**RESOLUTION OPPOSING LEGISLATION REGULATING THE DIVISION OF MILITARY RETIREMENT BENEFITS IN DIVORCE**

Adopted by the American Academy of Matrimonial Lawyers Board of Governors on June 24, 2016.

WHEREAS, the American Academy of Matrimonial Lawyers (AAML) is an organization of highly regarded domestic relations attorneys the mission of which is "To provide leadership that promotes the highest degree of professionalism and excellence in the practice of family law," and consists of highly skilled negotiators and litigators who represent individuals in all facets of family law; and

WHEREAS the AAML provides leadership and guidance in family law policy matters, assisting states in evaluating, passing, and enforcing just laws for the support of families and the distribution of marital and community property and

WHEREAS, the AAML has several times reaffirmed its position that state divorce court judges should have the authority to divide all marital or community property between the parties to a marriage, and to do equity to the parties to a marriage; and

WHEREAS, AAML positions have specifically addressed military retirement benefits and military related divorce matters, including detailed position papers submitted to Congress in 2001 and 2010 regarding the Uniformed Services Former Spouses Protection Act and related issues,

NOW THEREORE IT IS RESOLVED: that the American Academy of Matrimonial Lawyers opposes proposed Section 642 of the FY 2017 DoD Appropriations Act [May 18, 2016] or any other proposed legislation that would alter State divorce law in the majority of States by requiring the States to divide military retirements – as opposed to every other kind of defined benefit pension plan – in accordance with rank and grade at the moment of divorce rather than in accordance with the Time Rule.

# REPORT

## I. INTRODUCTION

It is at this point a truism that retirement benefits, usually the most valuable asset of a marriage, are divisible upon divorce to at least the degree to which they were accrued during the marriage.[1] This is particularly true of military marriages, in which frequent moves are the norm and there is often less opportunity to accumulate large real estate equity.

Statutory and case law throughout the country now recognizes pension benefits as marital property with near uniformity. Stated rationales for that recognition include that the benefits accrued during marriage, that income during marriage was reduced in exchange for the deferred pension benefits, and that the choice was made to forego possible alternative employment which would have paid more in current wages, in order to have the pension.

On June 26, 1981, the United States Supreme Court focused the debate by issuing its opinion in *McCarty v. McCarty*.[2] The husband in a California divorce had requested that his military retirement benefits be "confirmed" as his separate property. In 1977, the California trial court refused, finding that the military retirement benefits were quasi-community property,[3] and therefore ordered the normal "time rule" division of defined benefit pensions.

The case was eventually appealed to the United States Supreme Court, which determined that State community property laws conflicted with the federal military retirement scheme, and thus were impliedly pre-empted by federal law. The majority held that the apparent congressional intent was to make military retirement benefits a "personal entitlement" and thus the sole property of individual service members, so the benefits could not be considered as community property in a California divorce.

The Court invited Congress to change the statutory scheme if divisibility of retired pay was desired, stating: "We recognize that the plight of an ex-spouse of a retired service member is often a serious one," and noting that:

> Congress may will decide, as it has in the Civil Service and Foreign Service contexts, that more protection should be afforded a former spouse of a retired service member. This decision, however, is for Congress alone. . . .[4]

[1] *See, e.g.*, Annotation, *Pension or Retirement Benefits as Subject to Assignment or Division by Court in Settlement of Property Rights Between Spouses*, 94 A.L.R.3d 176; Marshal Willick, MILITARY RETIREMENT BENEFITS IN DIVORCE (ABA 1998) at xix-xx.

[2] *McCarty v. McCarty*, 453 U.S. 210, 101 S. Ct. 2728 (1981).

[3] Essentially, quasi-community property is a label used by community property States to describe property acquired outside the State that ***would have been*** community property if acquired within the State; such States generally divide such property as if it were regular community property.

[4] 453 U.S. at 235-36, 101 S.Ct. at 2743.

Congress reacted by enacting the Uniformed Services Former Spouses Protection Act ("USFSPA") on September 8, 1982.[5] The declared goal of the USFSPA, at the time of its passage, was to "reverse *McCarty* by returning the retired pay issue to the states."[6] Later re-interpretations indicated that this stated declaration of intent might not have totally overruled *McCarty* after all,[7] but in any event treatment of retired pay was again made dependent on the divorce laws of the jurisdictions granting decrees.

The primary purpose of the USFSPA was to define State court jurisdiction to consider and use military retired pay in fixing the property and support rights of the parties to a divorce, dissolution, annulment, or legal separation.[8] By fits and starts, every State in the Union has permitted military retirement benefits to be divided as property, at least in certain circumstances.

The USFSPA is both jurisdictional and procedural; it both permits the State courts to distribute military retirement to former spouses, and provides a method for enforcement of these orders through the military pay center. The USFSPA itself does not give former spouses an automatic ***entitlement*** to any portion of members' pay. Only State laws can provide for division of military retirement pay in a divorce, or provide that alimony or child support are to be paid from military retired pay.

[5] Also commonly known as the "Federal Uniformed Services Former Spouses Protection Act," or FUSFSPA, or as "the Former Spouses Act," or in some references simply as "the Act." 10 U.S.C. § 1408; Pub. L. No. 97-252, 96 Stat. 730 (Sept. 8, 1982), amended from time to time since then.

[6] "The purpose of this provision is to place the courts in the same position that they were in on June 26, 1981, the date of the *McCarty* decision, with respect to treatment of nondisability military retired or retainer pay. The provision is intended to remove the federal pre-emption found to exist by the United States Supreme Court and permit State and other courts of competent jurisdiction to apply pertinent State or other laws in determining whether military retired or retainer pay should be divisable [*sic*]. Nothing in this provision requires any division; it leaves that issue up to the courts applying community property, equitable distribution or other principles of marital property determination and distribution. This power is returned to the courts retroactive to June 26, 1981. This retroactive application will at least afford individuals who were divorced (or had decrees modified) during the interim period between June 26, 1981 and the effective date of this legislation the opportunity to return to the courts to take advantage of this provision." S. Rep. No. 97-502, 97th Cong., 2nd Sess. 15, (1982), *reprinted in* 1982 U.S.Code Cong. & Ad.News 1596, 1611. *See also Steiner v. Steiner*, 788 So. 2d 771 (Miss. 2001), *opn. on reh'g*.

[7] In *Mansell v. Mansell*, 490 U.S. 581, 109 S. Ct. 2023 (1989), the Court found that the Act did not ***totally*** repudiate the pre-emption found by the Court to exist in *McCarty*; Congress' failure to alter the language of the Act so as to alter this finding, when it next amended the Act in 1990, has been read by some to imply congressional consent that at least some partial pre-emption was intended to remain after passage of the Act.

[8] Legislative History, Pub. L. No. 97-252; S. Rep. No. 97-502. The Report noted that as of June 26, 1981, case decisions in "virtually all" community property States, and in many of those employing equitable distribution principles, permitted military retired pay to be considered marital property subject to division. In only the two "title" States, Mississippi and West Virginia, were pensions considered upon divorce the exclusive property of the party in whose name the asset was titled. Since that time, both of those States have adopted equitable distribution schemes.

The USFSPA has remained largely undisturbed for decades, although pension experts have noted that it the most restrictive and limited of the major pension schemes in the United States as to the rights and protections accorded to spouses.[9]

In 2016, Steve Russell, R-Okla., a combat veteran and retired infantry officer, proposed amending the USFSPA to force states to calculate spousal shares of military retirement benefits in accordance with a member's rank and grade a the moment of divorce, rather than, as almost all States do, in accordance with the pension benefits ultimately received. Similar proposals have been made for at least 20 years, and have always been opposed by the ABA and the AAML and by informed experts in pension benefit division.

## II. THE TIME RULE

A defined ***benefit*** plan (often called a pension plan or retirement plan) is usually funded by employer contributions (although in some plans employees can contribute) and is intended to provide certain specified benefits to the employee after retirement, usually for life. Often, the benefit is determined by a formula taking into account the highest salary received and the total number of years worked for the employer (such as a "high-three" or "high five" plan).

The military retirement plan is a defined benefit plan, just like many other plans throughout the United States.[10]

The overwhelming majority of States – 44 of them – applying the time rule formula view the "community" years of effort ***qualitatively*** rather than quantitatively, reasoning that the early and later years of total service are ***equally*** necessary to the retirement benefits ultimately received.[11] This is sometimes labeled the "building block" approach.

[9] As compared with all private pensions governed by ERISA/REA, or the Civil Service retirement systems (CSRS and FERS), or most State retirement plans. *See, e.g.*, Marshal Willick, *Retirement Plan Division: What Every Nevada Divorce Lawyer Needs to Know* (CLE, Ely, Mar., 2013), posted at http://www.willicklawgroup.com/published-works/.

[10] One of the fallacies in the proposed legislation is the assertion that the military plan is somehow "unique." It isn't, and both the way the benefits are calculated, and the way the spousal interest is calculated under the Time Rule, are precisely the same for military pensions as they are for every ***other*** defined benefit plan enjoyed by Civil Service employees, union electricians and carpenters, police officers, and virtually everyone else.

[11] *See, e.g., Marriage of Poppe*, 97 Cal. App. 3d 1, 158 Cal. Rptr. 500 (1979); *Bangs v. Bangs*, 475 A.2d 1214 (Md. App. Ct. 1984); *Gemma v. Gemma*, 105 Nev. 458, 778 P.2d 429 (1989); *In re Hunt*, 909 P.2d 525 (Colo. 1995); *Croley v. Tiede*, ___ S.W.3d ___, 2000 WL 1473854 (Tenn. Ct. App., No. M1999-00649-COURT OF APPEALS-R3-VC, Oct. 5, 2000); *Johnson v. Johnson (Zoric)*, 270 P.3d 556 (Utah 2012); *Kiser v. Kiser*, 32 P.3d 244 (Or. Ct. App. 2001) (divorce court is required to look to the value of the benefit at retirement); *In re: Malpass*, ___ P.3d ___ (Or. Ct. App. No A146655, Feb. 13, 2013) (freezing spousal share to a fraction of the rank earned upon divorce was error under the time rule). Such jurisdictions typically add a hedge; the trial court can reserve jurisdiction to determine, after retirement, whether the benefits proved to be much greater than expected because of extraordinary "effort and achievement" (as opposed to "ordinary promotions and cost of living increases"), in which case the court could recalculate the spousal interest. *See, e.g., Fondi v. Fondi*, 106 Nev. 856, 802 P.2d 1264 (1990).

This majority view of the time rule essentially provides to the former spouse an ever "smaller slice of a larger pie" by getting a shrinking percentage of a retirement that is increasing in size based upon post-divorce increases in the wage-earner's salary and years in service.[12] In terms of lifetime collection, the ***best*** that a former spouse can do under the time rule as currently applied when the member continues service is to ***almost*** break even. This was reported to Congress as long ago as 1990.[13]

Some critics – and the proponents of the legislative change now being proposed – complain that such a formula gives the non-employee former spouse an interest in the employee spouse's post-divorce earnings if the divorce occurs while the employee is still working. They argue that the spousal share should be frozen at the earnings level at divorce; a minority of States (apparently, 6 of them, including Texas) have adopted this approach, usually in cases that do not contemplate the actual mathematical impact of the decision reached.[14]

Certain other States, while rejecting the Texas approach, have nevertheless left the door open to a member establishing that increases in retirement benefits are "attributable to post-dissolution efforts of the employee spouse, and not dependent on the prior joint efforts of the parties during the marriage," and therefore are the separate property of the member.[15] Such cases invite fact-intensive hair-splitting since, as the Nevada Supreme Court observed in a non-military case, there is an expectation of pension increases by way of "ordinary promotions and cost of living increases, in contradistinction to the increased income the employee spouse achieved because of his post-marriage effort and accomplishments."[16]

The Texas minority approach undervalues the spousal interest by giving no compensation for deferred receipt, and also contains a logic problem, at least in a community property analysis, of treating similarly situated persons differently.

Specifically, the majority time rule approach comes closest to providing equity to successive spouses. Two consecutive spouses, during the first and last halves of a member's career, would be treated equally under the qualitative approach, but very differently under any approach that freezes the spousal share at the level of compensation being received by the member at the time of divorce.

[12] *See Glover v Ranney* 314 P.3d 535, 541 (Alaska 2013) (division of military retired pay by time rule "allowed [wife's] share of the retirement to increase in value as a result of his promotions and pay raises").

[13] *Proposed Amendments to the Uniformed Services Former Spouses Protection Act, 1990: Hearings on H.R. 3776, H.R. 2277, H.R. 2300, and H.R. 572 Before the Subcomm. on Military Personnel and Compensation of the House Comm. on Armed Services*, 101st Cong., 2nd Sess. (1990) (Statement of Marshal S. Willick, Chairman of Subcommittee on Federal and Military Pension Legislation, Committee on Federal Legislation and Procedures, Section of Family Law, on Behalf of the American Bar Association, April 4, 1990).

[14] *See, e.g., Grier v. Grier*, 731 S.W.2d 931 (Tex. 1987); *Armstrong v. Armstrong*, 34 S.W.3d 83 (Ky. Ct. App. 2000).

[15] *Barr v. Barr*, ___ A.2d ___ (N.J. Super. Ct. App. Div. No. A-1389-09T2, Jan. 19, 2011).

[16] *Gemma v. Gemma*, 105 Nev. 458, 463, 778 P.2d 429, 432 (1989).

An example is useful to illustrate this discussion. Presume a member who entered service after 1980 (and did not elect REDUX), was in service for exactly 20 years, and was married to wife one for the first ten, and wife two for the next ten, retiring on the day of divorce from wife two. Presume he had started work at $20,000 per year, and had enjoyed 5% raises every year. That would make his historical earnings look like this:

| Yearly Salary | Monthly Salary |
|---|---|
| $20,000.00 | $1,666.67 |
| $21,000.00 | $1,750.00 |
| $22,050.00 | $1,837.50 |
| $23,152.50 | $1,929.38 |
| $24,310.13 | $2,025.84 |
| $25,525.63 | $2,127.14 |
| $26,801.91 | $2,233.49 |
| $28,142.01 | $2,345.17 |
| $29,549.11 | $2,462.43 |
| $31,026.56 | $2,585.55 |
| $32,577.89 | $2,714.82 |
| $34,206.79 | $2,850.57 |
| $35,917.13 | $2,993.09 |
| $37,712.98 | $3,142.75 |
| $39,598.63 | $3,299.89 |
| $41,578.56 | $3,464.88 |
| $43,657.49 | $3,638.12 |
| $45,840.37 | $3,820.03 |
| $48,132.38 | $4,011.03 |
| $50,539.00 | $4,211.58 |

If this hypothetical member had a standard longevity military retirement, the above wage history would make his average monthly salary during his last three years' service $4,014.21, and the military retirement formula[17] would make his retired pay $2,007.11.

Under the ***qualitative*** approach to the time rule embraced by most States, the member would receive half of this sum himself – $1,003.55. Each of his former spouses, having been married to him for exactly half the time the pension accrued, would receive half of ***that*** sum – $501.78. In other words:

| | |
|---|---|
| Member: | $1,003.55 |
| Wife one (10 years): | $ 501.78 |
| Wife two (10 years): | $ 501.78 |
| Total: | $2,007.11 |

If the calculations were done in accordance with the proposal being made, the results would be quite different. Wife one's share of the retirement would be calculated in accordance with rank and grade at the time of her divorce from the member; in this case, she would get a pension share based on the "high three" years at the ten year point, which was $2,464.38. The formula postulated above would produce a hypothetical retirement

[17] Years of service x 2.5% x high-three average basic pay.

of $616.10. Wife one would receive half of that sum – $308.05, but not until after the member's actual retirement, ten years later.

The smaller share going to wife one would leave more for wife two and the member who, on these facts, would effectively split it as follows:

| | |
|---|---|
| Member: | $1,100.41 |
| Wife one (10 years): | $ 308.05 |
| Wife two (10 years): | $ 598.65 |
| Total: | $2,007.11 |

Perhaps the clearest expositions of the reasoning behind the two approaches are found in those cases in which a reviewing court splits as to which interpretation is most correct. The Iowa Supreme Court faced such a conflict in the case of *In re Benson*.[18] The trial court had used a time-rule approach, with the wife's percentage to be applied to the sum the husband actually received, whenever he actually retired.

The appellate court restated the question as being the time of valuation, with the choices being the sum the husband ***would have*** been able to receive if he had retired at divorce, or the sum payable at retirement. The court acknowledged that the longer the husband worked after divorce, the smaller the wife's portion became. The court accepted the wife's position that to "lock in" the value of the wife's interest to the value at divorce, while delaying payment to actual retirement, prevented the wife from "earning a reasonable return on her interest."

Quoting at length from a law review article analyzing the mathematics of the situation, the court found that acceptance of the husband's argument would have allowed him to collect the entirety of the accumulating "earnings" on the marital property accumulated by both parties. Three judges dissented.[19]

The ***reason*** that virtually all States have adopted the qualitative "time rule" formula is that of all the options available, it comes closes to doing equity in the greatest number of cases to everyone affected. It is used for ***all*** defined benefit pension plans, including military pension cases.

[18] 545 N.W.2d 252 (Iowa 1996).

[19] The Iowa court apparently did not even consider the possibility of having the wife's interest begin being paid to her at the employee's first eligibility for retirement, "freezing" it at that point and letting the husband enjoy all accumulations after that time. Presumably, this is because that possibility was not litigated at the trial level. That is the result in most or all community property States, however, and case law has made it clear that a spouse choosing to accept retirement benefits at first eligibility has no interest in any credits accruing thereafter, having made an "irrevocable election." *See In re Harris*, 27 P.3d 656 (Wash. Ct. App. 2001), and the citations set out in the following section.

Several State courts have held that the interest of a former spouse in retired pay is realized at ***vesting***,[20] theoretically entitling the spouse to collect a portion of what the member ***could*** get at that time irrespective of whether the member actually retires.[21] As phrased by the California court in *Luciano*: "The employee spouse cannot by election defeat the nonemployee spouse's interest in the community property by relying on a condition within the employee spouse's control."[22]

Most of those who advocate the "freeze at divorce" approach discussed above either oppose or ignore the question of whether distribution of the spousal share should be mandated at the time of the participant's first eligibility for retirement. It is not possible, however, to fully and fairly evaluate the impact of a "freeze at divorce" proposal ***without*** examining that question as well.

Unless payments to spouses are required at each first eligibility for retirement, regardless of the date of actual retirement, a "rank at divorce" proposal, at least in military cases, would result in a reduction in the value of the spousal share by at least 13%. A second spouse married to a member for the last couple years of service could actually receive more money after divorce than a first spouse who assisted the member for most of the military career. There does not appear to be any valid public policy that could be served by causing this result.

In most military marriages, the military retirement benefits are more valuable than all the other property accumulated during the marriage. In other words, if this one asset is inequitably divided, it is usually impossible to make a military divorce fair to both parties.

## III. THE 2001 DoD STUDY

In 2001, the Department of Defense, issued a lengthy report to Congress on various aspects of federal former spouse protection laws.[23] On most subjects, it rationally urged deferral to State domestic relations law, noting that Military retirement is "similar enough to other types of retirement that it does not merit being treated differently than virtually all other retirement benefits."[24]

[20] A "vested" pension is one that, having been earned and accrued, is beyond the power of the issuing authority to withdraw from payment. *See LeClert v. LeClert*, 453 P.2d 755 (N.M. 1969) (exploring definitions of "vestedness" and "maturity" of retired pay).

[21] *See In re Marriage of Luciano*, 164 Cal. Rptr. 93, 104 Cal. App. 3d 956 (Ct. App. 1980); *In re Marriage of Gillmore*, 629 P.2d 1, 174 Cal. Rptr. 493 (Cal. 1981); *In re Marriage of Scott*, 202 Cal. Rptr. 716, 156 Cal. App. 3d 251 (Ct. App. 1984); *Gemma v. Gemma*, 105 Nev. 458, 778 P.2d 429 (1989); *Koelsch v. Koelsch*, 713 P.2d 1234 (Ariz. 1986); *Ruggles v. Ruggles*, 860 P.2d 182 (N.M. 1993); *Balderson v. Balderson*, 896 P.2d 956 (Idaho 1994); *Blake v. Blake*, 807 P.2d 1211 (Colo. Ct. App. 1990); *Harris v. Harris*, 107 Wash. App. 597, 27 P.3d 656 (Wash. Ct. App. 2001); *Bailey v. Bailey*, 745 P.2d 830 (Utah 1987) (time of distribution of retirement benefits is when benefits are received "or at least until the earner is eligible to retire").

[22] *In re Marriage of Luciano*, *supra*, 164 Cal. Rptr. at 95.

[23] *See A Report to Congress Concerning Federal Former Spouse Protection Laws* (Report to the Committee on Armed Services of the United States Senate and the Committee on Armed Services of the

In a rare gaffe, the report ignored its own directives when discussing the subject of methodology of pension division, falsely stated that a military retirement "unlike any private sector retirement plan" because employees do not contribute to it, etc., and made the same proposal now being made in § 642.[25]

## IV. DISCUSSION

As noted above, the military retirement plan is a very normal non-contributory defined benefit pension plan; the stated bases for labeling it "unique" simply aren't.

Treating the recipients of one particular kind of defined benefit pension plan differently from everyone else in the United States who divides such plan benefits with a spouse creates substantial equal protection problems.

If, for example, a military member was married to a Civil Service employee or worker in the private sector, the military member would get a substantially greater interest in his spouse's retirement than she would receive from his. There is no valid public policy purpose to such a slanting of marital property law, or for forcing States forced to have two separate ways of determining spousal interests in retirement benefits – one for military members, and one for everyone else.

As noted, the proposal would skew divorces in at least 44 States, creating havoc in the divorce courts of those States which are often encouraged or required to divide property equally between spouses. There is no legitimate rationale for treating military members differently from employees in other, similar retirement systems, or in treating military members differently than their spouses in divorce litigation. The proposal being made would do both.

The premises of the pending legislation – that there is some kind of "windfall" in military cases, or that military retirement benefits are treated "inconsistently" with other marital assets in divorce litigation – are simply false. In fact, the proposal would create the precise disparate treatment that its proponent claims to be trying to avoid, and pre-empt the law of the substantial majority of states so as to effectively unjustly enrich military members at the expense of their spouses, as well as create artificial distinctions between successive spouses.

For several legal and public policy reasons discussed above, any such proposal should be rejected. The federal government should not attempt to micro-manage by the heavy hand of federal pre-emption the delicate balancing of interests reflected in the divorce laws of

House of Representatives) (Department of Defense, Sept. 4, 2001), http://dticaw.dtic.mil/prhome/spouserev.html.

[24] See, *e.g.*, Report at 82, discussing the rejected proposal to terminate pension division upon remarriage of a spouse.

[25] *Id*. at 71-72.

the States. It is not possible for Congress to enact any such provisions without wrecking havoc on the statutory schemes and balancing of interests that went into the creation of State divorce and property laws, and any effort to do so is far more likely to create injustice than to prevent it.

## V. CONCLUSIONS

There is no justification – mathematical, equitable, federal, or otherwise, to force the divorce law of 44 States to calculate one specific kind of defined benefit pension – military retirement benefits – differently than every other pension plan. It would create inequity, needlessly interfere with State divorce courts' efforts to do equity to the parties before them, and have large unintended consequences harmful to divorcing parties throughout the United States. The proposal to mandate that change should be removed from pending legislation.

Respectfully submitted,

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Chair, AAML Legislation Committee
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