Florida Law Review

Volume 34 | Issue 2 Article 5

January 1982

Domestic Relations: Military Retirement Pay and Equitable Division in Divorce Court--Preemption

Katherine Macdonald Walton

DOMESTIC RELATIONS: MILITARY RETIREMENT PAY AND EQUITABLE DIVISION IN DIVORCE COURTS – PREEMPTION*

McCarty v. McCarty, 101 S. Ct. 2728 (1981)

Appellant[1] petitioned for dissolution of his marriage[2] in the Superior Court of California.[3] Appellee, his wife,[4] requested a portion of his military retirement pension[5] in the property disposition. Concluding that appellant's military retirement rights were subject to division as community property,[6] the court ordered appellant to pay a specified portion[7] of his pension to appellee upon retirement. The California Court of Appeal affirmed, rejecting appellant's contention that federal legislation preempted state community property laws permitting division of military retirement pay.[8] The Supreme Court of California denied appellant's subsequent petition for hearing.[9] On appeal,[10] the

*This case comment was awarded the *George W. Milam Award* as the outstanding case comment submitted by a candidate during the fall term 1981.

1. Appellant McCarty, a colonel, had served in the United States Army for approximately 18 years at the time he filed suit. Appellant was Chief of Cardiology at a military hospital in San Francisco. 101 S. Ct. at 2728, 2733 (1981).

2. Appellant married appellee during his second year in medical school. The couple had been married for over 19 years at the time he petitioned for divorce. *Id.* at 2732-33.

3. California, a community property state, deems each spouse to own half of all assets acquired during the marriage except for separate property owned before the marriage or obtained through separate gift, inheritance, bequest or devise. *See* W. DEFUNIAK & M. VAUGHN, PRINCIPLES OF COMMUNITY PROPERTY, §§ 66, 69 (2d ed. 1971).

4. By agreement, appellant McCarty received custody of the three minor children. In an interrogatory appended to his subsequent brief to the United States Supreme Court, McCarty alleged that his wife, appellee, had a prolonged affair with the fiance of the couple's oldest daughter, who was at the time a minor. McCarty alleged the daughter witnessed the acts and informed him of them. Brief for Appellant, Joint Appendix, at 53. In response, appellee in her subsequent brief to the Supreme Court charged this was a violation of Rule 34(b) of the Supreme Court of the United States, which instructs counsel to refrain from introducing irrelevant and scandalous material in briefs to the Court. Additionally, she stated that due to California's no-fault divorce laws, had appellant made similar allegations in the trial court, his counsel might have been reprimanded. Brief for Appellee at 14.

5. 101 S. Ct. at 2733. Under California case law, military retirement rights were subject to division as community property upon a divorce. *E.g., In re* Marriage of Milhan, 27 Cal. 3d 765, 613 P.2d 812, 166 Cal. Rptr. 533 (1980).

6. The court held the military retirement benefits divisible as community property under California's concept of quasi-community property. *See* CAL. CIV. CODE § 4803 (West Supp. 1981) (quasi-community property includes all property acquired outside California which California recognizes as community property).

7. 101 S. Ct. at 2733-34. The court ordered appellant to pay appellee payments equaling one-half of the ratio of the time they were married while appellant was in the Army to the total number of years served at the time of retirement, approximately 45%. *Id.* at 2734.

8. *Id.* at 2734.

9. *Id.*

10. The Supreme Court found its jurisdiction to be a proper appeal on the authority of Dahnke-Walker Milling Co. v. Bondurant, 257 U.S. 282, 288-89 (1921) (conflict jurisdiction exists even where alleged violation of specific constitutional provision provides no jurisdiction). *See also* 28 U.S.C. § 1257(2) (1976) (conflict jurisdiction).

United States Supreme Court reversed and HELD, federal law preempts state court division of military retirement pay pursuant to state community property laws upon dissolution of marriage.[11]

Under the federal preemption doctrine,[12] the Supremacy Clause[13] mandates that any state law, even in an area of acknowledged state power,[14] which interferes or conflicts with a federal law must yield to federal law. The Supreme Court has applied various tests[15] to prevent state encroachment upon federal authority. Under these tests, the Court examines relevant federal legislation to ascertain congressional purpose and to determine whether, under the circumstances, state law impedes congressional objectives.[16] When considering areas historically within the states' legislative domain,[17] the Supreme Court has sought to avoid preemption unless Congress has clearly manifested an intention to preempt state law.[18]

Family law and property law have traditionally been areas reserved to the states.[19] However, in five previous cases the United States Supreme Court has

11. 101 S. Ct. at 2742-43.

12. The federal preemption doctrine was first established in Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824) (Marshall, C. J.) (Commerce Clause preempts inconsistent state regulation of interstate commerce).

13. U.S. CONST. art. VI, cl. 2.

14. *Gibbons*, 22 U.S. (9 Wheat.) at 211. *But see* Hirsch, *Toward a New View of Federal Preemption*, 1972 U. ILL. L.F. 515, 515. The Constitution's framers would have been surprised at the preemption doctrine's continuing importance. THE FEDERALIST PAPERS discussed the Supremacy Clause only with respect to the concern that it overcome diverse state constitutional provisions reserving to state legislatures absolute sovereignty over all powers other than those the Articles of Confederation granted to the central government. *Id. See also* Wechsler, *The Political Safeguards of Federalism*, 54 COLUM. L. REV. 543, 559 (1954).

15. Hines v. Davidowitz, 312 U.S. 52, 67 (1941) (identifying such tests as occupying the field, conflicting, contrary to, repugnance, irreconcilability, difference, inconsistency, curtailment, violation, and interference).

16. *Id.* The ad hoc nature of preemption decisions has impeded the formulation of useful constitutional preemption standards. Hirsch, *supra* note 14, at 521. *But see* Note, *Pre-emption as a Preferential Ground: A New Canon of Construction*, 12 STAN. L. REV. 208, 210 (1959) (the Court might base its decisions on preemption grounds in order to avoid considering some other constitutional question). Further, the Court in purporting to find congressional intent to preempt might be trying to shift to Congress some of the ill will for invalidating state law and might also be inviting congressional reconsideration of the issue. *Id.* at 224-25. *See also* Wechsler, *supra* note 14, at 560 (the Supreme Court has often had to resolve issues involving federal-state powers due to congressional difficulty in reaching agreement on such issues).

17. For example, police, health and safety, family and property laws.

18. Rice v. Sante Fe Elevator Corp., 331 U.S. 218, 230 (1947). Congressional intention to preempt was found if the federal scheme was so pervasive that it was reasonable to infer that Congress did not want states to supplement it, or if the federal law was in a field where the federal interest was so dominant that state law enforcement in the same field was assumed to be precluded, or the state policy produced a result inconsistent with the federal objective. *Id.*

19. United States v. Yazell, 382 U.S. 341, 352 (1966) (because states have a significant interest in family-property arrangements, only if state law will clearly impair substantial federal interests will preemption operate). *Accord* Labine v. Vincent, 401 U.S. 532, 538 (1971) (the people of Louisiana and the United States Constitution commit the power to promote family life to the Louisiana legislature); DeSylva v. Ballentine, 351 U.S. 570, 580 (1956)

held that federal law preempted community property states' family law. These preemption cases involved specific legislative stipulations, concerning such issues as homestead succession schedules,[20] the right to name insurance beneficiaries,[21] and savings bonds succession rights.[22] Congressional intent to preempt the conflicting state laws was clearly ascertainable from these specific statutory stipulations.

In the most recent and pertinent family law preemption case, *Hisquierdo v. Hisquierdo*,[23] the Court found a California dissolution award in direct conflict with Railroad Retirement Act (RRA) provisions.[24] Finding no conflict with federal law, the California Supreme Court had affirmed a divorce court's division of railroad retirement benefits.[25] The United States Supreme Court reversed and held a specific RRA prohibition[26] against any legal process, attachment, assignment or anticipation of railroad retirement benefits preempted a state court from granting the wife an interest in RRA benefits.[27] The Court

(there is no federal family law, which is a state matter); *In re* Burrus, 136 U.S. 586, 593-94 (1889) (the area of family relations belongs to state law, not federal law).

20. McCune v. Essig, 199 U.S. 382 (1905). The Supreme Court overturned a Washington law granting homestead rights in direct opposition to those granted by federal homestead statutes. The federal homestead statutes set forth a specific schedule of succession rights to the homestead. Although the federal statutes gave the interest to the entryman's widow, the state community property law would have given the entryman's children an interest paramount to that of the widow. *Id.* at 387-89. Because the state laws collided with a direct statutory expression of congressional intent, the Court found the state law to be preempted. *Id.* at 389.

21. Wissner v. Wissner, 338 U.S. 655 (1950) (5-3 decision). In *Wissner*, a federal statute governing military life insurance granted an insured the right to name the beneficiary of a policy. *Id.* at 658. A deceased serviceman, previously estranged from his wife, had named his parents policy beneficiaries. *Id.* at 657. His widow sought the proceeds, basing her claim on the state's community property laws which deemed the wife the owner of one-half of the proceeds. *Id.* at 657-58. The Court found that Congress had clearly conveyed its intent that state law be preempted. *Id.* at 660-61. In a footnote, the Court stated that its disposition of the case made it unnecessary to decide whether states were allowed to treat military pay as community property. *Id.* at 657 n.2.

22. Free v. Bland, 369 U.S. 663 (1962). In *Free* the Supreme Court examined federal law which provided a right of survivorship upon the death of either co-owner of United States savings bonds. Under Texas law, when co-owners were husband and wife, each spouse owned an undivided one-half interest in the bonds. *Id.* at 664-65. The deceased wife's son by a previous marriage claimed an interest in the bonds under the state's community property laws. Her husband claimed sole ownership under the Treasury regulations. *Id.* Finding direct interference with the federal government's borrowing power, the Court held the state law was preempted. *Id.* at 670. The Court stated in dictum that relief would be available in circumstances indicating fraudulent activity by the husband in his management of the general community property. *Id.*

Yiatchos v. Yiatchos, 376 U..S. 306, 307-09 (1964) (indicating that relief would be available to a person whose spouse committed fraud in managing community property funds).

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

24. Railroad Retirement Act (RRA) of 1974, 45 U.S.C. §§ 231a (a)(1), (b)(1)(iv), (c)(3)(i), (d)(1)(iii)-(iv), 231d (c)(3), 231e, 231m (1976 & Supp. II 1978).

25. *In re* Hisquierdo, 19 Cal. 3d 613, 566 P.2d 224, 139 Cal. Rptr. 590 (1977), *rev'd*, 439 U.S. 572 (1979).

26. 45 U.S.C. § 231m (1976).

27. 439 U.S. at 583. The Court stipulated that it must limit review to examining whether Congress had "positively required by direct enactment" the preemption of state family law.

reasoned that Congress intended to enhance the railroad employee's economic security and to encourage retirement.[28] The majority further held that states may not mitigate the loss of expected railroad retirement benefits by awarding an offsetting remedy that would conflict[29] with the anti-anticipation clause.[30] Subsequently, Congress amended the RRA[31] to make divorced wives, remarried widows, widows and mothers of railroad employees eligible for railroad annuities under the eligibility rules established for Social Security benefits.[32]

The cases[33] in which federal law was found to preempt[34] state family law

---

See Wetmore v. Markoe, 196 U.S. 68, 77 (1904). Additionally the Court stated it must determine whether family law did "major damage" to "clear and substantial" federal interests for a finding of federal preemption. 439 U.S. at 585. *Accord* United States v. Yazell, 382 U.S. 341, 352 (1966).

28. 439 U.S. at 585. Because Congress intended to ensure that the benefits actually reach the beneficiary, a state law dividing the benefits was preempted by the federal provision. *Id.* at 584. Additionally, the Supreme Court heavily weighted the limited community property concept embodied in the RRA. Since the RRA provided spousal benefits which were specifically cut off upon divorce, the Court ruled that Congress intended no additional community property treatment of RRA benefits in dissolution proceedings. *Id.* at 584-85.

29. *Id.* at 589 (an offset would impair the economic security sought by Congress). Stressing that the *Hisquierdo* holding upset the balance of equality of community property division, Professor Reppy notes that a railroad employee now may be awarded all the retirement benefits, half of the marital homestead, and half of all other community property. Thus, the railroad employee's spouse would get substantially less than the half ownership of all marital assets to which the spouse was previously entitled. Reppy, *Learning to Live With* Hisquierdo, 6 COMM. PROP. J. 5, 17 (1979).

30. In dissent, Justice Stewart, joined by Justice Rehnquist, argued that there was no conflict because the anti-attachment provision was merely designed to protect retirement benefits from creditors. 439 U.S. at 599 (Stewart, J., dissenting). Stressing that California's community property laws conveyed equal property rights upon husband and wife, Justice Stewart urged that a spousal interest in retirement benefits should have been treated as a substantive property right upon divorce. *Id.* at 592-93 (Stewart, J., dissenting).

31. The amendments to the Railroad Retirement Act were enacted August 13, 1981 as part of the Budget Reconciliation Act. Pub. L. No. 97-35, 45 U.S.C. § 231c, d, e(5), f(2), g, h (West 1981).

32. Taxes paid by the railroad employee are credited to a Social Security trust fund, then interchanged back to the Railroad Retirement Fund for direct annuities to ex-wives, widows who meet eligibility requirements, and mothers of railroad employees. Although the amendments are significant in view of *Hisquierdo*, they were not enacted in response to the decision. Rather, efforts to enact these amendments had been made since the original RRA was enacted in 1974. Telephone interviews with Mary Jane Yarrington, Staff Assistant to U.S. Representative Oberstar (October 16, 1981).

33. *See supra* notes 19-23. *But see* Zschernig v. Miller, 389 U.S. 429 (1968) (involving a non-community property state). The Supreme Court preempted Oregon's Iron Curtain probate provisions as applied, holding they interfered with the conduct of foreign affairs entrusted by the Constitution to the President and Congress. Significantly, the Department of Justice in its brief *amicus curiae* had stated that the Oregon escheat provision as applied did not unduly interfere with the federal conduct of foreign relations. *Id.* at 460. *Zschernig* has been limited and distinguished. *See* Comment, *The Demise of the "Iron Curtain" Statute*, 18 VILL. L. REV. 49 (1972). *See generally* H. STEINER & D. VAGTS, TRANSNATIONAL LEGAL PROBLEMS 162-72 (2d ed. 1976).

See also United States v. Summerlin, 310 U.S. 414 (1940) (federal fiscal interests preempted state time limitations in probate of decedents' estates); United States v. Embry, 145 Fla. 277,

arose in community property states. Based on the fundamental principle of spousal equality, community property law deems each spouse to own an undivided one-half interest in all marital assets.[35] Because each spouse is considered to have contributed, directly or indirectly, to the wealth accumulated during the marriage, community property jurisdictions generally treat each spouse as a one-half owner of all community property upon divorce.[36] While the eight community property states' laws vary,[37] all share the basic concept of equal ownership.[38] In contrast, the common law concept of family property

---

109 So. 41 (1940) (federal tax claim may be filed in probate proceedings despite expiration of time permitted by Florida non-claim statute).

34. Analyzing the first four family law preemption cases, some commentators emphasized that they were decided before the recent increase in the divorce rate and trend towards equitable division of marital assets. Because state interest in equitable division of marital assets is greater today than when the decisions were rendered, this interest should have greater weight in the Supreme Court's considerations of alleged federal-state law conflicts. Foster & Freed, *Spousal Rights in Retirement and Pension Benefits,* 16 J. FAM. L. 187, 204-05 (1977-78). These commentators question a federal policy which immunizes marital assets from distribution upon divorce, and advocate re-examination of the federal preemption doctrine. *Id.* at 205 n.75. Further, Foster and Freed argue there is a national interest in the efficient operation of state alimony and marital property law due to the expense of the welfare programs. *Id.* at 205 n.76.

Professor Hirsch argues that rather than determining whether there is a conflict or interference, the Supreme Court should articulate the real underlying policy, a balancing of the importance of the interference with the federal law's operation. Hirsch charges that the Court's failure to articulate this decisional principle led it to invalidate state laws which a reasonable application of the principle might have led it to sustain. Hirsch, *supra* note 14, at 537-38.

35. Other states with community property statutes are Arizona, Idaho, Louisiana, Nevada, New Mexico, Texas, and Washington. Community property concepts are of ancient origin, stemming from the Germanic Visigoths. The system was brought to America by Spanish explorers. The concept of spousal equality evolved from spouses working side by side facing adverse conditions. The fact that some Western states have adopted community property laws could be partially due to similar primitive conditions in settling the early American West. *See* W. DEFUNIAK & M. VAUGHN, *supra* note 3, §§ 1-10; W. REPPY & W. DEFUNIAK, COMMUNITY PROPERTY IN THE UNITED STATES 1-15 (1975). *See also* Bartke & Zurvalec, *Wisconsin, Illinois, Ontario — Three Roads to Marital Property Reform,* 12 LOY. U. L.J. 1 (1980); Irish, *A Common Law State Considers a Shift to Community Property,* 5 COMM. PROP. J. 227-29 (1978).

36. *See* Irish, *supra* note 35, at 229. Separate property is not divided upon divorce. Separate property is acquired through lucrative title (succession, inheritance, and separate donation), while community property, or financial property, is acquired through onerous title (labor during the marriage). *See* W. DEFUNIAK & M. VAUGHN, *supra* note 3, at § 1.

37. *See, e.g.,* Eichelberger v. Eichelberger, 582 S.W.2d 395, 401-02 (Tex. 1979) (awarding alimony is against public policy). California applies the principle of source of income received during coverture in classifying income as community property. Income from separate property is thus classified as separate property. In contrast, Texas classifies all income during coverture as community income regardless of its source. *See* Kent, *Pension Funds and Problems Under California Community Property Laws,* 2 STAN. L. REV. 447, 466 (1950).

38. Although based on the principle of spousal equality, until recently community property states deemed the husband the sole manager of the community property in his position as head of the household. For a critical examination of reforms in several community property states on this issue, see Bartke, *Community Property Law Reform in the United States and in Canada,* 50 TUL. L. REV. 213 (1976). *See also* Bingaman, *New Mexico's "Community Property Act of 1973",* 1 COMM. PROP. J. 213 (1974).

treats title as the key to ownership.[39]

California's spousal equality principle has extended to vested retirement benefits flowing from federal, state or private employment. California courts have found such benefits to be community property subject to equal division in divorce actions.[40] The Supreme Court of California in *In re Marriage of Brown*[41] expanded the community property concept by holding that non-vested pension rights earned during marriage were contingent property interests, not expectancies.[42] The court reasoned that any other ruling would inequitably divide property rights acquired through community effort.[43] Thus, California courts divided military pension rights derived from employment during marriage as community property.[44]

In another California Supreme Court case, *In re Marriage of Fithian*,[45] the court held federal law did not preempt judicial division of federal military retirement pay in California divorce proceedings. The court examined legislative history and determined that Congress intended the military retirement

39. In common law states, earnings of each spouse and other benefits, such as gifts, have generally been deemed owned by the recipient spouse. Therefore, the domestically oriented spouse traditionally has had limited rights to the earnings of the other spouse upon divorce. *See* Irish, *supra* note 35, at 227. For a discussion of the tax consequences of the community property states' laws' concept of spousal ownership of marital assets, see generally Irish, *supra* note 35. For a discussion of the tax consequences of equitable distribution states, see generally DuCanto, *The Federal Tax Treatment of Transfers of "Marital Property" Under the New Illinois Marriage and Dissolution of Marriage Act*, 59 CHI. B. REC. 286 (1978).

40. *Accord* Waite v. Waite, 6 Cal. 3d 461, 492 P.2d 13, 99 Cal. Rptr. 325 (1972); Phillipson v. Board of Administration, 3 Cal. 3d 32, 473 P.2d 765, 89 Cal. Rptr. 61 (1970); Benson v. City of Los Angeles, 60 Cal. 2d 355, 384 P.2d 649, 33 Cal. Rptr. 257 (1963); French v. French, 17 Cal. 2d 775, 112 P.2d 235 (1941); Crossan v. Crossan, 35 Cal. App. 2d 39, 94 P.2d 609 (1939).

41. 15 Cal. 3d 838, 544 P.2d 561, 126 Cal. Rptr. 633 (1976).

42. 15 Cal. 3d at 841-42, 544 P.2d at 562-63, 126 Cal. Rptr. at 634-35 (overruling French v. French, 17 Cal. 2d 775, 112 P.2d 235 (1941)). *French* had held that retirement pay a serviceman would receive as a Naval Reserve member was an expectancy, not community property subject to division upon dissolution. 17 Cal. 2d at 778, 112 P.2d at 237. The *French* reasoning has been criticized because it allowed a person to sue for marital dissolution just prior to the time his or her retirement rights matured, thereby defeating any community interest of the spouse in the benefits, even though married many years. Note, *Retirement Pay: A Divorce in Time Saved Mine*, 24 HAST. L.J. 347, 353 (1973).

43. 15 Cal. 3d at 847, 544 P.2d at 566, 126 Cal. Rptr. at 638. For a thorough analysis of *Brown*, see Reppy, *Community and Separate Interests in Pensions and Social Security Benefits After* Marriage of Brown *and ERISA*, 25 U.C.L.A. L. REV. 417 (1978).

44. *Accord* Bodenhorn v. Bodenhorn, 567 F.2d 629 (5th Cir. 1978); Ramsey v. Ramsey, 96 Idaho 672, 535 P.2d 53 (1975); Sims v. Sims, 358 So. 2d 919 (La. 1978); LeClert v. LeClert, 80 N.M. 235, 453 P.2d 755 (1969); Cearley v. Cearley, 544 S.W.2d 661 (Tex. 1976); Busby v. Busby, 457 S.W.2d 551 (Tex. 1970); Payne v. Payne, 82 Wash. 2d 573, 512 P.2d 736 (1973). Some common law states treated military retirement pensions as a factor to be considered in equitable distribution of property. *See* Chisnell v. Chisnell, 82 Mich. App. 699, 267 N.W.2d 155 (1978), *cert. denied*, 442 U.S. 940 (1979); Howard v. Howard, 196 Neb. 351, 242 N.W.2d 884 (1976); Kruger v. Kruger, 73 N.J. 464, 375 A.2d 659 (1977); Pinkowski v. Pinkowski, 67 Wis. 2d 176, 226 N.W.2d 518 (1975). *But See* Fenney v. Fenney, 259 Ark. 858, 537 S.W.2d 367 (1976); Ellis v. Ellis, 191 Colo. 17, 552 P.2d 506 (1976); Light v. Light, 599 S.W.2d 476 (Ky. 1980).

45. 10 Cal. 3d 592, 517 P.2d 449, 111 Cal. Rptr. 369, *cert. denied*, 419 U.S. 825 (1974) (overruled on other grounds by *In re* Marriage of Brown, 15 Cal. 3d 838, 544 P.2d 561, 126 Cal. Rptr. 633 (1976)).

scheme to boost morale and to encourage prolonged military service. Congress attempted to reach this goal, the court reasoned, by establishing a retirement plan that promised economic security.[46] Finding no evidence of any conflict with the military retirement pay scheme, the court concluded California courts were not preempted from treating military retirement pensions as community property in divorce actions.[47]

Subsequent to *Hisquierdo,* the validity of state law division of military retirement pay was challenged. In *In re Marriage of Milhan,*[48] the California Supreme Court distinguished *Hisquierdo,* finding the congressional intent to provide a retirement incentive present in the RRA but absent in the military retirement provisions.[49] The supreme court declared military retirement pay was established to encourage service members to remain in the armed services.[50] The court noted the RRA provisions expressly forbid legal process, attachment or anticipation of retirement benefits, and viewed the absence of a similar federal statute shielding military retirement provisions as significant.[51]

Although some jurisdictions followed the California Supreme Court's conclusion in *Milhan,*[52] several community property states denied division of military retirement benefits, relying instead on *Hisquierdo.* The legality of dividing military pensions was relevant to many common law jurisdictions because over thirty states[53] use equitable division of marital property as a guiding principle[54] in divorce proceedings. Decisions in these jurisdictions were

46. 10 Cal. 3d at 599, 517 P.2d at 453, 111 Cal. Rptr. at 373. Although divisibility of military retirement pensions was an unresolved issue in 1967, the Supreme Court of California upheld a malpractice award of $100,000 against an attorney who failed to assert a client's community interest in her husband's National Guard retirement pensions. Smith v. Lewis, 13 Cal. 3d 349, 530 P.2d 589, 118 Cal. Rptr. 621 (1975) (also overruled on other grounds by *Brown*).

47. 10 Cal. 3d at 604, 517 P.2d at 457, 111 Cal. Rptr. at 377.

48. 27 Cal. 3d 765, 613 P.2d 812, 166 Cal. Rptr. 533 (1980).

49. *Id.* at 772-73, 613 P.2d at 815, 166 Cal. Rptr. at 536.

50. *Id.*

51. *Id.* at 773, 613 P.2d at 816, 166 Cal. Rptr. at 537. *Cf.* Henn v. Henn, 26 Cal. 3d 323, 605 P.2d 10, 161 Cal. Rptr. 502 (1980).

52. *Compare* Czarnecki v. Czarnecki, 123 Ariz. 466, 600 P.2d 1098 (1979) (despite *Hisquierdo,* military retirement pay subject to state community property law) *with* Eichelberger v. Eichelberger, 582 S.W.2d 395 (Tex. 1979) (*Hisquierdo* forbade division of military retirement pay as community property).

53. The 39 common law states permitting an equitable distribution of property upon divorce, by statute or decision, are: Alabama (as to alimony only), Alaska, Arkansas, Colorado, Connecticut, Delaware, Florida, Georgia (as to alimony only), Hawaii, Illinois, Indiana, Iowa, Kansas, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, New Hampshire, New Jersey, New York, North Carolina (as to alimony only), North Dakota, Ohio (as to alimony only), Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Vermont, Wisconsin, and Wyoming. *See, e.g.,* Freed & Foster, *Divorce in the 50 States,* 13 FAM. L.Q. 105, 117 (1979).

For a discussion of the factors considered in equitably dividing military retirement pay, see generally Young, *Disposition of Military Retirement Pay Upon Dissolution of a Marriage,* 2 COMM. PROP. J. 239 (1975).

54. *E.g.,* Canakaris v. Canakaris, 382 So. 2d 1197, 1204 (Fla. 1980) (a dissolution award should be sufficient to compensate the wife for her contribution to the marriage); Painter v. Painter, 65 N.J. 196, 320 A.2d 484 (1974) (all property acquired during marriage in which

similarly disparate.[55] The split among state courts, the high national divorce rate and the trend toward equitable division of property rights contributed to the need for direction from the United States Supreme Court.

In the instant case, the Supreme Court found a conflict between California law and the military retirement scheme.[56] Stressing that Congress intended the military retirement pension to be the service member's personal entitlement, the Court focused on two provisions.[57] First, the service member had the right to designate a beneficiary to receive unpaid retirement arrearages upon his death.[58] Second, the service member was given an option to reduce retirement pay and fund an annuity.[59] Additionally, the Court noted that Congress had recently amended the Civil Service and Foreign Service retirement schemes allowing ex-spouses to share portions of retirement pay but had failed to amend the military retirement provisions in a similar fashion.[60]

The Supreme Court held that the conflict sufficiently impeded congressional objectives to warrant preemption.[61] The Court pointed to congressmen's statements made contemporaneously with the nondisability retirement provisions' enactment, which stressed the need to induce older officers to retire.[62] The Court declared that Congress designed the scheme to stimulate recruitment

---

a spouse acquires an interest may be equitably divided in a divorce action). *See* Letts, *First Came* Canakaris, *Then Came Its Progeny*, 56 FLA. B.J. 669 (1981); Knight & Esser, *Critical Factors Which Influence Equitable Distribution Awards*, 55 FLA. B.J. 581 (1981).

55. *Compare In re* Marriage of Musser, 70 Ill. App. 3d 706, 388 N.E.2d 1289 (1979) (equitable division of military retirement pension as marital property in divorce action not preempted by federal military provisions) *with* Russell v. Russell, 605 S.W.2d 33 (Ky. 1980) (due to *Hisquierdo*, dividing military retirement pensions upon divorce would conflict with federal statutory scheme).

56. 101 S.Ct. at 2741 (6-3 decision).

57. 10 U.S.C. §§ 1434, 2771 (1976).

58. 101 S. Ct. at 2737. Although this provision gave a service member testamentary power over any amount owed by the government, the Court did not decide whether California may treat active duty pay as community property.

59. *Id.* at 2738. The Court also reasoned that in contrast to the RRA, the military retirement provisions contained no community property concepts. This omission indicated to the Court that Congress had considered community property law and intended no community property treatment of military retirement benefits. *Id.* at 2737.

60. The Civil Service Amendments, Act of Sept. 15, 1978 Pub. L. No. 95-366, § 1(a), 92 Stat. 600, 5 U.S.C. § 8345(j)(1) (Supp. III 1979), require that ex-spouses receive Civil Service retirement benefits pursuant to court divorce decrees. The Foreign Service amendments, Foreign Service Act of 1980, Pub. L. 96-465, § 814, 94 Stat. 2113, (to be codified at 22 U.S.C. § 4054) grant an ex-spouse who was married to a Foreign Service officer at least ten years a pro-rata share of a maximum of half the Foreign Service member's retirement benefits. In addition, the ex-spouse may claim a pro-rata share of the member's widow's survivor's annuity, and the Foreign Service member must have the ex-spouse's consent should the member not want to provide a survivor's annuity. 101 S. Ct. at 2740.

61. 101 S. Ct. at 2741-42. *See also id.* at 2737-38; Goldberg, *Is Armed Services Retired Pay Really Community Property?*, 48 CAL. B.J. 12, 13-14 (1973) (Congress intended that federal military retirement pay laws preempt state law). Goldberg notes the irony of a serviceman, never domiciled in California until the day before eligible to retire, being faced with a divorce judgment granting his wife one-half of his retired pay. *Id. But see supra* note 42.

62. 101 S. Ct. at 2737.

and reenlistment and to ensure a youthful military for the national defense.[63] The majority reasoned that a potential involuntary transfer to a community property state, where retirement pay might be divided upon divorce, discouraged enlistment.[64] Furthermore, the Court found reduced retirement pay for divorced service members also discouraged retirement, since current income after divorce was not divisible as community property.[65] Because division of retirement pensions frustrated the congressional goal of a youthful military force, the Court held the state law was preempted.[66] A footnote added that offsetting awards in the property disposition to compensate for lost retirement pay may not be granted.[67]

Justice Rehnquist,[68] writing for the dissent, attacked the majority's reasoning as logically inconsistent.[69] He argued the majorities in *Hisquierdo* and the instant case found congressional intent to preempt state laws in diametrically opposed federal provisions.[70] The *Hisquierdo* majority found congressional intent to preempt in the RRA, which forbade assignment of retirement pay. The dissent emphasized, however, that federal legislation permits military officers to assign their retirement pay.[71] Further, the dissent insisted the analytical jump required to find that all military retirement pay was outside the scope of community property because parts of it, arrearages and annuities, were individual property was too great.[72]

The instant case belies the United States Supreme Court's historical reluctance to preempt state family law unless a conflict with federal law or congressional intent to preempt were clearly indicated.[73] The majority departed from family law preemption precedent. The previous cases involved specific statutory stipulations from which congressional intent to preempt was clearly

---

63. *Id.* at 2742. *See also id.* at 2743 (citing Rostker v. Goldberg, 101 S.Ct. 1, 3 (1981)) (the Court affords great deference to congressional regulation of military affairs).

64. 101 S. Ct. at 2742.

65. *Id.* The system has generous retirement provisions and the government contributes to the plan. 10 U.S.C. §§ 1447-55, 3991 (1976).

66. 101 S. Ct. 2741-42. The Court said that the ex-spouse adversely affected by the instant case holding should look to Congress for alleviation. *Id.* at 2743.

67. *Id.* at 2739 n.22 (the offset prohibition was deemed required by a military provision, 37 U.S.C. § 701(c) (1976), which permitted an Army officer to assign or transfer military pay but only when due and payable).

68. Justice Rehnquist was the only Justice with solid experience in community property law, having practiced law in California. Kornfeld, *Supreme Court Majority Shoots Down Community Property Division of Military Retired Pay*, 8 COMM. PROP. J. 187, 187 (1981).

69. 101 S. Ct. at 2746-47 (Rehnquist, J., dissenting with Brennan and Stewart, JJ., concurring) (in the instant case, the majority determined that the absence of a community property provision in the military retirement plan suggested congressional intent to preempt; under *Hisquierdo*, its absence would indicate no such congressional intent).

70. 101 S. Ct. at 2746 (Rehnquist, J., dissenting); 45 U.S.C. § 231m (1976); 37 U.S.C. § 701(a) (1976).

71. 37 U.S.C. § 701(a) (1976) (under regulations prescribed by the Secretary of the Army or Air Force a commissioned officer may transfer or assign his pay account, when due and payable). *See* 45 U.S.C. § 231m (1976).

72. 101 S. Ct. at 2748 (Rehnquist, J., dissenting).

73. *See supra* note 19.

ascertainable.[74] In marked contrast, no such specific stipulation is present in the military provisions.[75]

Absent any specific statutory indication of congressional intent to preempt, the Court focused on isolated provisions of the military retirement scheme. The provisions allowing a service member to fund an annuity and designate a beneficiary for unpaid arrearages were secondary aspects of the retirement scheme.[76] A conflict between these two provisions and state community property law, however, did not clearly indicate a conflict between the entire military retirement scheme and state community property law.[77]

Furthermore, the Court's interpretation of Congress' purposes in drafting the military retirement provisions was internally inconsistent. The Court declared the provisions' purposes were to provide an incentive for recruitment and reenlistment and to encourage older service members to retire.[78] Inducing both reenlistment and early retirement would be inconsistent. Buttressing the Court's conclusion that Congress intended to encourage service members to retire were statements in the 1861 *Congressional Globe* made at the time nondisability military retirement benefits were enacted.[79] Although there was a need to retire incompetent or elderly officers at the time the nondisability military retirement pay scheme was enacted, the military's needs have changed in the past 120 years. Indeed, the contemporary military is encountering difficulty in retaining skilled personnel.[80] The California Supreme Court recognized in *Fithian* and *Milhan* that Congress intended to provide enhanced economic security and thereby to entice the service member to remain in the military by enacting the military retirement scheme.

The Court's ban on offsetting remedies to compensate for lost benefits undercuts state laws which deem spouses to own these benefits. Because this position undermines community property's underlying concept of spousal equality, the instant case will have a disturbing impact on divorce courts.[81]

74. *See supra* notes 20-35 and accompanying text.

75. 101 S. Ct. at 2744-46.

76. *Id.* at 2747. The heart of the retirement system was its generous provisions and the fact that the government contributes to the plan. *Id.* at 2731-32.

77. *See supra* note 72 and accompanying text. A better decision might have held the annuity and unpaid arrearages provisions to be untreatable as community property but left the retirement pay in general treatable by state divorce courts.

78. 101 S. Ct. at 2742.

79. *Id.* at 2731.

80. Less than two percent of the armed services as a whole have college degrees. There is discussion of extending the present twenty-year minimum length of service to thirty years to qualify for retirement in order to meet the present demand for specially skilled service members. Kornfeld, *supra* note 68, at 191. *See also* Gross, *The Drive to Revive the Draft*, 229 NATION 353, 361-62 (1979) (quoting Binkin, *Youth or Experience? Manning the Military*, BROOKINGS INST. REP (1979)) (the military still follows the wasteful and inadequate practice of recruiting young people who lack the needed skills, despite its need for more technicians and craftsmen).

81. For example, because service members frequently relocate, their spouses are unable to obtain permanent employment to qualify for a personal pension. This mobility also encourages military families to rent rather than buy housing. Consequently, military retirement pensions are often the family's only significant asset. Brief for *Amici Curiae* on Behalf of Certain Members of Congress and Organizations at 50, 52-53. By denying the ex-

With over thirty common-law states using equitable division of marital assets as a guideline in dissolution proceedings,[82] military spouses will be adversely affected even in non-community property states. The offset prohibition, buried in a footnote,[83] might induce courts to disguise an offset through increased alimony or child support. Such a disguised offset would produce inequitable inconsistencies. For instance, the availability of alimony as a disguised compensatory offset would vary with each jurisdiction's alimony policy.[84] Similarly, child support might not be available because there were no children of the marriage or the children had reached their majority.[85] Therefore, the divorce court's ability to undercut the prohibition will be limited by state laws and the facts of each case.

Recent amendments to the RRA grant annuity rights to ex-spouses and widows.[86] This suggests that the Supreme Court in *Hisquierdo* misinterpreted the RRA's anti-assignment, anti-anticipation clause in finding congressional intent to preempt. The absence of a similar clause in the military retirement scheme, and the recent RRA amendments, render the Court's reasoning in the instant case suspect.[87] Congress has also recently amended the Foreign Service and Civil Service provisions to permit spousal sharing of retirement benefits.[88] Congress should similarly amend the military retirement provisions. The inequitable situation[89] that would result from courts surreptitiously off-

---

spouse any portion of the retirement pensions, the instant case significantly reduces the ability of divorce courts to award the ex-spouse an equitable property settlement.

82. *See supra* notes 53-54 and accompanying text.

83. 101 S. Ct. at 2739 n.22.

84. For instance, Texas grants no alimony. *See supra* note 37. *See* Rheinstein, *Division of Marital Property*, 12 WILLAMETTE L.J. 413, 425-26 (1976). Thus, the military spouse under Texas divorce law would not receive any disguised offset, while military spouses in other states might be awarded more equitable settlements in disguised offsets to avoid the impact of the instant case. *See* Reppy, *supra* note 29, at 21 (federal common law preempts the Texas anti-alimony authority to fill the gap created by the similar *Hisquierdo* offset prohibition). *But see* Eichelberger v. Eichelberger, 582 S.W.2d 395, 401-02 (Tex. 1979) (court relied on *Hisquierdo*'s prohibition against offsets as compensation to deny railroad spouse a 40% interest in husband's railroad retirement benefits and awarded no alimony due to the public policy against alimony).

85. A finding of fraud may supply an alternative basis for compensation. *See supra* note 22. *Cf.* Ibey v. Ibey, 93 N.H. 434, 43 A.2d 157 (1945) (widow entitled to constructive trust in compensation for amount lost in spouse's savings bonds fraud), *aff'd on rehearing*, 94 N.H. 425, 55 A.2d 872 (1947); W. MACDONALD, FRAUD ON THE WIDOW'S SHARE 227-28 (1960) (discussing *Ibey*). For a discussion of the unpredictability of the exercise of judicial discretion in divorce actions, see Rheinstein, *supra* note 88, at 831-33.

86. *See supra* notes 31-32 and accompanying text.

87. The unsavory allegations appended to appellant McCarty's brief may have subtly influenced the majority. *See supra* note 4. Furthermore, the instant case may reflect common law judges' typical hostility toward community property law. *See, e.g.*, Bartke, *Yours, Mine and Ours—Separate Title and Community Funds*, 44 WASH. L. REV. 379, 381 (1969) (quoting Willcox v. Penn Mut. Life Ins. Co., 357 Pa. 581, 586-87, 55 A.2d 521, 524 (1947)) (community property law represents a concept of property that is entirely alien and foreign to that of the common law as to the conjugal relationship and the marital rights in property).

88. *See supra* note 60 and accompanying text.

89. A Florida court distinguished the instant case in a subsequent dissolution opinion, Cullen v. Cullen, No. ZZ-355, slip op. (Fla. 1st D.C.A. March 22, 1982). The court ordered

setting awards calls for renewed congressional attention.[90]

KATHERINE MACDONALD WALTON

---

a retired Air Force colonel to pay his wife permanent periodic alimony in the amount of one half his military nondisability retirement pay. Reasoning that community property and alimony awards are based on different legal foundations, the court ruled that the instant case only held community property division of military retirement pay to be preempted. Because alimony is a support obligation imposed by law separately from spousal property rights, the court held the instant case inapplicable to alimony support awards. *Id.* at 4-8. *See also* Higgins v. Higgins, 408 So. 2d 731 (Fla. 1st D.C.A. 1982) (court may consider military retirement pension an asset of a spouse when determining the amount of a permanent periodic alimony award because alimony is a support obligation based on spousal needs). *But see supra* note 84 and accompanying text (the *Cullen* and *Higgins* reasoning could not be used to compensate the spouse denied a portion of military retirement pay in Texas, where alimony is not granted).

90. In response to the instant case, bills that would permit divorce courts to award proportional shares of service members' military retirement pensions to their spouses were introduced in Congress. S. 888, S. 1453, S. 1648, S. 1772, S. 1814, 97th Cong., 1st Sess. (1981); H.R. 3039, H.R. 4902, 97th Cong., 1st Sess. (1981). A strong military lobby opposed the bills. In response, ex-wives of servicemen joined Action for Former Military Wives, a national organization formed to lobby for congressional legislation guaranteeing them a share of their husbands' military benefits. *Orlando Sentinel Star,* Oct. 18, 1981, at 1F, col. 1.

Subsequent to the instant case, the United States Supreme Court further expanded its protective policy towards the military service member's benefits in Ridgway v. Ridgway, 102 S. Ct. 49 (1981). *Ridgway* involved a deceased serviceman who had changed his Servicemen's Group Life Insurance Act of 1965 policy to name his second wife the beneficiary immediately after remarrying. Although the serviceman had been legally obligated to maintain the policy on behalf of his children pursuant to a divorce decree, the Supreme Court upheld the beneficiary change. Noting that the military insurance scheme provided an insured service member the right to freely designate and change a beneficiary, the Court held the military provisions preempted the state divorce decree. *Id.* at 55-57.