

1993

Varallo v. Varallo : Brief of Appellee

Utah Court of Appeals

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DOCKET NO. 930574
IN THE UTAH COURT OF APPEALS

MERRILYN SUSAN VARALLO,	:	
	:	
Plaintiff-Appellant,	:	Case No. 930574-CA
	:	
vs.	:	Priority No. 15
	:	
FRANCIS V. VARALLO,	:	
	:	
Defendant-Appellee.	:	
	:	

BRIEF OF APPELLEE

Appeal from Decree of Divorce and Judgment
of the Second District Court, Davis County, Utah
the Honorable Jon M. Memmott, Presiding

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FILED
Utah Court of Appeals

SEP 26 1994

Marilyn M. Branch
Clerk of the Court

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I. INTRODUCTION

Comes now the Appellee, Francis V. Varallo, by and through his attorneys of record, W. Kevin Jackson and Douglas P. Hoyt, and respectfully submits the following appellate brief in this matter.

II. STATEMENT OF THE COURT'S JURISDICTION

This Court has jurisdiction to decide this appeal and the cross-appeal pursuant to Utah Code Annotated 78-2a-3(2)(i)(1994). This is an appeal by the plaintiff and a cross appeal by the defendant from a Decree of Divorce and Judgment entered by the Second District Court on August 11, 1993. (R. 187). The defendant filed an objection to the proposed findings of fact, conclusions of law and the Decree of Divorce on the 29th day of June, 1993. No post judgment motions were filed by either party. A notice of appeal was filed by the plaintiff on September 7, 1993. An amended notice of cross-appeal was filed by the defendant on September 24, 1993. This court on it own motion consolidated the appeal and the cross-appeal by an order entered on the 12th day of November, 1993.

III. STATEMENT OF ISSUES

The following four (4) issues are presented to this Court by the Appellant Merrilyn Susan Varallo (sometimes hereinafter referred to as the "plaintiff") on her direct appeal:

1. Whether or not the plaintiff was entitled to an award of thirty percent (30%) of the defendant's (i.e. her husband's) disposable military retirement benefits.

2. Whether or not income should be imputed to the defendant for purposes of computing alimony and child support.

3. Whether or not the parties' twenty (20) year old son, Sean, is in need of continued child support.

4. Who should be entitled to claim Sean as a dependant for federal and state income tax purposes.

The following seven (7) issues are presented to this Court by Francis V. Varallo, also known as "Bob" Varallo (sometimes hereinafter referred to as the "defendant"), on his cross appeal:

1. Whether or not the District Court committed error by ordering the Defendant, Mr. Varallo, to pay alimony to the Plaintiff in the sum of \$500.00 per month, given the earning capacity of Ms. Varallo and the fact that Mr. Varallo is currently retired from his military occupation and is not otherwise employed.

2. Did the District Court commit error by dividing Mr. Varallo's retirement benefits and giving Ms. Varallo a 30% interest therein in light of the property division ordered by the court.

3. Did the District Court commit error in ordering Mr. Varallo to exercise his Survivor's Benefit Protection enrollment option to obtain the maximum coverage for Ms. Varallo and by ordering Mr. Varallo to pay all costs associated with the coverage.

4. Did the District Court commit error by ordering Mr. Varallo to pay one-half (1/2) of all educational expenses of each of the parties' children until each child attains the age of 22 years without a specific finding of disability or other unusual dependency of the adult children.

5. Did the District Court commit error by ordering Mr. Varallo to maintain unchanged his life insurance contracts with the present carrier in light of the facts of the case and the fact that the insurance company is currently in receivership.

6. Whether or not the District Court committed error by not dividing the plaintiff's pension fund and a Bank of Scotland bond as part of the marital estate.

7. Whether or not the state court has jurisdiction to divide any portion of the defendant's disability benefits.

IV. THE STANDARD OF REVIEW ON APPEAL

This Court has defined the standard of review for an appeal from a decree of divorce. The standard of review that this Court uses in resolving an appeal of a domestic matter is that the Court of Appeals will not disturb the findings of fact of the trial court unless a clear abuse of discretion is shown. Burnham v. Burnham, 716 P.2d 781 (Utah 1986). Greene v. Greene, 751 P.2d 827 (Utah

App. 1988) cert. denied 765 P.2d 1278 (Utah 1988). This standard of review applies to cases involving alimony and property distribution, Rasband v. Rasband, 752 P.2d 1331 (Utah App. 1988), and child support, Hansen v. Hansen, 736 P.2d 1055 (Utah App. 1987).

If it is alleged, on appeal, that the District Court made insufficient findings of fact, the District Court's findings of fact will be reversed "unless the facts in the record are 'clear, uncontroverted, and capable of supporting only a finding in favor of the judgment.'" Carlton v. Carlton, 756 P.2d 86 (Utah App. 1988) citing Action v. J.B. Deliran, 737 P.2d 996, 999 (Utah 1987).

Issues of law are reviewed by the Court under the correction of error standard with no special deference being given to the District Court's ruling on the law. Smith v. Smith, 793 P.2d 407 (Utah App. 1990), Cummings v. Cummings, 821 P.2d 472 (Utah App. 1991).

V. DETERMINATIVE STATUTES

The determinative statutes for this appeal are as follows: 10 USC §1408, which is set forth in addendum "A". 10 USC §1448, which is set forth in addendum "B".

Utah Code Annotated §78-2a-3(2)(i) reads as follows:

"(2) The Court of Appeals has appellate jurisdiction, including jurisdiction of interlocutory appeals, over: . . .

(i) appeals from district court involving domestic relations cases, including, but not limited to, divorce,

annulment, property division, child custody, support, visitation, adoption, and paternity; . . ."

Utah Code Annotated §78-45-7.5(2) reads as follows:

"(2) Income from earned income sources is limited to the equivalent of one full-time job."

Utah Code Annotated §78-45-7.10 reads as follows:

"(1) When a child becomes 18 years of age, or has graduated from high school during the child's normal and expected year of graduation, whichever occurs later, the base child support award is automatically reduced to reflect the lower base combined child support obligation shown in the table for the remaining number of children due child support, unless otherwise provided in the child support order.

(2) The award may not be reduced by a per child amount derived from the base child support award originally ordered."

VI. STATEMENT OF THE CASE

A. The Nature of the Case:

This appeal is made by reason of a divorce action filed by Plaintiff on or about the 21st day of August, 1992. (R. 1).

B. The Course of Proceedings:

In this brief "Tr." refers to the trial transcript, with regard to the trial held on February 17 and 18, 1993; "R." refers to the Court's record of the case.

On or about the 21st day of August, 1992, the plaintiff, Mrs. Marilyn Susan Varallo, filed a verified complaint for a divorce in the Second Judicial District, County of Davis. The verified complaint sought a divorce from the defendant, Francis V. Varallo, an alimony award, the division of the marital property, the payment

of all marital debts by the defendant and the division of the defendant's military pension. A non-jury trial, on the merits of the case, was held before the Honorable Jon M. Memmott, on February 17th and 18th, 1993. When the Court rendered its decision it gave the plaintiff and the defendant two options as to the division of the marital estate and the payment of the alimony.

The first option presented by the District Court and rejected by the plaintiff during the trial was to divide the marital estate which would include the defendant's retirement payments and his disability income or benefits. The plaintiff would receive thirty percent (30%) of the defendant's retirement benefits in the amount of \$1,267.50 per month. (Tr. 186). The plaintiff would then have to pay alimony to the defendant in the amount of \$850.00 per month.

The second option presented by the District Court provided that Mr. Varallo would increase the Survivor Benefits Plan (hereinafter "SBP") to the maximum level available and he would pay the monthly cost of the plan or election. Mr. Varallo would then pay the plaintiff \$500.00 per month in alimony. (Tr. 187). The plaintiff choose the second option presented by the District Court. (Tr. 193). The defendant agreed to this option based upon the plaintiff's decision rather than allowing the court to make the decision and taking the decision away from the parties.

On or about the 11th day of August, 1993 the Court entered its Findings of Fact and Conclusions of Law and the Decree of Divorce. In the Findings of Fact the trial court specifically found that

Sean Varallo, the son of the parties, does not have any special needs which warrant ongoing custody and support. The court found that the plaintiff's gross income was in the sum of \$3,242.00 per month and the defendant's gross income was \$4,225.00 per month. Based upon these findings on the parties' respective income the District Court ordered the defendant to pay child support, according the guidelines which were then in effect, to the plaintiff in the amount of \$401.86 per month.

The District Court further found that the defendant was capable of being gainfully employed notwithstanding his proven military disability rating. The court recognized that the defendant would probably be unable to find employment at a salary comparable to his previous salary while he was working with Unisys and that his prospects for employment may depend on obtaining vocational training.

The court found that the plaintiff was in need of spousal support and the defendant was ordered to pay \$500.00 per month in alimony to the plaintiff. The court further found that the defendant should pay the plaintiff the sum of \$4,250 to reinstate the plaintiff's retirement fund with the federal government. The District Court did not divide the plaintiff's pension benefits as part of the marital estate.

The court found that the plaintiff was entitled to thirty percent (30%) of the Defendant's gross military retirement in the amount of \$1,267.50 per month. The court allowed the parties the

decision to increase the SBP to the maximum level in lieu of the 30% award of gross retirement payments with the defendant paying the monthly costs of the plan.

VII. STATEMENT OF FACTS

1. The defendant attended college at Loyola University in 1958 and obtained a Bachelor of Science degree in Humanities.

2. The defendant successfully completed Reserve Officer Training Corp while attending college. Upon his graduating from college and ROTC the defendant was commissioned a Second Lieutenant in the United States Army during the month of February, 1958.

3. The defendant was periodically advanced in rank during the time of his military service and held the rank of major when he married the plaintiff. (Tr. 86).

4. The defendant had been an active member of the military for over 12 years prior to the date the parties were married. (Tr. 86).

5. The parties were legally and lawfully married on June 26, 1970 in Washington D.C.

6. The plaintiff was working as a government employee at the U.S. Census Bureau when the parties were married. The plaintiff obtained a job with the United States Army shortly after the parties were married. (Tr. 86).

7. The parties agreed that the plaintiff would quit her job with the government and devote her time to the keeping of the

marital residence and the raising of the children of the marriage. (Tr. 7).

8. During the course of the marriage the defendant was involved in military intelligence and in other sensitive and covert operations throughout the world. (Tr. 84).

9. The plaintiff was not employed outside of the home until some time late in 1987 when she voluntarily began working for the Defense Nuclear Agency. (Tr. 49). She then took a job with the Department of the Interior, Bureau of Reclamation in the month of January, 1990. (Tr. 31). The plaintiff was still gainfully employed by the Department of the Interior at the time of the trial.

10. The plaintiff voluntarily made the decision to return to full time work. The plaintiff expressed her happiness that the defendant was able to care for the children at the time the defendant left the work force. (Tr. 31).

11. Three (3) children have been born as of issue to the parties during the course of the marriage, TO WIT: Valerie Jean, born January 18, 1972 now age 22, Sean Thomas, born August 17, 1974 now age 20 and Cara Noel, born December 21, 1977, now age 16 and who is the only minor child of the marriage.

12. The son of the parties, Sean Thomas Varallo, is currently living with the plaintiff and plans to return to school to obtain his high school diploma. Sean testified at trial that if he decides to apply himself he can succeed at anything. (Tr. 153-4).

13. Sean has an above average I.Q. and received an award for being the most improved student in Bountiful Junior High School. (Tr. 150).

14. Sean testified that he has no physical or psychological impairment that would prevent him from pursuing a career or an appropriate profession. (Tr. 147-150).

15. Sean has also considered leaving the residence of the plaintiff and living with the defendant. The issue of his permanent residency has not been resolved at this time and the Court did not make an order involving his living with either parent. (Tr. 154).

16. The defendant has retired from the United States Army after having served in this occupation for approximately thirty (30) years. He received an honorable discharge when he retired from the United State Army. The defendant, by and through his military service, has retirement benefits available to him. He retired in or about 1988.

17. The defendant also receives a monthly disability benefit due to a physical disability he incurred while serving in the army. (Tr. 28).

18. The defendant is paid \$4,225.00 per month in combined retirement benefits and disability benefits.

19. The defendant also has the option of purchasing a Survivors Benefit Plan that would pay the plaintiff 55% of the defendant's gross monthly retirement payments for the remainder of

the plaintiff's life. The plan is optional and can only be entered into by the defendant. Pursuant to the second option provided by the trial court the defendant has obtained the maximum coverage for the plaintiff.

20. The total amount of the Survivor's Benefit Plan allowed to be paid to the plaintiff will be reduced to 35% of the defendant's retirement benefits if and when the plaintiff utilizes the defendant's Social Security benefits which consist of payments directly to the plaintiff of approximately \$1,300.00 per month when the defendant claims any Social Security benefits. (Tr. 180).

21. The plaintiff was awarded the custody of the minor child, Cara, and was awarded child support in the amount of \$410.86 per month from the defendant. (Tr. 202).

22. The defendant was ordered to pay one-half (1/2) of each child's educational expenses. These additional payments were to continue until each child reached the age of 22 years. These amounts are in addition to the court ordered child support. (Tr. 203).

23. The plaintiff was awarded the following property by the trial court:

<u>Item</u>	<u>Value</u>
Pentagon Federal Credit Union Account	\$32,572.00
Riggs National Bank account	1,000.00
America First Credit Union Account	8,000.00
Chase Manhattan Account	3,133.00

Proceeds from the sale of the parties' Virginia home	<u>143,541.00</u>
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TOTAL	\$188,246.00.
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The plaintiff was awarded all of the property she received as an inheritance from her mother, even though all monies from the inheritance were not segregated from the other assets of the marital estate. (Tr. 203-204). The amount of the inheritance was determined to be \$56,536.88 and consisted of a \$15,000.00 bond with the Royal Bank of Scotland, \$15,000.00 equity in the Petroleum Technologies Corporation, \$5,261.98 in the Vanguard Money Market Fund and \$21,274.90 in the Dreyfus Money Market Fund. (Plaintiff's Trail Exhibit No. 1). The Royal Bank of Scotland Bond is currently held in a joint account with Susan Varallo and Bob Varallo being the holders of the bond. (Tr. 20). The bond was held in a joint account because the broker did not have a pay on death option when the account was initially opened. Id.

24. The defendant was awarded the following property by the court:

<u>Item</u>	<u>Value</u>
Pentagon Federal Credit Union account	\$13,733.00
Union Bank of Switzerland account	97,797.00
Army National Bank account	30,000.00
Miscellaneous securities	2,000.00
Proceeds from the sale of the parties' Virginia home	<u>45,659.00</u>

TOTAL

\$189,225.00.

(Tr. 203-204).

25. The plaintiff makes \$3,242 per month in gross pay from her employment with the United States Government. The defendant makes \$4,225 per month in retirement pay and disability benefits. The defendant's military retirement pay is \$3,734 per month and the disability benefit is \$491.00 per month. (Tr. 194).

VIII. SUMMARY OF ARGUMENT

1. Under Utah law a party is awarded alimony after the court applies a three (3) part test. This test was announced in Jones v. Jones, 700 P.2d 1072 (Utah 1985). The three (3) parts of this test are:

- A. The financial conditions and needs of the spouse;
- B. The ability of the spouse to produce a sufficient income for himself or herself; and
- C. The ability of the other spouse to provide support.

This Court held in Rasband, 752 P.2d at 1333 that:

"An alimony award should, to the extent possible, equalize the parties' respective post-divorce living standards and maintain them at a level as close as possible to that standard of living enjoyed during the marriage. . . . Failure to consider these factors constitutes an abuse of the trial court's discretion."

The trial court erred by awarding the plaintiff alimony in this case and abused its discretion by failing to consider and apply the above three (3) factors when the court entered its order of alimony. The trial court erred in failing to include the

plaintiff's separate sources of income in the court's assessment of the plaintiff's financial situation, the award of the alimony and the requirement of the payment of child support beyond age 18.

2. The trial court erred when it ordered the division of the gross amount of the military retirement benefits and disability benefits which are being paid to the defendant/appellee. The trial court ordered that 30% of the gross amount be awarded to the plaintiff/appellant. In interpreting the federal law, the United States Supreme Court clearly held that a state court order can only divide the retiree's "net" retirement pay. Mansell v. Mansell, 490 US 210, 101 S.Ct. 2728, 69 L.Ed.2d 675 (1989). The state District Court failed to apply the governing federal law which is set forth in 10 USC §1408. Disability benefits are not subject to any division by the state courts.

3. The trial court cannot impute income to the defendant to determine the amount of alimony or child support obligations. The trial court must base its award of alimony upon the factors that are presented at the time of the trial and cannot speculate on future employment or the possibility of future income. See Rudman v. Rudman, 812 P.2d 73 (Utah App. 1991). No evidence was presented to the trial court concerning the defendant's ability or opportunity for future employment and the court found that such earnings would require additional training in any event.

4. The trial court also erred when it ordered the defendant to provide the maximum coverage available under the Survivors

Benefit Plan. The member of the military and their spouse are the proper persons to decide if the spouse or children should be covered by the SBP and not the trial Court. See 10 USC §1448(a)(3). A state court may order participation in the plan but may not order a specific level of participation. In this case the parties agreed that the defendant would provide a minimum amount of coverage under the SBP and not the maximum amount available.

5. The trial court's decision with respect to the issues of the level of child support for the minor child and the tax deduction allowed to the defendant for Sean Varallo should be upheld.

6. The trial court erred with respect to the issues of the payment of additional educational expenses for the adult children of the parties when no specific need for the education or training was shown.

7. It was error for the trial court to order the defendant to maintain all present insurance policies inasmuch as the insurance companies were no longer financially secure and it would be imprudent for the defendant to maintain those insurance policies when alternative carriers are available.

8. It was an abuse of discretion for the trial court to order defendant to pay to the plaintiff the sum of \$4,250.00 for reinstatement of the plaintiff's retirement plan while failing to divide said retirement plan according to the Woodward formula. See Woodward v. Woodward, 656 P.2d 1431 (Utah 1982). No findings were

made as to how the court offset or considered this asset when dividing the defendant's benefits.

9. The Bank of Scotland Bond should be divided equally between the parties as part of the marital estate even though the plaintiff received the bond through an inheritance.

IX. ARGUMENT

A. The trial court abused its discretion in awarding the plaintiff alimony.

The trial court did not sufficiently or properly determine the plaintiff's need for spousal support in the findings of fact and conclusions of law. The law in Utah states that the trial court must take into consideration the following: (1) the financial conditions and needs of the recipient spouse, (2) the recipient's ability to provide her own income, and (3) the payor spouse's ability to provide the necessary or desired level of support. Fletcher v. Fletcher, 615 P.2d 1218 (Utah 1980), Cox v. Cox, 242 Utah Adv. Rep. 44 (Utah App. 1994). The District Court entered findings of fact on the first two (2) parts of this test but never made any determinations about the defendant's ability to pay support to the plaintiff. (tr. 198). The District Court did not enter sufficient findings of facts concerning the plaintiff's need for support. It made no determination as to the needs of the defendant and his ability to earn income in excess of a minimal standard of living for himself.

The District Court simply stated that the plaintiff should be awarded \$500.00 per month in alimony. No specific findings of fact as to the plaintiff's need for spousal support were entered by the court. A general finding was entered stating that the plaintiff is in need of support to maintain the standard of living which the parties enjoyed while they were married. The District Court made a general finding as to the monthly expenses of the parties. The court did not make any findings of the plaintiff's ability to provide support for herself with the monthly income she was found to be earning. Nor did the District Court take into consideration the parties' financial condition from other monetary sources, such as the plaintiff's income from her investments.

The District Court found that the plaintiff was making \$3,643.42 per month with reasonable living expenses of \$2,496.00 per month. The defendant was found to be making \$4,475.00 per month from the retirement benefits he receives from the United States Army and the defendant's monthly living expenses were determined to be \$2,300.00 per month. (Tr. 195) The plaintiff thus has a net income of \$1,147.42 per month and the defendant has a net income, before alimony and child support, of \$2,175.00 per month. The District Court ordered the defendant to pay child support in the amount of \$401.86 per month and alimony of \$500.00 per month thus leaving him with \$1,273.14 per month in net income. The plaintiff would then have net income per month of \$2,049.28.

<u>Source of income</u>	<u>Plaintiff</u>	<u>Defendant</u>
Gross monthly income	3,643.42	4,475.00
less expenses	<u>2,496.00</u>	<u>2,300.00</u>
subtotal	1,147.42	2,175.00
alimony	<u>+ 500.00</u>	<u>- 500.00</u>
subtotal	1,647.42	1,675.00
child support	<u>+ 401.86</u>	<u>- 401.86</u>
NET MONTHLY INCOME	2,049.28	1,273.14.

Additionally, the defendant was ordered to pay the costs associated with providing Survivor's Benefit Plan at the maximum rate in lieu of paying the plaintiff 30% of the defendant's net retirement pay. It is clear that the plaintiff is in a much better financial position than the defendant, after the District Court entered its order of support. This award also is based on an erroneous premises that the court had the right and ability to divide disability benefits of the defendant.

Any finding of fact that the a spouse is in need of support should be specific enough for this court to properly review the District Court's analysis and computation of the award. This Court has stated that "[f]indings are adequate only if they are 'sufficiently detailed and include enough subsidiary facts to disclose the steps by which the ultimate conclusion on each factual issue was reached.'" Action, 737 P.2d at 999 (Utah 1987), quoting Rucker v. Dalton, 598 P.2d 1336 (Utah 1979). The District Court failed to make adequate findings of fact to support the decision to award alimony to the plaintiff. The findings of fact are not

specific enough to show how the court came to its ultimate conclusion to award alimony to the plaintiff and the amount thereof.

This Court needs to be able to review the findings of the District Court in order to make a proper decision on appeal. To properly review the District Court's decision to award alimony sufficient findings of fact should have been entered that would show this Court how the District Court made its decision. No such findings of fact were entered by the District Court.

The District Court did not address the important fact that the plaintiff has approximately \$57,000.00 in liquid assets or near liquid assets, as valued at the time of the trial, from an inheritance from her mother's estate and its earnings potential. The plaintiff was further awarded one-half (1/2) of the marital estate which is valued at approximately \$188,246.00 in liquid assets. The Defendant had approximately the same amount from the marital estate awarded to him in the Decree of Divorce. The plaintiff has a greater amount of assets available to her for her benefit than does the defendant.

The plaintiff did not prove that she was in need of spousal support from the defendant. However, this court cannot properly review this determination because the District Court did not enter the specific findings of fact that would allow this court to properly review the matter.

The issue of spousal support should be returned to the District Court so that adequate findings of fact may be made as to the plaintiff's actual need for continuing support from the defendant and his ability to provide the same.

B. The plaintiff should not be entitled to thirty percent of Bob's disposable retirement benefits.

The plaintiff argues that she should also be entitled to thirty (30%) percent of the defendant's disposable retirement income. This would amount to a lump sum payment to the plaintiff of \$185,058.00 or a monthly payment to the plaintiff from the defendant of \$1,028.00. See Appellant's brief at page 17. The state District Court failed to properly address this issue in its findings of fact and conclusions of law.

The District Court found that the plaintiff should have been awarded thirty percent (30%) of the defendant's gross retirement pay. The United State Supreme Court has held that only the "net" or "disposable" retirement pay of United States Military personnel can be divided in a Decree of Divorce. Mansell, 490 U.S. at 589, 101 S.Ct. at 2028. The Supreme Court found that the definition for "disposable" pay is contained directly in the language of 10 USC §1408(a)(4). This section of the United States Code reads as follows:

"The term "disposable retired pay" means the total monthly retired pay to which a member is entitled less amounts which

(A) are owed by that member to the United States for previous overpayments of retired pay and for

recoupments required by law resulting from entitlement to retired pay;

(B) are deducted from the retired pay of such other member as a result of forfeitures of retired pay ordered by a court-martial or as a result of a waiver of retired pay required by law in order to receive compensation under title 5 or title 38;

(C) in the case of a member entitled to retired pay under chapter 61 of this title [10 USC §§1201 et seq.], are equal to the amount of retired pay of the member under that chapter computed using the percentage of the member's disability on the date when the member was retired (or the date on which the members' name was placed on the temporary disability retired list); or

(D) are deducted because of an election under chapter 73 of this title [10 USC §§1431 et seq.] to provide an annuity to a spouse or former spouse to whom payment of a portion of such member's retired pay is being made pursuant to a court order under his section."

The District Court erroneously ordered that the plaintiff receive thirty percent (30%) of the defendant's gross retirement pay. The plaintiff is only entitled to a portion of the defendant's disposable retirement pay, if any. The District Court failed to make any findings of fact as to what the net pay of the defendant would be when all lawful deductions are taken out of the gross retirement pay and the defendant's disability benefits are excluded from the monthly income and analysis.

The plaintiff argues that the expert introduced at trial gave an accurate life expectancy for the defendant based upon the actuarial tables used by the plaintiff's expert. The District Court found that the method used by the plaintiff's expert was too speculative to accurately determine a present value of the

defendant's retirement fund. The District Court is correct in this determination. The retirement fund for the defendant will end upon the defendant's death. See 10 USC §1408(d)(4). This makes the present value of the defendant's retirement fund too speculative to determine at any point in time. The proper way to determine the present value of any income stream, such as the defendant's military retirement fund, is to know exactly how long the income stream lasts. It is impossible to determine the present value of an income stream when it is unknown how long the income stream will last. If the income stream lasts one period longer or one period shorter than the amount of time used to determine the present value of the income stream, the value of the income stream is different than what it was originally determined to be.

If the defendant dies then the value of the retirement benefits is nothing. If the defendant lives for a period of time longer than the time period used by the expert witness then the present value is greater than what the plaintiff's expert estimated it to be. It is too uncertain to determine a present value of the defendant's retirement income at this or any time in the future. If the District Court had ordered a lump sum payment of the retirement income, as estimated by the plaintiff's expert witness, it is almost a certainty that one party would be harmed by either receiving an award that is too small in terms of the actual value of the retirement benefits or would be paying out too much of the

marital estate to fulfill the court's order to divide the defendant's retirement fund.

The District Court determined that one way to solve this problem would be to provide the plaintiff a type of retirement fund by having the defendant provide the maximum amount available in the survivor's benefit plan. This way the plaintiff forgoes receiving a portion of the defendant's retirement plan at the present time in order to receive a secured income for the beneficiary upon the death of the defendant. When the defendant dies the plaintiff will receive survivor benefits for the remainder of her lifetime. This benefit will only decrease if the plaintiff begins to take social security benefits due to her from the defendant's work history. An offset does not occur for her own earned social security benefits. The plaintiff is actually gaining financial security in the long run because she will receive the secured income rather than a portion of the defendant's retirement fund that will end at the death of the defendant.

The District Court determined that a more equitable solution would be found in one of the two options presented by the court to the parties. The parties both finally choose the option where the plaintiff would forego the thirty percent of the defendant's net retirement pay and have the defendant provide the maximum survivors' benefit plan available. The defendant was ordered to pay for the costs of increasing the survivor's benefit plan in lieu of paying the plaintiff thirty percent of the retirement fund. The

court also ordered the defendant to pay \$500.00 per month in alimony to the plaintiff as part of this option.

The defendant, by providing the maximum survivor's benefits available, is providing a type of retirement benefit for the plaintiff. This is an equitable and fair resolution by the District Court to the problem of the division of the defendant's retirement fund.

The District Court acted properly in allowing the defendant to provide the plaintiff with the maximum survivor's benefit plan, which provides for the plaintiff's future needs, instead of ordering the defendant to pay thirty percent of the net retirement benefits. The District Court's order should be upheld by this Court and the defendant should keep the survivor's benefit plan at the current level.

C. Income for purposes of alimony and child support should not be imputed to the Defendant.

The plaintiff argues that the District Court should have imputed income to the defendant in an amount at least equal to the plaintiff's monthly income. The plaintiff's assertion of this argument is wholly unsupported by the evidence. The plaintiff relies upon Olson v. Olson, 704 P.2d 564 (Utah 1985) and Osguthorpe v. Osguthorpe, 804 P.2d 530 (Utah App. 1990) in her argument to say that the District Court should have imputed income to the defendant. The plaintiff relies upon the statements made in these decisions that historical income should be used by the court when

making an award of alimony. The cases cited by the plaintiff can easily be distinguished from this case.

The Olson court found that the defendant had a total lack of income even though he was working. This finding by the District Court allowed the court to impute income to the defendant for the determination of the alimony and child support awards. The Osguthorpe case imputed income to the defendant because the District Court found that the defendant was either overpaid when he began his career or was underpaid at the time of the trial. Again, the court made a specific finding as to why income should be imputed to the defendant in awarding alimony and child support. In this case the District Court has not made any findings of fact as to why any income should be imputed to the defendant. Neither did the plaintiff introduce any evidence at the trial that would allow the District Court to impute income to the defendant for any purpose.

The District Court found that the defendant received a monthly income in the form of a military retirement and disability income. The District Court also found that the defendant was unemployed. There were no findings that would support the District Court's imputing income to the defendant.

This Court has stated that "... the trial court must make adequate factual findings on all material issues unless the facts in the record are 'clear, uncontroverted, and capable of supporting only a finding in favor of the judgment.'" Rudman, 812 P.2d at

76. There were no findings of fact by the court as to the defendant's ability or opportunity to obtain employment comparable to what he had or enjoyed in the military or with Unisys. There were no findings of fact that would support the court in imputing income to the defendant.

The District Court's finding that the defendant was receiving a retirement benefit and a disability benefit was sufficient for the court to award alimony based upon these sources of income. The plaintiff's appeal does not take into account Utah Code Annotated §78-45-7.5(2). This section states that for child support purposes income from earned income sources is to be limited to the equivalent of one full-time job. The defendant's retirement pay should be considered the equivalent of one full-time job for purposes of computing child support. The defendant's retirement income from the military is sufficient income to base an alimony and child support award on. The disability income should be considered a separate source of income. The District Court used the combined retirement fund amount to base the award of support on. The District Court acted improperly in using this amount for the support award. This Court should uphold the District Court's decision, except for including the disability benefit amount as part of the defendant's monthly income used to determine the child support award, and not impute any income to the defendant.

D. The District Court's order for maximum coverage under the Survivor's Benefit Plan should be overturned.

The trial court also erred when it ordered the defendant to provide the maximum coverage available under the Survivors Benefit Plan. The Court lacks the proper power to make an order of this type under 10 USC §1448(a)(3)(A). The member of the military and their spouse are the proper persons to decide if the spouse or children should be covered by the SBP and at what level the coverage should be at, not the trial Court. It could be argued that a court may order participation in the plan but it may not order a specific level of participation. The federal law is set up so that the payor and the payor's spouse determine what the coverage amount should be. Congress' intent is shown in 10 USC §1448(a)(3)(A), which reads as follows:

"A married person who is eligible to provide a standard annuity may not without the concurrence of the person's spouse elect--

- (i) not to participate in the Plan;
- (ii) to provide an annuity for the person's spouse at less than the maximum level; or
- (iii) to provide an annuity for a dependent child but not for the person's spouse."

The parties in this case agreed that the defendant would provide a minimum amount of coverage under the SBP and not the maximum amount available. (Tr. 27). This agreement is in accord with the provisions of the Survivor's Benefit Plan as it was enacted by Congress. The defendant should not have been ordered by

the District Court to provide the maximum amount of coverage when the parties had already agreed that the defendant would provide a different amount of coverage for the plaintiff. The District Court's order regarding the Survivor's Benefit Plan should be reversed and the parties original agreement for coverage should be given full credit. This was a bargained for consideration by the parties which should not be disturbed on appeal.

E. The trial court's decision with respect to the issues of child support and the tax deduction allowed to the defendant for Sean Varallo should be upheld.

The District Court found that Sean Varallo is not a dependant for purposes of child support needs. (Tr. 194). Sean Varallo was examined by Dr. Chris Wale, a clinical psychologist who was called to testify on behalf of the plaintiff. Dr. Wale testified that Sean had an auditory processing difficulty with some difficulties in verbal expression and with his memory. (Tr. 119). Dr. Wale further testified that Sean might have trouble with self-motivation and would be a good candidate for "vocational rehabilitation." Dr. Wale did not know for certain what Sean's motivational level is. Plaintiff's counsel argued that there was no other evidence to show that Sean was not in need of further support from his father. However, this argument is unsupported by the evidence presented at the time of trial.

Sean Varallo testified at the trial that he does not have any physical disabilities. He did testify that he has an audio

auditory discrimination that affects the way he hears and the way he comprehends what people say at times. (Tr. 152). He further testified that he thought he could get by if he were shoved out into the world. He also testified that he can be highly motivated once he puts his mind to it and that he can do a good job if he made up his mind to do so. (Tr. 153-154). Sean has held jobs in the past and has enjoyed those jobs. (Tr. 148). Sean was competent to testify about his physical condition and testified that he did not have any physical impairment that would stop him from obtaining a high school degree or a job. This testimony is in direct conflict to Dr. Wale's testimony.

The District Court found that there was no need to order continuing child support for Sean Varallo. There were no demonstrated special circumstances that would require support payments to continue beyond the statutory period for support which ends when a child reaches the age of eighteen years. See Utah Code Annotated §78-45-7.10(1).

The District Court must make specific findings of fact as to the need of the child for continued support from the parents. The District Court must make specific findings of fact to justify an order of child support continuing beyond age eighteen (18) years. Fletcher v. Fletcher, 615 P.2d 1218 (Utah 1980). The trial court has the power to order continuing child support beyond age eighteen where "... exigent circumstances exist which necessitate further support of dependant children rather than allowing them to become

dependant on the State." Harris v. Harris, 585 P.2d 435 (Utah 1978). The evidence considered in a light most favorable to the plaintiff does not suggest the child will be dependant on the state.

In this case the District Court specifically found that Sean Varallo is not a dependant for child support purposes. (Tr. 194). This finding by the court is specific enough for this court to properly review this determination under the standard of review stated above. No abuse of discretion has been committed by the District Court when it entered its findings on this issue. The District Court referred to the testimony of the parties, Sean Varallo and the psychologist to properly make the findings of fact in support of this decision.

The plaintiff argues that the District Court abused its discretion in allowing the defendant the tax deduction for Sean Varallo as a dependant. The plaintiff urges this Court to overturn the District Court's decision and allow the plaintiff the tax deduction. The plaintiff relies upon Motes v. Motes, 786 P.2d 232, 239, (Utah App. 1990) cert. denied, 795 P.2d 1138 (Utah 1990), to say that the plaintiff should be allowed the tax deduction for Sean because under the Motes decision the tax deduction should be given to the parent who provides the "majority of support for the child."

The plaintiff maintains that she is providing virtually all of the support for Sean. She conveniently forgets to inform this Court that the defendant is providing the majority of support for

the minor daughter, Cara, who is still receiving child support from the defendant. Under the Motes rational the defendant should be given the tax deduction for the minor daughter because he is paying the majority of the support under the order of the District Court. The District Court found the defendant would be entitled to the tax deduction for one child and the plaintiff would be entitled to the tax deduction for the two other children. See Findings of Fact Number 21.

If the District Court committed any error in awarding the defendant the tax deduction for Sean Varallo it committed harmless error. The District Court's decision awarding the defendant the tax deduction for Sean Varallo and awarding the plaintiff the tax deduction for the other two children of the marriage should be upheld by this Court.

F. The District Court erred when it ordered the defendant to pay one-half of the education expenses for the children of the marriage until each child reaches the age of Twenty-two years.

The District Court ordered the parties to each pay one-half of the educational costs for each child until the child reaches the age of twenty-two (22) years. The District Court committed reversible error in making this order. The law of Utah on these issues provided that support for a child shall end when the child reaches the age of eighteen years or when the child graduates from high school during the child's normal and expected year of graduation. See Utah Code Annotated §78-45-7.10. In order for the

court to modify this statutory law the court must make specific and detailed findings of fact supporting its financial determinations. "Findings are adequate only if they are 'sufficiently detailed and include enough subsidiary facts to disclose the steps by which the ultimate conclusion on each factual issue was reached.'" Action, 737 P.2d at 999. The District Court made the finding that each parent was committed to the education of the children. See Findings of Fact No. 14. Based solely upon this finding the Court ordered each parent to pay one-half of the educational expenses for each child. Specifically, the parties were to pay for Valerie Varallo to complete the requirements for her degree at Westminster College, a private school. See Findings of Fact No. 14.

The Supreme Court of Utah has stated that it is improper for a court to compel a parent to assist a child in securing a college education. Ferguson v. Ferguson, 578 P.2d 1275 (Utah 1978). The Ferguson Court went on to say that a trial court may make such an order if some unusual circumstance exists. The Ferguson court did not list any such unusual circumstances as an example that would allow this type of order. No such facts exist in this case.

The District Court committed error in its order because the law states that support, including support so that the child may obtain a college education, for a child ends when the child reaches his or her majority. The District Court abused its discretion in making this order. The order of continuing support for education should be overturned by this court and the support order should

reflect the law of Utah and have the support terminate when each child reaches the age of majority.

G. It was error for the District Court to order the defendant to maintain insurance policies with an insurance company in receivership.

The District Court ordered the defendant to maintain the life insurance policies covering the defendant. (Tr. 200) The Court held that if the company which holds the life insurance policies was not viable then the court's order would be to discontinue the coverage. There was evidence presented at trial that the insurance company was in conservatorship and therefore financially unsound as an insurance carrier. The District Court did not make any specific findings on the viability of the insurance company that would allow the defendant to discontinue the insurance coverage with the present company. (Tr. 141). The District Court should have allowed the defendant to change the policies from the current insolvent company to a new and financially viable company. The District Court committed an abuse of its discretion by not allowing the defendant to change life insurance carriers. This Court should reverse the District Court's decision and allow the defendant to change to a financially sound life insurance carrier. The need for the insurance and the amount being determined, it should be left to the defendant to see how it was to be satisfied absent some showing that the carrier was unique.

H. The District Court abused its discretion when it ordered the defendant to pay one-half of the cost of restoring the plaintiff's retirement plan without also dividing the retirement plan as marital property.

The District Court ordered that all marital property be divided equally between the parties. The District Court also ordered the defendant to pay to the plaintiff the sum of \$4,250.00 so that the plaintiff could reinstate her government employee's retirement fund. However, the Court did not order the division of the plaintiff's retirement fund as marital property. It also did not determine how much the plaintiff's retirement benefits were accrued prior to the marriage.

When a court makes a division of marital property in a divorce the court may take into consideration all of the pertinent circumstances to the property. The Court in Woodward stated that these circumstances "encompass all of the assets of every nature possessed by the parties, whenever obtained and from whatever source derived; and that this includes any such pension fund or insurance." Woodward, 656 P.2d at 432. The plaintiff's retirement fund was obtained from her employment with the federal government while the parties were married. (Tr. 7-8). The portion of her retirement fund that was earned while the parties were married should have been included in the marital estate for division by the District Court.

The District Court abused its discretion when it failed to properly divide this asset of the marriage. This Court should

return the case to the trial court so that the trial court can properly divide the retirement fund according to the Woodward criteria.

I. The Bank of Scotland Bond should be divided equally between the parties as part of the marital estate.

During the course of the marriage the plaintiff inherited some property or money from her mother's estate. The money was put into different bank and security accounts. The plaintiff testified that she had tried to maintain the individual character of this property by keeping it separate from the rest of the marital property. (Tr. 19-20). The plaintiff also testified that the Bank of Scotland Bond was jointly held by the plaintiff and the defendant, this was the only security from the inheritance that was not held solely by the plaintiff. The plaintiff explained that the reason for holding the bond in a joint account was that "the broker agent did not have pay on death option when I opened that account." (Tr. 20). This statement alone indicates that the plaintiff intended for the defendant to be a recipient of those funds should the plaintiff die while the parties were still married. The plaintiff fully intended for the defendant to share the proceeds of her inheritance. She thus "commingled" this asst with the marital estate, giving the District Court the power to divide the proceeds of the bond as marital property.

The District Court failed to divide this bond between the parties as part of the marital estate when the court entered its

Decree of Divorce. The plaintiff did not segregate these funds from those of the marital estate. If she had intended to do so she would have bought the bond in her name alone. The trial court abused its discretion in not including the Bank of Scotland Bond with the marital estate. This Court should remand this issue to the trial court to make the findings of fact necessary to include the bond in the marital estate and to divide the proceeds from the bond equally between the parties.

J. The District court does not have jurisdiction to divide the defendant's disability benefits as part of the marital estate.

Under the Act, the state court is still prohibited from dividing any portion of retirement pay that a veteran waives in order to receive disability compensation. Disability benefits of a veteran are separate property that can not be divided by the state court. In Re: Stenquist 582 P.2d 96 (Calif. 1978). The District Court divided the defendant's total monthly benefits, including the disability benefits the defendant receives.

The District court committed an error when it included the disability benefits as part of the defendant's monthly divisible income. This Court should return the issue of the defendant's monthly income to the District court for a determination of the amount that is divisible for support purposes.

X. CONCLUSION

WHEREFORE the defendant in this matter respectfully requests that this Court:

A. Return to the District Court the issue of alimony in order for that court to properly determine if alimony should be paid to either party according to the Jones analysis;

B. Direct the District Court to amend the Decree of Divorce to conform the division of the defendant's retirement income to the current law;

C. Deny the plaintiff's demand that income be imputed to the defendant so that the plaintiff may have a greater amount of alimony and child support;

D. Overturn the District Court's order for the defendant to obtain and pay for the maximum level of the Survivor's Benefit Plan available to the defendant;

E. Uphold the District Court's order allowing the defendant the tax deduction for Sean Varallo and not having the defendant pay child support to the plaintiff for Sean;

F. Overturn the District Court's order of payment for the college educational expenses for the parties children;

G. Overturn the District Court's order that the defendant maintain insurance coverage with the insurance company in conservatorship;

H. Return the issue of the division of the marital property to the District Court to make a full division of marital property including the plaintiff's pension fund; and

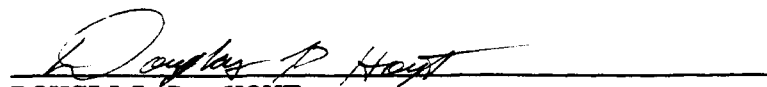
I. Return the issue of the Bank of Scotland Bond to the District Court so that proper findings of fact as to the bond being marital property can be entered by the court.

DATED this 26th day of September, 1994

JENSEN, DUFFIN, CARMAN, DIBB & JACKSON



W. KEVIN JACKSON



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VARA-APP.BRF

CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of the foregoing Brief of Appellee to the following:

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by placing the same in the United States Mail, postage prepaid,
this 26th day of September, 1994.

Addendum "A."

10 USC 1408

36 months (whether or not consecutive) of active duty as a member of a uniformed service.

(Added Sept. 8, 1980, P. L. 96-342, Title VIII, § 813(a)(1), 94 Stat. 1100; Dec. 12, 1980, P. L. 96-513, Title I, § 113(c), Title V, Part A, § 501(21), Part B, § 511(53), 94 Stat. 2877, 2908, 2925.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Amendments:

1980. Act Dec. 12, 1980 (effective upon enactment on 12/12/80, as provided by § 701(b)(3) of such Act, which appears as 10 USCS § 101 note), in subsec. (a)(1), substituted “after September 7, 1980” for “on or after the date of the enactment of the Department of Defense Authorization Act, 1981”.

Such Act further (effective 9/15/81, as provided by § 701(a) of such Act, which appears as 10 USCS § 101 note), in subsec. (b)(4) inserted “633, 634, 635, 636, 1251,”; in subsec. (d)(1) substituted “or 6383” for “6381, 6383, 6390, 6394, 6396, 6398, or 6400”.

Other provisions:

Effective date of 1980 amendment. Act Dec. 12, 1980, P.L. 96-513, Title VII, § 701(a), 94 Stat. 2955, provided that the amendment made to this section “shall take effect on September 15, 1981”, except as provided in § 701(b)(1) of such Act Dec. 12, 1980, which appears as 10 USCS § 101 note.

CROSS REFERENCES:

This section is referred to in 10 USCS §§ 1401, 1402, 1402a, 3991, 3992, 6151, 6322, 6323, 6325, 6326, 6330, 6383, 8991, 8992; 14 USCS § 423; 33 USCS § 853o; 42 USCS §§ 211, 212.

INTERPRETIVE NOTES AND DECISIONS

Erroneous payments of basic pay are not includable in computation of service member's retirement pay base; provision that retired pay base is computed on basic pay “received” is

limited to basic pay service member was legally entitled to receive. (1983) 62 Op Comp Gen p 157.

§ 1408. Payment of retired or ~~retainer~~ pay in compliance with court orders

(a) In this section:

(1) “Court” means—

(A) any court of competent jurisdiction of any State, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the Virgin Islands, the Northern Mariana Islands, and the Trust Territory of the Pacific Islands;

(B) any court of the United States (as defined in section 451 of title 28 [28 USCS § 451]) having competent jurisdiction; and

(C) any court of competent jurisdiction of a foreign country with which the United States has an agreement requiring the United States to honor any court order of such country.

(2) "Court order" means a final decree of divorce, dissolution, annulment, or legal separation issued by a court, or a court ordered, ratified, or approved property settlement incident to such a decree (including a final decree modifying the terms of a previously issued decree of divorce, dissolution, annulment, or legal separation, or a court ordered, ratified, or approved property settlement incident to such previously issued decree), which—

(A) is issued in accordance with the laws of the jurisdiction of that court;

(B) provides for—

(i) payment of child support (as defined in section 462(b) of the Social Security Act (42 U.S.C. 662(b)) [42 USCS § 662(b)]);

(ii) payment of alimony (as defined in section 462(c) of the Social Security Act (42 U.S.C. 662(c)) [42 USCS § 662(c)]); or

(iii) division of property (including a division of community property); and

(C) in the case of a division of property, specifically provides for the payment of an amount, expressed in dollars or as a percentage of disposable retired or retainer pay, from the disposable retired or retainer pay of a member to the spouse or former spouse of that member.

(3) "Final decree" means a decree from which no appeal may be taken or from which no appeal has been taken within the time allowed for taking such appeals under the laws applicable to such appeals, or a decree from which timely appeal has been taken and such appeal has been finally decided under the laws applicable to such appeals.

(4) "Disposable retired or retainer pay" means the total monthly retired or retainer pay to which a member is entitled (other than the retired pay of a member retired for disability under chapter 61 of this title [10 USCS §§ 1201 et seq.]) less amounts which—

(A) are owed by that member to the United States;

(B) are required by law to be and are deducted from the retired or retainer pay of such member, including fines and forfeitures ordered by courts-martial, Federal employment taxes, and amounts waived in order to receive compensation under title 5 or title 38 [5 USCS §§ 101 et seq.; 38 USCS §§ 101 et seq.];

(C) are properly withheld for Federal, State, or local income tax purposes, if the withholding of such amounts is authorized or required by law and to the extent such amounts withheld are not greater than would be authorized if such member claimed all dependents to which he was entitled;

(D) are withheld under section 3402(i) of the Internal Revenue Code of 1954 (26 U.S.C. 3402(i)) [26 USCS § 3402(i)] if such member

presents evidence of a tax obligation which supports such withholding;

(E) are deducted as Government life insurance premiums (not including amounts deducted for supplemental coverage); or

(F) are deducted because of an election under chapter 73 of this title [10 USCS §§ 1431 et seq.] to provide an annuity to a spouse or former spouse to whom payment of a portion of such member's retired or retainer pay is being made pursuant to a court order under this section.

(5) "Member" includes a former member.

(6) "Spouse or former spouse" means the husband or wife, or former husband or wife, respectively, of a member who, on or before the date of a court order, was married to that member.

(b) For the purposes of this section—

(1) service of a court order is effective if—

(A) an appropriate agent of the Secretary concerned designated for receipt of service court orders under regulations prescribed pursuant to subsection (h) or, if no agent has been so designated, the Secretary concerned, is personally served or is served by certified or registered mail, return receipt requested;

(B) the court order is regular on its face;

(C) the court order or other documents served with the court order identify the member concerned and include, if possible, the social security number of such member; and

(D) the court order or other documents served with the court order certify that the rights of the member under the Soldiers' and Sailors' Civil Relief Act of 1940 (50 U.S.C. App. 501 et seq.) [50 USCS Appx §§ 501 et seq.] were observed; and

(2) a court order is regular on its face if the order—

(A) is issued by a court of competent jurisdiction;

(B) is legal in form; and

(C) includes nothing on its face that provides reasonable notice that it is issued without authority of law.

(c)(1) 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.

(2) Notwithstanding any other provision of law, this section does not create any right, title, or interest which can be sold, assigned, transferred, or otherwise disposed of (including by inheritance) by a spouse or former spouse.

(3) This section does not authorize any court to order a member to apply for retirement or retire at a particular time in order to effectuate any payment under this section.

(4) A court may not treat the disposable retired or retainer pay of a member in the manner described in paragraph (1) unless the court has jurisdiction over the member by reason of (A) his residence, other than because of military assignment, in the territorial jurisdiction of the court, (B) his domicile in the territorial jurisdiction of the court, or (C) his consent to the jurisdiction of the court.

(d)(1) After effective service on the Secretary concerned of a court order providing for the payment of child support or alimony or, with respect to a division of property, specifically providing for the payment of an amount of the disposable retired or retainer pay from a member to the spouse or a former spouse of the member, the Secretary shall make payments (subject to the limitations of this section) from the disposable retired or retainer pay of the member to the spouse or former spouse in an amount sufficient to satisfy the amount of child support and alimony set forth in the court order and, with respect to a division of property, in the amount of disposable retired or retainer pay specifically provided for in the court order. In the case of a member entitled to receive retired or retainer pay on the date of the effective service of the court order, such payments shall begin not later than 90 days after the date of effective service. In the case of a member not entitled to receive retired or retainer pay on the date of the effective service of the court order, such payments shall begin not later than 90 days after the date on which the member first becomes entitled to retired or retainer pay.

(2) If the spouse or former spouse to whom payments are to be made under this section was not married to the member for a period of 10 years or more during which the member performed at least 10 years of service creditable in determining the member's eligibility for retired or retainer pay, payments may not be made under this section to the extent that they include an amount resulting from the treatment by the court under subsection (c) of disposable retired or retainer pay of the member as property of the member or property of the member and his spouse.

(3) Payments under this section shall not be made more frequently than once each month, and the Secretary concerned shall not be required to vary normal pay and disbursement cycles for retired or retainer pay in order to comply with a court order.

(4) Payments from the disposable retired or retainer pay of a member pursuant to this section shall terminate in accordance with the terms of the applicable court order, but not later than the date of the death of the member or the date of the death of the spouse or former spouse to whom payments are being made, whichever occurs first.

(5) If a court order described in paragraph (1) provides for a division of property (including a division of community property) in addition to an amount of child support or alimony or the payment of an amount of disposable retired or retainer pay as the result of the court's treatment of such pay under subsection (c) as property of the member and his spouse, the Secretary concerned shall pay (subject to the limitations of this section) from the disposable retired or retainer pay of the member to the

spouse or former spouse of the member, any part of the amount payable to the spouse or former spouse under the division of property upon effective service of a final court order of garnishment of such amount from such retired or retainer pay.

(e)(1) The total amount of the disposable retired or retainer pay of a member payable under subsection (d) may not exceed 50 percent of such disposable retired or retainer pay.

(2) In the event of effective service of more than one court order which provide for payment to a spouse and one or more former spouses or to more than one former spouse the disposable retired or retainer pay of the member shall be used to satisfy (subject to the limitations of paragraph (1)) such court orders on a first-come, first-served basis. Such court orders shall be satisfied (subject to the limitations of paragraph (1)) out of that amount of disposable retired or retainer pay which remains after the satisfaction of all court orders which have been previously served.

(3)(A) In the event of effective service of conflicting court orders under this section which assert to direct that different amounts be paid during a month to the same spouse or former spouse of the same member, the Secretary concerned shall—

(i) pay to that spouse from the member's disposable retired or retainer pay the least amount directed to be paid during that month by any such conflicting court order, but not more than the amount of disposable retired or retainer pay which remains available for payment of such courts orders based on when such court orders were effectively served and the limitations of paragraph (1) and subparagraph (B) of paragraph (4);

(ii) retain an amount of disposable retired or retainer pay that is equal to the lesser of—

(I) the difference between the largest amount required by any conflicting court order to be paid to the spouse or former spouse and the amount payable to the spouse or former spouse under clause (i); and

(II) the amount of disposable retired or retainer pay which remains available for payment of any conflicting court order based on when such court order was effectively served and the limitations of paragraph (1) and subparagraph (B) of paragraph (4); and

(iii) pay to that member the amount which is equal to the amount of that member's disposable retired or retainer pay (less any amount paid during such month pursuant to legal process served under section 459 of the Social Security Act (42 U.S.C. 659) [42 USCS § 659] and any amount paid during such month pursuant to court orders effectively served under this section, other than such conflicting court orders) minus—

(I) the amount of disposable retired or retainer pay paid under clause (i); and

(II) the amount of disposable retired or retainer pay retained under clause (ii).

(B) The Secretary concerned shall hold the amount retained under clause (ii) of subparagraph (A) until such time as that Secretary is provided with a court order which has been certified by the member and the spouse or former spouse to be valid and applicable to the retained amount. Upon being provided with such an order, the Secretary shall pay the retained amount in accordance with the order.

(4)(A) In the event of effective service of a court order under this section and the service of legal process pursuant to section 459 of the Social Security Act (42 U.S.C. 659) [42 USCS § 659], both of which provide for payments during a month from the same member, satisfaction of such court orders and legal process from the retired or retainer pay of the member shall be on a first-come, first-served basis. Such court orders and legal process shall be satisfied out of moneys which are subject to such orders and legal process and which remain available in accordance with the limitations of paragraph (1) and subparagraph (B) of this paragraph during such month after the satisfaction of all court orders or legal process which have been previously served.

(B) Notwithstanding any other provision of law, the total amount of the disposable retired or retainer pay of a member payable by the Secretary concerned under all court orders pursuant to this section and all legal processes pursuant to section 459 of the Social Security Act (42 U.S.C. 659) [42 USCS § 659] with respect to a member may not exceed 65 percent of the disposable retired or retainer pay payable to such member.

(5) A court order which itself or because of previously served court orders provides for the payment of an amount which exceeds the amount of disposable retired or retainer pay available for payment because of the limit set forth in paragraph (1), or which, because of previously served court orders or legal process previously served under section 459 of the Social Security Act (42 U.S.C. 659) [42 USCS § 659], provides for payment of an amount that exceeds the maximum amount permitted under paragraph (1) or subparagraph (B) of paragraph (4), shall not be considered to be irregular on its face solely for that reason. However, such order shall be considered to be fully satisfied for purposes of this section by the payment to the spouse or former spouse of the maximum amount of disposable retired or retainer pay permitted under paragraph (1) and subparagraph (B) of paragraph (4).

(6) Nothing in this section shall be construed to relieve a member of liability for the payment of alimony, child support, or other payments required by a court order on the grounds that payments made out of disposable retired or retainer pay under this section have been made in

the maximum amount permitted under paragraph (1) or subparagraph (B) of paragraph (4). Any such unsatisfied obligation of a member may be enforced by any means available under law other than the means provided under this section in any case in which the maximum amount permitted under paragraph (1) has been paid and under section 459 of the Social Security Act (42 U.S.C. 659) [42 USCS § 649] in any case in which the maximum amount permitted under subparagraph (B) of paragraph (4) has been paid.

(f)(1) The United States and any officer or employee of the United States shall not be liable with respect to any payment made from retired or retainer pay to any member, spouse, or former spouse pursuant to a court order that is regular on its face if such payment is made in accordance with this section and the regulations prescribed pursuant to subsection (h).

(2) An officer or employee of the United States who, under regulations prescribed pursuant to subsection (h), has the duty to respond to interrogatories shall not be subject under any law to any disciplinary action or civil or criminal liability or penalty for, or because of, any disclosure of information made by him in carrying out any of his duties which directly or indirectly pertain to answering such interrogatories.

(g) A person receiving effective service of a court order under this section shall, as soon as possible, but not later than 30 days after the date on which effective service is made, send a written notice of such court order (together with a copy of such order) to the member affected by the court order at his last known address.

(h) The Secretaries concerned shall prescribe uniform regulations for the administration of this section.

(Added Sept. 8, 1982, P. L. 97-252, Title X, § 1002(a), 96 Stat. 730; Oct. 19, 1984, P. L. 98-525, Title VI, Part E, § 643(a)-(d), 98 Stat. 2547.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Effective date of section:

Act Sept. 8, 1982, P. L. 97-252, Title X, § 1006, 96 Stat. 737, which appears as a note to this section, provided that this section, as added by such Act, is effective on the first day of the first month which begins more than one hundred and twenty days after enactment on Sept. 8, 1982.

Amendments:

1984. Act Oct. 19, 1984, in subsec. (a)(2)(C), inserted “in the case of a division of property,”; in subsec. (b)(1)(C), inserted “, if possible,”; in subsec. (d), in para. (1), substituted “After effective service on the Secretary concerned of a court order providing for the payment of child support or alimony or, with respect to a division of property, specifically providing for the payment of an amount of the disposable retired or retainer pay from a member to the spouse or a former spouse of the member, the Secretary shall make payments (subject to the

limitations of this section) from the disposable retired or retainer pay of the member to the spouse or former spouse in an amount sufficient to satisfy the amount of child support and alimony set forth in the court order and, with respect to a division of property, in the amount of disposable retired or retainer pay specifically provided for in the court order." for "After effective service on the secretary concerned of a court order with respect to the payment of a portion of the retired or retainer pay of a member to the spouse or a former spouse of the member, the Secretary shall, subject to the limitations of this section, make payments to the spouse or former spouse in the amount of the disposable retired or retainer pay of the member specifically provided for in the court order.", in para. (5), substituted "child support or alimony or the payment of an amount of disposable retired or retainer pay as the result of the court's treatment of such pay under subsection (c) as property of the member and his spouse, the Secretary concerned shall pay (subject to the limitations of this section) from the disposable retired or retainer pay of the member to the spouse or former spouse of the member, any part" for "disposable retired or retainer pay, the Secretary concerned shall, subject to the limitations of this section, pay to the spouse or former spouse of the member, from the disposable retired or retainer pay of the member, any part"; and in subsec. (e), in para. (2), substituted ", the disposable retired or retainer pay of the member" for "from the disposable retired or retainer pay of a member, such pay", in para. (3)(A), in the introductory matter, deleted "from the disposable retired or retainer pay" following "former spouse", in cl. (i), substituted "from the member's disposable retired or retainer pay the least amount" for "the least amount of disposable retired or retainer pay", in cl. (ii)(I), deleted "of retired or retainer pay" following "largest amount", in para. (4)(A), deleted "the retired or retainer pay of" following "month from", and substituted "satisfaction of such court orders and legal process from the retired or retainer pay of the member shall be" for "such court orders and legal process shall be satisfied", and in para. (5), deleted "of disposable retired or retainer pay" in two places following "payment of an amount", and substituted "disposable retired or retainer pay" for "such pay" following "which exceeds the amount of".

Other provisions:

Commissary and exchange privileges. Act Sept. 8, 1982, P. L. 97-252, Title X, § 1005, 96 Stat. 737, effective on the first day of the first month which begins more than 120 days after enactment on Sept. 8, 1982, as provided by ¶ 1006(a) of such Act, which appears as 10 USCS § 1408 note, provided: "The Secretary of Defense shall prescribe such regulations as may be necessary to provide that an unremarried former spouse described in subparagraph (F)(i) of section 1072(2) of title 10, United States Code [10 USCS § 1072(2)(F)(i)] (as added by section 1004), is entitled to commissary and post exchange privileges to the same extent and on the same basis as the surviving spouse of a retired member of the uniformed services."

Effective dates and transition of amendments by Act Sept. 8, 1982; application of subsec. (d). Act Sept 8, 1982, P. L. 97-252, Title X,

10 USCS § 1408

GEN. MIL. LAW—PERSONNEL

§ 1006, 96 Stat. 737; Sept. 24, 1983, P. L. 98-94, Title IX, Part D, § 941(c)(4), 97 Stat. 654; Oct. 19, 1984, P. L. 98-525, Title VI, Part E, § 645(b), 98 Stat. 2549, effective Jan. 1, 1985, as provided by § 645(d) in part of such Act, which appears as 10 USCS § 1072 note, provided:

“(a) The amendments made by this title [which, among other things, enacted this section; for full classification, consult USCS Tables volumes] shall take effect on the first day of the first month which begins more than one hundred and twenty days after the date of the enactment of this title [enacted Sept. 8, 1982].

“(b) Subsection (d) of section 1408 of title 10, United States Code [subsec. (d) of this section], as added by section 1002(a), shall apply only with respect to payments of retired or retainer pay for periods beginning on or after the effective date of this title [subsec. (a) of this note], but without regard to the date of any court order. However, in the case of a court order that became final before June 26, 1981, payments under such subsection may only be made in accordance with such order as in effect on such date and without regard to any subsequent modifications.

“(c) The amendments made by section 1003 of this title [10 USCS §§ 1447, 1448 and 1450] shall apply to persons who become eligible to participate in the Survivor Benefit Plan provided for in subchapter II of chapter 73 of title 10, United States Code [10 USCS §§ 1447 et seq.], before, on, or after the effective date of such amendments [subsec. (a) of this note].

“(d) The amendments made by section 1004 of this title [10 USCS §§ 1072, 1076 and 1086] and the provisions of section 1005 of this title [note to this section] shall apply in the case of any former spouse of a member or former member of the uniformed services whether the final decree of divorce, dissolution, or annulment of the marriage of the former spouse and such member or former member is dated before, on, or after February 1, 1983.

“(e) For the purposes of this section—

“(1) the term ‘court order’ has the same meaning as provided in section 1408(a)(2) of title 10, United States Code [subsec. (a)(2) of this section] (as added by section 1002 of this title);

“(2) the term ‘former spouse’ has the same meaning as provided in section 1408(a)(6) of such title [subsec. (a)(6) of this section] (as added by section 1002 of this title); and

“(3) the term ‘uniformed services’ has the same meaning as provided in section 1072 of title 10, United States Code [10 USCS § 1072].”.

Application of Oct. 19, 1984 amendments. Act Oct. 19, 1984, P. L. 98-525, Title VI, Part E, § 643(e), 98 Stat. 2548, provides: “The amendments made by this section [amending this section] shall apply with respect to court orders for which effective service (as described in section 1408(b)(1) of title 10, United States Code [subsec. (b)(1) of this section], as amended by subsection (b) of this section) is made on or after the date of the enactment of this Act [enacted Oct. 19, 1984].”.

CODE OF FEDERAL REGULATIONS

Establishment of policy and authorization for direct payments to former spouse of member of armed forces from retired pay in response to court-order alimony, child support, or division of property, 32 CFR Part 63.

CROSS REFERENCES:

This section is referred to in 10 USCS § 1447.

RESEARCH GUIDE

Am Jur:

24 Am Jur 2d, Divorce and Separation § 909.

INTERPRETIVE NOTES AND DECISIONS

VERALEX™: Cases and annotations referred to herein can be further researched through the VERALEX electronic retrieval system's two services, Auto-Cite® and SHOWME™. Use Auto-Cite to check citations for form, parallel references, prior and later history, and annotation references. Use SHOWME to display the full text of cases and annotations.

1. Generally
2. Purpose
3. Retroactivity
4. Pay subject to apportionment and direct payment
5. 10-year marriage requirement

1. Generally

Requirement in predecessor to 10 USCS § 1448(a) that spouse be notified if person eligible to participate in plan elects not to participate applies only to service member who is automatically enrolled in Survivor Benefit Plan because he retires on or after effective date of § 1448; requirement does not apply with respect to service member who was already entitled to retired or retainer pay and who was permitted by Congress but declined to elect to participate in Plan. *Passaro v United States* (1985, CA FC) 774 F2d 456.

Trial court erred in declaring military pension to be husband's separate property, notwithstanding that Uniformed Services Former Spouse's Protection Act (10 USCS § 1408) gives each state power to deal with military pensions as it sees fit. In re *Marriage of Sarles* (1983, 4th Dist) 143 Cal App 3d 24, 191 Cal Rptr 514.

Fact that § 1408 is effective February 1, 1983 does not bar action by former wife, divorced from serviceman in 1966, for community interest in serviceman's military retirement pension, where former wife does not seek to modify or reopen 1966 judgment, and where her action is independent one to divide asset which was not

before divorce court in 1966 and was not altered by divorce decree. *Casas v Thompson* (1985, 4th Dist) 171 Cal App 3d 458, 217 Cal Rptr 471.

Division of value by state Family Court of right of United States Public Health veterinarian to retire and receive benefits does not violate 10 USCS § 1408. *Wallace v Wallace* (1984) 5 Hawaii App 55, 677 P2d 966.

Section 1048(c)(1) does not mandate that military retirement pension be shared by recipient and recipient's former spouse; it only authorizes division, and leaves to state courts decision regarding whether any allocation is to be made. Re *Marriage of Habermehl* (1985, 5th Dist) 135 Ill App 3d 105, 89 Ill Dec 939, 481 NE2d 782.

Former Spouses' Protection Act (10 USCS § 1408) allowing courts to consider retirement pay in fashioning divorce settlements permits but does not command state courts to consider military retirement benefit as marital property; Act provides power to each state to deal with military pensions in manner in which it had previously treated them or chooses to treat them in future. *Koenes v Koenes* (1985, Ind App) 478 NE2d 1241.

Prior judgment awarding approximately one-half of military retiree's future benefits is res judicata, notwithstanding subsequent decision by United States Supreme Court in *McCarty v McCarty* (1981) 453 US 210, 69 L Ed 2d 589, 101 S Ct 2728, 2 EBC 1502 (superseded by statute as stated in *Chase v Chase* (Alaska) 662 P2d 944) and (superseded by statute as stated in

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hich read:

"(c) Computation of high-three average. (1) Formula. For the purposes of this section, a member's high-three average is the amount equal to—

"(A) the total amount of monthly basic pay to which the member was entitled for the member's high-36 months, divided by

"(B) 36.

"(2) High-36 months defined. (A) General rule. A member's high-36 months are the 36 months out of all the months of active duty served by the member as a member of a uniformed service for which the monthly basic pay to which the member was entitled was the highest.

"(B) Rule for non-regular service retirees. In the case of a member who is entitled to retired pay under section 1204 or 1205 of this title or under chapter 67 of this title, a member's high-36 months are the 36 months out of all the months the member was a member of a uniformed service before becoming entitled to retired pay for which the monthly basic pay to which the member would have been entitled had he served on active duty during those months was the highest."

Such Act further redesignated former subsec. (d) as subsec. (e); added new subsecs. (c) and (d); and deleted former subsecs. (e)-(g), which read:

"(e) Special rules for short-term disability retirees. (1) Members entitled to retired pay under section 1201 or 1202. In the case of a member who—

"(A) is entitled to retired pay under section 1201 or 1202 of this title; and

"(B) served on active duty for less than 36 months, the months (including any fraction thereof) that the member served on active duty shall be deemed to be the member's high-36 months.

"(2) Members entitled to retired pay under section 1204 or 1205. In the case of a member who—

"(A) is entitled to retired pay under section 1204 or 1205 of this title; and

"(B) was a member of a uniformed service for less than 36 months, the months (including any fraction thereof) that the member was such a member shall be deemed to be the member's high-36 months.

"(f) Special rule for members retiring with non-regular service. (1) Disability retirement. In the case of a member of a uniformed service who is entitled to retired pay under section 1204 or 1205 of this title (relating to members on active duty for 30 days or less), the high-36 average is determined as if the member served on active duty and was entitled to basic pay for the member's high-36 months.

"(2) Chapter 67 retirement. In the case of a person who is entitled to retired pay under section 1331 of this title (relating to retired pay for non-regular service), the person's high-36 average is determined as if the person served on active duty and was entitled to basic pay for the person's high-36 months.

"(g) Definition. In this section, the term 'years of creditable service' means the number of years of service creditable to a member in computing the member's retired or retainer pay (including $\frac{1}{12}$ of a year for each full month of service that is in addition to the number of full years of service of the member)."

§ 1408. Payment of retired or retainer pay in compliance with court orders

(a) Definitions. In this section:

(1) The term "court" means—

(A) any court of competent jurisdiction of any State, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the Virgin Islands, the Northern Mariana Islands, and the Trust Territory of the Pacific Islands;

(B) any court of the United States (as defined in section 451 of title 28) having competent jurisdiction; and

(C) any court of competent jurisdiction of a foreign country with which the United States has an agreement requiring the United States to honor any court order of such country.

(2) The term "court order" means a final decree of divorce, dissolution, annulment, or legal separation issued by a court, or a court ordered, ratified, or approved property settlement incident to such a decree (including a final decree modifying the terms of a previously issued decree of divorce, dissolution, annulment, or legal separation, or a court ordered, ratified, or approved property settlement incident to such previously issued decree), which—

(A) is issued in accordance with the laws of the jurisdiction of that court;

(B) provides for—

(i) payment of child support (as defined in section 462(b) of the Social Security Act (42 U.S.C. 662(b)));

(ii) payment of alimony (as defined in section 462(c) of the Social Security Act (42 U.S.C. 662(c))); or

(iii) division of property (including a division of community property); and

(C) in the case of a division of property, specifically provides for the payment of an

amount, expressed in dollars or as a percentage of disposable retired pay, from the disposable retired pay of a member to the spouse or former spouse of that member.

- (3) The term "final decree" means a decree from which no appeal may be taken or from which no appeal has been taken within the time allowed for taking such appeals under the laws applicable to such appeals, or a decree from which timely appeal has been taken and such appeal has been finally decided under the laws applicable to such appeals.
- (4) The term "disposable retired pay" means the total monthly retired pay to which a member is entitled less amounts which—
 - (A) are owed by that member to the United States for previous overpayments of retired pay and for recoupments required by law resulting from entitlement to retired pay;
 - (B) are deducted from the retired pay of such member as a result of forfeitures of retired pay ordered by a court-martial or as a result of a waiver of retired pay required by law in order to receive compensation under title 5 or title 38;
 - (C) in the case of a member entitled to retired pay under chapter 61 of this title [10 USCS §§ 1201 et seq.], are equal to the amount of retired pay of the member under that chapter computed using the percentage of the member's disability on the date when the member was retired (or the date on which the member's name was placed on the temporary disability retired list); or
 - (D) are deducted because of an election under chapter 73 of this title [10 USCS §§ 1431 et seq.] to provide an annuity to a spouse or former spouse to whom payment of a portion of such member's retired pay is being made pursuant to a court order under this section.
 - (E), (F) [Redesignated]
- (5) The term "member" includes a former member entitled to retired pay under section 1331 of this title.
- (6) The term "spouse or former spouse" means the husband or wife, or former husband or wife, respectively, of a member who, on or before the date of a court order, was married to that member.
- (7) The term "retired pay" includes retainer pay.
- (b) **Effective service of process.** For the purposes of this section—
 - (1) service of a court order is effective if—
 - (A) an appropriate agent of the Secretary concerned designated for receipt of service court orders under regulations prescribed pursuant to subsection (i) or, if no agent has been so designated, the Secretary concerned, is personally served or is served by certified or registered mail, return receipt requested;
 - (B) the court order is regular on its face;
 - (C) the court order or other documents served with the court order identify the member concerned and include, if possible, the social security number of such member; and
 - (D) the court order or other documents served with the court order certify that the rights of the member under the Soldiers' and Sailors' Civil Relief Act of 1940 (50 U.S.C. App. 501 et seq.) were observed; and
 - (2) a court order is regular on its face if the order—
 - (A) is issued by a court of competent jurisdiction;
 - (B) is legal in form; and
 - (C) includes nothing on its face that provides reasonable notice that it is issued without authority of law.
- (c) **Authority for court to treat retired pay as property of the member and spouse.** (1) Subject to the limitations of this section, a court may treat disposable retired pay payable to a member for pay periods beginning after June 25, 1981, either as property solely of the member or as property of the member and his spouse in accordance with the law of the jurisdiction of such court. A court may not treat retired pay as property in any proceeding to divide or partition any amount of retired pay of a member as the property of the member and the member's spouse or former spouse if a final decree of divorce, dissolution, annulment, or legal separation (including a court ordered, ratified, or approved property settlement incident to such decree) affecting the member and the member's spouse or former spouse (A) was issued before June 25, 1981, and (B) did not treat (or reserve jurisdiction to treat) any amount of retired pay of the member as property of the member and the member's spouse or former spouse.
- (2) Notwithstanding any other provision of law, this section does not create any right, title, or interest which can be sold, assigned, transferred, or otherwise disposed of (including by inheritance) by a spouse or former spouse. Payments by the Secretary concerned under subsection (d) to a spouse or former spouse with respect to a division of retired pay as the property of a member and the member's spouse under this subsection may not be treated as amounts received as retired pay for service in the uniformed services.

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(3) This section does not authorize any court to order a member to apply for retirement or retire at a particular time in order to effectuate any payment under this section.

(4) A court may not treat the disposable retired pay of a member in the manner described in paragraph (1) unless the court has jurisdiction over the member by reason of (A) his residence, other than because of military assignment, in the territorial jurisdiction of the court, (B) his domicile in the territorial jurisdiction of the court, or (C) his consent to the jurisdiction of the court.

(d) **Payments by Secretary concerned to spouse or former spouse.** (1) After effective service on the Secretary concerned of a court order providing for the payment of child support or alimony or, with respect to a division of property, specifically providing for the payment of an amount of the disposable retired pay from a member to the spouse or a former spouse of the member, the Secretary shall make payments (subject to the limitations of this section) from the disposable retired pay of the member to the spouse or former spouse in an amount sufficient to satisfy the amount of child support and alimony set forth in the court order and, with respect to a division of property, in the amount of disposable retired pay specifically provided for in the court order. In the case of a member entitled to receive retired pay on the date of the effective service of the court order, such payments shall begin not later than 90 days after the date of effective service. In the case of a member not entitled to receive retired pay on the date of the effective service of the court order, such payments shall begin not later than 90 days after the date on which the member first becomes entitled to retired pay.

(2) If the spouse or former spouse to whom payments are to be made under this section was not married to the member for a period of 10 years or more during which the member performed at least 10 years of service creditable in determining the member's eligibility for retired pay, payments may not be made under this section to the extent that they include an amount resulting from the treatment by the court under subsection (c) of disposable retired pay of the member as property of the member or property of the member and his spouse.

(3) Payments under this section shall not be made more frequently than once each month, and the Secretary concerned shall not be required to vary normal pay and disbursement cycles for retired pay in order to comply with a court order.

(4) Payments from the disposable retired pay of a member pursuant to this section shall terminate in accordance with the terms of the applicable court order, but not later than the date of the death of the member or the date of the death of the spouse or former spouse to whom payments are being made, whichever occurs first.

(5) If a court order described in paragraph (1) provides for a division of property (including a division of community property) in addition to an amount of child support or alimony or the payment of an amount of disposable retired pay as the result of the court's treatment of such pay under subsection (c) as property of the member and his spouse, the Secretary concerned shall pay (subject to the limitations of this section) from the disposable retired pay of the member to the spouse or former spouse of the member, any part of the amount payable to the spouse or former spouse under the division of property upon effective service of a final court order of garnishment of such amount from such retired pay.

(e) **Limitations.** (1) The total amount of the disposable retired pay of a member payable under all court orders pursuant to subsection (c) may not exceed 50 percent of such disposable retired pay.

(2) In the event of effective service of more than one court order which provide for payment to a spouse and one or more former spouses or to more than one former spouse the disposable retired pay of the member shall be used to satisfy (subject to the limitations of paragraph (1)) such court orders on a first-come, first-served basis. Such court orders shall be satisfied (subject to the limitations of paragraph (1)) out of that amount of disposable retired pay which remains after the satisfaction of all court orders which have been previously served.

(3)(A) In the event of effective service of conflicting court orders under this section which assert to direct that different amounts be paid during a month to the same spouse or former spouse of the same member, the Secretary concerned shall—

(i) pay to that spouse from the member's disposable retired pay the least amount directed to be paid during that month by any such conflicting court order, but not more than the amount of disposable retired pay which remains available for payment of such court orders based on when such court orders were effectively served and the limitations of paragraph (1) and subparagraph (B) of paragraph (4),

(ii) retain an amount of disposable retired pay that is equal to the lesser of—

(I) the difference between the largest amount required by any conflicting court order to be paid to the spouse or former spouse and the amount payable to the spouse or former spouse under clause (i), and

- (II) the amount of disposable retired pay which remains available for payment of any conflicting court order based on when such court order was effectively served and the limitations of paragraph (1) and subparagraph (B) of paragraph (4); and
- (iii) pay to that member the amount which is equal to the amount of that member's disposable retired pay (less any amount paid during such month pursuant to legal process served under section 459 of the Social Security Act (42 U.S.C. 659) and any amount paid during such month pursuant to court orders effectively served under this section, other than such conflicting court orders) minus—
- (I) the amount of disposable retired pay paid under clause (i); and
- (II) the amount of disposable retired pay retained under clause (ii).
- (B) The Secretary concerned shall hold the amount retained under clause (ii) of subparagraph (A) until such time as that Secretary is provided with a court order which has been certified by the member and the spouse or former spouse to be valid and applicable to the retained amount. Upon being provided with such an order, the Secretary shall pay the retained amount in accordance with the order.
- (4)(A) In the event of effective service of a court order under this section and the service of legal process pursuant to section 459 of the Social Security Act (42 U.S.C. 659), both of which provide for payments during a month from the same member, satisfaction of such court orders and legal process from the retired pay of the member shall be on a first-come, first-served basis. Such court orders and legal process shall be satisfied out of moneys which are subject to such orders and legal process and which remain available in accordance with the limitations of paragraph (1) and subparagraph (B) of this paragraph during such month after the satisfaction of all court orders or legal process which have been previously served.
- (B) Notwithstanding any other provision of law, the total amount of the disposable retired pay of a member payable by the Secretary concerned under all court orders pursuant to this section and all legal processes pursuant to section 459 of the Social Security Act (42 U.S.C. 659) with respect to a member may not exceed 65 percent of the amount of the retired pay payable to such member that is considered under section 462 of the Social Security Act (42 U.S.C. 662) to be remuneration for employment that is payable by the United States.
- (5) A court order which itself or because of previously served court orders provides for the payment of an amount which exceeds the amount of disposable retired pay available for payment because of the limit set forth in paragraph (1), or which, because of previously served court orders or legal process previously served under section 459 of the Social Security Act (42 U.S.C. 659), provides for payment of an amount that exceeds the maximum amount permitted under paragraph (1) or subparagraph (B) of paragraph (4), shall not be considered to be irregular on its face solely for that reason. However, such order shall be considered to be fully satisfied for purposes of this section by the payment to the spouse or former spouse of the maximum amount of disposable retired pay permitted under paragraph (1) and subparagraph (B) of paragraph (4).
- (6) Nothing in this section shall be construed to relieve a member of liability for the payment of alimony, child support, or other payments required by a court order on the grounds that payments made out of disposable retired pay under this section have been made in the maximum amount permitted under paragraph (1) or subparagraph (B) of paragraph (4). Any such unsatisfied obligation of a member may be enforced by any means available under law other than the means provided under this section in any case in which the maximum amount permitted under paragraph (1) has been paid and under section 459 of the Social Security Act (42 U.S.C. 659) in any case in which the maximum amount permitted under subparagraph (B) of paragraph (4) has been paid.
- (f) **Immunity of officers and employees of United States.** (1) The United States and any officer or employee of the United States shall not be liable with respect to any payment made from retired pay to any member, spouse, or former spouse pursuant to a court order that is regular on its face if such payment is made in accordance with this section and the regulations prescribed pursuant to subsection (i).
- (2) An officer or employee of the United States who, under regulations prescribed pursuant to subsection (i), has the duty to respond to interrogatories shall not be subject under any law to any disciplinary action or civil or criminal liability or penalty for, or because of, any disclosure of information made by him in carrying out any of his duties which directly or indirectly pertain to answering such interrogatories.
- (g) **Notice to member of service of court order on Secretary concerned.** A person receiving effective service of a court order under this section shall, as soon as possible, but not later than 30 days after the date on which effective service is made, send a written notice of such court order (together with a copy of such order) to the member affected by the court order at his last known address.

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(h) Benefits for dependents who are victims of abuse by members losing right to retired pay.

(1) If, in the case of a member or former member of the armed forces referred to in paragraph (2)(A), a court order provides (in the manner applicable to a division of property) for the payment of an amount from the disposable retired pay of that member or former member (as certified under paragraph (4)) to an eligible spouse or former spouse of that member or former member, the Secretary concerned, beginning upon effective service of such court order, shall pay that amount in accordance with this subsection to such spouse or former spouse.

(2) A spouse or former spouse of a member or former member of the armed forces is eligible to receive payment under this subsection if—

(A) the member or former member, while a member of the armed forces and after becoming eligible to be retired from the armed forces on the basis of years of service, has eligibility to receive retired pay terminated as a result of misconduct while a member involving abuse of a spouse or dependent child (as defined in regulations prescribed by the Secretary of Defense or, for the Coast Guard when it is not operating as a service in the Navy, by the Secretary of Transportation); and

(B) the spouse or former spouse—

(i) was the victim of the abuse and was married to the member or former member at the time of that abuse; or

(ii) is a natural or adopted parent of a dependent child of the member or former member who was the victim of the abuse.

(3) The amount certified by the Secretary concerned under paragraph (4) with respect to a member or former member of the armed forces referred to in paragraph (2)(A) shall be deemed to be the disposable retired pay of that member or former member for the purposes of this subsection.

(4) Upon the request of a court or an eligible spouse or former spouse of a member or former member of the armed forces referred to in paragraph (2)(A) in connection with a civil action for the issuance of a court order in the case of that member or former member, the Secretary concerned shall determine and certify the amount of the monthly retired pay that the member or former member would have been entitled to receive as of the date of the certification—

(A) if the member or former member's eligibility for retired pay had not been terminated as described in paragraph (2)(A); and

(B) if, in the case of a member or former member not in receipt of retired pay immediately before that termination of eligibility for retired pay, the member or former member had retired on the effective date of that termination of eligibility.

(5) A court order under this subsection may provide that whenever retired pay is increased under section 1401a of this title (or any other provision of law), the amount payable under the court order to the spouse or former spouse of a member or former member described in paragraph (2)(A) shall be increased at the same time by the percent by which the retired pay of the member or former member would have been increased if the member or former member were receiving retired pay.

(6) Notwithstanding any other provision of law, a member or former member of the armed forces referred to in paragraph (2)(A) shall have no ownership interest in, or claim against, any amount payable under this section to a spouse or former spouse of the member or former member.

(7)(A) If a former spouse receiving payments under this subsection with respect to a member or former member referred to in paragraph (2)(A) marries again after such payments begin, the eligibility of the former spouse to receive further payments under this subsection shall terminate on the date of such marriage.

(B) A person's eligibility to receive payments under this subsection that is terminated under subparagraph (A) by reason of remarriage shall be resumed in the event of the termination of that marriage by the death of that person's spouse or by annulment or divorce. The resumption of payments shall begin as of the first day of the month in which that marriage is so terminated. The monthly amount of the payments shall be the amount that would have been paid if the continuity of the payments had not been interrupted by the marriage.

(8) Payments in accordance with this subsection shall be made out of funds in the Department of Defense Military Retirement Fund established by section 1461 of this title or, in the case of the Coast Guard, out of funds appropriated to the Department of Transportation for payment of retired pay for the Coast Guard.

(9)(A) A spouse or former spouse of a member or former member of the armed forces referred to in paragraph (2)(A), while receiving payments in accordance with this subsection, shall be entitled to receive medical and dental care, to use commissary and

exchange stores, and to receive any other benefit that a spouse or a former spouse of a retired member of the armed forces is entitled to receive on the basis of being a spouse or former spouse, as the case may be, of a retired member of the armed forces in the same manner as if the member or former member referred to in paragraph (2)(A) was entitled to retired pay.

(B) A dependent child of a member or former member referred to in paragraph (2)(A) who was a member of the household of the member or former member at the time of the misconduct described in paragraph (2)(A) shall be entitled to receive medical and dental care, to use commissary and exchange stores, and to have other benefits provided to dependents of retired members of the armed forces in the same manner as if the member or former member referred to in paragraph (2)(A) was entitled to retired pay.

(C) If a spouse or former spouse or a dependent child eligible or entitled to receive a particular benefit under this paragraph is eligible or entitled to receive that benefit under another provision of law, the eligibility or entitlement of that spouse or former spouse or dependent child to such benefit shall be determined under such other provision of law instead of this paragraph.

(10)(A) For purposes of this subsection, in the case of a member of the armed forces who has been sentenced by a court-martial to receive a punishment that will terminate the eligibility of that member to receive retired pay if executed, the eligibility of that member to receive retired pay may, as determined by the Secretary concerned, be considered terminated effective upon the approval of that sentence by the person acting under section 860(c) of this title (article 60(c) of the Uniform Code of Military Justice).

(B) If each form of the punishment that would result in the termination of eligibility to receive retired pay is later remitted, set aside, or mitigated to a punishment that does not result in the termination of that eligibility, a payment of benefits to the eligible recipient under this subsection that is based on the punishment so vacated, set aside, or mitigated shall cease. The cessation of payments shall be effective as of the first day of the first month following the month in which the Secretary concerned notifies the recipient of such benefits in writing that payment of the benefits will cease. The recipient may not be required to repay the benefits received before that effective date (except to the extent necessary to recoup any amount that was erroneous when paid).

(11) In this subsection, the term "dependent child", with respect to a member or former member of the armed forces referred to in paragraph (2)(A), means an unmarried legitimate child, including an adopted child or a stepchild of the member or former member, who—

(A) is under 18 years of age;

(B) is incapable of self-support because of a mental or physical incapacity that existed before becoming 18 years of age and is dependent on the member or former member for over one-half of the child's support; or

(C) if enrolled in a full-time course of study in an institution of higher education recognized by the Secretary of Defense for the purposes of this subparagraph, is under 23 years of age and is dependent on the member or former member for over one-half of the child's support.

(i) **Regulations.** The Secretaries concerned shall prescribe uniform regulations for the administration of this section.

(As amended Nov. 14, 1986, P. L. 99-661, Div A, Title VI, Part D, § 644(a), 100 Stat. 3887; Apr. 21, 1987, P. L. 100-26, §§ 3(3) in part, 7(h)(1) in part, 101 Stat. 273, 282; Nov. 29, 1989, P. L. 101-189, Div A, Title VI, Part F, § 653(a)(5), Title XVI, Part C, § 1622(e)(6), 103 Stat. 1462, 1605; Nov. 5, 1990, P. L. 101-510, Div A, Title V, Part E, § 555(a)-(d), (f), (g), 104 Stat. 1569, 1570; Dec. 5, 1991, P. L. 102-190, Div A, Title X, Part E, § 1061(a)(7), 105 Stat. 1472; Oct. 23, 1992, P. L. 102-484, Div A, Title VI, Subtitle E, § 653(a), 106 Stat. 2426; Nov. 30, 1993, P. L. 103-160, Div A, Title V, Subtitle E, § 555(a), (b), Title XI, Subtitle H, § 1182(a)(2), 107 Stat. 1666, 1771.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Amendments:

1986. Act Nov. 14, 1986, § 644(a) (applicable as provided by § 644(b) of such Act, which appears as a note to this section), as amended Act Apr. 21, 1987, § 3(3), (applicable as if included in Act Nov. 14, 1986 when enacted on 11/14/86, as provided by § 12(a) of Act Apr. 21, 1987, which appears as 10 USCS § 774 note), in subsec. (a), in para. (4), in the introductory matter, deleted "(other than the retired pay of a member retired for disability under chapter 61 of this title)" following "member is entitled", and substituted subpara. (E) for one which read: "are deducted as Government life insurance premiums (not including amounts deducted for supplemental coverage); or".

1987. Act Apr. 21, 1987, in subsec. (a)(4)(D), substituted "Internal Revenue Code of 1986" for "Internal Revenue Code of 1954".

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Such Act further made a technical correction to the directory language of § 644(a) of Act Nov. 14, 1986, P. L. 99-661, which did not affect the text of this section.

1989. Act Nov. 29, 1989, in subsec. (a), in para. (4)(D), deleted "(26 U.S.C. 3402(i))" following "1986", and, in para. (5), inserted "entitled to retired pay under section 1331 of this title".

Such Act further, in subsec. (a), in the introductory matter of paras. (1)-(4), and in paras. (5) and (6), inserted "The term" and revised the first word in quotation marks in each para. so that the initial letter of such word is lower case.

1990. Act Nov. 5, 1990 deleted "or retainer" following "retired", wherever appearing, and added the subsection headings in subsecs. (a)-(h).

Such Act further (applicable as provided by § 555(e)(1) of such Act, which appears as a note to this section), in subsec. (c)(1), added the sentence beginning "A court may not treat retired pay as property . . .".

Such Act further (applicable as provided by § 555(e)(2) of such Act, which appears as a note to this section), in subsec. (a)(4), in subpara. (A), substituted "for previous overpayments of retired pay and for recoupments required by law resulting from entitlement to retired pay;" for the semicolon, substituted subpara. (B) for one which read: "(B) are required by law to be and are deducted from the retired or retainer pay of such member, including fines and forfeitures ordered by courts-martial, Federal employment taxes, and amounts waived in order to receive compensation under title 5 or title 38;" redesignated former subparas. (E) and (F) as subparas. (C) and (D), and deleted former subparas. (C) and (D), which read:

"(C) are properly withheld for Federal, State, or local income tax purposes, if the withholding of such amounts is authorized or required by law and to the extent such amounts withheld are not greater than would be authorized if such member claimed all dependents to which he was entitled;

"(D) are withheld under section 3402(i) of the Internal Revenue Code of 1954 (26 U.S.C. 3402(i)) if such member presents evidence of a tax obligation which supports such withholding;"

Such Act further (applicable as above), in subsec. (c)(2), added the sentence beginning "Payments by the Secretary concerned under subsection (d) . . ."; and, in subsec. (e), in para. (1), substituted "payable under all court orders pursuant to subsection (c)" for "payable under subsection (d)", and, in para. (4)(B), substituted "the amount of the retired pay payable to such member that is considered under section 462 of the Social Security Act (42 U.S.C. 662) to be remuneration for employment that is payable by the United States" for "the disposable retired or retainer pay payable to such member".

1991. Act Dec. 5, 1991 substituted the section heading for one which read: "§ 1408. Payment of retired pay in compliance with court orders".

1992. Act Oct. 23, 1992 (applicable as provided by § 653(c) of such Act, which appears as a note to this section) redesignated subsec. (h) as subsec. (i); and added new subsec. (h).

1993. Act Nov. 30, 1993 (applicable as provided by § 1182(h) of such Act, which appears as 10 USCS § 101 note), in subsecs. (b), in para. (1)(A), and in subsec. (f), in paras. (1) and (2), substituted "subsection (i)" for "subsection (h)"; and, in subsec. (h)(4)(B), inserted "of" after "of that termination".

Such Act further (effective as of 10/23/92 and applicable as if the provisions of subsec. (h)(10) added by such Act were included in the amendment made by § 653(a)(2) of Act Oct. 23, 1992, P. L. 102-484, as provided by § 555(c) of the 1993 Act), in subsec. (h), in para. (2)(A), inserted "or, for the Coast Guard when it is not operating as a service in the Navy, by the Secretary of Transportation", in para. (8), inserted "or, in the case of the Coast Guard, out of funds appropriated to the Department of Transportation for payment of retired pay for the Coast Guard", redesignated para. (10) as para. (11), and added a new para. (10).

Other provisions:

Repeal of provision for commissary and exchange privileges. Act Sept. 8, 1982, P. L. 97-252, Title X, § 1005, 96 Stat. 737, which formerly appeared as a note to this section, and which was effective on the first day of the first month which began more than 120 days after enactment on Sept. 8, 1982, as provided by § 1006(a) of such Act, which appears as 10 USCS § 1408 note, was repealed by Act July 19, 1988, P. L. 100-370, § 1(c)(5), 102 Stat. 841. It provided for rules and regulations to be prescribed for commissary and post exchange privileges for surviving spouses of retired uniformed services members. Similar provisions are now contained in 10 USCS § 1062.

Applicability of 1986 amendments. Act Nov. 14, 1986, P. L. 99-661, Div A, Title VI, Part D, § 644(b), 100 Stat. 3887, provides: "The amendments made by subsection (a) shall apply with respect to court orders issued after the date of the enactment of this Act."

Applicability of 1990 amendments. Act Nov. 5, 1990, P. L. 101-510, Div A, Title V, Part E, § 555(e), 104 Stat. 1570; Dec. 5, 1991, P. L. 102-190, Div A, Title X, Part E, § 1062(a)(1), 105 Stat. 1475, provides:

"(1) The amendment made by subsection (a) [amending subsec. (c)(1) of this section] shall apply with respect to judgments issued before, on, or after the date of the enactment of this Act. In the case of a judgment issued before the date of the enactment of this Act, such amendment shall not relieve any obligation, otherwise valid, to make a payment that is due to be made before the end of the two-year period beginning on the date of the enactment of this Act.

10 USCS § 1408

ARMED FORCES

GENERAL

"(2) The amendments made by subsections (b), (c), and (d) [amending subsections (a), (c)(2) and (e) of this section] apply with only respect to divorces, dissolutions of marriage, annulments, and legal separations that become effective after the end of the 90-day period beginning on the date of the enactment of this Act."

Applicability of subsec. (h). Act Oct 23, 1992, P L 102-484, Div A, Title VI, Subtitle E, § 653(c), 106 Stat 2429, provides "No payments under subsection (h) of section 1408 of title 10, United States Code (as added by subsection (a)), shall accrue for periods before the date of the enactment of this Act"

Study required. Act Oct 23, 1992, P L 102-484, Div A, Title VI, Subtitle E, § 653(e), 106 Stat. 2429, provides

"(1) The Secretary of Defense shall conduct a study in order to estimate—

"(A) the number of persons who will become eligible to receive payments under subsection (h) of section 1408 of title 10, United States Code (as added by subsection (a)), during each of fiscal years 1993 through 2000, and

"(B) for each of fiscal years 1993 through 2000, the number of members of the Armed Forces who, after having completed at least one, and less than 20, years of service in that fiscal year, will be approved in that fiscal year for separation from the Armed Forces as a result of having abused a spouse or dependent child

"(2) The study shall include a thorough analysis of—

"(A) the effects, if any, of appeals and requests for clemency in the case of court-martial convictions on the entitlement to payments in accordance with subsection (h) of section 1408 of title 10, United States Code (as added by subsection (a)),

"(B) the socio-economic effects on the dependents of members of the Armed Forces described in subsection (h)(2) of such section that result from terminations of the eligibility of such members to receive retired or retainer pay, and

"(C) the effects of separations of such members from the Armed Forces on the mission readiness of the units of assignment of such members when separated and on the Armed Forces in general

"(3) Not later than one year after the date of the enactment of this Act, the Secretary shall submit to Congress a report on the results of the study"

RESEARCH GUIDE

Am Jur:

6 Am Jur 2d, Attachment § 179 5

9B Am Jur 2d, Bankruptcy § 3126

31 Am Jur 2d, Exemptions § 46

Annotations:

Divorce excessiveness or adequacy of combined property division and spousal support awards 55 ALR4th 14

Divorce excessiveness or adequacy of trial court's property award 56 ALR4th 12

Law Review Articles:

Poichek, Recent property settlement issues for legal assistance attorneys 1992 Army Law 4, December, 1992

Cardos, Perry and Sinnott, The Uniformed Services Former Spouses Protection Act. 33 Federal Bar News and Journal 33, January, 1986

Guilford, Exploring the labyrinth current issues under the Uniformed Services Former Spouses' Protection Act 132 Mil L Rev 43, Spring 1991

Manashul, The Uniformed Services Former Spouses' Protection Act of 1982 Problems Resulting From its Application 20 U S F L Rev 83, Fall, 1985

INTERPRETIVE NOTES AND DECISIONS

1. Generally

Statute does not grant state courts power to treat as property divisible upon divorce military retirement pay that retiree had waived pursuant to 38 USCS § 3105 in order to receive veterans' disability benefits, it cannot be read merely as garnishment statute designed not to pre-empt authority of state courts but solely to set out circumstances under which federal government will make direct payments of retirement pay to retiree's former spouse pursuant to court order because statute provides that court may treat disposable retired or retainer pay but not total retired pay as property of retiree and spouse, and term "disposable retired or retainer pay" is defined to exclude military retirement pay waived in order to receive veterans' disability benefits, and other subsections of statute impose substantive limits on state courts' power to divide

military retirement pay *Mansell v Mansell* (1989, US) 104 L Ed 2d 675, 109 S Ct 2023, 10 EBC 2521

Court otherwise having jurisdiction of parties is not allowed to invoke powers of Federal Uniform Services Former Spouses' Protection Act (10 USCS § 1408) unless personal jurisdiction has been acquired by domicile or consent or residence other than by military assignment, careful reading of 10 USCS § 1408(c)(1) reveals that provision is limitation on subject-matter, rather than personal jurisdiction *Steel v United States* (1987, CA9 Cal) 813 F2d 1545

Passage of Uniform Services Former Spouse's Protection Act (10 USCS § 1408(c)(1) (USFSPA) did not result in taking of former military personnel's property (portion of their military retired pay) in violation of Fifth Amendment to Constitution as Act merely removed federal pre-emption which

precluded state retirement pension as part of intent on government, even assets taken from child use but for *Pern v United*

In view of e is patently clear nity to permit United States (

Under Calif Spouse's Protection Act court to determine interest in former pension in action there was no time divorce d *Sullivan* (1985,

Former service military retiree § 1408 has community military retirement property under effective date of require states to marital property *Cir* 482 So 2d

Exception to overruled in for partition husband military spouse jurisdiction by all jurisdictions spouse answered state jurisdiction solution of marital property consent to (1986, La App 488 So 2d 199 107 S Ct 178

Exception to action for partitioning former husband ruled since husband and formerly related to jurisdiction answering divorce that it was with subsequent order La App 3d *Cir* So 2d 199 and S Ct 178

Rights to military retirement pay continuously through and wife's entitlement determined under domiciled for military retirement (1986, La App 3 488 So 2d 199 a 107 S Ct 178

Section 1408 community property retirement *Austin v Austin*

Modification Secretary of Air Force's former retirement pay is appropriate in circumstances and

Addendum "B."

10 USC 1448

Effective date and application of amendments made by Act Nov. 8, 1985. Act Nov. 8, 1985, P. L. 99-145, Title VII, Part C, § 731, 99 Stat. 678, provided:

“(a) Effective date. Except as otherwise provided in this title [this note, among other things; for full classification, consult USCS Tables volumes], the amendments made by this title [this note, among other things; for full classification, consult USCS Tables volumes] shall take effect on the first day of the first month beginning more than 90 days after the date of the enactment of this Act [enacted Nov. 8, 1985].

“(b) Prospective benefits only. No benefit shall accrue to any person by reason of the enactment of this title [this note, among other things; for full classification, consult USCS Tables volumes] for any period before the effective date under subsection (a).”.

INTERPRETIVE NOTES AND DECISIONS

Surviving spouse does not qualify under 10 USCS § 1447(3)(A) for any annuity at time of her husband's death where service member had elected spouse and children coverage, had divorced, remarried and died prior to first anniversary of remarriage; however since spouse was pregnant and later gave birth to service member's child, she qualifies as eligible widow for annuity purposes effective on date of child's birth. (1981) 60 Op Comp Gen p 240.

Annuity may properly be suspended if evi-

dence exists demonstrating that beneficiary has become independently capable of earning amounts sufficient for own personal needs through substantial and gainful employment; determination in any given case of whether handicapped beneficiary has become capable of self-support depends upon individual facts of case; in absence of evidence that salary of handicapped beneficiary is sufficient for her own particular personal needs, annuity should be not be suspended. (1983) 62 Op Comp Gen p 193.

§ 1448. Application of Plan

(a)(1) The program established by this subchapter [10 USCS §§ 1447 et seq.] shall be known as the Survivor Benefit Plan. The following persons are eligible to participate in the Plan:

(A) Persons entitled to retired pay.

(B) Persons who would be eligible for retired pay under chapter 67 of this title [10 USCS §§ 1331 et seq.] but for the fact that they are under 60 years of age.

(2) The Plan applies—

(A) to a person who is eligible to participate in the Plan under paragraph (1)(A) and who is married or has a dependent child when he becomes entitled to retired pay, unless he elects (with his spouse's concurrence, if required under paragraph (3)) not to participate in the Plan before the first day for which he is eligible for that pay; and

(B) to a person who (i) is eligible to participate in the Plan under paragraph (1)(B), (ii) is married or has a dependent child when he is notified under section 1331(d) of this title [10 USCS § 1331(d)] that he has completed the years of service required for eligibility for retired pay under chapter 67 of this title [10 USCS §§ 1331 et seq.], and (iii) elects to participate in the Plan (and makes a designation

under subsection (e)) before the end of the 90-day period beginning on the date he receives such notification.

A person described in subclauses (i) and (ii) of clause (B) who does not elect to participate in the Plan before the end of the 90-day period referred to in such clause shall remain eligible, upon reaching 60 years of age and otherwise becoming entitled to retired pay, to participate in the Plan in accordance with eligibility under paragraph (1)(A).

(3)(A) A married person who is eligible to provide a standard annuity may not without the concurrence of the person's spouse elect—

- (i) not to participate in the Plan;
- (ii) to provide an annuity for the person's spouse at less than the maximum level; or
- (iii) to provide an annuity for a dependent child but not for the person's spouse.

(B) A married person who elects to provide a reserve-component annuity may not without the concurrence of the person's spouse elect—

- (i) to provide an annuity for the person's spouse at less than the maximum level; or
- (ii) to provide an annuity for a dependent child but not for the person's spouse.

(C) A person may make an election described in subparagraph (A) or (B) without the concurrence of the person's spouse if the person establishes to the satisfaction of the Secretary concerned—

- (i) that the spouse's whereabouts cannot be determined; or
- (ii) that, due to exceptional circumstances, requiring the person to seek the spouse's consent would otherwise be inappropriate.

(D) This paragraph does not affect any right or obligation to elect to provide an annuity for a former spouse (or for a former spouse and dependent child) under subsection (b)(2).

(E) If a married person who is eligible to provide a standard annuity elects to provide an annuity for a former spouse (or for a former spouse and dependent child) under subsection (b)(2), that person's spouse shall be notified of that election.

(4)(A) An election under paragraph (2)(A) not to participate in the Plan is irrevocable if not revoked before the date on which the person first becomes entitled to retired or retainer pay.

(B) An election under paragraph (2)(B) to participate in the Plan is irrevocable if not revoked before the end of the 90-day period referred to in such paragraph.

(5) A person who is not married when he becomes eligible to participate in the Plan but who later marries or acquires a dependent child may elect to participate in the Plan, but his election must be written, signed by him, and received by the Secretary concerned within one year after he marries or acquires that dependent child. Such an election may not

be revoked except in accordance with subsection (b)(3). His election is effective as of the first day of the first calendar month following the month in which his election is received by the Secretary concerned. In the case of a person providing an annuity by virtue of eligibility under paragraph (1)(B), such an election shall include a designation under subsection (e).

(6)(A) A person—

- (i) who is a participant in the Plan and is providing coverage for a spouse or a spouse and child;
- (ii) who does not have an eligible spouse beneficiary under the Plan; and
- (iii) who remarries,

may elect not to provide coverage under the Plan for the person's spouse.

(B) If such an election is made, no reduction in the retired pay of such person under section 1452 of this title [10 USCS § 1452] may be made. An election under this paragraph—

- (i) is irrevocable;
- (ii) shall be made within one year after the person's remarriage; and
- (iii) shall be made in such form and manner as may be prescribed in regulations under section 1455 of this title [10 USCS § 1455].

(C) If a person makes an election under this paragraph—

- (i) not to participate in the Plan;
- (ii) to provide an annuity for the person's spouse at less than the maximum level; or
- (iii) to provide an annuity for a dependent child but not for the person's spouse,

the person's spouse shall be notified of that election.

(D) This paragraph does not affect any right or obligation to elect to provide an annuity to a former spouse under subsection (b).

(b)(1) A person who is not married and does not have a dependent child when he becomes eligible to participate in the Plan may elect to provide an annuity to a natural person with an insurable interest in that person. In the case of a person providing a reserve-component annuity, such an election shall include a designation under subsection (e).

(2) A person who has a former spouse when he becomes eligible to participate in the Plan may elect to provide an annuity to that former spouse. In the case of a person with a spouse or a dependent child, such an election prevents payment of an annuity to that spouse or child (other than a child who is a beneficiary under an election under paragraph (4)), including payment under subsection (d). If there is more than one former spouse, the person shall designate which former spouse is to be provided the annuity. In the case of a person providing a

reserve-component annuity, such an election shall include a designation under subsection (e).

(3)(A) A person—

(i) who is a participant in the Plan and is providing coverage for a spouse or a spouse and child (even though there is no beneficiary currently eligible for such coverage), and

(ii) who has a former spouse who was not that person's former spouse when he became eligible to participate in the Plan,

may (subject to subparagraph (B)) elect to provide an annuity to that former spouse. Any such election terminates any previous coverage under the Plan and must be written, signed by the person, and received by the Secretary concerned within one year after the date of the decree of divorce, dissolution, or annulment.

(B) A person may not make an election under subparagraph (A) to provide an annuity to a former spouse who that person married after becoming eligible for retired pay unless—

(i) the person was married to that former spouse for at least one year, or

(ii) that former spouse is the parent of issue by that marriage.

(C) An election under this paragraph may not be revoked except in accordance with section 1450(f) of this title [10 USCS § 1450(f)] and is effective as of the first day of the first calendar month following the month in which it is received by the Secretary concerned. This paragraph does not provide the authority to change a designation previously made under subsection (e).

(D) If a person who is married makes an election to provide an annuity to a former spouse under this paragraph, that person's spouse shall be notified of that election.

(4) A person who elects to provide an annuity for a former spouse under paragraph (2) or (3) may, at the time of the election, elect to provide coverage under that annuity for both the former spouse and a dependent child, if the child resulted from the person's marriage to that former spouse.

(5) A person who elects to provide an annuity to a former spouse under paragraph (2) or (3) shall, at the time of making the election, provide the Secretary concerned with a written statement (in a form to be prescribed by that Secretary and signed by such person and the former spouse) setting forth whether the election is being made pursuant to a written agreement previously entered into voluntarily by such person as a part of or incident to a proceeding of divorce, dissolution, or annulment and (if so) whether such voluntary written agreement has been incorporated in, or ratified or approved by, a court order.

(c) The application of the Plan to a person whose name is on the temporary disability retired list terminates when his name is removed from that list and he is no longer entitled to disability retired pay.

- (d)(1) The Secretary concerned shall pay an annuity under this subchapter [10 USCS §§ 1447 et seq.] to the surviving spouse of a member who dies on active duty after—
- (A) becoming eligible to receive retired pay;
 - (B) qualifying for retired pay except that he has not applied for or been granted that pay; or
 - (C) completing 20 years of active service but before he is eligible to retire as a commissioned officer because he has not completed 10 years of active commissioned service.
- (2) The Secretary concerned shall pay an annuity under this subchapter [10 USCS §§ 1447 et seq.] to the dependent child of a member described in paragraph (1) if the member and the member's spouse die as a result of a common accident.
- (3) If a member described in paragraph (1) is required under a court order or spousal agreement to provide an annuity to a former spouse upon becoming eligible to be a participant in the Plan or has made an election under subsection (b) to provide an annuity to a former spouse, the Secretary—
- (A) may not pay an annuity under paragraph (1) or (2); but
 - (B) shall pay an annuity to that former spouse as if the member had been a participant in the Plan and had made an election under subsection (b) to provide an annuity to the former spouse, or in accordance with that election, as the case may be, if the Secretary receives a written request from the former spouse concerned that the election be deemed to have been made in the same manner as provided in section 1450(f)(3) of this title [10 USCS § 1450(f)(3)].
- (4) An annuity that may be provided under this subsection shall be provided in preference to an annuity that may be provided under any other provision of this subchapter [10 USCS §§ 1447 et seq.] on account of service of the same member.
- (5) The amount of an annuity under this subsection is computed under section 1451(c) of this title [10 USCS § 1451(c)].
- (e) In any case in which a person electing to participate in the Plan is required to make a designation under this subsection, the person making such election shall designate whether, in the event he dies before becoming 60 years of age, the annuity provided shall become effective on the day after the date of his death or on the 60th anniversary of his birth.
- (f)(1) The Secretary concerned shall pay an annuity under this subchapter [10 USCS §§ 1447 et seq.] to the surviving spouse of a person who is eligible to provide a reserve-component annuity and who dies—
- (A) before being notified under section 1331(d) of this title [10 USCS § 1331(d)] that he has completed the years of service required for eligibility for retired pay under chapter 67 of this title [10 USCS §§ 1331 et seq.]; or

(B) during the 90-day period beginning on the date he receives notification under section 1331(d) of this title [10 USCS § 1331(d)] that he has completed the years of service required for eligibility for retired pay under chapter 67 of this title [10 USCS §§ 1331 et seq.] if he had not made an election under subsection (a)(2)(B) to participate in the Plan.

(2) The Secretary concerned shall pay an annuity under this subchapter [10 USCS §§ 1447 et seq.] to the dependent child of a person described in paragraph (1) if the person and the person's spouse die as a result of a common accident.

(3) If a person described in paragraph (1) is required under a court order or spousal agreement to provide an annuity to a former spouse upon becoming eligible to be a participant in the Plan or has made an election under subsection (b) to provide an annuity to a former spouse, the Secretary—

(A) may not pay an annuity under paragraph (1) or (2); but

(B) shall pay an annuity to that former spouse as if the person had been a participant in the Plan and had made an election under subsection (b) to provide an annuity to the former spouse, or in accordance with that election, as the case may be, if the Secretary receives a written request from the former spouse concerned that the election be deemed to have been made in the same manner as provided in section 1450(f)(3) of this title [10 USCS § 1450(f)(3)].

(4) The amount of an annuity under this subsection is computed under section 1451(c) of this title [10 USCS § 1451(c)].

(g)(1) A person—

(A) who is a participant in the Plan and is providing coverage under subsection (a) for a spouse or a spouse and child, but at less than the maximum level; and

(B) who remarries,

may elect, within one year of such remarriage, to increase the level of coverage provided under the Plan to a level not in excess of the current retired pay of that person.

(2) Such an election shall be contingent on the person paying to the United States the amount determined under paragraph (3) plus interest on such amount at a rate determined under regulations prescribed by the Secretary of Defense.

(3) The amount referred to in paragraph (2) is the amount equal to the difference between—

(A) the amount that would have been withheld from such person's retired pay under section 1452 of this title [10 USCS § 1452] if the higher level of coverage had been in effect from the time the person became a participant in the Plan; and

(B) the amount of such person's retired pay actually withheld.

(4) An election under paragraph (1) shall be made in such manner as the Secretary shall prescribe and shall become effective upon receipt of the payment required by paragraph (2).

(5) A payment received under this subsection by the Secretary of Defense shall be deposited into the Department of Defense Military Retirement Fund. Any other payment received under this subsection shall be deposited in the Treasury as miscellaneous receipts.

(Added Sept. 21, 1972, P. L. 92-425, § 1(3), 86 Stat. 707; Oct. 14, 1976, P. L. 94-496, § 1(2), 90 Stat. 2375; Sept. 30, 1978, P. L. 95-397, Title II, § 202, 92 Stat. 844; Sept. 8, 1982, P. L. 97-252, Title X, § 1003(b), 96 Stat. 735; Oct. 12, 1982, P. L. 97-295, § 1(18), 96 Stat. 1290; Sept. 24, 1983, P. L. 98-94, Title IX, Part D, § 941(a)(1), (2), (c)(2), 97 Stat. 652, 653; Nov. 8, 1985, P. L. 99-145, Title V, Part B, § 513(b), Title VII, Part A, §§ 712(a), 713(a), 715, 716(a), 719(3), (8)(A) in part, Part B, § 721(a), 99 Stat. 628, 670, 671, 673-676.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Amendments:

1976. Act Oct. 14, 1976 (effective 9/21/72, as provided by § 3 of such Act, which appears as 10 USCS § 1447 note), in subsec. (a), inserted "or elects to provide an annuity for a dependent child but not for his spouse".

1978. Act Sept. 30, 1978, substituted subsec. (a) for one which read: "The Plan applies to a person who is married or has a dependent child when he becomes entitled to retired or retainer pay unless he elects not to participate in the Plan before the first day for which he is eligible for that pay. If a person who is married elects not to participate in the Plan at the maximum level, or elects to provide an annuity for a dependent child but not for his spouse that person's spouse shall be notified of the decision. An election not to participate in the Plan is irrevocable if not revoked before the date on which the person first becomes entitled to retired or retainer pay. However, a person who is not married when he becomes entitled to retired or retainer pay but who later marries, or acquires a dependent child, may elect to participate in the Plan but his election must be written, signed by him, and received by the Secretary concerned within one year after he marries, or acquires that dependent child. Such an election may not be revoked. His election is effective as of the first day of the month after his election is received by the Secretary concerned."; in subsec. (b), substituted "eligible to participate in the Plan" for "entitled to retired or retainer pay" and added "In the case of a person providing an annuity under this subsection by virtue of eligibility under subsection (a)(1)(B), such an election shall include a designation under subsection (e)."; and added subsec. (e).

1982. Act Sept. 8, 1982 (effective on the first day of the first month which begins more than 120 days after enactment on 9/8/82), in subsec. (a)(3), in subparas. (A) and (B), inserted "or elects to provide an annuity under subsection (b)(2) of this section,"; and substituted

subsec. (b) for one which read; “A person who is not married and does not have a dependent child when he becomes eligible to participate in the Plan may elect to provide an annuity to a natural person with an insurable interest in that person. In the case of a person providing an annuity under this subsection by virtue of eligibility under subsection (a)(1)(B), such an election shall include a designation under subsection (e).”.

Act Oct. 12, 1982, in the section heading, substituted “Plan” for “plan”.

1983. Act Sept. 24, 1983, in subsec. (a)(3), in subparas. (A) and (B), inserted “for a former spouse” and deleted “of this section” following “(b)(2)”, in each instance, in para. (5), inserted “except in accordance with subsection (b)(3)”; and substituted subsec. (b) for one which read:

“(b)(1) A person who is not married and does not have a dependent child when he becomes eligible to participate in the Plan may elect to provide an annuity to a natural person with an insurable interest in that person or to provide an annuity to a former spouse.

“(2) A person who is married or has a dependent child may elect to provide an annuity to a former spouse instead of providing an annuity to a spouse or dependent child if the election is made in order to carry out the terms of a written agreement entered into voluntarily with the former spouse (without regard to whether such agreement is included in or approved by a court order).

“(3) In the case of a person electing to provide an annuity under paragraph (1) or (2) of this subsection by virtue of eligibility under subsection (a)(1)(B), the election shall include a designation under subsection (e).

“(4) Any person who elects under paragraph (1) or (2) to provide an annuity to a former spouse shall, at the time of making such election, provide the Secretary concerned with a written statement, in a form to be prescribed by that Secretary, signed by such person and the former spouse setting forth whether the election is being made pursuant to a voluntary written agreement previously entered into by such person as a part of or incident to a proceeding of divorce, dissolution, annulment, or legal separation, and if so, whether such voluntary written agreement has been incorporated in or ratified or approved by a court order.”.

1985. Act Nov. 8, 1985, in subsec. (c), inserted “disability” before “retired pay”.

Such Act further (effective on the first day of the first month beginning more than 90 days after enactment on 11/8/85, as provided by § 731(a) of such Act, which appears as 10 USCS § 1447 note), in subsec. (a), in para. (1)(A), deleted “or retainer” preceding “pay”, in para. (2)(A), deleted “or retainer” following “to retired”, and inserted “(with his spouse’s concurrence, if required under paragraph (3))”, and substituted para. (3) for one which read:

“(3)(A) If a person who is eligible under paragraph (1)(A) to participate in the Plan and who is married elects not to participate in the Plan at the maximum level, or elects to provide an annuity for a dependent child but not for his spouse, or elects to

provide an annuity for a former spouse under subsection (b)(2), that person's spouse shall be notified of that election.

“(B) If a person who is eligible under paragraph (1)(B) to participate in the Plan and who is married does not elect to participate in the Plan at the maximum level, or elects to provide an annuity for a dependent child but not for his spouse, or elects to provide an annuity for a former spouse under subsection (b)(2), that person's spouse shall be notified of that action.”.

Such Act further, in subsec. (a), added para. (6); in subsec. (b), in para. (1), substituted “a reserve-component annuity” for “an annuity under this paragraph by virtue of eligibility under subsection (a)(1)(B)”, in para. (2), inserted “(other than a child who is a beneficiary under an election under paragraph (4))” and substituted “a reserve-component annuity” for “an annuity under this paragraph by virtue of eligibility under subsection (a)(1)(B)”, in para. (3)(B), deleted “or retainer” preceding “pay”, redesignated para. (4) as para. (5), and added new para. (4); substituted subsec. (d) for one which read: “If a member of an armed force dies on active duty after he has become entitled to retired or retainer pay, or after he has qualified for that pay except that he has not applied for or been granted that pay, and his spouse is eligible for dependency and indemnity compensation under section 411(a) of title 38 in an amount that is less than the annuity the spouse would have received under this subchapter if it had applied to the member when he died, the Secretary concerned shall pay to the spouse an annuity equal to the difference between that amount of compensation and 55 percent of the retired or retainer pay to which the otherwise eligible spouse described in section 1450(a)(1) of this title would have been entitled if the member had been entitled to that pay based upon his years of active service when he died.”; and added subsecs. (f) and (g).

Other provisions:

Election to participate in the Survivor Benefit Plan and withdraw from the Retired Serviceman's Family Protection Plan.

Act Sept. 21, 1972, P. L. 92-425, § 3, 86 Stat. 711; Nov. 16, 1973, P. L. 93-155, Title VIII, § 804, 87 Stat. 615, provided:

“(a) The Survivor Benefit Plan established pursuant to clause (3) of the first section of this Act [adding 10 USCS §§ 1447 et seq.] applies to any person who initially becomes entitled to retired or retainer pay on or after the effective date of this Act [enacted Sept. 21, 1972]. An election made before that date by such a person under section 1431 of title 10, United States Code [10 USCS § 1431], is canceled. However, a person who initially becomes entitled to retired or retainer pay within 180 days after the effective date of this Act [enacted Sept. 21, 1972] may, within 180 days after becoming so entitled, elect—

“(1) not to participate in such Survivor Benefit Plan if he is married or has a dependent child; or

“(2) to participate in that Plan, if he is a person covered by section 1448(b) of title 10, United States Code [subsec. (b) of this section].

“(b) Any person who is entitled to retired or retainer pay on the effective date of this Act [enacted Sept. 21, 1972] may elect to

participate in the Survivor Benefit Plan established pursuant to clause (3) of the first section of this Act [adding 10 USCS §§ 1447 et seq.] at any time within eighteen months after such date. However, such a person who is receiving retired or retainer pay reduced under section 1436(a) of title 10, United States Code [10 USCS § 1436(a)], or who is depositing amounts under section 1438 of that title [10 USCS § 1438], may elect at any time within eighteen months after the effective date of this Act [enacted Sept. 21, 1972]—

“(1) to participate in the Plan and continue his participation under chapter 73 of that title [10 USCS §§ 1431 et seq.] as in effect on the day before the effective date of this Act [enacted Sept. 21, 1972], except that the total of the annuities elected may not exceed 100 percent of his retired or retainer pay; or

“(2) to participate in the Plan and, notwithstanding section 1436(b) of that title [10 USCS § 1436(b)], terminate his participation under chapter 73 of that title [10 USCS §§ 1431 et seq.] as in effect on the day before the effective date of this Act [enacted Sept. 21, 1972].

A person who elects under clause (2) of this subsection is not entitled to a refund of amounts previously deducted from his retired or retainer pay under chapter 73 of title 10, United States Code [10 USCS §§ 1431 et seq.], as in effect on the day before the effective date of this Act [enacted Sept. 21, 1972], or any payments made thereunder on his behalf. A person who is not married or does not have a dependent child on the first anniversary of the effective date of this Act [enacted Sept. 21, 1972], but who later marries or acquires a dependent child, may elect to participate in the Plan under the fourth sentence of section 1448(a) of that title [subsec. (a) of this section].

“(c) Notwithstanding the provisions of the Survivor Benefit Plan established pursuant to clause (3) of the first section of this Act [adding 10 USCS §§ 1447 et seq.], and except as otherwise provided in this section [this note], subchapter I of chapter 73 of title 10, United States Code [10 USCS §§ 1431 et seq.] (other than the last two sentences of section 1436(a), section 1443, and section 1444(b)), as in effect on the day before the effective date of this Act [enacted Sept. 21, 1972], shall continue to apply in the case of persons, and their beneficiaries, who have elected annuities under section 1431 or 1432 of that title [10 USCS § 1431 or 1432] and who have not elected under subsection (b)(2) of this section [this note] to participate in that Plan.

“(d) In this section [this note], ‘base amount’ means—

“(1) the monthly retired or retainer pay to which a person—

“(A) is entitled on the effective date of this Act [enacted Sept. 21, 1972]; or

“(B) later becomes entitled by being advanced on the retired list, performing active duty, or being transferred from the temporary disability retired list to the permanent disability retired list; or

“(2) any amount less than that described in clause (1) designated by that person at the time he makes an election under subsection (a)(2) or (b) of this section [this note], but not less than \$300; as increased from time to time under section 1401a of title 10, United States Code [10 USCS § 1401a].

“(e) An election made under subsection (a) or (b) of this section [this note] is effective on the date it is received by the Secretary concerned, as defined in section 101(5) of title 37, United States Code [37 USCS § 101(5)].

“(f) Sections 1449, 1453, and 1454 of title 10, United States Code [10 USCS §§ 1449, 1453, 1454], as added by clause (3) of the first section of this Act [adding 10 USCS §§ 1447 et seq.], are applicable to persons covered by this section [this note].”.

Income supplement for certain widows of retired members of the uniformed forces; special annuity for widows of commissioned personnel of the Public Health Service and National Oceanic and Atmospheric Administration in lieu of VA Pension. Act Sept. 21, 1972, P. L. 92-425, § 4, 86 Stat. 712; Oct. 14, 1976, P. L. 94-496, § 2, 90 Stat. 2375; Sept. 30, 1978, P. L. 95-397, Title II, § 209, 92 Stat. 848; Oct. 9, 1980, P. L. 96-402, § 6, 94 Stat. 1708; Sept. 24, 1983, P. L. 98-94, Title IX, Part D, § 942(a), 97 Stat. 654 (effective for payments after Sept. 1983, as provided by § 942(b) by such Act), provided:

“(a) A person—

“(1) who, on September 21, 1972, was, or during the period beginning on September 22, 1972, and ending on March 20, 1974, became, a widow of a person who was entitled to retired or retainer pay when he died;”

“(2) who is eligible for a pension under subchapter III of chapter 15 of title 38, United States Code [38 USCS §§ 531 et seq.], or section 306 of the Veterans’ and Survivors’ Pension Improvement Act of 1978 [38 USCS § 521 note]; and

“(3) whose annual income, as determined in establishing that eligibility, is less than \$2,340;

shall be paid an annuity by the Secretary concerned unless she is eligible to receive an annuity under the Survivor Benefit Plan established pursuant to clause (3) of the first section of this Act [adding 10 USCS §§ 1447 et seq.]. However, such a person who is the widow of a retired officer of the Public Health Service or the National Oceanic and Atmospheric Administration, and who would otherwise be eligible for an annuity under this section except that she does not qualify for the pension described in clause (2) of this subsection because the service of her deceased spouse is not considered active duty under section 101(21) of title 38, United States Code [38 USCS § 101(21)], is entitled to an annuity under this section [this note].

“(b) The annuity under subsection (a) of this section [this note] shall be in an amount which when added to the widow’s income determined under subsection (a)(3) of this section [this note], plus the amount of any annuity being received under sections 1431–1436 of title 10, United States Code [10 USCS §§ 1431–1436], but exclusive of a pension described in subsection (a)(2) of this section [this note], equals \$2,340 a year. In addition, the Secretary concerned shall pay to the widow, described in the last sentence of subsection (a) of this section [this note], an amount equal to the pension she would otherwise have been eligible to receive under subchapter III of chapter 15 of title 38, United States Code [38 USCS §§ 531 et seq.], if the service of her deceased

spouse was considered active duty under section 101(21) of that title [38 USCS §§ 101(21)].

“(c) The amounts specified in subsections (a)(3) and (b) shall be increased by the Secretary concerned whenever there is an increase under section 3112 of title 38, United States Code [38 USCS § 3112], in the maximum annual rate of pension under section 541(b) of such title [38 USCS § 541(b)]. Any such increase under the preceding sentence shall be in the same amount, and shall have the same effective date, as such increase in the maximum annual rate of pension.

“(d) Subsection 1450(i) and section 1453 as added to title 10, United States Code, by clause 3 of the first section of this Act [10 USCS §§ 1450(i), 1453], are applicable to persons covered by this section [this note].”.

90-day period. Act Sept. 30, 1978, P. L. 95-397, Title II, § 208, 92 Stat. 848, provided that for certain individuals, the 90-day period referred to in subsec. (a)(2) and (4)(B) of this section shall be considered to end at the end of the one-year period beginning on the effective date of Title II of that Act; see 10 USCS § 1447 note.

Effective date and application of 1978 amendments. Act Sept. 30, 1978, P. L. 95-397, Title II, § 210, 92 Stat. 848, which appears as 10 USCS § 1447 note, provided that the amendments made to this section by such Act are effective on Oct. 1, 1978 and applicable to annuities payable by virtue of such amendments for months beginning on or after such date.

Surviving spouse; annuity payment and reduction provisions; election of annuity; definitions; effective date. Act Oct. 9, 1980, P. L. 96-402, § 5, 94 Stat. 1707 (effective Dec. 1, 1980, and applicable as provided by § 7 of such Act, which appears as 10 USCS § 1447 note), provided:

“(a)(1) The Secretary concerned shall pay an annuity to any individual who is the surviving spouse of a member of the uniformed services who—

“(A) died before September 21, 1972;

“(B) was serving on active duty in the uniformed services at the time of his death and had served on active duty for a period of not less than 20 years; and

“(C) was at the time of his death entitled to retired or retainer pay or would have been entitled to that pay except that he had not applied for or been granted that pay.

“(2) An annuity under paragraph (1) shall be paid under the provisions of subchapter II of chapter 73 of title 10, United States Code [10 USCS §§ 1447 et seq.], in the same manner as if such member had died on or after September 21, 1972.

“(b)(1) The amount of retired or retainer pay to be used as the basis for the computation of an annuity under subsection (a) is the amount of the retired or retainer pay to which the member would have been entitled if the member had been entitled to that pay based upon his years of active service when he died, adjusted by the overall percentage increase in retired and retainer pay under section 1401a of title 10, United States Code [10 USCS § 1401a] (or any prior comparable provision of law), during the period beginning on

the date of the member's death and ending on the day before the effective date of this section [effective Dec. 1, 1980].

“(2) In addition to any reduction required under the provisions of subchapter II of chapter 73 of title 10, United States Code [10 USCS §§ 1447 et seq.], the annuity paid to any surviving spouse under this section shall be reduced by any amount such surviving spouse is entitled to receive as an annuity under subchapter I of such chapter [10 USCS §§ 1431 et seq.].

“(c) If an individual entitled to an annuity under this section is also entitled to an annuity under subchapter II of chapter 73 of title 10, United States Code [10 USCS §§ 1447 et seq.], based upon a subsequent marriage, the individual may not receive both annuities but must elect which to receive.

“(d) As used in this section:

“(1) The term ‘uniformed services’ means the Armed Forces and the commissioned corps of the Public Health Service and of the National Oceanic and Atmospheric Administration.

“(2) The term ‘surviving spouse’ has the meaning given the terms ‘widow’ and ‘widower’ in section 1447 of title 10, United States Code [10 USCS § 1447].

“(3) The term ‘Secretary concerned’ has the meaning given such term in section 101(8) of title 10, United States Code [10 USCS § 101(8)], and includes the Secretary of Commerce, with respect to matters concerning the National Oceanic and Atmospheric Administration, and the Secretary of Health and Human Services, with respect to matters concerning the Public Health Service.”.

Open enrollment period for Survivor Benefit Plan. Act Aug. 13, 1981, P. L. 97-35, Title II, Subtitle B, § 212, 95 Stat. 383; Sept. 8, 1982, P. L. 97-252, Title XI, § 1119, 96 Stat. 753, provided:

“(a)(1) Any eligible member who on the date of the enactment of this Act [enacted Aug. 13, 1981] is not a participant in the Survivor Benefit Plan may elect to participate in the Plan during the open enrollment period specified in subsection (b).

“(2) Any eligible member who on the date of the enactment of this Act [enacted Aug. 13, 1981] is a participant in the Plan but elected not to participate in the Plan at the maximum level or (in the case of an eligible member who is married) elected to provide an annuity under the Plan for a dependent child and not for the member's spouse may during the open enrollment period elect to participate in the Plan at a higher level or to provide an annuity under the Plan for the eligible member's spouse at a level not less than the level provided for the dependent child.

“(3) Any such election shall be made in the same manner as an election under section 1448 of such title [10 USCS § 1448] and shall be effective when received by the Secretary concerned. Notwithstanding the last sentence of section 1452(a) of such title [10 USCS § 1452(a)], the reduction in retired or retainer pay prescribed by the first sentence of such section shall, in the case of an individual making an election under paragraph (1), begin on the first day of the first month beginning after such election is effective.

“(b) The open enrollment period is the period beginning on October 1, 1981, and ending on September 30, 1982, in the case of a member or former member of the uniformed services who on August 13, 1981, was entitled to retired or retainer pay, and the period beginning on October 1, 1982, and ending on September 30, 1983, in the case of a member or former member who on August 13, 1981, would have been entitled to retired pay under chapter 67 of title 10, United States Code [10 USCS §§ 1331 et seq.], but for the fact that he was under sixty years of age on that date.

“(c) If an individual making an election under subsection (a) dies before the end of the two-year period beginning on the date of that election, the election is void and the amount of any reduction in the retired or retainer pay of such individual that is attributable to the election shall be paid in a lump sum to that individual's beneficiary under the Plan (as designated under that election).

“(d) Sections 1449, 1453, and 1454 of title 10, United States Code [10 USCS §§ 1449, 1453, 1454], are applicable to individuals making elections and to elections under this section.

“(e) For the purposes of this section:

“(1) The term ‘eligible member’ means a member or former member of the uniformed services who on August 13, 1981 (A) was entitled to retired or retainer pay, or (B) would have been entitled to retired pay under chapter 67 of title 10, United States Code [10 USCS §§ 1331 et seq.], but for the fact that he was under sixty years of age on that date.

“(2) The term ‘Survivor Benefit Plan’ or ‘Plan’ means the program established under subchapter II of chapter 73 of title 10, United States Code [10 USCS §§ 1447 et seq.].

“(3) The term ‘Secretary concerned’ has the meaning given such term in section 101(5) of title 37, United States Code [37 USCS § 101(5)].”.

Application of Sept. 8, 1982 amendment of this section. For provisions as to the application of the amendment of this section by Act Sept. 8, 1982, P. L. 97-252, Title X, § 1003 (see the 1982 Amendments note to this section), see § 1006(c) of such Act, which appears as 10 USCS § 1408 note.

Application and construction of the Oct. 12, 1982 amendment of this section. For provisions as to the application and construction of the Oct. 12, 1982 amendment of this section (see the Amendments note to this section), see § 5 of such Act, which appears as 10 USCS § 101 note.

Application of subsec. (b) to person described in subsec. (b)(3)(A). Act Sept. 24, 1983, P. L. 98-94, Title IX, Part D, § 941(b), 97 Stat. 653, provided: “In the case of a person who on the date of the enactment of this Act [enacted Sept. 24, 1983] is a person described in subparagraph (A) of subsection (b)(3) of section 1448 of title 10, United States Code [subsec. (b)(3)(A) of this section] (as amended by subsection (a)(2) [see the 1983 Amendments note to this section]), such subsection shall apply to that person as if the one-year period provided for in subpara-

graph (A) of such subsection began on the date of the enactment of this Act [enacted Sept. 24, 1983].”.

Annuity payable after September 1983. Act Sept. 24, 1983, P. L. 98-94, Title IX, Part D, § 942(b), 97 Stat. 654, provided: “Any annuity payable by reason of subsection (a) [amending Act Sept 21, 1972, P. L. 92-425, § 4, 86 Stat. 712, which appears as a note to this section] shall be payable only for months after September 1983.”.

Option for certain participants to withdraw from Survivor Benefit Plan. Act Nov. 8, 1985, P. L. 99-145, Title VII, Part A, § 711(c), 99 Stat. 670, provided: “A person who during the period beginning on October 19, 1984, and ending on the date of the enactment of this Act [enacted Nov. 8, 1985] became a participant in the Survivor Benefit Plan under subchapter II of chapter 73 of title 10, United States Code [10 USCS §§ 1447 et seq.], may elect to withdraw from the Plan before the end of the one-year period beginning on the date of the enactment of this Act [enacted Nov. 8, 1985]. Any person who makes a withdrawal shall be paid the amount of the contributions by such person under the Plan, plus interest on such amount as determined by the Secretary of Defense.”.

Application of Nov. 8, 1985 amendment to subsec. (d). Act Nov. 8, 1985, P. L. 99-145, Title VII, Part A, § 712(b), 99 Stat. 671, provided:

“(1) Section 1448(d) of title 10, United States Code [subsec. (d) of this Section], as amended by subsection (a) applies to the surviving spouse and dependent children of a person who dies on active duty after September 20, 1972, and the former spouse of a person who dies after September 7, 1982.

“(2) In the case of the surviving spouse and children of a person who dies during the period beginning on September 21, 1972, and ending on October 1, 1985, the Secretary concerned shall take appropriate steps to locate persons eligible for an annuity under section 1448(d) of title 10, United States Code [subsec. (d) of this section], as amended by subsection (a). Any such person must submit an application to the Secretary for such an annuity before October 1, 1988, to be eligible to receive such annuity. Any such annuity shall be effective only for months after the month in which the Secretary receives such application.”.

Application of subsec. (f). Act Nov. 8, 1985, P. L. 99-145, Title VII, Part A, § 713(c), 99 Stat. 672, provided:

“(1) Section 1448(f) of title 10, United States Code [subsec. (f) of this section], as added by subsection (a), shall apply to the surviving spouse and dependent children of any person who dies after September 30, 1978, and the former spouse of a person who dies after September 7, 1982.

“(2) In the case of the surviving spouse and dependents of a person who dies during the period beginning on September 30, 1978, and ending on October 1, 1985, the Secretary concerned shall take appropriate steps to locate persons eligible for an annuity under section 1448(f) of title 10, United States Code [subsec. (f) of this section], as added by subsection (a). Any such person must submit

an application to the Secretary for such an annuity before October 1, 1988, to be eligible to receive such annuity. Any such annuity shall be effective only for months after the month in which the Secretary receives such application.”.

Revision for former spouse coverage already in effect. Act Nov. 8, 1985, P. L. 99-145, Title VII, Part A, § 716(b), 99 Stat. 674, provided: “A person who before the date of the enactment of this Act [enacted Nov. 8, 1985] made an election under section 1448(b) of title 10, United States Code [subsec. (b) of this section], to provide an annuity for a former spouse may elect, within the one-year period beginning on that date of enactment, to change that election so as to provide an annuity for the former spouse and the dependent children of the person, as authorized by paragraph (4) of that section [subsec. (b)(4) of this section] added by subsection (a). Such an election may be made even though the former spouse for whom the annuity was provided has died.”.

One-year open period to switch computation of SBP annuity. Act Nov. 8, 1985, P. L. 99-145, Title VII, Part B, § 723(c), 99 Stat. 677, provided: “A person who, before the effective date of this title [see 10 USCS § 1447 note], participated in the Survivor Benefit Plan under subchapter II of chapter 73 of title 10, United States Code [10 USCS § 1447 et seq.], and had elected to provide an annuity to a former spouse may, with the concurrence of such former spouse, elect to terminate such annuity and provide an annuity to such former spouse under section 1450(a)(1) of such title [10 USCS § 1450(a)(1)]. Any such election shall be made before the end of the 12-month period beginning on the date of the enactment of this Act [enacted Nov. 8, 1985].”.

One-year open period for new former spouse coverage. Act Nov. 8, 1985, P. L. 99-145, Title VII, Part B, § 723(d), 99 Stat. 677, provided: “A person who before the effective date of this part [see 10 USCS § 1447 note] was a participant in the Survivor Benefit Plan and did not elect to provide an annuity to a former spouse may elect to provide an annuity to a former spouse under the Plan. Any such election shall be made before the end of the 12-month period beginning on the date of the enactment of this Act [enacted Nov. 8, 1985].”.

Application of amendments by Act Nov. 8, 1985. For provisions as to the application of amendments to this section by Act Nov. 8, 1985, see Act Nov. 8, 1985, P.L. 99-145, Title VII, Part C, § 731(b), 99 Stat. 678, which appears as 10 USCS § 1447 note.

CROSS REFERENCES

This section is referred to in 10 USCS §§ 1447, 1449, 1450-1452, 1455; 38 USCS § 410.

RESEARCH GUIDE

Law Review Articles:

Hauserman and Fethke, Military Pensions as Divisible Assets: The Uniformed Services Former Spouses' Protection Act. 11 J Legis 27, Winter, 1984.

INTERPRETIVE NOTES AND DECISIONS

1. Relationship to other law
2. Election to participate; timeliness
3. —Notice
4. —Incorrect listing of spouse's name

1. Relationship to other law

Limitation contained in 10 USCS § 8963(a) restricting use of promotion to temporary grade for retired pay computation purposes is not applicable in establishing survivor benefit plan annuity under 10 USCS § 1448(d). (1980) 59 Op Comp Gen p 276.

Children of deceased Air Force Reserve officer killed while on active duty for training after having elected coverage for his children under Survivor Benefit Plan (10 USCS §§ 1447 et seq.) and subsequently qualifying for retirement under § 8911, are entitled to annuity payments under Survivor Benefit Plan, where officer was not actually retired and entitled to retired pay under § 8911, since merely qualifying for retirement under another statute does not void election to participate in Survivor Benefit Plan where election was valid when made. (1982) 61 Op Comp Gen p 441.

2. Election to participate; timeliness

Where member had opportunity to elect for dependent children during 18-month period authorized by Public Law 92-425, § 3(b), 86 Stat 711, and failed to do so before March 21, 1974, when his election period for Survivor Benefits Plan closed, he is precluded from thereafter amending his coverage to include dependent children. (1977) 56 Op Comp Gen 1022.

Pre-Survivor Benefit Plan effective date retiree, who is unmarried with dependent child on first anniversary date of Survivor Benefit Plan, may elect spouse coverage under fourth sentence of 10 USCS § 1448(a) upon marriage after close of 18-month election period authorized under subsection 3(b) of Public Law 92-425 (10 USCS § 1448 note) notwithstanding fact that he could have elected coverage for his dependent child during that period and failed to do so. (1977) 57 Op Comp Gen 98.

3. —Notice

Widow and surviving dependent child of retired serviceman are entitled to recover survi-

vors' annuity benefits under Survivor Benefit Plan (10 USCS §§ 1447 et seq.), notwithstanding that day before being discharged, serviceman elected not to participate in plan, after having earlier elected full plan coverage for his family, where Air Force did not furnish wife notice of husband's election not to be covered by plan, as required by § 1448(a). *Barber v United States* (1982) 230 Ct Cl 287, 676 F2d 651.

Spouses of pre-Survivor Benefit Plan (10 USCS §§ 1447 et seq.) are entitled to notice from government of retiree's election not to participate in SBP; retiree's election not to participate in Plan has no effect until government fulfils its ministerial duty to notify retiree's spouse. *Passaro v United States* (1984) 4 Cl Ct 395, adhered to, on reconsideration 5 Cl Ct 754.

Failure of government of notify spouse of military retiree's election not to participate in Survivor Benefits Plan violates 10 USCS § 1448(a) and gives rise to claim for damages on part of surviving spouse cognizable in claims court. *Passaro v United States* (1984) 5 Cl Ct 754.

4. —Incorrect listing of spouse's name

While incorrect listing of spouse's name on Survivor Benefit Plan form by member automatically covered by Plan under 10 USCS § 1448(a) would not ordinarily be sufficient to remove member from coverage nor would it affect legal spouse's right to annuity under Plan since in such case listing of spouse's name on form is primarily for administrative convenience; however, in case of retired member who must make affirmative election to participate in Plan pursuant to Public Law 92-425 § 3(b) (10 USCS § 1448 note), completion of form is evidence of member's election to participate and where member made election to participate for purpose of providing annuity to ineligible beneficiary, in this case second spouse whose marriage was nullity due to continued validity of previous marriage, election to participate is defective and must be considered invalid and no annuity may be paid although amounts deducted from retired pay as cost of Plan coverage should be paid to proper beneficiary under 10 USCS § 2771. (1978) 57 Op Comp Gen 426.

§ 1449. Mental incompetency of member

If a person to whom section 1448 of this title [10 USCS § 1448] applies is determined to be mentally incompetent by medical officers of the armed

1, 103 Stat. 1589,
which read: "1454.

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(11) The term "retired pay" includes retainer pay paid under section 6330 of this title.

(12) The term "standard annuity" means an annuity provided by virtue of eligibility under section 1448(a)(1)(A) of this title.

(13) The term "reserve-component annuity" means an annuity provided by virtue of eligibility under section 1448(a)(1)(B) of this title.

(14) The term "reserve-component retired pay" means retired pay under chapter 67 of this title [10 USCS §§ 1331 et seq.].

(As amended July 1, 1986, P. L. 99-348, Title III, § 301(a)(1), 100 Stat. 702; Nov. 14, 1986, P. L. 99-661, Div. A, Title XIII, Part E, § 1343(a)(8)(A), 100 Stat. 3992; Dec. 4, 1987, P. L. 100-180, Div. A, Title XII, Part D, § 1231(17), 101 Stat. 1161; Nov. 29, 1989, P. L. 101-189, Div. A, Title XIV, § 1407(a)(1)-(3), 103 Stat. 1589; Nov. 5, 1990, P. L. 101-510, Div. A, Title XIV, Part H, § 1484(l)(4)(C)(i), 104 Stat. 1719.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Amendments:

1986. Act July 1, 1986, in para. (2)(A), in the introductory matter, inserted "(determined without regard to any reduction under section 1409(b)(2) of this title)".

Act Nov. 14, 1986, in para. (2)(A), in the introductory matter, deleted "or retainer" following "retired or" in two places.

1987. Act Dec. 4, 1987, in paras. (1)-(13), inserted "The term" and, in paras. (2)-(13), revised the first quoted word in each para. so that the initial letter of such word is lower case.

1989. Act Nov. 29, 1989, in paras. (2)(B), in the introductory matter, and (C)(ii), substituted "reserve-component retired pay" for "retired pay under chapter 67 of this title", in para. (2)(C)(i), and the introductory matter in paras. (3) and (4), deleted "or retainer" following "retired", in para. (5), in the concluding matter, substituted "this paragraph" for "this clause" wherever appearing, in para. (11), inserted "paid under section 6330 of this title", and added para. (14).

1990. Act Nov. 5, 1990 (effective 11/29/89 as provided by § 1484(l)(4)(C) of this Act) corrected the statutory instructions of Act Nov. 29, 1989, P. L. 101-189, § 1407(a), so that the amendment to para. (5) concluding matter substituting "this paragraph" for "this clause" was effected each place it appears.

Short title:

Act Nov. 29, 1989, P. L. 101-189, Div. A, Title XIV, § 1401, 103 Stat. 1577, provides: "This title may be cited as the 'Military Survivor Benefits Improvement Act of 1989'." For full classification of this Title, consult USCS Tables volumes.

RESEARCH GUIDE

Law Review Articles:

Polchek, Recent property settlement issues for legal assistance attorneys. 1992 Army Law 4, December, 1992.

INTERPRETIVE NOTES AND DECISIONS

Children of Survivor Benefit Plan (10 USCS §§ 1447 et seq.) participants who are over 18 years old and are not attending school may become eligible for annuity at any time until they reach age of 22 by undertaking full-time course of study, as Congress in establishing plan indicated that children aged anywhere between 18 and 22 years old who are students should be regarded as eligible dependents for purposes of annuity coverage. (1986) 65 Op Comp Gen p 767.

If Survivor Benefit Plan (10 USCS §§ 1447 et seq.) participant's child who is between 18 and 22 years old becomes full-time student and thus becomes eligible for annuity under plan, any resulting adjustment that may be necessary in participant's cost for beneficiary coverage should be made effective on first day of month after child has resumed school attendance, as costs for benefit coverage generally are assessed on monthly basis and should be predicated on beneficiary status in beginning on first day of month for that month. (1986) 65 Op Comp Gen p 767.

Generally, valid marriage entered into by Survi-

vor Benefit Plan (10 USCS §§ 1447 et seq.) participant's child terminates child's annuity eligibility for all time, as valid marriage operates to end child's dependence upon parents, and relationship of dependency cannot be renewed by subsequent divorce; if marriage is ended not by ordinary divorce but rather by annulment, or there is otherwise judicial decree rendered by court of competent jurisdiction declaring marriage void, there would be proper basis for concluding marriage was invalid, and child's annuity coverage could be reinstated. (1986) 65 Op Comp Gen p 767.

Former wife is not entitled to be designated as former spouse beneficiary under survivor benefit plan of retired service member where court order merely reiterated earlier divorce decree requirement that service member provide former spouse coverage, since court order is not "modification" of previous court order as that term is used in 10 USCS § 1447(8) and does not establish new statutory one year filing period for election of coverage. Nawanna Driggers (1992) 71 Comp Gen 475; Constance L. Posner (1992) 71 Comp Gen 478.

§ 1448. Application of Plan

(a)(1) [Introductory matter unchanged]

10 USCS § 1448

ARMED FORCES

GENERA

- (A) [Unchanged]
 (B) Persons who would be eligible for reserve-component retired pay but for the fact that they are under 60 years of age.
- (2) [Introductory matter unchanged]
 (A) [Unchanged]
 (B) to a person who (i) is eligible to participate in the Plan under paragraph (1)(B), (ii) is married or has a dependent child when he is notified under section 1331(d) of this title that he has completed the years of service required for eligibility for reserve-component retired pay, and (iii) elects to participate in the Plan (and makes a designation under subsection (e)) before the end of the 90-day period beginning on the date he receives such notification.
- [Concluding matter unchanged]
 (3) [Unchanged]
 (4)(A) An election under paragraph (2)(A) not to participate in the Plan is irrevocable if not revoked before the date on which the person first becomes entitled to retired pay.
 (B) [Unchanged]
 (5) A person who is not married when he becomes eligible to participate in the Plan but who later marries or acquires a dependent child may elect to participate in the Plan, but his election must be written, signed by him, and received by the Secretary concerned within one year after he marries or acquires that dependent child. Such an election may not be revoked except in accordance with subsection (b)(3). His election is effective as of the first day of the first calendar month following the month in which his election is received by the Secretary concerned. In the case of a person providing a reserve-component annuity, such an election shall include a designation under subsection (e).
- (6) [Unchanged]
 (b)(1)-(4) [Unchanged]
 (5) A person who elects to provide an annuity to a former spouse under paragraph (2) or (3) shall, at the time of making the election, provide the Secretary concerned with a written statement (in a form to be prescribed by that Secretary and signed by such person and the former spouse) setting forth (A) whether the election is being made pursuant to the requirements of a court order, or (B) whether the election is being made pursuant to a written agreement previously entered into voluntarily by such person as a part of or incident to a proceeding of divorce, dissolution, or annulment and (if so) whether such voluntary written agreement has been incorporated in, or ratified or approved by, a court order.
- (c) [Unchanged]
 (d)(1) [Unchanged]
 (2) The Secretary concerned shall pay an annuity under this subchapter [10 USCS §§ 1447 et seq.] to the dependent child of a member described in paragraph (1) if there is no surviving spouse or if the member's surviving spouse subsequently dies.
- (3)-(5) [Unchanged]
 (e) [Unchanged]
 (f)(1) [Introductory matter unchanged]
 (A) before being notified under section 1331(d) of this title [10 USCS § 1331(d)] that he has completed the years of service required for eligibility for reserve-component retired pay; or
 (B) during the 90-day period beginning on the date he receives notification under section 1331(d) of this title that he has completed the years of service required for eligibility for reserve-component retired pay if he had not made an election under subsection (a)(2)(B) to participate in the Plan.
- (2) The Secretary concerned shall pay an annuity under this subchapter [10 USCS §§ 1447 et seq.] to the dependent child of a person described in paragraph (1) if there is no surviving spouse or if the person's surviving spouse subsequently dies.
- (3), (4) [Unchanged]
 (g) [Unchanged]
 (As amended Nov. 14, 1986, P. L. 99-661, Div A, Title VI, Part D, §§ 641(b)(1), 642(a), 100 Stat. 3885, 3886; Nov. 14, 1986, P. L. 99-661, Div A, Title XIII, Part E, § 1343(a)(8)(B), 100 Stat. 3992; Nov. 29, 1989, P. L. 101-189, Div A, Title XIV, § 1407(a)(2), (3), 103 Stat. 1588.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Amendments:

1986. Act Nov. 14, 1986 (applicable as provided by § 641(c) of such Act, which appears as 10 USCS § 1450 note), in subsec. (b), in para. (5), inserted "(A) whether the election is being made pursuant to the requirements of a court order, or (B)".

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Such Act further (applicable as provided by § 642(c) of such Act, which appears as a note to this section), in subsec. (d), substituted "if there is no surviving spouse or if the member's surviving spouse subsequently dies" for "if the member and the member's spouse die as a result of a common accident"; and in subsec. (f), in para. (2), substituted "if there is no surviving spouse or if the person's surviving spouse subsequently dies" for "if the person and the person's spouse die as a result of a common accident".

Such Act further, in subsec. (a)(5), substituted "a reserve-component annuity" for "an annuity by virtue of eligibility under paragraph (1)(B)".

1989. Act Nov. 29, 1989, in subsec. (a), in paras. (1)(B) and (2)(B), substituted "reserve-component retired pay" for "retired pay under chapter 67 of this title", deleted "or retainer" following "retired", and, in subsec. (f)(1)(A) and (B), substituted "reserve-component retired pay" for "retired pay under chapter 67 of this title".

Other provisions:

Income supplement for certain widows of retired members of the uniformed forces; special annuity for widows of commissioned personnel of the Public Health Service and National Oceanic and Atmospheric Administration in lieu of VA Pension. Act Sept. 21, 1972, P. L. 92-425, § 4, 86 Stat. 712; Oct. 14, 1976, P. L. 94-496, § 2, 90 Stat. 2375; Sept. 30, 1978, P. L. 95-397, Title II, § 209, 92 Stat. 848; Oct. 9, 1980, P. L. 96-402, § 6, 94 Stat. 1708; Sept. 24, 1983, P. L. 98-94, Title IX, Part D, § 942(a), 97 Stat. 654 (effective for payments after Sept. 1983, as provided by § 942(b) by such Act), provided:

(a), (b) [Unchanged]

"(c) The amounts specified in subsections (a)(3) and (b) shall be increased by the Secretary concerned whenever there is an increase under section 3112 [now section 5112] of title 38, United States Code, in the maximum annual rate of pension under section 541(b) of such title. Any such increase under the preceding sentence shall be in the same amount, and shall have the same effective date, as such increase in the maximum annual rate of pension."

(d) [Unchanged]

Revision for former spouse coverage already in effect. Act Nov. 8, 1985, P. L. 99-145, Title VII, Part A, § 716(b), 99 Stat. 674; Nov. 14, 1986, P. L. 99-661, Div A, Title VI, Part D, § 645, 100 Stat. 3887, provides:

"A person who before March 1, 1986 made an election under section 1448(b) of title 10, United States Code [subsec. (b) of this section], to provide an annuity for a former spouse may elect to change that election so as to provide an annuity for the former spouse and the dependent children of the person, as authorized by paragraph (4) of that section [subsec. (b)(4) of this section] added by subsection (a). Such an election may be made even though the former spouse for whom the annuity was provided has died. Such an election must be made—

"(1) not later than March 1, 1987, in the case of a person who made the election to provide an annuity for a former spouse before November 8, 1985; and

"(2) not later than the end of the one-year period beginning on the date of the enactment of the Department of Defense Authorization Act, 1987 [enacted Nov. 14, 1986], in the case of a person who made the election to provide an annuity for a former spouse during the period beginning on November 8, 1985, and ending on February 28, 1986."

Application of the amendments made by § 642 of Act Nov. 14, 1986. Act Nov. 14, 1986, P. L. 99-661, Div A, Title VI, Part D, § 642(c), 100 Stat. 3886, provides: "The amendments made by subsection (a) shall apply only to claims arising on or after March 1, 1986. The amendments made by subsection (b) shall apply to payments for periods after February 28, 1986."

Authority for certain remarried Survivor Benefit Plan participants to withdraw from Plan. Act Dec. 4, 1987, P. L. 100-180, Div A, Title VI, Part D, § 631, 101 Stat. 1104, provides:

"(a) Authority to withdraw. (1) An individual who is a participant in the Survivor Benefit Plan under subchapter II of chapter 73 of title 10, United States Code [10 USCS §§ 1447 et seq.], and is described in paragraph (2) may, with the consent of such individual's spouse, withdraw from participation in the Plan.

"(2) An individual referred to in paragraph (1) is an individual who—

"(A) is providing coverage for a spouse or for a spouse and child under the Plan; and

"(B) remarried before March 1, 1986, and at a time when such individual was a participant in the Plan but did not have an eligible spouse beneficiary under the Plan.

"(b) Applicable provisions. An election under subsection (a) shall be subject to subparagraphs (B) and (D) of section 1448(a)(6) of title 10, United States Code, except that in applying such subparagraph (B) to subsection (a), the one-year period referred to in clause (ii) of such subparagraph shall extend until the end of the one-year period beginning 90 days after the date of the enactment of this Act.

"(c) Treatment of prior contributions. No refund of amounts by which the retired pay of a participant in the Survivor Benefit Plan has been reduced by reason of section 1452 of title 10, United States Code, may be made to an individual who withdraws from the Survivor Benefit Plan under subsection (a)."

Annuity for certain surviving spouses. Act Sept. 29, 1988, P. L. 100-456, Div A, Title VI, Part F, § 653, 102 Stat. 1991, provides:

"(a) Annuity (1) The Secretary concerned shall pay an annuity to the qualified surviving spouse of each member of the uniformed services who—

10 USCS § 1448

ARMED FORCES

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“(A) died before November 1, 1953; and

“(B) was entitled to retired or retainer pay on the date of death.

“(2) A qualified surviving spouse for purposes of this section is a surviving spouse who has not remarried and who is eligible for an annuity under section 4 of Public Law 92-425 (10 U.S.C. 1448 note).

“(b) Amount of annuity. (1) An annuity payable under this section shall be paid at the rate of \$165 per month, as adjusted from time to time under subsection (c).

“(2) An annuity paid to a surviving spouse under this section shall be reduced by the amount of dependency and indemnity compensation (DIC) to which the surviving spouse is entitled under section 411(a) of title 38, United States Code.

“(c) Cost-of-living increases. Whenever retired or retainer pay is increased under section 1401a(b)(2) of title 10, United States Code, each annuity that is payable under this section shall be increased at the same time and by the same total percent. The amount of the increase shall be based on the monthly annuity payable before any reduction under this section.

“(d) Relationship to other programs. An annuity paid to a surviving spouse under this section is in addition to any pension to which the surviving spouse is entitled under subchapter III of chapter 15 of title 38, United States Code [38 USCS §§ 532 et seq.], or section 306 of the Veterans' and Survivors' Pension Improvement Act of 1978 (38 U.S.C. 521 note), and any payment made under the provisions of section 4 of Public Law 92-425 [note to this section]. An annuity paid under this section shall not be considered as income for the purposes of eligibility for any such pension.

“(e) Definitions. For purposes of this section.

“(1) The terms ‘uniformed services’ and ‘Secretary concerned’ have the meanings given those terms in section 101 of title 37, United States Code.

“(2) The term ‘surviving spouse’ has the meaning given the terms ‘widow’ and ‘widower’ in paragraphs (3) and (4), respectively, of section 1447 of title 10, United States Code.

“(f) Effective date. Annuities under this section shall be paid for months beginning after the month in which this Act is enacted. No benefit shall accrue to any person by reason of the enactment of this section for any period before the first month referred to in the preceding sentence. No benefit shall be paid to any person under this section unless an application for such benefit has been filed with the Secretary concerned by or on behalf of such person.”

Open enrollment period. Act Nov. 29, 1989, P. L. 101-189, Div A, Title XIV, § 1405, 103 Stat. 1586; Nov. 5, 1990, P. L. 101-510, Div A, Title VI, Part D, § 631(2), Title XIV, Part H, § 1484(1)(4)(B), 104 Stat. 1580, 1719; Dec. 5, 1991, P. L. 102-190, Div A, Title VI, Part E, § 653(a)(1), (c)(2), 105 Stat. 1388; Oct. 23, 1992, P. L. 102-484, Div A, Title VI, Subtitle D, § 643, 106 Stat. 2425, provides

“(a) Persons not currently participating in Survivor Benefit Plan (1) Election of SBP coverage. An eligible retired or former member may elect to participate in the Survivor Benefit Plan during the open enrollment period specified in subsection (f).

“(2) Election of supplemental annuity coverage. An eligible retired or former member who elects under paragraph (1) to participate in the Survivor Benefit Plan at the maximum level may also elect during the open enrollment period to participate in the Supplemental Survivor Benefit Plan established under subchapter III of chapter 73 of title 10, United States Code [10 USCS §§ 1456 et seq.], as added by section 1404

“(3) Eligible retired or former member. For purposes of paragraphs (1) and (2), an eligible retired or former member is a member or former member of the uniformed services who on the day before the first day of the open enrollment period is not a participant in the Survivor Benefit Plan and—

“(A) is entitled to retired pay; or

“(B) would be entitled to retired pay under chapter 67 of title 10 [10 USCS §§ 1331 et seq.], United States Code, but for the fact that such member or former member is under 60 years of age.

“(4) Status under SBP of persons making elections. (A) Standard annuity A person making an election under paragraph (1) by reason of eligibility under paragraph (3)(A) shall be treated for all purposes as providing a standard annuity under the Survivor Benefit Plan.

“(B) Reserve-component annuity. A person making an election under paragraph (1) by reason of eligibility under paragraph (3)(B) shall be treated for all purposes as providing a reserve-component annuity under the Survivor Benefit Plan.

“(b) Election to increase coverage under SBP. A person who on the day before the first day of the open enrollment period is a participant in the Survivor Benefit Plan but is not participating at the maximum base amount or is providing coverage under the Plan for a dependent child and not for the person's spouse or former spouse may, during the open enrollment period elect to—

“(1) participate in the Plan at a higher base amount (not in excess of the participant's retired pay), or

“(2) provide annuity coverage under the Plan for the person's spouse or former spouse at a base amount not less than the base amount provided for the dependent child.

“(c) Election for current SBP participants to participate in supplemental SBP. (1) Election. A person who is eligible to make an election under this paragraph may elect during the

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open enrollment period to participate in the Supplemental Survivor Benefit Plan established under subchapter III of chapter 73 of title 10, United States Code [10 USCS §§ 1456 et seq], as added by section 1404

“(2) Persons eligible Except as provided in paragraph (3), a person is eligible to make an election under paragraph (1) if on the day before the first day of the open enrollment period the person is a participant in the Survivor Benefit Plan at the maximum level, or during the open enrollment period the person increases the level of such participation to the maximum level under subsection (b) of this section, and under that Plan is providing annuity coverage for the person’s spouse or a former spouse

“(3) Limitation on eligibility for certain SBP participants not affected by two-tier annuity computation A person is not eligible to make an election under paragraph (1) if (as determined by the Secretary concerned) the annuity of a spouse or former spouse beneficiary of that person under the Survivor Benefit Plan will be computed under section 1451(e) of title 10, United States Code However, such a person may during the open enrollment period waive the right to have that annuity computed under such section. Any such election is irrevocable. A person making such a waiver may make an election under paragraph (1) as in the case of any other participant in the Survivor Benefit Plan.

“(d) Manner of making elections An election under this section must be made in writing, signed by the person making the election, and received by the Secretary concerned before the end of the open enrollment period Any such election shall be made subject to the same conditions, and with the same opportunities for designation of beneficiaries and specification of base amount, that apply under the Survivor Benefit Plan or the Supplemental Survivor Benefit Plan, as the case may be A person making an election under subsection (a) to provide a reserve-component annuity shall make a designation described in section 1448(e) of title 10, United States Code

“(e) Effective date for elections Any such election shall be effective as of the first day of the first calendar month following the month in which the election is received by the Secretary concerned

“(f) Open enrollment period defined The open enrollment period is the one-year period beginning on April 1, 1992

“(g) Effect of death of person making election within two years of making election (1) If a person making an election under this section dies before the end of the two-year period beginning on the effective date of the election, the election is void and the amount of any reduction in retired pay of the person that is attributable to the election shall be paid in a lump sum to the person who would have been the deceased person’s beneficiary under the voided election if the deceased person had died after the end of such two-year period

“(2) Paragraph (1) does not apply in the case of the death of a person making an election under subsection (a) if the beneficiary of that person under the election is the person’s spouse and that spouse was entitled, before November 1, 1990, to receive dependency and indemnity compensation benefits from the Department of Veterans Affairs based on a previous marriage to another member or former member of the uniformed services.

“(h) Applicability of certain provisions of law The provisions of sections 1449, 1453, and 1454 of title 10, United States Code, are applicable to a person making an election, and to an election, under this section in the same manner as if the election were made under the Survivor Benefit Plan or the Supplemental Survivor Benefit Plan, as the case may be

“(i) Report concerning open season Not later than June 1, 1990, the Secretary of Defense shall submit to the Committees on Armed Services of the Senate and House of Representatives a report on the open season authorized by this section for the Survivor Benefit Plan. The report shall include—

“(1) a description of the Secretary’s plans for implementation of the open season,

“(2) the Secretary’s estimates of the costs associated with the open season, including any anticipated effect of the open season on the actuarial status of the Department of Defense Military Retirement Fund, and

“(3) any recommendation by the Secretary for further legislative action

“(j) Additional premium The Secretary of Defense may require that the SBP premium for a person making an election under subsection (a)(1) or (b) include, in addition to the amount required under section 1452(a) of title 10, United States Code, an amount determined under regulations prescribed by the Secretary of Defense for the purposes of this subsection Any such amount shall be stated as a percentage of the base amount of the person making the election and shall reflect the number of years that have elapsed since the person retired, but may not exceed 4 5 percent of that person’s base amount ”

Definitions. Act Nov 29, 1989, P L 101-189, Div A, Title XIV, § 1406, 103 Stat. 1588, Dec 5, 1991, P L 102-190, Div A, Title VI, Part E, § 653(a)(2), 105 Stat 1388, provides

“For the purpose of this title [for full classification, consult USCS Tables volumes]

“(1) The term ‘Survivor Benefit Plan’ means the program established under subchapter II of chapter 73 of title 10, United States Code [10 USCS §§ 1447 et seq]

“(2) The term ‘retired pay’ includes retainer pay paid under section 6330 of title 10, United States Code

“(3) The terms ‘uniformed services’ and ‘Secretary concerned’ have the meanings given those terms in section 101 of title 37, United States Code

"(4) The term 'SBP premium' means the reduction in retired pay required as a condition of providing an annuity under the Survivor Benefit Plan.

"(5) The term 'base amount' has the meaning given that term in section 1447(2) of title 10, United States Code."

RESEARCH GUIDE

Law Review Articles:

Polchek, Recent property settlement issues for legal assistance attorneys. 1992 Army Law 4, December, 1992.

INTERPRETIVE NOTES AND DECISIONS

5. Right of action

2. Election to participate; timeliness

Terminally ill retired officer's election of Survivor Benefit Plan (SBP) coverage for former spouse pursuant to clause in divorce settlement was irrevocable, and precluded current spouse from SBP coverage where election in favor of former spouse was made in proper form, member was never adjudicated incompetent, and great weight of medical and other evidence presented supported former spouse's contention that he was mentally competent when he made election. (1985) 65 Op Comp Gen p 134.

3. —Notice

Air Force's failure to notify spouses of service members' election to not participate in survivor annuity benefits under Survivor Benefit Plan (10 USCS §§ 1447-1455) rendered such elections ineffective as Congress intended that election out would be void unless statutory notice requirement was satisfied. Kelly v United States (1987, CA FC) 826 F2d 1049.

Widow's affidavit containing assertion that she received no notice of late husband's decision to forego participation in annuity plan rebutted presumption that Air Force officials discharged their duties correctly, and thus presumption ceased to exist. Kelly v United States (1986) 10 Cl Ct 579, affd (CA FC) 826 F2d 1049.

§ 1449. Mental incompetency of member

If a person to whom section 1448 of this title applies is determined to be mentally incompetent by medical officers of the armed force concerned or of the Department of Veterans Affairs, or by a court of competent jurisdiction, any election described in subsection (a)(2) or (b), of section 1448 of this title may be made on behalf of that person by the Secretary concerned. If the person for whom the Secretary has made an election is later determined to be mentally competent by an authority named in the first sentence, he may, within 180 days after that determination revoke that election. Any deductions made from retired pay by reason of such an election will not be refunded.

(As amended Nov. 29, 1989, P. L. 101-189, Div A, Title XIV, § 1407(a)(3), Title XVI, Part C, § 1621(a)(1), 103 Stat. 1588, 1602.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Amendments:

1989. Act Nov. 29, 1989 deleted "or retainer" following "retired" and substituted "Department of Veterans Affairs" for "Veterans' Administration".

§ 1450. Payment of annuity: beneficiaries

(a) [Unchanged]

(b) An annuity payable to the beneficiary terminates effective as of the first day of the month in which eligibility is lost. An annuity for a widow, widower, or former spouse shall be paid to the widow, widower, or former spouse while the widow, widower, or former spouse is living or, if the widow, widower, or former spouse remarries before reaching age 55, until the widow, widower, or former spouse remarries. If the widow, widower, or former spouse remarries before reaching age 55 and that marriage is terminated by death, annulment, or divorce, payment of the annuity will be resumed effective as of the first day of the month in which the marriage is so terminated. However, if the widow, widower, or former spouse is also entitled to an annuity

Air Force was not contractually or statutorily obligated to notify estranged spouse of retired service member's failure to elect coverage under Survivor Benefit Plan that went into effect after his retirement. Wirt v United States (1990) 21 Cl Ct 92.

With respect to claims for annuities (survivor benefit plan annuities and minimum income widow annuities) by surviving spouses of deceased members of uniformed services, where member elected not to participate in annuity program but government failed to notify spouse of that fact (effect of which is to invalidate non-participation election), 31 USCS § 3702(b), which limits General Accounting Office's jurisdiction to consider claims to those that are filed within six years after they arise, operates as statute of limitations, such that surviving spouse must claim benefits within six years of member's death (or when all events have transpired necessary to file claim) or be forever barred from doing so. Application of Barring Act to Annuity Claims (1992) 71 Comp Gen 398.

5. Right of action

10 USCS § 1448(a) creates substantive right, violation of which gives rise to claim for money damages. Dean v United States (1986) 10 Cl Ct 563.

under the Plan based may not receive both (c) If, upon the death of the widow, widower, or former spouse, the annuity or reduction in an annuity on the date of the death of the member is 38 [38 USCS §§ 101 (d), (e) [Unchanged] (f)(1) [Unchanged]

(2) A person who by a court order is a spouse (or to be a spouse (whether voluntarily or otherwise) an election pursuant to paragraph (1) un

(A) in a case in which the person is to make the election

(i) furnish regular on such election change the

(ii) [Unchanged]

(B) in a case in which the person is approved by a

(i), (ii) [Unchanged]

(3)(A) If a person is incident to a court order to elect under such agreement, such agreement has been filed with the law or if such person then has made such manner as that such an order, regular of such person official) that State law.

(B) An election in case of any spouse of the

(C) [Unchanged]

(4) A court order under section 1448 of former spouse a

(g) [Unchanged]

(h) Except as provided to any other payment annuity shall be covered Affairs.

(i), (j) [Unchanged]

(k)(1) If a widow, or (c) subsequently of the remarriage remarriage such of the annuity, the effective date be in effect with subsection (c) h

Addendum "C."

Mansell v. Mansell

Equipment & U.S., at 376, 98 Federal Courts tute, 36 U.Chi. sure "[w]hat-ope of jurisdic-ar statute can ss.⁵⁷⁸" ante, at ieve us of our to the congres-quite incorrect ongress did not ident-party jur-text, it has not th respect to federal jurisdic-

o draw support wood, 312 U.S. 1058 (1941), a issue³⁵ and a urisdiction con-⁶ The Court's on the special ims, see *id.*, at rtly on the view nt to be sued ed," *id.*, at 590, tely, after the 1946, the Court ned view of the nity effected by

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lucker Act should ie consent of the effect as a post- n that in the hands d not be within its

igly argues that the in an unsound and maxim that sover- ist be strictly con- Lucas, & G. Grot- ice ¶ 20.07(3), pp.).

that statute. Thus, in its decision uphold- ing jurisdiction of a claim against the Unit- ed States for contribution—incidentally, a claim that was not expressly covered by the Act—the Court wrote:

"This brings the instant cases within the principle approved in *United States v. Aetna Surety Co.*, 338 U.S. 366, 383 [70 S.Ct. 207, 216, 94 L.Ed. 171]:

"In argument before a number of Dis- trict Courts and Courts of Appeals, the Government relied upon the doctrine that statutes waiving sovereign immunity must be strictly construed. We think that the congressional attitude in passing the Tort Claims Act is more accurately reflected by Judge Cardozo's statement in *Anderson v. Hayes Construction Co.*, 243 N.Y. 140, 147, 153 N.E. 28, 29–30: 'The exemption of the sovereign from suit involves hardship enough where consent has been withheld. We are not to add to its rigor by refinement of construction where consent has been announced.'"

"Once we have concluded that the Fed- eral Tort Claims Act covers an action for contribution due a tort-feasor, we should not, by refinement of construction, limit that consent to cases where the proce- dure is by separate action and deny it where the same relief is sought in a third-party action. As applied to the State of New York, Judge Cardozo said in language which is apt here: 'No sensi- ble reason can be imagined why the State, having consented to be sued, should thus paralyze the remedy.' 243

37. See also *Larson v. Domestic & Foreign Com- merce Corp.*, 337 U.S. 682, 709, 69 S.Ct. 1457, 1470, 93 L.Ed. 1628 (1949) (Frankfurter, J., dis- senting) ("In the course of a century or more a steadily expanding conception of public moral- ity regarding 'governmental responsibility' has led to a 'generous policy of consent for suits against the government' to compensate for the negligence of its agents as well as to secure obedience to its contracts"); *Great Northern Life Ins. Co. v. Read*, 322 U.S. 47, 59, 64 S.Ct. 873, 879, 88 L.Ed. 1121 (1944) (Frankfurter, J., dis- senting) ("[C]onsent does not depend on some ritualistic formula. Nor are any words needed to indicate submission to the law of the land. The readiness or reluctance with which courts

N.Y. at 147, 153 N.E. at 29. 'A sense of justice has brought a progressive relax- ation by legislative enactments of the rigor of the immunity rule. As represen- tative governments attempt to amelio- rate inequalities as necessities will per- mit, prerogatives of the government yield to the needs of the citizen.... When authority is given, it is liberally construed.' *United States v. Shaw*, 309 U.S. 495, 501[, 60 S.Ct. 659, 661, 84 L.Ed. 888]." *United States v. Yellow Cab Co.*, 340 U.S. 543, 554–555, 71 S.Ct. 399, 406–407, 95 L.Ed. 523 (1951).³⁷

¹³⁸⁰Today we should be guided by the wisdom of Cardozo and Friendly rather than by the "unnecessarily grudging" ap- proach that was unanimously rebuffed in *Gibbs*. See 383 U.S., at 725, 86 S.Ct., at 1138.

I respectfully dissent.



490 U.S. 581, 104 L.Ed.2d 675

¹³⁸¹Gerald E. MANSELL, Appellant

v.

Gaye M. MANSELL.

No. 87–201.

Argued Jan. 10, 1989.

Decided May 30, 1989.

Former husband sought modification of divorce decree by removing the provision

find such consent has naturally been influenced by prevailing views regarding the moral sanc- tion to be attributed to a State's freedom from suability. Whether this immunity is an absolute survival of the monarchical privilege, or is a manifestation merely of power, or rests on ab- stract legal grounds, it undoubtedly runs coun- ter to modern democratic notions of the moral responsibility of the State. Accordingly, courts reflect a strong legislative momentum in their tendency to extend the legal responsibility of *Government and to confirm Maitland's belief*, expressed nearly fifty years ago, that 'it is a wholesome sight to see "the Crown" sued and answering for its torts'").

that required him to share his total retirement pay with his former wife. The California Superior Court, Merced County, denied the request without opinion. Former husband appealed. The California Court of Appeal affirmed. The California Supreme Court denied the former husband's petition for review. Appeal was taken. The Supreme Court, Justice Marshall, held that military retirement pay that had been waived by the former husband in order to receive veterans' disability benefits was not community property divisible upon divorce.

Reversed and remanded.

Justice O'Connor filed a dissenting opinion, in which Justice Blackmun joined.

Opinion on remand, 217 Cal App 219, 265 Cal Rptr 227.

1. Husband and Wife ⇌249(3)

Uniformed Services Former Spouses' Protection Act did not give state courts authority to treat total military retirement pay as community property, but rather, gave them authority to treat disposable retirement pay as community property. 10 U S C A § 1408(a)(4)(B), (c)(1).

2. Divorce ⇌252.3(4)

Husband and Wife ⇌249(3)

Uniformed Services Former Spouses' Protection Act imposes substantive limits on state courts' power to divide military retirement pay, and is not garnishment statute designed solely to limit when federal government will make direct payment to former spouse. Act does not give state courts authority to treat total retirement pay as community property. 10 U S C A § 1408(a)(4)(B), (c)(1).

3. Divorce ⇌252.3(4)

Husband and Wife ⇌249(3)

Military retirement pay that had been waived by former husband in order to receive veterans' disability benefits was not

community property divisible upon divorce. 10 U S C A § 1408(a)(4)(B), (c)(1).

Syllabus *

In direct response to *McCarty v McCarty*, 453 U S 210, 101 S Ct 2728, 69 L Ed 2d 589, which held that federal law as it then existed completely pre-empted the application of state community property law to military retirement pay, Congress enacted the Uniformed Services Former Spouses' Protection Act (Act), 10 U S C § 1408 (1982 ed. and Supp. V) which authorizes state courts to treat as community property "disposable retired or retainer pay," § 1408(c)(1), specifically defining such pay to exclude, *inter alia*, any military retirement pay waived in order for the retiree to receive veterans' disability benefits, § 1408(a)(4)(B). The Act also creates a mechanism whereby the Federal Government will make direct community property payments of up to 50 percent of disposable retired or retainer pay to certain former spouses who present state-court orders granting such pay. A pre-*McCarty* property settlement agreement between appellant and appellee, who were divorced in a county Superior Court in California, a community property State, provided that appellant would pay appellee 50 percent of his total military retirement pay, including that portion of such pay which he had waived in order to receive military disability benefits. After the Act's passage, the Superior Court denied appellant's request to modify the divorce decree by removing the provision requiring him to share his total retirement pay with appellee. The State Court of Appeal affirmed, rejecting appellant's contention that the Act precluded the lower court from treating as community property the military retirement pay appellant had waived to receive disability benefits. In so holding, the court relied on a State Supreme Court decision which reasoned that the Act did not limit a state court's ability

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the

reader. See *United States v Detroit Lumber Co.*, 200 U S 321, 337, 26 S Ct 282, 287, 50 L Ed 499.

to treat total military retirement pay as community property and to enforce a former spouse's rights to such pay through remedies other than direct Federal Government payments.

Held: The Act does not grant state courts the power to treat as property divisible upon divorce military retirement pay waived by the retiree in order to receive veterans' disability benefits. In light of § 1408(a)(4)(B)'s limiting language as to such waived pay, the Act's plain and precise language establishes that § 1408(c)(1) grants state courts the authority to treat only disposable retired pay, not total retired pay, as community property. Appellee's argument that the Act has no preemptive ¹⁵⁸²effect of its own and must be read as a garnishment statute designed solely to limit when the Federal Government will make direct payments to a former spouse, and that, accordingly, § 1408(a)(4)(B) defines "disposable retired or retainer pay" only because payments under the statutory direct payment mechanism are limited to amounts defined by that term, is flawed for two reasons. First, the argument completely ignores the fact that § 1408(c)(1) also uses the quoted phrase to limit specifically and plainly the extent to which state courts may treat military retirement pay as community property. Second, each of § 1408(c)'s other subsections imposes new substantive limits on state courts' power to divide military retirement pay, and it is unlikely that all of the section, except for § 1408(c)(1), was intended to pre-empt state law. Thus, the garnishment argument misplaces its reliance on the fact that the Act's saving clause expressly contemplates that a retiree will be liable for "other payments" in excess of those made under the direct payment mechanism, since that clause is more plausibly interpreted as serving the limited purpose of defeating any inference that the mechanism displaced state courts' authority to divide and garnish property not covered by the mechanism. Appellee's contention that giving effect to the plain and precise statutory language would thwart the Act's obvi-

ous purposes of rejecting *McCarty* and restoring to state courts their pre-*McCarty* authority is not supported by the legislative history, which, read as a whole, indicates that Congress intended both to create new benefits for former spouses and to place on state courts limits designed to protect military retirees. Pp. 2028-2032.

Reversed and remanded.

MARSHALL, J., delivered the opinion of the Court, in which REHNQUIST, C.J., and BRENNAN, WHITE, STEVENS, SCALIA, and KENNEDY, JJ., joined. O'CONNOR, J., filed a dissenting opinion, in which BLACKMUN, J., joined, *post*, p. 2032.

Douglas B. Cone, Merced, Cal., for appellant.

Dennis A. Cornell, Merced, Cal., for appellee.

¹⁵⁸³Justice MARSHALL delivered the opinion of the Court.

In this appeal, we decide whether state courts, consistent with the federal Uniformed Services Former Spouses' Protection Act, 10 U.S.C. § 1408 (1982 ed. and Supp. V) (Former Spouses' Protection Act or Act), may treat as property divisible upon divorce military retirement pay waived by the retiree in order to receive veterans' disability benefits. We hold that they may not.

I

A

Members of the Armed Forces who serve for a specified period, generally at least 20 years, may retire with retired pay. 10 U.S.C. § 3911 *et seq.* (1982 ed. and Supp. V) (Army); § 6321 *et seq.* (1982 ed. and Supp. V) (Navy and Marine Corps); § 8911 *et seq.* (1982 ed. and Supp. V) (Air Force). The amount of retirement pay a veteran is eligible to receive is calculated according to the number of years served and the rank

achieved. §§ 3926 and 3991 (Army); §§ 6325-6327 (Navy and Marine Corps); § 8929 (Air Force). Veterans who became disabled as a result of military service are eligible for disability benefits. 38 U.S.C. § 310 (wartime disability); § 331 (peacetime disability). The amount of disability benefits a veteran is eligible to receive is calculated according to the seriousness of the disability and the degree to which the veteran's ability to earn a living has been impaired. §§ 314 and 355.

In order to prevent double dipping, a military retiree may receive disability benefits only to the extent that he waives a corresponding amount of his military retirement pay. § 3105.¹ Because disability benefits are exempt from federal, state, and local taxation, § 3101(a), military retirees who waive their retirement pay in favor of disability benefits increase² their after-tax income. Not surprisingly, waivers of retirement pay are common.

California, like several other States, treats property acquired during marriage as community property. When a couple divorces, a state court divides community property equally between the spouses while each spouse retains full ownership of any separate property. See Cal.Civ.Code Ann. § 4800(a) (West 1983 and Supp.1989). California treats military retirement payments as community property to the extent they derive from military service performed during the marriage. See, e.g., *Casas v. Thompson*, 42 Cal.3d 131, 139, 228 Cal.Rptr. 33, 37-38, 720 P.2d 921, 925, cert. denied, 479 U.S. 1012, 107 S.Ct. 659, 93 L.Ed.2d 713 (1986).

1. For example, if a military retiree is eligible for \$1500 a month in retirement pay and \$500 a month in disability benefits, he must waive \$500 of retirement pay before he can receive any disability benefits.

2. The language of the Act covers both community property and equitable distribution States, as does our decision today. Because this case concerns a community property State, for the sake of simplicity we refer to § 1408(c)(1) as authorizing state courts to treat "disposable retired or retainer pay" as community property.

In *McCarty v. McCarty*, 453 U.S. 210, 101 S.Ct. 2728, 69 L.Ed.2d 589 (1981), we held that the federal statutes then governing military retirement pay prevented state courts from treating military retirement pay as community property. We concluded that treating such pay as community property would do clear damage to important military personnel objectives. *Id.*, at 232-235, 101 S.Ct., at 2741-2743. We reasoned that Congress intended that military retirement pay reach the veteran and no one else. *Id.*, at 228, 101 S.Ct., at 2739. In reaching this conclusion, we relied particularly on Congress' refusal to pass legislation that would have allowed former spouses to garnish military retirement pay to satisfy property settlements. *Id.*, at 228-232, 101 S.Ct., at 2739-2741. Finally, noting the distressed plight of many former spouses of military members, we observed that Congress was free to change the statutory framework. *Id.*, at 235-236, 101 S.Ct. at 2742-2743.

In direct response to *McCarty*, Congress enacted the Former Spouses' Protection Act, which authorizes state courts to treat "disposable retired or retainer pay" as community property. 10 U.S.C. § 1408(c)(1).² "Disposable retired or ~~retainer~~ pay" is defined as "the total monthly retired or retainer pay to which a military member is entitled," minus certain deductions. § 1408(a)(4) (1982 ed. and Supp. V). Among the amounts required to be deducted from total pay are any amounts waived in order to receive disability benefits. § 1408(a)(4)(B).³

3. Also deducted from total military retirement pay are amounts: (a) owed by the military member to the United States; (b) required by law to be deducted from total pay, including employment taxes, and fines and forfeitures ordered by courts-martial; (c) properly deducted for federal, state, and local income taxes; (d) withheld pursuant to other provisions under the Internal Revenue Code; (e) equal to the amount of retired pay of a member retired for physical disability; and (f) deducted to create an annuity for the former spouse. 10 U.S.C. §§ 1408(a)(4)(A)-(F) (1982 ed. and Supp. V).

The Act also creates a payments mechanism under which the Federal Government will make direct payments to a former spouse who presents, to the Secretary of the relevant military service, a state-court order granting her a portion of the military retiree's disposable retired or retainer pay. This direct payments mechanism is limited in two ways. § 1408(d). First, only a former spouse who was married to a military member "for a period of 10 years or more during which the member performed at least 10 years of service creditable in determining the member's eligibility for retired or retainer pay," § 1408(d)(2), is eligible to receive direct community property payments. Second, the Federal Government will not make community property payments that exceed 50 percent of disposable retired or retainer pay. § 1408(e)(1).

B

Appellant Gerald E. Mansell and appellee Gaye M. Mansell were married for 23 years and are the parents of six children. Their marriage ended in 1979 with a divorce decree from the Merced County, California, Superior Court. At that time, Major Mansell received both Air Force retirement pay and, pursuant to a waiver of a portion of that pay, disability benefits. Mrs. Mansell and Major Mansell entered ¹³⁸⁶into a property settlement which provided, in part, that Major Mansell would pay Mrs. Mansell 50 percent of his total military retirement pay, including that portion of retirement pay waived so that Major Mansell could receive disability benefits. Civ. No. 55594 (May 29,

1979). In 1983, Major Mansell asked the Superior Court to modify the divorce decree by removing the provision that required him to share his total retirement pay with Mrs. Mansell. The Superior Court denied Major Mansell's request without opinion.

Major Mansell appealed to the California Court of Appeal, Fifth Appellate District, arguing that both the Former Spouses' Protection Act and the anti-attachment clause that protects a veteran's receipt of disability benefits, 38 U.S.C. § 3101(a) (1982 ed. and Supp. IV),⁴ precluded the Superior Court from treating military retirement pay that had been waived to receive disability benefits as community property. Relying on the decision of the Supreme Court of California in *Casas v. Thompson*, *supra*, the Court of Appeal rejected that portion of Major Mansell's argument based on the Former Spouses' Protection Act. 5 Civ. No. F002872 (Jan. 30, 1987).⁵ *Casas* held that after the passage of the Former Spouses' Protection Act, federal law no longer pre-empted ¹³⁸⁷state community property law as it applies to military retirement pay. The *Casas* court reasoned that the Act did not limit a state court's ability to treat total military retirement pay as community property and to enforce a former spouse's rights to such pay through remedies other than direct payments from the Federal Government. 42 Cal.3d, at 143-151, 228 Cal.Rptr., at 40-46, 720 P.2d, at 928-933. The Court of Appeal did not discuss the anti-attachment clause, 38 U.S.C. § 3101(a).⁶ The Supreme

4. That clause provides that veterans benefits "shall not be assignable except to the extent specifically authorized by law, and shall be exempt from the claim[s] of creditors, and shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, either before or after receipt by the [veteran]." 38 U.S.C. § 3101(a) (1982 ed. and Supp. V).

5. In a supplemental brief, Mrs. Mansell argues that the doctrine of *res judicata* should have prevented this pre-*McCarty* property settlement from being reopened. *McCarty v. McCarty*, 453 U.S. 210, 101 S.Ct. 2728, 69 L.Ed.2d 589 (1981).

The California Court of Appeal, however, decided that it was appropriate, under California law, to reopen the settlement and reach the federal question. 5 Civ. No. F002872 (Jan. 30, 1987). Whether the doctrine of *res judicata*, as applied in California, should have barred the reopening of pre-*McCarty* settlements is a matter of state law over which we have no jurisdiction. The federal question is therefore properly before us.

6. Because we decide that the Former Spouses Protection Act precludes States from treating as community property retirement pay waived to receive veterans disability benefits, we need not decide whether the anti-attachment clause,

Court of California denied Major Mansell's petition for review.

We noted probable jurisdiction, 487 U.S. 1217, 108 S.Ct. 2868, 101 L.Ed.2d 904 (1988), and now reverse.

II

Because domestic relations are preeminently matters of state law, we have consistently recognized that Congress, when it passes general legislation, rarely intends to displace state authority in this area. See, e.g., *Rose v. Rose*, 481 U.S. 619, 628, 107 S.Ct. 2029, 2035, 95 L.Ed.2d 599 (1987); *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 581, 99 S.Ct. 802, 808, 59 L.Ed.2d 1 (1979). Thus we have held that we will not find preemption absent evidence that it is "positively required by direct enactment." *Hisquierdo*, *supra*, at 581, 99 S.Ct. at 808 (quoting *Wetmore v. Markoe*, 196 U.S. 68, 77, 25 S.Ct. 172, 176, 49 L.Ed. 390 (1904)). The instant case, however, presents one of those rare instances where Congress has directly and specifically legislated in the area of domestic relations.

It is clear from both the language of the Former Spouses' Protection Act, see, e.g., § 1408(c)(1), and its legislative history, see, e.g., H.R.Conf.Rep. No. 97-749, p. 165 (1982); S.Rep. No. 97-502, pp. 1-3, 16 (1982), U.S.Code Cong. & Admin.News 1982, p. 1555, that Congress sought to change the legal landscape created by the *McCarty* decision.⁷ Because pre-existing federal law, as construed by this Court, completely pre-empted the application of state community property law to military retirement pay, Congress could overcome the *McCarty* decision only by enacting an affirmative grant of authority giving the States the power to treat military retirement pay as community property. Cf. *Mid-*

lantic Nat. Bank v. New Jersey Dept. of Environmental Protection, 474 U.S. 494, 501, 106 S.Ct. 755, 759-60, 88 L.Ed.2d 959 (1986).

The appellant and appellee differ sharply on the scope of Congress' modification of *McCarty*. Mrs. Mansell views the Former Spouses' Protection Act as a complete congressional rejection of *McCarty*'s holding that state law is pre-empted; she reads the Act as restoring to state courts all pre-*McCarty* authority. Major Mansell, supported by the United States, argues that the Former Spouses' Protection Act is only a partial rejection of the *McCarty* rule that federal law preempts state law regarding military retirement pay.⁸

[1] Where, as here, the question is one of statutory construction, we begin with the language of the statute. See, e.g., *Blum v. Stenson*, 465 U.S. 886, 896, 104 S.Ct. 1541, 1547-48, 79 L.Ed.2d 891 (1984); *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108, 100 S.Ct. 2051, 2056, 64 L.Ed.2d 766 (1980). Mrs. Mansell's argument faces a formidable obstacle in the language of the Former Spouses' Protection Act. Section 1408(c)(1) of the Act affirmatively grants state courts the power to divide military retirement pay, yet its language is both precise and limited. It provides that "a court may treat disposable retired or retainer pay ... either as property solely of the member or as property of the member and his spouse in accordance with the law of the jurisdiction of ~~139~~ such court." § 1408(c)(1). The Act's definitional section specifically defines the term "disposable retired or retainer pay" to exclude, *inter alia*, military retirement pay waived in order to receive veterans' disability

§ 3101(a), independently protects such pay. See, e.g., *Rose v. Rose*, 481 U.S. 619, 107 S.Ct. 2029, 95 L.Ed.2d 599 (1987); *Wissner v. Wissner*, 338 U.S. 655, 70 S.Ct. 398, 94 L.Ed. 424 (1950).

7. Congress also demonstrated its focus on *McCarty* when it chose June 25, 1981, the day before *McCarty* was decided, as the applicable

date for some of the Act's provisions. 10 U.S.C. § 1408(c)(1); see also note following § 1408, Pub.L. 97-252, § 1006(b) (transition provisions).

8. Although the United States has filed an *amicus* brief supporting Major Mansell, its initial *amicus* brief, filed before the Court noted jurisdiction, supported Mrs. Mansell.

ity payments § 1408(a)(4)(B).⁹ Thus, 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.

[2] Mrs. Mansell attempts to overcome the limiting language contained in the definition, § 1408(a)(4)(B) by reading the Act as a garnishment statute designed solely to set out the circumstances under which, pursuant to a court order, the Federal Government will make direct payments to a former spouse. According to this view, § 1408(a)(4)(B) defines "[d]isposable retired or retainer pay" only because payments under the federal direct payments mechanism are limited to amounts defined by that term.

The garnishment argument relies heavily on the Act's saving clause. That clause provides

"Nothing in this section shall be construed to relieve a member of liability for the payment of alimony, child support, or other payments required by a court order on the grounds that payments made out of disposable retired or retainer pay under this section have been made in the maximum amount permitted under [the direct payments mechanism]. Any such unsatisfied obligation ¹³⁹⁰of a member may be enforced by any means available under law other than the means provided under this section in any case in which the maximum amount permitted under [the direct payments mechanism] has been paid." § 1408(e)(6) (emphasis added)

Mrs. Mansell argues that, because the saving clause expressly contemplates "other

9. The statute provides in pertinent part

"Disposable retired or retainer pay means the total monthly retired or retainer pay to which a member is entitled less amounts which—

'(B) are required by law to be and are deducted from the retired or retainer pay of such member including fines and forfeitures ordered

payments in excess of those made under the direct payments mechanism the Act does not attempt to tell the state courts what they may or may not do with the underlying property.' Brief for Appellee 17. For the reasons discussed below, we find a different interpretation more plausible. In our view, the saving clause serves the limited purpose of defeating any inference that the federal direct payments mechanism displaced the authority of state courts to divide and garnish property not covered by the mechanism. Cf. *Hisquierdo*, 439 U.S., at 584, 99 S.Ct., at 809-10 (to prohibit garnishment is to prohibit division of property), *Wissner v. Wissner* 338 U.S. 655, 70 S.Ct. 398, 94 L.Ed. 424 (1950) (same).

First, the most serious flaw in the garnishment argument is that it completely ignores § 1408(c)(1). Mrs. Mansell provides no explanation for the fact that the defined term—"disposable retired or retainer pay"—is used in § 1408(c)(1) to limit specifically and plainly the extent to which state courts may treat military retirement pay as community property.

Second, the view that the Act is solely a garnishment statute and therefore not intended to pre-empt the authority of state courts is contradicted not only by § 1408(c)(1), but also by the other subsections of § 1408(c). Sections 1408(c)(2), (c)(3), and (c)(4) impose new substantive limits on state courts' power to divide military retirement pay. Section 1408(c)(2) prevents a former spouse from transferring, selling, or otherwise disposing of her community interest in the military retirement pay.¹⁰ Section 1408(c)(3) provides that a ¹³⁹¹state court cannot order a military member to retire so that the former spouse can immediately begin receiving her portion of

by courts martial. Federal employment taxes and amounts waived in order to receive compensation under title 5 or title 38 [disability payments] § 1408(a)(4)(B).

10. The Senate Report expressly contemplates that § 1408(c)(2) will preempt state law. S.Rep. No. 97-502, p. 16 (1982).

military retirement pay.¹¹ And § 1408(c)(4) prevents spouses from forum shopping for a State with favorable divorce laws.¹² Because each of these provisions pre-empts state law, the argument that the Act has no pre-emptive effect of its own must fail.¹³ Significantly, Congress placed each of these substantive restrictions on state courts in the same section of the Act as § 1408(c)(1). We think it unlikely that every subsection of § 1408(c), except § 1408(c)(1), was intended to pre-empt state law.

In the face of such plain and precise statutory language, Mrs. Mansell faces a daunting standard. She cannot prevail without clear evidence that reading the language literally would thwart the obvious purposes of the Act. See, e.g., *Trans Alas-*

ka Pipeline Rate Cases, 436 U.S. 631, 643, 98 S.Ct. 2053, 2061, 56 L.Ed.2d 591 (1978). The legislative history does not indicate the reason for Congress' decision to shelter from community property law that portion of military retirement pay waived to receive veterans' disability payments.¹⁴ But the absence of legislative history on this decision is immaterial in light of the plain and precise language of the statute; Congress is not required to build a record in the legislative history to defend its policy choices.

Because of the absence of evidence of specific intent in the legislative history, Mrs. Mansell resorts to arguments about the broad purposes of the Act. But this reliance is misplaced because, at this general level, there are statements that both

11. There was some concern expressed at the Senate hearings on the Act that state courts could direct a military member to retire. See, e.g., Hearings before the Subcommittee on Manpower and Personnel of the Senate Committee on Armed Services, 97th Cong., 2d Sess., 132-133 (1982) (Sen. Exon); *id.*, at 70-71 (veterans' group); *id.*, at 184 (Air Force). Thus the Senate version of the bill contained § 1408(c)(3) in order to ensure that state courts did not have such power, S.Rep. No. 97-502, *supra*, at 17, and at conference the House agreed to add the provision. H.R.Conf.Rep. No. 97-749, p. 167 (1982).

12. A state court may not treat disposable retirement pay as community property unless it has jurisdiction over the military member by reason of (1) residence, other than by military assignment in the territorial jurisdiction of the court, (2) domicile, or (3) consent. § 1408(c)(4). Although the Senate Committee had decided not to include any forum shopping restrictions, seeing "no need to limit the jurisdiction of the State courts by restricting the benefits afforded by this bill . . .," S.Rep. No. 97-502, *supra*, at 9, U.S.Code Cong. & Admin.News 1982, p. 1604, the House version of the bill contained the restrictions, and at conference, the Senate agreed to add them. H.R.Conf.Rep. No. 97-749, *supra*, at 167.

13. That Congress intended the substantive limits in § 1408(c)(1) to be, to some extent, distinct from the limits on the direct payments mechanism contained in § 1408(d) is demonstrated by the legislative compromise that resulted in the direct payments mechanism being available only to former spouses who had been married

to the military retiree for 10 years or more. § 1408(d)(2). Under the House version of the bill, military retirement pay could be treated as community property only if the couple had been married for 10 years or more. H.R.Conf.Rep. No. 97-749, *supra*, at 165. The Senate Committee had considered, but rejected, such a provision. S.Rep. No. 97-502, *supra*, at 9-11. The conferees agreed to remove the House restriction. Instead, they limited the federal direct payments mechanism to marriages that had lasted 10 years or more. H.R.Conf.Rep. No. 97-749, *supra*, at 166-167. Under this compromise, state courts have been granted the authority to award a portion of disposable military retired pay to former spouses who were married to the military member for less than 10 years, but such former spouses may not take advantage of the direct payments mechanism.

14. The only reference to the definitional section is contained in the Senate Report which states that the deductions from total retired pay, including retirement pay waived in favor of veterans' disability payments, "generally parallel those existing deductions which may be made from the pay of Federal employees and military personnel before such pay is subject to garnishment for alimony or child support payments under section 459 of the Social Security Act. (42 U.S.C. 659)." S.Rep. No. 97-502, *supra*, at 14, U.S.Code Cong. & Admin.News 1982, p. 1609. This statement, however, describes the defined term in § 1408(a)(4). It is not helpful in determining why Congress chose to use the defined term—"disposable retired or retainer pay"—to limit state-court authority in § 1408(c)(1).

contradict and support her arguments. Her argument that the Act contemplates no federal pre-emption is supported by statements in the Senate Report and the House Conference¹⁵ Report that the purpose of the Act is to overcome the *McCarty* decision and to restore power to the States.¹⁵ But the Senate Report and the House Conference Report also contain statements indicating that Congress rejected the uncomplicated option of removing all federal pre-emption and returning unlimited authority to the States.¹⁶ Indeed, a bill that would have eliminated all federal pre-emption died in the Senate Committee.¹⁷ Her argument that Congress primarily intended to protect former spouses is supported by evidence that Members of Congress were moved by, and responding to, the distressed economic plight of military wives after a divorce.¹⁸ But the Senate Report and the House debates contain¹⁹ statements which reveal that Congress was

concerned as well with protecting the interests of military members.¹⁹

Thus, the legislative history, read as a whole, indicates that Congress intended both to create new benefits for former spouses and to place limits on state courts designed to protect military retirees. Our task is to interpret the statute as best we can, not to second-guess the wisdom of the congressional policy choice. See, e.g., *Rodriguez v. United States*, 480 U.S. 522, 526, 107 S.Ct. 1391, 1393, 94 L.Ed.2d 533 (1987) (*per curiam*) ("Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice"). Given Congress' mixed purposes, the legislative history does not clearly support Mrs. Mansell's view that giving effect to the plain and precise language of the statute would thwart the obvious purposes of the Act.

15. See, e.g., S.Rep. No. 97-502, *supra*, at 1, U.S.Code Cong. & Admin.News 1982, p. 1596 ("The primary purpose of the bill is to remove the effect of the United States Supreme Court decision in *McCarty v. McCarty*, 453 U.S. 210, 101 S.Ct. 2728, 69 L.Ed.2d 589 (1981). The bill would accomplish this objective by permitting Federal, State, and certain other courts, consistent with the appropriate laws, to once again consider military retired pay when fixing the property rights between the parties to a divorce, dissolution, annulment or legal separation"). See also *id.*, at 5 and 16; H.R.Conf.Rep. No. 97-749, *supra*, at 165.

16. H.R.Conf.Rep. No. 97-749, *supra*, at 165, U.S.Code Cong. & Admin.News 1982, p. 1570 ("The House amendment would permit disposable military retired pay to be considered as property in divorce settlements *under certain specified conditions*") (emphasis added); *ibid.* ("The House Amendment contained several provisions that would place restrictions on the division of retired pay"); S.Rep. No. 97-502, *supra*, at 4, U.S.Code Cong. & Admin.News 1982, p. 1599 ("[Senate] 1814 imposes *three distinct limits* on the division or enforcement of court orders against military retired pay in divorce cases") (emphasis added).

17. Entitled "Nonpreemption of State law" the bill provided that "[f]or purposes of division of marital property of any member or former member of the armed forces upon dissolution of such member's marriage, the law of the State in

which the dissolution of marriage proceeding was instituted shall be dispositive on all matters pertaining to the division of any retired, retirement, or retainer pay to which such member or former member is entitled or will become entitled." S. 1453, 97th Cong., 1st Sess. (1981).

18. The Senate Committee pointed out that "frequent change-of-station moves and the special pressures placed on the military spouse as a homemaker make it extremely difficult to pursue a career affording economic security, job skills and pension protection." S.Rep. No. 97-502, *supra*, at 6, U.S.Code Cong. & Admin.News 1982, p. 1601. The language of the Act, and much of its legislative history, is written in gender neutral terms, and there is no doubt that the Act applies equally to both former husbands and former wives. But "it is quite evident from the legislative history that Congress acted largely in response to the plight of the military wife." Horkovich, Uniformed Services Former Spouses' Protection Act: Congress' Answer to *McCarty v. McCarty* Goes Beyond the Fundamental Question, 23 Air Force L.Rev. 287, 308 (1982-1983) (emphasis in original).

19. See, e.g., S.Rep. No. 97-502, *supra*, at 7, U.S.Code Cong. & Admin.News 1982, p. 1611 ("All agreed that some form of remedial legislation which is fair and equitable to both spouses was necessary to provide a solution to the *McCarty* decision"); see also *id.*, at 11; nn. 10, 11, 12, and 16, *supra*.

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

III

[3] For the reasons stated above, we hold that the Former Spouses' Protection Act does not grant state courts the ¹³⁹⁵power to treat as property divisible upon divorce military retirement pay that has been waived to receive veterans' disability benefits. The judgment of the California Court of Appeal is hereby reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

Justice O'CONNOR, with whom Justice BLACKMUN joins, dissenting.

Today the Court holds that the federal Uniformed Services Former Spouses' Protection Act (Former Spouses' Protection Act or Act) denies state courts the power to order in a divorce decree the division of military retirement pay unilaterally waived by a retiree in order to receive veterans' disability benefits. The harsh reality of this holding is that former spouses like Gaye Mansell can, without their consent, be denied a fair share of their ex-spouse's military retirement pay simply because he elects to increase his after-tax income by converting a portion of that pay into disability benefits. On the Court's reading of the Former Spouses' Protection Act, Gaye Mansell will lose nearly 30 percent of the monthly retirement income she would otherwise have received as community property. I view the Court's holding as inconsistent with both the language and the purposes of the Act, and I respectfully dissent.

The Court recognized in *McCarty v. McCarty*, 453 U.S. 210, 235, 101 S.Ct. 2728,

2742, 69 L.Ed.2d 589 (1981), that "the plight of an ex-spouse of a retired service member is often a serious one." In holding that federal law precluded state courts from dividing *nondisability* military retired pay pursuant to state community property laws, *McCarty* concluded with an invitation to Congress to reexamine the issue. Congress promptly did so and enacted the Former Spouses' Protection Act. Today, despite overwhelming evidence that Congress intended to overrule *McCarty* completely, to alter pre-existing federal military retirement law so as to eliminate the pre-emptive effect ¹³⁹⁶discovered in *McCarty*, and to restore to the States authority to issue divorce decrees affecting military retirement pay consistent with state law, the Court assumes that Congress only partially rejected *McCarty* and that the States can apply their community property laws to military retirement pay only to the extent that the Former Spouses' Protection Act affirmatively grants them authority to do so. *Ante*, at 2028. The *McCarty* decision, however, did not address retirement pay waived to receive disability benefits; nor did it identify any explicit statutory provision precluding the States from characterizing such waived retirement pay as community property. Thus, I reject the Court's central premise that the States are precluded by *McCarty* from characterizing as community property any retirement pay waived to receive disability benefits absent an affirmative grant of authority in the Former Spouses' Protection Act.

In my view, Congress intended, by enacting the Former Spouses' Protection Act, to eliminate the effect of *McCarty*'s pre-emption holding altogether and to return to the States their authority "to treat military pensions in the same manner as they treat other retirement benefits." S.Rep. No. 97-502, p. 10 (1982), U.S.Code Cong. & Admin.News 1982, p. 1604. See also *id.*, at 1, U.S.Code Cong. & Admin.News 1982, p. 1596 ("The primary purpose of the bill is to remove the effect of the United States Su-

preme Court decision in *McCarty v. McCarty*, 453 U.S. 210, 101 S.Ct. 2728, 69 L.Ed.2d 589 (1981). The bill would accomplish this objective by permitting Federal, State, and certain other courts, consistent with the appropriate laws, to once again consider military retired pay when fixing the property rights between the parties to a divorce, dissolution, annulment or legal separation"); *id.*, at 5, U.S.Code Cong. & Admin.News 1982, 1599 ("[T]he committee intends the legislation to restore the law to what it was when the courts were permitted to apply State divorce laws to military retired pay"); *id.*, at 16, U.S.Code Cong. & Admin.News 1982, p. 1611 ("The provision is intended to remove the federal pre-emption found to exist by the United States Supreme Court and permit State and other courts of competent jurisdiction to apply pertinent State or other laws in determining ¹³⁹⁷whether military retired or retainer pay should be divis[i]ble"); 128 Cong.Rec. 18314 (1982) ("The amendment simply returns to State courts the authority to treat military retired pay as it does other public and private pensions") (remarks of Rep. Schroeder, bill sponsor).

Family law is an area traditionally of state concern, *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 581, 99 S.Ct. 802, 808, 59 L.Ed.2d 1 (1979), and we have not found federal pre-emption of state authority in this area absent a determination that "Congress has 'positively required by direct enactment' that state law be pre-empted." *Ibid.* (quoting *Wetmore v. Markoe*, 196 U.S. 68, 77, 25 S.Ct. 172, 176, 49 L.Ed. 390 (1904)). The Former Spouses' Protection Act does not "positively require" States to abandon their own law concerning the divisibility upon divorce of military retirement pay waived in order to obtain veterans' disability benefits. On the contrary, the whole thrust of the Act was to restore to the States their traditional authority in the area of domestic relations. Even beyond that restoration, Congress sought to provide greater federal assistance and protection to military spouses than existed before

McCarty by creating a federal garnishment remedy in aid of state court community property awards. That, in fact, is the central purpose and preoccupation of the Act's complex statutory framework. The Former Spouses' Protection Act is primarily a remedial statute creating a mechanism whereby former spouses armed with state court orders may enlist the Federal Government to assist them in obtaining some of their property entitlements upon divorce. The federal garnishment remedy created by the Act is limited, but it serves as assistance and not, as the Court would have it, a hindrance to former spouses. Thus, the provision at 10 U.S.C. § 1408(a)(4)(B) (1982 ed. and Supp. V) of the Act defining "[d]isposable retired or retainer pay" to exclude "amounts waived in order to receive compensation under title 5 or title 38," and its incorporation into § 1408(c)(1)'s community property provision, only limits the federal garnishment remedy created by the Act. It does not limit the authority ¹³⁹⁸of States to characterize such waived retirement pay as community property under state law.

This reading is reinforced by the legislative history, which indicates that "[t]he specific deductions that are to be made from the total monthly retired and retainer pay generally parallel those existing deductions which may be made from the pay of Federal employees and military personnel before such pay is subject to *garnishment* for alimony or child support payments under section 459 of the Social Security Act (42 U.S.C. 659)." S.Rep. No. 97-502, *supra*, at 14, U.S.Code Cong. & Admin.News 1982, p. 1609 (emphasis added). The Court finds that this statement "is not helpful in determining why Congress chose to use the defined term—'disposable retired or retainer pay'—to limit state-court authority in § 1408(c)(1)." *Ante*, at 2030, n. 14. True, it is singularly unhelpful in supporting the Court's view that § 1408(c)(1) denies state courts authority to *characterize* retirement pay waived in lieu of disability benefits as community property. By contrast, it is

helpful in determining why Congress chose to use "disposable retired or retainer pay" as the term limiting state court authority to *garnish* military retirement pay. In light of the fact that disability benefits are exempt from garnishment in most cases, 38 U.S.C. § 3101(a) (1982 ed., Supp. V), had Congress not excluded "amounts waived" in order to receive veterans' disability benefits from the federal garnishment remedy created by the Former Spouses' Protection Act it would have eviscerated the force of the anti-attachment provisions of § 3101(a).

To take advantage of the federal garnishment remedy, which provides for direct payment by the Government to former spouses in specified circumstances, former spouses must serve on the appropriate service Secretary court orders meeting certain requirements. In the case of a division of property, the court order must "specifically provid[e] for the payment of an amount, expressed in dollars or as a percentage of disposable retired or retainer pay, from the disposable retired or retainer pay of a member." 10 U.S.C. § 1408(a)(2)(C)⁵⁹⁹ (1982 ed., Supp. V). It must contain certain information and be regular on its face. §§ 1408(b)(1)(B), 1408(b)(1)(C), 1408(b)(1)(D), 1408(b)(2) (1982 ed. and Supp. V). The Act sets forth the procedures to be followed by the Secretary in making payments directly to former spouses. § 1408(d) (1982 ed. and Supp. V). Finally, the Act places limits on the total amount of disposable retirement pay that may be paid by the Secretary to former spouses, §§ 1408(e)(1), 1408(e)(4)(B) (1982 ed. and Supp. V), and it clarifies the procedures to be followed in the event of multiple or conflicting court orders. §§ 1408(e)(2), 1408(e)(3)(A) (1982 ed., Supp. V).

Subsection 1408(c)(1) authorizes the application of this federal garnishment remedy to community property awards by providing that "a court *may* treat disposable retired or retainer pay payable to a member ... 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." (Emphasis added.) This provision should not be read to *preclude* States from characterizing retirement pay waived to receive disability benefits as community property but only to preclude the use of the federal direct payments mechanism to attach that waived pay. Nor do §§ 1408(c)(2), (c)(3), and (c)(4) compel the conclusion that Congress intended to pre-empt States from characterizing gross military retirement pay as community property divisible upon divorce. Those three provisions indicate what States may "not" do. That Congress explicitly restricted the authority of courts in certain specific respects, however, does not support the inference that § 1408(c)(1)—an affirmative *grant* of power—should be interpreted as precluding everything it does not grant. On the contrary, it supports the inference that Congress explicitly and directly precluded those matters it wished to pre-empt entirely, leaving the balance of responsibility in the area of domestic relations to the States. In this respect, the Court mischaracterizes Gaye Mansell's argument as insisting that "the Act contemplates no federal pre-emption..." ¹⁶⁰⁰*Ante*, at 2030. Subsection 1408(c) has substantive effects on the power of state courts—its first paragraph expands those powers ("a court may treat"); its remaining paragraphs restrict those powers ("this section does not create"; "[t]his section does not authorize"; "[a] court may not treat").

That States remain free to characterize waived portions of retirement pay as community property is unambiguously underscored by the broad language of the saving clause contained in the Act, § 1408(e)(6). That clause provides:

"*Nothing* in this section shall be construed to relieve a member of liability for the payment of alimony, child support, or other payments required by a court order on the grounds that payments made out of disposable retired or retainer pay under this section have been made in the maximum amount permitted under para-

graph (1) or subparagraph (B) of paragraph (4). *Any such unsatisfied obligation of a member may be enforced by any means available under law other than the means provided under this section* in any case in which the maximum amount permitted under paragraph (1) has been paid and under section 459 of the Social Security Act (42 U.S.C. 659) in any case in which the maximum amount permitted under subparagraph (B) of paragraph (4) has been paid." (Emphasis added.)

The Court explains that the saving clause "serves the limited purpose of defeating any inference that the federal direct payments mechanism displaced the authority of state courts to divide and garnish property *not* covered by the mechanism." *Ante*, at 2029 (emphasis added). I agree. What I do not understand is how the Court can read the Act's saving clause in this manner and yet conclude, without contradiction, that California may not characterize retirement pay waived for disability benefits as community property. All California seeks to do is "divide and garnish property not covered by the [federal direct payments] mechanism." *Ibid*. Specifically, California wishes to exercise its traditional family⁶⁰¹ law powers to divide as community property that portion of Major Mansell's retirement pay which he unilaterally converted into disability benefits, and use state-law garnishment remedies to attach the *value* of Gaye Mansell's portion of this community property. That is precisely what § 1408(e)(6) saves to the States by "defeating" any contrary inference, *ante*, at 8, that the Act has displaced the State's authority to enforce its divorce decrees "by any means available under law other than the means provided under this section. . . ." § 1408(e)(6). As the California Supreme Court so aptly put it, in the saving clause Congress emphasized that "the limitations on the service secretary's ability to reach the retiree's gross pay [are] not to be deemed a limitation on the state court's ability to define the community property interests at the time of dissolution." *Ca-*

sas v. Thompson, 42 Cal.3d 131, 150, 228 Cal.Rptr. 33, 45, 720 P.2d 921, 933, cert. denied, 479 U.S. 1012, 107 S.Ct. 659, 93 L.Ed.2d 713 (1986). In other words, while a former spouse may not receive community property payments that exceed 50 percent of a retiree's disposable retirement pay through the direct federal garnishment mechanism, § 1408(e)(1), a state court is free to characterize gross retirement pay as community property depending on the law of its jurisdiction, and former spouses may pursue any other remedy "available under law" to satisfy that interest. "Nothing" in the Former Spouses' Protection Act relieves military retirees of liability under such law if they possess other assets equal to the value of the former spouse's share of the gross retirement pay.

Under the Court's reading of the Act as precluding the States from characterizing gross retirement pay as community property, a military retiree has the power unilaterally to convert community property into separate property and increase his after-tax income, at the expense of his ex-spouse's financial security and property entitlements. To read the statute as permitting a military retiree to pocket 30 percent, 50 percent, even 80 percent of gross retirement pay by converting it into disability benefits and thereby to avoid his obligations⁶⁰² under state community property law, however, is to distort beyond recognition and to thwart the main purpose of the statute, which is to recognize the sacrifices made by military spouses and to protect their economic security in the face of a divorce. Women generally suffer a decline in their standard of living following a divorce. See Weitzman, *The Economics of Divorce: Social and Economic Consequences of Property, Alimony and Child Support Awards*, 28 UCLA L.Rev. 1181, 1251 (1981). Military wives face special difficulties because "frequent change-of-station moves and the special pressures placed on the military spouse as a homemaker make it extremely difficult to pursue a career affording economic security,

ls and pension protection." S.Rep. 502, at 6, U.S.Code Cong. & Ad. 1982, p. 1601. The average multiple married for 20 years moves 2 times, and military wives experience unemployment rate more than double of their civilian counterparts. or Women's Equity Action League s *Amici Curiae* 10-11. Retirement moreover, is often the single most le asset acquired by military couples. 18. Indeed, the one clear theme that s from the legislative history of the that Congress recognized the dire of many military wives after divorce ight to protect their access to their bands' military retirement pay. See No. 97-502, at 6; 128 Cong.Rec. (1982) ("[F]requent military moves reclude spouses from pursuing their reers and establishing economic in- lence. As a result, military spouses requently unable to vest in their own ent plans or obtain health insurance ge from a private employer. Mil- ipouses who become divorced often ll access to retirement and health ts—despite a 'career' devoted to the y") (remarks of Rep. Schumer). See d., at 18315, 18316, 18317, 18320, 18328. Reading the Act as not pre- g States from characterizing retire- pay waived to receive disability bene- s property divisible upon divorce is ul to the clear remedial purposes e statute in a way that the Court's retation is not.

conclusion that States may treat military retirement pay as property ble upon divorce is not inconsistent 38 U.S.C. § 3101(a) (1982 ed., Supp. This anti-attachment provision pro- that veterans' disability benefits l not be liable to attachment, levy, or re by or under any legal or equitable ss whatever, either before or after pt by the beneficiary." Gaye Mansell owledges, as she must, that § 3101(a) udes her from garnishing under state Major Mansell's veterans' disability

benefits in satisfaction of her claim to a share of his gross military retirement pay, just as § 1408(c)(1) precludes her from invoking the federal direct payments mechanism in satisfaction of that claim. To recognize that § 3101(a) protects the funds from a specific source, however, does not mean that § 3101(a) prevents Gaye Mansell from recovering her 50 percent interest in Major Mansell's gross retirement pay out of any income or assets he may have other than his veterans' disability benefits. So long as those benefits themselves are protected, calculation of Gaye Mansell's entitlement on the basis of Major Mansell's gross retirement pay does not constitute an "attachment" of his veterans' disability benefits. Section 3101(a) is designed to ensure that the needs of disabled veterans and their families are met, see *Rose v. Rose*, 481 U.S. 619, 634, 107 S.Ct. 2029, 2038, 95 L.Ed.2d 599 (1987), without interference from creditors. That purpose is fulfilled so long as the benefits themselves are protected by the anti-attachment provision.

In sum, under the Court's interpretation of the Former Spouses' Protection Act, the former spouses Congress sought to protect risk having their economic security severely undermined by a unilateral decision of their ex-spouses to waive retirement pay in lieu of disability benefits. It is inconceivable that Congress intended the broad remedial purposes of the statute to be thwarted in such a way. To be sure, as the Court notes, Congress sought to be "fair and equitable" to retired service members as well as to protect divorced spouses. *Ante*, at 2031, and n. 19. Congress explicitly protected military members by limiting the percentage of disposable retirement pay subject to the federal garnishment remedy and by expressly providing that military members could not be forced to retire. See 10 U.S.C. §§ 1408(e)(1), 1408(e)(4)(B), 1408(c)(3). Moreover, a retiree is still advantaged by waiving retirement pay in lieu of disability benefits: the pay that is waived is not subject to the federal direct

payments mechanism, and the former spouse must resort instead to the more cumbersome and costly process of seeking a state garnishment order against the value of that waived pay. See H.R.Rep. No. 98-700, pp. 4-5 (1984) (discussing difficulties faced by ex-spouses in obtaining state garnishment orders). Even these state processes cannot directly attach the military retiree's disability benefits for purposes of satisfying a community property division given the strictures of the anti-attachment provision of 38 U.S.C. § 3101(a). There is no basis for concluding, however, that Congress sought to protect the interests of service members by allowing them unilaterally to deny their former spouses any opportunity to obtain a fair share of the couple's military retirement pay.

It is now once again up to Congress to address the inequity created by the Court in situations such as this one. But because I believe that Congress has already expressed its intention that the States have the authority to characterize waived retirement pay as property divisible upon divorce, I dissent.



490 U.S. 605, 104 L.Ed.2d 696

ASARCO INCORPORATED,
et al., Petitioners

v.

Frank KADISH, et ux., et al.

No. 87-1661.

Argued Feb. 27, 1989.

Decided May 30, 1989.

Taxpayers brought action challenging Arizona statute permitting State Land Department to lease minerals and school trust lands at flat rate royalty. The Superior

Court, Maricopa County, No. C-433745, John Sticht, J., granted summary judgment in favor of defendants. Plaintiffs appealed. Motion for transfer was granted and the Arizona Supreme Court, Feldman, V.C.J., 155 Ariz. 484, 747 P.2d 1183, reversed and remanded with instructions. Certiorari was granted. The Supreme Court, Justice Kennedy, held that: (1) Supreme Court had jurisdiction, and (2) statute governing mineral leases of state lands was void.

Affirmed.

Justice O'Connor took no part in the consideration or decision.

Justice Brennan filed an opinion concurring in part and concurring in the judgment in which Justices White, Marshall, and Blackmun joined.

Chief Justice Rehnquist filed a concurring and dissenting opinion in which Justice Scalia joined.

1. Federal Courts ⇐503

Arizona Supreme Court's decision, that state law governing mineral leases was invalid, was final, and therefore, United States Supreme Court had jurisdiction on writ of certiorari even though Arizona Supreme Court remanded case for trial court to determine appropriate further relief; trial court on remand did not have before it any federal question as to whether past or current leases were valid since respondents on appeal withdrew request for accounting and payment of sums under past leases and trial court's further actions could not affect Arizona Supreme Court's ruling that state law was invalid. A.R.S. § 27-234, subd. B.

2. Courts ⇐97(1)

Although state courts are not bound to adhere to federal standing requirements, they possess authority, absent provision for exclusive federal jurisdiction, to render binding judicial decisions that rest on their own interpretations of federal law. 28 U.S.C.A. § 1738.

Addendum "D."

Plaintiff's Trial Exhibit No. 1

UPDATED FINANCIAL DISCLOSURE FOR SUE VARALLO AS OF FEBRUARY 15, 1993

(Includes pay raise and other income)

1. Gross Monthly Income

Salary	\$3350.53
Dividends & interest	
Dreyfus & Vanguard (est) *	110.57
Mortgage note from Mom's estate *	152.03
Royal Bank of Scotland Bond *	119.00
Savings account (est)	329.00
	<hr/>
	\$4060.60

* Income from mother's estate

2. Monthly Deductions

State & federal income tax	\$ 877.54
Number exemptions taken	0
Social Security	256.30
Medical insurance (Mail Handlers, High Option, Self & Family)	87.99
Retirement fund	194.33
Savings Plan	10.83
Charity	6.50
Life Insurance	15.38
	<hr/>
	\$1448.87

3. Net Monthly Income: \$2611.73

4. Debts & Obligations

First Security Bank	Mortgage on Condo	\$84,500	\$ 593.00
Park Place Homeowners Asso	Condo Fee		175.00
Westminster College	Valerie's School	\$2,000	667.00 *
Judge Memorial High School	Cara's School	?	270.00 *
First Federal Bank	Mortgage on Btfl House	\$126,000	\$1388.00 **

* These obligations are currently shared equally w/husband.

**This obligation is shared equally w/husband; he is currently under court order to make the mortgage payments.

PLAINTIFF'S EXHIBIT
EXHIBIT NO. 1
CASE NO. 92478
DATE REC'D 2-17-93
IN EVIDENCE
CLERK KD

5. Property

Automobile: 1990 Mitsubishi Galant \$10,000

Securities, stocks, bonds:

Royal Bank of Scotland Bond *	\$15,000.00
Petroleum Technologies Corp **	15,000.00

* Purchased w/proceeds from mother's estate; currently held w/husband as joint owner as broker did not have Pay On Death option.

**Purchased w/proceeds from mother's estate.

Cash & Deposit Accounts

America First Credit Union	\$ 9,943.80
Chase Manhattan Bank	392.21
Exchange Credit Union	79,000.78
Vanguard Money Market Fund *	5,261.98
Dreyfus Money Market Fund *	21,274.90
* Funds from mother's estate	

Retirement Accounts:

Thrift Saving Plan (IRA) est.	1,900.00
Pentagon Fed Credit Union (IRA)	536.72

Addendum "E."

Findings of Fact and Conclusions of Law

PRINCE, YEATES & GELDZAHLER
Ronald E. Nehring (2374)
Sally B. McMinimee (5316)
Attorneys for Plaintiff
City Centre I, Suite 900
175 East Fourth South
Salt Lake City, Utah 84111
(801) 524-1000

IN THE SECOND JUDICIAL DISTRICT COURT IN AND FOR
DAVIS COUNTY, STATE OF UTAH

MERRILYN SUSAN VARALLO,	:	
)	
Plaintiff,	:	FINDINGS OF FACT AND
)	CONCLUSIONS OF LAW
vs.	:	
)	
FRANCIS V. VARALLO,	:	
)	
Defendant.	:	Civil No. 924701381

The above-captioned matter was tried before The Honorable Jon M. Memmott on February 17 and February 18, 1993. Ronald Nehring appeared as counsel for plaintiff; Harold Dent appeared as counsel for defendant. Having heard the testimony of witnesses, received evidence, and considered the arguments of counsel, the Court, being otherwise fully advised in the premises, now enters its:

FINDINGS OF FACT

Findings Relating to Jurisdiction.

1. Plaintiff is a bona fide resident of Davis County, state of Utah, and maintained such residency for more

than three months immediately prior to the filing of this action.

2. Defendant and plaintiff are husband and wife, having been married on June 26, 1970, at Washington, D.C.

Findings Relating to Grounds.

3. During the course of the marriage, the parties have developed differences which are irreconcilable, causing the continuation of the marriage to be impossible.

Findings Relating to Child Custody and Visitation.

4. Three children have been born as issue of this marriage, to-wit: Valerie Jean Varallo, born January 18, 1972; Sean Thomas Varallo, born August 17, 1974; and Cara Noel Varallo, born December 21, 1977.

5. Plaintiff is a fit and proper person to be awarded the care, custody, and control of Cara Varallo, subject to defendant's right to exercise rights of visitation as set out in the Standard Visitation Rule for the Second Judicial District Court.

6. The Court finds that Sean Varallo does not have special needs which warrant ongoing custody and support.

Findings Relating to Child Support.

7. The Court finds the plaintiff's gross income to be \$3,242 per month, and the defendant's gross income to be

\$4,225 per month for the purposes of determining child support pursuant to the Child Support Obligation Worksheet.

Accordingly, defendant is ordered to pay plaintiff the sum of \$401.86 per month as child support.

Findings Relating to Alimony.

8. Plaintiff is currently employed full time by the United States Bureau of Reclamation. Defendant is currently unemployed. Defendant has a bachelor of science degree, 30 years of experience in the United States Army, and two years experience as an employee of Unisys, Inc. The Court finds that defendant is capable of employment, notwithstanding his disability rating which may impair defendant's ability to perform physical labor. The Court recognizes that defendant is unlikely to find employment at a salary comparable to that received during his employment at Unisys and that his prospects for employment may depend on obtaining vocational training.

9. The Court finds that in order to maintain the standard of living which the parties enjoyed during their marriage, plaintiff is in need of support and, therefore, defendant is ordered to pay plaintiff alimony in the amount of \$500 per month. The Court finds that defendant's re-employment would constitute a material change of circumstance entitling plaintiff to seek an adjustment of alimony.

Findings Relating to the Marital Home.

10. During the course of the marriage, the parties acquired a residence located at 826 North Ridge Drive, Bountiful, Utah. The Court finds the equity in the marital home to be approximately \$70,000. The Court finds that the home should be sold in a manner reasonably calculated to maximize its value and the net proceeds of the sale equally divided one-half to each party. Pending the sale of the residence, defendant shall assume and pay the mortgage owing thereon, together with all other costs and expenses relating to the marital home.

Findings Relating to Retirement Plans.

11. The Court finds that plaintiff was employed for several years during the course of the marriage and obtained an interest in a retirement plan. When plaintiff terminated her employment, she withdrew retirement funds which were expended for marital purposes. Plaintiff incurred an obligation to repay approximately \$8,500 as a condition to reinstating her retirement plan. The Court finds that it is equitable for defendant to pay plaintiff the sum of \$4,250 as defendant's share of the reinstatement obligation. These funds shall be paid plaintiff within 30 days of the entry of the Decree of Divorce.

12. As of the date of trial, defendant received a total of \$4,225 per month, of which \$3,734 per month was comprised of military retirement payments, and \$491 per month V.A. disability payments. The military retirement payments are reduced pro rata by the amount of disability payments defendant receives. Plaintiff and defendant were married for 18 of the 30 years of defendant's military service. Accordingly, plaintiff is entitled to 30% of defendant's gross military retirement.

13. Defendant has the election of enrolling in the Survivor Benefit Plan (SBP). Under the SBP, defendant may obtain for the benefit of plaintiff an annuity which would pay plaintiff 55% of defendant's military retirement pay in the event of defendant's death, a sum which would be reduced to 35% in the event plaintiff were to receive Social Security benefits. The Court offered the parties the option of exercising his option to obtain the maximum available SBP coverage for plaintiff in lieu of a 30% award of gross retirement payments to plaintiff. Defendant accepted this offer, which the Court finds to be an equitable method for the allocation to plaintiff of her portion of defendant's military retirement. Accordingly, defendant shall exercise his SBP enrollment option and obtain the maximum available coverage. Defendant shall pay all costs of this coverage.

Findings Relating to Educational Expenses.

14. Both parties testified that they were committed to providing educational opportunities to their children to the maximum extent allowed by their resources. Consistent with this testimony, plaintiff and defendant shall share equally all education expenses of each of the parties' children until each attains the age of twenty-two years. Without limiting the foregoing, the Court finds that, based on the incomes of the parties and the value of the marital estate, Valerie should be permitted to complete the requirements for her degree at Westminster College and Cara should be permitted to continue her enrollment at Judge Memorial High School.

Findings Relating to Personal Property.

15. The personal property comprising the marital estate shall be divided as follows:

To the plaintiff:

Pentagon Federal Credit Union account
containing approximately \$32,572;

Riggs National Bank account containing
approximately \$1,000;

America First Credit Union account
containing approximately \$8,000;

Chase Manhattan account containing
approximately \$3,133;

Proceeds from the sale of the parties'
Virginia house in the amount of \$143,541.

To the defendant:

Pentagon Federal Credit Union account from which \$13,733 was withdrawn at or about September 1992;

Union Bank of Switzerland account having a value as of February 18, 1993, of \$97,797;

Army National Bank account containing approximately \$30,000;

Securities having a value of approximately \$2,000;

Proceeds from the sale of the parties' Virginia house in the amount of \$45,659.

16. With respect to household goods which have not yet been divided (Plaintiff's Exhibit 13), the Court finds that the china should be held by the plaintiff in trust for Cara and Valerie, and that the remaining household items should be selected by the parties on an alternating basis, with plaintiff choosing first.

17. The parties own two automobiles. The Court finds the automobiles to be of equal value. Plaintiff is awarded the 1990 Mitsubishi. The defendant is awarded the 1990 Isuzu.

18. All real and personal property not identified herein as being part of the marital estate is found to have been received by plaintiff or defendant through gift or inheritance and not subject to distribution.

Findings Relating to Health Insurance.

19. Plaintiff has health insurance available through her employment and shall maintain coverage of the parties' children to the maximum extent permitted. Defendant has health coverage under CHAMPUS and shall maintain coverage for the parties' children to the maximum extent permissible. Any medical or dental expenses not covered by insurance incurred by the parties' children shall be borne equally by the parties.

Findings Relating to Life Insurance.

20. Defendant is currently paying the sum of \$568 per month in life insurance premiums. Two of the policies owned by the defendant were written by Executive Life, an insurance company which is insolvent and in receivership. Defendant is ordered to maintain unchanged life insurance contracts currently in force on defendant's life unless owing to the financial instability of the insurance company it becomes no longer prudent to maintain coverage under the policies. In that event, defendant shall obtain a substitute policy or policies from a life insurance company rated A+ by A.M. Best Company with a premium equal to that now paid by defendant naming as beneficiaries those persons identified as beneficiaries on policies now in force.

Findings Relating to Taxes.

21. The parties shall file separate federal and state income tax returns for the year 1992. Defendant shall be entitled to claim Sean Varallo as a dependent. Plaintiff shall be entitled to claim Cara and Valerie as dependents.

Findings Relating to Indebtedness.

22. Plaintiff shall assume and pay the indebtedness secured by her condominium.

Findings Relating to Attorney's Fees.

23. The Court finds that the parties are capable of bearing their own attorney's fees incurred in the prosecution of this action.

Findings Relating to Miscellaneous Matters.

24. Each party is ordered to execute and deliver to the other such documents as are required to implement the provisions of the Decree of Divorce entered pursuant to these Findings and Conclusions.

25. If defendant falls 30 or more days in arrears in his child support obligation, plaintiff shall be entitled to mandatory income withholding relief pursuant to Utah Code Ann. § 78-45d-1, et seq. (1984, as amended).

From the foregoing Findings of Fact, the Court now makes and enters its

CONCLUSIONS OF LAW

The Court concludes that the parties are subject to the jurisdiction of the Court as set out above under the Court's Findings of Fact, and that the plaintiff is entitled to a Decree of Divorce, the same to become final upon entry herein.

The Court concludes that all other issues of dispute have been resolved by the Court pursuant to the above Findings of Fact.

DATED this _____ day of _____, 1993.

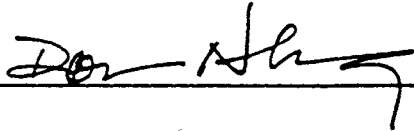
BY THE COURT:

JON M. MEMMOTT
District Court Judge

MAILING CERTIFICATE

I hereby certify that, on the 23 day of June, 1993,
I caused to be mailed, postage prepaid, a true and correct copy
of the foregoing proposed FINDINGS OF FACT AND CONCLUSIONS OF
LAW to the following:

Harold J. Dent, Jr., Esq.
KING & DENT
2120 South 1300 East, Suite 301
Salt Lake City, UT 84106



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Addendum "F."

In re: Stenquist

tolberg, and Johnson¹⁴ In the instant case, this full back pay award will serve not only to make plaintiff whole, but also to discourage similar unconstitutional dismissals in the future¹⁵

Thus we cannot conclude that plaintiff's eight-year struggle for vindication should yield him reappointment with only one year's back pay. Such a "victory" would be pyrrhic indeed. His reemployment is for a coming single one-year entitlement; for further employment he must prove his competence in accordance with lawful university procedures. His loss of earnings, however, encompasses seven years, and upon a proper showing he should recover the whole appropriate damages.

The judgment is affirmed.

BIRD, C. J., and MOSK, RICHARDSON, MANUEL and NEWMAN, JJ., concur.

1. We note that a plethora of statutory provisions both in California and elsewhere demonstrates a general policy in favor of full back pay awards even in the absence of constitutional violations. Thus, for example, under the National Labor Relations Act, even an at will employee who is improperly dismissed is entitled to an award of full back pay from the date of the improper dismissal to the date of his reinstatement (29 U.S.C. § 160(c)). As the United States Supreme Court explained in *NLRB v. Rutter Rex Manufacturing Co.* (1969) 396 U.S. 258, 263, 90 S.Ct. 417, 420, 24 L.Ed.2d 405, "[T]he purpose of the remedy is clear. 'A back pay order is a reparation order designed to vindicate the public policy of the statute by making the employees whole for losses suffered on account of an unfair labor practice.' [Citation omitted]."

Numerous California statutes in the Education Code and in other areas provide for similarly comprehensive back pay remedies. Thus, for example, section 89540, former section 24310, of the Education Code provides that with respect to both tenured permanent teachers and untenured probationary teachers, "[i]f the dismissal suspension or demotion [of the teacher for cause] is revoked or modified, the employee shall be restored to his position in accord with the decision, and shall be paid back salary equal to that which the employee would have earned if continuously employed in accord with the decision." (Emphasis added.) (See also former Ed Code, §§ 13439, 13516.5, now §§ 44946, 45037 (certificated employee of school district), §§ 13408, 13409, 13411, now §§ 87735, 87736, 87738 (regular and certificated employees of community

148 Cal Rptr 9

In re the MARRIAGE OF Richard William and Marilyn Betty STENQUIST.

Richard William STENQUIST, Appellant,

v.

Marilyn Betty STENQUIST, Appellant.

L.A. 30718.

Supreme Court of California,
In Bank

Aug 7, 1978

Appeal was taken from judgment of the Superior Court, San Diego County, Louis M. Welsh, J., in marriage dissolution case. The Supreme Court, Tobriner, J.,

college district), Gov. Code § 19584 (employee of state civil service) Lab. Code, § 1426 (permitting State Fair Employment Practice Commission to order employer to reinstate employee with full back pay when employer is found to have engaged in unlawful employment practice).

15. The trustees rely on *Zimmerer v. Spencer* (5th Cir. 1973), 485 F.2d 176, and *Frost v. Trustees*, 46 Cal App 3d 225, 120 Cal Rptr 1, for the conclusion that back pay is not available to plaintiff. Both cases are distinguishable from the instant case.

In *Zimmerer*, the court found a nontenured teacher's dismissal improper only because of the defendants' failure to provide the teacher with a hearing to which she was entitled. Finding that the [defendant] Board's reasons for its actions were valid and that the controversy was intractable and recognized by the parties to be such, the court concluded that "as a practical consequence the most that Dr. Zimmerer lost was one year's pay" (485 F.2d 176, 179). In the instant case, by contrast, the record does not in any way reveal that plaintiff's performance would inevitably have led to his termination after one additional year of teaching.

The *Frost* decision is also distinguishable from the present case. In *Frost* the court upheld the chancellor's decision to reinstate a probationary academic employee, but to deny him back salary. The claim in *Frost* for payment of back salary, however, was not based on an alleged violation of constitutional rights, as in the present case.

held that (1) upon dissolution of marriage, husband's military retired pay was properly divided on basis of determination that pension rights attributable to husband's military service before marriage, plus the portion of those rights earned during marriage attributable to husband's disability, constituted his separate property while the portion of pension rights earned during marriage equivalent to ordinary retirement pension, computed on the basis of longevity of service and rank at retirement, constituted a community asset, but (2) in case in which parties had been married for 25 years and, following retirement from military, husband had not yet been employed, while wife was attempting to start work as part-time real estate salesperson, trial court abused its discretion in divesting itself of jurisdiction to award spousal support 24 months after the date of the decree.

Affirmed in part and reversed and remanded in part.

Clark, J., filed a dissenting opinion.

Opinion, 62 Cal App 3d 849, 133 Cal Rptr 341, vacated.

3. Divorce ⇐240(4)

Award of only \$1 per month in spousal support was not an abuse of discretion where, following division of husband's military pension and considering wife's income from part-time employment, husband and wife would have approximate equal monthly incomes.

4. Divorce ⇐254

Decisions to terminate continuing jurisdiction with respect to spousal support cannot be based on speculation concerning future earnings and employment, but instead should be deferred until the realized facts demonstrate whether further support is warranted.

5. Divorce ⇐254

In case in which parties had been married for 25 years and, following retirement from military, husband had not yet been employed, where wife was attempting to start work as part-time real estate salesperson, trial court abused its discretion in divesting itself of jurisdiction to award spousal support 24 months after the date of the decree.

6. Courts ⇐100(1)

Husband and Wife ⇐249(3)

Military retired pay based on disability contains two components: (1) compensation to the serviceman for loss of earning power and personal suffering, and (b) retirement support, the latter component, to the extent that it is attributable to employment during marriage, is community property, but such holding will be applied retroactively only to those cases in which the property rights arising from the marriage have not yet been adjudicated, to such rights if such adjudication is still subject to appellate review, or if in such adjudication the trial court has expressly reserved jurisdiction to divide pension rights.

1. Divorce ⇐252

Upon dissolution of marriage, husband's military retired pay was properly divided on basis of determination that pension rights attributable to husband's military service before marriage, plus the portion of those rights earned during marriage attributable to husband's disability, constituted his separate property while the portion of pension rights earned during marriage equivalent to ordinary retirement pension, computed on the basis of longevity of service and rank at retirement, constituted a community asset. 10 U.S.C.A. §§ 1201, 1401.

2. Husband and Wife ⇐265

One spouse cannot, by invoking a condition wholly within his control, defeat community interest of the other spouse.

Hervey, Mitchell, Ashworth & Keeney and Thomas Ashworth, III, San Diego, for appellant Husband.

Rand & Day and Roland B. Day, San Diego, for appellant Wife.

ertrude D. Chern, Santa Maria, as amicus curiae on behalf of appellant Wife.

OBRINER, Justice.

etiring after 26 years of military service, husband received a "disability" pension of 75 percent of his basic pay in lieu of retirement pension at 65 percent of basic pay.¹ Although a military "retirement" pension is a community asset (*In re Marriage of Fithian* (1974) 10 Cal.3d 592, 111 Cal.Rptr. 369, 517 P.2d 449), husband claims that his entire "disability" pension is his separate property under our decision in *In re Marriage of Jones*, supra, 13 Cal.3d 457, 119 Cal.Rptr. 108, 531 P.2d 420. Looking beneath the label of a "disability" pension, however, the trial court found that by the excess of the "disability" pension rights over the alternative "retirement" pension represented additional compensation attributable to husband's disability; the balance of the pension rights acquired during the marriage, it ruled, served to replace ordinary "retirement" pay and thus must be classed as a community asset.

We agree with the reasoning of the trial court; to permit the husband, by unilateral action of a "disability" pension, to "transmute" community property into his own separate property" (*In re Marriage of Fithian*, supra, 10 Cal.3d 592, 602, 111 Cal.Rptr. 369, 517 P.2d 449, 455), is to negate the protective philosophy of the community property law as set out in previous decisions of this court. We therefore affirm the judgment of the trial court apportioning husband's pension rights between separate and community assets and dividing the community interest equally between the spouses.

Turning to wife's cross-appeal, we explain that the trial court's order limiting its jurisdiction over spousal support to 24 months conflicts with the policy established

We used the labels "disability pay" and "retirement pay" in *In re Marriage of Jones* (1975) 13 Cal.3d 457, 460, 119 Cal.Rptr. 108, 531 P.2d 420. Sections 1201 and 1401 of 10 United States Code, which govern military retirement benefits, speak only of "retired pay."

in our recent decision of *In re Marriage of Morrison* (1978) 20 Cal.3d 437, 143 Cal.Rptr. 139, 573 P.2d 41. Because any assertion that wife will attain economic self-sufficiency within 24 months of the judgment below rests on speculation, not evidence, the trial court's order divesting itself of the power to order spousal support beyond that brief period constitutes an abuse of discretion. We therefore reverse that portion of the trial court's order, remanding the matter for further proceedings in light of this opinion.

1. The trial court correctly apportioned husband's pension into community and separate assets.

In the instant case the husband joined the Army in 1944 and married in 1950. In 1953 he suffered a service-related injury leading to amputation of his left forearm, for which the Army assigned him an 80 percent disability rating. If the husband had retired immediately, his maximum "disability" pay would have been 75 percent of basic pay, compared to a maximum "retirement" pay of 22½ percent of basic pay. He nevertheless continued his military service until he retired in 1970. At that time he faced the choice of taking regular "retirement" pay at the rate of 65 percent of his basic pay, or taking "disability" pay, a stipend equal to 75 percent of basic pay.² Assuming the husband desired the higher amount, the Army began making "disability" payments to him.

[1] The husband commenced proceedings for dissolution of the marriage in 1974. The trial court first determined that all pension rights attributable to the husband's military service before marriage, plus the portion of those rights earned during marriage attributable to the husband's disability, constituted his separate property. It

2. We note that if the husband had retired four years later, in 1974, both his maximum "disability" and his maximum "retirement" pay would have been 75 percent of his basic pay.

then ruled that that portion of the pension rights earned after the marriage equivalent to an ordinary retirement pension, computed on the basis of longevity of service and rank at retirement, constituted a community asset.

The court finally divided this asset equally between the spouses.³ The husband appeals from the portion of the judgment awarding his wife part of his pension as community property. The wife also appeals from the judgment below; challenging the court's apportionment, she claims that only that portion of the pension attributable to husband's employment before marriage is separate property.

We begin our discussion of this issue by reviewing the procedure by which a disabled serviceman may compute the amount of "retired pay" to which he is entitled. He may elect, first, to compute his "retired pay" on the basis of his rank and disability by multiplying his monthly basic pay by his percentage of disability. Alternatively, he can compute his "retired pay" on the basis of rank and longevity of service by multiplying his monthly basic pay by 2½ percent times his years of service. (10 U.S.C.

3. The trial court held that "[t]he ratio of that portion of the marriage from the commencement thereof up until the time of the petitioner's [husband's] retirement from military service, as compared with the entire total service of twenty-five years, eight months and ten days with which petitioner was credited, is seventy-seven percent (77%). The Court therefore finds that had the petitioner retired on longevity retirement pay, the respondent [wife] would be entitled to 38.5% of such pay, as a division of community property, such percentage representing fifty percent (50%) of the amount of such retirement accumulated during coverture.

[1] The Court further finds that the difference in pay between what the Petitioner would have received had he retired on straight retirement for years, and the disability pay which he is actually receiving, is the sole and separate property of the husband, while said lesser sum is community property, as accumulated during coverture. [2] Pursuant thereto, the Court finds that 65/75ths (86.66%) of the disability retirement pay being received by the Petitioner would be community property to the extent the same was accrued during coverture, and that 77% thereof was so accrued during coverture, hence, 66.73% of

§ 1401.) Under either formula, he cannot receive more than 75 percent of his last monthly basic pay. The amount of retired pay the serviceman receives under either option therefore depends largely on his monthly pay at retirement, a function of longevity of service and rank; rank itself is closely related to length of service.

In *In re Marriage of Jones*, supra, 13 Cal.3d 457, 119 Cal.Rptr. 108, 531 P.2d 420, and *In re Marriage of Loehr* (1975) 13 Cal.3d 465, 119 Cal.Rptr. 113, 531 P.2d 425, its companion memorandum decision, we held that a serviceman's right to "disability" pay, acquired before he had earned a "vested" right to ordinary retirement pay, was separate property. Subsequently in *In re Marriage of Brown* (1976) 15 Cal.3d 838, 126 Cal.Rptr. 633, 544 P.2d 561, we held that "vested" and "nonvested" pension rights should be treated alike. Relying on those decisions, the husband contends that all military pensions based on disability are now separate property.⁴ Closer examination, however, reveals that the reasoning of *Jones* and *Brown* supports the division of the husband's pension which the present trial court ordered.

said disability retirement pay is community property and one-half thereof (33.36%, rounded off to 33½% for convenience by stipulation) is respondent's share. (86.66% × 77% ÷ 2 = 33½%)."

4. The wife on her part acknowledges that the trial court arrived at an equitable apportionment of the pension between separate and community interests. She argues, however, that the duty of making such apportionment imposes so great a burden on the courts that we should instead adopt a clear and simple rule that all "disability" payments, the right to which was earned during coverture, are community property. Rejecting this rigid rule and the contention that any other disposition of the issue causes complications, we point out that the method of apportionment adopted by the trial court, which we endorse, does not involve any delicate balancing of equities, but a simple mathematical computation based on the relationship of the "disability" pension to an alternative "retirement" pension. It does not impose a burden so heavy that for reasons of expediency we must settle for the less equitable, all-or-nothing rule wife proposes.

Jones, we held that when a spouse is disabled, and has no right to a pension based on longevity of service, the disability benefit payments are his separate property upon dissolution of the marriage. At the time *Jones* was decided, however, we had not considered the community interest in a non-vested retirement pension as a mere expectancy and not a property interest. (See *Shih v. French* (1941) 17 Cal.2d 775, 112 P.2d 235.) Since *Jones* retired before his disability, his "retirement" pension vested, his disability pay did not affect the present community asset, but merely created an expectancy from coming into the future. Recognizing, however, that the principles in *Jones* might not govern a case in which the serviceman had acquired a vested right to retired pay wholly apart from his disability, we expressly limited our holding to cases involving nonvested pen-

sions. One year following our decision in *Jones*, we overruled past precedent and held in *Marriage of Brown*, supra, 15 Cal.3d 838, 126 Cal.Rptr. 633, 544 P.2d 561, that disability rights, whether or not vested, constituted a property interest; that to the extent that such rights derive from employment during coverture, they now comprise community assets. This holding underscores the fundamental premise of *Jones*: the award of a serviceman's "disability" pension to the serviceman as his separate property would not impair any community interest of his spouse. Under current law—in contrast to the law prevailing when *Jones* was decided—both the nonvested disability pension in *Jones* and the husband's vested right to a "retirement" pension in the present case constitute valuable

property. While in *In re Marriage of Brown*, supra, 15 Cal.3d 838, 851, footnote 14, 126 Cal.Rptr. 633, 544 P.2d 561, we disapproved dicta in *Waite v. Waite*, Marriage of Peterson to the effect that vested pension rights were not community property, we did not disapprove the holding in *Jones* in cases that one spouse could not by election destroy the community interest of the other spouse.

community assets deserving of judicial protection.

Our reasoning in *Brown* is particularly appropriate to the present case. As we stated there, "over the past decades, pension benefits have become an increasingly significant part of the consideration earned by the employee for his services. As the date of vesting and retirement approaches, the value of the pension right grows until it often represents the most important asset of the marital community. . . . A division of community property which awards one spouse the entire value of this asset, without any offsetting award to the other spouse, does not represent that equal division of community property contemplated by [the Family Law Act]." (*In re Marriage of Brown*, supra, 15 Cal.3d 838, 847, 126 Cal.Rptr. 633, 638, 544 P.2d 561, 566.)

[2] We cannot permit the serviceman's election of a "disability" pension to defeat the community interest in his right to a pension based on longevity. In the first place, such a result would violate the settled principle that one spouse cannot, by invoking a condition wholly within his control, defeat the community interest of the other spouse. (See *Waite v. Waite* (1972) 6 Cal.3d 461, 472, 99 Cal.Rptr. 325, 492 P.2d 13; *In re Marriage of Peterson* (1974) 41 Cal.App.3d 642, 650-651, 115 Cal.Rptr. 184.)⁵ As the court explained in *In re Marriage of Mueller* (1977) 70 Cal.App.3d 66, 137 Cal.Rptr. 129, a case indistinguishable from the present appeal, the employee spouse retains the right to determine the nature of the benefits to be received.⁶ It would be inconsistent with community property principles "to permit that spouse to transmute what would otherwise be community property into his or her separate

6. Recognition of the nonemployee spouse's interest in the "disability" pension would not limit the employee's freedom "to elect between alternative retirement programs." (*In re Marriage of Brown*, supra, 15 Cal.3d 838, 849, 126 Cal.Rptr. 633, 640, 544 P.2d 561, 568.) Any serviceman eligible to receive "disability" payments higher than ordinary retirement benefits would remain free to elect the higher payments if he so chose.

property." (70 Cal.App.3d at pp. 71-72, 137 Cal.Rptr. at p. 132.)⁷

In the second place, "only a portion of husband's pension benefit payments, though termed 'disability payments,' is properly allocable to disability. It would be unjust to deprive wife of a valuable property right simply because a misleading label has been affixed to husband's pension fund benefits." (*In re Marriage of Cavnar* (1976) 62 Cal.App.3d 660, 665, 133 Cal.Rptr. 267, 270; see Pattiz, *In a Divorce or Dissolution Who Gets the Pension Rights: Domestic Relations Law and Retirement Plans* (1978) 5 Pepperdine L.Rev. 191, 198 and cases there cited.)⁸

The purpose of disability benefits, as we explained in *Jones*, is primarily to compensate the disabled veteran for "the loss of earnings resulting from his compelled premature military retirement and from diminished ability to compete in the civilian job market" (13 Cal.3d at p. 459, 119 Cal.Rptr. at p. 109, 531 P.2d at p. 421) and secondarily to compensate him for the personal suffering caused by the disability. Military retired pay based on disability, however, does not serve those purposes exclusively. Because it replaces a "retirement" pension, and is computed in part on the basis of longevity of service and rank at retirement, it also serves the objective of providing support for the serviceman and his spouse after he leaves the service. Moreover, as the veteran approaches normal retirement age, this latter purpose may become the predominate function served by the "disability" pension.

7. We note that the courts of Texas have held that if a serviceman surrenders a vested right to retirement benefits in order to obtain "disability" benefits, the "disability" benefits are community property. (See *Busby v. Busby* (Tex.1970) 457 S.W.2d 551; *Dominey v. Dominey* (Tex.Civ.App.1972) 481 S.W.2d 473, cert. den., 409 U.S. 1028, 93 S.Ct. 462, 34 L.Ed.2d 321.)

8. As we have affirmed many times, adjustments in the amount of alimony awarded will not mitigate the hardship caused the wife by the denial of her community interest in the pension payments. Alimony lies within the discretion of the trial court and may be modi-

The present case illustrates the point. The husband here did not retire prematurely from military service to face the prospect of competing on the civilian labor market handicapped by his disability; he served for 26 years, retiring only after he had acquired a vested right to a "retirement" pension. He did not begin to receive his disability pension until 17 years after the injury. The value of his present "disability" pension depends largely on the high military rank he had achieved at the time of retirement and his extensive military service; it does not relate to his rank or longevity at the time of injury. Under these circumstances, the pension's function of compensating the husband for loss of earning capacity or providing recompense for personal suffering is secondary to the primary objective of providing retirement support.

The Court of Appeal in *In re Marriage of Mueller*, supra, 70 Cal.App.3d 66, 137 Cal.Rptr. 129, explained the method of allocating a disability pension between the separate interest of the disabled spouse and the community interest in the retirement benefits. It stated that "where the employee spouse elects to receive disability benefits in lieu of a matured right to retirement benefits, only the net amount thus received over and above what would have been received as retirement benefits constitutes compensation for personal anguish and loss of earning capacity and is, thus, the employee spouse's separate property. The amount received in lieu of matured retirement benefits remains community property subject to division on dissolution." (70 Cal.App.3d at p. 71, 137 Cal.Rptr. at p. 132.)⁹

fied with changing circumstances: "the spouse 'should not be dependent on the discretion of the court . . . to provide her with the equivalent of what should be hers as a matter of absolute right.'" (*In re Marriage of Brown*, supra, 15 Cal.3d 838, 848, 126 Cal.Rptr. 633, 639, 544 P.2d 561, 567.)

9. Although the quoted language from *In re Marriage of Mueller* speaks of "matured" retirement benefits, the court earlier in its opinion made clear that matured benefits could not be distinguished from immature but vested benefits. Indeed in light of *In re Marriage of Brown*, supra, 15 Cal.3d 838, 126 Cal.Rptr. 633, 544 P.2d 561, no distinction can be drawn be-

a trial court in the present case correctly followed this formula. It first classifies separate property that portion of husband's pension attributable to employment before marriage. Turning to the excess of the pension, it assigned as separate property only the excess of the husband's pension over the "retirement" pension that he would have received if not disabled; the remainder of the pension is treated as community property.¹⁰ Finding that portion of the trial court's decision in accord with the principles stated in *In re Marriage of Mueller*, *supra*, 70 Cal.App.3d 37 Cal.Rptr. 129, and adopted in this case, we affirm its division of the marital property.¹¹

The trial court abused its discretion by limiting its jurisdiction to modify spousal support to a period of 24 months.

The trial court ordered husband to pay to wife "as and for her spousal support, the sum of \$1.00 per month, payable for a period of twenty-four (24) months, commencing on January 1, 1974, subject to the continuing jurisdiction of the Court to alter, modify, or terminate the same upon good cause first shown." Wife does not challenge the trial court's order.

When matured benefits and nonvested benefits are received, the trial court's order is affirmed.

Contrary to the view advanced in the dissenting opinion, allocation of the "disability" pension between separate and community interests does not discriminate against the disabled. In attempting to demonstrate such discrimination, the dissent first describes a healthy worker who takes some action, such as terminating his employment before his pension vests or working beyond his retirement date, which has the effect of forfeiting all or part of his pension rights. In such a case, of course, the worker's spouse has no claim to any of the forfeited rights; a community share of nothing equals nothing. (See *Reppy, Community and Separate Interests in Pension and Social Security Benefits After Marriage of Brown and ERL*, (1978) 25 U.C.L.A. L.Rev. 417, 426, fn. 31.) The dissent then compares such a healthy worker to a disabled worker who retires and receives a "disability" pension, part of which under the present decision will be classified as community property. Because the spouse of a disabled worker can claim a share in his

amount of \$1 per month, but contends that the 24-month limitation is an abuse of discretion.

Since the court's continuing jurisdiction is not expressly limited to the 24-month period, the order is not entirely clear on its face. The award of \$1 per month alimony, however, serves to clarify the meaning of the order. That award plainly is not intended as genuine support for the wife, but to serve as a legal fiction demonstrating the continuing jurisdiction of the court over spousal support. By limiting the \$1 per month payments to a period of 24 months, the court impliedly indicated that it did not intend to extend its jurisdiction to modify the award of spousal support beyond the 24-month period.

So interpreted, the trial court's award is inconsistent with our recent decision in *In re Marriage of Morrison*, *supra*, 20 Cal.3d 437, 143 Cal.Rptr. 139, 573 P.2d 41. We stated in *Morrison* that "A trial court should not terminate jurisdiction to extend a future support order after a lengthy marriage, unless the record clearly indicates that the supported spouse will be able to adequately meet his or her financial needs at the time selected for termination of jurisdiction. In making its decision concerning

pension, the dissent concludes that the decision discriminates against the disabled.

The conclusion of the dissent, however, derives from the dissent's inappropriate comparison. If instead of comparing a healthy worker who has forfeited pension rights with a disabled worker receiving a pension, we compare healthy and disabled workers who are both receiving pensions, we discover that under the allocation formula set forth in this opinion the disabled worker usually will retain a higher percentage of the benefits. In the present case, for example, the husband's pension by virtue of his disability is higher than the "retirement" pension of a healthy serviceman of equivalent rank and longevity. Because we allocate to husband the whole of the excess of his "disability" pensions over a "retirement" pension, he receives greater pension benefits than does the undischarged veteran.

11. Language in *In re Marriage of Jones*, *supra*, 13 Cal.3d 457, 119 Cal.Rptr. 108, 531 P.2d 420, and *In re Marriage of Loehr*, *supra*, 13 Cal.3d 465, 119 Cal.Rptr. 113, 531 P.2d 425, inconsistent with this opinion, is disapproved.

the retention of jurisdiction, the court must rely only on the evidence in the record and the reasonable inferences to be drawn therefrom. It must not engage in speculation. If the record does not contain evidence of the supported spouse's ability to meet his or her future needs, the court should not 'burn its bridges' and fail to retain jurisdiction." (20 Cal.3d at p. 453, 143 Cal.Rptr. at p. 150, 573 P.2d at p. 52.)

In the present case, the parties had been married for 25 years. Following retirement from the military, husband has not been employed. Wife attempted to start work as a part-time real estate salesperson, but as of trial she earned only about \$100 a month. As is so often the case, the combined income of the parties is insufficient to meet the anticipated expenses of separate living.¹²

[3] If the husband's military pension is divided as ordered by the trial court, husband and wife will have approximately equal monthly incomes; thus the award of only \$1 per month in spousal support is not an abuse of discretion. Any attempt to predict conditions of two, five, or ten years hence, however, is a matter of total speculation. Husband may remain unemployed and totally dependent on his military pension; on the other hand his demonstrated talents may yield a well paying job. Wife may or may not succeed as a real estate salesperson.

[4] Both *In re Marriage of Morrison* and the Court of Appeal cases cited with approval in *Morrison* stress that decisions to terminate continuing jurisdiction cannot be based on speculation concerning future earnings and employment. Such decisions

should instead be deferred until the realized facts demonstrate whether further support is warranted. As the Court of Appeal explained in *In re Marriage of Smith* (1978) 79 Cal.App.3d 725, 738-739, 145 Cal.Rptr. 205, 210: "by making an order terminating all spousal support . . . without reserving jurisdiction to extend the period, the court put it out of its power to provide any support whatever for wife after that time even if, after maximum effort on her part, she is unable to support herself in a reasonable fashion. There is no justification for the court so 'burning its bridges.'" (See also *In re Marriage of Andreen* (1978) 76 Cal.App.3d 667, 673, 143 Cal.Rptr. 94.)

[5] We conclude that the trial court abused its discretion in divesting itself of jurisdiction to award spousal support 24 months after the date of the decree. Four years having passed since the trial court rendered its judgment, that court should now reconsider the issue of spousal support in light of the current income and earning potential of the parties, and frame its award in conformity with the principles outlined in this opinion and elucidated fully in *In re Marriage of Morrison*, *supra*, 20 Cal.3d 437,¹³ 143 Cal.Rptr. 139, 573 P.2d 41.

3. Summary.

[6] We conclude that military retired pay based on disability contains two components: (a) compensation to the serviceman for loss of earning power and personal suffering, and (b) retirement support. The latter component, to the extent that it is attributable to employment during marriage, is community property.¹⁴ The trial court correctly followed this analysis in ap-

12. The record on appeal does not include a reporter's transcript of the brief testimony heard by the trial court. The arguments of the parties suggest that none of this testimony bore on the question of the wife's ability to attain economic self-sufficiency within a period of two years following the decree.

13. Upon such reconsideration, the trial court may wish to reserve jurisdiction to award spousal support to the husband as well as to the wife if the economic prospects of the parties so warrant.

14. Following the policy of *In re Marriage of Brown*, *supra*, 15 Cal.3d 838, 851, 126 Cal.Rptr. 633, 641, 544 P.2d 561, 569, our holding respecting the division of military "disability" pensions applies retroactively only to cases "in which the property rights arising from the marriage have not yet been adjudicated, to such rights if such adjudication is still subject to appellate review, or if in such adjudication the trial court has expressly reserved jurisdiction to divide pension rights."

ning the husband's pension rights in instant case. That court erred, however, in limiting its jurisdiction to award al support to the brief period of two years; it should have retained jurisdiction wider to be able to evaluate the parties' needs and capacities in light of future circumstances.

A portion of the judgment limiting the court's jurisdiction to award spousal support was reversed and the cause remanded for further proceedings consistent with the views expressed herein. In all other respects the judgment is affirmed. Marilyn Stenquist shall recover her costs on this appeal.

3RD, C. J., and MOSK, RICHARDSON, J., and JEFFERSON (Assigned by the Chairperson of the Judicial Council), concur.

ARK, Justice, dissenting.
Dissent.

Retirement pensions earned during marriage constitute community property, and disability pensions—no matter when the disability occurs—constitute separate property. Under federal law, a veteran who has served for both may receive only one. Whether the separate property interest or the community property interest must be sacrificed, and the question before us is whether dissolution a portion of the disability pension—equal to the amount of retirement pension earned during marriage—shall be treated to be community property. On the basis of well-settled principles, authorities reason set forth in *In re Marriage of Benson* (1975) 13 Cal.3d 457, 119 Cal.Rptr. 531 P.2d 420, it must be concluded the disabled person upon dissolution is entitled to the future disability pension payments as separate property, with spousal support available to meet the needs of the nondisabled former spouse in appropriate cases.

To reach the result that part of the disability pension is community, the majority must prove our recent unanimous decision in *Jones* (by the author of today's opinion), implying that *Jones* was based on the

overruled doctrine of *French v. French* (1941) 17 Cal.2d 775, 112 P.2d 235, which held that nonvested retirement pensions are mere expectancies. (Ante, p. 13 of 148 Cal.Rptr., p. 100 of 582 P.2d.) The implication is false; *Jones* did not rely upon the doctrine of *French*. Moreover, by repudiating *Jones*, the majority establish an invidious discrimination between disabled employees and healthy ones who terminate employment, a discrimination betraying a shocking lack of compassion for the handicapped.

FACTS

Husband entered the Army in 1944 and married in 1950. In 1953 he was injured by shell fragments, suffering amputation of his left forearm. Rather than exercising his right to disability compensation, he chose to remain on active duty.

When husband retired in 1970 at the age of 43, he possessed the options of regular retirement pay based on longevity of service equal to 65 percent of his basic pay, or disability compensation equal to 75 percent of his basic pay. Disability compensation is not subject to federal or state taxes. The Army assumed husband desired the higher amount and began making disability payments to him.

Husband commenced dissolution of the marriage in 1974. The trial court held the difference between future disability compensation and regular retirement benefits constitutes husband's separate property. A portion of the pension was attributed to husband's employment prior to marriage and was also held to be his separate property. The balance was attributed to employment during marriage and was held to be community property. The court awarded the wife half of all community assets, determined \$38,000 was her separate property, granted child support and one dollar per month spousal support for two years.

RETIREMENT PENSIONS

Recognizing that retirement benefits are not gratuities but represent deferred compensation for past service, this court has

held that anticipated future retirement payments attributable to employment during marriage constitute a community asset divisible upon dissolution. (*In re Marriage of Brown* (1976) 15 Cal.3d 838, 841 et seq., 126 Cal.Rptr. 633, 544 P.2d 561; *In re Marriage of Jones*, supra, 13 Cal.3d 457, 461, 119 Cal.Rptr. 108, 531 P.2d 420; *Waite v. Waite* (1972) 6 Cal.3d 461, 471, 99 Cal.Rptr. 325, 492 P.2d 13; *Phillipson v. Board of Administration* (1970) 3 Cal.3d 32, 89 Cal.Rptr. 61, 473 P.2d 765.) On this basis, future military retirement benefits have been held divisible as community property. (*In re Marriage of Fithian* (1974) 10 Cal.3d 592, 604, 111 Cal.Rptr. 369, 517 P.2d 449.) The retirement pension is divisible whether vested or nonvested. (*In re Marriage of Brown*, supra, 15 Cal.3d 838, 843-850, 126 Cal.Rptr. 633, 544 P.2d 561.) While nonvested pension rights may in theory be divided by determining the present value of the rights, their evaluation must take into account the possibility that death or termination of employment may destroy them before maturity. The uncertainties warrant refusal to divide present value and instead awarding a portion of each pension payment as it comes due. (*Id.* at p. 848, 126 Cal.Rptr. 633, 544 P.2d 561.)

Limitations on the applicability of community property principles to retirement pensions have also been established. Judicial recognition of the nonemployee spouse's interest in pension rights does not limit the employee's freedom to change or terminate his employment, to modify employment terms, including retirement benefits or "to elect between alternative retirement programs."¹² . . . The employee retains

¹²In *Phillipson v. Board of Administration*, supra, 3 Cal.3d 32, 89 Cal.Rptr. 61, 473 P.2d 765, the employee had absconded with most of the community assets; the trial court to equalize the division of community property awarded the spouse all of the employee's pension rights. Under those special circumstances we held that since the employee no longer enjoyed a beneficial interest in the rights, the divorce court could control the employee's election between alternative benefit programs. (3 Cal.3d at p. 48, 89 Cal.Rptr. 61, 473 P.2d 765.)

the right to decide, and by his decision define, the nature of the retirement bene-

fits owned by the community." (*In re Marriage of Brown*, supra, 15 Cal.3d 838, 849-850, 126 Cal.Rptr. 633, 544 P.2d 561, 568.) Unlike other community property interests, the nonemployee spouse's interests may not be devised or inherited. (*Waite v. Waite*, supra, 6 Cal.3d 461, 472-474, 99 Cal.Rptr. 325, 492 P.2d 13.) And a provision in the employee benefit plan granting benefits to an employee's "widow" will be enforced to exclude benefits to a spouse married during the employment period where the marriage was dissolved and the employee remarried. (*Id.* at p. 472, fn. 6, 99 Cal.Rptr. 325, 492 P.2d 13; *Phillipson v. Board of Administration*, supra, 3 Cal.3d 32, 42-43, 89 Cal.Rptr. 61, 473 P.2d 765; *Benson v. City of Los Angeles* (1963) 60 Cal.2d 355, 360-362, 33 Cal.Rptr. 257, 384 P.2d 649; *In re Marriage of Peterson* (1974) 41 Cal.App.3d 642, 650, 115 Cal.Rptr. 184.)

These limitations on the applicability of community property doctrine reflect that pension programs not only compensate for past services but are also designed to induce persons to continue in the service of their employer by providing subsistence for employees and their dependents. (*Waite v. Waite*, supra, 6 Cal.3d 461, 472-473, 99 Cal.Rptr. 325, 492 P.2d 13.) When the various goals conflict, community interests will be sacrificed when necessary to protect the private interests of employers and employees.

DISABILITY COMPENSATION

Unlike retirement pensions, veteran's disability benefits do not constitute deferred compensation for past services. While longevity of service may be a factor in determining the underlying right to disability compensation and its amount, benefits depend primarily upon physical or mental disability, compensating for loss of earning capacity in the open labor market. Earnings following dissolution are of course separate property. The secondary purpose of disability benefits is to compensate for pain, suffering, disfigurement and resulting misfortune—all personal rather than community concerns. (*In re Marriage of Jones*, su-

ra, 13 Cal.3d 457, 462, 119 Cal.Rptr. 108, 31 P.2d 420; 7 Witkin, Summary of Cal. Law (8th ed. 1974) Community Property, § 1, p. 5094.)

Because the main bases for disability compensation are loss of earning capacity and personal damage rather than past services performed, disability compensation is analogous to a personal injury award rather than to a retirement benefit. In *Washington v. Washington* (1956) 47 Cal.2d 249, 102 P.2d 569, we held that while personal injury awards recovered during marriage might be classified as community property, a cause of action for such injury becomes the injured spouse's separate property when the cause has not been reduced to judgment prior to the date of divorce. Justice Traynor reasoned that in "such a case not only may the personal elements of damages such as past pain and suffering be reasonably treated as belonging to the injured party, but the damages for future pain and suffering, future expenses, and future loss of earnings are clearly attributable to him as a single person following the divorce. Moreover, as in any other case involving future earnings or other after-acquired property, the wife's right, if any, to future support may be protected by an award of alimony." (47 Cal.2d 249, 253-254, 302 P.2d 569, 571.)

The Legislature subsequently extended the *Washington* principle to all personal injury damages and settlement payments received after interlocutory decree of dissolution. (Civ. Code, § 5126.)

For the foregoing reasons, we concluded in *In re Marriage of Jones*, supra, 13 Cal.3d 457, 464, 119 Cal.Rptr. 108, 113, 531 P.2d 420, 425, that "military disability payments received after dissolution of a marriage should . . . be classified as the separate property of the disabled veteran." (See *In re Marriage of Olhausen* (1975) 48 Cal.App.3d 190, 192 et seq., 121 Cal.Rptr. 444 (police officer disability).)¹

1. The majority's formula implicitly accepts the conclusion that disability benefits are separate property. Under the formula, had there been

WAIVER OF RETIREMENT PENSION

The veteran in *Jones* did not possess a vested right to a retirement pension and we expressly left open the question whether a disability pension, granted after the serviceman obtains a vested right, constitutes separate property. Nevertheless, the reasoning of *Jones* requires our conclusion that disability payments are separate property whether or not the veteran's right to a retirement pension has vested.

Jones was decided when the rule existed that nonvested pension rights do not constitute community property divisible on divorce. (*French v. French*, supra, 17 Cal.2d 775, 778, 112 P.2d 235.) We later overruled *French* and held that nonvested pension rights are divisible upon dissolution. (*In re Marriage of Brown*, supra, 15 Cal.3d 838, 851, 126 Cal.Rptr. 633, 544 P.2d 561.) Rejecting the argument that division of nonvested retirement pensions would infringe upon the employee's freedom to contract, we pointed out that recognition of the non-employee spouse's interest in vested pension rights does not limit the employee's right to change or terminate employment, to modify employment terms including retirement benefits, or to elect between alternative retirement programs. (*Id.* at p. 849, 126 Cal.Rptr. 633, 544 P.2d 561.)

Because our decision in *Brown* determined that vested and nonvested retirement pensions shall be treated alike, no reason exists to distinguish our holding in *Jones* that disability compensation following dissolution is separate property when a disabled employee possesses nonvested retirement rights. Disability compensation is obviously a legitimate separate property interest, whether the retirement pension is vested or not. And when, as here, direct conflict exists between that interest and the community interest in the retirement pension, one must bow. Resolution of the conflict is provided by *Washington v. Washington*, supra, 47 Cal.2d 249, 253-254, 302 P.2d 569, holding disability compensation

no retirement benefits, the former spouse of the disabled employee would not be entitled to any of the disability pension.

separate property but fashioning spousal support to meet the needs of the nondisabled spouse.²

Such holding does not result in a deprivation of the spouse's justifiable reliance on a retirement pension. Any such reliance must take into account our holding in *In re Marriage of Jones*, supra, 13 Cal.3d 457, 464, 119 Cal.Rptr. 108, 531 P.2d 420, that military disability payments received after dissolution of a marriage are separate property of the disabled veteran if retirement due to disability occurs prior to vesting of a retirement pension. Thus, the spouse is on notice during the entire period when the retirement pension is assertedly earned that should the employee obtain dissolution and retire for disability, the disability payments will be separate.

THE MAJORITY OPINION

A. *The Excuse to Reconsider In re Marriage of Jones*, supra, 13 Cal.3d 457, 119 Cal.Rptr. 108, 531 P.2d 420.

The majority indicate that *Jones* was somehow based on the doctrine of *French v. French*, supra, 17 Cal.2d 775, 112 P.2d 235, that nonvested pension rights were mere expectancies and thus not subject to division upon divorce as community property. (*Ante*, p. 13 of 148 Cal.Rptr., p. 100 of 582 P.2d.) The majority then reason that because *French* was overruled in *In re Marriage of Brown*, supra, 15 Cal.3d 838, 851, 126 Cal.Rptr. 633, 544 P.2d 561, we should now repudiate *Jones*.

The majority's indication that *Jones* was based on the expectancy doctrine is false. As shown above, the basis on *Jones* was that disability pensions are primarily compensation for loss of earning capacity and for pain, suffering, disfigurement, and resulting misfortune—all separate rather than community concerns after dissolution. *Jones* does not cite *French* or mention the expectancy doctrine. And there was a very

2. Such an approach was followed by the trial court in *Waite v. Waite*, supra, 6 Cal.3d 461, 466, 99 Cal.Rptr. 325, 492 P.2d 13, in dividing the retired judge's pension and providing for \$1 a month support. The court ordered that, in

good reason why it was not mentioned—the justices were fully aware of the likelihood that *French* and the expectancy doctrine would be repudiated. Less than a year earlier, this court in *In re Marriage of Vason* (1974) 10 Cal.3d 851, 853, 112 Cal.Rptr. 405, 406, 519 P.2d 165, 166, stated in its second and third sentences of the opinion: "We granted a hearing upon the petition respondent wife, supported by an implied invitation from the Court of Appeal, ascertain the current viability of the rule *French v. French* (1941) 17 Cal.2d 775, 7112 P.2d 235, [134 A.L.R. 366], that pension benefits which have not yet vested are mere expectancy and not subject to division as community property. [¶] Upon further examination of the record it appears that issue is not properly before us . . ."

All of the justices who participated in *Jones* had participated in *Wilson*, and participated less than a year after *Jones* when in *Brown*, *French* was disapproved. The right hand knew what the left hand was doing. In the circumstances, while expectancy doctrine could have furnished a basis to reach the result in *Jones*, any reliance upon expectancy doctrine of *French* in *Jones* would have been improper. *Jones* not even mentioning *French* or the expectancy doctrine, it is unreasonable to suggest that *Jones* was somehow based on *French* or the doctrine.

The excuse furnished by the majority repudiating our recent unanimous decision in *Jones* displays a remarkable lack of candor.

B. *Results of Repudiation of Jones*.

However contrived the excuse given reconsidering a recent unanimous decision, however weak the reasons given for repudiating the decision, in the last analysis results following from the new rule adoption must be weighed on their own merits. When we weigh the majority's determination to repudiate *Jones*, we find that it

the event the retired judge accepted a temporary judicial assignment thereby suspending pension payments, the support should be increased to an amount equal to the former spouse's share of the pension.

established an invidious discrimination against disabled employees and healthy employees who terminate employment here is a dissolution.

Approving *Jones*, the majority purports upon *In re Marriage of Brown*, 15 Cal.3d 838, 126 Cal.Rptr. 633, 544 P.2d 561. Both *Jones* and *Brown* dealt with cases who had nonvested retirement rights. *Brown* was concerned with cases generally without focusing on who was disabled. *Brown* held that vested retirement pensions would be community property like vested ones. However, recognizing that nonvested pensions might be destroyed by death or termination of employment before vesting, the court held that the uncertainties were a refusal to divide present value of the pension and instead awarding a portion of pension payment as it comes due. (*In re Marriage of Brown*, *supra*, 15 Cal.3d 838, 126 Cal.Rptr. 633, 544 P.2d 561.) This carefully pointed out that judicial recognition of the nonemployee spouse's interest in pension rights does not "limit" the employee's freedom to change or terminate employment. "The employee retains the right to decide, and by his decision, the effect of the retirement benefits owned by community." (*Id.* at pp. 849-850, 126 P.2d at p. 568.) Under *Brown* when the healthy employee having only nonvested retirement terminates his employment—perhaps before lucrative employment—the nonvested pension rights are lost with the employee owing no obligation to compensate a former spouse for the loss of the nonvested pension rights. Under *Jones*, a comparable case was reached—the disabled employee gave up nonvested retirement rights who terminated employment and received a disability pension was not required to compensate the former spouse for loss of the nonvested pension rights.

Disapproving *Jones*, the majority insists that the handicapped and compel them to

The majority in footnote 10 suggest that the proper comparison is between healthy employees who receive pension payments and the disabled. The comparison is not in point because

compensate former spouses for loss of nonvested pension rights due to termination of employment. The disabled are placed in a worse position than the healthy who terminate employment. Former spouses of the disabled are given benefits when former spouses of the healthy are denied similar benefits.

The disabled are also placed in a worse position than the healthy employee who continues his employment. There is no liability to former spouses because there are no retirement benefits. The employee may continue to work until he dies in which event there may never be retirement pension payments. On the other hand, the employee who retires for disability under today's majority decision immediately must pay part of the disability pension to the former spouse. The former spouse of the disabled employee is entitled to benefits upon payment of the disability pension, when had the employee remained healthy the former spouse might not have been entitled to any benefits and at most could only receive delayed benefits.³

Both federal and state law prohibit discrimination against the handicapped in employment. (See, e.g., 29 U.S.C. § 793; Lab. Code, §§ 1430, 1735.) Today, the majority not only permit but require discrimination against the disabled who are compensated for their liability to compete in the labor market—discrimination essentially against the unemployed handicapped. I cannot join in the majority's discrimination; I cannot share their lack of compassion.

Primarily, there are three situations where there is a clear difference in the practical effects of the majority's determination to give the former spouse an interest in the disability pension and my approach to hold that the pension is separate property with spousal support available to meet the needs of the former spouse. The three situations involve justification to deny or severely limit spousal support. The disability pension and other economic resources avail-

no payments are made under nonvested pensions. The pension must be vested before there are payments.

able to the disabled employee may be insufficient to meet his needs, warranting denial of spousal support. The former spouse may have sufficient economic resources so that little or no support is required. The former spouse may remarry terminating spousal support. (Civ. Code, § 4801.)⁴ In all three situations the balance of equities falls in favor of the disabled employee.

C. The Majority's Settled Principle.

Relying upon *Waite v. Waite*, *supra*, 6 Cal.3d 461, 472, 99 Cal.Rptr. 325, 492 P.2d 13, and *In re Marriage of Peterson*, *supra*, 41 Cal.App.3d 642, 650-651, 115 Cal.Rptr. 184, the majority proclaim the "settled principle that one spouse cannot, by invoking a condition wholly within his control, defeat the community interest of the other spouse." (*Ante*, p. 13 of 148 Cal.Rptr., p. 100 of 582 P.2d.)

However, the cases cited do not stand for the so-called "settled principle," but hold only that the possibility the employee may elect to forego an otherwise vested pension does not unvest that pension. (*Waite* and *Peterson* were decided prior to this court's decision in *Brown* holding that nonvested pensions are community property subject to division upon dissolution.)

Moreover, the so-called "settled principle" is contrary to *Brown* because, as we have seen, the employee is free to change or

4. Death of the obligor ordinarily terminates spousal support (Civ. Code, § 4801), but employee pension payments ordinarily terminate on death of the employee. As pointed out earlier, surviving spouse benefits are paid only to surviving spouses, not former spouses who may have been married to the employee during the period of employment.

5. *In re Marriage of Cavnar* (1976) 62 Cal App 3d 660, 133 Cal Rptr 267, is distinguishable on its own terms. In that case, the husband, after obtaining retirement payments at the age of 59, converted his retirement benefit plan to a disability retirement plan, receiving increased benefits. The court held that the portion of the disability benefits which could have been received as retirement benefits was a community asset. The court pointed out that *In re Marriage of Jones*, *supra*, 13 Cal 3d at p 462, 119 Cal Rptr 108, 531 P 2d 420, and *In re Marriage of Olhausen*, *supra*, 48 Cal App 3d at pp 193-194, 121 Cal Rptr. 444, holding disabili-

terminate employment, modify retirement terms, or elect between alternative retirement programs. (*In re Marriage of Brown*, *supra*, 15 Cal.3d 838, 849-850, 126 Cal.Rptr. 633, 544 P.2d 561.) Dissolution of the marriage does not require an employee to retire at the earliest possible age; rather he may forego retirement and continue working in which case there are no retirement payments to divide and the earnings after dissolution will be the employee's separate property or community property of any new marriage.⁵

I would reverse the judgment.



148 Cal Rptr 22

William M. BULLIS, as trustee, etc., et al., Plaintiffs and Respondents,

v.

SECURITY PACIFIC NATIONAL BANK, Defendant and Appellant.

L.A. 30711.

Supreme Court of California.

Aug. 10, 1978.

Heirs of an estate brought suit against a bank for damages allegedly occasioned

by pay was separate property were based on the characterization of disability benefits "as compensation for personal anguish and diminished earning capacity." The court then went on to reason that, because the husband had already retired before electing disability pay, that pay could not be characterized as compensation for diminished earning capacity or for inability to compete in the labor market. It was concluded that only part of the disability pay could be properly allocated to disability. (62 Cal App 3d at p 665, 133 Cal Rptr 267 at 270.)

By way of contrast, in the instant case the husband commenced receiving disability pay at the age of 43, he did not receive retirement pay, and it is clear that his disability pay is compensation for the diminished ability of a one armed man to compete in the labor market.

I would disapprove *In re Marriage of Mueller* (1977) 70 Cal App 3d 66, 137 Cal Rptr 129