirement as a condition for the vesting of a property interest in military retired pay in *LeClert v. LeClert*, 80 N.M. 235, 453 P.2d 755 (1969). That case, however, involved the additional factor that the serviceman, still on active duty, had received orders directing his retirement 4 months after the divorce.

In another context, the U.S. Tax Court based a retirement income credit ruling in favor of a retired serviceman and his wife on its opinion that a vested interest in military retired pay could not be acquired prior to actual retirement. *Wilkerson v. Commissioner*, 44 T.C. 718 (1965), *aff'd per curiam*, 368 F.2d 552 (9th Cir. 1966). The Tax Court's concept of vesting was criticized in *Lay, Retirement Income Credit and Community Property: A Problem of Vesting*, 42 TUL. L. REV. 304 (1968).

58. See cases cited note 57 *supra*. The California Supreme Court recently indicated its approval of this vesting rule for military retired pay. The statement was by way of dictum, however, because the husband, already retired, had conceded his interest in the retired pay to be vested. *Fithian v. Fithian*, 10 Cal. 3d 592, 517 P.2d 449, 111 Cal. Rptr. 369 (1974).

59. 475 S.W.2d 597 (Tex. Civ. App. 1971).

ular circumstances of that case, two subsequent Texas decisions have illustrated the difficulty of establishing a clearly-defined, unwavering line of demarcation called vesting. *In re Marriage of McCurdy*⁶⁰ involved a nonmilitary retirement plan under which the employee would not be entitled to receive any benefits unless he remained with the company until his retirement late in 1977. Nevertheless, both the divorce court (apparently motivated by the employee's completion of 14½ years of service) and the Texas appellate court recognized a property interest as if it had vested in 1972.⁶¹ *Davis v. Davis*⁶² involved military retired pay which another Texas divorce court treated as property subject to division in 1971, although the serviceman had only completed 8½ years of service and would not be eligible to retire until 1983. In reversing, the same appellate court which had decided *Miser* reiterated its limitation of the latter case to its peculiar facts and renewed its allegiance to the vesting requirement approved by the Texas Supreme Court:⁶³

[T]he interest of a serviceman in his military retirement benefits becomes a vested property right and community property subject to be divided by a court in a divorce action only when the required statutory period of time has come about during the marriage relationship even though the election of the serviceman to retire separates him from actual payment.

To some, this vesting rule—embraced by the courts of California⁶⁴ as well as Texas—deserves not allegiance, but abandonment. One critic predicted that a trial court adjudicating a divorce action involving a serviceman nearly eligible to retire, “probably would be tempted to go through some procedural stretching to achieve a just result.”⁶⁵ Faced with just such a situation, the Washington court over-

60. 489 S.W.2d 712 (Tex. Civ. App. 1973).

61. In affirming, the appellate court professed to rely on *Webster v. Webster*, 442 S.W.2d 786 (Tex. Civ. App. 1969), secondarily citing *Miser* and *Williamson v. Williamson*, 457 S.W.2d 311 (Tex. Civ. App. 1970). However, most of its inspiration must have been drawn from *Miser*, since the other two cases involved employees who had already completed the minimum service required for retirement at the time of their divorces.

62. 495 S.W.2d 607 (Tex. Civ. App. 1973).

63. *Id.* at 613.

64. *See, e.g.*, *Fithian v. Fithian*, 10 Cal. 3d 592, 517 P.2d 449, 111 Cal. Rptr. 369 (1974).

65. Note, *Retirement Pay: A Divorce in Time Saved Mine*, 24 HASTINGS L.J. 347, 353 (1973).

looked the problem in *Payne*, while the Texas court in *Miser* contrived an exception to its vesting rule to accommodate the facts of that case.⁶⁶ Consideration of *Payne* and the trio of Texas cases as a group suggests that once a court forsakes the rule of vesting at the time of eligibility for retirement, the point at which judicial recognition ought to occur is not clear.⁶⁷

B. *The Consequences of Choosing a Discrete Point of Vesting*

The direct result of selecting a point after which an interest in military retired pay shall be judicially recognized as property is that if dissolution should occur before that time, no part of the interest can be distributed as property.⁶⁸ Thus, the nonemployee spouse will be deprived of a community share of deferred compensation for services performed during the existence of the community.⁶⁹ This result is contrary to the basic tenet of community property law that compensation for either spouse's services accrues to the benefit of the commu-

66. See text accompanying note 59 *supra*. That exception would not, however, pertain if *Miser* had not been an enlisted man, but an officer whose continuance in service did not depend on successive contracts. Achievement of the same result might then have required a more artificial and arbitrary acceleration of vesting. Not only would such a concession to appealing equities be more difficult to rationalize, but desirable dimensions of the compromise are not readily ascertainable.

67. The uncertainty of one writer is illustrative:

Once the vested-unvested barrier is broken (judicially or legislatively), a problem of line drawing also has to be solved. Any right less than half earned should undoubtedly not be considered. But after that, what is the best place at which to begin to recognize the spouse's interest? There is no simple answer, but the inequity of allowing the non-employee spouse no share of a benefit that is very likely to vest in a year or two should not be allowed to continue.

Comment, *The Identification and Division of Intangible Community Property: Slicing the Invisible Pie*, 6 U.C.D.L. REV. 26, 32 (1973). Query whether it is really clear that a right less than half earned "should undoubtedly not be considered"?

68. The wife might be awarded maintenance, and the husband could use retired pay as a resource from which to make maintenance payments. The amount of maintenance, however, would depend upon the wife's future needs, not upon her past contribution to the community during the years the retired pay was being earned. See text accompanying notes 134-35 *infra*.

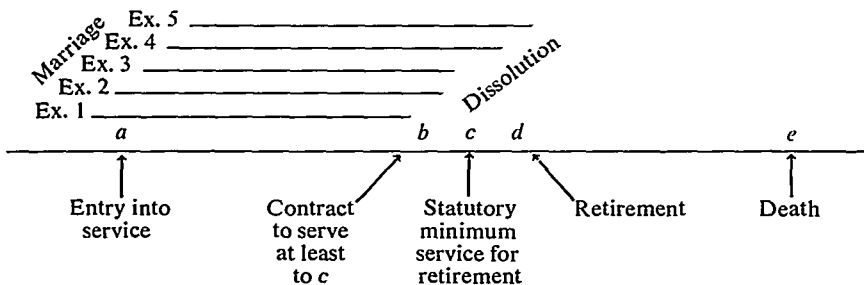
69. A California court of appeals recently recognized the inequities of this result, but reluctantly conceded its obligation to follow "the new well-settled rule that pension benefits which will mature in futuro are mere expectancies," until that rule is "reconsidered by higher authority." *In re Marriage of Wilson*, 32 Cal. App. 3d 546, 108 Cal. Rptr. 371, 374 (1973). Vacating the court of appeals decision while repeating its result verbatim, the California Supreme Court declined the court of appeals' invitation to reconsider the vesting question because the petitioning wife had not properly preserved the issue on appeal. *In re Marriage of Wilson*, 10 Cal. 3d 851, 519 P.2d 165, 112 Cal. Rptr. 405 (1974).

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nity.⁷⁰ The potential inequities are evident from a consideration of representative marital communities, each of 18 years' duration.⁷¹ A determination that vesting occurs at any designated point later than the inception of service⁷² precludes division of retired pay as property in those marital communities—all contributing 18 years to securing the benefit—which terminate prior to that point. In particular, if vesting is determined to occur only after 20 years of service, none of the military retired pay earned by a marital community spanning the first 18 years of service would be regarded as property subject to disposition at the time of divorce.⁷³ However, even a short-lived community beginning in the 19th year of military service and terminating after the 20th could be entitled to some share of the retired pay, considered property at the time of dissolution.⁷⁴

70. See *Friedlander v. Friedlander*, 58 Wn. 2d 288, 362 P.2d 352 (1961); W. DEFUNIAK & M. VAUGHN, *PRINCIPLES OF COMMUNITY PROPERTY* §66 (2d ed. 1971). Community property is statutorily defined in WASH. REV. CODE § 26.16.030 (Supp. 1973) as property acquired during marriage by either spouse, except that property defined as separate in *id.* §§ 26.16.010–020 (1963). Separate property includes all property brought into the marriage by either spouse or lucratively acquired (*i.e.*, by gift, bequest, devise or descent) during the marriage, plus all proceeds from such property.

71. Eighteen years was the length of the Payne marriage. Brief for Respondent at 3, *Payne v. Payne*, 7 Wn. App. 338, 498 P.2d 882 (1972). The reader may find useful the following graphical depiction of those representative 18-year marital communities:



Note that Example 3 represents the chronological sequence in *Payne* and *Miser*.

72. Point *a* on the graph, note 71 *supra*.

73. If vesting is deemed to occur at point *c* on the graph, note 71 *supra*, military retired pay will be property distributable at the dissolution of the marital communities depicted as Examples 4 and 5; the retired pay in Examples 1, 2 and 3 will not be distributable as property.

74. Or consider the disparate treatment of two marriages, each of 10 years' duration, one commencing the year before the service person's career begins, the other ending the year after retirement (and vesting) at 20 years. The former is the "less than half earned" right which one author finds unworthy of consideration in her

C. *A Suggested Rule of Immediate Vesting*

Such potential inequities will be eliminated only if military retired pay is considered vested when service begins. Although the third view of *Payne*⁷⁵ may be construed specifically to regard military retired pay as property within 13 months of being fully earned, it is also susceptible of this broader interpretation: That retired pay is of "sufficient value for judicial recognition"⁷⁶ as property whether a dissolution occurs before or after retirement is earned or elected. Consider the consequences with respect to an even more extreme example than the 18-year marriages: The identical contributions and interests of two marital communities of short duration—three years, for example—spanning the first and last portions of a 20-year military career could be similarly rewarded, for the retired pay would be property subject to disposition in both cases.

The last example, however, suggests several grounds for objection: (1) the length of time before military retired pay might actually be received; (2) the uncertainty of retired pay ever being fully earned or received; and (3) the apparently small community interest involved even if a right to retired pay does eventually mature. In response to these objections, some who favor immediate vesting have offered an analogy to life insurance.⁷⁷

In the case of life insurance, after a short marriage many years' premiums will usually remain to be paid if the insurance is to be in force and the proceeds payable when the policy matures (upon the death of the insured); likewise, many years' service must be rendered to fully earn the right to military retired pay, which will mature upon the retirement of the service person. If required premiums are not paid or services not rendered during those years following dissolution, neither proceeds nor retired pay will be received. Thus, both rights can be

concern for those whose benefits are "very likely to vest [for vest, read "be fully earned"] in a year or two." Comment, *The Identification and Division of Intangible Community Property: Slicing the Invisible Pie*, 6 U.C.D.L. REV. 26, 32 (1973). Certainly the equities of the latter seem stronger. But when recognition as property (vesting) is moved to a point two years earlier to include the interests of the latter group, a new group of borderline cases will present apparently irresistible equities; and the process continues until vesting at last coincides with inception of service.

75. See text following note 46 *supra*.

76. *York v. Stone*, 178 Wash. 280, 285, 34 P.2d 911, 913 (1934), *quoted*, text accompanying note 47 *supra*.

77. Note, *Retirement Pay: A Divorce in Time Saved Mine*, 24 HASTINGS L.J. 347, 355 (1973).

considered vested, subject to defeasance if those conditions necessary to maintain or fully earn the right to present enjoyment of the benefits are not fulfilled.⁷⁸

It should also be observed—and will be discussed below—that although the community's proportionate interest in both the life insurance proceeds and the military retired pay continue to decrease as noncommunity funds or labor are added after dissolution, they do not necessarily become insignificant.⁷⁹ Not the long wait, nor the uncertainty, nor the decreasing proportionate community interest has prevented Washington courts from recognizing an interest in life insurance proceeds as community property.⁸⁰ Neither have these factors prevented Washington courts from embracing the rule of immediate vesting with respect to both nonfederal public retirement plans⁸¹ and noncontributory corporate plans.⁸² Both reason and equity favor similar treatment of military retired pay.⁸³ But if the *Payne* court was

78. The insured's eventual death is obviously certain; not certain is his death while the policy is yet in force. The corresponding element rendering military retired pay due is the service person's actual retirement; once retired pay is earned, this event becomes not a certainty (death or dishonorable discharge could intervene), but nearly so. Thus, if the benefit in each case is not fully earned, the occurrence of the event potentially triggering payment is immaterial. On the other hand, if the benefits are fully earned, receipt of life insurance proceeds is certain, while receipt of retired pay is extremely probable.

79. The community interest in military retired pay should seldom become too small for judicial recognition. Even in the case of a community lasting only 3 of the military career's 20 years, the community interest would be 3/20 or 15%. If the service person retired at age 40 with monthly retired pay of \$360, as in *Payne*, and lived until age 70, the other spouse's interest could be computed as follows: $\frac{1}{2} \times 15\% \times \$360 \text{ per month} \times 30 \text{ years} \times 12 \text{ months per year} = \9720 . The entire community interest—\$19,440—even when actuarially reduced to dissolution-date value, would be a significant item in most marital communities.

For a discussion of this computation, see note 98 *infra*. That discussion mentions the need to account for portions of the marriage within and without community property jurisdictions; the above example assumes that in the case of a marriage only enduring for 3 years, the spouses might well have lived in a community property jurisdiction throughout.

80. After two hearings and what must be presumed considerable contemplation of the vesting problem, the Washington Court of Appeals relied on an insurance analogy to support its determination that an employee had a vested interest—hence property—in a noncontributory corporate retirement plan (under which the employee was not yet qualified for any benefits) “from the date of its inception.” *DeRevere v. DeRevere*, 5 Wn. App. 741, 743, 491 P.2d 249, 251, *rehearing* 5 Wn. App. 446, 488 P.2d 763 (1971).

81. See, e.g., *Leonard v. Seattle*, 81 Wn. 2d 479, 503 P.2d 741 (1972); *Bakenhus v. Seattle*, 48 Wn. 2d 695, 296 P.2d 536 (1956).

82. *DeRevere v. DeRevere*, 5 Wn. App. 741, 491 P.2d 249 (1971).

83. Professor Lay favors abolishing any rule of vesting coincident with either actual retirement or eligibility therefor. He suggests that either abolishment of the vesting requirement or its practical equivalent—vesting at the commencement of

not prepared to extend that vesting rule to military retired pay, it nevertheless should have responded with some unambiguous indication of when retired pay *is* property. A court, counsel or couple considering a dissolution must know when it is necessary and appropriate to proceed to the next question.

IV. TO WHAT EXTENT IS MILITARY RETIRED PAY COMMUNITY PROPERTY?

The dissolution court's equity power has sufficient scope to permit an award of all or any part of the community property or of one spouse's separate property to the other.⁸⁴ That all property of the parties is subject to the disposition of the court,⁸⁵ however, does not absolve the court of its duty to effect the division with due regard for the source and character of the property.⁸⁶ Even if the statute did not command the court to consider the parties' predissolution property interests, such an awareness is necessary for the "just and equitable" disposition which is required.⁸⁷ Moreover, characterization of prop-

service—would be as conceptually rational as the criticized rules and would produce superior results. Lay, *Retirement Income Credit and Community Property: A Problem of Vesting*, 42 TUL. L. REV. 304, 319 (1968).

Recognition of immediate vesting would not compel courts to award one spouse an interest in military retired pay of the other. It would merely make such an award *possible* when the facts of the case make it *desirable*, so that the community contribution may be accorded recognition regardless of when it happened to occur during the course of a military career.

84. See Part V-A *supra*. Only in exceptional circumstances, however, should a court award to one spouse part or all of the other's separate property. See, e.g., Merkel v. Merkel, 39 Wn. 2d 102, 234 P.2d 857 (1951); Bodine v. Bodine, 34 Wn. 2d 33, 207 P.2d 1213 (1949).

85. Patrick v. Patrick, 43 Wn. 2d 139, 260 P.2d 878 (1953).

86. See, e.g., Baker v. Baker, 80 Wn. 2d 736, 498 P.2d 315 (1972); Blood v. Blood, 69 Wn. 2d 680, 419 P.2d 1006 (1966), and cases cited therein.

87. The statute controlling in *Payne*, WASH. REV. CODE § 26.08.110 (1963), see note 10 *supra*, appeared to require the dissolution court to consider the character of the property owned by the parties. The current statute specifically directs the court to consider: "(1) [t]he nature and extent of the community property; (2) [t]he nature and extent of the separate property . . ." WASH. REV. CODE § 26.09.080 (Supp. 1973); see note 10 *supra*.

The disparity in decisions of the Washington Court of Appeals on this issue under the former statute reflected the need for a consistent, well-defined approach by the supreme court. Compare *In re Marriage of Melville*, 11 Wn. App. 879, 526 P.2d 1228 (1974) (characterization of property not controlling, but one of many factors to consider); *Pollock v. Pollock*, 7 Wn. App. 394, 499 P.2d 231 (1972) (court *must* have in mind correct status of property); *Belmondo v. Belmondo*, 3 Wn. App. 958, 480 P.2d 786 (1970) (court *may* consider source of property); *Peterson v. Peterson*, 3 Wn. App. 374, 475 P.2d 576 (1970) (items of property need not be labeled, but court *must* have in mind correct character).

erty by the court provides at least two other benefits: (1) It supplies the present parties and their counsel with information essential to the determination of tax consequences;⁸⁸ and (2) it indicates to future or potential parties and their counsel how the court would characterize their property, thus discouraging repetitious litigation and encouraging solution by means of a settlement agreement.⁸⁹

A. The "Inception of Right" Doctrine

Conceptual consistency dictates that interests in deferred compensation should be treated like interests in other earnings and gains acquired through the labor and industry of either spouse during marriage.⁹⁰ Thus, military retired pay is community property only if the marital community existed at the time property in the retired pay was acquired.⁹¹ The strict application of this inception of right doctrine would result in characterization of military retired pay as either entirely separate property or entirely community property—regardless of the duration of the community and its contribution to earning the benefit—depending only upon marital status at the time rights in the benefit are deemed to be acquired.⁹²

88. Where both community and separate property is before the court, the tax consequences may vary significantly depending upon the parties' respective pre- and postdissolution interests. See Victor, *Divorce and Deferred Compensation Arrangements*, U. So. CAL. 1972 TAX INST. 471; Hjorth, *Community Property Marital Settlements: The Problem and a Proposal*, 50 WASH. L. REV. 231 (1975).

89. A mutual recognition of their predissolution property interests may be crucial if the parties or their counsel are to be successful in avoiding litigation of the property disposition by means of a settlement agreement. Where such interests are uncertain, each party is likely to believe that his or her interest is greater than it actually is; the resulting hiatus will prolong, and may preclude, a settlement. Failure to achieve agreement will frequently be unfortunate, because the flexibility and planning potential of such a settlement can often produce results far more favorable to both parties than the court's disposition. See WASH. REV. CODE § 26.09.070 (Supp. 1973); Rieke, *The Dissolution Act of 1973: From Status to Contract?*, 49 WASH. L. REV. 375, 393-406 (1974).

90. See note 70 and accompanying text *supra*.

91. That property is characterized as community or separate as of the time of its acquisition is well settled in Washington. See, e.g., *Baker v. Baker*, 80 Wn. 2d 736, 745, 498 P.2d 315, 320 (1972) and cases cited therein. Acquisition of property in military retired pay might be deemed coincident with any of the vesting points considered in Part III *supra*.

92. The Washington court has encountered some difficulty in deciding whether certain types of property should be characterized according to the inception of right doctrine ("mortgage rule") or the proportionate ownership doctrine ("life insurance rule") discussed *infra*. See Cross, *The Community Property Law in Washington*, 49 WASH. L. REV. 729, 755-63 (1974).

B. A Preferable Approach: Proportionate Ownership

1. Military retired pay generally

The severity of an "all or nothing" characterization of the property⁹³ under the inception of right doctrine is frequently avoided by the application of proportionate ownership principles.⁹⁴

Under the proportionate ownership doctrine, the community interest should be that proportion of the entire retired pay expressed by the following equation:⁹⁵

$$\left\{ \begin{array}{l} \text{community interest in} \\ \text{military retired pay} \end{array} \right\} = \left\{ \begin{array}{l} \text{military} \\ \text{retired} \\ \text{pay} \end{array} \right\} \times \left\{ \begin{array}{l} \text{years of military service while} \\ \text{domiciled in a community prop-} \\ \text{erty jurisdiction during} \\ \text{marriage} \\ \hline \text{total years in military service} \end{array} \right\}$$

If the service person has not yet retired, the denominator is necessarily variable, increasing with the additional years or months of service

93. The substantial potential for inequity is illustrated by the facts of *Wilkerson v. Commissioner*, 44 T.C. 718 (1965), *aff'd per curiam*, 368 F.2d 552 (9th Cir. 1966), *criticized*, Lay, *Retirement Income Credit and Community Property: A Problem of Vesting*, 42 TUL. L. REV. 304, 317-19 (1968).

94. If the military retired pay is separate property because no marriage existed at the time a right to it was acquired, the community is nonetheless entitled to reimbursement to the extent that community labor earned the retired pay. Conversely, if the benefit is community property because a right thereto was deemed to be acquired during marriage, the service person is entitled to similar contribution in proportion to the separate labor supplied. The applicability of this concept to the disposition of military retired pay is well established in California, New Mexico and Texas. See *Fithian v. Fithian*, 10 Cal. 3d 592, 517 P.2d 449, 111 Cal. Rptr. 369 (1974); *LeClert v. LeClert*, 80 N.M. 235, 453 P.2d 755 (1969); *Mora v. Mora*, 429 S.W.2d 660 (Tex. Civ. App. 1968). Washington has applied such a tracing principle to apportion ownership interests in life insurance proceeds according to the community or separate character of the premiums. *Small v. Bartyzel*, 27 Wn. 2d 176, 177 P.2d 391 (1947); *In re Coffey's Estate*, 195 Wash. 379, 81 P.2d 283 (1938). Years of community and separate service which earn military retired pay are analogous to community and separate funds used to pay insurance premiums. See text accompanying notes 77-83 *supra*.

The applicability of the proportionate ownership doctrine to nonfederal statutory retirement plans is inherent in Washington's concept of the benefits as being continuously and incrementally acquired over the entire term of service or employment. *Leonard v. Seattle*, 81 Wn. 2d 479, 503 P.2d 741 (1972); *Tembruell v. Seattle*, 64 Wn. 2d 503, 392 P.2d 453 (1964). Thus, the portion of benefits "acquired" during marriage is generally community property, because earned with a community asset, the spouse's labor. The share acquired outside of marriage is separate property.

95. The fraction is expressed in units of time because they are a direct measure of the community contribution. Some courts have preferred to compare years of service, *Webster v. Webster*, 442 S.W.2d 786 (Tex. Civ. App. 1969), while others have used months. *Mora v. Mora*, 429 S.W.2d 660 (Tex. Civ. App. 1968).

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which fully earn or increase the value of military retired pay.⁹⁶ The obvious disadvantage of being unable to solve this equation until actual retirement can be overcome by substituting an equivalent fraction based upon the active base pay—not retired pay—for the service person's grade at the time of dissolution.⁹⁷ The following equation, incorporating this substitution, yields a value which will remain constant despite additional service performed after dissolution:⁹⁸

$$\left\{ \begin{array}{l} \text{community interest in} \\ \text{military retired pay} \end{array} \right\} = \left\{ \begin{array}{l} \text{military base} \\ \text{pay at} \\ \text{dissolution} \end{array} \right\} \times \left\{ \begin{array}{l} \text{years of military service} \\ \text{while domiciled in a com-} \\ \text{munity property jurisdiction} \\ \text{during marriage} \\ \hline 40 \end{array} \right\}$$

96. This method was adopted in a case purportedly decided on the basis of inception of right, not the proportionate ownership doctrine. *Williamson v. Williamson*, 457 S.W.2d 311 (Tex. Civ. App. 1970). There the wife was awarded a share of nonmilitary retirement benefits equal to 13/26 of the total benefits if her employee-husband should retire at the time of the divorce (after 26 years of employment). The court stipulated that her enjoyment of these benefits should be postponed to coincide with his, after actual retirement. Her share would then be a fraction with a numerator of 13 and a denominator equal to the total years of employment which earned the benefits. The variable denominator feature was applied to the division of military retired pay in *Miser v. Miser*, 475 S.W.2d 597 (Tex. Civ. App. 1971).

The denominator should be limited to that period of service after which the value of military retired pay is no longer increased—usually at 30 years, since retired pay is equal to 2½% of base pay for each year's service, but limited to 75%. See note 49 *supra*.

97. The community's share of the military retired pay should be based upon the service person's grade at the time of dissolution. (A specific pay grade is associated with each rate or rank in the military structure.) The community is not entitled to any increase in the value of retired pay due to subsequent promotions presumably earned by separate labor. While there is little doubt that a service person's prior performance influences his/her chances of promotion, the incalculable relationship would not justify awarding a spouse who divorced a lieutenant, for example, a share of military retired pay based on the rank of general 20 or 30 years later. To point out that the spouse had to wait many years for a share only reaffirms that deferred compensation is indeed deferred. The service person's share is much inflated, not because of the wait to collect it, but because of the considerable separate time and effort contributed towards its enhanced value since the dissolution.

98. The dollar amount of retired pay (and its percentage of base pay) increases with continued service as the community interest fraction decreases after dissolution. Because of this inverse relationship between the variable fraction representing the community interest and the general formula used by the military for computing retired pay, the community's share, expressed as a fraction of base pay (instead of retired pay) at dissolution, remains constant after dissolution.

The interrelationship may be observed more accurately if the formulae are expressed as follows:

- Let: C = the community interest in military retired pay;
 W = the nonearning spouse's interest in military retired pay;
 y = years of married service in a community property jurisdiction;
 z = years of military service;

2. *Changes of domicile*

In either of the above equations, only service performed while the married couple is domiciled in a community property jurisdiction enhances the community interest. Washington courts have long recog-

m = military retired pay; and
 b = base pay.

It has already been established that

$$C = \frac{y}{z} \times m \text{ (see formula in text following note 95 supra).}$$

and that

$$m = 2\frac{1}{2}\% \times z \times b \\ = \frac{zb}{40} \text{ (see note 55 supra).}$$

Combining these formulae.

$$C = \frac{y}{z} \times \frac{zb}{40} \\ = \frac{y}{40} b.$$

Furthermore, since

$$W = \frac{1}{2} C, \text{ then } W = \frac{y}{80} b.$$

An example may be helpful. If 10 years of a 15-year marriage were spent in a community property state during the last portion of a 20-year military career, we know:

$$C = \frac{10}{20} \times m = \frac{1}{2} m, \text{ and} \\ m = 2\frac{1}{2}\% \times 20 \times b = \frac{20}{40} b = \frac{1}{2} b.$$

$$\text{Thus, } C = \frac{1}{2} \left(\frac{1}{2} \times b \right) = \frac{1}{4} b.$$

In words, the community's interest is one-half the total military retired pay because it existed (and contributed) during one-half the years retired pay was being earned. But retired pay is one-half base pay after 20 years' service. Therefore, the community interest in retired pay is equal to one-fourth of base pay.

Using the same facts with respect to a 30-year career, we find that

$$C = \frac{10}{30} m = \frac{1}{3} m; \text{ but now,} \\ m = 2\frac{1}{2}\% \times 30 \times b = \frac{30}{40} b = \frac{3}{4} b.$$

$$\text{Thus, } C = \frac{1}{3} \times \frac{3}{4} \times b = \frac{1}{4} b.$$

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nized that the characterization of property as community or separate—controlled by the law of the domicile at the time of acquisition—survives a subsequent change of domicile.⁹⁹ Like the courts of other community property jurisdictions, however, they have overlooked or avoided the probable choice of law problem in most decisions characterizing and apportioning assets of transient marital communities.¹⁰⁰ In *Colpe v. Lindblom*, the Washington Supreme Court stated: “In the absence of evidence as to the domicile of the parties at the time the money was earned, the presumption will be indulged that the domicil-

Now the community has a smaller share of retired pay whose value, both absolute and as a function of base pay, has increased; but the community's interest in retired pay is still equal to one-fourth of base pay.

Similar formulae can be derived to provide a dissolution-date value for the respective interests in other noncontributory retirement plans whose benefits like military retired pay, increase lineally as a function of years of employment. As an example, consider the retirement plan in *DeRevere v. DeRevere*, 5 Wn. App. 446, 447, 488 P.2d 763, 764 (1971), wherein the annual amount of the employee's pension was computed “by multiplying his years of service by one per cent of the average of his five highest annual salaries.” In this corporate context, the formula for the community's interest is based upon the average salary for the employee's 5 highest-paid years prior to dissolution (or fewer, if employed or married fewer than 5 years), analogous to the base pay for the service person's grade at dissolution. Using the symbols introduced above,

$$C = \frac{y}{z} \times m, \text{ and, } m = 1\% \times z \times b = \frac{zb}{100}. \text{ Therefore,}$$

$$C = \frac{y}{100} b, \text{ and, } W = \frac{y}{200} b.$$

If 40 of Mr. DeRevere's “more than 40 years,” *id.*, of employment occurred while he was married and domiciled in Washington, and the average salary for his 5 highest-paid years preceding dissolution was \$24,000, Mrs. DeRevere's interest would be:

$$W = \frac{40}{200} \times \$24,000 = \$4800 \text{ per year, or } \$400 \text{ per month.}$$

No such formula is necessary with respect to contributory plans, because the contributions themselves provide the most direct measure of all interests.

99. *Rustad v. Rustad*, 61 Wn. 2d 176, 377 P.2d 414 (1963); *Colpe v. Lindblom*, 57 Wash. 106, 106 P. 634 (1910).

100. Until recently the conflicts problem had been confronted in only one reported decision, *Otto v. Otto*, 80 N.M. 331, 455 P.2d 642 (1969), in which the New Mexico Supreme Court remanded for a specific finding as to the parties' domicile while the military retired pay was being earned. In 1974 a Texas appellate court recognized that only the portion of military retired pay earned during marriage while the husband and wife resided in community property states was community property, those benefits earned in noncommunity property states during marriage being the separate property of the employee spouse. *Mitchim v. Mitchim*, 509 S.W.2d 720 (Tex. Civ. App. 1974).

In California, the choice of law problem may be avoided by the quasi-community property concept which effectively regards that property as community which would have been so classified had it been acquired in California. See CAL. CIV. CODE § 4803 (West Supp. 1974).

itary law is the same as our own."¹⁰¹ That presumption undoubtedly derives from a strong policy preference for community property¹⁰² and a judicial desire to avoid the complexities of determining a service person's domicile(s).¹⁰³ But the comparative paucity of community property jurisdictions¹⁰⁴ and the universal awareness of service persons' transience—the principal factor giving rise to domiciliary complexities—make the application of the *Colpe* presumption to military retired pay dispositions naive to the point of abusing the fiction.¹⁰⁵ In the absence of sufficient evidence as to domicile, a better presumption would be that domicile was consistently coincident with the service person's duty station throughout the military career.¹⁰⁶

101. 57 Wash. 106, 114, 106 P. 634, 637 (1910), explained in *Snyder v. Stringer*, 116 Wash. 131, 198 P. 733 (1921).

102. *Yesler v. Hochstetler*, 4 Wash. 349, 30 P. 398 (1892).

103. A discussion of service persons' domiciles is beyond the scope of this note. A reader unfamiliar with the peculiar problems involved might profitably refer to the following cases and commentaries: *Thomas v. Thomas*, 58 Wn. 2d 377, 363 P.2d 107 (1961); *Fiske v. Fiske*, 48 Wn. 2d 69, 290 P.2d 725 (1955); *Kankelborg v. Kankelborg*, 199 Wash. 259, 90 P.2d 1018 (1939); Sanftner, *The Serviceman's Legal Residence: Some Practical Suggestions*, 26 JAG J. 87 (1971); Thames, *Domicile of Servicemen*, 34 Miss. L.J. 160 (1963); Comment, *Domicile of Members of Armed Forces*, 26 TENN. L. REV. 415 (1959).

104. The community property jurisdictions (Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas and Washington) represent 16% of the states. The cumulative population of these eight states includes the same proportion of living veterans as their cumulative population bears to the total population of the United States—21%. U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 13, 275 (94th ed. 1973).

105. The New Mexico Supreme Court avoided the automatic, unquestioning application of any *Colpe*-like presumption in *Otto v. Otto*, 80 N.M. 331, 455 P.2d 642, 643 (1969):

[I]t is by no means clear from [the serviceman's] testimony where the parties were domiciled during the greater part of the coverture and for what period of time. Findings may not rest upon mere speculation and conjecture.

106. By reference to the service record, the service person's history of duty stations is readily ascertainable, while domicile may not be. Temporary deployments outside the United States could be ignored, since the portion of military retired pay earned during such deployment would continue to be characterized under the laws of the home port or permanent duty station. During permanent overseas assignments, the law of the last previous stateside station could control; but the forum could hardly be excoriated if it chose to fill these gaps by applying its own law. This presumption, admittedly arbitrary, is less so than the one being criticized, because greater effect is given to the realities of each case. Additionally, this presumption avoids the opposite extreme results of the *Colpe* presumption and of a concession of persisting noncommunity property domicile based on the service person's recollection of his or her *animus manendi*—an improvement if that memory might be influenced by a realization of the consequences.

That a service person may have both lived and worked on a federal military reservation while stationed within a particular state should not operate to avoid the effect of that state's laws. Cf. *Makah Indian Tribe v. Clallam County*, 73 Wn. 2d 677, 440 P.2d 442 (1968).

3. *Application by the dissolution court*

Thus, the only information needed by the court to determine the various interests in the military retired pay is: (1) the service person's grade at dissolution; and (2) the number of years during which marriage and service coincided in a community property jurisdiction. The community's interest is one-fortieth of the latter times the base pay of the former;¹⁰⁷ the other spouse's interest is one-half of the community's;¹⁰⁸ and the service person's share, by deduction, is the retired pay actually received less that portion to which the other spouse is entitled.¹⁰⁹

Once the court has determined the predissolution property interests of the parties, it should then be prepared to exercise properly its considerable discretion in ordering a disposition appropriate to the facts of the case.

V. WHAT DISPOSITION OF MILITARY RETIRED PAY IS APPROPRIATE?

A. *General Equity Power of Washington Courts*

The disposition of military retired pay as property¹¹⁰ need not conform to the predissolution interests of the parties;¹¹¹ indeed, the trial

107. The court's determination of the parties' predissolution interests should be expressed in terms corresponding to the method of disposition chosen. *See* Part V *infra*. If one spouse is awarded a fractional share to be received concurrently with the government's military retired payments to the other, the predissolution interests and disposition can be expressed just as they are in the text. If one spouse is to receive a lump sum, or an award of other property in lieu thereof, his or her predissolution interest should be expressed by the court in terms of a lump sum estimate, discounted for the uncertainty of eventual retirement and further reduced to an actuarial dissolution-date value. These factors are discussed more fully in the next section.

108. It is important to notice that the wife's ownership and possession in half of these earnings and gains during marriage passed to her automatically *ipso jure* without the necessity of delivery. And her ownership and possession in half of these earnings and gains did not depend upon any mere physical fact of placing the earnings or gains in the husband's hands but related, just as the husband's ownership did, to the very inception of the right to such earnings and gains.

W. DEFUNIACK & M. VAUGHN, *PRINCIPLES OF COMMUNITY PROPERTY* § 66, at 142 (2d ed. 1971).

109. Note that the service person's portion is composed of one-half of the community interest, plus any separate share. The community share will, of course, be identical to the other spouse's; any separate share will be based upon the actual retired grade and length of total service.

110. If the court has determined, by whatever rule or reason, that military retired pay is not property, the service person will necessarily retain whatever interest

court has wide discretion with respect to the disposition of any particular asset,¹¹² so long as the resulting distribution of community and separate property comports with the statutory standards of justice and equity.¹¹³ Division along the lines of the parties' predissolution inter-

or expectancy exists with respect to the benefits. The court will be concerned with the retired pay only as it might bear on one spouse's ability to afford maintenance (alimony) payments to the other whose circumstances justify such an award. See *Morse v. Morse*, 42 Wn. 2d 229, 254 P.2d 720 (1953); *Holland v. Holland*, 139 Wash. 424, 247 P. 455 (1926); *Mose v. Mose*, 4 Wn. App. 204, 480 P.2d 517 (1971).

111. See WASH. REV. CODE § 26.09.080 (Supp. 1973). By contrast, the courts of Canada (a common law jurisdiction) are required to identify and preserve the parties' predissolution interests. *Murdoch v. Murdoch*, [1974] 1 W.W.R. 361 (Can. 1973).

112. See notes 84-87 and accompanying text *supra*. It might persuasively be argued that deference to federal supremacy, U.S. CONST. art. VI, cl. 2, imposes limitations upon the state court's disposition of military retired pay that do not exist with respect to other property. Judge B. Abbott Goldberg has contended emphatically that state action in this sphere is not merely limited, but precluded. He insists that because military retired pay is a federally created benefit, rights therein are not susceptible of interpretation under state law unless that state law has been adopted by Congress or the federal courts. Noting that, "[n]othing has been found to indicate that Congress has ever considered treating retired pay as community property," the Judge's interpretation of Congressional intent led him to conclude "that retired pay is indeed a personal entitlement of the retiree, which accrues only to him, and in which his wife has no rights except as Congress gives them to her." Goldberg, *Is Armed Services Retired Pay Really Community Property?* 48 CAL. ST. B.J. 13, 91 (1973). In *Fithian v. Fithian*, 10 Cal. 3d 592, 517 P.2d 449, 111 Cal. Rptr. 369 (1974), the California Supreme Court recently had an opportunity to consider Judge Goldberg's analysis and rejected his view of two prior decisions in which the United States Supreme Court examined rights in other federal benefits—*Free v. Bland*, 369 U.S. 633 (1962) (U.S. Savings Bonds), and *Wissner v. Wissner*, 338 U.S. 655 (1950) (National Service Life Insurance). According to the California court, "*Free* and *Wissner* make clear, however, that state law may determine the treatment accorded locally to a federally created property right so long as the result does not frustrate the express or implied purposes of the federal legislation." 517 P.2d at 452 n.4, 111 Cal. Rptr. at 372 n.4. See also *In re Marriage of Milhan*, 13 Cal. 3d 129, 528 P.2d 1145, 117 Cal. Rptr. 809 (1974).

A state court which awards to the nonearning spouse at dissolution a lump sum or other property in lieu of his or her interest in military retired pay—or even one which awards only a predissolution share of that benefit—would appear not to thwart the apparent Congressional purpose of improving the morale and increasing the retention of service personnel. That "substantial interest" of the federal government might well "suffer major damage" (*United States v. Yazell*, 382 U.S. 341, 352 (1966)), however, if the state court presumes to award the nonearning spouse a percentage or dollar amount in excess of his or her predissolution interest in each retired pay check. The state court decisions mentioned earlier in this footnote have not discussed this distinction, but have treated the entire federal benefit as being properly before the dissolution court for characterization and disposition.

The most effective resolution of the supremacy issue would result from Congressional clarification; a welcome alternative would be an answer from the Supreme Court, which has thus far declined to speak. *House v. House*, Civil No. 11106 (Cal. Ct. App. 4th Dist., June 13, 1972), *cert. denied*, 409 U.S. 1118 (1973); *Dominey v. Dominey*, 481 S.W.2d 473 (Tex. Civ. App.), *cert. denied*, 409 U.S. 1028 (1972).

113. See *Roach v. Roach*, 72 Wn. 2d 144, 149, 432 P.2d 579, 582 (1967). Similarly wide discretion is vested in Texas courts. TEX. FAM. CODE § 3.63 (Supp. 1973). Other jurisdictions require an *equal* division of community property. CAL.

ests may be desirable in some cases; in every case it is a rational starting point¹¹⁴ from which to make any adjustments necessary to account for the “economic circumstances of each spouse.”¹¹⁵ For example, when one spouse’s needs cannot be met by his or her actual or potential income and predissolution share of the property, the court has the power to award that spouse additional property that would otherwise have gone to the spouse whose economic circumstances are superior. Additionally, or alternatively, the court can award maintenance (alimony) to the spouse in need from the spouse whose income is sufficient to provide it.¹¹⁶ Frequently, even where alteration of the aggregate interests of each spouse is not required because of economic circumstances, the court will reallocate particular items of property so that some assets will be owned entirely by one spouse, while offsetting property is awarded *in toto* to the other.¹¹⁷

B. Considerations Bearing Upon Disposition

The difficult task of disposition¹¹⁸ encompasses two discrete but concomitant functions: (1) division of the military retired pay into the portions to be awarded each party; and (2) selection of the most appropriate method of distributing those portions. Disposition of retired pay—as of property generally—should be considered, not in isolation, but rather in combination with other aspects of the parties’ circumstances,¹¹⁹ including:

Civ. CODE § 4800 (West Supp. 1973); *Michelson v. Michelson*, 86 N.M. 107, 520 P.2d 263 (1974).

114. Where both spouses are capable of supporting themselves, a decree which preserves predissolution interests may well be appropriate. In any event, preliminary sorting of the parties’ property according to such interests—instead of initially aggregating all community and separate property—will provide to the judge a keener appreciation for the extent of the transfers being effected by a decree which alters those interests.

115. WASH. REV. CODE § 26.09.080(4) (Supp. 1973).

116. See notes 134–35 and accompanying text *infra*.

117. Washington courts have generally preferred such a “clean break” to a scheme of distribution which would leave former spouses as co-owners of tangible or real property. See, e.g., *Bernier v. Bernier*, 44 Wn. 2d 447, 267 P.2d 1066 (1954).

118. It is always a difficult task for the trial court to follow the mandate of the statute . . . to make the property division just and equitable, having regard for the statutory factors to be taken into consideration. It is manifestly more difficult when one of those [the disposable] items of property has not yet come into being, and, when once it does come into existence, has an unpredictable life.

DeRevere v. DeRevere, 5 Wn. App. 741, 746, 491 P.2d 249, 253 (1971).

119. WASH. REV. CODE § 26.09.080 (Supp. 1973). See, e.g., *Friedlander v. Friedlander*, 80 Wn. 2d 293, 494 P.2d 208 (1972); *DeRuwe v. DeRuwe*, 72 Wn. 2d 404, 433 P.2d 209 (1967).

- (1) value of the retired pay;
- (2) predissolution interests of each party in the retired pay;
- (3) proximity of dissolution to the time of actual retirement or eligibility therefor;
- (4) value, kind, source, date of acquisition, and community or separate character of other property of the parties;
- (5) future earnings prospects of each party (and perhaps children), as indicated by age, health, education and employment history;
- (6) economic norms (standard of living) and needs of each party (and their children); and
- (7) gift, estate and income tax consequences.¹²⁰

In addition to these general considerations, a court disposing of future interests should weigh several other factors:

- (8) exactitude of alternative methods of distribution, *i.e.*, tendency for the result of the parties' full compliance with the decree to conform to the division which the court determined to be appropriate;
- (9) finality of alternative methods of distribution, *i.e.*, the unlikelihood that the court will be called upon at a later time to assist either party in enforcing the decree; and
- (10) enforceability of alternative methods of distribution.

C. *Alternative Methods of Disposition*

Based upon the particular pattern described by all of the factors in each case, the court can choose the most just and equitable method of distributing a spouse's share of retired pay from among several alternatives, which can be conveniently grouped according to time of enjoyment as follows: (1) distribution only as the retired pay is actually received by the service person (*e.g.*, the other spouse is awarded a percentage, fraction or dollar amount of each monthly check payable if, as and when received by the service person); and (2) distribution independent of pay actually received (*e.g.*, the other spouse is awarded the dissolution-date value of his or her portion in a lump sum or installments, or, in lieu, is awarded other property of equivalent

120. See Hjorth, *Community Property Marital Settlements: The Problem and a Proposal*, 50 WASH. L. REV. 231 (1975).

value). The influence of the enumerated factors on the choice of disposition must be assessed by considering the alternatives individually.

Many courts have decreed that a service person should pay to a former spouse a certain percentage or fraction of each retired paycheck when it is received.¹²¹ The perfect conformity between the division sought by the court and that accomplished by compliance with the decree cause this method to be unsurpassed in exactitude. Since the service person's present duty to pay does not arise until benefits are actually received, this method is particularly appropriate when the parties have little other property which might be awarded in lieu of an interest in the retired pay. Where the court determines a spouse's portion of the military retired pay to be small, the similarly small amount of property needed to substitute for a percentage share is more likely to be available; under those circumstances the relative inconvenience of continuing payments might well cause a court to reject this method. Considerations of finality and enforceability also might encourage a court to seek another alternative, especially if the service person will not begin to receive retired pay until many years after the dissolution.¹²²

The observations of the previous paragraph also apply to an award of a specific dollar amount of each month's retired pay, although the exactitude will be slightly diminished by the deviation from the court's intended division when (as is probable) the amount paid to the service person is periodically increased to account for inflation (sometimes

121. See, e.g., California, New Mexico and Texas cases cited in notes 94-96 *supra*.

122. Despite a service person's move from the jurisdiction granting dissolution, a former spouse can use the military locator services to ascertain his or her whereabouts. See Comment, *The Illegitimate Children and Parental Rights Act*, 49 WASH. L. REV. 647, 676-77 n.123 (1974). Location of the service person by no means insures recovery, however, for the retirement pay may not be attached or garnished whether the former spouse claims a property interest in military retired pay, see *Arnold v. United States*, 331 F. Supp. 42 (S.D. Tex. 1971), or attempts to enforce an alimony award. See *Applegate v. Applegate*, 39 F. Supp. 887, 889-90 (E.D. Va. 1941); cf. *Buchanan v. Alexander*, 45 U.S. 20 (1846). Nor is contempt a proper remedy to enforce property settlements which are unrelated to a duty to support spouse or children. *Decker v. Decker*, 52 Wn. 2d 456, 326 P.2d 332 (1958). *But cf.* *Brantley v. Brantley*, 54 Wn. 2d 717, 344 P.2d 731 (1959), where the court held imprisonment for contempt (under WASH. REV. CODE § 7.20.110 (1963)) to be constitutional as punishment for a spouse's failure to pay a community debt in accordance with the divorce court's decree, where the ordered payment bears a reasonable relationship to the spouse's support obligations. Such a relationship frequently would be more easily established with respect to payments—however labeled—from one spouse to the other than to payments to a third party creditor.

called a "cost-of-living increase"), while the other spouse's dollar amount remains fixed. For example, Mrs. Payne's award will continue to be \$65 ten-plus years from now, while the total retired pay received by Mr. Payne may have increased from \$360 to \$500 or more.¹²³ If by awarding \$65 of the total \$360, the court intended Mrs. Payne's share to be 18 percent of the retired pay, that intent will be frustrated in direct proportion to subsequent statutory increases or decreases in military base pay rates.

The circumstances of some parties might lead the court to award all the retired pay to the service person, with an award to the other spouse of cash or other property of a value equivalent to the interest in the retired pay which would otherwise be received. This method of disposition is obviously limited to those cases involving parties who have accumulated sufficient assets from which to make such an award.¹²⁴ The attractiveness of this method is further reduced by the lack of exactitude inherent when the award must be based upon an estimate at the time of dissolution of the value of benefits the service person may eventually receive—such value to be adjusted for the statistical probability of any receipt¹²⁵ and the actuarial estimation of duration of receipt,¹²⁶ further discounted for taxes saved¹²⁷ and acceleration of the time of enjoyment.¹²⁸ Against these disadvantages, a

123. See text accompanying note 1 *supra*.

124. See, e.g., *Weiss v. Weiss*, 75 Wn. 2d 596, 452 P.2d 748 (1969), which involved four different retirement plans of parties whose total assets were over \$160,000.

125. The military services have collected data, used to generate personnel continuation rates, from which can readily be computed the probability that a person with a known length of service will complete the 20 years of service generally required to qualify for retirement. These data account for attrition resulting from all causes, including death, disability, desertion and voluntary separation from the military service. Telephone interview with Commander Stevenson, Bureau of Naval Personnel (PERS 212), Department of the Navy, Washington, D.C., Jan. 8, 1975.

126. See, e.g., Treas. Reg. § 1.72-9 (1957).

127. Where a spouse is granted a lump sum at dissolution, and the award was part of an equal division, it would not be subject to tax; in all probability, the service person would be taxed on the entire amount of retired pay as received. See Hjorth, *Community Property Marital Settlements: The Problem and a Proposal*, 50 WASH. L. REV. 231 (1975).

128. For an example which accounts for some of these factors in estimating the divorce-date value of such an interest, see Brief for Respondent at 9-10, *Weiss v. Weiss*, 75 Wn. 2d 596, 452 P.2d 748 (1969). It should be noted, however, that no degree of care or refinement of calculation can eliminate the potential for inequity inherent even in such sophisticated guesswork.

The greatest disparity between the court's intended division and the actual result would occur if, after such a lump sum or property award to one spouse at the time

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court must weigh the greater finality and enforceability of this method. Immediate disposition is understandably attractive to a court eager to free itself and the receiving spouse from continuing concern as to the service person's dependability and whereabouts.¹²⁹

D. *The Maintenance Alternative*

To complement the comparison of alternative methods by which to distribute military retired pay as property, one should consider the alternative to property dispositions in general. Should a court adopt a rule of vesting by which retired pay would not be recognized as property distributable at dissolution, the only other means by which the nonearning spouse might share in that benefit is an award of maintenance. A maintenance award—in contrast to distribution as property—lacks immutability; *i.e.*, it is susceptible to later modification.¹³⁰ Maintenance also lacks finality, but it affords a spouse greater enforceability than does an award of property.¹³¹

of dissolution, the other died before receiving any (or a substantial amount) of the retired pay upon which the award was based. *See generally* Wise, *Those Uncertain Actuaries* (parts 1–2), FORTUNE, Dec. 1965, at 154 & Jan. 1966, at 164, cited in Hughes, *Community-Property Aspects of Profit-Sharing and Pension Plans in Texas*, 44 TEX. L. REV. 860, 879 (1966). Despite its inexactitude and limited applicability, this method of disposition was recommended (presumably because of its finality) in Riddell, *supra* note 3, at 2.

129. It is much harder to perceive why a court would order a husband who is not yet retired to make monthly installment payments in an amount determined by a compound approximation similar to that just described, thus sacrificing finality and enforceability without gaining in exactitude. Yet, just such an award was affirmed on appeal in *Bensing v. Bensing*, 25 Cal. App. 3d 889, 102 Cal. Rptr. 255 (1972) (military retired pay), and in *DeRevere v. DeRevere*, 5 Wn. App. 741, 491 P.2d 249, rehearing 5 Wn. App. 446, 488 P.2d 763 (1971) (corporate retirement plan).

Where the needs of one spouse dictate present payment, but the other's resources are insufficient to warrant a lump sum award, an award of maintenance would be more practical and equitable than a pre-retirement installment award of property as in *DeRevere*.

130. WASH. REV. CODE § 26.09.170 (Supp. 1973) provides in part:
[Except as provided in a separation contract,] the provisions of any decree respecting maintenance or support may be modified only as to installments accruing subsequent to the motion for modification and only upon a showing of a substantial change of circumstances. The provisions as to property disposition may not be revoked or modified, unless the court finds the existence of conditions that justify the reopening of a judgment under the laws of this state.
Compare WASH. REV. CODE § 26.08.110 (1963), quoted at note 10 *supra*. *See* McLaughlin v. McLaughlin, 43 Wn. 2d 111, 260 P.2d 875 (1953).

131. One spouse may enforce a maintenance award through contempt proceedings, *In re Cave*, 26 Wash. 213, 66 P. 425 (1901), even where the other's only income and assets are derived from a federal pension. *Gerold v. Gerold*, 6 Ore. App.

It is meaningless to speak of exactitude with respect to maintenance, which is not based on a predissolution interest in retired pay and does not represent a postdissolution property interest therein; instead, the amount of maintenance is based upon one spouse's need and the other's ability to pay.¹³² The extent to which that ability is increased by the service person's receipt of military retired pay is the only connection between the retired pay and the maintenance, which bears no necessary or probable relation to the other spouse's contribution to the service career.¹³³ Taken together with Washington's policy against permanent maintenance,¹³⁴ the above reasons strongly suggest that maintenance should not be decreed as a substitute for a property interest in retired pay, but only as an additional award in appropriate circumstances.¹³⁵

353, 488 P.2d 294 (1971). If the service person can still be found in Washington, the other spouse may also choose from additional enforcement mechanisms available under WASH. REV. CODE ch. 26.20 (Supp. 1973). Moreover, several mechanisms exist for reciprocal interstate enforcement of support. See, e.g., WASH. REV. CODE ch. 26.21 (Supp. 1973). See generally Diaz, *Pursuing the Elusive Nonsupporting Serviceman*, 14 JAG L. REV. 123 (1973). Compare the greater enforcement problems associated with property settlements, note 122 *supra*.

132. See *Kelso v. Kelso*, 75 Wn. 2d 24, 448 P.2d 449 (1968); *Endres v. Endres*, 62 Wn. 2d 55, 380 P.2d 873 (1963). Compare WASH. REV. CODE §§ 26.09.090 (Supp. 1973) with 26.08.110 (1963).

133. In fact, the service person's ability to afford maintenance will decrease upon retirement from the service unless he or she compensates for the disparity between former active duty pay and retired pay by obtaining civilian employment.

134. See *Berg v. Berg*, 72 Wn. 2d 532, 434 P.2d 1 (1967). But where the parties settle their affairs by means of a separation contract instead of leaving that task to the court, then permanence, immutability, control over the consequence, and greater enforceability can be made attributes of a maintenance award, which might thereby become more advantageous to both spouses than a division of retired pay as property. See WASH. REV. CODE § 26.09.070 (Supp. 1973); Rieke, *The Dissolution Act of 1973: From Status to Contract?*, 49 WASH. L. REV. 375, 398-99 (1974). The remarks of a Texas practitioner apply to contractual alimony in Washington as well. Vetter, *Community Property Divorce—a View from Texas*, 1 COMMUNITY PROPERTY J. 67, 69 (1974).

135. It is essential that the court clearly articulate its disposition of military retired pay even when it is being awarded entirely to the service person with an additional award of maintenance to the other spouse. The Texas Supreme Court, deciding a partition case involving military disability retirement pay not disposed of at the time of divorce, admonished:

In the future, counsel for litigants in divorce suits should call to the attention of the trial judge all of the assets of the marriage. . . . [T]he trial judges of the state, sitting in divorce suits, should inquire as to the existence of insurance or retirement programs to the end that the final judgment fully disposes of all property valuables of the community.

Busby v. Busby, 457 S.W.2d 551, 555 (Tex. 1970). Property not disposed of by the dissolution court vests equally in the former spouses as tenants in common and may well precipitate further litigation. Cf. *Chase v. Chase*, 74 Wn. 2d 253, 444 P.2d 145 (1968); *Pittman v. Pittman*, 64 Wn. 2d 735, 393 P.2d 957 (1964).

E. Fashioning the Award of Military Retired Pay

In summary, the court must determine the division of property interests in military retired pay and the method of disposition based upon a combination of factors related not only to the retired pay itself, but also to the parties' other property, income and economic needs. In choosing its method of disposition, the court faces a dilemma born of the divergent demands of equity and security. The division desired by the court will be most nearly achieved by the parties' full compliance with an award which delays the other spouse's receipt of an interest in retired pay to coincide with the service person's enjoyment. By contrast, finality and enforceability are enhanced by an award which provides for the receipt of the other spouse's interest as early as possible, thereby increasing the probability that full compliance will occur. Only by resolving this conflict will the court properly fulfill its minimal obligation to decree who should receive what, and how. The culmination of the court's efforts should be an explicit articulation of the following:

- (1) who is awarded an interest in the military retired pay (husband, wife or both);
- (2) the nature of each interest awarded (property or maintenance);
- (3) the exact extent of each interest (in dollars, or a percentage or fraction of some specified, ascertainable reference—*e.g.*, base pay or retired pay of a particular grade as of a particular time);
- (4) when the nonearning spouse should receive an interest (if at one time only; otherwise when periodic payments are to begin—*e.g.*, by date or relative to the service person's receipt of retired pay);
- (5) conditions which terminate payments from one spouse to the other (*e.g.*, upon the death of the first to die, or when the service person is no longer receiving retired pay);¹³⁶

136. This note is regrettably not an adequate vehicle for the consideration due the significant peripheral issue of disposition of the former spouse's interest at his or her death. An award of all retired pay to the service person with property to the other spouse in lieu of his or her interest will avoid this problem (as will an immediate lump sum cash payment). The court can also resolve the question by expressly providing for termination of the other spouse's interest upon the death of either. See *Fithian v. Fithian*, 10 Cal. 3d 592, 517 P.2d 449, 111 Cal. Rptr. 369 (1974); *Bensing v. Bensing*, 25 Cal. App. 3d 889, 102 Cal. Rptr. 255 (1972); *cf. Waite v. Waite*, 17 Cal. App. 3d 108, 94 Cal. Rptr. 677 (1971). That the Washington court should so provide seems justifiable in terms of both equity and expediency.

- (6) who is to pay taxes on each interest;¹³⁷
- (7) whether the decree is an adjudication of an amount owing or an order to pay.¹³⁸

VI. CONCLUSION

Prior to the decision in *Payne v. Payne*, the Washington Supreme Court had subjected military retired pay in dissolution (divorce) cases to inconsistent treatment. Each of the earlier cases involved a service person who already was receiving retired pay at the time of dissolution; none contained an analysis comprehensive enough to resolve the primary issue or underlying problems in *Payne*. Nevertheless, in *Payne*—involving a serviceman not yet retired at dissolution—the court assumed that the retired pay was property of some undetermined character and that as such, an interest in it could be awarded to the wife without regard for the extent of the previous community or separate interests therein. The result was a property award of \$65 per month for Mrs. Payne, and a regrettable lack of guidance for courts, counsel and couples.

The court should have addressed three principal questions:

- (1) Is military retired pay property?

Suggested Conclusion: Yes. As between the service person and anyone but the federal government, a right to military retired pay vests¹³⁹ upon entry into the service.

137. See Riddell, *supra* note 3, at 2. The California Supreme Court recently refused to accept the net amount of military retired pay, after deduction of federal income tax, as the proper amount to be used in determining the wife's share of benefits earned by her serviceman-husband. According to the California court, "The respondent [wife] having been declared owner of a percentage of the pension rights as her share of the community property will presumably pay income taxes on the amount she receives." *In re Wilson's Marriage*, 10 Cal. 3d 851, 856, 519 P.2d 165, 168, 112 Cal. Rptr. 405, 408 (1974).

138. This distinction may make a difference in the enforceability, through contempt and imprisonment, of the dissolution court's awards. See *Brantley v. Brantley*, 54 Wn. 2d 717, 344 P.2d 731 (1959).

139. Recall the difference between vesting and maturing: "vesting" is once again used as defined in note 53 *supra*. Federal courts have recognized that a person's right to a federal statutory benefit may be vested as between that person and any other individual although it is not as between that person and the federal government. See *Knapp v. Alexander-Edgar Lumber Co.*, 237 U.S. 162 (1915); *United States v. Buchanan*, 232 U.S. 72 (1914); *United States v. 10,245 Acres of Land*, 50 F. Supp. 470 (E.D. Wash. 1943).

Military Retired Pay

(2) To what extent is military retired pay community property?

Suggested Conclusion: The community has a predissolution interest in the retired pay equal to one-fortieth of the service person's base pay at dissolution grade times the number of years during which the parties' marriage coincided with military service in a community property jurisdiction.

(3) What disposition of the military retired pay is just and equitable in *Payne*?

Suggested Conclusion: Although the opinion reveals insufficient information regarding the parties economic circumstances for a well-informed appraisal, the division and method of disposition chosen appear to be appropriate, and are certainly well within the discretion of the court. A more effective and comprehensive decree, however, could have been expressed in terms of a percentage (in this case, nine per cent) of the base pay corresponding to the serviceman's pay grade at dissolution, and should have included specific provisions for payment of taxes, termination of the serviceman's obligation and other matters identified herein.

The above italicized responses are labeled "conclusions" rather than "answers," because competent answers by the court to these questions and other ancillary problems discussed in this note would require thorough analysis of a scope and depth (and consequently, length) far exceeding that of the *Payne* opinion. Once such a comprehensive approach is judicially adopted, however, its application to other cases can be accomplished readily in an opinion as compact as that in *Payne*. More importantly, future parties may be able to assume much of the burden of subsequent application if the adopting court's treatment is both sound in its reasoning and clear in its articulation. The treatment in *Payne* was neither.

D. Michael Young