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MILITARY RETIRED PAY AND DIVORCE: CONGRESS RETIRES *McCARTY v. McCARTY*—IS THAT ENOUGH?

The United States Constitution allows the states to exercise broad powers over domestic relations.¹ State laws govern the creation and dissolution of the marriage relationship and numerous rights and obligations that originate in the relationship between husband and wife.² Different patterns of economic, social, and cultural development within individual states have resulted in a diversity of state laws concerning marriage and divorce.³ Separate movements toward reform and uniformity have succeeded in bringing state marriage and divorce laws closer to the moral and economic views that prevail within individual states⁴ and in

¹ See U.S. CONST. amend X. The tenth amendment reserves to the states or to the people all powers that the Constitution does not delegate to the United States nor prohibit to the states. *Id.* The Supreme Court often has stated that the subject of domestic relations is the exclusive province of the states. See, e.g., *McCarty v. McCarty*, 453 U.S. 210, 220 (1981); *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 581 (1979); *In re Burrus*, 136 U.S. 586, 593-94 (1890); *infra* note 8 (domestic relations exception to diversity jurisdiction of federal courts). In exercising reserved domestic relations powers, the states may act to preserve the institution of marriage. See Garfield, *The Transitory Divorce Action: Jurisdiction in the No-Fault Era*, 58 TEX. L. REV. 501, 503-04 (1980). Another state concern in regulating the grounds for marriage and divorce is the effect given to state court divorce decrees under the full faith and credit clause of the Constitution. U.S. CONST. art. IV, cl. 1 (states must recognize acts, records, and proceedings of every other state); see *Sosna v. Iowa*, 419 U.S. 393, 407-09 (1975) (durational residence requirement for divorce applied to recent state resident is justified to insulate divorce decree from collateral attack in another state); *Viernes v. District Court*, 181 Colo. 284, _____, 509 P.2d 306, 308 (1973) (en banc) (establishment of proper divorce jurisdiction is vital to recognition of decrees under full faith and credit clause).

² See *Maynard v. Hill*, 125 U.S. 190, 205 (1888) (legislature has always controlled marriage), quoted in *Bacchetta v. Bacchetta*, _____ Pa. _____, _____, 445 A.2d 1194, 1197 (1982) (providing for distribution of property upon divorce is within exercise of state's police power); *infra* text accompanying notes 17 & 18 (use of state law relationships to resolve disputes concerning rights in federally created benefits). See generally *Developments in the Law—The Constitution and the Family*, 93 HARV. L. REV. 1156 (1980) [hereinafter cited as *Developments*].

³ See generally Johnston, *Sex and Property: The Common Law Tradition, the Law School Curriculum, and Developments Toward Equality*, 47 N.Y.U. L. REV. 1033 (1972).

⁴ See PA. STAT. ANN. tit. 23, §§ 101-703 (Purdon Supp. 1982-83) (Pennsylvania Divorce Code eliminating fault of one party as basis for divorce); Comment, *Divorce Reform: Pennsylvania Attempts to Break with the Past*, 18 DUQ. L. REV. 877, 911-14 (1980) (by rejecting fault-based conception of divorce, legislature has helped divorced spouses to achieve smooth transition to separate lives). Moral and economic views expressed in marriage and divorce laws have progressed. Compare G. TIEDEMAN, A TREATISE ON THE LIMITATIONS OF POLICE POWER IN THE UNITED STATES § 149 (1886 & photo. reprint 1971) (marital relation coexistent with and must have accompanied beginning of creation) with Glendon, *Marriage and the State: The Withering Away of Marriage*, 62 VA. L. REV. 663, 666 (1976) (formalities of marriage left to individuals, state interest more in terms of economic consequences of cohabitation). But see Weitzman, *Legal Regulation of Marriage: Tradition and Change*, 62 CALIF. L.

reconciling the differences between the laws of the states.⁵ To a considerable extent, however, the states' marriage and divorce laws remain a complex and diverse body of rights, responsibilities, and regulations.⁶

The differences between the states regarding the purpose of the marriage relationship and the economic and moral attributes of marriage can account partially for the diversity of state laws.⁷ The Supreme Court has encouraged the diversity of state laws through a reluctance to interfere with the states' prerogatives in the areas of marriage, divorce, and family relationships.⁸ State power over individuals' conduct through the operation of marriage and divorce laws, however, is not unlimited.⁹ Provisions of the Constitution impose a significant limitation on the marriage and divorce laws of the states.¹⁰ Within the last three decades, the Supreme Court has recognized a number of constitutional rights of individuals that are distinct from the rights that arise from the marriage

REV. 1169, 1243 (1974) (state regulation of marriage purporting to promote public morality no longer legitimate by present moral standards).

⁵ See Note, *Property Division and Alimony Awards: A Survey of Statutory Limitations on Judicial Discretion*, 50 *FORDHAM L. REV.* 415, 444-45 (1981) (statutory guidelines for judicial awards of property and alimony are bringing measure of uniformity to decisions) [hereinafter cited as *Survey of Statutory Limitations*]. But see R. LEVY, *UNIFORM MARRIAGE AND DIVORCE LEGISLATION: A PRELIMINARY ANALYSIS* 9-12 (n.d.) (Prepared for Special Committee on Divorce of the National Conference of Commissioners on Uniform State Laws) (interstate conflict in state laws persists in lack of uniformity).

⁶ See H. MARSH, *MARITAL PROPERTY IN CONFLICT OF LAWS* 9 (1952) (laws of states in area of marital property more divergent than almost any other area of law).

⁷ See *FAMILY POLICY, GOVERNMENT AND FAMILIES IN FOURTEEN COUNTRIES* (S. Kerman & A. Kahn eds. 1978) (range of ethnic, religious, and demographic characteristics of states leads to pluralistic solutions to problems involving marital relationship); R. WINCH, *THE MODERN FAMILY* (rev. ed. 1963) (cultural, racial, religious, class, rural and urban, and regional differences reflected in laws dealing with marriage); Comment, *The Development of Sharing Principles in Common Law Marital Property States*, 28 *U.C.L.A. L. REV.* 1269, 1271-72 (1981) (sharing-based community property system influenced by working classes while individualistic separate property concepts developed in common-law system influenced by aristocracy) [hereinafter cited as *Development of Sharing Principles*]. But see Rhein-stein, *Trends in Marriage and Divorce Law of Western Countries*, 18 *LAW & CONTEMP. PROBS.* 3, 18-19 (1953) (courts are more responsive than legislatures to individualistic demands with respect to marriage and divorce laws).

⁸ See *supra* note 1 (Supreme Court statements that domestic relations are matters of state concern). Federal courts have abstained from exercising diversity jurisdiction over cases involving marriage, divorce, and family matters. See *Sosna v. Iowa*, 419 U.S. 393, 404 (1975) (domestic relations regarded as virtually exclusive province of states); H. HART & H. WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 1189-92 (2d ed. 1973) (Supreme Court doctrine that federal courts are not competent to decide domestic relations issues). But see *Spindel v. Spindel*, 283 F. Supp. 797, 804-11 (E.D.N.Y. 1968) (domestic relations exception to federal jurisdiction based on inaccurate historical grounds).

⁹ See, e.g., Strickman, *Marriage, Divorce and the Constitution*, 22 *B.C. L. REV.* 935, 949 (1981) (choice of whom to marry is fundamental right that is subject to rigorous due process scrutiny when restricted by state); *Developments, supra* note 2, at 1309-11 (no fundamental right to divorce, but may be prerequisite to full exercise of right to marry).

¹⁰ See generally *Developments, supra* note 2.

relationship under state laws.¹¹ The Supreme Court has stated that the constitutional liberties of individual persons place limits on the extent to which states can regulate individual behavior by marriage and divorce laws.¹²

The operation of federal statutes presents a further check on the exercise of state power over marriage and divorce. The supremacy clause¹³ resolves conflicts between state and federal laws in favor of the federal power.¹⁴ Since the Constitution leaves the regulation of marriage, divorce, and related matters to the states, no federal laws exist that purport to govern domestic relations.¹⁵ Attainment of the objectives of federal laws, however, may conflict with the exercise of state domestic relations powers.¹⁶ Federal laws that determine the eligibility of persons

¹¹ See, e.g., *Zablocki v. Redhail*, 434 U.S. 374, 390-91 (1978) (striking statute requiring court approval for remarriage of person ordered by court to support child of previous marriage); *Doe v. Bolton*, 410 U.S. 179, 198 (1973) (striking statute limiting opportunity of married woman to obtain abortion); *Boddie v. Connecticut*, 401 U.S. 371, 383 (1971) (statute requiring filing fees for divorce beyond means of indigent plaintiffs held unconstitutional); *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (statute prohibiting interracial marriage held unconstitutional).

¹² See *supra* note 11 (constitutional rights of individuals limit state regulation of individual conduct through marriage and divorce legislation).

¹³ U.S. CONST. art. VI, cl. 2. The supremacy clause provides that the Constitution and all laws of the United States enacted pursuant to the Constitution are the supreme law of the Nation. *Id.*

¹⁴ See J. NOWAK, R. ROTUNDA & J. NELSON, HANDBOOK ON CONSTITUTIONAL LAW 267-269 (1978) [hereinafter cited as NOWAK, ROTUNDA & NELSON]. When federal and state laws conflict, the federal law pre-empts the state law. *Id.* at 267. Congress may provide expressly that federal legislation pre-empts state laws dealing with a particular subject. E.g., 29 U.S.C. § 1144(a) (1976) (pre-empting state laws relating to employee benefit plans regulated by Employee Retirement Income Security Act); *Alessi v. Raybestos-Manhattan, Inc.* 451 U.S. 504, 522-26 (1981) (explicit congressional statement about pre-emptive effect of legislation); *Delta Air Lines, Inc. v. Kramarsky*, 666 F.2d 21, 22-23 (2d Cir. 1981) (same). Conflicts between federal and state laws also may occur in situations in which Congress expressly has not required pre-emption of state laws. See NOWAK, ROTUNDA & NELSON, *supra*, at 268. In the absence of direction from Congress on the question of pre-emption, the Supreme Court has had to determine congressional intent from statutes and other legislative materials and ascertain the purposes embodied in conflicting federal and state laws. *Id.* at 268-69; see Choper, *The Scope of National Power Vis-a-Vis the States: The Dispensability of Judicial Review*, 86 YALE L.J. 1552, 1586-87 (1977). At different times the Court has relied on presumptions based upon the Court's conception of the federal form of government and the particular subject matter under review. See Note, *The Preemption Doctrine: Shifting Perspectives on Federalism and the Burger Court*, 75 COLUM. L. REV. 623, 626 (1975) (shift from pre-emption doctrine favoring state interests to federal-directed formulation of pre-emption analysis). In pre-emption cases involving state domestic relations laws, the Supreme Court has stated that conflict alone between federal and state laws will not lead necessarily to pre-emption. *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 581 (1979). State domestic relations law must do major damage to clear and substantial federal interests. *Id.*; see *infra* text accompanying notes 27-36 (*Hisquierdo* pre-emption test).

¹⁵ See *supra* note 1 (Supreme Court statements that no federal law of domestic relations exists).

¹⁶ See, e.g., *McCarty v. McCarty*, 453 U.S. 210, 232 (1981) (conflict between state's com-

to receive federal benefits may conflict with state regulation of the economic aspects of the marriage relationship.¹⁷ Conflict between state and federal laws may occur when a federal interest involves persons who are within the scope of federal benefit programs and in relationships that state marriage law creates.¹⁸ In *McCarty v. McCarty*,¹⁹ for example, the Supreme Court found that the application of state law governing the disposition of marital property²⁰ conflicted with the provisions of federal

munity property law and retirement benefits for military personnel); *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 582-83 (1979) (conflict between state's community property law and federal retirement benefits for railroad employees); *Yiatchos v. Yiatchos*, 376 U.S. 306, 307-08 (1964) (conflict between state's community property law and federal savings bond regulations); *infra* note 18 (conflicting meanings in terms of state and federal laws). See generally Note, *A Framework for Preemption Analysis*, 88 YALE L.J. 363 (1978).

¹⁷ See *McCarty v. McCarty*, 453 U.S. 210, 216-17 (1981) (state law governing acquisition of property by husband and wife). State laws also may require payment of financial support by one spouse to another upon divorce. See, e.g., *Orr v. Orr*, 440 U.S. 268, 271 (1979) (state law requiring payment of alimony to wife); *Stanton v. Stanton*, 421 U.S. 7, 12 (1975) (state law requiring payment by divorced spouse for support of children). States also may seek to regulate the inheritance of property on the basis of family relationships. See, e.g., *Labine v. Vincent*, 401 U.S. 532, 538-39 (1971) (state law definition of child who may inherit from father); *McCune v. Essig*, 199 U.S. 382, 387-88 (1905) (state law prescribing intestate succession of land). On six occasions the Supreme Court has found pre-emption of community property laws that conflicted with federal statutes governing the receipt of federal benefits. See *McCarty v. McCarty*, 453 U.S. 210, 236 (1981) (military retired pay); *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 589-90 (1979) (pension under Railroad Retirement Act 45 U.S.C. § 231 (1976)); *Yiatchos v. Yiatchos*, 376 U.S. 306, 309 (1964) (United States savings bonds); *Free v. Bland*, 369 U.S. 663, 670 (1962) (same); *Wissner v. Wissner*, 338 U.S. 655, 661 (1950) (military service insurance policy); *McCune v. Essig*, 199 U.S. 382, 390 (1905) (federal land under Homestead Act, 43 U.S.C. §§ 170-71 (1976) (repealed 1976)).

¹⁸ See *supra* note 17 (conflict arising when persons claim interests in federal benefits under state law). In some cases, conflict between state and federal laws occurs when federal law refers to a relationship under state law. See *De Sylva v. Ballentine*, 351 U.S. 570, 580-82 (1955). In *De Sylva*, the Supreme Court addressed whether the word 'children' as used in the Copyright Act included the illegitimate children of a copyright holder. *Id.* at 581; 17 U.S.C. § 201(d)(1) (1976) (copyright ownership may pass as personal property according to law of intestate succession). After repeating the dictum that no federal law of domestic relations exists, the Court held that state law dealing with relationships created by marriage should govern. 351 U.S. at 580-81.

¹⁹ 453 U.S. 210 (1981).

²⁰ See MARSH, *supra* note 6, at 11-27 (marital property is aggregate of interests that arise in one spouse with respect to things acquired by other spouse, solely by virtue of marriage relationship). State laws providing for disposition of property between spouses may focus on which spouse acquired the property—the so-called separate property systems. See Note, *Equitable Distribution vs. Fixed Rules: Marital Property Reform and the Uniform Marital Property Act*, 23 B.C. L. REV. 761, 762-63 (1982) (court in separate property state limited to determining title and awarding title accordingly) [hereinafter cited as *Marital Property Reform*]. Another system of allocating property between spouses, equitable distribution, allows courts to divide property between spouses in a just and fair manner, subject to statutory guidelines. *Id.* at 761-62; see *Development of Sharing Principles*, *supra* note 7, at 1282-83 (equitable distribution system allows judges to look beyond title and order transfer of property from one spouse to other spouse). In community property states, all property acquired during marriage is the property of both husband and wife, unless one

legislation governing the federal benefit of retired pay for retired members of the military services.²¹ The *McCarty* Court reasoned that the conflict threatened a federal interest, efficient management of the Nation's armed services, and consequently concluded that the supremacy clause required pre-emption of the state statute.²²

In *McCarty*, an Army officer who had served eighteen of the twenty years required for retirement with pay²³ filed for dissolution of his marriage.²⁴ The trial court dissolved the marriage and, in distributing the McCartys' property under California's community property statutes,²⁵ ordered Colonel McCarty to pay approximately forty-five percent of his total monthly retired pay to his wife.²⁶ The Supreme Court in *McCarty*

party can demonstrate that the property is his separate property. W. DE FUNIAK & M. VAUGHN, PRINCIPLES OF COMMUNITY PROPERTY, § 1, 1-2 (2d ed. 1971).

²¹ 453 U.S. at 232.

²² *Id.* at 234-36; see *infra* text accompanying notes 33-37 (application of state's community property law threat to twin objectives of military compensation system).

²³ See 10 U.S.C. §§ 3911, 3914 (1976 & Supp. V. 1981). An Army officer may retire from active service after at least twenty years of service. *Id.* § 3911. An enlisted member of the Army may retire after at least twenty years of active service and ten years of service in the Army Reserve. *Id.* § 3914. Both retired officers and enlisted members are entitled to receive retired pay. *Id.* § 3929. The amount of retired pay a retired service member may receive is a function of his rank at retirement and the length of his service. *Id.* § 3991. Length of service requirements and retired pay provisions are essentially the same for all branches of the military services. See *McCarty v. McCarty*, 453 U.S. at 213 n.5.

²⁴ 453 U.S. at 216.

²⁵ See CAL. CIV. CODE § 4800(a) (West Supp. 1982). Section 4800(a) requires a trial court in a divorce action to divide all of the community and quasi-community property of the parties. *Id.* Quasi-community property is property that either spouse acquired while domiciled in a state other than California, that would have been community property if the acquiring spouse had been domiciled in California at the time of acquisition. *Id.* § 4803(a); DE FUNIAK & VAUGHN, *supra* note 20, at §§ 68.3, 153 (concept of quasi-community property involves movement of spouses between community property and noncommunity property states).

²⁶ 453 U.S. at 218. The percentage amount of retired pay awarded to the wife in *McCarty* represented one-half of the ratio between the period of Colonel McCarty's military service while he was married to the total length of his military service. *Id.* Other courts have used a pro rata method to determine a former spouse's share of a military service member's retired pay. See, e.g., *In re Miller*, ___ Mont. ___, ___, 609 P.2d 1185, 1186 (1980) (wife to receive percentage amount of husband's monthly check), *vacated sub nom.*, *Miller v. Miller*, ___ U.S. ___, ___, 101 S. Ct. 3152 (1981); *In re Pea*, 17 Wash. App. 728, 731, 566 P.2d 212, 214 (1977) (percentage formula based on extent of community contributions).

The trial court ordered Colonel McCarty to pay 45% of his monthly retired pay to his wife and retained jurisdiction to supervise the payments. 453 U.S. at 218. Other courts have used the pro rata method of determining a former spouse's share of retired pay, but have ordered the retired service member to pay the spouse's share in a lump sum based upon the service member's actuarial life expectancy. See *Ramsey v. Ramsey*, 96 Idaho 672, ___, 535 P.2d 53, 60 (1975) (lump sum award required under Idaho community property law), *overruled*, *Rice v. Rice*, 103 Idaho 85 ___, 645 P.2d 319, 321 (1982) (following *McCarty* decision). A dissenting justice in *Ramsey* pointed out that the lump sum award probably would bankrupt the husband. *Id.* at 684, 535 P.2d at 65 (Bakes, J., dissenting). The dissent's prediction was correct. See *In re Ramsey*, 612 F.2d 1220, 1221 (9th Cir. 1980) (discharge in

applied a test for pre-emption that the Court had established in *Hisquierdo v. Hisquierdo*.²⁷ In a domestic relations context, the *Hisquierdo* Court concluded, the supremacy clause pre-empted state laws that conflicted with federal legislation.²⁸ Applying the *Hisquierdo* test, the *McCarty* Court first found a conflict between the provisions of the military retired pay statutes and the community property right that Mrs. McCarty claimed.²⁹ An examination of various provisions of federal law dealing with military benefits³⁰ led the *McCarty* Court to conclude that Congress had intended military retired pay to be a military service member's³¹

bankruptcy of lump sum military retired pay awarded to wife); Bowman, *Lump-Sum Division of Military Retired Pay: A Dissenting View*, 3 COMM. PROP. J. 135, 141 (1976) (wife may receive favorable lump sum judgment but virtually no judicial relief); cf. *In re Vogt*, 14 Bankr. 743, 748 (Bankr. E.D. Va. 1981) (fractional interest in retired pay payable upon receipt be service member is not dischargeable in bankruptcy).

²⁷ 439 U.S. 572 (1979). The *Hisquierdo* case involved a spouse's claim for a community property interest in benefits paid under the Railroad Retirement Act of 1974. *Id.* at 579-81; see 45 U.S.C. § 231 (1976). The *Hisquierdo* Court found that the application of community property law to benefits paid under the Railroad Retirement Act threatened the federal interest of providing for the economic security of retired railroad employees. *Id.* at 588-90. The potential injury to the congressional protection of railroad retirees required pre-emption of the community property law. *Id.* at 590.

²⁸ 439 U.S. at 581-83. The pre-emption analysis in *Hisquierdo* consisted of a two-step examination. First, the right to federal benefits asserted under state law must conflict with the express terms of federal law. *Id.* at 583. Second, the consequences of the conflict must injure sufficiently the objectives of a federal program to require pre-emption. *Id.* The *Hisquierdo* Court characterized its approach to the pre-emption question as practical and stated that the federal nature of the retirement benefits did not pre-empt state laws that purport to control federal benefits. *Id.*

²⁹ 453 U.S. at 232.

³⁰ *Id.* at 223-32. The *McCarty* Court noted that a retired service member may designate a person to receive arrearages of retired pay at his death, citing a case dealing with a similar provision concerning proceeds paid under the National Service Life Insurance Act. *Id.* at 224-26; see *Wissner v. Wissner*, 338 U.S. 655, 658 (1950) (proceeds of policy belong only to beneficiary named by serviceman). The Court next examined two statutory schemes allowing a service member to fund an annuity for his surviving spouse and children. 453 U.S. at 226-28. The Court reasoned that because a service member could choose not to fund an annuity or to fund an annuity only for his surviving children, Congress had intended retired pay to be the personal entitlement of the service member. *Id.* at 227. Finally, the Court noted that a former spouse cannot attach the service member's retired pay to satisfy a property settlement following a divorce. *Id.* at 228; see also 42 U.S.C. § 659 (1976 & Supp. V 1981) (federal law permitting garnishment of retired or retainer pay for alimony or child support); *infra* text accompanying notes 156-64 (restriction of garnishment process to alimony and child support obligations).

³¹ See Uniformed Services Former Spouses' Protection Act, PUB. L. NO. 97-252, § 1002(a), 1982 U.S. CODE CONG. & AD. NEWS (96 Stat.) 730-731 (codified at 10 U.S.C.A. § 1408(a)(5), (6) (Supp. 3 1982)). Throughout this note, the terms 'service member' and 'former spouse' follow the usage in the Act. Unless otherwise indicated, references to "former spouse" mean the wife or ex-wife of a military service member. See Note, *Military Retirement Pay Not Subject to Division as Community Property Upon Divorce: McCarty v. McCarty*, 19 HOUS. L. REV. 591, 596 (1982) (percentage of retired female service members was miniscule until very recently) [hereinafter cited as *Military Retirement Pay*].

personal entitlement and thus not subject to division under state law between a service member and his spouse.³²

The Supreme Court further concluded that the division of Colonel McCarty's military retired pay by the trial court threatened the objectives of the military compensation system.³³ The *McCarty* Court noted that by reducing the amounts that Congress had deemed adequate for the service member's needs,³⁴ division of military retired pay would discourage a service member from funding an annuity for his surviving spouse and dependent children from his share of retired pay.³⁵ In addition, the Court noted that the trial court's decision would diminish the value of military retired pay as a means by which Congress could assure a youthful and vigorous military.³⁶ The *McCarty* Court stated expressly that Congress' constitutional power to control the armed forces left the trial court with no authority to disturb the policies expressed in the military compensation system.³⁷

The *McCarty* decision upset a clearly established trend in state law

³² 453 U.S. at 224, 232.

³³ *Id.* at 232-35. The *McCarty* Court noted that two objectives of the military compensation system are income maintenance and personnel management. *Id.* at 213. Military retired pay provides for the needs of retired service members and operates as an inducement for recruiting and re-enlistment purposes. *Id.*; see *Preliminary Review of Military Retirement Systems: Hearings Before the Military Compensation Subcommittee of the House Committee on Armed Services*, 95th Cong., 2d Sess. 4-6 (1977-78).

³⁴ 453 U.S. at 233.

³⁵ *Id.* at 226-28; see *supra* note 30 (annuity for surviving spouse).

³⁶ 453 U.S. at 234-35. The *McCarty* Court reasoned that division of retired pay would disrupt the military personnel management system in two ways. *Id.* First, a division of retired pay would discourage a service member from retiring by reducing the amount available to him. *Id.* at 235. A service member, therefore, would continue in the service since any retired pay attributable to post-divorce service would be the member's separate property. *Id.* The Court concluded that the disincentive to retirement would frustrate a congressional goal of assuring youthful military forces. *Id.* Second, the Court recognized that not all states require division of military retired pay between spouses upon divorce. *Id.* Since a service member might be transferred to a state that divided retired pay, the value of retired pay as an inducement for enlistment or re-enlistment was diminished. *Id.* at 234. The *McCarty* Court did not consider the extent to which court awards of alimony or child support from retired pay might diminish the value of retired pay as an incentive. With the exception of Texas, all states provide for some form of alimony or child support. See *Military Retirement Pay*, *supra* note 31, at 598 (alimony after final divorce decree against public policy in Texas).

³⁷ 453 U.S. at 235-36. The *McCarty* Court suggested that Congress could act to provide greater protection for the former spouses of service members. *Id.* The suggestion reflected a traditional reluctance by the Supreme Court to question Congress' exercise of constitutional powers over war and military affairs. See *Rostker v. Goldberg*, 453 U.S. 57, 64-68 (1981) (conscription of men only is constitutional); *Schlesinger v. Ballard*, 419 U.S. 498, 509-10 (1975) (different promotion policy for female officers is constitutional). U.S. CONST. art. I, § 8, cls. 12-14 (power granted to Congress to raise, support, and discipline regular army and navy forces). *But see* *United States v. Robel*, 389 U.S. 258, 263-64 (1967) (national defense does not sanction subversion of constitutional right to free association).

to find spousal interests in military benefits.³⁸ Before *McCarty*, a number of courts in both the community property states³⁹ and the common-law states⁴⁰ had treated military retired pay the same as private pensions,⁴¹ subject to division between spouses as a form of property.⁴² A number of state courts that held that retired pay is marital property focused analysis on the attributes of retired pay and concluded that retired pay is a form of deferred compensation for a service member's past services.⁴³ The service member's years of active service and the rank he held at retirement determine the amount of retired or retainer pay the member receives.⁴⁴ State courts that held in favor of the divisibility of retired pay discounted the current compensation aspects of retired pay, concluding that retired pay is not compensation to a service member who faces a real risk of continued service obligations after his retirement.⁴⁵ State courts that divided retired pay reasoned that retired pay,

³⁸ See Bass, *Update: Division at Divorce of ERISA Pensions and Other Benefit Plans*, 6 FAM. L. REP. (BNA) No. 4, at 4001-03 (1979) (all community property states and several common-law states addressing question of military retired pay have held in favor of spousal interest in retired pay); *infra* text accompanying notes 39-48 (courts holding that retired pay is divisible marital property).

³⁹ See DE FUNIAK & VAUGHN, *supra* note 20, § 1 at 1. The community property states are Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, and Washington. *Id.* The community property system also prevails in Puerto Rico and the Virgin Islands. *Id.*

⁴⁰ See Freed & Foster, *Family Law in the Fifty States: An Overview as of September 1982*, 8 FAM. L. REP. (BNA) No. 46, at 4065 (1982). With the exception of Mississippi and West Virginia, all common-law states essentially provide for equitable distribution of property upon divorce. *Id.* at 4079-83 (listing states). See generally *Marital Property Reform*, *supra* note 20; *Development of Sharing Principles*, *supra* note 7.

⁴¹ See generally Reppy, *Community and Separate Interests in Pensions and Social Security Benefits After Marriage of Brown an ERISA*, 25 U.C.L.A. L. REV. 417 (1978); Thiede, *The Community Property Interest of the Non-Employee Spouse in Private Employee Retirement Benefits*, 9 U.S.F. L. REV. 635 (1975).

⁴² See *Linson v. Linson*, 618 P.2d 748, 754 (Hawaii Ct. App. 1980) (retired pay properly considered part of marital estate); *Ramsey v. Ramsey*, 96 Idaho 672, ___, 535 P.2d 53-56 (1975) (retired pay is earned property right based on member's service); *In re Schissel*, 292 N.W.2d 421, 427 (Iowa 1980) (trial court properly took retired pay into account in property division); *Kruger v. Kruger*, 73 N.J. 464, 470, 375 A.2d 659, 662 (1977) (once eligibility requirements met, retired pay is property subject to equitable distribution). *But see Fenney v. Fenney*, 259 Ark. 858, ___, 537 S.W.2d 367, 367 (1976) (right to retired pay not personal property within meaning of state statute); *Ellis v. Ellis*, 191 Colo. 317, ___, 552 P.2d 506, 507 (1976) (en banc) (retired pay not property since it has no surrender, redemption, or lump sum value).

⁴³ See *In re Fithian*, 10 Cal. 3d 592, 604, 517 P.2d 449, 456-57, 111 Cal. Rptr. 369, 376-77 (en banc) (retirement pay awarded for services previously rendered by service member), *cert. denied*, 419 U.S. 825 (1974).

⁴⁴ See *supra* note 30 (description of service member's entitlement to receive retired or retainer pay).

⁴⁵ See *Swope v. Mitchell*, 324 So.2d 461, 464 (La. App. 1975) (incorrect to characterize retirement pay as current compensation); *LeClert v. LeClert*, 80 N.M. 235, ___, 453 P.2d 755, 756 (1969) (possibility that service member may be recalled during national emergency does not make retirement pay compensation for present or future demands of government).

considered as a right to receive money after retirement, was a form of property that the service member had earned during marriage.⁴⁶ Although the right of a service member to receive retired pay is not absolute,⁴⁷ courts that divided retired pay between spouses concluded that the possibility that a service member would not receive retired pay should not defeat a former spouse's interest in marital property.⁴⁸

State courts holding that military retired pay is not subject to division between spouses emphasized the attributes of retired pay that would support a characterization of retired pay as current compensation for present services.⁴⁹ Retired service members remain subject to military discipline.⁵⁰ A retired officer may forfeit his right to receive retired pay upon court-martial,⁵¹ by engaging in certain prohibited activities,⁵² or by receiving other forms of government compensation.⁵³ Moreover, retired service members may be subject to recall into active service.⁵⁴ Courts

⁴⁶ See *supra* note 42 (cases holding that retired pay is subject to division as marital property between spouses).

⁴⁷ See *infra* text accompanying notes 51-54 (circumstances under which service member may lose right to receive retired or retainer pay).

⁴⁸ See, e.g., *Linson v. Linson*, 618 P.2d 748, 750-51 (Hawaii Ct. App. 1980) (emphasizing equity in awarding portion of retired pay to former spouse of career service member); *Chisnell v. Chisnell*, 82 Mich. App. 699, 706, 267 N.W.2d 155, 159 (1978) (correct approach is to categorize retired pay as deferred compensation), *cert. denied*, 442 U.S. 940 (1979); *Kruger v. Kruger*, 73 N.J. 464, 468, 375 A.2d 659, 662-63 (1977) (right to receive retired pay is economic asset subject to equitable distribution); *Ables v. Ables*, 540 S.W.2d 769, 770 (Tex. Civ. App. 1976) (real consideration for retired pay was service member's thirty years of service, not post-retirement duties).

⁴⁹ See *Fenney v. Fenney*, 259 Ark. 858, ____, 537 S.W.2d 367, 367 (1976) (right to receive retirement pay is not personal property within meaning of state law); *Ellis v. Ellis*, 191 Colo. 317, 319, 552 P.2d 506, 507 (1976) (retired pay is not property under state law). Other courts declined to address whether retired pay constituted property or current compensation. See *Cose v. Cose*, 592 P.2d 1230, 1232 (Alaska 1979) (supremacy clause prohibits application of state property settlement concepts to retired pay), *cert. denied*, 453 U.S. 922 (1981).

⁵⁰ See 10 U.S.C. § 802(4) (1976) (retired members of regular service component entitled to pay are subject to Code of Military Justice).

⁵¹ See *Hooper v. United States*, 326 F.2d 982, 988 (Ct. Cl.) (retired service member validly dismissed from Navy no longer entitled to retired pay), *cert. denied*, 377 U.S. 977 (1964).

⁵² See, e.g., U.S. CONST. art. I, § 9, cl. 8 (person holding office or trust under United States may not accept employment or gift from foreign state without congressional consent); 37 U.S.C. § 801(b) (Supp. V 1981) (prohibiting retired officer from selling supplies to Department of Defense or other designated agencies within three years after retirement); 50 OP. COMP. GEN. 566, 568-69 (1979) (renouncing United States citizenship may result in loss of retired pay).

⁵³ See 5 U.S.C. § 5532 (Supp. V 1981) (loss of retired pay for employment in federal civil service); *infra* text accompanying notes 141-46 (waiver of military retired pay to receive Veterans Administration disability pension).

⁵⁴ See 10 U.S.C. § 688 (Supp. V 1981). Section 688(a) authorizes the secretaries of the military departments to order a retired service member to active duty at any time. *Id.* A retired member recalled to active service is entitled to promotions and to increased retired pay based upon promotion in rank during his active service. *Id.* § 6151(b)(1).

that declined to divide retired pay concluded that the current compensation aspects of retired pay precluded a characterization of retired pay as a form of marital property.⁵⁵

The *McCarty* Court expressly left open the question whether military retired pay is deferred compensation for completed past services or current compensation for reduced present services.⁵⁶ The Court concluded that under the pre-emption analysis of *Hisquierdo*, the Court did not have to address Colonel *McCarty*'s contention that his retired pay was current compensation and thus not subject to division as community property under California law.⁵⁷ Instead, the *McCarty* Court expressed a traditional reluctance to interfere with congressional actions in the area of military affairs.⁵⁸ Noting that Congress had described retired pay as the personal entitlement of a military service member, the *McCarty* Court reasoned that Congress had prohibited the states from treating retired pay as marital property.⁵⁹ The *McCarty* decision rendered moot any consideration of military retired pay under a marital property analysis by emphasizing the congressional intent to pre-empt state laws that the Court found in the retired pay statutes.⁶⁰ Courts in post-*McCarty* cases held that the *McCarty* rationale applied equally to the marital property laws in noncommunity property states.⁶¹

The *McCarty* Court suggested that other means provided by state

⁵⁵ See *supra* note 49 (cases holding that retired pay is not marital property subject to division between spouses).

⁵⁶ 453 U.S. at 223. The *McCarty* Court stated in a footnote that Congress may have intended retired pay to be current compensation for the restrictions on retired service members and the risk of recall to active service. *Id.* at 223 n.16. The Court then suggested that a possible congressional intention of retired pay as current compensation required the states to act with caution in treating retired pay as divisible property. *Id.*

⁵⁷ *Id.* at 216-17. Colonel *McCarty* had argued without success in the lower courts that as current compensation his retired pay was his separate property under California law. *Id.* at 217; see CAL. CIV. CODE §§ 518, 519 (West 1970 & Supp. 1982) (earnings of each spouse while living separate and apart are separate property).

⁵⁸ See *McCarty*, 453 U.S. at 236 (noting Supreme Court's deference to congressional control of military affairs); *supra* note 37 (Supreme Court's deference to congressional war power in absence of threat to constitutional liberties).

⁵⁹ 453 U.S. at 233.

⁶⁰ See *id.* at 221-32. The *McCarty* Court's analysis led to the conclusion that Congress had intended military retired pay as a service member's personal entitlement. *Id.* at 224, 232; see S. REP. NO. 1480, 90th Cong., 2d Sess. 6, reprinted in 1968 U.S. CODE CONG. & AD. NEWS 3294, 3300. The Senate Report referred to military retired pay as the service member's personal entitlement in terms of congressional consideration of a new provision allowing service members to fund survivors' annuities from retired pay. *Id.*

⁶¹ See, e.g., *Rice v. Rice*, 103 Idaho 85, ___, 645 P.2d 319, 321 (1982) (no indication that *McCarty* intended to cover only community property states); *Gronquist v. Gronquist*, 7 Kan. App. 2d 583, ___, 644 P.2d 1365, 1366-67 (1982) (personal entitlement characterization of retired pay makes community property-equitable distribution distinction unnecessary); *Hill v. Hill*, 291 Md. 615, 620, 436 A.2d 67, 70 (1981) (*McCarty* rationale applies equally to equitable distribution states); *Grotelueschen v. Grotelueschen*, 113 Mich. App. 395, 404, 318 N.W.2d 227, 231 (1982) (overruling previous decision holding retired pay to be marital asset).

and federal law could mitigate any harsh consequences resulting from the *McCarty* decision.⁶² The decision effectively limited the former spouse of a military service member, who before *McCarty* received financial support by sharing in a service member's retired pay on the basis of marital property right,⁶³ to other means of support based on need, such as alimony and child support payments.⁶⁴ Significant differences, however, exist between the states with respect to court authority to award a former spouse alimony or child support.⁶⁵ Mechanisms for enforcing alimony or child support provisions of divorce decrees are not fully effective.⁶⁶ The *McCarty* Court further compounded the economic plight of the former spouse by prohibiting awards of other marital property to offset the value of retired pay.⁶⁷ The *McCarty* decis-

⁶² 453 U.S. at 230, 235. The *McCarty* Court suggested that the availability of garnishment to satisfy alimony and child support obligations represented a congressional provision for the needs of former spouses. *Id.* at 230; *see infra* text accompanying notes 155-64 (federal statute permitting garnishment for alimony and child support obligations).

⁶³ *See supra* text accompanying notes 38-55 (state court decisions question whether retired pay constitutes marital property).

⁶⁴ *See Higgins v. Higgins*, 408 So.2d 731, 732 (Fla. Dist. Ct. App. 1982) (*McCarty* decision allows court to consider retired pay in determining alimony award); *Gronquist v. Gronquist*, 7 Kan. App.2d 583, ___, 644 P.2d 1365, 1367 (1982) (same); *Rust v. Rust*, 321 N.W.2d 504, 507-08 (N.D. 1982) (*McCarty* does not preclude consideration of retired pay to set alimony award).

⁶⁵ *See generally Survey of Statutory Limitations, supra* note 5. State laws differ with respect to awards of alimony based upon a former spouse's needs. *See id.* at 426-43; *supra* note 6 (differences in state views on economic aspects of marriage). The amount of alimony awarded may vary from state to state depending on whether the courts consider, among other factors, the financial resources of the spouses, their ages and health, their earning capacities, and the amount of marital property each spouse has received. *Survey of Statutory Limitations, supra* note 5, at 428-29. In addition, some states still consider the cause of the divorce and the presence of fault in determining an alimony award. *See* CONN. GEN. STAT. ANN. § 46b-82 (West Supp. 1982) (court to consider cause of divorce); MO. ANN. STAT. § 452.335(2)(7) (Vernon 1977) (court to consider conduct of party seeking maintenance); PA. CONS. STAT. ANN. tit. 23, § 501(b)(14) (Purdon Supp. 1982-83) (court shall consider marital misconduct prior to divorce in determining amount of alimony).

⁶⁶ *See Ex parte Burson*, 615 S.W.2d 192, 196 (Tex. 1981) (court may not use contempt power to prevent service member from exercising right granted under federal law); *Ex parte Johnson*, 591 S.W.2d 453, 456 (Tex. 1979) (same). *But see Ersipan v. Badgett*, 647 F.2d 550, 555 (5th Cir. 1981) (service member may not defeat wife's award of alimony through discharge in bankruptcy), *cert. denied*, 102 S. Ct. 1443 (1982).

⁶⁷ 453 U.S. at 229 n.22; *see Hisquierdo v. Hisquierdo*, 439 U.S. 572, 588-90 (1979). The *Hisquierdo* Court prohibited an award of other marital property to the wife to offset the effect of the Court's holding that Railroad Retirement Act benefits are not divisible upon divorce. *Id.* The Court reasoned that to allow an offsetting award of other property would achieve the same effect as a division of the husband's retirement benefits. *Id.* at 588. Justice Rehnquist, dissenting in *McCarty*, contended that the absence of a statutory prohibition against anticipation or attachment in the retired pay system did not support application of the *Hisquierdo* holding in the case of retired pay. 453 U.S. at 242 (Rehnquist, J., dissenting). The *McCarty* majority relied on a nineteenth-century case that involved an attempt to attach military pay before the government had paid the service member. *Id.* at 229-30; *see Buchanan v. Alexander*, 16 U.S. (4 How.) 20, 21 (1845) (diversion of appropriated funds would

ion was a serious setback for the former spouses of career military service members, who in many cases had acquired few separate assets or pension rights of their own.⁶⁸ Criticism of the *McCarty* decision focused on the fairness of the decision⁶⁹ and the strong interest of the states in determining economic relationships between spouses upon dissolution of marriage.⁷⁰

To remedy the problems that *McCarty* created, Congress enacted the Uniformed Services Former Spouses' Protection Act (Act) in September, 1982.⁷¹ The Act resolves some of the difficulties former spouses encountered in their attempt to share in military benefits both before and after the *McCarty* decision.⁷² The Act removes the *McCarty* prohibition against dividing retired or retainer pay by authorizing courts to divide retired or retainer pay between a service member and his former spouse according to state laws dealing with marital property.⁷³ The Act also establishes a mechanism through which a former spouse may receive payments of her share of retired or retainer pay directly from the federal government.⁷⁴ The direct payment mechanism obviates some of

suspend functions of federal government); *see also* Applegate v. Applegate, 39 F. Supp. 887, 889-90 (E.D. Va. 1941) (attachment of funds in hands of government violates doctrine of sovereign immunity).

⁶⁸ *See Military Retirement Pay*, *supra* note 31, at 596-98 (former spouses of service members often without personal resources); *Hearings on H.R. 2817, H.R. 3677 and H.R. 6270 Before the Subcommittee on Military Compensation of the House Committee on Armed Services*, 96th Cong., 2d Sess. 3, 23 (1980) (frequent change of residence prevents permanent employment and acquisition of pension rights by service member's spouse) [hereinafter cited as *Hearings on House Resolution*].

⁶⁹ *See* Goodman, *Divorce Military Style*, Wash. Post, April 27, 1982, § A, at 19 (*McCarty* Court ignored financial plight of service members' former spouses).

⁷⁰ *See, e.g.,* Kornfeld, *Supreme Court Majority Shoots Down Community Property Division of Military Retirement Pay*, 8 COMM. PROP. J. 187, 187 (1981) (agreeing with *McCarty* dissent that majority decision was both unprecedented and incorrect); Raggio, *McCarty v. McCarty: The Moving Target of Federal Preemption Threatening All Non-Employee Spouses*, 13 ST. MARY'S L.J. 505, 506-10 (1982) (*McCarty* Court cannot maintain plausibly that Congress intended to pre-empt state law); *Military Retirement Pay*, *supra* note 31, at 594-96 (*McCarty* Court inclined to find pre-emption when congressional intent unclear).

⁷¹ Uniformed Services Former Spouses' Protection Act, Pub. L. No. 97-252, 1982 U.S. CODE CONG. & AD. NEWS (96 Stat.) 730 (adding 10 U.S.C. § 1408 and amending 10 U.S.C. §§ 1072, 1076, 1086, 1447, 1448 and 1450). *See* S. REP. NO. 502, 97th Cong., 2d Sess. 44, *reprinted in* 1982 U.S. CODE CONG. & AD. NEWS 1627 (additional views of Senator Denton) (providing financial protection is an exercise of congressional responsibility) [hereinafter cited as SENATE REPORT].

⁷² *See infra* text accompanying notes 84-88 (Act removing *McCarty* prohibition against division of retired or retainer pay); *infra* text accompanying notes 95-105 (Act provides for direct payment of retired or retainer pay to a former spouse); *infra* text accompanying notes 160-64 (Act provides direct payment of other property awarded to former spouse).

⁷³ 10 U.S.C.A. § 1408(c)(1) (Supp. 3 1982); *see infra* text accompanying notes 84-93 (authorization for state courts to divide retired or retainer pay if state law permits).

⁷⁴ 10 U.S.C.A. § 1408(d)(1) (Supp. 3 1982); *see infra* text accompanying notes 94-105 (direct payment of retired or retainer pay to former spouse).

the difficulties in enforcing the economic terms of state divorce decrees.⁷⁵

Although the Act significantly improves the opportunity of a service member's former spouse to secure adequate financial support, several problems remain.⁷⁶ The Act expressly limits direct payments of retired or retainer pay to former spouses who satisfy a length-of-marriage requirement.⁷⁷ Further, the secretaries of the military service branches, who are responsible under the Act for making payments to a former spouse, will not honor court orders based upon improper jurisdiction over a service member.⁷⁸ The treatment of marital property distributions under the bankruptcy laws⁷⁹ and a service member's election to receive a veteran's pension in lieu of retired or retainer pay also may hinder the efforts of a former spouse to reach the service member's military benefits.⁸⁰ Finally, constitutional limitations prevented Congress from entirely eliminating the effect of the *McCarty* decision.⁸¹ To avoid a

⁷⁵ See, e.g., *In re Ramsey*, 612 F.2d 1220, 1221 (9th Cir. 1980) (lump sum award of retired pay to former spouse was dischargeable when service member declared bankruptcy); *Anderson v. Anderson*, 285 Md. 515, 526, 404 A.2d 275, 281 (1979) (state law more restrictive than federal statute limiting amount of government compensation subject to garnishment); *United States v. Stelter*, 567 S.W.2d 797, 799 (Tex. 1978) (service member beyond jurisdiction of divorce court's contempt power to enforce community property division).

⁷⁶ See *infra* text accompanying notes 77-83 (limitations in Act and operation of other laws may prevent former spouse from securing benefits of Act).

⁷⁷ See 10 U.S.C.A. § 1408(d)(2) (Supp. 3 1982). To receive direct payment of retired or retainer pay, a former spouse must have been married to a service member for at least ten years. *Id.*; SENATE REPORT, *supra* note 71, at 43-45 (ten-year marriage requirement necessary to ensure equitable treatment of military service members).

⁷⁸ See 10 U.S.C.A. § 1408(b)(2)(A) (Supp. 3 1982); *infra* text accompanying notes 106-07 (proper jurisdiction over service member necessary for effective service of court order).

⁷⁹ See *supra* note 26 (discharge in bankruptcy of wife's share of retired pay).

⁸⁰ See *infra* text accompanying notes 142-53 (effect of service member's election to receive Veterans Administration pension in lieu of retired pay).

⁸¹ See generally Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation*, 73 HARV. L. REV. 692 (1960). For a prominent illustration of a Supreme Court decision that prompted a legislative response by Congress see *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946). In *Mt. Clemens*, the Court construed the meaning of 'working time' with regard to the overtime compensation requirement of the Fair Labor Standards Act of 1938. *Id.* at 686, 692; see 29 U.S.C. § 207(a)(1976) (overtime compensation requirement of Fair Labor Standards Act). The result of the Court's decision was an additional five billion dollars in overtime claims. Hochman, *supra* at 721. One year after the *Mt. Clemens* case, Congress enacted the Portal-to-Portal Act, PUB. L. No. 80-49, 61 Stat. 84 (codified at 29 U.S.C. 251-262 (1976)). See H. REP. No. 71, 80th Cong., 1st Sess. —, reprinted in 1947 U.S. CODE CONG. & AD. NEWS 1029, 1030-35 (Congress intended Portal-to-Portal Act to eliminate litigation following Supreme Court's *Mt. Clemens* decision). Although the Supreme Court never decided a case involving the constitutionality of the Portal-to-Portal Act, most federal appeals courts upheld the Act as a valid exercise of congressional authority. See *Battaglia v. General Motors Corp.*, 169 F.2d 254, 262 (2d Cir. 1948) (Act did not disturb final judgments under the *Mt. Clemens* case); *Seese v. Bethlehem Steel Co.*, 168 F.2d 58, 62 (4th Cir. 1948) (enactment of Portal-to-Portal Act had same effect as repeal of Fair Labor Standards Act provision at issue in *Mt. Clemens* case). One commen-

legislative reversal of the Supreme Court's decision in *McCarty*,⁸² Congress placed restrictions in the Act that may foreclose some former spouses in pre-*McCarty* cases from securing the benefits of the Act.⁸³

The Act benefits former spouses who are eligible for protection under the Act by eliminating the *McCarty* prohibition against division of military retired or retainer pay upon divorce.⁸⁴ The Act adds section 1408 to title 10 of the United States Code.⁸⁵ Section 1408(c)(1) authorizes state courts to consider retired or retainer pay as property solely of a military service member or as property of a service member and his spouse.⁸⁶ The *McCarty* Court had reasoned that since Congress had referred to retired or retainer pay as the personal entitlement of a service member,⁸⁷ states could not consider retired or retainer pay as a form of marital property.⁸⁸ Section 1408(c)(1) eliminates the basis of the *McCarty* decision by giving state courts express authority to divide retired or retainer pay.⁸⁹ By returning the treatment of retired or re-

tator has suggested that the constitutionality of retroactive legislation depends upon policy considerations such as the reliance of persons on existing law, the purpose of the retroactive legislation, and any unfairness in the operation of retroactive statutes. Hochman, *supra* at 726-27. No issue should arise as to the constitutionality of the Uniformed Services Former Spouses' Protection Act because the Act does not purport to change the result of cases in which judgments became final before the *McCarty* decision. *See infra* text accompanying notes 128-33 (Act's application to cases in which final judgments have been obtained).

⁸² *See* C. SANDS, 2 STATUTES AND STATUTORY CONSTRUCTION § 41.08 (4th ed. 1973) (legislation rendering court judgment ineffective is per se objectionable).

⁸³ *See infra* text accompanying notes 129-33 (benefits of Act do not extend to former spouses whose divorce decrees became final before *McCarty* decision).

⁸⁴ SENATE REPORT, *supra* note 71, at 16; *see* *McCarty v. McCarty*, 453 U.S. 210, 235-36 (1981). The *McCarty* Court held that the congressional scheme of military compensation preempted state marital property laws. *Id.* at 232-33. The Court based its conclusion on a finding that the application of state marital property law to military retired pay would frustrate the objectives of the military compensation system. *Id.* at 234-35; *see supra* text accompanying notes 33-37 (frustration of congressional intent in enacting military compensation statutes). With regard to the extent federal courts may review state laws, one commentator has described the Supreme Court's role as partly functional. *See* Choper, *supra* note 14, at 1586-87. Due to a lack of procedures for examining the impact of local laws and the pressures of ordinary business, Congress may not be able to determine whether local laws will conflict with the broad purposes of federal legislation. *Id.* The Supreme Court, however, may be more suited than Congress to examine state law effects and balance state and national interests since the Court can gather and apply detailed evidence of a particular law's legislation history and administration. *Id.*

⁸⁵ 10 U.S.C.A. § 1408 (Supp. 3 1982).

⁸⁶ *Id.* § 1408(c)(1).

⁸⁷ *See* *McCarty v. McCarty*, 453 U.S. 210, 224-32 (1981) (congressional characterization of retired pay as service member's personal entitlement); S. REP. NO. 4180, 90th Cong., 2d Sess. 6, *reprinted in* 1968 U.S. CODE CONG. & AD. NEWS 3294, 3300. The Senate Report referred to military retired pay as the personal entitlement of a service member in terms of congressional consideration of a provision allowing service members to fund survivors' annuities from the member's retired pay. *Id.*

⁸⁸ *See* 453 U.S. at 226-27 (community property division of retired pay inconsistent with congressional intent to make retired pay personal entitlement of service member).

⁸⁹ *See* 10 U.S.C.A. § 1408(c)(1) (Supp. 3 1982) (authority of state courts to divide retired

tainer pay to state law, Congress avoided the creation by the courts of a federal common-law rule to govern retired or retainer pay.⁹⁰ Unless Congress acts further to establish a comprehensive federal law of marital property rights in government benefits,⁹¹ a former spouse who seeks to share in a service member's retired or retainer pay must look to state law.⁹² When the Act becomes effective in 1983, a former spouse will be able to share in retired or retainer pay only if state law permits.⁹³

The Act also mitigates the problems that a former spouse faces in collecting retired or retainer pay that a court has awarded to the former spouse under state law.⁹⁴ Section 1408(d)(1) provides for direct payments of retired or retainer pay to a former spouse.⁹⁵ The former spouse, however, must have been married to a military service member for at least ten years prior to the date of a divorce decree.⁹⁶ The former spouse also must serve a copy of the court order directing payment of retired or retainer pay upon the appropriate military service secretary.⁹⁷

or retainer pay); SENATE REPORT, *supra* note 71, at 16 (issue of whether to divide retired or retainer pay is matter for state courts to decide).

⁹⁰ See Reppy, *supra* note 41, at 508-11. One commentator on community property laws has suggested that courts must employ a federal common-law rule to resolve issues arising from pre-emption of state laws. *Id.* at 508 n.322. Since the express purpose of the Act is to return the treatment of retired or retainer pay to state law, courts will not need to consider whether a federal common-law property rule governs military compensation. See SENATE REPORT, *supra* note 71, at 16 (state court authority to decide whether retired or retainer pay is divisible between spouses retroactive to June 26, 1981).

⁹¹ Cf. *McCarty v. McCarty*, 453 U.S. at 224. The *McCarty* Court referred to a limited community property right incorporated in the Railroad Retirement Act. *Id.*; see 45 U.S.C. § 231d(c)(3) (1976). The Railroad Retirement Act provides a separate annuity for a nonemployee spouse. *Id.* The annuity ceases upon the divorce of the spouse from the railroad employee. *Id.*; *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 584 (1979) (separate annuity for spouse under Railroad Retirement Act). The *McCarty* Court also referred to a provision of the Foreign Service retirement system designed to protect former spouses. 453 U.S. at 230-32. The former spouse of a Foreign Service member is entitled to a pro rata share of the member's retirement benefits. 22 U.S.C. § 4054(a)(1) (Supp. V 1981).

⁹² See 10 U.S.C. § 1408(c)(1) (Supp. 3 1982) (state law to decide whether retired or retainer pay is divisible marital property).

⁹³ See Uniformed Services Former Spouses' Protection Act, Pub. L. No. 97-252, § 1006(a), 1982 U.S. CODE CONG. & AD. NEWS (96 Stat.) 730, 737. The provisions of the Act become effective on February 1, 1983. *Id.*; see *infra* text accompanying notes 128-29 (limitations on court authority to divide retired or retainer pay and payments of retired or retainer pay to former spouse).

⁹⁴ See *supra* note 75 (difficulties in enforcing terms of divorce decree).

⁹⁵ 10 U.S.C.A. § 1408(d)(1) (Supp. 3 1982).

⁹⁶ *Id.* § 1408(d)(2). Section 1408(d)(2) prohibits any direct payments of retired or retainer pay to a former spouse if the former spouse was not married to the service member for at least ten years. *Id.* The former spouse also must have been married during ten years of military service creditable in determining the service member's eligibility for retired or retainer pay. *Id.* During consideration of the Act in the House, the ten-year marriage requirement prompted several objections. See 128 CONG. REC. H4730-32 (daily ed. July 28, 1982) (floor debate). The ten-year marriage requirement in the Act applies only to direct payments of retired or retainer pay to a former spouse. 10 U.S.C.A. § 1408(d)(2) (Supp. 3 1982).

⁹⁷ 10 U.S.C.A. § 1408(d)(1) (Supp. 3 1982). The Act defines a court order as a final

Several provisions of the Act govern effective service and set out the requirements of qualifying court orders.⁹⁸ The former spouse may serve the court order by personal service or by certified or registered mail.⁹⁹ The former spouse also may serve an agent whom the service secretary has designated to receive service of court orders.¹⁰⁰ To constitute effective service, a court order must be regular on its face.¹⁰¹ The Act provides that a court order is regular on its face if the order contains certain data identifying the service member¹⁰² and certifies that the trial court issuing the order observed the rights of the service member under the Soldiers' and Sailors' Civil Relief Act.¹⁰³ Section 1408(b)(2) further provides that a court order is regular on its face if the order gives no reasonable indication that a court issued the order without lawful authority.¹⁰⁴ Section 1408(c)(4) expressly prohibits state courts without proper jurisdiction over a service member from dividing retired or retainer pay between the service member and a former spouse.¹⁰⁵

For the purposes of the Act, a court may assert jurisdiction over military service members on the basis of a service member's residence or domicile within the territorial jurisdiction of the court or by the member's consent.¹⁰⁶ Section 1408(c)(4) provides that a service member's military assignment to a court's territorial jurisdiction will not supply

decree of divorce that orders payment of retired or retainer pay to a former spouse or an order that approves or ratifies a property settlement incident to a final decree of divorce. *Id.* § 1408(a)(2)(C). Under section 1408(a)(2) a divorce decree is a final decree of divorce, dissolution, annulment, or legal separation. *Id.* § 1408(a)(2). The decree may express the amount of the former spouse's share of retired or retainer pay as a certain sum of dollars or as a percentage of the service member's disposable monthly retired or retainer pay. *Id.* § 1408(a)(2)(C); *see supra* note 26 (court award of retired pay either as percentage of monthly amount or in lump sum).

⁹⁸ *See infra* text accompanying notes 99-104 (requirements of qualifying court orders).

⁹⁹ 10 U.S.C.A. § 1408(b)(1) (Supp. 3 1982).

¹⁰⁰ *Id.*

¹⁰¹ *Id.* § 1408(b)(1)(B) (Supp. 3 1982).

¹⁰² *Id.* at § 1408(b)(1)(C). A court order and any documents accompanying the court order served on a service secretary must identify the service member and contain the service member's social security number. *Id.*

¹⁰³ 50 U.S.C. app. §§ 501-591 (1976). The Soldiers' and Sailors' Civil Relief Act provides certain protections to military service members who are involved in civil litigation. *See id.* § 510. Section 521 provides that a service member in active service or within 60 days after he leaves active service is entitled to a continuance of any proceedings. *Id.* § 521. The service member may demand a continuance under the Soldiers' and Sailors' Civil Relief Act as a matter of right. *Id.*; *Bond v. Bond*, 547 S.W.2d 43, 44 (Tex. Civ. App. 1976). A trial court must grant the continuance unless the opposing party shows that the service member's military duties do not impair materially the service member's ability to prosecute or defend the action. 547 S.W.2d at 44. *See generally* Allshouse, *Overcoming the Obstacles of the Soldiers' and Sailors' Relief Act*, 3 FAM. ADVOC. 36 (1981).

¹⁰⁴ *See* 10 U.S.C.A. § 1408(b)(2)(C) (Supp. 3 1982); *infra* note 124 (comparison of collateral attacks on garnishment orders for lack of proper jurisdiction).

¹⁰⁵ 10 U.S.C.A. § 1408(c)(4) (Supp. 3 1982).

¹⁰⁶ *Id.*

jurisdiction based upon residence.¹⁰⁷ Divorce jurisdiction over military personnel has presented constitutional problems to the courts.¹⁰⁸ The Supreme Court never has stated unequivocally the bases of jurisdiction over divorce matters.¹⁰⁹ The Court, however, has favored domicile as a constitutional prerequisite to valid jurisdiction over divorce matters.¹¹⁰ Military personnel subject to assignment within any state may not be able to manifest the necessary intent to establish the duty state as their domicile.¹¹¹ Moreover, the Department of Defense has expressed concern over the divergent treatment of retired or retainer pay among the states.¹¹² Since military service members face the possibility of assignment to a state that divides retired or retainer pay between spouses, divergent treatment of retired or retainer pay by the states may impair the flexibility of personnel assignment policies.¹¹³

To resolve some of the difficulties in applying the preference for domicile to the situation of military personnel, several states have adopted special military servicemen's statutes.¹¹⁴ The statutes typically provide jurisdiction on the basis of either a service member's residence within a state or his assignment within a state for a certain period of

¹⁰⁷ *Id.*

¹⁰⁸ *Compare* Viernes v. District Court, 181 Colo. 284, ___, 509 P.2d 306, 310 (1973) (en banc) (state statute providing jurisdiction after 90 day residence within state invalid in view of constitutional requirement of domicile) *with* Lauterbach v. Lauterbach, 392 P.2d 24, 25 (Alaska 1964) (domicile is not sole basis for divorce jurisdiction unless statute requires). *See also* Garfield, *supra* note 1, at 526-32 (unsettled law on jurisdiction for military divorces in absence of definitive Supreme Court statement); Note, *Conflict of Laws: Limitations on the "Domicile of Choice" of Military Servicemen*, 31 OKLA. L. REV. 167, 172-75 (1978) (generalized concept of military compulsion inappropriate for determination of serviceman's domicile) [hereinafter cited as *Military Domicile*].

¹⁰⁹ *See* Garfield, *supra* note 1, at 502-03 (Supreme Court dicta requiring domicile for valid jurisdiction).

¹¹⁰ *See, e.g.,* Sosna v. Iowa, 419 U.S. 393, 409-10 (1975) (upholding statute requiring one-year residence notwithstanding showing of domicile); *Williams v. North Carolina*, 325 U.S. 226, 229 (1945) (judicial power to grant divorces is based on domicile). The concept of domicile includes two components. To create domicile, a person must establish residence within a state, manifested by maintenance of a home within the state. *See Military Domicile, supra* note 108, at 167-72. The person also must manifest an intention to return to his home within that state. *Id.*

¹¹¹ *See infra* note 117 (element of coercion involved in military assignment may negate intent element of domicile).

¹¹² *See Hearings on House Resolutions, supra* note 68, at 58, 63 (concern over effect of assignment to state in which retired pay is divisible between spouses); *McCarty v. McCarty*, 453 U.S. 210, 234 (1981) (military personnel, unlike civilian employees, are not free to choose place of residence).

¹¹³ *See* SENATE REPORT, *supra* note 71, at 55 (statement of Lt. Gen. Andrew P. Iosue) (service member contemplating divorce might not obey willingly assignment to community property or equitable distribution state).

¹¹⁴ *See* Garfield, *supra* note 1, at 528 n.169 (state statutes). Military servicemen's statutes purport to create jurisdiction over military personnel on the basis of either domicile or presence within a state by reason of military assignment. *Id.* at 527-58.

time prior to the divorce proceedings.¹¹⁵ In some cases, however, state courts have been reluctant to construe special servicemen's statutes as providing proper jurisdiction in the absence of a service member's domicile with the state asserting jurisdiction.¹¹⁶ The provisions of the Act concerning jurisdiction to divide retired or retainer pay are consistent with the results in cases that have found domicile of the service member a prerequisite to valid jurisdiction.¹¹⁷

Arguably, Congress may have contemplated a relaxation of the preference for domicile to effectuate the purpose of the Act to protect the economic position of the former spouse.¹¹⁸ The Act's grant of authority to divide retired or retainer pay and the establishment of a mechanism for direct payments to former spouses express a congressional intent to provide some measure of relief to spouses of military service members.¹¹⁹ In light of the trend among the states in favor of dividing retired or retainer pay¹²⁰ and a congressional intent to provide a measure of financial protection to former spouses,¹²¹ however, a relaxation of the strict

¹¹⁵ See, e.g., KAN. STAT. ANN § 60-1603(b) (1976) (60 days prior to filing of divorce petition); 12 OKLA. STAT. § 1272 (Supp. 1982-83) (six months prior to filing of divorce petition); VA. CODE § 20-97 (Supp. 1982) (six months prior to separation and continued residence within state until commencement of divorce action).

¹¹⁶ See *Viernes v. District Court*, 181 Colo. 284. _____, 509 P.2d 306, 310 (1973) (en banc). In *Viernes*, the Supreme Court of Colorado found insignificant contact between the state and the serviceman to support jurisdiction over his divorce. *Id.* at _____, 509 P.2d at 310. Although the serviceman had met the durational residence requirement of the Colorado statute, the court followed the Supreme Court's decision in *Williams v. North Carolina* and held that jurisdiction for divorce required domicile. *Id.*, 509 P.2d at 310. See *Williams v. North Carolina*, 325 U.S. 226, 229 (1945); *supra* note 109 (Supreme Court's preference for domicile as proper basis of divorce jurisdiction).

¹¹⁷ See 10 U.S.C.A. § 1408(c)(4) (Supp. 3 1982); *supra* text accompanying notes 106-07 (state may not assert jurisdiction by residence based on service member's assignment). Since the establishment of domicile requires a physical presence within a state and an intent to remain in the state, coerced presence within a state might tend to negate intent to remain. See RESTATEMENT (SECOND) OF CONFLICTS OF LAW § 18 (1961) (movement to new residence with intent to remain establishes domicile); *Military Domicile*, *supra* note 108, at 175-76 (military assignment may raise presumption against finding domicile of serviceman in place of assignment); *supra* note 110 (domicile requires establishment of new home and intention to remain). Some courts have held, however, that the compulsion inherent in military assignment does not preclude necessarily a finding that a service member has established domicile at his place of assignment. See *Ferrara v. Ibach*, 285 F. Supp. 1017, 1020 (D.S.C. 1968) (facts and circumstances clearly revealed serviceman's intention to change domicile to place of assignment); cf. *Stifel v. Hopkins*, 477 F.2d 1116, 1126 (6th Cir. 1973) (rejecting per se rule against prisoner's domicile at place of imprisonment).

¹¹⁸ See SENATE REPORT, *supra* note 71, at 9 (Congress saw no need to impose additional restrictions on jurisdiction or prescribe certain types of contacts with state by service member).

¹¹⁹ *Id.* at 5 (purpose of Act is to restore law to what it was before *McCarty* decision).

¹²⁰ See *supra* notes 39-42 (movement in favor of finding that retired pay is divisible between spouses).

¹²¹ See SENATE REPORT, *supra* note 71, at 5 (Act returns treatment of retired or retainer pay to states).

preference for domicile would not be likely to encourage abuses of jurisdiction by former spouses.¹²² Providing jurisdiction to divide retired or retainer pay on the basis of either a service member's domicile or his residence under a servicemen's statute would not prejudice the rights of service members to other marital property.¹²³ A service member would remain free to contest the validity of any divorce decree that directs the payment of retired or retainer pay to a former spouse.¹²⁴ Nevertheless, to receive the benefits of the Act the former spouse must demonstrate to the court that the service member has established some connection with the court's territorial jurisdiction other than the member's military assignment to the state.¹²⁵

¹²² See *Sosna v. Iowa*, 419 U.S. 393, 407 (1975); *Estin v. Estin*, 334 U.S. 541, 548-49 (1948). In *Sosna*, the Supreme Court upheld a one-year residence requirement for obtaining a divorce. 419 U.S. at 409-10. The Court reasoned that the state's interest in assuring recognition of its divorce decrees by other states justified the one-year requirement. *Id.* at 407. In *Estin*, the Court formulated the concept of a 'divisible divorce.' 334 U.S. at 548-49. Divisible divorce allows a spouse to sue and to receive an *ex parte* decree of divorce from a service member. *Id.* A court must have personal jurisdiction, however, to adjudicate the property rights of the service member, including retired or retainer pay. *Id.*; see 10 U.S.C.A. § 1408(c)(4) (Supp. 3 1982) (bases of jurisdiction over service member provided in Act).

¹²³ See *Vanderbilt v. Vanderbilt*, 354 U.S. 416, 418-19 (1957) (personal jurisdiction necessary to decide property issues); *Estin v. Estin*, 334 U.S. 541, 548-49 (1948) (same); *Garfield*, *supra* note 1, at 510-12 (personal jurisdiction to decide property issues protects absent spouse affected by *ex parte* divorce decree). Section 1408(g) of the Act requires a person who has received service of a court order directing payment of retired or retainer pay to notify the service member whom the court order affects. 10 U.S.C.A. § 1408(g) (Supp. 3 1982). A similar notification requirement applies to payments of Civil Service and Foreign Service retirement benefits. See 5 C.F.R. § 831.1707 (1982) (Civil Service); 22 C.F.R. § 19.6-6 (1982) (Foreign Service). Both the Civil Service and Foreign Service regulations allow the recipient of pension benefits 30 days in which to contest the validity of any court order before the government makes payments of the benefits to a former spouse. 5 C.F.R. § 831.1707(3) (1982); 22 C.F.R. § 19.6-6(2) (1982); see also *supra* note 103 (protection of military service members involved in civil litigation).

¹²⁴ Cf. *Lowell v. McDavid*, 532 F. Supp. 172, 174 (E.D. Va. 1980); *Cunningham v. Department of the Navy*, 455 F. Supp. 1370, 1372-73 (D. Conn. 1978). In *Lowell* and *Cunningham* the courts held that a serviceman could not attack collaterally garnishment orders. *Lowell*, 532 F. Supp. at 174; *Cunningham*, 455 F. Supp. at 1373. In both cases, the courts found that the waiver of federal government immunity from suit in the statute providing for garnishment did not extend to suits by military service members. *Lowell*, 532 F. Supp. at 174; *Cunningham*, 455 F. Supp. at 1373. *Accord* *Hobbs v. United States Office of Personnel Management*, 485 F. Supp. 456, 458-59 (M.D. Fla. 1980) (government official immune from suit challenging payment of Civil Service pension to former wife in accordance with statute). The Act provides that no government employee will be liable for payments of retired or retainer pay pursuant to a court order that is regular on its face. 10 U.S.C.A. § 1408(f)(1) (Supp. 3 1982); *supra* text accompanying notes 95-104 (direct payment of retired or retainer pay after service of court orders regular on their face). The Act, however, does contemplate challenges of validity of court orders in state courts. See SENATE REPORT, *supra* note 71, at 23 (service member may take legal action after receiving notice of intended payment to former spouse).

¹²⁵ See SENATE REPORT, *supra* note 71, at 8-9. Congress did not specify which contacts would support proper jurisdiction for the purpose of the Act. *Id.* at 9. Relying on existing

In addition to the jurisdictional requirements of the Act, the finality of a former spouse's divorce decree may prevent the former spouse from securing the benefits of Act.¹²⁶ To avoid legislative reversal of the *McCarty* decision,¹²⁷ Congress limited the authority provided in section 1408(c)(1) to divide retired or retainer pay to amounts payable to a service member for pay periods beginning after June 25, 1981, the date the Supreme Court announced the *McCarty* decision.¹²⁸ A former spouse whose divorce decree became final before June 26, 1981 may not seek to modify the terms of the decree to participate in the direct payment mechanism.¹²⁹ The finality of a former spouse's divorce decree, therefore, is an important factor in determining whether the former spouse may receive direct payments of retired or retainer pay.¹³⁰ Section 1408(a)(3) defines final decree for the purposes of the Act.¹³¹ A final decree is a decree that a former spouse may not appeal or from which the former spouse has not appealed within the time allowed by laws applicable to appeals.¹³² A final decree also may be a decree that the former spouse has appealed and for which the former spouse has received a final decision under applicable laws.¹³³

Some former spouses in pre-*McCarty* cases whose divorce decrees did not address whether retired or retainer pay is divisible marital property may be eligible for direct payments under section 1408(d)(1) of the Act.¹³⁴ Omission of retired or retainer pay as an issue in the cases may have occurred in several ways. The service member and his former spouse may have neglected to contest the issue.¹³⁵ The parties may have

protections against abuse of jurisdiction, Congress left the adjudication of jurisdictional disputes to state courts on a case-by-case basis. *Id.*

¹²⁶ See *infra* text accompanying notes 128-33 (limitations of Act with respect to finality of divorce decrees).

¹²⁷ See *supra* note 82 (disfavor of legislative reversal of court judgments).

¹²⁸ 10 U.S.C.A. § 1408(c)(1) (Supp. 3 1982); *McCarty v. McCarty*, 453 U.S. 210 (1981).

¹²⁹ See Uniformed Services Former Spouses' Protection Act, § 1006(b), PUB. L. NO. 97-252, 1982 U.S. CODE CONG. & AD. NEWS (96 Stat.) 730, 737. A service secretary must pay retired or retainer pay directly to a former spouse from amounts payable to a service member after the Act's effective date, February 1, 1983. See *id.* § 1006(a), (b). The payment provision applies without regard to the date of the court order served on the secretary by a former spouse. *Id.* § 1006(b). A former spouse with a pre-*McCarty* final divorce decree that prohibited division of retired or retainer pay between a service member and his former spouse, however, may not use the Act's direct payment mechanism. *Id.*

¹³⁰ See SENATE REPORT, *supra* note 71, at 13-14 (to receive benefit of Act former spouse must submit final court order).

¹³¹ 10 U.S.C.A. § 1408(a)(3) (Supp. 3 1982).

¹³² *Id.*

¹³³ *Id.*

¹³⁴ See *id.* § 1408(a)(2)(C). The Act requires, for the purpose of the direct payment mechanism, a final decree of divorce that specifically orders payment of an amount or percentage of retired or retainer pay to a former spouse. *Id.*; *infra* text accompanying notes 135-36 (circumstances under which former spouse in pre-*McCarty* case may obtain direct payments of retired or retainer pay).

¹³⁵ See *In re Miller*, 117 Cal. App. 3d 366, 370-71, 172 Cal. Rptr. 745, 747-48 (Ct. App.

requested the trial court to reserve jurisdiction over retired or retainer pay pending the Supreme Court's disposition of the *McCarty* case.¹³⁶ Since the Act's definition of court order requires a divorce decree that specifically directs payment of retired or retainer pay to a former spouse¹³⁷ and since the Act allows for modifications of previously issued divorce decrees,¹³⁸ a former spouse may litigate the issue of retired or retainer pay to take advantage of the Act's direct payment mechanism.¹³⁹

Some former spouses may obtain court orders that comply with the Act's requirements governing the direct payment mechanism, only to discover that the service member no longer is eligible to receive retired or retainer pay.¹⁴⁰ A service member may lose eligibility for retired or retainer pay other than through forfeitures or by engaging in prohibited activities.¹⁴¹ Retired service members are eligible to receive disability pensions administered by the Veterans Administration (VA).¹⁴² To receive a VA pension, a disabled service member must waive the right to receive an amount of retired or retainer pay equal to the amount of

1981) (no reference to military retired pay in pleadings, stipulation, interlocutory or final judgments of separation); *cf.* *Giovannoni v. Giovannoni*, 122 Cal. App. 3d 666, 671-72, 176 Cal. Rptr. 154, 157 (Ct. App. 1981) (omitted from property settlement on basis of attorney's statement that husband's pension had no value).

¹³⁶ See *Wintriss v. Superior Court*, ___ Cal. App. 3d ___, ___, 182 Cal. Rptr. 694, 698 (Ct. App. 1982) (court reserved jurisdiction to change characterization of retired pay as community property pending decision in *McCarty* cases).

¹³⁷ 10 U.S.C.A. § 1408(a)(2)(C) (Supp. 3 1982).

¹³⁸ *Id.* § 1408(a)(2). Section 1408(a)(2) allows modifications of previously issued decrees. *Id.* The Act, however, prohibits modifications of pre-*McCarty* final decrees. See *supra* note 129 (former spouse with decree prohibiting division of retired or retainer pay may not use direct payment mechanism).

¹³⁹ See *supra* text accompanying notes 131-33 (provisions of Act regarding finality of divorce decrees). The Act does not prevent a former spouse whose divorce decree did not address the issue of retired or retainer pay from subsequently contesting the issue. See Uniformed Services Former Spouses' Protection Act, § 1006(b), Pub. L. No. 97-252, 1982 U.S. CODE CONG. & AD. NEWS (96 Stat.) 730, 737. Further, a former spouse who received a divorce decree after the *McCarty* decision may seek to modify her divorce decree to take advantage of the Act. See SENATE REPORT, *supra* note 71, at 16 (former spouse may modify decree to take advantage of Act's direct payment provision).

¹⁴⁰ See 10 U.S.C.A. § 1408(a)(4) (Supp. 3 1982). A former spouse does not receive any rights to retired or retainer pay greater than the entitlement of the service member. See SENATE REPORT, *supra* note 71, at 16; text accompanying notes 50-54 (loss of retired or retainer pay entitlement). In addition, state courts may not order a service member to retire to initiate the direct payment mechanism of the Act. 10 U.S.C.A. § 1408(c)(3) (Supp. 3 1982).

¹⁴¹ See *infra* text accompanying notes 142-53 (defeating former spouse's interest by election to receive VA disability pension). A retired service member recalled to active duty receives active duty pay. See 37 U.S.C. § 903 (1976). Since the Act's direct payment mechanism relates to retired or retainer pay, a former spouse will not receive direct payments during the service member's recall. See SENATE REPORT, *supra* note 71, at 15-16 (suspension of direct payments during service member's recall to active duty).

¹⁴² See 38 U.S.C. § 310 (1976) (pension for war-related disability); *id.* § 331 (pension for disability not related to war). VA pensions are exempt from attachment and taxation. *Id.* § 3101(a)(c) (1976 & Supp. III 1979).

VA disability pension.¹⁴³ In cases decided before the Act, most courts held that VA disability pensions are not subject to division between a disabled service member and a former spouse.¹⁴⁴ Thus, a retired service member could defeat a former spouse's interest in retired or retainer pay by electing to receive a VA disability pension.¹⁴⁵ Moreover, the effective date of the waiver was the date on which the service member became eligible to receive a VA disability pension and not the date on which the service member actually waived retired or retainer pay.¹⁴⁶

The Act does not protect a former spouse from the service member's election to receive a VA disability pension in lieu of retired or retainer pay.¹⁴⁷ The authority granted to state courts to divide retired or retainer pay and the operation of the Act's direct payment mechanism depend upon the Act's definition of disposable monthly retired or retainer pay.¹⁴⁸ In addition to other amounts deducted from retired or retainer pay to arrive at disposable retired or retainer pay,¹⁴⁹ section 1408(a)(4)(B) excludes

¹⁴³ 38 U.S.C. § 3105 (1976). A service member must notify the service department through which he receives retired or retainer pay that he waives an amount of retired or retainer pay. *Id.* The service department then must notify the VA of the service member's waiver, the amount waived, and the effective date of the subsequent reduction of retired or retainer pay. *Id.*

¹⁴⁴ See, e.g., *Miller v. Miller*, 96 N.M. 497 _____, 632 P.2d 732, 733 (1981) (once service member elects to receive VA pension, payments may not be considered community property); *Ex parte Burson*, 615 S.W.2d 192, 194-96 (Tex. 1981) (federal law prohibits characterization of VA pension as community property). *But see In re Stenquist*, 21 Cal. 3d 779, 787, 582 P.2d 96, 100-01, 148 Cal. Rptr. 9, 12 (1978) (en banc) (only amount of VA disability pension in excess of amount waived is service member's separate property).

¹⁴⁵ See *Ex parte Burson*, 615 S.W.2d 192, 194-96 (Tex. 1981). In *Burson*, a service member had retired and begun to receive disability retirement pay. *Id.* at 193. The court held the service member in contempt for failing to comply with a divorce decree that awarded a share of the disability retirement pay to his former spouse. *Id.* The service member subsequently elected to receive a VA disability pension. *Id.* The Texas Supreme Court held that under federal law the service member was entitled to make the election unhampered by the state's community property law. *Id.*; cf. *In re Stenquist*, 21 Cal. 3d 779, 786, 582 P.2d 96, 100-01, 148 Cal. Rptr. 9, 13-14 (1978) (en banc). In *Stenquist*, the California Supreme Court held that under the state's community property law the service member could not defeat his wife's community property interest in retired pay by invoking a condition wholly within the member's control. *Id.* 582 P.2d at 100-01, 148 Cal. Rptr. at 13-14. In addition, the *Stenquist* court concluded that the primary purpose of a VA disability pension is retirement support and not compensation for a service member's loss of earning power from his disability. *Id.* at 787, 582 P.2d at 101, 148 Cal. Rptr. at 4.

¹⁴⁶ See 58 OP. COMP. GEN. 622 (1979) (effective date of retired pay waiver is earliest date service member is eligible for VA disability benefits); cf. *Strickland v. Commissioner*, 540 F.2d 1196, 1199 (4th Cir. 1976) (effective date of waiver is date service member applies for VA disability benefits).

¹⁴⁷ See *supra* text accompanying notes 143-45 (service member's election to receive VA pension defeating former spouse's interest in retired or retainer pay); *infra* text accompanying notes 149-54 (direct payment provision of Act excludes VA disability pension benefits).

¹⁴⁸ See 10 U.S.C.A. § 1408(a)(4) (Supp. 3 1982) (Act's definition of disposable retired or retainer pay).

¹⁴⁹ See *id.* Section 1408(a)(4) defines disposable monthly retired or retainer pay as the

the amount of retired or retainer pay that the service member waives when he elects a VA disability pension.¹⁵⁰ Thus, any former spouse who shares in a service member's retired or retainer pay under the terms of a court order still faces a possibility that the service member may defeat the former spouse's interest by an election to receive a VA disability pension.¹⁵¹ A former spouse faces an additional problem with regard to VA disability pensions. Before the Act, some courts construed strictly with respect to VA disability pensions a provision in federal law that allows a former spouse to garnish military compensation for alimony or child support obligations.¹⁵² Therefore, under both the Act and the case law preceding the Act a former spouse is unlikely to reach the service member's VA disability pension by any process.¹⁵³

The *McCarty* Court stated that the process available to garnish retired or retainer pay for alimony or child support obligations could mitigate to some extent the plight of a former spouse.¹⁵⁴ Section 459 of the Social Security Amendments of 1974¹⁵⁵ permits a former spouse to garnish retired or retainer pay for support obligations.¹⁵⁶ Garnishment process, however, is not available to secure payment pursuant to a division of property between a service member and a former spouse.¹⁵⁷ The

total monthly retired or retainer pay to which a service member is entitled less certain deductions. *Id.* § 1408(a)(4)(A)-(F) (deduction for fines and forfeitures upon court martial; amounts owed to United States; taxes properly withheld; life insurance premiums; amounts used to fund survivors' annuities).

¹⁵⁰ *Id.* § 1408(a)(4)(B).

¹⁵¹ See *supra* note 145 (election of VA disability pension defeats interest of former spouse in retired or retainer pay).

¹⁵² See 42 U.S.C. §§ 659(a), 662(c)-(f) (1976 & Supp. V 1981). Section 659 waives the immunity of the federal government against suits to enforce alimony or child support obligations. *Id.* § 659(a). Section 662 limits the kinds of federal benefits subject to garnishment. *Id.* § 662(f). Courts have reached different conclusions on the meaning of a provision in section 662(f) that limits garnishment to federal benefits that represent remuneration for employment. See *United States v. Murray*, 158 Ga. App. 781, 784-86, 282 S.E.2d 372, 375-76 (1981) (only amount of VA disability pension in excess of retired pay waived is free from garnishment); cf. *Douglas v. Donovan*, 534 F. Supp. 191, 195 (D.D.C. 1982) (plain language of federal garnishment statute excludes Civil Service disability benefits from legal process). Compare *Kruger v. Kruger*, 73 N.J. 464, 471, 375 A.2d 659, 663 (1977) (VA disability benefits subject to garnishment) with *Elmwood v. Elmwood*, 295 N.C. 168, 179, 244 S.E.2d 668, 675 (1978) (VA disability benefits exempt from garnishment).

¹⁵³ See 10 U.S.C.A. § 1408(a)(4)(B) (Supp. 3 1982) (provision of Act specifically exempting VA disability pension benefits from amounts subject to direct payment to former spouse).

¹⁵⁴ 453 U.S. at 235.

¹⁵⁵ 42 U.S.C. § 659 (1976 & Supp. IV 1980).

¹⁵⁶ *Id.*; see S. Rep. No. 1356, 93d Cong., 2d Sess. _____, reprinted in 1974 U.S. CODE CONG & AD NEWS 8133, 8157 (section 659 provides garnishment of all federal compensation based on employment). See also 42 U.S.C. § 662(b) (Supp. V 1981). Section 662(b) defines child support as an obligation provided in a court order to make periodic payments for the support and maintenance of a child. *Id.* Section 662(c) defines alimony as a court ordered obligation to furnish funds periodically for the support and maintenance to a spouse or former spouse. *Id.* § 662(c).

¹⁵⁷ 42 U.S.C. § 662(c) (Supp. V 1981); see *Marin v. Hatfield*, 546 F.2d 1230, 1231 (5th Cir.

Act provides a limited exception to the restriction of garnishment process to support obligations based on need.¹⁵⁸ Section 1408(d)(5) permits direct payments by a service secretary of other marital property payable to a former spouse under a court order.¹⁵⁹ The service secretaries will make direct payments of other marital property from the service member's disposable retired or retainer pay.¹⁶⁰ To receive the payments of other marital property, a former spouse must serve the appropriate service secretary with a court order of garnishment.¹⁶¹ The total amount that the service secretaries may pay to a former spouse, including amounts paid under a garnishment order dealing with other marital property, cannot exceed fifty percent of a service member's disposable monthly retired or retainer pay.¹⁶² The Act also permits former spouses to garnish retired or retainer pay for alimony or child support obligations under other provisions of federal law.¹⁶³ Section 1408(e)(4)(B) limits the total amount of a service member's retired or retainer pay subject to direct payment under the Act or other legal process to sixty-five percent of disposable monthly retired or retainer pay.¹⁶⁴

The opportunity of a former spouse to reach as much as sixty-five percent of a service member's retired or retainer pay is a significant improvement over the former spouse's position immediately following the Supreme Court's decision in *McCarty v. McCarty*.¹⁶⁵ By enacting the

1977) (per curiam) (community property settlement not enforceable by § 659 garnishment order); *Kelley v. Kelley*, 425 F. Supp. 181, 183 (W.D. La. 1977) (same).

¹⁵⁸ See 10 U.S.C.A. § 1408(d)(5) (Supp. 3 1982) (garnishment of property other than retired or retainer pay).

¹⁵⁹ *Id.*

¹⁶⁰ See *supra* note 149 (definition of disposable monthly retired or retainer pay).

¹⁶¹ See *supra* text accompanying notes 98-104 (requirements for effective service of court orders on secretary of military service or designated agent).

¹⁶² 10 U.S.C.A. § 1408(e)(1) (Supp. 3 1982).

¹⁶³ *Id.* § 1408(e)(4)(A); see *supra* text accompanying notes 154-57 (garnishment of retired or retainer pay under 42 U.S.C. § 659 (1976 & Supp. V 1981)). The service secretaries will honor court orders for direct payment of retired or retainer pay pursuant to § 1408(d)(1) and court orders of garnishment for alimony or child support obligations under 42 U.S.C. § 659 on a first-come, first-served basis. 10 U.S.C.A. § 1408(e)(4)(A) (Supp. 3 1982).

¹⁶⁴ See 10 U.S.C.A. § 1408(e)(4)(B) (Supp. 3 1982). Congress contemplated that the direct payment mechanism established in the Act and the regular process for garnishment under 42 U.S.C. § 659 would operate in tandem. See SENATE REPORT, *supra* note 71, at 20-21. The 65% limit on the total amount of retired or retainer pay subject to process under federal law is based on a provision in the Consumer Credit Protection Act. *Id.* at 21; see 15 U.S.C. § 1673(b)(2) (1976 & Supp. V 1981) (setting limitation on earnings subject to garnishment). State law limits on the amount of disposable monthly retired or retainer pay subject to legal process that are more favorable to the service member will prevail over the 65% limit. See *Evans v. Evans*, 429 F. Supp. 580, 582 (W.D. Okla. 1976) (Consumer Credit Protection Act does not pre-empt more restrictive state limit on amount subject to garnishment).

¹⁶⁵ 453 U.S. 210 (1981); see *supra* text accompanying notes 62-68 (*McCarty* decision, by prohibiting division of retired or retainer pay as marital property, limited former spouses to need-based means of support).

Uniformed Services Former Spouses' Protection Act, Congress has returned the treatment of retired or retainer pay to the states, which under the federal system are the source of law concerning marriage, divorce, and the disposition of marital property.¹⁶⁶ State laws dealing with disposition of property between spouses have undergone considerable change in recent decades.¹⁶⁷ A significant feature of state law developments is the trend toward a more equitable sharing of property between spouses.¹⁶⁸ Retirement benefits have assumed an important place in the financial planning of married couples.¹⁶⁹ State courts have been inclined to find that retirement benefits payable to persons in the private sector of the economy and to retired members of the military services represent a form of property acquired through the efforts of both partners to a marriage.¹⁷⁰

The Act recognizes that the spouses of military service members contribute to the overall effectiveness of the Nation's military forces.¹⁷¹ A service member's spouse plays a significant role in the preservation of family cohesion amid the rigors of military life and in the advancement of a service member's career.¹⁷² Upon divorce from a service member, a former spouse may discover that the couple has acquired few assets except the retirement benefits the member receives or will receive for his military service.¹⁷³ In addition, few former spouses have the opportunity to acquire separate assets or retirement benefits.¹⁷⁴

The Act does not guarantee financial support for the former spouse of a service member. The Act, however, does remove the principal obstacle to sharing in a service member's retirement benefits, pre-

¹⁶⁶ See SENATE REPORT, *supra* note 71, at 16 (state again may consider retired or retainer pay as divisible between spouses on basis of law at time of *McCarty* decision); *supra* text accompanying notes 1 & 2 (states' powers over marriage and divorce).

¹⁶⁷ See Prager, *Sharing Principles and the Future of Marital Property Law*, 25 U.C.L.A. L. REV. 1, 2-6 (1977) (true economic equality between sexes is emerging in state marital property laws); *Development of Sharing Principles*, *supra* note 7, at 1308-13 (abandonment of historical concepts of separate property for economic fairness); *supra* text accompanying notes 38-42 (trend in state law to find rights of former spouse to share in military service member's retired or retainer pay).

¹⁶⁸ See *supra* notes 4 & 5 (reform of state laws dealing with marriage, divorce, and economic relationships between spouses).

¹⁶⁹ See Prager, *supra* note 167, at 7-10 (employment and financial circumstances forcing married couples to consider separately acquired assets as available for needs of both husband and wife).

¹⁷⁰ See *supra* text accompanying notes 41 & 42 (state courts considering retired or retainer pay as similar to private pensions).

¹⁷¹ See SENATE REPORT, *supra* note 71, at 6 (Act acknowledges former spouse's unique status and contribution to military service member's career and to national defense).

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ See Brief for Amicus Curiae at 47-55, *McCarty v. McCarty*, 453 U.S. 210 (1981) (few former spouses of military service members have long-term employment necessary to earn separate pension rights).

emption of state marital property laws that the Supreme Court found in *McCarty*.¹⁷⁵ The Act enhances enforcement of divorce decrees by establishing a payment mechanism by which a former spouse may receive directly from the federal government any retired or retainer pay awarded under state law.¹⁷⁶ The Act, however, contains several limitations on who may receive direct payments.¹⁷⁷ The Act does not help former spouses who litigated the issue of retired or retainer pay to final unsuccessful conclusions prior to the *McCarty* case.¹⁷⁸ If a divorce decree was not final before *McCarty*, a former spouse may be able to seek a favorable decision and come within the Act's protection.¹⁷⁹ In addition, a former spouse who seeks direct payment of retired or retainer pay must satisfy a ten year length-of-marriage requirement¹⁸⁰ and must demonstrate that the trial court had proper jurisdiction over the service member.¹⁸¹ Finally, the Act preserves the option of a disabled service member to receive a Veterans Administration pension in lieu of retired or retainer pay.¹⁸² Election of a VA pension will continue to defeat a former spouse's court-awarded share of retired or retainer pay.¹⁸³ The former spouse of a military service member must determine whether she is eligible for the Act's protection and carefully follow the requirements of the Act to receive her share of the service member's military retirement benefits.

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¹⁷⁵ See SENATE REPORT, *supra* note 71, at 16 (section 1408(a)(1) of Act removes Supreme Court's finding of pre-emption in *McCarty* case).

¹⁷⁶ See *supra* text accompanying notes 95-105 (direct payment provisions of Act).

¹⁷⁷ See *supra* text accompanying note 96 (limitation of direct payments of retired or retainer pay to former spouses married at least 10 years to service member); *supra* text accompanying notes 127-29 (former spouse who received divorce decree denying share of retired or retainer pay before *McCarty* case may not modify decree).

¹⁷⁸ See *supra* text accompanying notes 131-33 (provisions of Act dealing with finality of divorce decrees).

¹⁷⁹ See SENATE REPORT, *supra* note 71, at 16-18 (Act should not be used to reopen pre-*McCarty* judgments that did not divide retired or retainer pay).

¹⁸⁰ See 10 U.S.C.A. § 1408(d)(2) (Supp. 3 1982).

¹⁸¹ See *supra* text accompanying notes 105-25 (provisions of Act dealing with jurisdiction over military service members).

¹⁸² See *supra* text accompanying notes 147-53 (effect of service member's election to receive VA disability pension in lieu of retired or retainer pay).

¹⁸³ *Id.*