

## **ABA response to the National Defense Authorization Act for 1998 § 643**

April 13, 1999

Mr. Francis M. Rush, Jr.  
Acting Asst. Secretary of Defense  
4000 Defense Pentagon  
Washington, D.C. 20301-4000

Re: National Defense Authorization Act for 1998 ' 643  
Comprehensive review of federal former spouse protection law  
Request to American Bar Association Family Law Section for  
input Your letter of December 23, 1998

Dear Mr. Rush:

On December 23, you wrote to Maurice Kutner, Chair of the [Section of Family Law](#) of the ABA, requesting the Section's input to the important review currently being completed by the Department of Defense. He has asked me to forward this response to you on his behalf, and on behalf of the Section.<sup>1</sup>

### **1. INTRODUCTION AND ABA POLICY POSITIONS**

While we have a great deal of information on this topic, you have requested input on three specific questions, and three bulleted items. I will try to address all of them, with enough background information to make the responses well grounded in law, fact, and policy. This area has been of interest to the ABA for some years. Two formal resolutions have issued from the House of Delegates (which sets formal policy), in 1979 and 1982.

I have personally worked in the area of military retirement benefits in divorce since shortly after the USFSPA was enacted, and chaired the committee of experts assigned by the ABA to report to the House Subcommittee on Military Personnel and Compensation in April, 1990.<sup>2</sup> Since then, I have handled hundreds of military divorce cases (working for both members and spouses), have written and lectured widely in this field, and recently completed a textbook on the subject.<sup>3</sup>

The ABA position, consistent with existing ABA resolutions, is to recommend that military retirement benefits be treated by courts in everyday litigation in a manner that is consistent with the property distribution laws of the states, which are designed to achieve equity in marital dissolutions.

In 1979, the American Bar Association formally adopted a policy resolution recommending the enactment of legislation requiring the Secretaries of the Armed Forces to recognize state court decrees of divorce dividing retired or retainer pay. The 1982 resolution, in the wake of *McCarty*<sup>4</sup>, urged Congress to enact legislation making **all** deferred compensation derived from federal employment subject to state property and divorce laws, except where specifically exempted by explicit federal legislation.<sup>5</sup>

Since then, the consistent ABA position has been to allow state divorce law to apply to military members and their spouses, as it does to everyone else, with the goal of avoiding any "special classes" of persons who would be wrongly deprived of, or unjustly enriched with, the fruits of a marriage.

All of the states have taken the view that marriage is, among other things, an economic partnership in which both parties contribute toward the common good, although sometimes in different ways. The states recognize that partnership by considering both parties to a marriage to be owners of that property which is acquired during the marriage, including pension and retirement benefits.

Today, all 50 states have recognized military retirement benefits as property, belonging to both parties to the extent earned during the marriage. This is in keeping with the treatment by the states of all other federal, state, and private retirement and pension plans. My own research has shown that in *most* military marriages, the military retirement benefits are more valuable than *all* the other property accumulated during the marriage. In other words, if this one asset is inequitably divided, it is usually impossible to make a military divorce fair to both parties.

Such a division of property should be *clearly* distinguished from any kind of alimony award. Different state courts have described the distinction (between property division and alimony) in different ways, but typically they consider the distribution of property at divorce as a *permanent division* of assets created by efforts during marriage, while alimony is discretionary, is dependent upon the needs and abilities of the parties, and is subject to review upon changed circumstances after divorce.<sup>6</sup>

In 1990, the ABA noted that it

recognizes the power of Congress to pre-empt state law in this field, but has uniformly held the position that no pre-emption of state law should be implied by the courts, and that Congress should be circumspect in determining that state law should be pre-empted at all. Where federal pre-emption is determined to be necessary, the scope of that pre-emption should be carefully defined so as to avoid wrecking havoc upon the balance of interests involved in state court divisions of marital property.<sup>7</sup>

ABA policy has not changed on this topic since that time, and it is in light of ABA policy that the specific questions asked in your letter, and commentary regarding proposals known to have been made by various special-interest groups, are addressed in this response.

## 2. EFFECTIVENESS OF THE ACT AND RELATED LAWS

Generally, the USFSPA as currently worded allows the courts of the states, in most cases, to do an appropriate division of military retirement benefits as marital or community property. The last two states with "title" schemes converted to Aequitable distribution statutory schemes within the past several years, and the states have moved toward virtual consensus on the basic proposition that retirement benefits are divisible upon divorce in proportion to the extent that they were accrued during the marriage, as the separate property of each of the spouses.

Similarly, federal civilian employees' retirement benefits (CSRS/FERS), and related medical and other benefits, are at this time set up in such a way that courts can generally do justice to the parties in a divorce situation. The major federal civilian statutory schemes will be commented upon below where it seems most appropriate to do so. <sup>8</sup>

### A. Division of Retirement Benefits

#### 1. The Current Definition of "Disposable Pay" Should Apply to All Retirements in Pay Status

The pre-1991 form of the USFSPA contained a definition of "disposable pay" that gave the former spouse significantly less than the percentage awarded.<sup>2</sup>

When Congress amended the definition of "disposable pay" in 1992, the change was not made retroactive, leading to a continuing series of enforcement problems in some cases decided before 1992. In my review of many hundreds of pre-1991 divorce decrees, I have never run across an order that took into account the old definition of "disposable pay" to accord to a spouse the interest specified by state law. Rather, courts throughout the country simply divided the retirement benefits by percentage, and presumed that each spouse would actually receive the designated percentage of the "entire benefit."

While any application of the current definition of disposable pay to pre-1991 divorce decrees should not allow the litigation of claims relating to pay periods that have already passed, the definition should be made to apply to all future pay periods.

Recommendation: The current definition of "disposable pay" should be made applicable to all court orders, whenever entered, for all prospective payments. The enactment should explicitly permit or encourage allowance of further court proceedings for those few cases (if any) in which the earlier, restricted definition of "disposable pay" was actually considered when defining the rights of the parties.

#### 2. The "Ten Year Rule" Should Be Abolished

There is a large number of cases in which there are problems with the so-called "ten year rule," which is widely misunderstood. Actually, the "rule" was merely a procedural compromise made in the original conference committee enactment which restricts

enforcement through the pay centers of orders concerning marriages which overlapped military service by less than ten years. 10 U.S.C. § 1408(d)(2). Most problems fall into two classes.

- 1 Many attorneys still do not realize that the "rule" exists B that the military pay center will not make direct payment in cases where the military service and marriage overlapped for less than ten years, no matter what the court orders say. The present situation is that state courts declare spouses to have rights, but there is no federal mechanism for enforcement of those rights, causing many state court orders to be "hollow" and unenforceable.
- 2 Some of those lawyers that have heard of the "ten year rule" incorrectly believe it to be some assertion of federal pre-emption, prohibiting division of retirement benefits when the military service and marriage overlapped for less than ten years. Of course, this is not true, and many spouses are divested of legitimate interests out of this mistaken perception.

A situation where there are rights without remedies brings disrepute on the judicial system, and causes much unnecessary contempt-of-court and other litigation throughout the states. It would be far preferable if the military pay center would enforce legitimate state court orders. Since the "rule" serves no useful purpose and causes significant misunderstanding and error, simple eliminating the provision would solve both these problems.

Recommendation: This is one of the ways in which the military system would be better if it worked like the FERS and CSRS systems. Specifically, any award legitimately made under state law should be enforceable through the pay center, whether the marriage lasted for twenty years, or ten, or five, or whatever. The "ten year rule" should be abolished.

### 3. SSB/VSI Problems Should Be Solved by Providing for Direct Payment

The Variable Separation Incentive (VSI) and Special Separation Benefit (SSB) programs were created by Congress in 1992. <sup>10</sup> The following year, Congress created an early retirement program whereby the services could offer early retirement for members with more than 15 but fewer than 20 years of service. All three of these programs were later extended to be in effect until 1999.<sup>11</sup> As of September 30, 1996, 42,248 members had taken early retirement under the "Temporary Early Retirement Authority" (TERA).

The overwhelming majority of courts interpreting the VSI, SSB, and TERA laws have concluded that the benefits are based on accrued service and therefore should generally be considered as divisible as the retirements that were foregone by election of those benefits.<sup>12</sup> Unfortunately, for SSB and VSI benefits, there is no federal mechanism for direct payment to a former spouse of the spousal interest. There does not appear to be any legitimate federal policy that is served by that omission of an enforcement mechanism.

Recommendation: Provide a direct-payment provision for court-adjudicated spousal shares of VSI and SSB benefits.

#### 4. Eliminate the Jurisdiction Rule in 10 U.S.C. § 1408(c)(4)

Under current law, special jurisdictional rules must be followed in military cases to get an enforceable order for division of the benefits as property (these rules do not restrict alimony or child support orders)<sup>13</sup>. In other public and private plans, including CSRS and FERS, any state court judgment valid under the laws of the state where it was entered is generally enforceable to divide retirement benefits. This is not true for military retirement benefits, but it should be.

The legislative history shows that the provisions were enacted out of concern that forum-shopping spouses might go to a state to which the member had a very tenuous connection and force defense of a claim to the benefits at such a location. The anti-forum-shopping rules were never really necessary, since no state permits division of property without sufficient minimum contacts to satisfy constitutional concerns. Unfortunately, especially in certain locations,<sup>14</sup> the jurisdictional limitations are producing exactly the harm they were intended to prevent, but in reverse B they provide a means for manipulation of otherwise adequate jurisdiction as a tactical weapon to prevent the proper court from hearing all aspects of a case that it should decide.

The practical result has been that in some cases retirement benefits are not ever brought before any court that has jurisdiction over both the parties and their property. In a far larger number of cases, there is much unnecessary litigation and gamesmanship by both parties just to get all appropriate matters before a judge. In practice, the special jurisdictional rules have definitely created injustice in a significant number of cases, without apparently preventing injustice as contemplated, anywhere, in any case. <sup>15</sup>

Recommendation: The "forum-shopping" concern that caused the creation of these rules was unfounded at the time, and experience has shown that the provisions have created much more mischief than they have prevented. They should be repealed.

#### 5. Do Not Allow Any Sort of Remarriage Test in Property Divisions

For some years, a fairly strident call has come from certain quarters to undo awards of military retirement benefits as property to spouses who have remarried or who remarry in the future. For a number of legal, public policy, and constitutional reasons, any such proposal should be rejected.

Such a proposal would essentially eliminate the status of military retirement benefits as property, which would pre-empt the law of every state in the Union. At present, in all states, property divided in a divorce decree remains in the possession of the person to whom it is awarded, irrespective of that person's future behavior or status. No state permits a "penalty" of removing property from one party and giving it to the other in the

event of remarriage, under any case law or statutory law.

Essentially, this persistently-raised proposal would convert all awards of military retirement benefits as property into alimony awards, by subjecting them to the same termination events. This is not a good idea, because the basis of allocating property rights upon divorce is different from the analysis of whether, how much, and for how long alimony should be awarded from one spouse to another.

State law concerning property distributions would be greatly impaired if the essential nature of such a valuable federal benefit was recharacterized as terminable upon remarriage. It would make the treatment of military retired pay B and military personnel B very different from the treatment of all other persons, including other federal employees, who divorce. The primary effect of this proposal would be to increase the number of former military spouses who receive no share of the most valuable property right created during their marriages. Without justification, it would unjustly enrich military members, while creating poverty for their former spouses, without serving any legitimate federal interest. This would wreck havoc upon the balancing of interests involved in state court divisions of marital property throughout the country, and would increase the difficulty and uncertainty of litigation everywhere.

The 1979 and 1982 resolutions of the American Bar Association clearly stand for the proposition that all deferred compensation derived from federal employment should be subject to state property and divorce law. A federal enactment which would create a result directly contrary to that ABA policy would interfere considerably with the public policies served by the statutory scheme of division of property in every state in the union.

The question, looked at another way, is whether there is anything so critical and unique about military retirement benefits that would justify over-ruling the property distribution schemes of all fifty states. In considering that question, it is worth noting that the United States Supreme Court B with the approval and urging of the various organizations of military members and retirees B has concluded that military retired pay is deferred compensation just like private or state retirement benefits, so that it cannot be taxed by the states any differently than other federal or state retirement benefits.<sup>16</sup>

Those arguing for equal treatment in the tax cases, but now claiming that the benefits are somehow so "special" that normal property-division law should not apply to them, have proven themselves hypocrites quite willing to argue contrary positions where necessary to put more dollars in their pockets. No one alleges that the Supreme Court erred in Barker, and the same result is warranted here B there is no significant difference between military retirement benefits on the one hand, and state and private retirement benefits on the other, that justifies treating the people receiving them differently than others are treated under law.

It is worth remembering here that the military retirement compensation package is widely used by recruiters as an incentive to enlist, much the way any company's retirement system and other "perks" are used in recruitment of desired personnel. The retirement

benefits should be considered to be what they are touted as upon enlistment B an additional payment for active duty service, over and above the regular pay received, to be made after retirement, as incentive for both parties to a military marriage to endure the rigors of the military lifestyle, with its frequent change-of-station moves, necessary limitations on development of a career for the spouse, and other drawbacks.

In other words, as to the property rights and legitimate expectations of the parties, there is no reason not to treat military retirement benefits like all other retirement and pension rights accrued during marriage. And because there is usually so little other property acquired in a military marriage, the quality of life that each party can reasonably expect to have after divorce is directly dependent upon the certainty of receipt of his or her share of that one asset.

From a constitutional perspective, there is some doubt whether it would be permissible to retroactively recharacterize property awards as a species of alimony, on due process and impairment of contracts grounds. Such a proposal would be less constitutionally objectionable if it was restricted to future remarriages, but the fundamental fairness question would remain. Additionally, eliminating spousal shares of military retirement benefits upon remarriage would have a chilling effect upon remarriage by former spouses, and thus would interfere with the public policy of many states (and the United States) encouraging marriage.

In summary, the proposal to terminate spousal rights to retirement benefits upon remarriage would pre-empt state law on a very large scale, and would treat military members and their spouses differently than all other persons in similar positions. It would unsettle well-established property rights for a large number of people, and lead to substantial litigation, without any corresponding improvement in achieving equitable distribution of property, or serving any legitimate federal policy. Any such proposal should be rejected.

Recommendation: Ignore proposals to terminate allocation of retirement benefits to spouses upon the spouses' remarriage.

#### 6. Resist Proposals to Divide Benefits in Accordance with Rank at Divorce

Another proposal often floated by extremists in certain organizations of military members would restrict division of retirement benefits (no matter when retirement occurs) to the members' rank attained during the marriage. This provision is subtle, but it would pre-empt the law of the substantial majority of states which use the "time rule" to determine the spousal shares of retirement benefits, and would effectively unjustly enrich military members at the expense of their spouses, as well as create artificial distinctions between successive spouses. For several legal and public policy reasons, any such proposal should be rejected.

The near-universal consensus of the state courts is to establish the spousal share of pension assets under the "time rule," through which each spouse receives half of the

percentage created by taking the number of months of marriage during service as a numerator, and the total number of months served as a denominator.

Under this formula, if the member delayed the spouse's receipt of military retired pay by choosing to remain in service (accruing further increases in rank and length of service), then the spouse obtains some compensation for that delay, in the form of a few more dollars per month when the benefits do begin, even though the former spouse's share is an ever-smaller percentage of the benefit. This is sometimes called the "smaller slice of the larger pie." I have personally checked the math, and in terms of lifetime collection, the best that a former spouse can do under the time rule, in normal circumstances when the member continues service, is to almost break even. This was reported to Congress as long ago as 1990. <sup>17</sup>

Many state courts have analyzed this question, focusing first on the nature of the asset being divided, and then on how to accomplish an equitable division of that asset. The decisions of these courts can be labeled the "building block" cases. The clear majority of states have adopted the "building block" approach. <sup>18</sup> The decisions of several other states have reached the same result, without setting out much analysis of why this is so. <sup>19</sup>

One example of an analytical case is *Fondi v. Fondi*,<sup>20</sup> in which the Nevada Supreme Court found that a "wait and see" approach is mandated in pension cases, through which the community has an interest in the pension ultimately received, not just the pension as it exists on the date of divorce. That court has since emphasized that the "wait and see" approach is defined as ensuring that the spousal share of the pension is based on value of the pension ultimately received by the worker, rather than a portion of the pension that would have been received if the worker retired on the date of divorce. <sup>21</sup>

Some courts have explained what they are doing as adhering to the "qualitative" view of spousal contributions to retirement accrual.<sup>22</sup> In other words, while a pension may be based on the "highest salary earned," and the highest earning years are usually the last years of employment, all of the years of work leading up to retirement are considered equally necessary to attain that status.

This view appears to be the majority view in the states, and it comes close to providing equity to successive spouses. Two consecutive spouses, during the first and last halves of a twenty-year military career, would be treated equally under the qualitative approach, but very differently under the "rank-at-divorce" proposals.

Perhaps the clearest expositions of the reasoning behind the two approaches are found in those cases in which a reviewing court splits as to which interpretation is most correct. The Iowa Supreme Court faced such a conflict in the case of *In re Benson*.<sup>23</sup> The trial court had used a time-rule approach, with the wife's percentage to be applied to the sum the husband actually received, whenever he actually retired.

The reviewing court restated the question as being the time of valuation, with the choices being the sum the husband would have been able to receive if he had retired at divorce, or

the sum payable at retirement. The court acknowledged that the longer the husband worked after divorce, the smaller the wife's portion became. The court accepted the wife's position that to "lock in" the value of the wife's interest to the value at divorce, while delaying payment to actual retirement, prevented the wife from "earning a reasonable return on her interest."

Quoting at length from a law review article analyzing the mathematics of the situation, the court found that acceptance of the husband's argument would have allowed him to collect the entirety of the accumulating "earnings" on the marital property accumulated by both parties. Three judges dissented. <sup>24</sup>

I have independently verified the mathematical effects of the various approaches taken by the state courts. Unless Congress is willing to also mandate that the states adopt rules requiring payments to spouses at each members' first eligibility for retirement, regardless of the date of actual retirement, I estimate that a "rank at divorce" proposal would result in a reduction in the value of the spousal share by at least 13%. A second spouse married to a member for the last couple years of service could actually receive more money after divorce than a first wife who assisted the member for more than half of the military career. There does not appear to be any valid federal policy that could be served by causing this result.

Tellingly, most of those who propose a "rank at retirement" approach either oppose or ignore the question of whether distribution of the spousal share should be mandated at the time of the member's first eligibility for retirement.<sup>25</sup> It is not possible to fully and fairly evaluate the impact of a "rank at divorce" proposal without examining that question as well.

Again, it should be stressed that treating this one asset (military retirement benefits) differently from all others, by federal pre-emption, would distort the ability of state divorce courts to achieve equity between spouses. The "rank at divorce" proposal does not appear to implicate any federal interest that would warrant interference with the domestic relations laws of the states.

Recommendation: No "rank at divorce" approach to valuation and distribution of military retirement benefits should be mandated by federal law.

## 7. Consider Adopting an "ERISA-like" Structure

Everything written above presumes that the current "derivative rights" model is to be followed in the future. Simply put, the way it is now done, the member has a right to retirement benefits, and if there is a divorce, the spouse may be awarded a portion of that benefit, usually in accordance with the "time rule" or "coverture fraction," taking into account the years of service and how many of those years overlapped the parties' marriage. Under this model, the spouse can never has any separate interest; rather, the spousal rights are derived from the member's rights. This structure gives rise to several results, including the cessation of the spouse's payments upon the member's death, and

the resulting need for the entire SBP scheme discussed below.

However, there is an alternative, which should probably be discussed in any comprehensive review of military retirement benefits. For most purposes, the military retirement system is not significantly different from private-sector defined benefit plans. For such private-sector retirement benefits, Congress has set up an entirely different scheme for protecting spousal interests, under the Employment Retirement Income Security Act of 1974,<sup>26</sup> which generally prohibited alienation of retirement benefits, and the Retirement Equity Act,<sup>27</sup> which formalized an exception for domestic relations orders.

Under an ERISA-like division of the benefits themselves, upon divorce the former spouse would get an actuarially-adjusted lifetime interest, which could be further reduced to provide survivor's benefits to another. The member, who retains all but the spousal portion, is free to name a new survivor beneficiary. The member's benefits are then completely unaffected by the former spouse's life or death, and the member's life or death is simply not relevant to the benefits payable to the former spouse.

The effects of such a change in model would be significant. First, it would mean that members of the armed forces and their spouses would be treated under the law much more like all other couples in the United States. In other words, in terms of rights upon divorce, a soldier would have much the same rights, options, and obligations as an employee of a private corporation which had a retirement plan.

Advantages of such a state of affairs would include an increased predictability of results in divorce cases, and both the appearance and reality of increased "fairness," as more people are treated the same way under the law. One somewhat subtle bonus of this structure is elimination of the litigation concerning court orders for payment of a spousal share upon eligibility for retirement, as is the law of California, Nevada, and several other states.<sup>28</sup> Since the benefits are divided into two separate portions, the spouse's election to begin benefits will simply have no effect on the member, even though, actuarially, all benefits to both parties are the same as in the current statutory scheme.

The disadvantages to be expected if an ERISA-like structure is adopted are surprisingly few, but would include retraining of governmental administrative staffs to handle "QDROs" and the creation of a regulatory structure mirroring that in place for civilian retirements. It would, however, be a major "sea change" in how to conceptualize federal retirement benefits, and it is believed that many might oppose such a restructuring of the retirement systems out of reflex, or simple fear of something "new."

## B. Survivorship Benefits

### 1. Divisibility Among Multiple Beneficiaries

Survivorship benefits should be divisible among multiple beneficiaries. The current "one-only" form of the statute has led to both the wrongful deprivation of survivorship interests, and the accidental over-compensation of former spouse survivors who had less than 50% of the military retired pay during the member's life, but are named as

beneficiaries of the full sum of the SBP.<sup>29</sup>

This is an area in which both the private-sector ERISA scheme,<sup>30</sup> and the CSRS/FERS model are superior; the definition of "pro rata" interests in the OPM regulations is adequate for most purposes, although the regulations themselves have proven too complex for most parties (and lawyers) to successfully negotiate, and there are a few anachronisms that should be abolished there, as well.<sup>31</sup>

Recommendation: The SBP should be specifically made divisible among multiple beneficiaries, presumptively in pro-rata shares corresponding to the respective share of the underlying retirement benefits.

## 2. Translation of "Spouse" Benefit to "Former Spouse" Benefit Should Be Automatic

One very unfortunate aspect of the current military system is the loss of the SBP to a former spouse who was named as the beneficiary during marriage. Specifically, most members and spouses (and, for that matter, most lawyers and judges) have no idea that the designation of the spouse as beneficiary does not simply continue post-divorce, since the premiums are still being paid and the (now former) spouse is still shown as the beneficiary.

In conjunction with Comptroller General opinions interpreting 10 U.S.C. § 1447 et seq. to allow for an application within a year of the first court order addressing survivorship, the current administrative scheme produces illogical results of penalizing those that try to operate within the rules, while giving unlimited delays to those who do nothing. No valid public policy appears to be served by the current regulatory structure providing the one-year deadline for application, and significant hardship has befallen many individuals under these rules, without benefitting anyone.

Recommendation: The SBP election of a current spouse should be made to presumptively cover the same individual as a former spouse, if the premiums continue to be paid, and a pre-existing SBP election should not be canceled without a signed spousal (or former spousal) consent, or a court order allowing termination of the benefit.

## 3. Eliminate Termination/Suspension of Benefits Upon Remarriage Before Age 55

Current law provides that former spouses receiving survivorship payments lose eligibility for continued receipt of those benefits if they remarry prior to age 55 (this was changed from age 60). The entire provision is problematic, as it confuses the concepts of property and alimony, is contrary to the public policy of encouraging marriage, and is unduly paternalistic and sexist. Specifically, the provision presumes, unfairly, that it is a husband's role to provide for a wife, and that a wife somehow does not "deserve" to continue receiving her own property (which is what the survivorship benefit stream from a retirement is), if she chooses to marry someone else at a later date.

Like a husband who continues using a toaster obtained in a divorce to make toast for his new wife, a wife should be free to use and enjoy her share of property obtained in an earlier divorce without reporting to the government her future relationships. It is simply not anyone else's business whether a former member, or former spouse, chooses to remarry; the division of property rights upon divorce should be permanent.

Recommendation: The "loss-of-benefits-upon-remarriage" penalties in the military SBP statutory scheme should be eliminated.

#### 4. Allocation of the SBP Premium Should be Allowed

Currently, the SBP premium is taken "off the top" of disposable retired pay in all cases, with the net effect that both parties effectively "pay" for a portion of the SBP benefit, in accordance with the parties' respective shares of the retirement benefits.

Such a division of the premium might, of course, be perfectly appropriate under the facts of some cases, and inappropriate in others. It is easy to see fact situations where it would be reasonable to have either the member or the former spouse pay the entirety of the premium, and many courts issue orders providing just that. Currently, such orders are ineffective, leading to much wasteful litigation.

It is possible for knowledgeable counsel to "write around" the problem, by adjusting the spousal share of the retirement benefits to effectively cause the member, or spouse, to pay the premiums, but few know how to do this, the amount of work involved is unwarranted, and it cannot be done at all in some cases.<sup>32</sup> Accordingly, the law should be revised to allow for allocation of the premium to the member, to the former spouse, or to come "off the top" (as it is currently).

Recommendation: The SBP premium cost should be made deductible from the benefit stream going to either the member or the former spouse, if so provided in a valid court order, as well as allowed to come "off the top" as it does currently.

#### C. Disability Pay

##### 1. The Waiver of Regular Retired Pay for a Disability Award

The problem, in a nutshell, is that when a retiree receives a post-divorce disability award, the "disposable" pay already divided between the member and former spouse is reduced, causing the bottom line of reducing the flow of money to the former spouse, and instead directing it to the retiree, no matter what the divorce court ordered.

This contentious issue has a simple solution which will cost money, or a less-satisfactory solution which will cost the government nothing, but can only strike a balance among the various competing public policies, rather than fully satisfying any of them.

The "simple" solution is to eliminate the provisions requiring waiver of regular retired

pay upon receipt of disability pay. If retired pay is properly seen as a deferred reward for service, and disability compensation is government compensation for future lost wages and opportunities because of disabilities suffered in government service, then they are and should be separately payable to the same individual to the extent deserved. Thus, a claim of disability will have no impact on a longevity retirement; the former spouse has no interest in the disability award, and both the members and the former spouses would be fully satisfied. The government, however, would have to pay disability compensation in addition to the longevity retirement earned by those eligible to receive it.

To the degree that this is considered fiscally impossible, there seems no choice but to weigh the interest of disabled veterans in receipt of full compensation against the interest of former spouses to receive their accrued and adjudicated separate property rights.

A review of cases around the country and over the years indicate that many courts have struck the balance by stating that any pre-divorce disability creates a separate property interest of the member that is not divisible upon divorce, while a post-divorce disability application is not allowed to divest a former spouse of any interest that she has already been awarded. In *Mansell* itself, the court upon remand refused to allow the ruling in that case to affect the pre-existing division of dollars between the parties.<sup>33</sup> This logic was followed by other courts examining pre-*Mansell* divorces.<sup>34</sup>

There has, however, been much uncertainty, as each court felt its way through the equities, and the results have been uncertain and resulted in much litigation.

Some courts have focused on alimony.<sup>35</sup> Other courts looked to the details of the decrees in question, "saving" the spousal interest when they found safeguard clauses and indemnification for reduction clauses, under a theory appears of "constructive trust" (i.e., once the divorce goes through, the retirement money is considered no longer the member's property to convert).<sup>36</sup>

The problem is probably self-evident from the case summaries noted, however. There is a lack of predictability and uniformity to the results, and similarly-situated people are treated differently because of trivial differences between their divorce decrees, or on the perceptions of individual judges. A clear rule prohibiting the divestment of spousal interests that have already been ordered, would save much litigation.

**Recommendation:** Ideally, disability awards should be in addition to, and not require waiver of, longevity retired pay. If this cannot be done, the federal law governing application for VA disability should be modified to include a provision prohibiting the conversion to disability pay of any portion of disposable retired pay that has been awarded to a former spouse as the separate property of that former spouse.

#### D. Medical Benefits for Spouses and Dependents

##### 1. The VSI/SSB/"Early Out" Problem

As discussed above, three separate "early out" programs have been utilized by thousands of military members in the past several years. In all ways other than sums paid, the members electing TERA retirees are treated just like any other retirees. There is a significant difference in how their spouses and former spouses are treated, however. Since, by definition, no member taking a TERA retirement ever stays on active duty for 20 years, it is not possible for a spouse of such a member to ever have 20 years of marriage during active duty, and therefore to be a "20/20/20" former spouse entitled to lifetime medical and other benefits.

This creates the situation whereby a current spouse of a TERA retiree is treated just like the spouse of any other retired member, but the former spouse of a TERA retiree (irrespective of the timing of the divorce and the retirement) has none of the ancillary benefits that the former spouse of a "regular" retiree would have.

Recommendation: At least where all service was performed during the marriage, extend the same medical, exchange and commissary benefits to former spouses of members that would be enjoyed by members, and the current spouses of members, who have taken VSI, SSB, or TERA "early outs."

#### E. Miscellaneous Administrative and Operational Matters

1. It is unfortunate that the "proposed" regulations dated April, 1995, for 32 CFR § 63.6 were never made final. They are an order of magnitude better than the set they replaced, but are still somewhat vague and difficult for most practitioners to follow, especially where they set out "hypotheticals." They should be clarified; the private Bar has several members well-versed in this subject matter who could be of assistance in this effort.
2. It would go a long way to helping courts in the day-to-day management of divorce case-loads if the military pay center would do as private pension plan administrators do, and pre-approve proposed orders. That way, proposed orders would be known to be sufficient (or, if insufficient, could be fixed) before court proceedings are completed, which would save a great deal of post-divorce litigation around the country.
3. At some point, certain pay centers decided not to enforce COLA provisions attached to divorce orders phrasing division of retirement benefits as property as divisions of dollars, rather than percentages. After unification of the pay centers at Cleveland, this became the standard practice. Worse, despite violating the face of the USFSPA, the pay center will not even enforce COLA provisions attached to alimony orders stated in dollar terms. There is really no good reason for this policy, and the pay center should be directed to enforce such orders.
4. Withholding of the spousal share set out in court orders should begin immediately after service of a court order, with the withheld money sent to the spouse upon approval of the order, or remitted to the member if for any reason the order is rejected. The current practice leads to accrual of a significant amount of arrearages, and much

unnecessary litigation in the state courts.

5. It makes no sense that about the only kind of monetary award that cannot be garnished from military retirement benefits is arrears owing to a spouse of those very military retirement benefits. Yet, apparently accidentally, that is what the phrasing of 10 U.S.C. § 1408(d)(5) produces. The provision should be rephrased to specifically allow garnishment (within the existing garnishment limitations) of court-adjudicated arrearages in military retired pay owed to a former spouse.
6. DFAS should confirm receipt of deemed election requests, and indicate whether they are to be honored, in much the same "check-the-box" fashion that they now respond to direct payment requests. The administrative burden is small, and the elimination of confusion and uncertainty would be considerable.
7. This seems like a good opportunity to revisit the issue of SGLI susceptibility to enforcement of agreements or court orders for beneficiary allocation. Under current law, a member is free to sign an agreement guaranteeing coverage of a former spouse or dependent, or even be ordered to do so, and then go back on his word, and no court is allowed to enforce the agreement, or create a constructive trust to correct the situation. See *Ridgway v. Ridgway*, 454 U.S. 48 (1981). Cases since then have cited it for the proposition that there is simply nothing they can do for defrauded former spouses or others.<sup>37</sup> Agreements to nominate beneficiaries of the SGLI should be enforceable, as should court orders concerning those benefits.
8. Administratively, it might make sense at the end of the current review process, for Congress to ask the Department of Defense to issue guidelines and model clauses, as the OPM has done for CSRS and FERS, to assist lawyers and judges throughout the country trying to craft enforceable orders. Ultimately, such an effort should lessen the workload of the DFAS by reducing the number of orders that have to be rejected.
9. Finally, those reviewing this submission, and making policy recommendations to Congress, should recognize and note that pressure groups are trying to insert the federal government where it does not belong B micro-managing by the heavy hand of federal pre-emption the delicate balancing of interests reflected in the divorce laws of the states. For example, both members= and spouses= organizations have sometimes tried to get the federal law re-written to reflect matters of marital fault, or impose a different statute of limitations than is found in state law, or otherwise require states to alter how divorce litigants are treated. All such requests should be flatly denied. It is not possible for Congress to enact any such provisions without wrecking havoc on the statutory schemes and balancing of interests that went into the creation of state divorce and property laws, and any effort to do so is far more likely to create injustice than to prevent it.

### III. CONCLUSIONS

As the ABA has uniformly maintained for the past twenty years, deferred compensation from federal employment, such as pensions and retired pay, should be subject to state community property and equitable distribution law, on the same basis as all other deferred compensation benefits. As noted above, the 1982 formal policy statement of the

ABA calls for "all deferred compensation derived from federal employment, such as pensions, retired pay and other income of that nature" to be subject to state property law except as specifically exempted by explicit federal legislation.

Generally, it is not believed that justice would be served by creating any additional federal pre-emptions of state law, whether as matters of jurisdiction, or of substantive limitations on the powers of state divorce courts to fashion equitable property settlements. Thus, Congress should resist any calls to impose unprecedented recharacterizations of property upon remarriage, and should eliminate those already existing regarding SBP benefits payable to former spouses who remarry prior to age 55.

Rather, some of the existing jurisdictional restrictions should be eliminated, and Congress should amend the law to make it as easy as possible for state divorce courts to do equity to the persons before the court, by making enforceable through the military pay centers the rulings of those courts, and refraining from imposing any rules relating to military retirement benefits that are different from those that govern divorce between similarly-situated persons who have other employment. Thus, the "ten year rule" should be abolished, as should the special jurisdictional rules for division of military retirement benefits as property, and the enforcement provisions for state-court divisions of VSI and SSB benefits should be put into place.

Congress should make every effort to avoid intruding upon traditional state-law concerns of what constitutes divisible community or marital property, or when it accrues, or when payments should begin, or when statutes of limitation run. Those matters are appropriate for consideration by state legislatures and courts, and the states are moving toward virtual consensus on many of these topics.

Rather than pre-empting state legislatures as to the balancing of equities between spouses, Congress should amend the federal regulatory structure to be as responsive as possible to state court orders dividing retirement benefits, allocating survivorship interests, and honoring property allocations without fear of recharacterizations by means of post-divorce disability applications. In this way, Congress can best assist the courts hearing divorce cases in achieving justice.

Sincerely yours,

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