Equitable Distribution of Military Pensions? Re-thinking the Uniformed Services Former Spouses Protection Act

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Introduction

The Uniformed Services Former Spouses' Protection Act[1] (FUSFSPA)[2] was passed by Congress in 1982. By the Act,[3] Congress intended to eliminate the effects of the 1981 United States Supreme Court decision in *McCarty v. McCarty,*[4] which prohibited states from dividing military pensions[5] as marital property following divorce.[6] Congress' purpose in enacting FUSFSPA was two-

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1. The Uniformed Services Former Spouses' Protection Act, 10 U.S.C. § 1408 (1988), *amended by* Act of Nov. 5, 1990, Pub. L. No. 101-510 § 555, 104 Stat. 1485 (1990). The statute as it currently reads, in part, is printed in the Appendix.

2. FUSFSPA is the acronym used primarily by courts in California. It is used in this article to differentiate between the federal Uniformed Services Former Spouses' Protection Act and state statutes which grant former spouses of military personnel their rights under the federal act.

3. 10 U.S.C. § 1408 (1988), *amended by* Act of Nov. 5, 1990, Pub. L. No. 101-510, § 555, 104 Stat. 1485 (1990).

4. 453 U.S. 210 (1981). For a discussion of *McCarty*, see *infra* notes 52-57 and accompanying text. For a discussion of FUSFSPA's purpose, see *infra* notes 7-8, 100-01, 107, 111-20 and accompanying text.

5. *Id.* Members of the armed forces are eligible to receive a pension upon retirement from the armed forces provided they have served for a specified period of time. Generally, a service of 20 years is required before a service member is eligible to receive a non-disability military retirement pension. 10 U.S.C. §§ 3911-3929 (1988) (Army); 10 U.S.C. §§ 6321-6332 (1988) (Navy and Marine Corps); 10 U.S.C. §§ 8911-8929 (1988) (Air Force).

The amount of military retirement pay is calculated by taking into account both the length of service and the achieved rank. 10 U.S.C. §§ 3926, 3991 (1988) (Army); 10 U.S.C. §§ 6325-6327 (1988) (Navy and Marine Corps); 10 U.S.C. § 8929 (1988) (Air Force).

6. Currently, all states (except Alabama), the District of Columbia, Puerto Rico, and the Canal Zone recognize or are likely to recognize the division of military pensions as marital property upon divorce. *Uniformed Services Former Spouses' Protection Act Update*, Army Lawyer, June 1989, at 43. Even Alabama courts consider military retired pay in determining alimony obligations. *Id.* Most states also permit division of military pensions before they are vested. *Id. See, e.g.*, Chase v. Chase, 662 P.2d 944 (Alaska 1983), overruling Cose v. Cose, 592 P.2d 1230 (Alaska 1979), *cert. denied*, 453 U.S. 922 (1982) (military retired pay divisible as

fold. First, Congress wanted to return the issue of division of retirement benefits to the states, who are better equipped to deal with matters of family law.[7] Second, Congress felt a need to address particular concerns regarding military families.[8]

A military family moves as often as every twelve to twenty-four months.[9] Military spouses also tend to be responsible for

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marital property upon divorce); DeGryse v. DeGryse, 135 Ariz. 335, 661 P.2d 185 (1983); Young v. Young, 288 Ark. 33, 701 S.W.2d 369 (1986); *In re* Fithian, 10 Cal. 3d 592, 517 P.2d 449, 11 Cal. Rptr. 369 (1974); Gallo v. Gallo, 752 P.2d 47 (Colo. 1988) (vested military retired pay is divisible); Holler v. Holler, 257 Ga. 27, 354 S.E.2d 140 (1987) (court "[a]ssum[ed] that vested and unvested military retirement benefits acquired during the marriage are . . . marital property subject to equitable division. . . ."); Linson v. Linson, 1 Haw. App. 272, 618 P.2d 748 (1981); *In re* Dooley, 137 Ill. App. 3d 401, 484 N.E.2d 894 (1985); *In re* Howell, 434 N.W.2d 629 (Iowa 1989); Jones v. Jones, 680 S.W.2d 921 (Ky. 1984); Swope v. Mitchell, 324 So. 2d 461 (La. 1975); Lunt v. Lunt, 522 A.2d 1317 (Me. 1987); Nisos v. Nisos, 60 Md. App. 368, 483 A.2d 97 (1984) (application of Md. Fam. Law Code Ann. § 8-203(b)(1984), providing that military pensions are to be treated in the same manner as other pension benefits, and that such benefits are marital property under Maryland law); McGinn v. McGinn, 126 Mich. App. 689, 337 N.W.2d 632 (1983); Deliduka v. Deliduka, 347 N.W.2d 52 (Minn. Ct. App. 1984); Powers v. Powers, 465 So. 2d 1036 (Miss. 1985); Coates v. Coates, 650 S.W.2d 307 (Mo. Ct. App. 1983); *In re* Marriage of Kecskes, 210 Mont. 479, 683 P.2d 478 (1984); Taylor v. Taylor, 217 Neb. 409, 348 N.W.2d 887; Castiglioni v. Castiglioni, 192 N.J. Super. 594, 471 A.2d 809 (1984); Walentowski v. Walentowski, 100 N.M. 484, 672 P.2d 657 (1983); Lydick v. Lydick, 130 A.D.2d 915, 516 N.Y.S.2d 326 (N.Y. App. Div. 1987) (suggests military retired benefits divisible); Delorey v. Delorey, 357 N.W.2d 488 (N.D. 1984); Anderson v. Anderson, 13 Ohio App. 3d 194, 468 N.E.2d 784 (1984); Stokes v. Stokes, 738 P.2d 1346 (Okla. 1987); *In re* Manners, 68 Or. App. 896, 683 P.2d 134 (1984); Major v. Major, 359 Pa. Super. 344, 518 A.2d 1267 (1986) (marital property includes nonvested military retired pay); Martin v. Martin, 296 S.C. 436, 373 S.E.2d 706 (S.C. Ct. App. 1988) (vested military retirement benefits are divisible); Cameron v. Cameron, 641 S.W.2d 210 (Tex. 1982); Konzen v. Konzen, 103 Wash. 2d 470, 693 P.2d 97, *cert. denied*, 473 U.S. 906 (1985); Thorpe v. Thorpe, 123 Wis. 2d 424, 367 N.W.2d 233 (Wis. Ct. App. 1985); Parker v. Parker, 750 P.2d 1313 (Wyo. 1988) (marital property includes nonvested military retired pay); Bodenhorn v. Bodenhorn, 567 F.2d 629 (5th Cir. 1978) (military retired pay divisible in the Canal Zone); *but see* Tomlinson v. Tomlinson, 102 Nev. 652, 729 P.2d 1363 (1986) (court notes FUSFSPA but declines to divide retired pay in post-divorce situation involving a decree from a foreign jurisdiction).

7. [W]e should allow the State domestic courts to make all divorce decisions. If we do not adopt this amendment, we are in effect taking the position that the Federal Government is going to make final determinations on what type of judgments come out of divorce courts. I will tell you, that is going to open up a lot of problems and it will be a can of worms.

128 Cong. Rec. 18,334 (July 28, 1982) (statement of Rep. Hance).

8. H.R. Conf. Rep. No. 749, 97th Cong., 2d Sess. 165, *reprinted in* 1982 U.S. Code Cong. & Admin. News 1555, 1570.

9. *Legislation Related to Benefits for Former Spouse of a Military Retiree: Hearings on HR 2817, HR 3677, and HR 6270 Before the Military Compensation Subcomm. of the Comm. on Armed Services*, 96th Cong., 2d Sess. 74 (1982) [hereinafter *House Hearings*]; *see also* 128 Cong. Rec. 18,328 (July 28, 1982) (statement of Rep. Mitchell) (military families move as many as 10 to 12 moves in a 20-year career).

larger than average families.[10] Consequently, upon divorce, former military spouses are less able to make up the loss of support from a military pension. As a result of their frequent relocation and child-bearing patterns, they are also less likely to have access to substantial non-pension marital property,[11] their own social security, or private retirement pensions.[12] In addition, former spouses have little ability to apply the political pressures which might safeguard their rights. Military wives are a highly diverse group of individuals, unified only by their marital status, and therefore politically fragmented and geographically isolated from similarly situated former spouses.

The problem is compounded when one considers the lack of alternatives to "self support," such as earned wages and pension rights of their own, available to military spouses. As of 1983, only 13.9 percent of divorced women received an alimony award, and the mean amount received was only $3,980.[13]

Former military spouses do not fare particularly well when it comes to enjoying an income level adequate to meet their needs. A member poll conducted by Ex-Partners of Servicemen/Women for Equality (EX-POSE)[14] found that the majority of former spouses responding had a monthly income from all sources of less than $1100.[15] The survey showed that 23 percent of EX-POSE's

10. More than 2,900,000 spouses and children of active duty military members exist today and 1,500,000 more are dependents of the military reserves. H.R.J. Res. 566, 101st Cong., 2d Sess., 136 Cong. Rec. 10,349 (1990). In fact, dependents now outnumber military service numbers. *Id.* Gaye Mansell (Forbes) is a striking example of this trend among military families: she was married to Gerald E. Mansell (the military retiree) for 23 years, and they were the parents of six children. *Mansell v. Mansell*, 490 U.S. 581 (1989).

11. *See, e.g., In re* Marriage of Valley, 97 Or. App. 95, 775 P.2d 332 (1989). The parties in that case were frequently relocated and therefore never acquired a home. The district court's *McCarty*-era decree, which was reversed on appeal, awarded the wife $8,000 in marital property while the husband retained a $100,000 military pension. *Id.* at 333.

12. *See infra* notes 132-154 and accompanying text.

13. Bureau of the Census, U.S. Dep't of Commerce, Series P-23, No. 141, *Child Support and Alimony: 1983, Current Population Reports* 4 (1985).

14. Headquartered in Alexandria, Virginia, "EX-POSE is a non-profit, volunteer organization dedicated to achieving equity for the ex-wives of servicemen. . . ." Although they work on behalf of all former spouses, EX-POSE is especially concerned with "the older woman whose primary career in her long-term marriage was that of military wife and homemaker." *What is EX-POSE?*, EX-POSE Membership Application (copy on file with *Law & Inequality*). Twenty-five percent of EX-POSE's members responded to the poll. EX-POSE newsletter, Jan.-Feb. 1989, at 4. The federal government does not gather or maintain official statistics concerning the number of former spouses of military personnel or the average pension awards to former spouses.

15. EX-POSE newsletter, Jan.-Feb. 1989, at 4 (membership survey conducted July-Aug. 1988) (copy on file with *Law & Inequality*).

members live at or below the poverty line.[16]

FUSFSPA, however, contains loopholes[17] which permit retired service personnel to *unilaterally* exclude retirement income from divisible assets. The most damaging of these loopholes is the exclusion of the Veteran's Administration disability pension.[18] This disability pension offsets, rather than augments, a portion of the retirement income,[19] and its exclusion from marital property was solidified in 1989 in *Mansell v. Mansell*.[20] The *Mansell* decision has drastic consequences for former spouses of military personnel. As a result of *Mansell*, former spouses of military personnel are now eligible for less than the statutorily authorized 50 percent of the military spouse's pension.[21]

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16. *Id.*

17. A number of expenses are excluded from the statutory definition of disposable retired pay. 10 U.S.C. § 1408(a)(4) (1988), *as amended by* Act of Nov. 5, 1990, Pub. L. No. 101-510, § 555, 104 Stat. 1485 (1990). *See supra* note 1 and accompanying text.

18. 10 U.S.C. § 1408(a)(4)(B) (1988), *as amended by* Act of Nov. 5, 1990, Pub. L. No. 101-510, § 555, 104 Stat. 1485 (1990).

19. Generally, a military retiree may receive disability payments only to the extent that he or she waives a corresponding amount of his or her retirement pay. 38 U.S.C. § 3105 (1988). For example, if a military retiree is eligible for $1500 per month in retirement pay, and $300 per month in Veteran's Administration disability pay, the retiree must waive $300 of the retirement pay in order to receive the $300 in disability pay.

Where a veteran is "entitled to compensation from both the military [in the form of retirement pay] and the [Veteran's Administration], he [or she] may not collect an amount greater than the larger of the two pensions." Chuck Pardue, *Military Disability in a Nutshell*, 109 Mil. L. Rev. 149, 180 (1985) (emphasis added) (citing I.R.C. § 104 (1954)). The retiree is not required to select compensation from only one of the pensions to which he or she is entitled. Rather, the retiree may receive a portion of his or her compensation from each pension, "provided that the total does not exceed the larger of the two pensions." *Id.* at 180. Therefore, the gross amount of a retiree's military retirement pay will only be augmented by Veteran's Administration disability compensation where the total amount of disability pay exceeds the total retirement pay, i.e., disability compensation is the larger of the two pensions.

20. Mansell v. Mansell, 490 U.S. 581 (1989).

21. Former spouses of military personnel are entitled to up to 50 percent of the military pension under certain circumstances. When they have been married to a military member "for a period of 10 years or more during which the member performed at least 10 years of service creditable in determining the member's eligibility for retired or retainer pay," they may be eligible to receive up to 50 percent of the military spouse's "disposable retired or retainer pay." 10 U.S.C. §§ 1408(d)(2), (e)(1) (1988), *as amended by* Act of Nov. 5, 1990, Pub. L. No. 101-510, § 555, 104 Stat. 1485 (1990). For the current statute, see Appendix. Former spouses who meet this criteria are eligible for direct payments from the federal government, provided they present a state court order granting a portion of the military retiree's disposable income or retainer pay to the Secretary of the relevant military service. *Id.* at § 1408 (d)(1).

Former spouses who were married to a military member less than 10 years, or who were married during a period when the military member performed less than 10 years of service creditable in determining the member's eligibility for retired

This article proposes that FUSFSPA be amended to authorize division of the gross amount of military pensions as marital property upon divorce; that Congress' fiscal concerns, particularly about "double-dipping" can be addressed *without* excluding significant portions of a former spouse's property; and that Congressional objectives, e.g., tax benefits for long-term and partially disabled service retirees, can be achieved where the assessed disability pay does not *exceed* 50 percent of the gross pension amount without excluding a former spouse from retirement pay to which he or she should be entitled.

Section I of this article discusses the origins of the Uniformed Services Former Spouses' Protection Act, the *McCarty* decision,[22] and general trends with respect to divorce, including the divisibility of pensions as marital property. Section II addresses the effect of the *Mansell* decision[23] and offers a critique of the majority opinion in *Mansell*.[24] Section III proposes changes in the Uniformed Services Former Spouses' Protection Act which would restore the pension rights of former military spouses to their pre-*McCarty* state,[25] while achieving the ends Congress sought[26] in enacting FUSFSPA.

I. The Uniformed Services Former Spouses' Protection Act

Congress passed the Uniformed Services Former Spouses' Protection Act in response to two important legal developments. The immediate impetus to the Act was the United States Supreme Court's decision in *McCarty v. McCarty*.[27] The more profound impetus, however, stemmed from a combined social and legal devel-

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pay, may still benefit from FUSFSPA to the extent that their state considers military pensions to be marital property. However, they are not eligible to receive payments directly from the government.

22. McCarty v. McCarty, 453 U.S. 210 (1981).

23. Mansell v. Mansell, 490 U.S. 581 (1989).

24. *Id.*

25. Most state courts did not divide military pensions as marital property prior to the *McCarty* decision. This article assumes that division of military pensions was a natural development in the law. Prior to *McCarty*, nine states and the Canal Zone divided military pensions. Bodenhorn v. Bodenhorn, 567 F.2d 629 (5th Cir. 1978); *In re* Fithian, 10 Cal. 3d 592, 517 P.2d 449, 111 Cal. Rptr. 369 (1974); Linson v. Linson, 1 Haw. App. 272, 618 P.2d 748 (1980); Ramsey v. Ramsey, 96 Idaho 672, 535 P.2d 53 (1975) (over 75 percent of husband's retirement pay was community property of spouse); Swope v. Mitchell, 324 So. 2d 461 (La. 1975); *In re* Weaver, 606 S.W.2d 243 (Mo. Ct. App. 1980); *In re* Miller, 37 Mont. 556, 609 P.2d 1185 (1980); Kruger v. Kruger, 139 N.J. Super. 413, 354 A.2d 340 (1976), *aff'd*, 73 N.J. 464, 375 A.2d 659 (1977); Le Clert v. Le Clert, 80 N.M. 235, 453 P.2d 755 (1969); *In re* Vinson, 48 Or. App. 283, 616 P.2d 1180 (1980);

26. *See supra* notes 7, 8.

27. 453 U.S. 210 (1981).

opment: the staggering increase in divorce rates among the general population, its severe economic impact on former wives, and the states' legislative and judicial responses. *McCarty* would have created much less public outrage had its effect been less widespread.

The "Divorce Revolution": Its Economic Consequences, and Resulting Legal Developments

In the past thirty years, the "institution" of divorce has changed dramatically. Divorce, once a source of scandal and the hallmark of disrepute,[28] particularly for women, is fast becoming a "normal" occurrence. In fact, recent indications show divorce to be almost as common as marriage. In 1985, 2.4 million marriages commenced—and 1.2 million couples divorced.[29] Statisticians currently predict that half of all marriages will end in divorce.[30] While younger couples and individuals who remarry are more likely to divorce,[31] divorce rates are also rising among older Americans with long-term marriages. Between 1980 and 1986, the divorce rate among men between the ages of fifty-five and fifty-nine increased by 10 percent; the rates for men between age sixty and age sixty-four, and over age sixty-five, increased 14 percent and 5 percent respectively.[32] During the same time period, women in the fifty-five to fifty-nine age range experienced an 8 percent increase in the divorce rate, while rates for those ages sixty to sixty-four increased by 4 percent and increased 7 percent for those over

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28. *See* Naomi Gerstel, *Divorce and Stigma*, 34 Soc. Probs. 172 (1987).

29. Bureau of the Census, U.S. Dep't of Commerce, Statistical Abstract of the United States 86 (1990). Preliminary reports estimate that 1,183,000 divorces took place in 1988. *Id.* at 89.

30. *See* Teresa C. Martin & Larry L. Bumpass, *Recent Trends in Marital Disruption*, 26 Demography 37 (Feb. 1989).

There is some debate over the manner in which divorce statistics are reported. Some statisticians now believe that current methods of predicting divorce rates do not adequately account for the number of marriages which do not end in divorce. *See And Divorce Loses: Divorce Rate Lower Than Believed*, Psychology Today, Sept. 1988, at 8.

31. In 1985, divorce rates in the United States were highest for teenage women, and men between the ages of twenty and twenty-four. National Center for Health Statistics, *Advance Report of Final Divorce Statistics, 1985*, 36 Monthly Vital Statistics Rep. 1 (Supp. Dec. 7, 1987), at 3-4. Considering the duration of the marriage, the proportion of divorces was highest at two and three years. *Id.* at 4. Statistics indicate that six out of ten second marriages are likely to end in divorce. Gary N. Skoloff, *Family Law Section Seeks to Educate*, Nat'l L.J., Aug. 6, 1990, at 25.

32. David Larsen, *Late Finale: When Long Marriages End*, L.A. Times, Jan. 25, 1990, at E1, col. 2. Statistics were provided by the National Center for Health Statistics and are a composite of the 31 states which report divorce statistics for older Americans. *Id.*

age sixty-five.[33] Overall, current statistics show a definite increase in divorces for older women.

The rising divorce rate has contributed to a disturbing modern phenomenon: the feminization of poverty. One widely quoted statistic graphically demonstrates the problem: following divorce, women experience a 73 percent decline in their standard of living, while their former husbands experience a 42 percent increase in their standard of living.[34] The number of women who fall into the category of "displaced homemaker"[35] continues to rise with the divorce rate. According to census reports, the number of displaced homemakers increased by over 12 percent between 1980 and 1989.[36] During the same time period, the percentage of adult women classified as displaced homemakers rose from 14.6 percent to 15.8 percent.[37]

Skyrocketing divorce rates have also contributed to another development in divorce law. As divorce became more socially acceptable, states moved to "no fault" divorce, a system in which parties need not allege that one spouse is responsible for the destruction of the marriage.[38]

Ironically, "no fault" divorce has contributed substantially to the feminization of poverty. Women may now have less "bargaining power" when negotiating a divorce, and certainly tend to be much worse off financially following divorce.[39] Women who are single parents are particularly vulnerable. About nine out of ten one-parent families were headed by women in 1987,[40] and more than half of those families were living in poverty.[41] Between 60 and 65 percent of all poor adults are women.[42]

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33. *Id.*

34. Lenore J. Weitzman, Divorce Revolution: The Unexpected Social and Economic Consequences for Women and Children in America 339 (1985).

35. Displaced homemakers are "women who have worked outside the home for a short time or not at all and have dedicated the best years of their lives to supporting their husbands and children." Mary Ann Mason, The Equality Trap 56 (1988).

36. There were 13.9 million "displaced homemakers" in 1980 and 15.6 million in 1989. Tamar Lewin, *Data Showing Rising Plight of Displaced Homemakers*, N.Y. Times, June 2, 1990, at 13, col. 3.

37. *Id.*

38. *See* James B. McLindon, *Separate But Unequal: The Economic Disaster of Divorce for Women and Children*, 21 Fam. L.Q. 351 (1987).

39. *Id.* at 352. *See also* Weitzman, *supra* note 34, at 339. *But see* Jana B. Singer, Divorce Reform and Gender Justice, 67 N.C.L. Rev. 1103, 1105-07 (1989) (inequitable post-divorce property divisions no more common under no-fault laws than under traditional models).

40. Bureau of the Census, U.S. Dep't of Commerce, Series P-23, No. 163, *Changes in American Family Life* 13 (1989).

41. *Id.* at 25.

42. Martha E. Giminez, *The Feminization of Poverty: Myth or Reality?*, 17 Soc. Just. 43, 48 (1990).

Under "no fault" divorce laws, which are normally written in gender-neutral terms, the dissolution of a marriage resembles closely the dissolution of a business partnership. Unfortunately, most courts award women what amounts to substantially less than half of the marital assets.[43] However, because women are now considered "equal" partners despite disparties in resources and earning power, courts are also less likely to award long-term alimony.[44] All divorced women now have the "right" to go out and support themselves alone, even if they have no current job skills, have young children at home, and are unable to afford day care.[45] While wages for women have increased, and women continue gradually to narrow the wage gap, working women still only earn 65 percent of men's wage rates.[46] The wage differential between men and women is naturally greater for those women who remove themselves from the paid labor force to care for homes or families.[47] Women who have contributed to marital assets in the form of homemaking skills are clearly not able to retain their standard of living following divorce. Consequently, older women are particularly vulnerable to the feminization of poverty.

While courts generally do not reward the "non-income producing" contributions of wives with an equal distribution of the marital assets,[48] they are increasingly aware of the economic con-

43. Studies on the economic impact of divorce on women indicate that the no-fault era has resulted in decreases in alimony and child support awards, and that women now receive a smaller share of the family assets and a greater share of the debts. McLindon, *supra* note 38, at 352.

44. Divorce reform beginning in the 1960s emphasized the use of property division rather than alimony as a means of support for the spouse disadvantaged by divorce. Suzanne Reynolds, *The Relationship of Property Division and Alimony: The Division of Property to Address Need*, 56 Fordham L. Rev. 827, 837-39 (1988). Although alimony is now awarded infrequently, the courts' tendency to divide property equally (as opposed to equitably), with little consideration for economic need, has exacerbated the impact of the reform on women. *Id.* at 866, 914.

45. *See* Mason, *supra* note 35, at 53-54.

46. *See id.* at 123-34. Recently, this figure has been estimated to be at 70 percent. *Id.* at 124.

47. *See* Weitzman, *supra* note 34, at 331.

48. This inequity probably occurs more often in non-community property states. However, residence in a community property state provides no guarantee that a former spouse will receive a respectable share of the income-earning spouse's pension, even where the pension is considered under state law to be a community asset of the marriage. *See generally* Rearden v. Rearden, 568 So. 2d 1111 (La. Ct. App. 1990) (District court awarded former spouse five percent of husband's military retirement benefits accumulated while the couple resided in Missouri, an equitable distribution state); Newman v. Newman, 558 So. 2d 821 (Miss. 1990) (wife's claim of property right in former spouse's military retirement pension governed by the law of states of domicile of serviceman during the time he was a member of the armed forces).

tributions[49] of women who do not work outside the home.[50] Consequently, most states regard pensions and other retirement benefits earned by either spouse as marital assets which may be distributed upon divorce.[51]

The McCarty *Decision*

In 1981, the Supreme Court first addressed the question of whether states were permitted to divide military retirement pensions as marital property upon divorce.[52] The Court concluded that state division of military retirement benefits was precluded by the supremacy clause[53] because such division would do "major damage" to "clear and substantial" federal interests.[54] The clear and substantial federal interest identified by the Court was the need to maintain a "youthful and vigorous" military force.[55] The damage to those interests arose because military retirement benefits are used as an incentive in recruitment and re-enlistment drives, and "[t]he value of retired pay as an inducement for enlistment or re-enlistment is obviously diminished to the extent that the service member recognizes that he or she may be involuntarily transferred to a State that will divide that pay upon divorce."[56]

The Court found Congress' expressed intent to preclude the division of military retired pay in the *absence* of language expressly permitting the division of retired pay.[57] Congress promptly "overruled" the Court, creating a statutory right to divide military retirement pay,[58] and placing military retirement benefits in the same position as other federally-paid retirement benefits. Federal Civil Service pensions are currently divisible under state law,[59] as are Foreign Service Pensions,[60] Central Intelligence Agency pensions,[61] and pensions under the Railroad Retirement Act.[62]

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49. Homemakers contribute economically in that they provide services, especially cleaning, cooking and childcare, that otherwise would have to be paid for at significant expense. *See* Mason, *supra* note 35, at 120-22.

50. *See, e.g.*, Steinke v. Steinke, 126 Wis. 2d 372, 381, 376 N.W.2d 839, 844 (1985); *reh'g denied*, 127 Wis. 2d 444, 379 N.W.2d 853 (1986).

51. *See supra* note 6 and accompanying text.

52. McCarty v. McCarty, 453 U.S. 210 (1981).

53. U.S. Const. art. VI, § 2.

54. *McCarty*, 453 U.S. at 220, 236 (quoting Hisquierdo v. Hisquierdo, 439 U.S. 571, 581).

55. *Id.* at 234.

56. *Id.*

57. *See id.* at 237-38 (Rehnquist, J., dissenting).

58. *McCarty* was decided in 1981. Congress passed FUSFSPA in 1982.

59. 5 U.S.C. § 8345(j)(1) (1988).

60. Exec. Order No. 12,145, 44 Fed. Reg. 42,653 (1979).

61. 50 U.S.C. § 403, Title II § 221 (1988).

62. 45 U.S.C. § 231 (1988).

II. The *Mansell* Decision

The Supreme Court revisited the question of dividing military benefits in 1989 in *Mansell v. ansell*.[63] *Mansell* dealt specifically with the divisibility of Veteran's Administration retirement disability benefits,[64] although it has implications for other items excluded from disposable pay. For example, for those divorced before 1991 the following are currently excluded from disposable pay: a) federal income taxes withheld by federal, state, and local governments;[65] b) unpaid federal, state, or local income taxes, or other tax obligations;[66] c) any monies owed by the service member to the federal government;[67] d) child support and maintenance obligations authorized by court order;[68] e) Survivor Benefit Plan[69] fees, where applicable, i.e., when the former spouse is named as the beneficiary of the Survivor Benefit Plan and a portion of the service member's retired or retainer pay is paid to the service

63. Mansell v. Mansell, 490 U.S. 581 (1989).

64. *Id.*

65. 10 U.S.C. § 1408(a)(4)(C) (1988) (amended 1990). Prior to the 1990 amendments, federal income taxes were assessed on the whole amount of the disposable retirement pay, not on the portions "belonging" to the service member or the former spouse. Divorce decrees finalized before 1991 remain subject to the original tax withholding provisions of 10 U.S.C. § 1408(a)(4)(C) (1988). Prior to the 1990 amendments, 10 U.S.C. § 1408 (a)(4)(C) read: " 'Disposable retired or retainer pay' means the total monthly retired or retainer pay . . . less amounts which are . . . properly withheld for Federal, State, or local income tax purposes, if the withholding of such amounts is authorized or required by law and to the extent such amounts withheld are not greater than would be authorized if such member claimed all dependents to which he was entitled. . . ."

66. 10 U.S.C. § 1408(a)(4)(D) (1988). For decrees finalized before 1991, a servicemember's withheld income tax and other tax obligations are deducted from the gross amount of retired or retainer pay. *Id.* They are not considered disposable retired or retainer pay. Therefore, such a service member's tax obligations reduce the proportion of retired or retainer pay available to a former spouse as marital property or in the form of alimony or other support.

The effect of removing portions of retired or retainer pay from disposable retired or retainer pay is discussed in the context of Veteran's Administration disability benefits. *See supra* notes 86-93.

67. 10 U.S.C. § 1408(a)(4)(A) (1988) (amended 1990).

68. 10 U.S.C. § 1408(a)(4)(B) (1988) (amended 1990).

69. The Survivor Benefit Plan (SBP) provides an annuity to the service member's spouse or former spouse after the military spouse dies. *See generally*, H.R. Conf. Rep. No. 352, 98th Cong., 1st Sess. (1983); H.R. Conf. Rep. No. 1080, 98th Cong., 1st Sess. (1983). It ensures that, should the military retiree die before his or her spouse, pension funds will continue to be paid to the beneficiary spouse. *Id.* Retirees are automatically enrolled in the SBP and may not unilaterally opt out of the program. *Id.* However, they may, with the consent and signature of the beneficiary spouse, choose not to continue to receive the SBP. *Id.* A small fee is assessed for those who remain in the program. Following a divorce, a military retiree cannot unilaterally elect not to pay the Survivor Benefit Plan fees when her or his former spouse is the named beneficiary of the plan. *Id.*

member's spouse or former spouse pursuant to a court order;[70] f) court-martial fines and fees;[71] g) and formerly overpayed pension amounts.[72] The disposable retirement pay is thus reduced by the amounts deducted at the point of origination. The former spouse is entitled to up to 50 percent of the *disposable income*, which is the retirement pay minus items deducted at the point of origination.

The Effects of the Mansell *Decision on the Rights of Former Spouses*

While the *Mansell* decision significantly reduces the compensation available to former spouses,[73] it has even wider reaching consequences than first appear. For example, the decision precludes division of the portion of retirement pay waived to accept a disability benefit, whether the disability benefit was assessed before or *after* retirement.[74]

The military disability system makes a number of relevant distinctions between types of disability. Disability which occurs as a result of wartime service is assessed differently than disability which occurs as a result of peacetime service.[75] In addition, Veteran's Administration disability[76] may be assessed for disabilities which occur as a direct result of military service[77] or for pre-existing conditions[78] which are aggravated by military service.[79]

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70. 10 U.S.C. § 1408(a)(4)(F) (1988) (amended 1990) (redesignated (D)).

71. 10 U.S.C. § 1408(a)(4)(B) (1988) (amended 1990).

72. Section 555 of the fiscal 1991 Department of Defense Authorization Bill amended FUSFSPA to assess federal income tax, state income tax, and monies owed the federal government against the non-paying spouse responsible for the assessment and not against the pension as a whole. Act of Nov. 5, 1990, Pub. L. No. 101-510, § 555, 104 Stat. 1485 (1990). Court martial fines and fees remain assessed against the pension as a whole. *Id.* This amendment affects only those former spouses and personnel retiring 90 days after passage of section 555. *Id.*

73. For example, under the Supreme Court's interpretation of FUSFSPA, Gaye Mansell (Forbes) lost "nearly 30 percent of the monthly retirement income she would otherwise have received as community property." *Mansell*, 490 U.S. at 595 (O'Connor, J., dissenting).

74. Mansell v. Mansell, 490 U.S. 581 (1981).

75. Pardue, *supra* note 18, at 165.

76. Veteran's Administration disability is more readily available than regular service disability, and may be "available upon the expiration of . . . term of service without reenlistment or upon retirement. . . . Army disability benefits [on the other hand] are intended only for soldiers whose careers are interrupted by service-incurred or service-aggravated disabilities." Eva Novak, *The Army Physical Disability System*, 112 Mil. L. Rev. 273, 277 (1986).

77. Pardue, *supra* note 19, at 165.

78. Pre-existing conditions are labeled as conditions which "existed prior to service" or EPTS. Novak, *supra* note 76, at 278.

79. *Id.*

Claims for Veteran's Administration disability benefits are normally processed concurrently with retirement from the service.[80] The Veteran's Administration will also periodically review the retiree "to determine whether a change in the extent of disability warrants a change in [disability] rating and benefits."[81]

Military disability in the form of Veteran's Administration disability benefits provides an important source of income for retirees. It is awarded, in part, because of the real and perceived physical hardships of military service. Military disability generally reflects fitness for active duty, and does not necessarily reflect potential disability, if any, in the civilian job force.[82] However, Veteran's Administration disability benefits are adjustable and may take into account the relative fitness of a retiree or other disability recipient to participate in the civilian work force.[83]

The disability benefit offset is also a substantial "perk" of military service. Since the disability generally offsets, but does not augment, the retirement income received directly from the United States government,[84] it does not facially increase a retiree's income. However, a retiree benefits financially from the receipt of the disability offset because the portion of the retirement pay relabeled as disability pay cannot be taxed as income at the federal, state, or local level. Consequently, the retiree's after-tax income will increase even though the total amount of direct pay to which he or she is entitled has not changed.

Davis v. Davis[85] graphically illustrates the problems posed by changes in disability which occur after pensions are divided in divorce settlements. In *Davis*, the military retiree was assessed a 40 percent disability upon retirement, with twenty-six years of service in the military.[86] His retirement pay, based on longevity of service, was 65 percent of his base pay at retirement.[87] He was eli-

80. *Id.* at 283.

81. *Id.*

82. *See* Weberg v. Weberg, 158 Wis. 2d 540 463 N.W.2d 382, 383 (Wis. Ct. App. 1990) (Vietnam-era veteran, with a disability rating of 70 percent, worked for Chrysler Corporation for 10 years after disability retirement). Many, if not most, military retirees seek employment in the civilian work force after separation from the military. Edna J. Hunter, Families Under the Flag: A Review of Military Family Literature 79 (1982).

83. *See* Pardue, *supra* note 19, at 165.

84. *See supra* note 19 and accompanying text.

85. 777 S.W.2d 230 (Ky. 1989).

86. *Id.* at 231.

87. "The percentage multiplier [to determine retired pay] is either the total disability percent rating or 2 1/2 percent of the total years of service. . . ." Dep't of Army, Reg. No. 635-40, app. C-12c, Personnel Separations-Physical Evaluation for Retention, Retirement, or Separation (Dec. 13, 1985 Update) [hereinafter AR 635-

gible to receive 40 percent of base pay as disability compensation.[88] Therefore, he was eligible to receive a total of 65 percent of his base pay,[89] and could elect to receive 40 percent of base pay as disability, leaving 25 percent of base pay to be collected as disposable retirement pay. In the years subsequent to his retirement, however, Mr. Davis's disability rating was increased by the Veteran's Administration from 40 to 80 percent.[90] He remained able to recover 65 percent of base pay as retirement pay. However, the increase in his disability rating meant he was now able to receive 75 percent,[91] the maximum amount allowed, of his base pay at the time of retirement as disability benefits. Davis's former spouse therefore was effectively precluded from receiving any portion of the military pension because the total disability benefit exceeded the total retirement pay.[92]

Veteran's Administration disability benefits are fairly readily available. For example, a retiree with a disability rating of less than 30 percent who has more than twenty years of active service for retirement, or less than twenty years of service and a disability rating of more than 30 percent, will be eligible for Veteran's Administration benefits.[93] Therefore, most career military personnel[94] will be eligible for some Veteran's Administration benefits. Consequently, most former spouses of career military retirees are affected by the *Mansell* decision.

Mansell acknowledges that "disability benefits are exempt from federal, state, and local taxation . . . [and thus] military retirees who waive their retirement pay in favor of disability benefits increase their after-tax income."[95] As a result of *Mansell*, however, military retirees facing division of their pensions upon divorce are able to significantly increase their retirement pay simply by relabeling a portion of that retirement pay and pulling the

40]. The multiplier is then applied to base pay. Retired pay/disability may not exceed 75 percent of base pay at the time of retirement. *Id.*

88. *Id.*

89. *Id.*

90. *Davis*, 777 S.W.2d at 231.

91. The multiplier cannot exceed 75 percent of base pay at the time of retirement. AR 635-40.

92. Note that Davis could have elected to receive 10 percent of base pay as disability, and 65 percent as retirement pay. However, he elected to unilaterally "rename" his retirement pension as disability pay. Nothing in the *Mansell* decision or FUSFSPA prevents a military retiree and his or her former spouse from reaching an agreement which exceeds the statutory guidelines.

93. AR 635-40.

94. Service personnel with 20 or more years of active service are generally considered "career military personnel."

95. *Mansell*, 490 U.S. at 583-84. The Court concluded: "Not surprisingly, waivers of retirement pay are common." *Id.* at 584.

funds from the portion of pay which is labeled "disposable income."

Mansell apparently precludes the division of any of the relabeled retirement pay[96] and permits the military retiree to defeat a court-ordered division of the pension. State court decisions in the pre-*Mansell* era were divided as to whether or not the retired military spouse was entitled to defeat such an award. For example, a California appellate court ruled that it would not permit the military spouse to unilaterally destroy his or her former spouse's marital property rights by opting to receive retirement benefits in the form of disability, rather than longevity, pay.[97] However, another California court reached the opposite result, holding that the federal statute preempted state domestic relations law.[98]

Taking Mansell *to Task: A Critical View of the Majority Opinion*

The Uniformed Services Former Spouses' Protection Act (FUSFSPA) was originally intended to alleviate the hardships imposed on former spouses of military retirees[99] by the *McCarty* decision. Congress enacted FUSFSPA only a year after *McCarty*, and many of its provisions were made retroactive to the day before the decision in *McCarty* was announced.[100] The Court reached its decision in *Mansell* by applying a strict textualist variation of statutory analysis.[101] The court approached the statute by noting that FUSFSPA authorizes state courts to treat "disposable retired or retainer pay" as divisible marital property.[102] The majority's analysis essentially begins and ends with the Act's definition of disposable retired or retainer pay. The term "disposable retired or retainer pay" means the total monthly retired or retainer pay to

96. *See id.*

97. *In re* Marriage of Mastropaolo, 166 Cal. App. 3d 953, 213 Cal. Rptr. 26 (1985).

98. *In re* Marriage of Costo, 156 Cal. App. 3d 781, 203 Cal. Rptr. 85 (1984).

99. Although FUSFSPA is written in gender neutral terms, and presumably applies to the pensions of male and female military retirees, it is clear that Congress was concerned primarily with the plight of former military wives. *Mansell*, 490 U.S. at 593-94 n.18.

100. *McCarty* was decided on June 26, 1981. When passed, FUSFSPA read "[A] court may treat disposable retired or retainer pay . . . after *June 25, 1981*, either as property solely of the member or as property of the member and his spouse . . . ." 10 U.S.C. § 1408(c)(1) (1988) (emphasis added).

101. The Court remarked: "We realize that *reading the statute literally* may inflict economic harm on many former spouses. But we decline to misread the statute in order to reach a sympathetic result when such a reading requires us to do violence to the *plain language* of the statute and to ignore much of the legislative history." *Mansell*, 490 U.S. at 594 (emphasis added).

102. *Id.* at 584.

which a military member is entitled "minus certain deductions," including "any amounts waived in order to receive disability benefits."[103] The court construed the language of the statute to provide that "state courts have been granted the authority to treat disposable retired pay as community property; they have not been granted the authority to treat total retired pay as community property."[104]

The Court's analysis pattern began with the language of the statute and then shifted the burden to appellee, Mrs. Gaye Mansell Forbes, to prove that the Act's legislative history demonstrated that Congress' intent differed from the literal words of § 1408(c)(1).[105] The Court completely ignored the Act's savings clause which provided that:

> Nothing in this section shall be construed to relieve a member of liability for the payment of alimony, child support, *or other payments required by a court order* on the grounds that payments made out of disposable retired or retainer pay under this section have been made in the maximum amount permitted. . . . Any such unsatisfied obligation of a member may be enforced by any means available under law *other than the means provided under this section in any case in which the maximum amount permitted . . . has been paid. . . .*[106]

This clause seems to contemplate judicial discretion in apportioning military retired pay in order to prevent the retiree from unilaterally displacing a former spouse's interest in the marital property.

In addition, the Court focused on the state of the law after *McCarty* and before FUSFSPA, ignoring the fact that most, if not all, of FUSFSPA's provisions were meant to be applied *retroactively* to the day *before* the *McCarty* decision.[107] Instead the Court adopted the position of Major Mansell and the Solicitor General of

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103. *Id.* at 585 (citing 10 U.S.C. § 1408(a)(4)(B) (1988)).

104. *Mansell*, 490 U.S. at 589. The Court acknowledged that Congress contemplated other marital property division schemes. However, the Court addressed the problems proposed by the *Mansell* case solely in terms of community property as the case arose in California, a community property state. *Mansell*, 490 U.S. at 584 n.2.

105. *Id.* at 592.

106. 10 U.S.C. § 1408(e)(6) (1988) (emphasis added). The Court chose to interpret this provision as applying only to the direct payment mechanism included in the statute.

107. The Court said:

> Because pre-existing federal law, as construed by this Court, completely pre-empted the application of state community property law to military retirement pay, Congress could overcome the *McCarty* decision only by enacting an affirmative grant of authority giving the States the power to treat military retirement pay as community property.

Mansell, 490 U.S. at 588.

the United States: that FUSFSPA is only "a partial rejection of the *McCarty* rule that federal law preempts state law regarding military retirement pay."[108]

The Court placed relatively little importance on FUSFSPA's primary purpose: "to eliminate the effect of *McCarty*'s pre-emption holding altogether and to return to the States their authority 'to treat military pensions in the same manner as they treat other retirement benefits.' "[109] The Senate Report on FUSFSPA clearly stated that:

> [T]he primary purpose of the bill is to remove the effect of the United States Supreme Court decision in *McCarty v. McCarty*. . . . The bill would accomplish this objective by permitting Federal, State, and certain other courts, consistent with the appropriate laws, to once again consider military retired pay when fixing the property rights between the parties to a divorce, dissolution, annulment or legal separation.[110]

Furthermore, FUSFSPA was intended to "*remove the federal preemption* 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]."[111]

FUSFSPA recognizes that retired military personnel have the option of receiving a portion of their retirement pension in the form of disability pay.[112] However, this recognition does not preclude a different scheme of division than that promulgated in the *Mansell* decision. FUSFSPA attempts, rather, to reach a "form of remedial legislation which is fair and equitable to both spouses. . . ."[113] Congress apparently wished to provide divorced military retirees access to Veteran's Administration disability ben-

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108. *See id.* It should be noted that the Solicitor General filed two amicus briefs in the *Mansell* case. The first brief, filed before the Court noted jurisdiction, was in support of Mrs. Mansell's position. The Solicitor General abruptly changed his position on the issue and filed a subsequent brief in support of Major Mansell. *Id.* at 588 n.8.

109. *Id.* at 596 (O'Connor, J., dissenting) (quoting S. Rep. No. 502, 97th Cong., 2d Sess. 10, *reprinted in* 1982 U.S. Code Cong. & Admin. News 1596, 1604-05). A number of states divide disability benefits as marital property. *See, e.g.*, Riddle v. Riddle, 566 N.E.2d 78 (Ind. App. 1st Dist. 1991); Powers v. Powers, 779 P.2d 91 (Nev. 1989).

110. S. Rep. No. 502, 97th Cong., 2d Sess. 1, *reprinted in* 1982 U.S. Code Cong. & Admin. News 1596, 1599.

111. S. Rep. No. 502, 97th Cong., 2d Sess. 16, *reprinted in* 1982 U.S. Code Cong. & Admin. News 1596, 1611.

112. This article does not address and is not intended to express a position on the wisdom of providing Veteran's Administration disability to career military service members upon retirement.

113. S. Rep. No. 502, 97th Cong., 2d Sess. 7, *reprinted in* 1982 U.S. Code Cong. & Admin. News 1596, 1601.

efits equal to that enjoyed by their counterparts who either never married or continue to be married.

Congress has traditionally enjoyed the freedom to set or alter military benefits partly because they are perceived by the courts as an integral aspect of achieving military personnel objectives.[114] However, Congress considered and rejected the military's arguments concerning possible detrimental effects on the recruiting and retention of military personnel when they decided to reject *McCarty*. The House, in passing FUSFSPA, noted that "[t]he Department of Defense has not submitted any satisfactory empirical evidence to show that during the period prior to the McCarty [sic] decision, recruiting, retention, and personnel assignments were adversely affected by the application of State domestic relations law."[115] In fact, the legislative record of FUSFSPA indicates that recognition and respect for the role of military spouses as homemakers, mothers, and companions actually enhances national defense.[116] The only factor considered more important in a service member's decision to re-enlist than the amount of pay and immediate benefits is the attitude and support of the service member's spouse.[117]

In reaching the decision in *Mansell*, however, the Supreme Court ignored Congress' rejection of the "military necessity" argument and implied that it was returning to just that analysis.[118] The Court's reluctance to apply well established principles of law to the military, under the premise that the military itself is best suited to regulate such matters, is particularly distressing in light of the limited, and perhaps detrimental, effect on personnel recruitment which might be attributed to limitations on the pension rights of former military spouses. The military, it seems, is entitled to take advantage of the recruiting and retention benefits, made possible by dedicated military spouses without compensating them for their contribution.

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114. *See McCarty*, 453 U.S. 210, 232-35 (1981).

115. 128 Cong. Rec. H18,315 (1982) (statement of Rep. Patricia Schroeder).

116. S. Rep. No. 502, 97th Cong., 2d Sess. 6, *reprinted in* 1982 U.S. Code Cong. & Admin. News 1596, 1601. ("[T]he committee believes that the unique status of the military spouse and that spouse's great contribution to our defense require that the status of the military spouse be acknowledged, supported and protected.") Military family members are considered to accept and to be "devoted to the overall mission of the Department of Defense. . . ." H.R.J. Res. 566, 101st Cong., 2d Sess.; 136 Cong. Rec. H10,349 (1990).

117. *See* Gloria Lauer Grace & Mary B. Steiner, *Wives' Attitudes and the Retention of Navy Enlisted Personnel*, in Military Families 42-54 (Edna J. Hunter & D. Stephen Nice, eds. 1978).

118. *Mansell*, 490 U.S. at 584.

The Case for Former Spouses: Mansell's Inherent Inequality

The military family is a relatively new phenomenon. While the military members in 1891[119] were overwhelmingly single men, the military of today is composed of both men and women,[120] most of whom are married. In fact, 52 percent of all active duty enlisted military personnel and 72 percent of all active duty military officers are married.[121] Dependent military family members currently outnumber uniformed service members.[122]

This change in military demographics led to another development: military divorces. Traditionally the military family has had a much lower divorce rate than civilian families. Many military families are changing, however, just as families in society in general have been changing.[123] Military marriages are subject to the same social forces as civilian marriages. The rapid increase in divorce rates in the last twenty-five years has not bypassed the military family. In fact, the national divorce rate[124] doubled between 1963 and 1975, and peaked in 1981 at 1.21 million divorces.[125] The rising divorce rate has hit military families even harder than civilian families: the divorce rate among veterans is slightly higher than among their civilian counterparts.[126]

Military spouses are subject to stresses which their civilian counterparts rarely face.[127] Military families are subject to frequent relocation to remote and, occasionally, hazardous duty stations. They also face long periods of separation from the military service member. Duty assignments away from home average twenty-five days per year in the United States Air Force.[128] Due to frequent duty assignments, at any given time 15 to 20 percent of military fathers are not living with their families.[129] Consequently, military spouses often spend more time than their civilian

119. The military retirement system was initiated in 1891.

120. *See* 135 Cong. Rec. E2,753-57 (daily ed. July 31, 1989).

121. 133 Cong. Rec. S12,834 (daily ed. Sept. 25, 1987).

122. *See* text accompanying *supra* note 10.

123. Edna J. Hunter, Families Under the Flag: A Review of Military Family Literature 4 (1982).

124. Divorce rate statistics are for all marriages, both civilian and military.

125. Weitzman, *supra* note 34, at xvii.

126. Larry Long, Military Families: Do They Differ From Their Civilian Counterparts 15 (1984) (Center for Demographic Studies, U.S. Bureau of the Census).

127. Florence W. Kaslow & Richard I. Ridenour, The Military Family: Dynamics and Treatment 53 (1984).

128. Dennis K. Orthner, Families in Blue: A Study of Married and Single Parent Families in the U.S. Air Force 43 (1980) (Family Research and Analysis, Inc.).

129. Edna J. Hunter & Melissa A. Pope, Family Roles in Transition: In a Changing Military 11 (1981).

counterparts bearing full responsibility for maintaining the family and home.

The frequent moves and extensive parenting responsibilities of military spouses affects, to a devastating degree, the employment and educational attainment of military spouses. Consequently, military spouses have a lowered ability to accrue pensions, benefits, and occupational skills.[130] Military wives have an unemployment rate twice that of civilian wives.[131] "The proportion of [income-earning] military wives [decreases] with [the] increasing rank or rate of the husband. . . ."[132] Those who are employed are more likely than their civilian counterparts to be employed in clerical or service occupations.[133] They are also likely to earn substantially less than civilian wives who work outside the home. Military wives at all age groups were also more likely to have no earnings,[134] and military wives of all ages were much less likely than civilian wives to contribute $10,000 or more to the average family income.[135]

Those wives who do manage to find work face other problems. Frequent transfers "lead to loss of salary, fringe benefits and seniority rights on the job."[136] In addition, skilled and educated spouses may be prevented from finding employment "because of the lack of uniformity in state licensing and certification requirements."[137] Those spouses are forced to requalify for employment with each of the member's transfers.[138] Finally, potential employers may view military spouses as temporary employees because of the transient nature of military life.[139]

Military spouses are less likely to earn outside income during their marriage to a military member.[140] "Typically the military wife, unlike the civilian wife, shares her husband's occupation to a greater extent, while concurrently maintaining her stereotypic family responsibilities. The military wife has . . . more roles to perform, more demands on her time, and more sole responsibility

130. *See generally* Hunter, *supra* note 123, at 23 (1982).

131. *House Hearings*, *supra* note 7, at 125.

132. Hunter, *supra* note 123, at 18.

133. 135 Cong. Rec. E2 753-57 (daily ed. July 31, 1989)(remarks of Rep. Patricia Schroeder).

134. Long, *supra* note 126, at 29.

135. *Id.*

136. Hunter, *supra* note 123, at 23.

137. *Id.* at 23-24.

138. *Id.* at 24.

139. *Id.*

140. This may be changing, however. The Washington Post reported that 44 percent of officers' wives work outside the home. Molly Moore, *Commanders Barred From Interfering in Military Spouses Careers*, Wash. Post, Oct. 27, 1987, at A6.

for sole decision making."[141] They are also more likely to have an education below the level of their spouses.[142] If they do work outside the home,[143] it is unlikely they will find well-paying employment.

Military wives, however, face an additional pressure which their civilian counterparts rarely encounter. They are pressured by the military not to take outside employment. This is especially true of officers' wives, who have been told that, by taking outside employment, they will harm their husbands' chances for promotion.[144] Evaluations of a member's wife have become part of his service record.[145] One of the most blatant incidents occurred in 1987 at Grissom Air Force Base, where the base commander informed the wives of several officers that their husbands would not be promoted if they continued to work.[146] While such blatant threats are rare, a great deal of anecdotal evidence[147] suggests that working wives, or wives who are considering outside employment, continue to be pressured by lower ranking members of base command or commanders' wives.[148] These women are often obliquely or overtly threatened with denial of their husbands' promotions if they fail to comply and continue in or accept outside employment.[149] Military spouses are instead encouraged to provide gratuitous labor and to support volunteer activities essential to the military community. The volunteer organizations military spouses are expected to support include: the Officers' Wives Clubs, the Red Cross, thrift shops, civilian and military hospitals, and military

141. Hunter, *supra* note 123, at 9-10.

142. *Id.* at 26.

143. "[T]he military wife has traditionally been involved with her husband's career as a firm priority, above personal and family interests, much more than a civilian wife. . . . [I]t is apparent that the [military] institution places demands on both marital partners. . . . The wife is unpaid and unseen labor. Unfortunately, the wife's commitment to her military wife role and the mobility associated with the military lifestyle usually result in her inability to pursue her own occupational goals." *Id.* at 11.

144. 133 Cong. Rec. S12,834-35 (daily ed. Sept. 25, 1987). Despite the results of investigations into this practice, commanders involved were not disciplined. *Officer's Wives Told They Should Quit Jobs*, N.Y. Times, Oct. 12, 1987, at B6, col. 1. Prohibitions against compelling military wives to participate in volunteer activities and against including a member's wife's lack of volunteer activity in service member evaluations are located in 32 C.F.R. §§ 105.1-105.6 (1990).

145. 133 Cong. Rec. S12,834-36 (daily ed. Sept. 25, 1987).

146. For a discussion of the Grissom Air Force Base story, and letters to the editor of Air Force Times who printed an article about the situation, see 133 Cong. Rec. S12,835-36 (daily ed. Sept. 25, 1987).

147. *See id.*

148. Commanders' wives are often charged with responsibility for the success of base-wide volunteer activities and organizations. *See* 133 Cong. Rec. S12,834-35 (daily ed. Sept. 25, 1987).

149. *Id.*

family support services.[150] Given their frequent relocations, lower education levels, the propensity to work in clerical or service occupations, and the systemic pressure not to work outside the home, it is not surprising that many former spouses emerge from long marriages with no social security or pension benefits of their own. In addition, these women face the same pressures which other long-term homemakers encounter when trying to re-enter the work force following divorce. Displaced homemakers and other older women are rarely, if ever, able to achieve the income level to which they were accustomed (prior to becoming divorced or widowed) through their own employment efforts.[151]

The spouses of military retirees deserve military pensions not only as security to which they are entitled as a result of the duration of their marriage to military personnel, but also as an *earned* asset by virtue of their unique service to the Armed Services. The time and effort they expend as primary caretakers of the military home and family, as well as the additional contribution of volunteer services, contribute substantially to the character and operation of the modern military force. Continued denial of substantial marital assets accrued during military service is indefensible. Clearly, FUSFSPA must be amended.

III. Amending FUSFSPA: A Proposed Course of Action

In deciding *Mansell*, the Supreme Court invited Congress to amend FUSFSPA,[152] just as they left Congress free to amend their decision in *McCarty*.[153] Congress can, and should, amend FUSFSPA to preserve the military retiree's right to elect to receive Veteran's Administration disability benefits *and* to ensure that former spouses receive the portion of the military pensions which they have earned and deserve.

The most rational course of action for Congress to take is to amend FUSFSPA so that state courts are free to assign up to 50 percent of the *original* retired pay to the former spouse. This would be assessed in the following manner: courts would start with the total amount of retired pay, which may be prorated according to years of marriage coinciding with years of service, to which the retiree was entitled, whether or not the retiree elected to take the full amount of retired pay as retired pay at the time of retirement. The state court would then divide the original amount

150. *See generally* 133 Cong. Rec. S12,835 (daily ed. Sept. 25, 1987).
151. *See* Mason, *supra* note 35, at 193-94; Weitzman, *supra* note 34, at 331.
152. *Mansell*, 490 U.S. 594.
153. *McCarty*, 453 U.S. at 235-36.

of retired pay according to state law guidelines or rules concerning the division of pensions. The former spouse would then receive the pension labeled as retired pay. The military retiree could then elect to offset the remaining retired pay with the Veteran's Administration disability benefits to which he or she is entitled. Former spouses would not be entitled to any disability benefits which are granted in addition to (i.e., not as an offset to) the original amount of retired pay.

A suggested approach for such an amendment is to amend 10 U.S.C. § 1408(a)(4) to read:

> Disposable retired pay is the total monthly retired pay to which a member is entitled. Disposable retired pay for purposes of division under this Act includes amounts waived by a member to receive disability benefits but is limited to the original amount of retired pay. Former spouses shall receive retired pay only in the form of retired pay. Members may receive remaining retired pay in the form of retired pay or disability benefits to which they are otherwise entitled.

Disability offsets would remain available to military retirees on the following basis: the military retiree would retain the right to receive the larger of the two pension amounts, either disability or retired pay. The retiree could then elect to re-label the portion of retired pay (or a portion of the portion) as Veteran's Administration disability pay. The military member *could not* receive an amount more than the larger of the two pensions minus the portion assigned to the former spouse.

Courts would remain free to divide pensions, or not to divide pensions, based on the abilities and resources of the parties. This proposed amendment would not mandate division where a member is completely disabled or is otherwise unable to maintain a reasonable and equitable standard of living.

Conclusion

This proposal would ensure that former spouses receive the treatment and consideration which FUSFSPA was originally intended to provide up to half of the retired pay earned during their marriage to a military member. It would fairly and adequately provide disability benefits, and their accompanying tax breaks, to career military members. Because larger portions of retired pay might remain labeled as retired pay (the portion to which the former spouse is entitled), federal, state and local revenues from income taxes could increase. Finally, it would prevent military retirees from unilaterally reducing or obliterating the funds to which their former spouses are entitled.

The landscape of divorce law changed to permit the fair and equitable distribution of pensions, often the most important marital asset. It is long past time to amend FUSFSPA and place military pensions back where they belong: as accessible marital assets in the state courts.

Appendix

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

(a) Definitions. In this section:

(1) The term "Court" means—

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

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

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

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

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

(B) provides for—

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

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

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

(C) in the case of a division of property, specifically provides for the payment of an amount, expressed in dollars or as a percentage of disposable retired pay,

from the disposable retired pay of a member to the spouse or former spouse of that member.

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

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

(A) are owed by that member to the United States for previous overpayments of retired pay and for recoupments required by law resulting from entitlement to retired pay;

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

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

(D) are deducted because of an election under chapter 73 of this title to provide an annuity to a spouse or a former spouse to whom payment of a portion of such member's retired pay is being made pursuant to a court order under this section.

(5) The term "member" includes a former member entitled to retired pay under section 1331 of this title.

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

(7) The term "retired pay" includes retainer pay.

(b) . . . .

(c) Authority for court to treat retired pay as property of the member and spouse.

(1) Subject to the limitations of this section, a court may treat disposable retired pay payable to a member for pay periods beginning after June 25, 1981, either as property solely of the member or as property of the member and his spouse in accordance with the law of the jurisdiction of such court. A court may not treat retired pay as property in any proceeding to divide or partition any amount of retired pay of a member as the property of the member and the member's spouse or former spouse if a final decree of divorce, dissolution, annulment, or legal separation (including a court ordered, ratified, or approved property settlement incident to such decree) affecting the member and the member's spouse or former spouse (A) was issued before June 25, 1981, and (B) did not treat (or reserve jurisdiction to treat) any amount of retired pay of the member as property of the member and the member's spouse or former spouse.

(2) Notwithstanding any other provisions of law, this section does not create any right, title, or interest which can be sold, assigned, transferred, or otherwise disposed of (including by inheritance) by a spouse or former spouse. Payments by the Secretary concerned under subsection (d) to a spouse or former spouse with respect to a division of retired pay as the property of a member and the member's spouse under this subsection may not be treated as amounts received as retired pay for service in the uniformed services.

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

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

the court, or (C) his consent to the jurisdiction of the court.

(d) Payments by Secretary concerned to spouse or former spouse.

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

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

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

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

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

(e) Limitations

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