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Comments: Division of Military Retirement Pay upon Divorce

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COMMENTS

DIVISION OF MILITARY RETIREMENT PAY UPON DIVORCE*

In 1981, the Supreme Court rendered a decision prohibiting state courts from dividing, as marital property, military retirement pay upon divorce. In response to the overwhelming public outcry, Congress has enacted a law which effectively overturns the Supreme Court's ruling. This comment discusses the law prior to this opinion, the opinion itself, the controversy it provoked and finally, the law it initiated.

I. INTRODUCTION

State courts have traditionally exercised almost exclusive jurisdiction in determining the proper division of property upon the dissolution of a marriage. Depending upon the individual jurisdiction, courts have generally divided both private and government pensions the same as other marital property. Despite the federal government's normal practice of noninvolvement in the field of domestic relations, in *McCarty v. McCarty*[1] the United States Supreme Court held that military retirement pay constituted the personal and nondivisible entitlement of a member of the military. Although Congress had been silent on the issue of preemption, the Court further concluded that state divorce courts are preempted from treating military retirement pay similar to ordinary pension plans. The decision generated a great deal of criticism, resulting in a law which returns jurisdiction to the state divorce courts and effectively overrides the holding of *McCarty*.

This comment discusses the division of marital property upon divorce, with emphasis on the distribution of pensions and, in particular, military retirement pay.[2] *McCarty* will be analyzed in light of the precedent it has deviated from, the reactions it has provoked, the concerns it has raised, and the legislation it has generated.

II. BACKGROUND

A. Division of Marital Property in General

Formulating a just division of marital property is one of the most important functions performed by state divorce courts.[3] The power to determine spousal interest in marital property is derived mainly from

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1. 453 U.S. 210 (1981).
2. This comment is national in scope, although Maryland court decisions are periodically discussed in examples.
3. Marital property is that property interest one acquires by reason of a marital relation. H. MARSH, JR., MARITAL PROPERTY IN CONFLICT OF LAWS § 1, at 11 (1952); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 258 (1971).

the local state law.[4] Because strict common law states, equitable distribution states, and community property states define and distribute marital property differently, an understanding of these doctrines is necessary for a complete discussion of the property distribution set out in *McCarty v. McCarty.*[5]

The English common law concept of marital property has been adopted by the majority of American states.[6] Under that view, the husband and wife were originally considered one legal entity,[7] with the wife having no separate legal existence from that of her husband.[8] The husband could mortgage, sell, or dispose of all property at will, the wife being wholly under his dominion.[9]

Married Women's Property Acts were enacted in an attempt to elevate the wife to an equal position with that of her husband regarding the acquisition, ownership, and consequence of her separate property.[10] Despite these acts, the presumption remained that all marital property was acquired, and hence, owned by the husband.[11] Consequently, upon divorce the wife could be granted maintenance or dower, but the

4. *See* Menor v. Menor, 154 Colo. 475, 480, 391 P.2d 473, 476 (1964); Joyce v. Joyce, 10 Md. App. 516, 523, 276 A.2d 692, 697 (1970); Melamed v. Melamed, 286 N.W.2d 716, 717 (Minn. 1979); Halla v. Halla, 200 N.W.2d 271, 275 (N.D. 1972); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 258(1) (1971).

5. 453 U.S. 210 (1981). *Compare* Martin v. Soden, 81 Idaho 274, 284, 340 P.2d 848, 854 (1959) (community property jurisdiction) *with* Carter v. Carter, 419 A.2d 1018, 1020 (Me. 1980) (equitable distribution jurisdiction) *and* Pierce v. Pierce, 274 S.E.2d 514 (W.Va. 1981) (strict common law jurisdiction).

6. *E.g.,* Joyce v. Joyce, 10 Md. App. 516, 517, 276 A.2d 692, 693-94 (1970); Newberg v. Babowicz, 401 Pa. 146, 150, 162 A.2d 662, 663-64 (1960). *See generally* Freed & Foster, *Divorce in the Fifty States: An Overview as of August 1, 1981,* 7 FAM. L. REP. (BNA) No. 49, at 4049 (Oct. 20, 1981).

7. Jones v. Jones, 293 Ala. 39, 42, 299 So.2d 729, 732 (1974); Swan v. Walden, 156 Cal. 195, 196, 103 P. 931, 931 (1909); Joyce v. Joyce, 10 Md. App. 516, 517, 276 A.2d 692, 693 (1970); 3 W. BLACKSTONE, COMMENTARIES 182 (1922); Greene, *Comparison of the Property Aspects of the Community Property and Common Law Marital Property Systems and Their Relative Compatability with the Current View of the Marriage Relationship and the Rights of Women,* 13 CREIGHTON L. REV. 71, 76 (1979) [hereinafter cited as GREENE]; Note, *The Distribution of Marital Real Property Upon Divorce in West Virginia: The Need for Legislative Reform,* 82 W. VA. L. REV. 611 (1980).

8. Whyman v. Johnston, 62 Colo. 461, 462, 163 P. 76, 77 (1917); Joyce v. Joyce, 10 Md. App. 516, 517, 276 A.2d 692, 693 (1970); Kerner v. McDonald, 60 Neb. 663, 669, 84 N.W. 92, 92 (1900); Madden v. Gosztonyi Savings and Trust Co., 331 Pa. 476, 487-88, 200 A. 624, 628 (1938); I. BAXTER, MARITAL PROPERTY § 1.1 (1973).

9. *See* sources cited *supra* note 8.

10. Whyman v. Johnston, 62 Colo. 461, 463, 163 P. 76, 77 (1917); Mittel v. Karl, 133 Ill. 65, 67, 24 N.E. 553, 554 (1890); Joyce v. Joyce, 10 Md. App. 516, 519-20, 276 A.2d 692, 695 (1970); Madden v. Gosztonyi Savings and Trust Co., 331 Pa. 476, 488, 200 A. 624, 628 (1938); Van Ausdall v. Van Ausdall, 48 R.I. 106, 110, 135 A. 850, 852 (1927); I. BAXTER, MARITAL PROPERTY § 2.2 (1973); W. DEFUNIAK & M. VAUGN, PRINCIPLES OF COMMUNITY PROPERTY 5 n.5 (2d ed. 1971); Greene, *supra* note 7, at 71.

11. Whyman v. Johnston, 62 Colo. 461, 462-63, 163 P. 76, 77 (1917); Arrand v. Graham, 297 Mich. 559, 298 N.W. 281 (1941); *In re* Hackett, 104 Pa. Super. 18, 63 A.2d 477, 479 (1949); I. BAXTER, MARITAL PROPERTY § 2.3 (1973); Greene, *supra*

husband was awarded most, if not all, of the marital property.[12]

Five states: Florida, Mississippi, South Carolina, Virginia, and West Virginia apply the strictest interpretation of the common law.[13] However, the husband is no longer presumed to own all property acquired during the marriage. Rather, title to property remains the determinative factor in the allocation of marital assets.[14] If property is titled in only one name it will be awarded to that spouse, the court being without authority to divest spouses of their separate property.[15]

Where strict common law states have enacted statutes allowing the award of alimony and dower, most other jurisdictions have gone much further in modifying the common law system by statutorily providing for the equitable distribution of marital property upon divorce.[16] Equi-

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note 7, at 79; Haskins, *The Estate By the Marital Right*, 97 U. PA. L. REV. 345, 352-53 (1949).

12. Dura Seal Products Co. v. Carver, 186 Pa. Super. 425, 429, 140 A.2d 844, 846 (1958); Patterson v. Patterson, 277 S.E.2d 709, 715 (W.Va. 1981); Wood v. Wood, 126 W.Va. 189, 193, 28 S.E.2d 423, 425 (1943); *see also* Painter v. Painter, 65 N.J. 196, 213, 320 A.2d 484, 493 (1974) (before enactment of a statute specifying otherwise, the court was limited to permitting payment of alimony and maintenance to the wife); Jennings v. Connecticut, 194 Or. 686, 690, 243 P.2d 1080, 1081-82 (1952) (the presumption that assistance from a wife is gratuitous is a rationale one, otherwise "titles to real property would be greatly disturbed and made uncertain"); Perlberger, *Marital Property Distribution: Legal and Emotional Considerations,* 25 VILL. L. REV. 662, 668 (1980).

13. FLA. STAT. ANN. § 61-08 (West Supp. 1982); MISS. CODE ANN. § 93-5-23 (Supp. 1979); S.C. CODE ANN. § 20-3-120 (Law. Co-op. Supp. 1980); VA. CODE § 20-111 (Supp. 1981); W.VA. CODE §§ 48-2-16, 48-2-21 (1976).

However, Florida and South Carolina have recognized the conferment of lump sum alimony. FLA. STAT. ANN. § 61-08 (West Supp. 1982); S.C. CODE ANN. § 20-3-130 (Law. Co-op. 1976 & Supp. 1980); *see* Canakaris v. Canakaris, 382 So.2d 1197, 1200-01 (Fla. 1980); Neff v. Neff, 386 So.2d 318, 319 (Fla. 1980); Simmons v. Simmons, 275 S.C. 41, 42, 267 S.E.2d 427, 428 (1980). In addition, the state legislatures of Florida and South Carolina give the wife a special equity in the property which she contributed to the acquisition of during coverture. *See* Blum v. Blum, 382 So.2d 52, 55 (Fla. 1980); Powers v. Powers, 273 S.C. 51, 55, 254 S.E.2d 289, 291 (1979); Wilson v. Wilson, 270 S.C. 216, 221-22, 241 S.E.2d 566, 568 (1978). Hence, they can be likened to equitable jurisdiction states.

14. Patterson v. Patterson, 277 S.E.2d 709, 711 (W. Va. 1981); Pierce v. Pierce, 274 S.E.2d 514, 515 (W.Va. 1981); Note, *The Distribution of Marital Real Property Upon Divorce in West Virginia: The Need for Legislative Reform,* 82 W.VA. L. REV. 611, 612 (1980); *see* Wray v. Langston, 380 So.2d 1262, 1263 (Miss. 1980); Bond v. Bond, 355 So.2d 672, 673 (Miss. 1978).

15. *See* authorities cited *supra* note 12.

16. *E.g.,* ALASKA STAT. § 09-55.210(6) (1973); ARK. STAT. ANN. § 34-1214 (Supp. 1981); COLO REV. STAT. § 14-10-113 (Supp. 1980); CONN. GEN. STAT. ANN. § 46b-81 (West Supp. 1981); DEL. CODE ANN. tit. 13, § 1513 (Supp. 1980); D.C. CODE ANN. § 16.910 (1981); HAWAII REV. STAT. § 580-47 (Supp. 1979); ILL. ANN. STAT. ch. 40, § 503 (Smith-Hurd 1980 & Supp. 1981-82); IND. CODE ANN. § 31-1-11.5-11 (Burns 1980); IOWA CODE ANN. § 598.21 (West Supp. 1981-82); KAN. STAT. ANN. § 60-1610(c) (Supp. 1980); KY. REV. STAT. ANN. § 403.190 (Baldwin 1979); ME. REV. STAT. ANN. tit. 19, § 722-A (1964); MD. CTS. & JUD. PROC. CODE ANN. § 3-6A-05 (1980); MICH. COMP. LAWS ANN. § 552-19 (Supp. 1981-82); MINN. STAT. ANN. § 518.58 (West Supp. 1981); MO. ANN. STAT. § 452-330 (Vernon Supp. 1981); MONT. REV. CODES ANN. § 40-4-202 (1979); NEB. REV.

table distribution jurisdictions recognize that both spouses contribute their best efforts to the marriage, its undertakings and acquisitions in such a way as to maximize the financial benefits to the marital relationship.[17] Based on this premise the courts in these jurisdictions apportion the marital assets in what they determine to be the most just and equitable manner.[18] Although the factors to be considered may be statutorily enumerated,[19] the courts invariably retain extremely broad discretion in the actual division of marital property.[20] It should be noted that *equitable* distribution is not equivalent to *equal* distribution, rather the appropriate allocation depends upon the specific facts and

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STAT. § 42-365 (1978); N.H. REV. STAT. ANN. tit. XLIII, ch. 458:19 (Supp. 1981); N.J. STAT ANN. § 2A:34-23 (West Supp. 1981-82); N.Y. DOM. REL. LAW § 236B (McKinney Supp. 1980-81); N.D. CENT. CODE § 14-05-24 (1971); OKLA. STAT. ANN. tit. 12, § 1278 (West Supp. 1980-81); OR. REV. STAT. § 107.105(e) (1979-80); PA. STAT. ANN. tit. 23, § 401 (Purdon Supp. 1981-82); R.I. GEN. LAWS § 15-5-16.1 (Supp. 1980); S.D. COMP. LAWS ANN. § 25-4-44 (1976); TENN. CODE ANN. § 36-8216 (Supp. 1981); UTAH CODE ANN. § 30-3-5 (Supp. 1979); VT. STAT. ANN. tit. 15, § 751 (Supp. 1979); WIS. STAT. ANN. § 767-255 (West Supp. 1981); WYO. STAT. § 20-2-114 (1977); *see also* Carter v. Carter, 419 A.2d 1018, 1023 (Me. 1980) (marital property is all property acquired subsequent to the marriage and prior to a decree of legal separation); Melamed v. Melamed, 286 N.W.2d 716, 717 (Minn. 1979) (same); Halla v. Halla, 200 N.W.2d 271, 275 (N.D. 1972) (same); Barbou v. Barbou, 518 P.2d 12, 15 (Wyo. 1974) (same).

Separate property is generally stipulated as that property acquired prior to the marriage, or by gift, bequest, devise, descent, or acquired after a decree of legal separation or excluded by valid agreement of the parties. *See, e.g.,* COLO. REV. STAT. § 14-10-113(2)(a) to (2)(d) (Supp. 1980); ME. REV. STAT. ANN. tit. 19, § 722-A (1964); MO. ANN. STAT. § 452-330.2 (Vernon 1979); N.Y. DOM. REL. LAW § 236B(1)(d) (McKinney Supp. 1980-81).

17. Harper v. Harper, 49 Md. App. 339, 346, 431 A.2d 761, 764 (1981); DiFlorido v. DiFlorido, 459 Pa. 641, 650-51, 331 A.2d 174, 179 (1975); *see* Painter v. Painter, 65 N.J. 196, 211-12, 320 A.2d 484, 492 (1974); Perlberger, *Marital Property Distribution: Legal and Emotional Considerations,* 25 VILL. L. REV. 662, 670 (1980); Note, *The Distribution of Marital Real Property Upon Divorce in West Virginia: The Need for Legislative Reform,* 82 W. VA. L. REV. 611, 613 (1980).
18. *See* Harper v. Harper, 49 Md. App. 339, 343-44, 431 A.2d 761, 763 (1981) (discusses what is just and equitable); Anderson v. Anderson, 584 S.W.2d 613, 615 (Mo. 1979) (same); Painter v. Painter, 65 N.J. 196, 211-12, 215, 320 A.2d 484, 492, 494 (1974) (same).
19. In a recent Maryland decision the court of special appeals acknowledged that those factors set out in MD. CTS. & JUD. PROC. CODE ANN. § 3-6A-05 (1980) included the contributions, both monetary and nonmonetary, made by each party to the well-being of the family, the value of the property interests of each spouse, the circumstances contributing to the estrangement of the parties, the duration of the marriage, and how and when the specific marital property was acquired. Taking these factors into consideration, the court found that although the husband provided the bulk of the financial contributions toward acquiring the family house the wife, as wife and mother for twenty-nine years, had made substantial nonmonetary contributions toward the marriage and family during the time the home was acquired. Therefore, the court held the home to be marital property awarding a one-half interest to each spouse. Harper v. Harper, 49 Md. App. 339, 346, 431 A.2d 761, 763 (1981).
20. *See* Painter v. Painter, 65 N.J. 196, 320 A.2d 484 (1974); Halla v. Halla, 200 N.W.2d 271 (N.D. 1972); DiFlorido v. DiFlorido, 459 Pa. 641, 331 A.2d 174 (1975).

circumstances of each case.[21]

In contrast, the doctrine of community property, originating from Spanish law,[22] is based upon the concept of equality between spouses. It concentrates on when and how the marital property was acquired, rather than who acquired it, in determining its distribution upon divorce.[23] Unlike the equitable distribution theory, a spouse does not have a mere expectancy but an absolute ownership of half of the community property.[24] Presently this system is adopted in eight American states.[25] Within these states, community property, broadly defined as that property acquired during the marriage and not constituting separate property, is divided equitably upon divorce.[26] Separate property is comprised of those assets acquired by one spouse before or after marriage, by gift, bequest, or inheritance and is distributed accordingly.[27]

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21. Collett v. Collett, 621 P.2d 1093, 1096 (Mont. 1981); Halla v. Halla, 200 N.W.2d 271, 275 (N.D. 1972); Johnson v. Johnson, 300 N.W.2d 865, 868 (S.D. 1980); Barbou v. Barbou, 518 P.2d 12, 16 (Wyo. 1974).
22. Packard v. Arellanes, 17 Cal. 525 (1861); Saul and His Creditors, 5 Martin (n.s.) 569, 16 Am. Dec. 212 (La. 1827); Nixon v. Brown, 46 Nev. 439, 214 P. 524 (1923); McDonald v. Senn, 53 N.M. 198, 204 P.2d 990 (1949).
23. *In re* Bjornestad's Marriage, 38 Cal. 3d 801, 806, 113 Cal. Rptr. 576, 579 (1974); Bowman v. Bowman, 72 Idaho 266, 270, 240 P.2d 487, 489 (1952); Smoot v. Smoot, 568 S.W.2d 177, 180 (Tex. 1978); Rustad v. Rustad, 61 Wash. 2d 176, 179, 377 P.2d 414, 415 (1963); *see* Jurek v. Jurek, 129 Ariz. 596, 606 P.2d 812, 814 (1980) (damage claims for personal injuries are divisible when lost wages and expenses are incurred during marriage); Patillo v. Norris, 65 Cal. 3d 209, 218, 135 Cal. Rptr. 210, 216 (1976) (insurance benefits held divisible); Michelson v. Michelson, 89 N.M. 282, 287, 551 P.2d 638, 642-44 (1976) (ascertaining growth and profits as separate property); *In re* Estate of Trierweiler, 5 Wash. App. 17, 24, 486 P.2d 314, 318 (1971) (value of wife's labor held divisible as community property).
24. LaTourette v. LaTourette, 15 Ariz. 200, 208, 137 P. 426, 429 (1914); Phillips v. Phillips, 160 La. 814, 826, 107 So. 584, 588 (1926); *In re* Chavez's Estate, 34 N.M. 258, 265, 280 P. 241, 243 (1929).
25. ARIZ. REV. STAT. ANN. § 25-211 (1976); CAL. CIV. CODE § 5110 (West Supp. 1981); IDAHO CODE § 32-906 (Supp. 1981); LA. CIV. CODE ANN. art. 2334 (West Supp. 1981); NEV. REV. STAT. § 123.030 (1979); N.M. STAT. ANN. § 40-3-2 (1978); TEX. FAM. CODE ANN. tit. 1, § 5.01 (Vernon 1975); WASH. REV. CODE ANN. § 26.16.030 (Supp. 1981).
26. Flowers v. Flowers, 118 Ariz. 577, 580, 578 P.2d 1006, 1008 (1978); LaTourette v. LaTourette, 15 Ariz. 200, 206, 137 P. 426, 428 (1914); Stranger v. Stranger, 98 Idaho 725, 727, 571 P.2d 1126, 1128 (1977); Moore v. Moore, 71 N.M. 495, 499, 379 P.2d 784, 787 (1963); Contreras v. Contreras, 590 S.W.2d 218, 220-21 (Tex. 1979); *see also* ARIZ. REV. STAT. ANN. § 25-211 (1976); CAL. CIV. CODE § 5110 (West Supp. 1981); IDAHO CODE § 32-906 (Supp. 1981); LA. CIV. CODE ANN. art. 2338 (West Supp. 1981); NEV. REV. STAT. § 123.220 (1979); N.M. STAT. ANN. § 40-3-8(B) (1978); TEX. FAM. CODE ANN. tit. 1, § 5.01(b) (Vernon 1975); WASH. REV. CODE ANN. § 26.16.030 (Supp. 1981). *See generally* Hughes v. Hughes, 91 N.M. 339, 573 P.2d 1194, 1199 (1978) (explaining the differences between common law right to marital property and community property right to marital property); W. DEFUNIAK & M. VAUGN, PRINCIPLES OF COMMUNITY PROPERTY § 1, at 1 (2d ed. 1971).
27. Flowers v. Flowers, 118 Ariz. 577, 579, 578 P.2d 1006, 1010 (1978); Stranger v. Stranger, 98 Idaho 725, 727, 571 P.2d 1126, 1128 (1977); Stephens v. Stephens, 93 N.M. 1, 2-3, 595 P.2d 1196, 1197-98 (1974); *see also* ARIZ. REV. STAT. ANN. § 25-218 (1976); CAL. CIV. CODE §§ 5107 (wife), 5108 (husband) (West Supp. 1981);

A rebuttable presumption exists that all property acquired during the marriage belongs to the community.[28] The party asserting the separate nature of the property has the burden of overcoming that presumption by tracing the property to a separate source.[29] Once its status has been determined, the courts exercise wide discretion in equitably distributing the community property.[30] Although California[31] and New Mexico[32] are the only community property states statutorily requiring equal division, most other states voluntarily apportion the property in a substantially equal manner.[33]

B. Distribution of Private Pensions Upon Divorce

No general rule exists as to the distribution of private pension rights upon divorce. Jurisdictions differ, taking into account such factors as whether the employee had contributed into the pension during the marriage[34] and whether the pension had vested prior to divorce.[35]

IDAHO CODE § 32-903 (Supp. 1981); LA. CIV. CODE ANN. art. 2341 (West Supp. 1981); NEV. REV. STAT. § 123.130 (1979); N.M. STAT. ANN. § 40-3-8(A) (1978); TEX. FAM. CODE ANN. tit. 1, § 5.01(a) (Vernon 1975); WASH. REV. CODE ANN. §§ 26.16.010 to .020 (Supp. 1981).

28. Estate of Murphy, 15 Cal. 3d 907, 917, 544 P.2d 956, 964, 126 Cal. Rptr. 820, 828 (1976); Stranger v. Stranger, 98 Idaho 725, 727, 571 P.2d 1126, 1128 (1977); Bowman v. Bowman, 72 Idaho 266, 268, 240 P.2d 487, 488 (1952); *see also* LA. CIV. CODE ANN. art. 2340 (West Supp. 1981) (statutory presumption of community property); NEV. REV. STAT. § 123.230 (1979) (same); N.M. STAT. ANN. § 40-3-12 (1978) (same); TEX. FAM. CODE ANN. tit. 1, § 5.02 (Vernon 1975) (same).
29. Estate of Murphy, 15 Cal. 3d 907, 917, 544 P.2d 956, 964, 126 Cal. Rptr. 820, 828 (1976); Stranger v. Stranger, 98 Idaho 725, 728, 571 P.2d 1126, 1128 (1977); Contreras v. Contreras, 590 S.W.2d 218, 221 (Tex. 1979); *see* Matter of Messer, 118 Ariz. 291, 293, 576 P.2d 150, 152 (1978) (failure to rebut presumption will lead the court to conclude that property is community).
30. Guy v. Guy, 98 Idaho 205, 208-09, 560 P.2d 876, 879 (1977); Murff v. Murff, 615 S.W.2d 696, 698 (Tex. 1981); Campbell v. Campbell, 586 S.W.2d 162, 166, 169 (Tex. 1979); *In re* Marriage of Hadley, 88 Wash. 2d 649, 656, 565 P.2d 790, 794 (1977); ARIZ. REV. STAT. ANN. § 25-318 (1976); IDAHO CODE § 32-712(1) (Supp. 1981); NEV. REV. STAT. § 125.150 (1979); N.M. STAT. ANN. § 40-4-7 (1978); TEX. FAM. CODE ANN. tit. 1, § 363 (Vernon 1975); WASH. REV. CODE ANN. § 26.09.080 (Supp. 1981); W. DEFUNIAK & M. VAUGN, PRINCIPLES OF COMMUNITY PROPERTY § 227, at 514 (2d ed. 1971); Greene, *supra* note 7, at 97.
31. CAL. CIV. CODE § 4800 (West Supp. 1981).
32. N.M. STAT. ANN. § 40-4-7 (1978); *see* Ridgway v. Ridgway, 94 N.M. 345, 610 P.2d 749, 750 (1980).
33. Nace v. Nace, 6 Ariz. App. 348, 353, 432 P.2d 896, 901 (1967); Guy v. Guy, 98 Idaho 205, 209, 560 P.2d 876, 880 (1977); Shepard v. Shepard, 94 Idaho 734, 735, 497 P.2d 321, 322 (1972). *But see* LA. CIV. CODE ANN. art. 2406 (West Supp. 1981) (statute requiring the equal division of community property repealed Jan. 1, 1980).
34. *See In re* Marriage of Pope, 37 Colo. App. 237, 544 P.2d 639 (1975) (husband's contribution on deposit with the Public Employee's Retirement Association constituted marital property); Hutchins v. Hutchins, 71 Mich. App. 361, 248 N.W.2d 272 (1977) (husband's interest in Public Safety Department Pension was created in most part from his salary and therefore is marital property).
35. *Compare* Hutchins v. Hutchins, 71 Mich. App. 361, 248 N.W.2d 272 (1977) (pension found divisible was fully vested and could not be subjected to divestment or

A pension is vested when a sufficient amount of requirements have been fulfilled so as to render the rights to the fund irrevocable.[36] Maturation of a pension right, in contrast to vesting, grants an individual an unconditional and immediate right to payment.[37] For example, if a retirement program is based upon a point system, an employee may accrue enough points to hold a vested interest in his pension, yet his right may not mature until he reaches a certain designated retirement age and elects to retire.[38] A contributory pension plan is funded, at least in part, by deductions from employee's salaries, while a noncontributory plan is funded solely by the employer.[39]

In common law property states, pensions are not distributed upon divorce since they are held in only one person's name; however, they are taken into consideration to determine a proper award of alimony.[40] To the contrary, equitable distribution jurisdictions view a vested pension as marital property.[41] In a contributory pension plan, in which the pension has been funded through accumulated deductions from one spouse's earnings during the marital relationship, courts justify dividing the pension by noting that, absent such deductions, the couple probably would have used the earnings in another manner.[42] In the case of a noncontributory pension plan, the divisibility is dependent

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forfeiture) *with* Murphy v. Murphy, 613 S.W.2d 450 (Mo. App. 1981) (nonvested pension plan value considered de minimus and too speculative to be considered as marital property requiring disposition).

36. *In re* Marriage of Brown, 15 Cal. 3d 838, 842, 544 P.2d 561, 563, 126 Cal. Rptr. 633, 635 (1976); *In re* Marriage of Fithian, 10 Cal. 3d 592, 596, 517 P.2d 449, 451, 111 Cal. Rptr. 369, 371 (1974); *In re* Marriage of Hunt, 78 Ill. App. 3d 653, 658, 397 N.E.2d 511, 515 (1979); Frank v. Day's Inc., 13 Wash. App. 401, 405, 535 P.2d 479, 482 (1975); Solomon, *Beyond Preemption: Accomodation of the Nonemployee Spouse's Interest Under ERISA,* 31 HASTINGS L.J. 1021, 1024 (May, 1980).
37. *In re* Marriage of Brown, 15 Cal. 3d 838, 842, 544 P.2d 561, 563, 126 Cal. Rptr. 633, 635 (1976); *In re* Marriage of Fithian, 10 Cal. 3d 592, 596, 517 P.2d 449, 451, 111 Cal. Rptr. 369, 371 (1974); *In re* Marriage of Hunt, 78 Ill. App. 3d 653, 658, 397 N.E.2d 511, 515 (1979).
38. *In re* Marriage of Brown, 15 Cal. 3d 838, 841-43, 544 P.2d 561, 562-63, 126 Cal. Rptr. 633, 634-35 (1976); *see* Frank v. Day's Inc., 13 Wash. App. 401, 405, 535 P.2d 479, 482 (1975) (though entitled to only 45% of his credits, an employee who terminates his employment after 10 years does have a fully vested right to that percentage and the employer is bound to pay it after the right to payment matures).
39. *In re* Marriage of Pope, 37 Colo. App. 237, 544 P.2d 639 (1975); *In re* Marriage of Hunt, 78 Ill. App. 3d 653, 397 N.E.2d 511 (1979).
40. *See* Beechan v. Beechan, 407 So.2d 237, 238 (Fla. 1981) (no pension was awarded, yet the court let stand the lower court's consideration of the pension in setting the wife's alimony).
41. *In re* Marriage of Mitchell, 195 Colo. 399, 402-03, 574 P.2d 613, 616 (1978); Husband B. v. Wife B., 396 A.2d 169, 172 (Del. Super. Ct. 1978); Tavares v. Tavares, 58 Hawaii 541, 544, 574 P.2d 125, 127 (1978); *In re* Marriage of Bodford, 94 Ill. App. 3d 91, 92, 418 N.E.2d 487, 488 (1981); Hutchins v. Hutchins, 71 Mich. App. 361, 371, 248 N.W.2d 272, 277 (1977); Jensen v. Jensen, 276 N.W.2d 68, 69 (Minn. 1979).
42. *In re* Marriage of Pope, 37 Colo. App. 237, 239, 544 P.2d 639, 640 (1975); Hutchins v. Hutchins, 71 Mich. App. 361, 371, 248 N.W.2d 272, 277 (1977); *see In re*

upon whether a spouse earned the pension during consortium, regardless of the fact that no funds were actually diverted from the marital community.[43]

Although most courts in equitable distribution jurisdictions hold that nonvested pension interests are mere expectancies and, hence, too speculative to be considered marital property,[44] a number of recent cases appear to be moving away from that position.[45] These courts place greater emphasis on whether the rights or benefits to the pension were acquired during the marriage, regardless of whether that right had vested.[46] Reasoning that the efforts of both parties contribute to the marriage, spouses are viewed as holding identical expectations of future enjoyment and security from the pension.[47]

In the recent case of *Deering v. Deering,*[48] the Court of Appeals of Maryland reviewed this current trend and dismissed vesting as the determinative of whether a pension should be considered marital property.[49] The court held that pension benefits represent a form of deferred compensation, constituting marital property to the extent that they are accumulated during the marriage.[50]

Various methods are utilized by the courts in allocating retirement benefits upon divorce. Often, the value of pensions is included with other marital assets and then equitably distributed with the marital property as a whole.[51] However, an increasing number of states have begun to separately apportion the pension fund itself.[52] The *Deering* court summarized three alternative methods for dividing the pension:

> First, the trial court could consider the amount of [the husband's] contribution to the fund, plus interest, and award

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Marriage of Smith, 84 Ill. App. 3d 446, 454, 405 N.E.2d 884, 890 (1980) (military disability pay).

43. *In re* Marriage of Bodford, 94 Ill. App. 3d 91, 418 N.E.2d 487 (1981); *In re* Marriage of Hunt, 78 Ill. App. 3d 653, 397 N.E.2d 511 (1979); Kikkert v. Kikkert, 177 N.J. Super. 471, 427 A.2d 76 (1981).
44. *In re* Marriage of Pope, 37 Colo. App. 237, 239, 544 P.2d 639, 640 (1975); Savage v. Savage, 374 N.E.2d 536, 539 (Ind. 1978); Murphy v. Murphy, 613 S.W.2d 450, 452 (Mo. App. 1981).
45. *E.g., In re* Marriage of Bodford, 94 Ill. App. 3d 91, 93, 418 N.E.2d 487, 489 (1981); *In re* Marriage of Hunt, 78 Ill. App. 3d 653, 662, 397 N.E.2d 511, 518 (1979); Deering v. Deering, 292 Md. 115, 128, 437 A.2d 883, 890 (1981); Bloomer v. Bloomer, 84 Wis. 2d 124, 130, 267 N.W.2d 235, 238 (1978).
46. *See* cases cited *supra* note 42.
47. *See* cases cited *supra* note 45.
48. 292 Md. 115, 437 A.2d 883 (1981).
49. *Id.* at 128, 437 A.2d at 890.
50. *Id.*
51. *See* cases cited *supra* note 42.
52. Husband B. v. Wife B., 396 A.2d 169, 172 (Del. Super. Ct. 1978); Pollick v. Pollick, 52 Hawaii 357, 364, 477 P.2d 620, 640 (1970); *In re* Marriage of Bodford, 94 Ill. App. 3d 91, 92, 418 N.E.2d 487, 488 (1981); Deering v. Deering, 292 Md. 115, 129, 437 A.2d 883, 891 (1981); Martinez v. Martinez, 7 FAM. L. REP. (BNA) 2781, 2782 (N.Y. Sup. Ct. Oct. 13, 1981).

> [the wife] an appropriate share . . . . Second, the trial court could attempt to calculate the present value of [the husband's] retirement benefits when they vest under the plan. Under this approach, the benefits payable in the future would have to be discounted for interest in the future, for mortality . . . and for vesting . . . . The benefits would then have to be calculated with respect to [the husband's] life expectancy as a retiree . . . .
>
> Under either of the above two methods, the trial court would have the discretion to order the payment to [the wife] of her share in either a lump sum or in installments, depending primarily on the other assets and relative financial positions of the parties. The third method . . . is to determine a fixed percentage for [the wife] of any future payments [the husband] receives under the plan, payable to her as if, and when paid to [the husband]. . . . Under this approach . . . [t]he court need do no more than determine the appropriate percentage to which the non-employee spouse is entitled.[53]

In addition, the court in *Deering* cautioned that the method chosen to divide pensions should be made in light of the individual circumstances of the case.[54]

A majority of community property jurisdictions conclude that both vested and nonvested private pension benefits represent a form of deferred compensation and, as such, represent a property interest.[55] To the extent that this interest accrued during coverture it constitutes community property subject to division upon divorce.[56]

In re Marriage of Brown[57] is the leading community property case addressing the division of pension benefits upon divorce. In that case, Brown participated in a noncontributory pension plan based on an age and years-of-service point system. Brown and his wife separated after he had acquired seventy-two of the required seventy-eight points.[58] Overruling all prior inconsistent holdings, the court held that pension

53. Deering v. Deering, 292 Md. 115, 130-31, 437 A.2d 883, 891 (1981) (citing Bloomer v. Bloomer, 84 Wis. 2d 124, 267 N.W.2d 235, 241 (1978)).
54. Deering v. Deering, 292 Md. 115, 133, 437 A.2d 883, 892 (1981).
55. *In re* Marriage of Brown, 15 Cal. 3d 838, 852, 544 P.2d 561, 570, 126 Cal. Rptr. 633, 642 (1976); Shill v. Shill, 100 Idaho 433, 436, 599 P.2d 1004, 1007 (1979); Copeland v. Copeland, 91 N.M. 409, 575 P.2d 99, 102 (1978); Ellett v. Ellett, 94 Nev. 34, 37, 573 P.2d 1179, 1181 (1978); Murff v. Murff, 615 S.W.2d 696, 700 (Tex. 1981); DeRevere v. DeRevere, 5 Wash. App. 741, 743, 491 P.2d 249, 252 (1971); *see also* W. DEFUNIAK & M. VAUGN, PRINCIPALS OF COMMUNITY PROPERTY, § 233, at 259 (2d ed. 1971); *cf.* Van Loan v. Van Loan, 116 Ariz. 272, 273, 569 P.2d 214, 216 (1977) (military retirement pay divisible upon divorce).
56. *In re* Marriage of Brown, 15 Cal. 3d 838, 856, 544 P.2d 561, 564, 126 Cal. Rptr. 633, 641 (1976); Shill v. Shill, 100 Idaho 433, 436, 599 P.2d 1004, 1007 (1979); Ellett v. Ellett, 94 Nev. 34, 37, 573 P.2d 1179, 1181 (1978); DeRevere v. DeRevere, 5 Wash. App. 741, 743, 491 P.2d 249, 252 (1971).
57. 15 Cal. 3d 838, 544 P.2d 561, 126 Cal. Rptr. 633 (1976).
58. *Id.* at 842-43, 544 P.2d at 563, 126 Cal. Rptr. at 635.

benefits were a form of deferred compensation and that nonvested pension benefits should be considered community property.[59] The court recognized that pension rights are often the most valuable asset of the marital community and that the required equal division of community property would be impossible if the entire pension were awarded to one spouse alone.[60] In response to the argument that any inequities created under prior law could be redressed by the award of alimony, the court remarked, "[t]he spouse should not be dependent on the discretion of the court . . . to provide her with the equivalent of what should be hers as a matter of absolute right."[61] Moreover, the court stated:

> [T]he joint effort that composes the community and the respective contributions of the spouses that make up its assets are the meaningful criteria. The wife's contribution to the community is not one whit less [sic] if we declare the husband's pension rights not a contingent asset but a mere "expectancy."
>
> Fortunately we can appropriately reflect the realistic situation by recognizing that the husband's pension rights, a contingent interest, whether vested or not vested, comprise a property interest of the community and that the wife may properly share in it.[62]

Until recently, because of the distinctive features of military retirement pay, courts in both community property and common law jurisdictions varied as to whether such benefits were similar to private pensions.

C. Military Retirement Pay

1. Generally

Unlike most private pension plans, military retirement pay is noncontributory.[63] It is funded by annual appropriations[64] provided by

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59. *Id.* at 851, 544 P.2d at 569, 126 Cal. Rptr. at 641.
60. *Id.* at 847, 544 P.2d at 566, 126 Cal. Rptr. at 638.
61. *Id.* at 848, 544 P.2d at 567, 126 Cal. Rptr. at 639.
62. *Id.* at 851-52, 544 P.2d at 569-70, 126 Cal. Rptr. at 641-42.
63. McCarty v. McCarty, 453 U.S. 210, 215 (1981); Watson v. Watson, 424 F. Supp. 866, 868 (D.N.C. 1976); *In re* Marriage of Brown, 15 Cal. 3d 838, 851-52, 544 P.2d 561, 569-70, 126 Cal. Rptr. 633, 641-42 (1976); *Preliminary Review of Military Retirement Systems, Hearings Before the Subcomm. on Military Compensation of the House Comm. on Armed Services,* 95th Cong., 1st & 2d Sess. 7 (1977-78) (testimony of Col. Leon S. Hirsh, Jr.) [hereinafter cited as *Military Retirement Systems*]; *Hearings on H.R. 2817, H.R. 3677 & H.R. 6270, Legislation Related to Benefits for Former Spouse of a Military Retiree Before the Military Compensation Subcomm. of the Comm. on Armed Services*, 96th Cong., 2d Sess. 97 (1980) (statement of C.A. "Mack" McKinney, Sergeant Major, USMC Retired, Senior V.P. for Gov't Affairs, Non-Commissioned Officers Ass'n) [hereinafter cited as *Hearings*].
64. McCarty v. McCarty, 453 U.S. 210, 214 (1981); Watson v. Watson, 424 F. Supp. 866, 869 (D.N.C. 1976).

Congress and administered by the Department of Defense.[65] Vesting does not occur until the member has served for a minimum prescribed period, currently twenty years.[66] Military retirement pay commences at the time of retirement, with the amount calculated on a percentage of active duty basic pay.[67] If a member terminates his[68] service before twenty years, the entitlement to retirement pay is forfeited.[69]

A military retiree remains, in effect, a member of the armed forces.[70] The retiree is subject to recall to active duty[71] and continues to be governed by the Uniform Code of Military Justice.[72] Continuation of military retirement pay may be affected by the retiree's subse-

65. Lynch v. United States, 292 U.S. 571, 577 (1934); Frisbee v. United States, 157 U.S. 160, 166 (1895); United States v. Teller, 107 U.S. 64, 68 (1882); Gordon v. United States, 140 F. Supp. 263, 264 (1956).
66. McCarty v. McCarty, 453 U.S. 210, 214 (1981); Lynch v. United States, 292 U.S. 571, 577 (1934); Watson v. Watson, 424 F. Supp. 866, 869 (D.N.C. 1976); *In re* Marriage of Mitchell, 195 Colo. 399, 403, 574 P.2d 613, 617 (1978); 10 U.S.C. § 3911 (1976) (an army officer who has served for twenty years, at least ten in active service as a commissioned officer, may request the Secretary of the Army to retire him); *see also* 10 U.S.C. § 3917 (1976) (an enlisted member of the Army may be retired upon request after thirty years of service).
67. McCarty v. McCarty, 453 U.S. 210, 214 n. 7 (1981); *Military Retirement Systems, supra* note 63, at 6 (testimony of Col. Leon S. Hirsh, Jr.); SUBCOMM. ON RETIREMENT INCOME AND EMPLOYMENT, HOUSE SELECT COMM. ON AGING, WOMEN AND RETIREMENT INCOME PROGRAMS, 96TH CONG., 1ST SESS., CURRENT ISSUES OF EQUITY AND ADEQUACY 15 (Comm. Print No. 96-190 (1979)) [hereinafter cited as WOMEN AND RETIREMENT]. 75% of basic pay is the maximum amount permitted to calculate military retirement pay, regardless of the number of years of actual service. 75% would be obtained upon the completion of thirty years of service. *Military Retirement Systems, supra* note 63, at 6 (testimony of Col. Leon S. Hirsh, Jr.); WOMEN AND RETIREMENT, *supra*, at 7.
68. The masculine pronoun is generally recognized as proper grammatical usage. In addition, the term "serviceman" is used throughout this comment solely for stylistic reasons. The author fully recognizes that the male and female roles, in this circumstance, are interchangeable.
69. McCarty v. McCarty, 453 U.S. 210, 214 (1981); Lynch v. United States, 292 U.S. 571, 577 (1934); Watson v. Watson, 424 F. Supp. 866, 869 (D.N.C. 1976); *In re* Marriage of Mitchell, 195 Colo. 399, 403, 574 P.2d 613, 617 (1978); *Military Retirement Systems, supra* note 63, at 27 (testimony of Col. Leon S. Hirsh, Jr.); *Hearings, supra* note 63, at 97 (statement of C.A. "Mack" McKinney, Sergeant Major, USMC Retired, Senior V.P. for Gov't Affairs, Non-Commissioned Officers Ass'n).
70. Puglisi v. United States, 564 F.2d 403, 410 (1977); Hotinsky v. United States, 292 F.2d 508, 510 (1961); Lemly v. United States, 75 F. Supp. 248, 249 (1948); 10 U.S.C. §§ 3503, 3504 (1976); *Hearings, supra* note 63, at 97 (1980) (statement of C.A. "Mack" McKinney, Sergeant Major, USMC Retired, Senior V.P. for Gov't Affairs, Non-Commissioned Officers Ass'n).
71. Puglisi v. United States, 564 F.2d 403, 410 (1977); Hotinsky v. United States, 292 F.2d 508, 510 (1961); Lemly v. United States, 75 F. Supp. 248, 249 (1948); 10 U.S.C. § 672(a) (1976).
72. Puglisi v. United States, 564 F.2d 403, 410 (1977); Hotinsky v. United States, 292 F.2d 508, 510 (1961); Lemly v. United States, 75 F. Supp. 248, 249 (1948); Watson v. Watson, 424 F. Supp. 866, 868 (D.N.C. 1976); 10 U.S.C. § 1482 (1976); *Hearings, supra* note 63, at 99 (written statement of C.A. "Mack" McKinney, Sergeant Major, USMC Retired, Senior V.P. for Gov't Affairs, Non-Commissioned Officers Ass'n).

quent employment[73] or forfeited upon conviction of certain crimes.[74] Although military retirement pay terminates at death, a portion of the member's retirement pay can be automatically set aside for his survivors.[75] Under the Survivor Benefit Plan the service member is free to designate someone other than his spouse or ex-spouse as a beneficiary.[76]

2. Division Upon Divorce Prior to *McCarty*

a. Common Law and Equitable Distribution States

Prior to *McCarty,* some noncommunity property jurisdictions considered military retirement pay to be separate property, not subject to division upon the dissolution of marriage.[77] Others refused to distribute the benefits to the nonmilitary spouse, finding the issue federally preempted.[78] The remainder divided military retirement pay upon divorce as marital property.[79]

The jurisdictions holding military retirement pay nondivisible upon divorce followed the rationale proffered in *In re Marriage of Ellis.*[80] In that Colorado case, even though the husband's right to military retirement pay had vested prior to his divorce, the court declined to distribute the benefits between the spouses. The court gave great weight to the fact that a member's right to payment did not generally vest until a full twenty years had been served.[81] In addition, the court considered a member's subjectibility to active recall and the tax implications of distributing the benefits.[82] Furthermore, the court placed significant emphasis on the lack of cash surrender, loan, redemption or lump sum value of military retirement pay.[83] Thus, military retirement

73. Retired members are prevented from being employed by any foreign government. U.S. CONST. art. 1, § 9, cl. 8. Moreover, retirement pay is subject to reduction upon any further employment. 5 U.S.C. § 5532 (1976).
74. 5 U.S.C. § 8312 (1976).
75. McCarty v. McCarty, 453 U.S. 210, 215 (1981); 10 U.S.C. §§ 1447-1455 (1976); *Women and Retirement, supra* note 67, at 17, 68.
76. McCarty v. McCarty, 453 U.S. 210, 215 (1981); 10 U.S.C. § 2771(d) (1976).
77. *See, e.g.,* Fenney v. Fenney, 537 S.W.2d 367 (Ark. 1976); Hill v. Hill, 47 Md. App. 460, 424 A.2d 779 (1981); Baker v. Baker, 421 A.2d 998 (N.H. 1980); Baker v. Baker, 546 P.2d 1325 (Okla. 1975).
78. *See, e.g.,* Cose v. Cose, 592 P.2d 1230 (Alaska 1979); Russell v. Russell, 605 S.W.2d 33 (Ky. 1980).
79. *See, e.g., In re* Marriage of Musser, 70 Ill. App. 2d 706, 388 N.E.2d 1289 (1979); *In re* Marriage of Schissel, 292 N.W.2d 421 (Iowa 1980); Chisnell v. Chisnell, 82 Mich. App. 699, 267 N.W.2d 155 (1978); *In re* Marriage of Miller, 609 P.2d 1185 (Mont. 1980), *judgment vacated and case remanded for further consideration in light of McCarty*, 453 U.S. 918 (1982); Kruger v. Kruger, 139 N.J. Super. 413, 354 A.2d 340 (1976), *aff'd,* 73 N.J. 464, 375 A.2d 659 (1977).
80. 36 Colo. App. 234, 538 P.2d 1347 (1975), *aff'd,* 91 Colo. 317, 552 P.2d 506 (1976).
81. 36 Colo. App. at 235, 538 P.2d at 1349.
82. Military retirement pay is considered taxable income under the Internal Revenue Code. I.R.C. § 61(a)(1) (1976); *see* 26 U.S.C. § 61(a)(11) (Supp. IV 1980).
83. *In re* Marriage of Ellis, 36 Colo. App. 234, 236, 538 P.2d 1347, 1349 (1975), *aff'd,* 91 Colo. 317, 552 P.2d 506 (1976).

pay was deemed continuing compensation for active duty performed on a reduced basis, nondivisible as a property right upon the dissolution of a marriage.[84] However, the court held that military retirement pay, as post-divorce income, could be considered in awarding maintenance and child support.[85]

A small minority of states avoided the issue of whether to classify military retirement pay as a divisible property right by holding the matter to be federally preempted.[86] The courts relied upon the Supreme Court's decision in *Hisquierdo v. Hisquierdo*[87] where it was held that a state court order dividing railroad retirement pay upon divorce would contravene the intent of Congress.[88] Applying this decision to military retirement pay, these courts found that Congress' failure to provide for a divorced spouse in the annuity plan for military retired members, coupled with the abolishment of a divorced spouse's beneficiary status, demonstrated Congress' express intent to preempt traditional state division of military retirement pay.[89]

The third group of states held military retirement pay to be marital property divisible upon divorce.[90] For example, in *Kruger v. Kruger,*[91] the New Jersey Superior Court held that military retirement pay, although noncontributory, constitutes an integral part of the compensation for military service previously rendered by the retiree.[92] Accordingly, in the court's opinion, once the retirement pay became irrevocable, it constituted assets subject to equitable distribution to the extent that military service had been rendered during the pendency of the marriage.[93]

b. Community Property Jurisdictions

Prior to *McCarty,* community property states generally[94] held that

84. 36 Colo. App. at 236-37, 538 P.2d at 1349.
85. *Id.* at 238, 538 P.2d at 1350.
86. *E.g.,* Cose v. Cose, 592 P.2d 1230 (Alaska 1979); Russell v. Russell, 605 S.W.2d 33 (Ky. 1980).
87. 439 U.S. 572 (1979).
88. *Id.* at 590.
89. Cose v. Cose, 592 P.2d 1230, 1232 (Alaska 1979); Russell v. Russell, 605 S.W.2d 33, 36 (Ky. 1980). *See* 10 U.S.C. §§ 1447-1455 (1976).
90. *E.g.,* Linson v. Linson, 618 P.2d 748 (Hawaii 1981); *In re* Marriage of Musser, 70 Ill. App. 2d 706, 388 N.E.2d 1289 (1979); *In re* Marriage of Schissel, 292 N.W.2d 421 (Iowa 1980); Chisnell v. Chisnell, 82 Mich. App. 699, 267 N.W.2d 155 (1978); Kruger v. Kruger, 139 N.J. Super. 413, 354 A.2d 340 (1976), *aff'd*, 73 N.J. 464, 375 A.2d 659 (1977); Overman v. Overman, 570 S.W.2d 857 (Tenn. 1978).
91. 139 N.J. Super. 413, 354 A.2d 340 (1976), *aff'd*, 73 N.J. 464, 375 A.2d 659 (1977).
92. 139 N.J. Super. at 420, 354 A.2d at 344.
93. *Id.*
94. Louisiana had previously ruled in accordance with the seven other community property states. Swope v. Mitchell, 324 So.2d 461 (La. 1975). However, in light of the Supreme Court case, Hisquierdo v. Hisquierdo, 439 U.S. 572 (1979), Louisiana recently ruled that military retirement pay is preempted from the purview of state divorce actions. DeDon v. DeDon, 390 So.2d 937 (La. App. 1980).

vested and nonvested military retirement pay constituted community property divisible upon divorce.[95] The rationale behind this practice is illustrated in two California cases: *In re Marriage of Brown*[96] and *In re Marriage of Fithian.*[97]

In deciding the divisibility of military retirement pay, courts have consistently cited *In re Marriage of Brown*[98] despite the fact that the case involved a private pension. The court in *Brown* expressed the view that marriage constitutes an equal partnership, each spouse's role equally important in maintaining the marriage community. As a result, each spouse acquired a property interest in the pension at issue. Furthermore, the court observed that a pension is often the most significant asset of the marital community.[99] Relying on *Brown,* those courts distributing military retirement pay also recognized that the constant mobility of military life all but destroyed the nonmilitary spouse's ability to acquire a vested interest in a pension of her own.[100] As a result, the eventual economic security of military retirement pay was consistently held to be a community property right divisible upon dissolution of a marriage.[101]

The husband in *In re Marriage of Fithian*[102] contended that the state court was federally preempted from dividing his military retirement pay.[103] Refuting this contention, the Supreme Court of California noted that Congress had been silent on the issue of preemption and held that the division of military retirement pay in a state divorce proceeding does not interfere with the congressional purpose of military retirement pay.[104] The benefits were intended, in the court's opinion, solely to enhance morale and encourage military service, not to compensate the retiree for further government responsibilities.[105]

III. *McCARTY v. McCARTY*

A. The Decision

At the time the McCarty's nineteen year marriage dissolved, Richard McCarty had served approximately eighteen of the twenty years

95. Van Loan v. Van Loan, 116 Ariz. 272, 569 P.2d 214 (1977); Ramsey v. Ramsey, 96 Idaho 672, 535 P.2d 53 (1975); LeClert v. LeClert, 453 P.2d 755 (N.M. 1976).
96. 15 Cal. 3d 838, 544 P.2d 561, 126 Cal. Rptr. 633 (1976).
97. 10 Cal. 3d 592, 517 P.2d 449, 111 Cal. Rptr. 369 (1974).
98. 15 Cal. 3d 838, 544 P.2d 561, 126 Cal. Rptr. 633 (1976).
99. *Id.* at 847, 544 P.2d at 566, 126 Cal. Rptr. at 638.
100. *See* I. BAXTER, MARITAL PROPERTY § 11.2, at 35 (1973).
101. Van Loan v. Van Loan, 116 Ariz. 272, 569 P.2d 214 (1977); Ramsey v. Ramsey, 96 Idaho 672, 535 P.2d 53 (1975); LeClert v. LeClert, 453 P.2d 755 (N.M. 1976); Clearly v. Clearly, 544 S.W.2d 661 (Tex. 1976); *In re* Marriage of Jacobs, 20 Wash. App. 272, 579 P.2d 1023 (1978).
102. 10 Cal. 3d 592, 517 P.2d 449, 111 Cal. Rptr. 369 (1974).
103. *Id.* at 593, 517 P.2d at 450, 111 Cal. Rptr. at 370.
104. *Id.* at 604, 517 P.2d at 457, 111 Cal. Rptr. at 377.
105. *Id.* at 605, 517 P.2d at 456, 111 Cal. Rptr. at 376.

required for retirement from the Army.[106] The California Superior Court ruled that his military retirement pay was divisible as quasi-community property[107] and awarded an equal portion to his wife.[108] The Court of Appeals of California affirmed the award, refusing to accept the husband's contention that the issue was federally preempted.[109]

In July, 1981 the United States Supreme Court reversed the California court, concluding that military retirement pay is a personal entitlement of the retired serviceman and not divisible upon divorce as community property.[110] Furthermore, federal preemption was held to preclude state divorce courts from ruling otherwise.[111] In reaching its decision, the Supreme Court relied on the lack of statutory language conferring on the retired member's spouse any personal right to retirement pay.[112] The Court found it significant that a serviceman is statutorily free to determine whether, upon his death, an annuity should be provided to his current spouse.[113] Therefore, the Court reasoned that because one spouse cannot legally deprive the other of his rightful community property interest, Congress could not have intended military retirement pay to be considered community property.[114]

Recognizing that a "mere conflict in words"[115] is insufficient to support a finding of federal preemption, the Supreme Court reviewed Congress' objectives in providing for military retirement pay. The paramount goal was held to be the maintenance of a youthful and vigorous military force.[116] Military retirement pay, in the Court's opinion, was intended to accomplish this goal by encouraging enlistment and reenlistment while concurrently inducing retirement at a designated age.[117] The Court feared that once a person realized military retirement pay would be divided upon divorce he would decide against enlisting or, conversly, decide against retiring.[118] The Court further

106. McCarty v. McCarty, 453 U.S. 210, 216 (1981).
107. CAL. CIV. CODE § 4803 (West Supp. 1981) (quasi-community property is that property acquired by the spouse when domiciled elsewhere which would have been deemed community property had it been acquired while the spouse was domiciled in California).
108. McCarty v. McCarty, 453 U.S. 210, 211 (1981).
109. *Id.* at 218-19.
110. *Id.* at 210-11.
111. *Id.*
112. *Id.* at 223-24. The Supreme Court cites a quote as support for its decision: "Historically, military retirement pay has been a *personal entitlement* payable to the retired member himself so long as he lives." *Id.* at 224 (emphasis added). It should be noted that this quote was stated in the context of discussing survivor plan arrearages, not military retirement pay per se. *See* S. REP. NO. 1480, 90th Cong., 2d Sess. 6, *reprinted in* 1968 U.S. CODE CONG. & AD. NEWS 3294, 3300.
113. 10 U.S.C. § 2771 (1976).
114. McCarty v. McCarty, 453 U.S. 210, 226, 232 (1981).
115. *Id.* at 232.
116. *Id.* at 234.
117. *Id.*
118. *Id.*

feared that servicemen would be discouraged from setting aside portions of their retirement pay as an annuity if an ex-spouse were permitted a paramount interest to that of a widow and surviving children.[119] In conclusion, the Court stated that, as Congress had chosen not to speak on this issue,[120] any conflict between community property rights and the federal military retirement system was insufficient to outweigh the threat of grave harm to clear and substantial federal interests.[121] If not preempted, the Court believed that states would divide military retirement pay, frustrating what the Court considered clear congressional objectives.[122]

B. Deviation from Precedent

Traditionally, questions relating to family relationships and property law have been recognized as matters of state concern and were consistently left to the authority of each individual jurisdiction absent the clearest direction from Congress to the contrary.[123] In *McCarty,* the Supreme Court deviated from precedent by interpreting the silence of Congress as indicative of an intent to preempt states from determining the relative property rights of their citizens upon divorce.[124]

Only five previous Supreme Court decisions effectively preempted state community property law.[125] Each of these cases involved specific statutes containing clear statements of congressional intent. *McCune v. Essig*[126] involved the Homestead Act where Congress had clearly stated that a homesteader's widow was to receive the husband's interest

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119. *Id.* at 233.

120. Congress has passed legislation directing the recognition of community property law when dealing with Civil Service retirement benefits, 5 U.S.C. § 8345(j)(1) (1976 & Supp. II 1978), and Foreign Service retirement benefits, 22 U.S.C. § 4054 (Supp. IV 1980). The Court interpreted Congressional inaction in the area of military retirement pay as indicative of its personal nature. McCarty v. McCarty, 453 U.S. 210, 215 (1981).

121. McCarty v. McCarty, 453 U.S. 210, 235-36 (1981).

122. Congressional power to rule on military retirement pay is granted through the U.S. CONST. art. I, § 8, cls. 12-14(9). It includes the power "to raise and support Armies," "to provide and maintain a Navy," and to make rules for the governing and regulation of land and naval forces. *Id.*

123. McCarty v. McCarty, 453 U.S. 210, 237 (1981) (Rehnquist, J., dissenting); Alessi v. Raybestos Manhatten Inc., 450 U.S. 906, 911 (1981); United States v. Yazell, 382 U.S. 341, 352 (1966); *In re* Burris, 136 U.S. 586, 594 (1890); Buechold v. Urtiz, 401 F.2d 371, 372 (9th Cir. 1968); Stone v. Stone, 450 F. Supp. 919, 921 (N.D. Cal. 1978); I. BAXTER, MARITAL PROPERTY § 11.2 (Supp. 1980); Reppy, *Community and Separate Interests in Pensions and Social Security Benefits After Marriage of Brown and ERISA,* 25 U.C.L.A. L. REV. 417, 483 (1978); Note, *The Federal Common Law,* 82 HARV. L. REV. 1512 (1969).

124. McCarty v. McCarty, 453 U.S. 210, 236-38 (1981) (Rehnquist, J., dissenting).

125. Hisquierdo v. Hisquierdo, 439 U.S. 572 (1979); Yiatchos v. Yiatchos, 376 U.S. 306 (1964); Free v. Bland, 369 U.S. 663 (1962); Wissner v. Wissner, 388 U.S 655 (1950); McCune v. Essig, 199 U.S. 382 (1905).

126. 199 U.S. 382 (1905).

in his land.[127] In *Wissner v. Wissner*[128] it was held that Congress had spoken with "force and clarity" in the National Life Insurance Act of 1940,[129] wherein a retired military member was given the right to designate the beneficiary of his insurance policy and these payments were protected from creditors, levies, seizures or attachments under any legal or equitable proceeding.[130] In both *Yiatchos v. Yiatchos*[131] and *Free v. Bland*[132] the statute at issue specifically stipulated that one co-owner of United States Savings Bonds became the sole owner upon the other's death.[133] In the most recent case, *Hisquierdo v. Hisquierdo,*[134] the Supreme Court held that sections of the Railroad Retirement Act clearly conflicted with the community property laws of the state of California.[135]

The Supreme Court in *McCarty* relied heavily upon the *Hisquierdo* decision. Both *McCarty* and *Hisquierdo* involved the division of retirement benefits upon divorce in community property jurisdictions, and in both the Court expressed the fear that if retirement benefits were to be reduced upon divorce then employees would prolong employment in lieu of retiring.[136] Although there are similarities, the two cases can be distinguished based upon differences in the applicable federal statutes. In *Hisquierdo* the Supreme Court established a test to determine whether federal law preempted state autonomy in the area of family law: "On the rare occasion where state family law has come into conflict with the federal statute, this Court has limited review under the Supremacy Clause to a determination of whether Congress has positively required by direct enactment that state law be preempted."[137] Accordingly, throughout the *Hisquierdo* opinion, the

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127. *Id.* at 384.
128. 388 U.S. 655 (1950).
129. 38 U.S.C. § 802 (1976).
130. Wissner v. Wissner, 388 U.S. 655, 659 (1950).
131. 376 U.S. 306 (1964).
132. 369 U.S. 663 (1962).
133. Yiatchos v. Yiatchos, 376 U.S. 306 (1964) (concerned regulations found in 31 U.S.C. § 315.66 (1976)); Free v. Bland, 369 U.S. 663 (1962) (concerned regulations found in 31 U.S.C. § 257(c)(a) (1976)).
134. 439 U.S. 572 (1979).
135. *Id.* at 581. The Railroad Retirement Act provides in part:

> Notwithstanding any other law of the United States, or of any state, territory, or the District of Columbia, no annuity or supplemental annuity shall be assignable or be subject to any tax or garnishment, attachment, or other legal process under any circumstances whatsoever, nor shall the payment thereof be anticipated . . . .

45 U.S.C. § 231(m) (1976). The Court also relied upon 45 U.S.C. § 231(d)(c)(3) which reads in part, "[t]he entitlement of a spouse of an individual to an annuity . . . shall end on the last day of the month preceding the month . . . the spouse and the individual are absolutely divorced . . . ." *Id.*
136. *Compare* McCarty v. McCarty, 453 U.S. 210, 235 (1981) (fear expressed in regard to military retirees) *with* Hisquierdo v. Hisquierdo, 439 U.S. 572, 585 (1979) (fear expressed in regard to railroad retirees).
137. Hisquierdo v. Hisquierdo, 439 U.S. 572, 581 (1979).

Court repeatedly stressed that its holding was based upon the clear and deliberate intent of Congress as enunciated in the Railroad Retirement Act.[138] This test directly followed precedent,[139] yet in *McCarty,* the Supreme Court could find no similar direct expression of legislative purpose in the legislation concerning military retirement pay. Consequently, the Court resorted to an interpretation of legislative history to reach the conclusion that Congress intended military retirement pay to be a personal entitlement.[140] However, the term "personal entitlement" was found in a congressional discussion on specific military annuity plans, not on the overall military retirement pay system.[141] It is, therefore, questionable whether the Court's conclusion was "positively required by direct enactment" so as to justify preempting the states' normal autonomy in the domestic relations of their citizens.

C. *Effect of* McCarty

Although the Supreme Court only ruled on the preemption of community property law in *McCarty,* the decision was equally applicable to common law jurisdictions.[142] For example, in *Hill v. Hill,*[143] the Court of Appeals of Maryland, relying on *McCarty,* held that military retirement pay is not marital property subject to division upon divorce.[144] In *Hill,* the court recognized that the federal preemption issue could not depend on the doctrines applied in any individual state.[145] The legitimacy of the Maryland court's decision is further confirmed by the fact that several common law cases in which the Supreme Court had granted certiorari were vacated and remanded back to the state courts for further consideration in light of the *McCarty* decision.[146]

The Supreme Court's failure to address the issue of retroactivity, resulted in disagreement among state courts as to whether previously distributed military retirement pay was affected by the *McCarty* decision.[147] In *In re Marriage of Fellers*[148] the California appellate court refused to reopen a 1977 judgment dividing the husband's military retirement pay, holding that to rule otherwise:

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138. *Id.*; *see supra* note 135.
139. *See supra* note 125.
140. McCarty v. McCarty, 453 U.S. 210, 228 (1981).
141. *See supra* note 112.
142. *See In re* Marriage of Jones, 309 N.W.2d 457 (Iowa 1981); Hill v. Hill, 47 Md. App. 460, 424 A.2d 783 (1981); *see also* 2 EQUITABLE DISTRIBUTION REP. (Panel) § 8, at 99 (Feb. 1982).
143. 47 Md. App. 460, 424 A.2d 783 (1981).
144. *Id.* at 469, 424 A.2d at 785.
145. *Id.*
146. Milhan v. Milhan, 453 U.S. 918 (1981); Miller v. Miller, 453 U.S. 918 (1981).
147. *See* Erspan v. Badgett, 659 F.2d 26 (5th Cir. 1981); Erbe v. Eady, 406 So.2d 936 (Ala. App. 1981); *In re* Marriage of Fellers, 125 Cal. App. 3d 254, 178 Cal. Rptr. 35 (1981); *Ex parte* Acree, 623 S.W.2d 810 (Tex. App. 1981); Braden v. Reno, 8 FAM. L. REP. (BNA) 2041 (Idaho Dist. Ct. Nov. 3, 1981).
148. 125 Cal. App. 3d 254, 178 Cal. Rptr. 35 (1981).

> [W]ould flaunt the rules of res judicata, upset settled property distributions on which parties have planned their lives and unsettle judgments entered as long as forty years ago. The consequences would be devastating, not only from the standpoint of the litigants but in terms of the workload of the courts.[149]

The Alabama and Idaho courts similarly opted for prospective rather than retroactive application of *McCarty.*[150] However, in *Ex parte Buckhanan*[151] and *Ex parte Acree,*[152] the Texas courts ruled that *McCarty* relates back to the time when Congress first enacted the Military Retirement Pay Act, reasoning that the Supreme Court did not preempt state court decisions but merely "considered, determined, and announced what Congress had already done."[153] These decisions were doubly alarming in light of the fact that Texas is the only community property state that does not award alimony or spousal support.[154] Hence, the American Bar Association noted that, unless Congress enacts legislation to effectively overrule *McCarty,* Texas would have to "pass alimony statutes or else become a dumping ground for the nations's indigent military ex-wives."[155]

As yet, however, the Supreme Court has not prohibited state courts from considering the retired member's pay as a relevant factor in distributing other marital assets or in determining the retiree's ability to pay alimony or child support.[156] *McCarty* merely mandated that military retirement pay could not be considered as either community or marital property in allocating marital assets.[157] Nevertheless, the Supreme Court in *Ridgway v. Ridgway*[158] utilized the *McCarty* ruling

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149. *Id.* at 257, 178 Cal. Rptr. at 37.
150. Erbe v. Eady, 406 So.2d 936 (Ala. App. 1981); Braden v. Reno, 8 FAM. L. REP. (BNA) 2041 (Idaho Dist. Ct. Nov. 3, 1981).
151. 626 S.W.2d 65 (Tex. 1981).
152. 623 S.W.2d 810 (Tex. App. 1981).
153. *See id.* at 812.
154. TEX. FAM. CODE ANN. tit. 1, § 3.59 (Vernon Supp. 1982). However, when agreements or contracts to make support payments after divorce are entered into, they will be held enforceable as any other obligation, so long as the payments are referable to property apportioned by a court. Myrick v. Myrick, 601 S.W.2d 152, 153 (Tex. Civ. App. 1980); Strader v. Strader, 517 S.W.2d 905, 908 (Tex. Civ. App. 1979); Benedict v. Benedict, 542 S.W.2d 692, 699 (Tex. Civ. App. 1976).
155. *Uniformed Services Former Spouses Protection Act: Hearings Before the Subcomm. on Manpower and Personnel of the Comm. on Armed Services, United States Senate, on* S. 1453, S. 1648 *and* S. 1814, 97th Cong., 1st and 2d Sess. (statement of Robert D. Arenstein, member of the Exec. Comm. of the N.Y. State Bar's Family Law Section; Chairman, Comm. on Interstate and Fed. Support Laws and Procedures, on behalf of the Am. Bar Ass'n) (unpublished testimony, available from the Senate Documents Room for the Comm. on Armed Services); *see infra* notes 209-23 and accompanying text.
156. *See* Higgens v. Higgens, 408 S.W.2d 731 (Fla. 1982); *In re* Marriage of Jones, 309 N.W.2d 457 (Iowa 1981); *In re* Marriage of Bedwell, 626 S.W.2d 455 (Mo. 1981).
157. McCarty v. McCarty, 453 U.S. 210, 228 (1981).
158. 454 U.S. 46 (1981).

as precedent in what appears to be a trend toward a further limiting of the right of former military spouses.

As part of a divorce decree, and in accordance with the separation agreement, Richard Ridgway, a career sergeant in the Army, had been ordered to keep his military life insurance policy in force for the benefit of his three children.[159] Less than four months after the divorce, he remarried and designated his new wife as sole beneficiary on that same policy.[160] As a consequence of the *Hisquierdo* and *McCarty* precedent, the Court reversed the Supreme Judicial Court of Maine's ruling that Ridgway's beneficiary change superseded the earlier actions of the state divorce court.[161] The United States Supreme Court found congressional intent to preempt state action in the federal statute provisions granting an insured military member the freedom to designate any person as a beneficiary[162] and precluding creditor attachment of the proceeds.[163] After *McCarty* and *Ridgway,* and before congressional action, it was arguable that no award of military benefits upon divorce would be enforceable, even if voluntarily agreed upon.[164]

Commentators also expressed concern that the *McCarty* Court's preemption theories would be extended to the Employee Retirement Income Security Act (ERISA).[165] ERISA is a comprehensive federal statute covering all privately funded deferred-benefit plans for those people engaged in interstate commerce[166] and was enacted for the purpose of ensuring the protection, well-being and security of those workers and their families who had been promised retirement benefits.[167] Based on this purpose, however, and the fact that ERISA does not expressly provide for federal preemption, it is unlikely that the *McCarty*

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159. *Id.* at 48.

160. *Id.* Sergeant Ridgway changed the policy's beneficiary designation to one directing that its proceeds be paid as specified "by law." Under statutory prescription, the proceeds would be paid to his "widow," that is, his "lawful spouse . . . at the time of his death." 38 U.S.C. § 765(7) (1976).

161. Ridgway v. Ridgway, 454 U.S. 46, 63 (1981).

162. 38 U.S.C. § 770(a) (1976).

163. *Id.* § 770(g).

164. Am. Bar Ass'n, McCarty v. McCarty: A Possible Nightmare for All Non-Employee Spouses in the 1980's 12 (Feb. 1982) (unpublished manuscript, available from the Am. Bar Ass'n).

165. Foster & Freed, *McCarty v. McCarty, Farewell to Alms?,* N.Y.L.J., July 31, 1981, at 1, col. 1; *see* I. BAXTER, MARITAL PROPERTY § 11.2, at 35 (Supp. 1980); Reppy, *Learning to Live with Hisquierdo,* 6 COMM. PROP. J. 5, 18-19 (1979); Reppy, *Community and Separate Interests in Pensions and Social Security Benefits After Marriage of Brown and ERISA,* 25 U.C.L.A. L. REV. 417, 511-27 (1978).

166. *See* 29 U.S.C. § 1001(a) (1976); *see also* Allessi v. Raybestos-Manhatten Inc., 450 U.S. 906 (1981); American Telephone and Telegraph Co. v. Merry, 592 F.2d 118, 120 (2d Cir. 1979); Reppy, *Community and Separate Interests in Pensions and Social Security Benefits After Marriage of Brown and ERISA,* 25 U.C.L.A. L. REV. 417, 511 (1978); Solomon, *Beyond Preemption: Accomodation of the Non-employee Spouse's Interest Under ERISA,* 31 HASTINGS L.J. 1021, 1025 (1980).

167. Allessi v. Raybestos-Manhatten Inc., 450 U.S. 906 (1981); American Telephone and Telegraph Co. v. Merry, 592 F.2d 118, 120 (2d Cir. 1979).

decision would provide adequate precedent for preempting divorce courts from distributing ERISA benefits according to state law.[168] Furthermore, unlike military retirement pay, ERISA is merely the regulation of private pension programs by federal law.[169] Moreover, state decisions since *McCarty* have unanimously adhered to prior rulings, holding private pensions divisible as marital property upon divorce.[170]

D. Support for the McCarty *Decision*

"The wife of a serviceman does not work for his service — she works for him,"[171] claims John P. Sheffey, Executive Vice President of the National Association for Uniformed Services (NAUS). NAUS and a number of other military organizations[172] gave the *McCarty* decision its greatest support. Although these proponents recognize that a nonmember spouse's contributions to a military marriage may impose a tremendous obligation on the serviceman rather than the government, they asserted that fulfilling that obligation rests with the serviceman only.[173]

The defenders of *McCarty* claim that it is the serviceman alone who earns the military retirement pay by bearing the hardships and dangers of a military career and enduring the mud and cold of field operations, confinements in battleships, dangers of flight and possible loss of life or limb in battle or training exercises.[174] In further support of their position, the proponents of *McCarty* offer the retired serviceman's subjectivity to active recall and disciplinary action under the Military Code of Justice.

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168. Allessi v. Raybestos-Manhatten Inc., 450 U.S. 906 (1981); Cody v. Reicker, 594 F.2d 314 (2d Cir. 1979); Provience v. Valley Clerks Trust Fund, 509 F. Supp. 388 (E.D. Cal. 1981); Ohm v. Ohm, 49 Md. App. 392, 431 A.2d 1371 (1981).
169. Hisquierdo v. Hisquierdo, 439 U.S. 572, 590 n. 24 (1979).
170. *See* Deering v. Deering, 292 Md. 115, 127, 437 A.2d 883, 889, 890 (1981); Kikkert v. Kikkert, 177 N.J. Super. 471, 427 A.2d 76, 79 (1981).
171. *Uniformed Services Former Spouses Protection Act: Hearings Before the Subcomm. on Manpower and Personnel of the Comm. on Armed Services, United States Senate, on* S. 1453, S. 1648 *and* S. 1814, 97th Cong., 1st and 2d Sess. 76 (1981-82) (statement of John P. Sheffey, Exec. V.P., Nat'l Ass'n for Uniformed Services (NAUS)) [hereinafter cited as *Senate Hearings*].
172. In Nov. 1980, The Retired Officer's Association joined with six other military oriented associations in filing an amicus curiae brief with the Supreme Court of the United States in support of Col. McCarty. The six were: Non-Commissioned Officers Ass'n, Air Force Sergeants Ass'n, Fleet Reserve Ass'n, Reserve Officers Ass'n, NAUS, and Marine Corps League; *see also Senate Hearings, supra* note 171, at 69 (statements of Capt. Henry S. Palau, U.S. Navy, Retired, Deputy Director for Legislative Affairs, Retired Officers Ass'n).
173. *Senate Hearings, supra* note 171, at 76 (statement of John P. Sheffey, Exec. V.P., NAUS).
174. *See id.* at 76 (statement of John P. Sheffey, Exec. V.P., NAUS); at 70 (statement of Capt. Henry S. Palau, U.S. Navy, Retired, Deputy Director for Legislative Affairs, Retired Officers Ass'n); at 85 (statement of C.A. "Mack" McKinney, Sergeant Major, USMC Retired, Senior V.P. for Gov't Affairs, Non-Commissioned Officers Ass'n).

McCarty supporters have voiced the fear that, if states were free to divide military retirement pay, potential enlistees, recognizing the possibility of transfer to such states, would be dissuaded from entering the service.[175] In a letter often cited by *McCarty* advocates, a serviceman decries the unjust treatment he received when his wife obtained a divorce in a no-fault community property state while he was confined to base.[176] Between the attorney's fees and property judgment awarded to his ex-wife, which included an equal division of his retirement pay, he claims he was "cleaned out."[177] Thus, the concern of *McCarty* proponents is not only based on the fact that a serviceman has no choice as to where he may be transferred, but also that his lack of mobility may prevent him from adequately defending his rights in the state his wife chooses to obtain a divorce.[178]

Proponents cite the average age of a divorced woman, after ten years of marriage, as between thirty to thirty-five years old.[179] Based on this statistic, they contend that no justification exists for dividing retirement pay between a serviceman and his young ex-spouse who is normally still capable of establishing her own profitable career.[180] Moreover, supporters believe that alimony and social security benefits are sufficient to adequately compensate the nonmember ex-spouse.[181] An award of military retirement pay upon divorce is viewed as a luxury, not a necessity.

E. Views Against the McCarty *Decision*

Thus far, the majority of responses to this Supreme Court decision, including that of the American Bar Association[182] and the Department of Defense,[183] have been negative.[184] Perhaps the strongest

175. *Id.* at 73 (statement of Capt. Henry S. Palau, U.S. Navy, Retired, Deputy Director for Legislative Affairs, Retired Officers Ass'n).
176. *Id.* at 76, 77 (statement of John P. Sheffey, Exec. V.P., NAUS); *see also Hearings, supra* note 63, at 87 (statement of John P. Sheffey, Exec. V.P., NAUS).
177. *Senate Hearings, supra* note 171, at 76 (statement of John P. Sheffey, Exec. V.P., NAUS).
178. *Id.* at 76, 78, 79 (statement of John P. Sheffey, Exec. V.P., NAUS); *see id.* at 73 (statement of Capt. Henry S. Palau, U.S. Navy, Retired, Deputy Director for Legislative Affairs, Retired Officers Ass'n).
179. *Id.* at 79 (statement of John P. Sheffey, Exec. V.P., NAUS).
180. *Id.* at 80-81 (statement of John P. Sheffey, Exec. V.P., NAUS); at 183 (statement of Lt. Gen. Andrew P. Losue, U.S. Air Force, Deputy Chief of Staff for Manpower and Personnel, Headquarters, U.S. Air Force).
181. *Id.* at 44 (statement of R. Dean Tice, Lt. Gen., U.S. Army, Deputy Assistant Secretary of Defense for Military Personnel and Force Management); at 83 (statement of C.A. "Mack" McKinney, Sergeant Major, USMC Retired, Senior V.P. for Gov't Affairs, Non-Commissioned Officers Ass'n).
182. *Id.* at 105 (panel presentation on behalf of the American Bar Ass'n: Stanford E. Lerch, Chairman, Section of Family Law; Michael E. Barber, Council Member of Family Law; Robert D. Arenstein, Chairman, Comm. on Interstate and Fed. Support Laws and Procedures, Section of Family Law).
183. *See id.* at 139 (statement of Hon. Lawrence J. Korb, Assistant Secretary of Defense (Manpower Reserve Affairs and Logistics)).
184. *Id.* at 50 (statements of Rosemary Locke, Legislative Chairman, Nat'l Military

opposition emanates from the many women with the potential to be detrimentally affected by the decision. This is evidenced by the fact that the membership of Ex-Partners of Servicemen (Women) For Equality (EXPOSE), formed in May 1980 to fight the injustices accorded military ex-spouses,[185] grew from ten to two thousand in less than one year after the *McCarty* decision.[186] While proponents of *McCarty* cite divorce statistics based on the nation as a whole, critics of the decision cite similarly biased, but perhaps more appropriate, statistics based on the average member of EXPOSE.[187] The composite of this person is a fifty-two-year-old woman who was divorced at age forty-seven. She spent twenty of her twenty-five years with her husband in the military, moving twelve times and raising two children.[188] The experiences of these women provide *McCarty* adversaries with their greatest justification for challenging the Supreme Court's decision.

It is asserted that a spouse's entitlement to military retirement pay would strengthen rather than weaken the armed services.[189] The nonmember spouse plays an integral role in the military community,[190] critics claim, not simply working for her husband, but for the betterment of the armed services as well.[191] Opponents of *McCarty* believe

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Wives Ass'n (NMWA); Suzanne Davis, Chairman, Divorce Study Group, NMWA); *e.g., ABA Family Law Section Hears about Practice Improvement Strategies,* 7 FAM. L. REP. (BNA) 2653 (1981); Quinn, *A Housewife's Lot,* NEWSWEEK (Sept. 14, 1981); Mann, *Fair,* Washington Post, Sept. 25, 1981 at B1, col. 1; Garment, *Bills Coming Due, Military Ex-Wives Present Theirs,* Wall St. J., Aug. 21, 1981 at 18, col. 3; Crawley, *Former Military Wives Fight for Their Benefits,* Chicago Tribune, Aug. 16, 1981, § 3, at 1, col. 1; Foster & Freed, *McCarty v. McCarty, Farewell to Alms?,* N.Y.L.J., July 31, 1981 at 1, col. 1; Washington Post, July 9, 1981 (Va. Weekly), at 5 (quote of Nancy Abell, Pres. of Ex-Partners of Servicemen (Women) for Equality (EXPOSE)).

185. EXPOSE, Newsletter (Sept. 1981) (available from EXPOSE, P.O. Box 3269, Falls Church, Va. 22043).

186. *Id.*

187. *Senate Hearings, supra* note 171, at 61 (statements of Nancy Abell, Pres. EXPOSE; Shirley Taft); *see also* EXPOSE, Statistics (available from EXPOSE, P.O. Box 3269, Falls Church, Va. 22043).

188. *See* authorities cited *supra* note 187.

189. *Senate Hearings, supra* note 171, at 50 (statements of Rosemary Locke, Legislative Chairman, NMWA; Suzanne Davis, Chairman, Divorce Study Group, NMWA).

190. *Id.*

191. *Id.* at 54-58 (prepared statement of Suzanne Davis, Chairman, Divorce Study Group, NMWA). This testimony, offered on behalf of NMWA, cites numerous reports which support this view. For example, General R. H. Barrows, Commandant of the Marine Corps, in *Marine Corps Family Service Program Manual* (Dec. 28, 1979) is quoted as stating: "The fact is that the well-being and quality of life of our marine corps family contributes directly to our readiness." A quote is reported from *The Navy Leaders Family Manual,* which explains that "Many factors contribute to satisfaction with the Navy. Often mentioned are a sense of mission, the feeling that good work is appreciated, and a belief that the family's future is provided for." Furthermore, a recent study by Dr. Eli Brejer, Chief of Psychiatry Service at the Naval Hospital in Beaufort, S.C., reported in *Military Family,* (Mili-

that a young wife weighing her future as a military partner will surely think twice about selecting the military as a way of life when she realizes that the government does not attach any worth to her contributions.[192]

One of the gravest problems faced by the former nonmilitary spouse arises as a direct result of the extreme mobility of the military family. The spouse is virtually incapable of acquiring any marketable job skills because she is forced to move an average of once every two and one-half years.[193] Even if she is able to obtain a career promotion, a new location "inevitably" results in a return to an entry level position.[194] Not only is she denied the reward of a successful career, but those job benefits requiring longevity, such as pensions, are effectively denied her.[195]

Normally, the sacrifices endured by the military family are recompensed by the many benefits received, the most treasured of which is military retirement pay.[196] In most cases, this military benefit also constitutes the most valuable marital asset.[197] *McCarty,* however, prohibited the division of retirement pay upon divorce, thus leaving the former spouse with nothing to compensate her for the years of service and sacrifice to her husband's military career.[198] Opponents view this as the ultimate inequity of the *McCarty* ruling. The ex-wife of a serviceman is often left with no marketable skills and, consequently, extremely limited employment opportunities.[199] The military member,

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tary Family Resource Center of YMCA) is cited as showing that "The effects on children of the father's absence in large measure reflects the mother's adjustment to her husband's absence . . . . She should be prepared to involve herself in her son's activities to the best of her ability. In so doing, the mother is expanding her parental role into a dual role, being both a mother and to a large extent a father to the children." *Senate Hearings, supra* note 171, at 54-58.

192. *Senate Hearings, supra* note 171, at 58 (prepared statement of Suzanne Davis, Chairman, Divorce Study Group, NMWA); *Hearings, supra* note 63, at 40 (quote of Nancy Abell, Pres. of EXPOSE).

193. *Senate Hearings, supra* note 171, at 54 (prepared statement of Suzanne Davis, Chairman, Divorce Study Group, NMWA); *Hearings, supra* note 63, at 22 (statement of Hon. Patricia Schroeder, Rep. from Colo.).

194. *Senate Hearings, supra* note 171, at 54 (prepared by Suzanne Davis, Chairman, Divorce Study Group, NMWA, this was a quote from a letter received from the wife of an Air Force officer).

195. *Id.* at 51 (statements of Rosemary Locke, Legislative Chairman, NMWA; Suzanne Davis, Chairman, Divorce Study Group, NMWA); *Hearings, supra* note 63, at 22 (statement of Hon. Patricia Schroeder, Rep. from Colo.); at 51 (written statement of Hon. Kent R. Lance, Rep. from Texas).

196. *Hearings, supra* note 63, at 25-31 (letters introduced by Hon. Patricia Schroeder, Rep. from Colo.); at 122 (statement of Dorothy Norris Pair); CONG. REC. E3451 (daily ed. July 14, 1981) (statement of Hon. Patricia Schroeder, Rep. from Colo.).

197. *See* authorities cited *supra* note 196.

198. *Hearings, supra* note 63, at 25-31 (letters introduced by Hon. Patricia Schroeder, Rep. from Colo.); CONG. REC. E3451 (daily ed. July 14, 1981) (statement of Hon. Patricia Schroeder, Rep. from Colo.).

199. *Hearings, supra* note 63, at 73 (statement of Hon. Patricia Schroeder, Rep. from Colo.).

on the other hand, normally retires with a lifetime pension and years of marketable skills which are often employable in a second career that may provide additional retirement benefits.[200]

Although proponents of *McCarty* view alimony and social security benefits as adequate compensation for an ex-wife, opponents realistically point out that only four percent of the nation's four and one-half million divorced women actually receive alimony.[201] Courts are not always willing to award alimony, and in the state of Texas, alimony is expressly prohibited.[202] Moreover, even if alimony is awarded, it generally terminates upon the death of the compensating spouse.[203] Social security benefits are also viewed as insufficient since a former spouse cannot draw upon them until the military spouse retires and begins collecting the social security benefits himself.[204] Hence, should the military member begin another career after retirement and work beyond age sixty-five, his ex-wife would not be entitled to any benefits.[205]

The Department of Defense recognizes its responsibility to military members and their spouses, former spouses, and families.[206] Even some supporters of the *McCarty* decision admit that their wives actually deserve half of their retirement pay.[207] Yet despite the Supreme Court's recognition of the plight of the ex-wife,[208] the Court's holding illustrates that there is a wide chasm between deserving something and actually receiving it.

IV. Congressional Response to *McCarty*

Members of Congress, in reacting to these inequities, have passed a bill which amends Title X of the United States Code and effectively overrides the *McCarty* decision.[209] This law returns jurisdiction to

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200. *Id.*

201. *Senate Hearings, supra* note 171, at 15 (statement of Hon. Mark Hatfield, Sen. from Or.); at 24 (statement of Hon. Patricia Schroeder, Rep. from Colo.); at 62 (statements of Nancy Abell, Pres. EXPOSE; Shirley Taft).

202. TEX. FAM. CODE ANN. tit. 1, § 3.59 (Vernon Supp. 1982); *see* Marin v. Hatfield, 546 F.2d 1230 (5th Cir. 1977). *But see supra* note 154.

203. *See, e.g.,* LaChance v. LaChance, 28 Md. App. 571, 346 A.2d 676 (1975); Simpson v. Simpson, 18 Md. App. 571, 308 A.2d 410 (1973); MD. ANN. CODE. art. 16, § 5 (1957).

204. *Hearings, supra* note 63, at 24 (statement of Hon. Patricia Schroeder, Rep. from Colo.).

205. *Id.*

206. *Senate Hearings, supra* note 171, at 139 (statement of Hon. Lawrence J. Korb, Assistant Secretary of Defense (Manpower Reserve Affairs and Logistics)).

207. *Hearings, supra* note 63, at 96, 104 (statement of Capt. Henry S. Palau, U.S. Navy, Retired, Deputy Director for Legislative Affairs, Retired Officers Ass'n); *see id.* at 104 (statement of C.A. "Mack" McKinney, Sergeant Major, USMC Retired, Senior V.P. for Gov't Affairs, Non-Commissioned Officers Ass'n).

208. McCarty v. McCarty, 453 U.S. 210, 235 (1981).

209. Uniform Services Former Spouses' Protection Act, Pub. L. No. 97-252, 96 Stat. 718 (1982).

state divorce courts, subject to a number of exceptions.[210]

According to the new law, a military couple does not need to be married for any minimum number of years before the state courts can consider the retirement pay as marital property.[211] Furthermore, if the retirement pay is divided upon divorce it is not discontinued upon the remarriage of the nonmember spouse.[212] However, state courts cannot treat retirement pay as property unless jurisdiction over the member is conferred by reason of the member's consent, residence or domicile in the state.[213] A court order will not be effective if the serviceman resides in a state solely because of his military assignment.[214] A serviceman is permitted to voluntarily assign survivors benefits to a former spouse,[215] and the retirement pay may be garnished in an effort to satisfy a court award of property other than retirement pay.[216] Furthermore, those spouses who were married to a serviceman during twenty years of active duty, if they remain unmarried, may continue to receive military health treatment.[217]

In regard to the retroactive effect of the law, Congress has not prohibited the reopening of any cases decided after the date of the *McCarty* ruling.[218] Moreover, the legislative history specifically states that changes made to final court orders, effected in order to implement the holding of the *McCarty* decision, should *not* be recognized.[219] Nevertheless, it is also asserted that courts should not favorably consider reopening those decisions rendered prior to *McCarty* if they did not divide the military retirement pay.[220]

The new law also includes provisions designed to protect the serviceman. For example, award of military retirement pay upon divorce does not create a right, title, or interest in the former spouse which can be sold.[221] A fifty percent limit is placed on the amount of retirement

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210. Letter from Hon. Patricia Schroeder, Rep. from Colo. to general constituents (August 1982) (available from Rep. Schroeder's office).

211. Uniform Services Former Spouses' Protection Act, Pub. L. No. 97-252, § 1408(c)(1), 96 Stat. 718 (1982). However, the law does provide that in order for there to be direct payment from the member's retirement pay by a service finance center to a former spouse, the marriage must have been in existence for at least ten years during the time the member performed military service. *Id.* § 1408(c)(4)(d)(2).

212. *Id.* (c)(4)(d)(4).

213. *Id.* (c)(4)(c).

214. *Id.*

215. *Id.* § 1003(b)(2).

216. *Id.* § 1408(c)(4)(d)(5).

217. *Id.* § 1004(a)(3).

218. *Id.* § 1408(e)(5), (e)(6).

219. H.R. REP. NO. 112, 97th Cong., 2d Sess. 5999-6000, *reprinted in* 1982 U.S. CODE CONG. & AD. NEWS 1571-72.

220. *Id.*

221. Uniform Services Former Spouses' Protection Act, Pub. L. No. 97-252, § 1408(c)(2), 96 Stat 718 (1982).

pay available to satisfy a court order[222] and a court may not direct a serviceman to retire at a particular time to effectuate any award.[223]

V. CONCLUSION

The *McCarty* decision, prohibiting the division of military retirement pay upon divorce, provoked a myriad of emotional and legal reactions. The Supreme Court's unique approach to the issue of federal preemption and the subsequent use of *McCarty* as precedent in *Ridgway* further aggravated the confusion surrounding the division of property in divorce litigation. Now that President Reagan has signed a law which effectively overrides the *McCarty* decision, most of the confusion should be alleviated. However, the effects of the ruling in *McCarty* should not be underestimated or forgotten. Before enactment of the new law, it was written of the Supreme Court's decision that, "the lesson is clear: the spouses of military personnel are not marital partners, rather they are civilian casualties."[224] While the ultimate result of overturning *McCarty* did aid the former spouse in the battle for the recognition of legitimately earned rights to military retirement pay, the fact remains that the Supreme Court misinterpreted congressional silence, which forced military spouses to defend a right that should never have been deprived them. The lesson is indeed clear, there is still a long way to go before a spouse's contribution is fully recognized and peace can finally be declared.

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222. *Id.* § 1408(e)(1).
223. *Id.* § 1408(c)(3).
224. Foster & Freed, McCarty v. McCarty: Farewell to Alms?, N.Y.L.J., July 31, 1981, at 2, col. 4.