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## Characterizing Military Separation Benefits At Dissolution in California

Glenn C. Jones\*

### INTRODUCTION

Beginning in 1990, responding to dramatic changes in the world's geo-political makeup, Congress initiated a massive draw-down of active duty armed forces.<sup>1</sup> To effect the drawdown, Congress modified the existing statute governing involuntary separation pay and enacted two other programs to encourage military members to voluntarily leave active duty before completing a twenty year career.<sup>2</sup>

Unfortunately, many of the large number of service members, who will leave active duty under one of these three programs between now and 1995, will contemplate or pursue marital dissolution, or will be recently divorced. In many cases, the military separation benefit will form the bulk of the family's assets. Therefore, it is incumbent to be aware of how these programs may affect active duty or former service members or their spouses.

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1. See *infra* notes 11-17 (discussing the reduction in armed forces).

2. 10 U.S.C. § 1174 (1991) (involuntary separation pay); *id.* § 1174a (1991) (special separation benefits); *id.* § 1175 (1991) (voluntary separation incentive).

In California, military separation pay has been characterized as the separate property of the military member.<sup>3</sup> However, Congress' 1990 amendments<sup>4</sup> to the statute governing separation pay<sup>5</sup> could alter that characterization. In light of those amendments, the vitality of *In re Marriage of Kuzmiak*,<sup>6</sup> California's only case to address the issue of military separation pay, is now subject to question. In *Kuzmiak*, the husband, an Air Force Captain, was involuntarily released from active duty in 1983 and received \$30,000 in separation pay under the terms of 10 U.S.C. § 1174. He later enlisted so he could qualify for retirement benefits after twenty years of service. His former wife claimed his separation pay was community property. The court of appeals held that separation pay is the separate property of the servicemember.

Additionally, the characterization of the recently enacted Special Separation Benefits (SSB)<sup>7</sup> and Voluntary Separation Incentives (VSI),<sup>8</sup> upon marital dissolution, is also an unanswered question under California law. This Article will explore whether post-1990 separation pay, SSB, and VSI, should be characterized as community or separate property in California upon marital dissolution.

In Section I, this Article will examine the events that caused Congress to amend the separation pay statute<sup>9</sup> in 1990 and enact SSB and VSI in 1991 to help shrink the size of the active duty armed forces. Next, for the benefit of those unfamiliar with military compensation issues, Section II will highlight the contours of the law concerning three other important aspects of military compensation: military retired pay, "disposable" retired pay, and disability

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3. See generally *In re Marriage of Kuzmiak*, 176 Cal. App. 3d 1152, 1158, 222 Cal. Rptr. 644, 647 (1986) (holding that the separation pay of an unmarried service member is his or her separate property), *review denied, cert. denied sub nom*, 479 U.S. 885 (1986).

4. National Defense Authorization Act for Fiscal Year 1991, Pub. L. No. 101-510, Div. A, Title V, Part A, § 501, 104 Stat. 1549 (1990) (codified as amended at 10 U.S.C. § 1174 (1991)).

5. 10 U.S.C. § 1174 (1991).

6. 176 Cal. App. 3d 1152, 222 Cal. Rptr. 644 (1986), *review denied, cert. denied sub nom*, 479 U.S. 885 (1986).

7. 10 U.S.C. § 1174a (1991).

8. *Id.* § 1175 (1991).

9. *Id.* § 1174 (1991).

pay. Section II will also examine how Congress, the United States Supreme Court, and California courts have responded to developments in these areas. Section III will review legislation enacted by Congress to effect the drawdown of military forces. Section IV will explore separation pay under 10 U.S.C. § 1174 and consider the only California case on point, *In re Marriage of Kuzmiak*.<sup>10</sup> This will establish a framework for the discussion in Section V of post-1990 separation pay, SSB, and VSI, and whether they should be characterized as separate or community property.

Based on Congress' well-documented concern to care for the military *family* during the rapid drawdown of active duty forces, the inescapable conclusions are that these benefits should be characterized as community property in California and that *Kuzmiak* is outdated and should be discarded.

## I. THE DRAWDOWN

Responding to dramatic world events, Congress cut 129,500 service members from active duty forces in fiscal year 1991.<sup>11</sup> In fiscal years 1992 and 1993, Congress enacted even more dramatic cuts in the active duty force structure.<sup>12</sup> By the end of fiscal year 1993, the United States will reduce its active duty armed forces from 2,076,405 to 1,766,500 members. This reduction of approximately 280,000 members is a fifteen percent cutback in the active duty forces. The force reduction is in response to the disintegration of the Soviet Union, the collapse of the Warsaw Pact, German reunification, and a diminished nuclear threat.<sup>13</sup> More reductions

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10. 176 Cal. App. 3d 1152, 222 Cal. Rptr. 644 (1986), *review denied, cert. denied sub nom*, 479 U.S. 885 (1986).

11. *See generally* H.R. REP. No. 665, 101st Cong., 2d Sess. (1990), *reprinted in* 1990 U.S.C.C.A.N. 2991 (providing figures for the proposed reduction in force).

12. *See infra* Table 1.

13. H.R. REP. No. 665, 101st Cong., 2d Sess. (1990), *reprinted in* 1990 U.S.C.C.A.N. 2989. Congress noted:

With the crumbling of the Warsaw Pact, the diminished threat in Europe, and the enormous Federal deficit, the nation can no longer afford to maintain a large Cold War-era standing military on foreign soil. By mid-decade, the size of the active force—just over two million men and women in uniform today—may well shrink by at least 25 percent by mid-decade. . . .

are anticipated through fiscal year 1995.<sup>14</sup> To help achieve a large portion of these reductions, Congress significantly amended the existing separation pay statute in 1990,<sup>15</sup> and enacted SSB<sup>16</sup> and VSI<sup>17</sup> in 1991. The goal is to shape the armed forces to meet post-Cold War requirements. Table 1 depicts how the drawdown will impact the armed forces through fiscal year 1993.

SERVICE	FY 1990	FY 1991	FY 1992	FY 1993	DECREASE
ARMY	744,169	675,669	660,700	598,900	-145,269 (19.5%)
NAVY	590,501	570,501	551,400	535,800	-54,701 (9.26%)
MARINES	196,735	192,235	188,000	181,900	-14,835 (7.5%)
AIR FORCE	545,000	508,500	486,800	449,900	-95,100 (17.4%)
TOTAL	2,076,405	1,946,905	1,886,400	1,766,500	-309,905 (14.9%)

In order to understand the impact of these drawdowns on those separating from the armed forces, the reader must have a grasp of the principles of military compensation.

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In making this recommendation, the committee is mindful of the unprecedented quality of the young men and women in uniform today and of the need to ensure that the force drawdown is accomplished in a balanced and equitable fashion that will preserve the integrity of the military, maintain adequate force readiness, and cushion the blow for adversely affected career personnel.

*Id.*

14. *See id.* (stating that "By mid-decade, the size of the active force—just over two million men and women in uniform today—may well shrink by at least 25% . . .").

15. National Defense Authorization Act for Fiscal Year 1991, Pub. L. No. 101-510, Div. A, Title V, Part A, § 501, 104 Stat. 1549 (codified as amended at 10 U.S.C. § 1174 (1991)).

16. National Defense Authorization Act for Fiscal Years 1992 and 1993, Pub. L. No. 102-190, Div. A, Title VI, Part F, § 661(a)(1), 105 Stat. 1394 (codified at 10 U.S.C. § 1174a (1991)).

17. *Id.* § 662(a)(1), 105 Stat. 1396 (codified at 10 U.S.C. § 1175 (1991)).

18. *Id.*, Title IV, Part A, § 401, 105 Stat. 1349 (codified at 10 U.S.C. § 115 (1991)). *See generally* H.R. REP. No. 101-665, 101st Cong., 2d Sess. (1990), *reprinted in* 1990 U.S.C.C.A.N. 2991.

## II. COMPONENTS OF MILITARY COMPENSATION

Military compensation is a thicket of base pays,<sup>19</sup> special pays,<sup>20</sup> allowances,<sup>21</sup> and bonuses.<sup>22</sup> While on active duty, military members earn their pay and allowances monthly.

A military member generally qualifies for retired pay after serving on active duty for twenty years.<sup>23</sup> At that time, the retiree will receive a specified portion of the retiree's basic pay on a monthly basis for the rest of the retiree's life. For example, a Major who retires at twenty years with a basic monthly pay of \$4,000 will receive gross retirement pay of \$2,000 a month.<sup>24</sup>

An indirect component of regular military compensation is disability pay. It is awarded to a service member or retiree based on an assessed level of service-connected disability and is paid by the Department of Veterans Affairs.<sup>25</sup> Retired pay, if received, is offset in an amount equal to disability pay received. For example, a disabled retiree who is entitled to receive \$1,000 a month in retired pay, and is also eligible to receive \$300 a month in disability bene-

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19. 37 U.S.C. §§ 201-207, 209 (1988); *id.* § 1009 (1988).

20. *Id.* §§ 301-307, 310-316 (1988).

21. *Id.* §§ 401-425, 427-432 (1988).

22. *Id.* §§ 308a-308i (1988).

23. See 10 U.S.C. § 3911 (1956) (providing qualifications for entitlement to retirement pay for Army officers); *id.* § 3914 (1956) (Army enlisted members); *id.* § 1293 (1956) (Army, Navy and Marine warrant officers); *id.* § 6323 (1956) (Navy and Marine officers); *id.* § 6330 (1950) (Navy and Marine enlisted members); *id.* § 8911 (1956) (Air Force officers); *id.* § 8914 (1956) (Air Force enlisted members). Congress has also authorized military members to retire at 15 years of service instead of the customary twenty years. Pub. L. No. 102-484, Title XLIV, Subtitle A, § 4403, 106 Stat. 2702-2704 (1992). Congress designed this as "a temporary additional force management tool with which to effect the drawdown of military forces" ending on October 1, 1995. *Id.*

24. Members who were on active duty on or before September 7, 1980 receive one-half their base pay at retirement, plus two and one-half percent per year of service over 20 years to a maximum of seventy-five percent. 10 U.S.C. § 1406 (1986). Members who entered active duty after September 7, 1980, compute their retired pay by averaging the base pay they received for their last 36 months on active duty. *Id.* They receive one-half this amount plus two and one-half percent per year of service over 20 years to a maximum of seventy-five percent. *Id.* § 1407 (1986). Members who entered active duty after July 31, 1986 compute their retired pay the same as post-September 7, 1980 retirees, except that if the member is less than 62 years of age at retirement, and has served less than 30 years, that member's multiplier is reduced by one percent for each year of service less than 30 years. *Id.* § 1409 (1986). There is a provision for recomputation and catch-up when the retiree reaches age 62. *Id.* § 1410 (1986).

25. 38 U.S.C. § 5305 (1991).

fits, must waive \$300 of retired pay to receive the disability pay. However, the \$300 disability pay is tax exempt.<sup>26</sup> This makes disability pay a highly attractive option for the disabled retiree. Before discussing how "disposable" retired pay and disability pay are characterized at dissolution, let us first turn to a brief overview of retired military pay.

### A. Retired Pay

In 1974, the California Supreme Court held in *In re Marriage of Fithian*<sup>27</sup> that military retired pay was community property and subject to division by California courts at divorce.<sup>28</sup> However, in the 1981 landmark case *McCarty v. McCarty*,<sup>29</sup> the United States Supreme Court held that military retired pay was the separate property of the retiree and not subject to division by state courts at divorce.<sup>30</sup> Following the *McCarty* decision, Congress enacted the Federal Uniformed Service Former Spouse's Protection Act (USFSPA),<sup>31</sup> which was designed to overturn the effects of *McCarty* and return to the states the power to treat disposable retired pay in accordance with state law.<sup>32</sup> In fact, USFSPA was made retroactive to the day before *McCarty* was decided.<sup>33</sup> Almost all states now recognize military retired pay as a marital

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26. *Id.* § 5301(d) (1958).

27. 10 Cal. 3d 592, 517 P.2d 449, 111 Cal. Rptr. 369 (1974).

28. *Id.* 10 Cal. 3d at 604, 517 P.2d at 457, 111 Cal. Rptr. at 377.

29. 453 U.S. 210 (1981).

30. *Id.* at 233 ("State courts are not free to reduce the amounts that Congress has determined are necessary for the retired member.").

31. 10 U.S.C. § 1408 (1982).

32. See generally Lt. Col. Jeffrey S. Guilford, *Exploring the Labyrinth: Current Issues Under the Uniformed Services Former Spouses' Protection Act*, 132 MIL. L. REV. 43 (1991). For recent developments in *McCarty*-related California case law, see *Berry v. Berry*, 216 Cal. App. 3d 1155, 265 Cal. Rptr. 338 (1989) and *In re Marriage of Curtis*, 7 Cal. App. 4th 1, 9 Cal. Rptr. 2d 145 (1992), both dealing with retired military pay as an omitted asset.

33. 10 U.S.C. § 1408(c)(1) (1982). This section provides:

Subject to the limitations of this section, a court may treat disposable retired or retainer pay payable to a member for pay periods beginning after June 25, 1981, either as property solely of the member or as property of the member and his spouse in accordance with the law of the jurisdiction of such court.

*Id.* *McCarty* was decided on June 26, 1981. *McCarty v. McCarty*, 43 U.S. 210 (1981).

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asset subject to division at divorce.<sup>34</sup> Alabama is the lone exception.<sup>35</sup>

However, we also need to examine “disposable” retired pay since USFSPA and the recent United States Supreme Court decisions in *Mansell v. Mansell*<sup>36</sup> and *Rose v. Rose*<sup>37</sup> define how much retired and disability pay a court may divide at dissolution.

### B. What Is Disposable Pay?

USFSPA defines “disposable” pay as the total monthly retired pay minus certain deductions such as, monies owed the United States, offsets due to receiving disability pay, and payments for survivor’s annuities.<sup>38</sup> It became controversial when state courts sought to divide retired pay and disability pay at dissolution. In *Casas v. Thompson*,<sup>39</sup> the California Supreme Court interpreted the disposable pay language in the then-effective language of USFSPA as merely a procedural limitation on payment methods and not a substantive invasion of California’s right to enforce its

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34. Major J. Connor, Family Law Note, *State-by-State Analysis of the Divisibility of Military Retired Pay*, ARMY LAW, Department of the Army Pamphlet No. 27-50-234, May, 1992, at 37.

35. See *Tinsley v. Tinsley*, 431 So. 2d 1304, 1307 (Ala. Civ. App. 1983) (holding that “under Alabama law, military retirement benefits cannot be considered as marital property and may not be included in an award of alimony in gross or in a division of property. It may be considered only as a source of income regarding periodic alimony.”); see also *Phillips v. Phillips*, 489 So. 2d 592, 596 (Ala. Civ. App. 1986) (awarding wife half of her husband’s gross retired pay as alimony).

36. 490 U.S. 581 (1989).

37. 481 U.S. 619 (1987). The Supreme Court upheld Tennessee’s law which allowed Tennessee courts to reach a veteran’s disability payments to enforce a child support order, holding that neither the Veterans’ Benefits provisions of Title 38 nor the provisions of the Child Support Enforcement Act at Title 42 indicated unequivocally that a veteran’s disability benefits were solely for the veteran’s support. *Id.* at 636.

38. 10 U.S.C. § 1408(a)(4) (1991). In 1991, Congress restructured USFSPA’s definition of “disposable retired pay” to mean the total monthly retired pay to which a member is entitled to minus: (1) amounts which the member owes the United States for previous overpayments and recoupments; (2) amounts deducted as a result of forfeiture due to a court-martial or as a result of a waiver of retired pay to receive disability (for medically retired members, the percentage of disability they were determined to have at retirement is not excluded) and (3) amounts deducted to fund survivor’s annuity. *Id.* This amendment deleted exclusions for federal, state, and local tax withholdings, and withholdings under 26 U.S.C § 3402(i) of the Internal Revenue Code. *Id.*

39. 42 Cal. 3d 131, 149, 720 P.2d 921, 932, 228 Cal. Rptr. 33, 44 (1986).



domestic relations laws.<sup>40</sup> The court found that, "USFSPA is not inconsistent with a division of gross, rather than disposable, military retired pay."<sup>41</sup> Associate Justice (now Chief Justice) Lucas wrote the majority opinion, in which he justified the court's decision that total retired pay was divisible<sup>42</sup> and that USFSPA restricted only garnishments of retired pay.<sup>43</sup> The court held, "in California the military retiree's gross pay is a community asset subject to equal division."<sup>44</sup>

However, three years later in *Mansell v. Mansell*,<sup>45</sup> the United States Supreme Court overruled this holding by concluding that Congress intended to preempt state family law in this area.<sup>46</sup> The United States Supreme Court noted that Congress had "*directly and specifically*" legislated in the area of domestic relations.<sup>47</sup> The Court held that while USFSPA grants state courts the affirmative power to divide military retirement pay either as the separate property of the member or as community property, its language is both precise and limited.<sup>48</sup> The Court noted that "under the Act's plain and precise language, state courts have been granted the authority to treat *disposable* retired pay as community property; they have not been granted the authority to treat *total retired pay* as community property."<sup>49</sup> With that issue settled, at least for the moment, let us examine how the courts have wrestled with the division of disability pay.

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40. *Id.* (noting "the disposable earnings limitation [of USFSPA] does not affect the size of the retiree's legal obligation to the ex-spouse, but only places limitations on monies that can be directly collected from the government employer in a pay period.").

41. *Id.* 42 Cal. 3d at 151, 720 P.2d at 933, 228 Cal. Rptr. at 45.

42. *Id.* 42 Cal. 3d at 148, 720 P.2d at 931, 228 Cal. Rptr. at 43 (stating: "The concept of 'disposable' pay of income has nothing to do with the characterization of an asset. The amount of retired pay which is 'disposable' will change, perhaps yearly or even monthly. This inevitable periodic variance does not change the nature or value of the pension asset which was previously acquired by the community.").

43. *Id.* 42 Cal. 3d at 151, 720 P.2d at 933, 228 Cal. Rptr. at 45.

44. *Id.* at 151, 720 P.2d at 933, 228 Cal. Rptr. at 45-46.

45. 490 U.S. 581 (1989).

46. *Id.* at 594-95.

47. *Id.* at 587.

48. *Id.* at 588.

49. *Id.* at 589 (emphasis added).

C. Disability Pay

Even though a former spouse may be entitled to a portion of retired pay, a retiree's decision to waive retired pay for disability pay can adversely affect the former spouse's entitlement. Although in *Mansell* the United States Supreme Court concluded that a spouse is entitled to a share of retired pay, the Court also held that disability retired pay is not a divisible community property asset.<sup>50</sup>

Courts have struggled with the consequences of a retiree's unilateral decision to waive retired pay in order to receive disability pay. In the 1978 California case of *In re Marriage of Stenquist*,<sup>51</sup> the husband became disabled while on active duty.<sup>52</sup> When he retired, he received his retired pay as disability pay.<sup>53</sup> During dissolution proceedings four years later, the trial court divided his retired disability pay as community property, and the husband appealed.<sup>54</sup> The California Supreme Court upheld the trial court saying, "to permit the husband by unilateral election of a 'disability' pension, to 'transmute community property into his own separate property,' is to negate the protective philosophy of the community property law as set out in previous decisions of this court."<sup>55</sup> This holding of *Stenquist* stood until 1989 when the United States Supreme Court decided *Mansell*.<sup>56</sup>

In *Mansell v. Mansell*,<sup>57</sup> a case that arose in California, the United States Supreme Court held that, "the Former Spouses' Protection Act does not grant state courts the power to treat as property divisible upon divorce military retirement pay that has been waived to receive veterans' disability benefits."<sup>58</sup> This over-

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50. *Id.*

51. 21 Cal. 3d 779, 582 P.2d 96, 148 Cal. Rptr. 9 (1978).

52. *Id.* at 783, 582 P.2d at 98, 148 Cal. Rptr. at 11.

53. *Id.* He could have taken regular retirement at 65% of his basic pay, or disability pay at 75% of his base pay. The Army assumed the husband desired the higher amount and began making disability payments to him. *Id.*

54. *Id.* 21 Cal. 3d at 784, 582 P.2d at 99, 148 Cal. Rptr. at 12.

55. *Id.* 21 Cal. 3d at 782, 582 P.2d at 98, 148 Cal. Rptr. at 11.

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

57. *Id.*

58. *Id.* at 594-95.

ruled *Stenquist* as to veterans' disability benefits and made the benefits the separate property of the disabled veteran. The Supreme Court's holding in *Mansell* forecloses any attempt by a state court to *directly* divide disability pay. Thus, disability pay is not subject to partition by a court at dissolution as a community asset; it is the separate property of the disabled retiree.<sup>59</sup>

Interestingly, on remand the California Court of Appeals held in *In re Marriage of Mansell*<sup>60</sup> that Major Mansell "consented to said act [division of his disability pay] when he signed the stipulated property settlement agreement, and he is therefore barred from complaining."<sup>61</sup> In short, in the property settlement agreement, Major Mansell had contracted away part of his interest in his disability pay, and the court gave it effect. Thus, he was estopped to deny Mrs. Mansell's claim merely because he had agreed to pay it out of his disability pay.

The decision on remand reinforces the long settled premise of California community property law that married couples are generally free to contract around, or out of, the community property scheme.<sup>62</sup> *In re Marriage of Mansell* upheld this concept while explicitly recognizing the State's limitations in *imposing* a property settlement.<sup>63</sup> However, state courts have been creative in finding

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59. However, there are still uncharted areas to this issue. A court *may* order a disabled retiree to pay child support from his disability pay. See *supra* note 37 and accompanying text (discussing *Rose*); see also *Clauson v. Clauson*, 831 P.2d 1257, 1264 (Alaska 1992) (holding that a court may consider the economic consequences of a divorcing service member's decision to waive his or her military retirement pay so the member can receive nondivisible veteran's disability benefits in fashioning an equitable division of marital property). The Washington Supreme Court reconciled Washington's property distribution statute with *Mansell* in their recent decision, *In re Kraft*, 832 P.2d 871 (Wash. 1992). The Washington Supreme Court held that a dissolution court may consider a military retiree's disability pension as an economic circumstance of the divorcing parties justifying a disproportionate community property award to the other spouse, but may not divide the disability pension, or value it and offset other property against that value. *Id.* at 875.

60. 217 Cal. App. 3d 219, 265 Cal. Rptr. 227 (1989).

61. *Id.* at 230, 265 Cal. Rptr. at 233.

62. See generally CAL. CIV. CODE § 4800 (West Supp. 1993); *id.* § 5110 (West Supp. 1993).

63. *In re Marriage of Mansell*, 217 Cal. App. 3d at 234, 265 Cal. Rptr. at 235.

ways to mitigate the damage they perceive *Mansell* may inflict on the non-retiree spouse.<sup>64</sup>

*Mansell*, *McCarty*, and USFSPA are the three pillars of retired military and disability pay law. It is essential to have a sound grasp of these principles when representing military clients or their spouses. They also form the foundation for counseling and representing clients who are separation pay, SSB, or VSI beneficiaries. With that in mind, let us examine the legislative history of separation pay, SSB, and VSI before we delve into their technical aspects.

### III. TOOLS TO ASSIST THE DRAWDOWN

As part of the Defense Authorization Act for Fiscal Year 1991,<sup>65</sup> Congress proposed a “comprehensive package of benefits to provide a ‘safety net’ for service members *and their families* affected by the force drawdown.”<sup>66</sup> Congress perceived that separation pay had to be enhanced to assist the drawdown.<sup>67</sup> The 1991 Defense Authorization Act authorized the payment of separation

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64. See, e.g., *Owen v. Owen*, 419 S.E.2d 267 (Va. Ct. App. 1992) (giving effect to the divorcing couple’s property settlement agreement). In *Owen*, the husband and wife divorced, and in the property settlement agreement, the husband agreed to pay the wife one-half of his Army retired pay. *Id.* at 268. The property settlement agreement also contained a guarantee/indemnity clause to the effect that husband would take no action to defeat wife’s interests in the retired pay and would indemnify if he breached the agreement. *Id.* After retiring one year after their divorce, he was rated 60% disabled and waived retired pay to receive disability pay from the Veteran’s Administration. He attempted to reduce his wife’s share of his combined retired pay and disability pay income. The court framed the question as “whether parties may use a property settlement agreement to guarantee a certain level of income by providing for alternative payments to compensate for a reduction in payment level based on a reduction in retirement benefits.” *Id.* at 269-70. The court held that they could, saying the property settlement agreement did not offend the federal prohibition against a direct assignment of disability pay since there was no assignment of right, but merely a guarantee of monthly support in consideration of wife’s waiver of spousal support. *Id.* at 269. Further, no source of funds was specified. *Id.* at 269-70.

65. Pub. L. No. 101-510, Div. A, Title V, Part A, § 501, 104 Stat. 1549 (codified as amended at 10 U.S.C. § 1174 (1991)).

66. H.R. REP. No. 665, 101st Cong., 2d Sess. (1990), reprinted in 1990 U.S.C.C.A.N. 2990 (emphasis added). “The committee reaffirms its belief that people are our most important asset[.]” *Id.*

67. *Id.* at 2994-95 (“A principal component of the package of transition assistance benefits necessary in a force drawdown environment is a modification of existing law with respect to the payment of separation pay.”).

pay for involuntarily separated personnel<sup>68</sup> with six or more years of service who were not in their initial term of enlistment or period of obligated service.<sup>69</sup>

Congress enacted a companion suite of transition benefits for involuntarily separated members, including pre-separation counseling,<sup>70</sup> employment assistance,<sup>71</sup> job training assistance through

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68. Involuntary separation is defined as follows:

A member of the Army, Navy, Air Force, or Marine Corps shall be considered to be involuntarily separated for purposes of this chapter if the member was on active duty or full-time National Guard duty on September 30, 1990, and—

(1) in the case of a regular officer (other than a retired officer), the officer is involuntarily discharged under other than adverse conditions, as characterized by the Secretary concerned;

(2) in the case of a reserve officer who is on the active duty list or, if not on the active-duty list, is on full-time active duty (or in the case of a member of the National Guard, full-time National Guard duty) for the purpose of organizing, administering, recruiting, instructing, or training the reserve components, the officer is involuntarily discharged or released from active duty or full-time National Guard (other than a release from active duty or full-time National Guard duty incident to a transfer to retired status) under other than adverse conditions, as characterized by the Secretary concerned;

(3) in the case of a regular enlisted member serving on active duty, the member is (A) denied reenlistment, or (B) is involuntarily discharged under other than adverse conditions, as characterized by the Secretary concerned; or

(4) in the case of a reserve enlisted member who is on full-time active duty (or in the case of a member of the National Guard, full-time National Guard duty) for the purpose of organizing, administering, recruiting, instructing, or training the reserve components, the member is (A) denied reenlistment, or (B) is involuntarily discharged or released from active duty (or full-time National Guard) under other than adverse conditions, as characterized by the Secretary concerned.

Pub.L. No. 101-510, Div. A, Title V, § 1141, 104 Stat. 1551-52 (codified at 10 U.S.C. § 1141 (1990)).

69. H.R. REP. No. 655, 101st Cong., 2d Sess. (1990), reprinted in 1990 U.S.C.C.A.N. 2995.

70. 10 U.S.C. § 1142(b) (1991) (mandating that separating members be counseled on educational benefits available, i.e., the Montgomery GI Bill, disability compensation and rehabilitation available through Veterans Affairs, affiliation with the Selected Reserve, Government and private sector programs for job search and placement assistance, *job and placement counseling for a member's spouse*, information on relocation assistance services, information on the availability of post-separation medical and dental coverage, *counseling for the member and his or her family on the effect of career change on the family*, and financial planning assistance) (italics added).

71. *Id.* § 1143 (1991) (providing for employment assistance). Subsection (a) directs the Secretary of Defense to provide separated members a certification or verification of "any job skills and experience acquired while on active duty that may have application to employment in the civilian sector." *Id.* Subsection (b) requires the Secretary of Defense to establish permanent employment assistance centers at appropriate military installations. *Id.* § 1143(b) (1991). Subsection (c) provides that to assist "members . . . and their spouses in locating civilian employment and training opportunities, the Secretary of Defense shall establish and implement procedures to release to civilian employers, organizations, State employment agencies, and other appropriate entities the names (and

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the Department of Veterans Affairs and Department of Labor,<sup>72</sup> transitional health care,<sup>73</sup> commissary and exchange privileges,<sup>74</sup> use of military family housing,<sup>75</sup> excess leave and permissive temporary duty for job and house hunting,<sup>76</sup> preference for involuntarily separated members to affiliate with a National Guard or Reserve unit within one year after separation,<sup>77</sup> and an opportunity to participate in the Montgomery GI Bill Educational Assistance Program.<sup>78</sup>

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other pertinent information) of such members *and their spouses*." *Id.* § 1143(c) (1991) (emphasis added). "Such names may be released for such purposes only with the consent of such members and spouses." *Id.* Subsection (d) gives a one-time hiring preference by nonappropriated fund instrumentalities *to involuntarily separated members and their families*, subordinate to hiring preferences under § 806(a)(2) of the Military Family Act of 1985 [10 U.S.C. § 113 note]. *Id.* § 1143(d) (1991) (emphasis added).

72. *Id.* § 1144 (1991) (appropriating \$22,000,000 over fiscal years 1991, 1992, and 1993 and directing the Secretaries of Defense, Labor, and Veterans Affairs to "establish and maintain a program to furnish counseling, assistance in identifying employment and training opportunities, help in obtaining such employment and training, and other related information and services to members of the armed forces under the jurisdiction of the Secretary of a military department who are being separated from active duty *and the spouses of such members*." (emphasis added).

73. *Id.* § 1145 (1991) (providing for 60 days of health care for involuntarily separated members who had less than six years active service, and 120 days of health care for involuntarily separated members with six or more years of active service). It also provides for the purchase of conversion health policies *for the member and his or her dependents*. *Id.*

74. *Id.* § 1146 (1991) (granting an involuntarily separated member the privilege of using military exchanges and commissaries for two years from their date of involuntary separation on the same basis as when they were on active duty). Thus, if the involuntarily separated member's dependents were authorized commissary and exchange privileges while the member was on active duty, they should also be authorized those privileges during the two year period the separated member is authorized these privileges. *Id.*

75. *Id.* § 1147 (1991) (allowing a service Secretary to make military family housing available for 180 days beyond the date of separation for a member *and the member's family*). The services are allowed to make a reasonable rental charge for such use of military family housing. *Id.*

76. *Id.* § 1149 (1991) (directing the secretary of the military department to grant a member who is to be involuntarily separated up to 30 days excess leave [leave without pay], or up to 10 days of permissive temporary duty [permission to travel from the home station in a duty status without the ability to claim travel entitlements] "in order to facilitate the member's carrying out necessary relocation activities (such as job search and residence search activities).").

77. *Id.* § 1150(a) (1991) (providing that a person who is involuntarily separated between October 1, 1990 and September 30, 1995 who applies to join the National Guard or Reserve within one year after separation "shall be given preference over other equally qualified applicants for existing or projected vacancies within the unit to which the member applies.")

78. Pub. L. No. 102-484, § 4404, 106 Stat. 2704-2706 (1991) (codified at 38 U.S.C. § 3018B (1992)).

In the Defense Authorization Act for Fiscal Years 1992 and 1993,<sup>79</sup> Congress responded to the need to rapidly shrink the active duty force. The Act authorizes the Defense Department to temporarily:

(1) Offer involuntary separation pay and transition benefits to active duty personnel who elect to voluntarily separate in order to avoid the possibility of facing selection for involuntary separation or denial of reenlistment; and (2) offer a voluntary separation incentive in the form of an annuity to active duty personnel who elect to voluntarily separate in order to avoid the possibility of facing selection for involuntary separation or denial of reenlistment.

The conferees take this action because of their concern over the effect of strength reductions during the next few years on our men and women in uniform *and their families*.<sup>80</sup>

It is significant to note that Congress reiterated its concern for military families originally expressed the year before.<sup>81</sup> This concern was embodied in SSB and VSI, and gave the Services an attractive “carrot” to offer service members to encourage them to choose SSB or VSI in lieu of the “stick” of involuntary separation. Congress also recognized that this was the first drawdown which involved an all-volunteer force in which many members had joined the Armed Forces intending to make it a career, rather than joining

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79. Pub. L. No. 102-190, 105 Stat. 1290 (1991) (codified at 10 U.S.C. § 114 (1991)).

80. H.R. CONF. REP. No. 311, 102d Cong., 1st Sess. (1991), *reprinted in* 1991 U.S.C.A.N. 1111-12 (emphasis added).

81. *See supra* notes 66, 70-75 and accompanying text (noting extension of benefits for military families).

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through conscription or threat of conscription.<sup>82</sup> Table 2 illustrates sample values of separation pay, SSB, and VSI benefits.

Table 2. SAMPLE PAYMENT PROJECTIONS				
GRADE <sup>83</sup> YEARS OF SERVICE	MONTHLY PAY (a/o Jan 93)	SEPARATION PAY (\$ 1174)	SSB (\$ 1174a)	VSI (\$ 1175)
E-4/6	\$1,261.20	\$9,080.64	\$13,620.96	\$2,270.16 p.a. \$27,241.92 over 12 years
E-5/12	\$1,537.50	\$22,140.00	\$33,210.00	\$5,533.20 p.a. \$132,796.80 over 24 years
O-3/8	\$2,958.60	\$28,402.56	\$42,603.84	\$7,100.64 p.a. \$113,610.24 over 16 years
O-4/14	\$3,614.70	\$60,726.96	\$91,090.44	\$15,181.74 p.a. \$425,088.72 over 28 years

With this background, let us look at each individual program, starting with separation pay.

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82. H.R. CONF. REP. No. 311, 102d Cong., 1st Sess. (1991), reprinted in 1991 U.S.C.C.A.N. 1112. The committee noted:

The conferees especially recognize that this drawdown in strength is different from previous drawdowns because it affects people who are a product of an all volunteer force. Therefore, the conferees would provide these temporary authorities as tools to assist the military services in selectively reducing, on a voluntary basis, that portion of the career personnel inventory that is not retirement eligible. The conferees believe that these authorities would give a reasonable, fair choice to personnel who would otherwise have no option but to face selection for involuntary separation, and to risk being separated at a point not of their own choosing.

*Id.*

83. Pay grade E-4 is for a Corporal or Specialist in the Marine Corps and Army, a Senior Airman in the Air Force, and a Petty Officer Third Class in the Navy. 10 U.S.C. § 505 (1956). Pay grade E-5 is for a Sergeant in the Army and Marine Corps, a Staff Sergeant in the Air Force, and a Petty Officer Second Class in the Navy. *Id.* Pay grade O-3 is for a Captain in the Army, Marine Corps and Air Force, and a Lieutenant in the Navy. *Id.* § 741 (1956). Pay grade O-4 is for a Major in the Army, Marine Corps and Air Force, and a Lieutenant Commander in the Navy. *Id.*



#### IV. SEPARATION PAY

##### A. *Separation Pay (10 U.S.C. § 1174)*

Separation pay is a one-time, lump sum benefit paid to a member who has completed a portion of a twenty year career, but is involuntarily separated before qualifying for longevity retirement.<sup>84</sup> Prior to 1990, provisions existed to compensate involuntarily released officers by providing separation pay up to a maximum of \$30,000.<sup>85</sup> Enlisted members were not authorized separation pay. An officer whose basic monthly pay was \$3,000, and who had ten years of service, could have expected to receive \$30,000 under the pre-1990 provisions of section 1174.

In 1990, Congress amended section 1174 to significantly enhance its utility as a means of shrinking the active duty force.<sup>86</sup> Congress noted: "A principal component of the package of transition assistance benefits necessary in a force drawdown environment is a modification of existing law with respect to the payment of separation pay."<sup>87</sup> These modifications removed the \$30,000 cap and made Reserve officers and Regular enlisted members eligible for separation pay.<sup>88</sup> Involuntarily separated Regular enlisted members had to have served more than six but less than twenty years to be eligible for separation pay.<sup>89</sup> Congress waived the six

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84. H.R. REP. NO. 1462, 96th Cong., 2d Sess. 30 (1980), *reprinted in* 1980 U.S.C.C.A.N. 6361. As noted in the legislative history,

The separation pay is a contingency payment for an officer who is career committed but to whom a full military career may be denied. It is designed to encourage him to pursue his service ambition, knowing that if he is denied a full career under the competitive system, he can count on an adequate readjustment pay to ease his reentry into civilian life.

*Id.* (Note the gender orientation of the language).

85. The formula to compute this benefit is to multiply the member's monthly base pay by 12, multiply that product by the number of years of active service, then multiply by 10%. 10 U.S.C. § 1174 (1991).

86. Pub. L. No. 101-510, Div. A, Title V, Part A, § 501, 104 Stat. 1549 (codified as amended at 10 U.S.C. § 1174 (1991)).

87. H.R. REP. No. 665, 101st Cong., 2d Sess. 269 (1990), *reprinted in* 1990 U.S.C.C.A.N. 2994-95.

88. 10 U.S.C. § 1174(b), (c)(1), (d)(1) (1991).

89. *Id.* § 1174(b)(1) (1991).

year service requirement for Regular officers who had more than five years of service.<sup>90</sup>

However, separation pay is *not* available for Reserve officers who have more than five but less than six years active service.<sup>91</sup> This has created disparities because similarly situated Regular officers *are* eligible for separation pay.<sup>92</sup> Congress also reiterated its position that, "separation pay is designed to compensate career oriented service members who have been denied a career opportunity because of circumstances beyond their control."<sup>93</sup> Thus, a service member with ten years of service and receiving a monthly base pay of \$3,000 would now receive \$36,000 in separation pay as well as involuntary separation benefits.

### B. How Is Separation Pay Characterized?

Under *In re Marriage of Kuzmiak*,<sup>94</sup> unless the parties have agreed otherwise, California courts might characterize separation pay received under the pre-1990 terms of section 1174 as the military member's separate property. The California Appeals Court held in *Kuzmiak* that the "husband's military separation pay is his separate property unless he applies for military longevity retirement."<sup>95</sup> The question is whether California courts will feel bound to apply *Kuzmiak* to post-1990 separation pay.

The facts in *Kuzmiak* may provide a means for some parties to be included in or excluded from its holding. Captain Kuzmiak entered the Air Force in 1966 and was involuntarily separated from the Air Force on February 28, 1983, almost two years after his divorce on May 21, 1981.<sup>96</sup> He received \$30,000 in separation pay

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90. *Id.* § 1174(a)(1) (1991).

91. *Id.* § 1174(c)(1) (1991).

92. Joe West, *Some Forced Out Officers Won't Get Separation Pay*, AIR FORCE TIMES, Sept. 21, 1992, at 3, col. 1.

93. H.R. REP. No. 665, 101st Cong., 2d Sess. 269 (1990), reprinted in 1990 U.S.C.C.A.N. 2995.

94. 176 Cal. App. 3d 1152, 222 Cal. Rptr. 644 (1986), review denied, cert. denied sub nom, 479 U.S. 885 (1986).

95. *Kuzmiak*, 176 Cal. App. 3d at 1154, 222 Cal. Rptr. at 645.

96. *Id.* 176 Cal. App. 3d at 1153, 222 Cal. Rptr. at 645.

under the then effective provisions of Section 1174.<sup>97</sup> After he was separated as an officer, Captain Kuzmiak enlisted in the Air Force so that he could become eligible for longevity retirement at twenty years of service.<sup>98</sup> The trial court had reserved jurisdiction over the property settlement and entered a decree denominating the \$30,000 as “a community retirement benefit or payment in lieu of retirement.”<sup>99</sup> Noting that Congress had stated that the purpose of separation pay is to financially assist the member after the member leaves the service up until the time the member obtains private employment, the *Kuzmiak* court examined USFSPA and concluded that separation pay did not fall within its scope.<sup>100</sup>

The court found that Captain Kuzmiak’s ex-wife had a community interest in the \$30,000 because he enlisted in the Air Force and would have to pay back the \$30,000 before he could start drawing longevity retirement.<sup>101</sup> However, the court made it clear that if Captain Kuzmiak had not enlisted and qualified for longevity retirement, the \$30,000 would have been his separate property and not subject to division by the court.<sup>102</sup>

Should *Kuzmiak* be followed in light of post-1990 legislation? An asset acquired after separation or divorce is presumably the separate property of the person who acquires it.<sup>103</sup> However, Mrs. Kuzmiak’s rights to her share of Captain Kuzmiak’s retirement had not been extinguished by a final order of the trial court since it had reserved jurisdiction.<sup>104</sup> Thus, when Captain Kuzmiak enlisted to serve until he was eligible for retirement, his wife’s interest in his prospective retirement pay was revived and became subject to

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97. *Id.*

98. *Id.*

99. *Id.* 176 Cal. App. 3d at 1155-56, 222 Cal. Rptr. at 645-46.

100. *Id.* 176 Cal. App. 3d at 1157, 222 Cal. Rptr. at 646. The court stated:

USFSPA does not mention separation pay in defining retired or retainer pay. [T]he right to separation pay occurs only when there is an involuntary discharge of the service member.

*Id.* See H.R. REP. No. 1462, 96th Cong., 2d Sess. 1 (1990), reprinted in 1980 U.S.C.C.A.N. 6333.

101. *Kuzmiak*, 176 Cal. App. 3d at 1159, 222 Cal. Rptr. at 648.

102. *Id.* 176 Cal. App. 3d at 1159, 222 Cal. Rptr. at 648.

103. See generally CAL. CIV. CODE §§ 5118-5119 (West 1969).

104. *Kuzmiak*, 176 Cal. App. 3d at 1155, 222 Cal. Rptr. at 645.

determination by the court since Captain Kuzmiak would have to pay back the \$30,000 in order to receive retirement pay.

It could be argued that a major factor in determining the characterization of separation pay as separate property is the involuntary nature of the separation. This is especially true for separation pay received after marital separation or divorce. Congress made it clear that separation pay is not compensation for past services, but is to aid the involuntarily separated member's transition back to civilian life after being deprived of a twenty year career and its attendant retirement benefits.<sup>105</sup> However, the community property presumption still must be overcome if the separation pay was acquired during marriage. The *Kuzmiak* court explicitly recognized the impact of involuntary separation on the community, noting in dicta: "If a marriage subsists at the time the service member is involuntarily discharged, the loss of employment becomes a *community loss* and separation pay serves to ameliorate this loss."<sup>106</sup>

A distinction based upon the time at which a service member is discharged is critically important in overcoming an argument where *Kuzmiak* is cited as authority for characterizing separation pay as separate property, regardless of when received. Recall that the Kuzmiaks separated on May 21, 1981, and Captain Kuzmiak was involuntarily separated from the Air Force on February 28, 1983.<sup>107</sup> If a hypothetical Captain Smith and her husband were married when she was involuntarily separated, and they later divorced, the *Kuzmiak* court's dicta indicates a recognition that separation pay is a community asset, absent any other agreement of the parties, because the entire community has to make the transition and adjustment to civilian life and employment.<sup>108</sup>

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105. See *supra* note 100 and accompanying text (discussing *Kuzmiak's* characterization of separation pay and analysis of congressional intent).

106. *Kuzmiak*, 176 Cal. App. 3d at 1157, 222 Cal. Rptr. at 646-47 (emphasis added).

107. See *supra* notes 96-102 and accompanying text (summarizing the facts of *Kuzmiak*).

108. *Kuzmiak*, 176 Cal. App. 3d at 1157, 222 Cal. Rptr. at 646-47.

A spouse's community property interest in his or her spouse's military retirement pay is earned as it accrues.<sup>109</sup> Involuntary separation from the Armed Forces cuts off that interest, resulting in damage to the community. However, neither spouse has voluntarily acted to prejudice the other's interests in the prospective retirement, and both spouse's interests are equally injured.

A literal reading of congressional intent, when Congress amended the separation pay statute in 1990 and passed ancillary separation benefit legislation, supports a division of separation pay as community property.<sup>110</sup> As noted, Congress stated that the 1990 changes to involuntary separation pay, and the transition programs it enacted, were to provide a safety net for members *and their families*.<sup>111</sup> This conclusion dignifies Congress' concern for the military family, serves to compensate the spouse whose interest in his or her spouse's prospective retirement is involuntarily extinguished, and is in harmony with the protective philosophy of California community property law.

An even more compelling argument to characterize separation pay as community property arises if the member was eligible for SSB or VSI (both voluntary programs), consciously chose to forego those programs, preferring instead to "ride out" the drawdown in hopes of avoiding involuntary separation, and was later involuntarily separated. The military member's unilateral action to decline SSB or VSI with the resulting involuntary separation allows the injured spouse to argue that a unilateral decision by one spouse cannot act to cut off the other spouse's community property interests in an asset.<sup>112</sup> This argument is buttressed if the evidence showed

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109. See generally *In re Marriage of Fithian*, 10 Cal. 3d 592, 596, 517 P.2d 449, 451, 111 Cal. Rptr. 369, 371 (1974); *Henn v. Henn*, 26 Cal. 3d 323, 330, 605 P.2d 10, 13, 161 Cal. Rptr. 502, 505 (1980) (concluding that, under California law, a spouse's entitlement to a share of the community property accrues at the time the property is acquired).

110. See *supra* notes 65-78 and accompanying text (providing a general discussion of military separation benefits).

111. See *supra* note 66 and accompanying text.

112. See *supra* notes 51-55 and accompanying text (discussing *In re Marriage of Stenquist*). It is generally recognized that a military member's spouse is probably the most influential factor in career decisions. Most military couples spend a great deal of time deciding whether or not to "take the money and run." The bottom line, however, is that the final decision is the member's alone to make, and the member must be prepared to live with the attendant consequences, not all of which

the parties jointly consented to this course of action, thus making it a community decision. This argument, however, is admittedly predicated on the unproven assertion that SSB and VSI should properly be characterized as community property. With that in mind, let us examine SSB and VSI.

## V. SSB AND VSI

### A. *Special Separation Benefits (10 U.S.C. § 1174a)*

SSB is an outgrowth of the concepts and policies concerning separation pay codified at 10 U.S.C. § 1174. SSB incorporates portions of section 1174 by reference.<sup>113</sup> It is a limited-term statute which increases by half the amount of separation pay for which a service member is eligible.<sup>114</sup> SSB is calculated the same as section 1174 separation pay except that the multiplier is fifteen percent instead of ten percent.<sup>115</sup> Under section 1174a, a service member with ten years of service and a monthly base pay of \$3,000 would now receive \$54,000. SSB contains a sunset provision which terminates the benefit after September 30, 1995.<sup>116</sup>

Some may view SSB merely as a temporary expansion of separation pay, limited in time and focused in scope, destined to be relegated to the statutory boneyard after it has served its purpose. Proponents of this position argue that Congress did not intend to materially change the underlying purpose of separation pay and was reacting only to a temporary need. Instead, it is suggested that Congress merely reiterated the purpose for the pay, and it would be

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are foreseeable.

113. 10 U.S.C § 1174a(g) (1991) (incorporating 10 U.S.C § 1174 (e) through (h), with the exception of subsection (e)(2)(A), by reference). Subsection (g) of § 1174a establishes a requirement for involuntarily separated members to serve in the Ready Reserve for three years as a condition of accepting separation pay. *Id.* § 1174a(g) (1991). Subsection (e)(2)(A) exempts a member from Reserve service who is discharged or released from active duty at his request and exempts members from receiving separation pay. *Id.* § 1174(e)(2)(A) (1991). This exemption is not found in § 1175.

114. *Id.* § 1174a(b)(2)(A) (1991).

115. *Id.*

116. *Id.* § 1174(h) (1991).

incongruous for California courts to characterize SSB payments differently from separation pay.<sup>117</sup>

However, the counter-argument is that the voluntary nature of SSB, coupled with Congress' underlying intent to ease the transition of military *families* back to civilian life,<sup>118</sup> distinguishes SSB from separation pay. It would be inconsistent for a California court to allow a spouse to unilaterally transmute community property to separate property, unless specifically provided for, such as in *Mansell*.<sup>119</sup> Therefore, SSB should be characterized as community property and divided accordingly.

*B. Voluntary Separation Incentive (10 U.S.C. § 1175)*

VSI is different in form than separation pay and SSB. VSI is an annuity which is paid for twice the number of years a member was on active duty.<sup>120</sup> For example, a service member with ten years of service, and a monthly base pay of \$3,000, would receive twenty annual payments of \$9,000 for a total of \$180,000. VSI was crafted by the Department of Defense. Then-Secretary of Defense Cheney personally lobbied Congress for this particular benefit.<sup>121</sup> Although Congress passed the measure essentially as presented, they expressed reservations concerning its provisions, mostly having to do with funding VSI.<sup>122</sup>

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117. See *supra* note 100 and accompanying text (discussing the characterization of separation pay under *Kuzmiak*).

118. See *supra* notes 66, 70-75.

119. See *supra* notes 57-59 and accompanying text.

120. VSI is an annuity that is based on two and one-half percent of a member's monthly basic pay multiplied by 12. 10 U.S.C. § 1175(e)(1) (1991). The product is then multiplied by the number of years the member served on active duty. *Id.*

121. See H.R. CONF. REP. No. 311, 102d Cong., 1st Sess. 556 (1991), reprinted in 1991 U.S.C.C.A.N. 1112 ("The conferees note the Secretary of Defense's personal efforts to press the conferees for the adoption of the voluntary separation incentive be [*sic*] proposed.").

122. *Id.* at 1112-13. Congress also noted:

Although several features of the revised proposal required further examination, the conferees decided to adopt, with the exception of the funding feature, the Secretary's revised proposal as submitted. The conferees did this largely on the basis of the Secretary's stated urgent need for the incentive. With regard to the funding of the voluntary separation incentive, the conferees believe that fiscal responsibility requires accrual funding of this benefit, and the Secretary concurs. It is on the basis of the

For many, VSI is an attractive alternative to the lump-sum SSB payment. It spreads the tax consequences over a number of years and provides a predictable, stable, annual income.<sup>123</sup> Other features of VSI also suggest that a California court could conclude that VSI is an asset which is to be treated like a retirement substitute and be subject to division at dissolution as community property.

One of VSI's key components is that annuitant can devise their right to receive future VSI payments.<sup>124</sup> However, the right to receive VSI payments cannot be transferred *inter vivos*.<sup>125</sup> For example, a fourteen-year Major who separates at age thirty-five, will receive payments for twenty-eight years, until the Major is sixty-three. If the Major dies before all the payments are received, she can designate a beneficiary in the Major's will to receive the remaining VSI payments.<sup>126</sup>

Thus, the argument is that, since a VSI annuitant can devise the remaining VSI payments, Congress intended VSI solely for the annuitant's benefit, and therefore VSI is separate property. This argument is strengthened by the absence of a statutory requirement

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agreement that the voluntary separation incentive would be funded on an accrual basis that the conferees accept the Secretary's revised proposal.

*Id.*

123. VSI also has some significant restrictions which may make it a less attractive alternative. For example, 10 U.S.C. § 1175(e)(2) (1991) requires a member who selects VSI and is also entitled to basic pay for active or reserve service, or compensation for inactive duty training, to forfeit VSI payments up to the amount of basic pay received. Subsection (e)(3) requires a member who later becomes eligible to receive retired pay to pay back the VSI benefit out of retired pay. *Id.* § 1175(e)(3) (1991). This is similar to the re-capture provision for separation pay paid under § 1174. *See id.* § 1174(h) (1991). Subsection (e)(4) has an offset provision similar to that disabled retired members encounter when they receive disability benefits from the Department of Veterans Affairs. *Compare id.* § 1175(e)(4) (1991) with 38 U.S.C. § 5305 (1991). Under the latter statute, retired pay is reduced by the amount of disability pay received. *Id.* VSI has essentially the same feature. 10 U.S.C. § 1175(e)(4) (1991). Subsection (f) makes the annuity payments non-transferable. *Id.* § 1175(f) (1991). However, the annuitant may designate beneficiaries to receive the annuity payments after he or she dies. *Id.* This could be a significant estate planning tool. However, there is also no mechanism to adjust VSI payments for inflation, so the actual cash value of the annuity declines dramatically over time, especially with some annuities being paid over periods of 20 to 30 years.

124. 10 U.S.C. § 1175(f) (1991).

125. *Id.*

126. *Id.*



that the remaining annuity payments be devised to the decedent's surviving spouse or issue.

However, if VSI were characterized as community property, the VSI annuitants would only be able to devise their community property share of the VSI annuity. The remaining half would be subject to a surviving spouse's claim. If the decedent did not name a beneficiary in a will, the remaining VSI payments should generally pass through the residuary clause.<sup>127</sup> If the decedent died intestate, the right to receive VSI payments would pass according to the state's statutory scheme for distributing the intestate decedent's estate.

As with SSB, we must look at why VSI was established and its nature. VSI is a tool to help drawdown the active duty force by providing an incentive for members to voluntarily separate before completing a twenty year career. There is nothing to indicate that Congress wished to preempt a state's ability to divide SSB or VSI benefits according to state law. Congress' stated intent of caring for the military family supports a conclusion that these benefits should be characterized as community property.

However, there is a California case, *In re Marriage of DeShurley*,<sup>128</sup> which discusses the characterization of non-military separation pay which could influence how a court will characterize SSB or VSI payments.

### C. In Re Marriage of DeShurley

The recent California case of *In re Marriage of DeShurley*<sup>129</sup> must be addressed since it may influence characterization of SSB and VSI upon dissolution. In *DeShurley*, the husband elected to receive separation pay from Continental Airlines, which was in bankruptcy at the time, in exchange for waiving his right to be

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127. See CAL. PROB. CODE § 100 (1990) (indicating that if no beneficiary is designated, VSI benefits should become part of the deceased annuitant's residuary estate). See generally Maj. A. Peterson, *VSI Entitlements: Dispositions at Death of Recipient*, ARMY LAW, Department of the Army Pamphlet No. 27-50-240, Nov., 1992, at 41.

128. 207 Cal. App. 3d 992, 255 Cal. Rptr. 150 (1989).

129. *Id.*

recalled after a labor strike.<sup>130</sup> Mr. DeShurley was to receive \$126,800 in separation pay over a six year period.<sup>131</sup> During his divorce, he claimed it to be his separate property, and the trial court agreed.<sup>132</sup> The court of appeals concurred, saying that there were three characteristics to the severance pay: (1) it was derived from a (bankruptcy) court order; (2) it was an option that Mr. DeShurley could choose, the other choice being to return to work; and (3) the amount of severance pay was based on his length of employment.<sup>133</sup> The court rather tersely concluded that, "based on all relevant circumstances, John's severance pay represents present compensation for loss of earnings and is therefore his separate property."<sup>134</sup> The *DeShurley* court relied on the language in *In re Marriage of Horn*<sup>135</sup> which said the character of the benefits is to be determined by considering all relevant circumstances.<sup>136</sup>

An attempt to overlay *DeShurley's* holding directly onto circumstances involving SSB and VSI payments results in an ill fit.<sup>137</sup> SSB and VSI obviously do not derive from a court order, rather they are statutory, voluntary, and are based on length of service, but that does not constitute all the relevant circumstances.

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130. *Id.* at 994, 255 Cal. Rptr. at 151.

131. *Id.*

132. *Id.*

133. *Id.* 209 Cal. App. 3d at 995, 225 Cal. Rptr. at 152.

134. *Id.* 209 Cal. App. 3d at 996, 255 Cal. Rptr. at 153.

135. 181 Cal. App. 3d 540, 226 Cal. Rptr. 666 (1986).

136. *DeShurley*, 207 Cal. App. 3d at 994, 255 Cal. Rptr. at 151.

137. *But see* Captain Allison A. Polchek, *Recent Property Settlement Development Issues for Legal Assistance Attorneys*, ARMY LAW, Department of the Army Pamphlet 27-50-241, Dec., 1992, at 11. Captain Polchek concluded:

Like the separation pay option in *DeShurley*, VSI and SSB are not truly voluntary. Congress noted that the payments would give a 'fair choice to personnel who would otherwise have no option but to face selection for involuntary separation, and to risk being separated at a point not of their own choosing.' Accordingly, under *DeShurley*, a divorce court should not characterize VSI or SSB payments as community property.

*Id.* (citing H.R. REP. No. 311, 556, 102d Cong., 1st Sess., reprinted in 1991 U.S.C.C.A.N. 908, 1112). However, in the first sentence of the paragraph Captain Polchek references, Congress noted, "The conferees take this action because of their concern over the effect of strength reductions during the next few years on our men and women in uniform and their families." H.R. REP. No. 311, at 556, reprinted in 1991 U.S.C.C.A.N. 1112 (emphasis added). A better reading, in light of the fact that this is the first time that a reduction of this scale had been done since the inception of the all-volunteer force, would be that Congress meant what they said—these benefits were for the separated member and his or her family.

There is the issue of the transformation of the spouse's earned interest in the member's contingent retirement which is divested when the member elects VSI or SSB. In *In re Marriage of Brown*,<sup>138</sup> the California Supreme Court held that vested and unvested pension rights should be treated the same.<sup>139</sup> Justice Tobriner wrote: "Pension rights, whether or not vested, represent a property interest; to the extent that such rights derive from employment during coverture, they comprise a community asset subject to division in a dissolution proceeding."<sup>140</sup> The question is whether a member's acceptance of SSB or VSI is a compromise of non-vested pension rights.

Even after the final dissolution decree and property distribution, if retirement interests or separation benefits are not addressed in the property settlement agreement, *Henn v. Henn*<sup>141</sup> supports the proposition that an omitted community property asset retains its community property character and can be divided after a final decree has been issued.<sup>142</sup> Thus, a spouse who divorced a military member before the member was involuntarily separated, or selected SSB or VSI, and who holds an undivided interest in the military member's retirement benefits, holds that interest with the former spouse as a tenant in common until the property is partitioned.<sup>143</sup>

#### CONCLUSION

Separation pay, SSB, and VSI benefits could well form the bulk of a recently separated military family's assets. Proper characterization of these benefits as either community or separate property

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138. 15 Cal. 3d 830, 544 P.2d 561, 126 Cal. Rptr. 633 (1976).

139. *Id.* 15 Cal. 3d at 843, 544 P.2d at 562-63, 126 Cal. Rptr. at 635.

140. *Id.*

141. *Henn v. Henn*, 26 Cal. 3d 323, 605 P.2d 10, 161 Cal. Rptr. 502 (1980) (holding: (1) that to the extent a pension is earned during marriage, it is the parties' community property; and (2) property left unadjudicated by a dissolution decree can be divided in a subsequent action).

142. *Id.* 26 Cal. 3d at 330, 605 P.2d at 13, 161 Cal. Rptr. at 505. See *In re Marriage of Curtis*, 7 Cal. App. 4th 1, 8, 9 Cal. Rptr. 2d 145, 148 (1992) (noting "it was settled that California courts have the power to reopen dissolution actions to divide omitted assets if the complaining spouse had an interest in that asset at the time of dissolution."); see also *supra* notes 39-44 and accompanying text (discussing *Casas v. Thompson*).

143. *Henn*, 26 Cal. 3d at 330, 605 P.2d at 13, 161 Cal. Rptr. at 505.

is vital to an equitable division of marital assets. Mischaracterization could dramatically affect the post-dissolution finances of both parties.

The circumstances under which the 1990 and 1991 legislation was passed support a conclusion that post-1990 separation pay, SSB, and VSI are community property assets. Congress affirmatively stated their desire to provide a "safety net" for military families affected by the drawdown. Their 1990 amendments to 10 U.S.C. § 1174, the SSB and VSI legislation, and Congress' traditional deference to the states in the area of domestic relations, alters the conclusion of the *Kuzmiak* court that Congress intended these benefits *solely* for the welfare of the separating military member.

Nevertheless, the *Kuzmiak* holding that separation pay is the separate property of the service member presents a formidable hurdle to overcome. The *Kuzmiak* court relied heavily on congressional intent embodied in USFSPA in arriving at its decision.<sup>144</sup>

*Kuzmiak's* reliance on congressional intent provides the ammunition to overcome it. The legislative history of the 1990 amendments to separation pay and the SSB and VSI legislation is rife with Congress' expressions of concern for the military family. Applying *Stenquist's*<sup>145</sup> admonition that one spouse cannot unilaterally impair the community property interest of the other spouse leads to the logical conclusion that these benefits should properly be characterized as community property.<sup>146</sup> *Kuzmiak* is also distinguishable by the fact that the separation was involuntary instead of voluntary, as it would be under SSB or VSI.

Of course, Congress can preempt state domestic relations law concerning the characterization of federal benefits.<sup>147</sup> The question is whether Congress intended to preempt state law in this area. A thorough reading of the legislative history leads to the conclusion that there was no "direct and specific" legislation on this

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144. *In re Marriage of Kuzmiak*, 176 Cal. App. 3d 1152, 1158, 222 Cal. Rptr. 644, 647 (1986), review denied, cert. denied sub nom, 479 U.S. 885 (1986).

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

146. *Id.* 21 Cal. 3d at 782, 582 P.2d at 98, 148 Cal. Rptr. at 11.

147. *Curtis v. Curtis*, 7 Cal. App. 4th 1, 11, 9 Cal. Rptr. 145, 150 (1991).

point, such as the *Mansell* court found when it held disability pay to be the separate property of the disabled spouse. Additionally, separation pay, SSB and VSI do not fall under USFSPA. The next question is whether a substantial federal interest is gravely threatened or harmed if California courts characterize these benefits as community property.<sup>148</sup> As mentioned, Congress specifically constructed a safety net for the military member and the member's family in order to drawdown the active duty armed forces. The ancillary benefits were targeted at the member and, in most cases, the spouse. It is hard to imagine which federal interests would be gravely threatened or harmed if post-1990 separation pay, SSB, or VSI were to be characterized as community property at dissolution, especially in light of the overwhelmingly pro-family legislative history. The logical conclusion is that, absent a clear congressional mandate, state law should control the division of those assets.

*Brown's* holding, concerning non-vested pension rights, supports the proposition that the non-member spouse has a property interest in the contingent retirement which is extinguished by an involuntary separation.<sup>149</sup> However, it is inconsistent to suggest that a spouse's earned community property interest in a contingent retirement plan is somehow magically transmuted into the separate property of one spouse because the member chooses a *voluntary* separation benefit that cuts off the other spouse's earned retirement interest. Admittedly, this facile sleight-of-hand is precisely what occurred in *Kuzmiak*, although Captain Kuzmiak's separation was involuntary. Under *Kuzmiak*, if the former military member qualifies for military retirement pay in the future, the former spouse's interest in the retirement pay is magically resurrected. But, where does this earned property interest go in the interim—to contingent interest purgatory? The proper result is for the benefit to be consistently characterized as community property, regardless of the form it has assumed when the division is made.

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148. See *Casas v. Thompson*, 42 Cal. 3d 131, 144, 720 P.2d 921, 929, 228 Cal. Rptr. 33, 41 (1986) (analyzing whether USFSPA impliedly preempts state law).

149. *In re Marriage of Brown*, 15 Cal. 3d 838, 843, 544 P.2d 561, 562-63, 126 Cal. Rptr. 633, 634-35 (1976).

As for SSB and VSI, the key fact to remember is that they are *voluntary* programs. The right to receive SSB or VSI is based on the member making a *voluntary* decision to leave active duty. Incident to that decision, the spouse's contingent interest in the member's potential retirement is cut short, making SSB and VSI essentially a settlement of future retirement rights. Again, *Stenquist's* and *Brown's* logic seem to compel a court to characterize these benefits as community property.

The voluntary nature of these programs should allow California courts to characterize SSB or VSI as community property with a clear conscience. This equitable result recognizes the contributions of the non-member spouse, compensates spouses for their earned interest in the contingent pension, and dignifies Congress' intent to provide a "safety net" for military families affected by the draw-down.

