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September 5, 2001

Ms. Gail H. McGinn
Acting Asst. Secretary of Defense
4000 Defense Pentagon
Washington, D.C. 20301-4000

Re: American Academy of Matrimonial Lawyers Response to Request for Comments as to P.L. 105-85 Review of the USFSPA
Your letter of March 6, 2001

Dear Ms. McGinn:

On March 6, 2001, you wrote to Charles C. Shainberg, President of the American Academy of Matrimonial Lawyers, requesting input to the important review currently being completed by the Department of Defense. He and the Board of Directors have asked me to forward this response to you on behalf of the AAML.[1]

I. INTRODUCTION AND AAML BACKGROUND

The American Academy of Matrimonial Lawyers is an organization of the nation's top matrimonial attorneys who specialize in all issues related to marriage, divorce, annulment, custody, child visitation, property valuation, property distribution, alimony, and child support.

The Academy was founded in 1962 "to encourage the study, improve the practice, elevate the standards and advance the cause of matrimonial law to the end that the welfare of the family and society be preserved."

[1] Previously, I have submitted responses on behalf of the American Bar Association Family Law Section and the State Bar of Nevada Family Law Section, having been tapped by both of those organizations to express their consensus in writing. Much of the text here is similar in content, as the Academy's view is not at variance with the expressed ABA policy.

The Academy currently has chapters in most states, and conducts local and national continuing education programs, participates in the legislative process, and engages in a variety of other activities to serve the public and to improve the practice of matrimonial law.

The Academy has no political affiliation, and its members represent both military members and the spouses of those members, and thus has no political agenda on the questions in this area other than making sure, to the degree possible, that law in this area is compatible with the law governing all persons in similar situations, so that the ends of equity and substantial justice are served in cases involving the military, as in all other cases.

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.[2] Since then, I have handled several hundred military divorce cases (working for both members and spouses), have written and lectured widely in this field, and completed a textbook on the subject.[3]

The Academy position, in essence, is that both members and their spouses should be equal under law and treated in state divorce courts as equals, so that the laws designed to achieve equity between spouses in divorce can be applied to them, as they apply to all other persons. Of course, in doing so, the particular privileges and duties of military service should be recognized, and divorce courts should and must provide accommodation by means of such procedural safeguards as are necessary to recognize and support military duties.

Like the ABA, the Academy believes that the property division aspect of state divorce law should 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 employment during 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 every kind of pension and retirement benefits, whether private or governmental.

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

[3] *See* A LAWYER'S GUIDE TO MILITARY RETIREMENT AND BENEFITS IN DIVORCE (ABA 1998).

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 (or somehow awarded entirely to one spouse), it is usually impossible to make a military divorce fair to both parties, and the divested party usually ends up impoverished.

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 usually discretionary, dependent upon the needs and abilities of the parties, and subject to review upon changed circumstances after divorce.[4]

The Academy position supports that of the ABA, as expressed in 1990:

> 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.[5]

Your request letter to the Academy did not list specific issues for review, as did the letter to the ABA two years ago. However, the issues being debated by partisans in the field – even false "issues" put forward to serve political or personal agendas without any sound legal basis – have not changed since that time. This response is grounded in an underlying policy that divorce should do equity to ***both*** parties to a military marriage. Neither members nor their spouses are any more – or any less – deserving of equitable treatment under law than others whose marriages come to an end. Like those others, both parties to military marriages deserve protection of the reasonable expectation of sharing in the rewards accrued during marriage.

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[4] *See*, *e.g.*, *Wolff v. Wolff*, 112 Nev. 1355, 929 P.2d 916 (1996).

[5] 1990 Statement, *supra* fn. 2, at 5.

II. 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 "equitable distribution statutory schemes several years ago. 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. The mechanics of dividing retirement benefits this way is typically referred to as the "time rule" or "marital coverture fraction."

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.[6]

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 former spouses significantly less than the percentage intended to be awarded by courts.[7] 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."

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[6] The "smaller" federal plans (for example, foreign service and CIA) have not gathered much commentary or review from public or private organizations, or from commentators in professional journals. This is, presumably, because of the relatively small numbers of persons affected by those plans; it is believed that there are very few divorces per year in which these plans are at issue. From a limited review, however, it appears that several of the plans may have some anachronistic provisions rooted in public policies more reflective of the 1950s than of modern jurisprudence. Accordingly, it is submitted that the results of this study, and particularly any effort to create a "grand unification" of federal retirement systems, be made to encompass those smaller plans as well.

[7] Reports by the General Accounting Office and Congressional Research Service in 1984 and 1989 found that court orders purporting to divide military retirement benefits on a "50/50" basis actually effected a split of "55.4%/44.6%" to "58.4%/41.6%" – always in favor of the former military member – after the impact of tax withholdings was considered. CRS Report For Congress: "Military Benefits for Former Spouses: Legislation and Policy Issues," March 20, 1989.

When Congress amended the definition of "disposable pay," the change was not made retroactive, leading to a continuing series of enforcement problems in some cases decided before February, 1991. While this problem is one that will lessen year by year, as those divorced under the old definition of "disposable pay" get older and die, statistics indicate that there are still some hundreds of thousands of persons affected.

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

Many cases reveal 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 – 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 could and would enforce legitimate state court orders. Since the "rule" serves no useful purpose, and causes significant misunderstanding and error, simply 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, the regulations are designed so that 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.[8] 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.[9] As of September 30, 1996, 42,248 members had taken early retirement under the "Temporary Early Retirement Authority" (TERA). This number is believed to increased significantly by the time the programs expired. They could, of course, be brought back if staffing requirements so dictated.

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.[10] 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.

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[8] Pub. L. No. 102-190, Div. A, Title X, Part E, § 1061(a)(7), 105 Stat. 1472 (Dec. 5, 1991); this was part of the Defense Authorization Act).

[9] Pub. L. No. 103-160, Div. A, Title V, Subtitle E, § 555(a), (b), Title XI, Subtitle H, § 1182(a)(2), 107 Stat. 1666, 1771 (Nov. 30, 1993); again, part of the Defense Authorization Act).

[10] *See In re McElroy*, 905 P.2d 1016 (Colo. Ct. App. 1995); *In re Shevlin*, 903 P.2d 1227 (Colo. Ct. App. 1995); *Kulscar v. Kulscar*, 896 P.2d 1206 (Okla. Ct. App. 1995); *In re Crawford*, 884 P.2d 210 (Ariz. Ct. App. 1994); *Marsh v. Wallace*, 924 S.W.2d 423 (Tex. Ct. App. 1996); *Abernathy v. Fishkin*, 638 So. 2d 160 (Fla. Ct. App. 1994); *Blair v. Blair*, 894 P.2d 958 (Mont. 1995); *Fisher v. Fisher*, 462 S.E.2d 303 (S.C. Ct. App. 1995).

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).[11] 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,[12] the jurisdictional limitations are producing exactly the harm they were intended to prevent, but in reverse – 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.[13]

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[11] In a military case, an order dividing retired pay as the property of the member and the former spouse will only be honored by the military if the issuing court exercised personal jurisdiction over the member by reason of: (1) residence in the territorial jurisdiction of the court (other than by military assignment); (2) domicile in the territorial jurisdiction of the court; or (3) consent to the jurisdiction of the court. 10 U.S.C. § 1408(c)(4). These limitations override state long-arm rules, and must be satisfied in ***addition*** to any state law jurisdictional requirements. Cases lacking such jurisdiction can go forward, but they will not result in enforceable orders.

[12] In most places, making a general appearance usually constitutes "consent" to trial of the entire action, but one case from San Diego, California, indicates that a service member may "un-consent" to court jurisdiction over the retirement issue alone, thus requiring a separate trial over that one issue in some other state. *See Tucker v. Tucker*, 277 Cal. Rptr. 403 (Ct. App. 1991). Similar decisions have been rendered in a handful of other jurisdictions. *See Wagner v. Wagner*, ___ A.2d ___, No. J-118-2000 (Pa., Apr. 18, 2001).

[13] The jurisdictional caution is even more applicable in partition cases. According to most courts that have ruled on the question, the jurisdictional test is to be applied in the *present* (i.e., when the current action is commenced) as opposed to considering what jurisdiction was established during the original divorce. Oddly, the federal courts have been willing to permit state-court long-arm jurisdiction where ***state*** courts themselves find they cannot exercise it. *See, e.g.,Tarvin v. Tarvin*, *Kovacich v. Kovacich*, 705 S.W.2d 281 (Tex. Ct. App. 1986); 187 Cal. App. 3d 56, 232 Cal. Rptr. 13 (Cal. Ct. App. 1986); *Messner v. District Court*, 104 Nev. 759, 766 P.2d 1320 (1988); *contra*, *Lewis v. Lewis*, 695

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, with traditional state long-arm statutes providing the ground rules for jurisdiction over military members.

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. A virtually identical bill to do so has been re-introduced in Congress every session for the past decade or so.[14] 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 – and military personnel – ***very*** different from the treatment of ***all*** other persons, including other federal employees, who divorce. As a practical matter, 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

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F. Supp. 1089 (D. Nev. 1988); *Delrie v. Harris*, 962 F. Supp. 931 (D.W. La. 1997).

[14] The most recent version known to me was HR 1983.

everywhere. Thus, as a matter of treating similarly-positioned people similarly, the proposal is a bad one.

The 1979 and 1982 resolutions of the American Bar Association stand for the proposition that ***all*** deferred compensation derived from federal employment should be subject to state property and divorce law. The Academy concurs with those resolutions. A federal enactment which would create a contrary result 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 – with the approval and urging of the various organizations of military members and retirees – 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.[15]

Any argument that military and civilian retirements should be treated equally in the tax cases, but that normal property-division law should not apply to military retirement, is hypocritical. No one alleges that the Supreme Court erred in *Barker*, and the same result is warranted here – 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.[16] The retirement benefits should be considered to be what they are touted as being upon enlistment – 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

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[15] *See Barker v. Kansas*, 503 U.S. 594, 112 S. Ct. 1619 (1992). Previously, the Court had ruled that a state could not tax federal Civil Service retirees if it did not also tax recipients of state retirement benefits. *See Davis v. Michigan Dept. of Treasury*, 489 U.S. 803, 109 S. Ct. 1500 (1989). The Supreme Court found that there were no "significant differences between the two classes [federal and state]" of retirement benefits and of beneficiaries. *Id*., 489 U.S. at 816, as quoted in *Barker v. Kansas, supra*, 503 U.S. at 598. The Court observed that military retirement benefits are treated as deferred compensation for purposes of determining deductibility of individual retirement account (IRA) contributions. *Id*. at 604. Discussing the relevant factors, the Court concluded: "For purposes of 4 U.S.C. § 111, military retirement benefits are to be considered deferred pay for past services."

[16] For many years, recruiters and others described the job of military spouse as "the hardest job in the military" in recruiting literature, and recognition awards. Whether true or not, there is no doubt that the ability to have the military retirement benefits after retirement has been used for decades as an enticement to both parties to a military marriage.

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:** Reject 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 as currently applied when the member continues service, is to almost break even. This was reported to Congress as long ago as 1990.[17]

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.[18] The decisions of several other states have reached the same result, without setting out much analysis of why they did so.[19]

One example of an analytical case is *Fondi v. Fondi*,[20] 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,

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

[18] At least one state, however, has embraced the analysis that would be mandated on the states under the "rank-at-divorce" proposal. In *Grier v. Grier*, 731 S.W.2d 931 (Tex. 1987), the Supreme Court of Texas considered a declaratory judgment action brought by the husband in Texas eight years after the parties divorced. The husband was a Major at divorce, but he had already been placed on a promotion list for Lieutenant Colonel (which rank he pinned on eight months after the divorce). The court, without doing or considering the mathematics, held that granting the former spouse a percentage of the retired pay based on the rank ultimately attained by the member would "impermissibly invade" the member's separate property. One justice, concurring and dissenting, would have held the applicable rank to be that of Lieutenant Colonel.

[19] *See*, *e.g.*, *Casas v. Thompson*, 720 P.2d 921 (Cal. 1986), *cert. denied*, 479 U.S. 1012 (1987).

[20] 106 Nev. 856, 802 P.2d 1264 (1990) (retirement under state public employees retirement system).

rather than a portion of the pension that would have been received if the worker retired on the date of divorce.[21]

Some courts have explained what they are doing as adhering to the "qualitative" view of spousal contributions to retirement accrual.[22] 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 closes 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" proposal.

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*.[23] The trial court had used a time-rule approach, with the wife's percentage to be applied to the sum the husband actually received, whenever he actually retired.

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

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

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[21] *Sertic v. Sertic*, 111 Nev. 1192, 901 P.2d 148 (1995) (CSRS retirement).

[22] *Stouffer v. Stouffer*, 10 Haw. App. 267, 867 P.2d 226 (1994).

[23] 545 N.W.2d 252 (Iowa 1996).

[24] The Iowa court apparently did not even consider the possibility of having the wife's interest begin being paid at first eligibility for employment, "freezing" it at that point and letting the husband enjoy all accumulations after that time. Presumably, this is because that possibility was not litigated at the trial level. That is the result in most or all community property states, however, and case law has made it clear that a spouse choosing to accept retirement benefits at first eligibility has no interest in any credits accruing thereafter, having made an "irrevocable election." *See In re*

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 most 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.[25] 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. Many states would be forced to have two separate ways of determining spousal interests in retirement benefits – one for military cases, and one for everyone else. The "rank at divorce" proposal does not appear to implicate any federal interest that would warrant such 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" or "split payment" model of establishing spousal shares 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

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Harris, ___ P.2d ___ (Wash. Ct. App., No. 45364-5-I, July 30, 2001), and the citations set out in the following footnote.

[25] Several state courts have held that the interest of a former spouse in military retired pay is realized at *vesting* (i.e., after 20 years of creditable service), theoretically entitling the spouse to collect a portion of what the member *could* get at that time irrespective of whether the member actually retires. *See In re Marriage of Luciano*, 164 Cal. Rptr. 93 (Ct. App. 1980); *In re Marriage of Gillmore*, 629 P.2d 1 (Cal. 1981); *In re Marriage of Scott*, 202 Cal. Rptr. 716 (Ct. App. 1984); *Gemma v. Gemma*, 105 Nev. 458, 778 P.2d 429 (1989); *Koelsch v. Koelsch*, 713 P.2d 1234 (Ariz. 1986); *Ruggles v. Ruggles*, 860 P.2d 182 (N.M. 1993); *Balderson v. Balderson*, 896 P.2d 956 (Idaho 1994); *Blake v. Blake*, 807 P.2d 1211 (Colo. Ct. App. 1990).

account the years of service and how many of those years overlapped the parties' marriage. Under this model, the spouse can never have 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,[26] which generally prohibited alienation of retirement benefits, and the Retirement Equity Act of 1984,[27] 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 would then be completely unaffected by the former spouse's life or death, and the member's life or death would not be 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 would be elimination of the litigation concerning court orders for payment of a spousal share upon eligibility for retirement (discussed above), as is the law of California, Nevada, and several other states.[28] Since the benefits

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[26] Commonly known as ERISA, enacted as Pub. L. No. 98-397 (1974).

[27] Commonly known as the REA, and enacted as Pub. L. No. 98-397 (1984).

[28] The theory behind such orders is that the employee (member) spouse should not be able to decide when benefits that are due and payable to the spouse will actually commence – that "The employee spouse cannot by election defeat the nonemployee spouse's interest in the community property by relying on a condition within the employee spouse's control." *In re Marriage of Luciano*, 164 Cal. Rptr. 93, 95 (Ct. App. 1980). A spouse making such an election

would be divided into two separate portions, the spouse's election to begin benefits would 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."

This change is neither recommended or not recommended, but it should be considered. Ultimately, the lives of many people would be improved by treating them more alike than differently, and at some point the treatment of employees of private corporations, of federal civilian employees, and military members, should be made as closely similar as is possible to achieve.

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.[29] The change would cost the government nothing additional in benefit pay-outs, and would do a great deal of good for a great many people on both sides of these cases, without injuring anyone.

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should also receive the imputed cost of living adjustments that *would have* accrued if the member had retired, but the former spouse does *not* share in any actual later increases in rank, or benefit from additional years in service. *See In re Harris*, *supra*.

[29] This was the single item agreed upon by ***all*** those testifying at the 1990 House Armed Services hearings on the USFSPA (the lobbyists for the members' organizations, the spouses' organizations, and the representatives of the Department of Defense, and the American Bar Association), but no action was taken by the committee to implement the change at that time.

This is an area in which both the private-sector ERISA scheme,[30] and the CSRS/FERS model are superior to the military model; 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.[31]

> **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 accidental 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 cover the same individual as a former spouse, 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.

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[30] As with the retirement benefits themselves, if the current "derivative rights" model is abandoned in favor of an ERISA-like division of the benefits themselves, then the member's life or death becomes irrelevant to the benefits payable to the former spouse. If an ERISA model is adopted, then upon divorce the former spouse would get an actuarially-adjusted lifetime interest, like the member.

[31] The most obvious of these is the loss of survivorship benefits upon remarriage of a former spouse. As with the military system, this provision confuses the concepts of property and alimony, is contrary to the public policy of encouraging marriage, and is unduly paternalistic and sexist. All "loss-of-benefits-upon-remarriage" penalties in federal retirement system statutes should be eliminated, as specified below.

3. Eliminate the 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 designed to secure and replace), 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.[32] Accordingly, the law should be revised to allow for allocation of the premium to

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[32] For example, where it is wished for the member to pay the premium, but the former spouse is receiving 50% of the benefit.

the member, to the former spouse, or to come "off the top" (as it is currently). Such an allowance would make the military system more compatible with the federal civilian plans under CSRS/FERS, and more similar to the options available to participants in private employment retirement plans.

> **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. It happens all the time, and costly litigation is raging between long-divorced former spouses throughout the country – with different results in different places, even among similarly-situated couples.

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.[33] 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 would have no impact on a longevity retirement; the former spouse would have 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.

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[33] Provisions to do exactly this are regularly introduced in Congress. The most recent of these that I have seen are H.R. 303 and S. 170.

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.[34] This logic was followed by other courts examining pre-*Mansell* divorces.[35]

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.[36] 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 of "constructive trust" (i.e., once the divorce goes through, the retirement money is considered no longer the member's property to convert).[37] Other courts, at least at the trial level, have simply noted the word "disability" attached to a post-divorce application for disability benefits, and without any kind of educated weighing or analysis, have allowed former spouses to be divested without any compensation at all.

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[34] *In re Marriage of Mansell*, 265 Cal. Rptr. 227 (Ct. App. 1989), *on remand from* 490 U.S. 581, 109 S. Ct. 2023 (1989).

[35] *See Toupal v. Toupal*, 790 P.2d 1055 (N.M. 1990); *Berry v. Berry*, 786 S.W.2d 672 (Tex. 1990); *Maxwell v. Maxwell*, 796 P.2d 403 (Utah App. 1990); *MacMeeken v. MacMeeken*, 117 B.R. 642 (1990) (Bankr. D. Kan 1990).

[36] *See In re Marriage of McGhee*, 131 Cal. App. 3d 408, 182 Cal. Rptr. 456 (Ct. App. 1982) (compensation by means of alimony, as set out in agreement between parties, used by dissolution court when member halted flow of military retirement benefits to former spouse after *McCarty* decision; court termed use of such "back-up" clauses to be making the property award "supportified"); *In re Marriage of Sheldon*, 124 Cal. App. 3d 371, 177 Cal. Rptr. 380 (Ct. App. 1981) (noting "close relationship between the amount of a property division and the entitlement, if any, of a spouse to spousal support"); *In re Marriage of Mastropaolo*, 213 Cal. Rptr. 26 (Ct. App. 1985)("conditionally" reversing an alimony award "on condition" that the court's affirmance of the retirement division became final); *Austin (Scott) v. Austin*, Mich. Ct. App. No. 92-15818 (unpublished intermediate court opinion), *rev. den.*, 546 N.W.2d 255 (Mich. 1996) (alimony, previously reserved, but only until remarriage, instituted for wife in lieu of pension share lost because of member's transfer to VA disability status; court approval given to post-remarriage alimony where the alimony compensates for distribution of a pension earned during marriage, under *Arnholt v. Arnholt*, 343 N.W.2d 214 (Mich. Ct. App. 1983) (non-military case)).

[37] *See In re Strassner*, 895 S.W.2d 614 (Mo. Ct. App. 1995). *See also Owen v. Owen*, 419 S.E.2d 267 (Va. Ct. App. 1992) (explicit indemnification; husband's subsequent disability retirement and reduction in retired pay to wife required husband to pay subtracted sums to wife and did not violate *Mansell* in any way); *Dexter v. Dexter*, 661 A.2d 171 (Md. App. 1995) (implicit indemnification; wife entitled to benefit of bargain reached at divorce); *McHugh v. McHugh*, 861 P.2d 113 (Idaho Ct. App. 1993); *Hillyer v. Hillyer*, (No. M1998-00942-COA-R3-CV, Tenn. Ct. App., March 13, 2001).

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. The current confusion is benefitting no one, and causing much litigation that should have been avoidable, often between spouses that have been divorced for decades.

A clear rule prohibiting the divestment of spousal interests that have already been ordered, would save much litigation, and increase the chances of consistent, equitable rulings being made in those cases that are litigated. As between husbands and wives, no further federal law should be necessary, but if any is contemplated, the appropriate focus should be along the lines of what courts now contemplate – whether the disability offset from retired pay was contemplated and taken into account in making the distribution of assets and the determination of whether any alimony should be paid and, if so, how much.

> **Recommendation:** Ideally, disability awards should be in ***addition*** to, 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 already 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 relatively recent past. 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 were 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." Even more unfortunately (and, I am informed, "accidentally"), the proposed regulations were re-issued in 1999 ***without*** the provisions relating to formula orders and hypotheticals, although court orders issued pursuant to the 1995 version are apparently still being honored. The regulations should be cleaned up, clarified, and finalized; 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 of letting some months pass after service of an order, before putting the order into place, 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 SBP 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.[38] Agreements to nominate beneficiaries of the SGLI should be enforceable, as should court orders concerning those benefits; to do otherwise encourages fraud.

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 – 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

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[38] *See*, *e.g.*, *Kaminski v. Kaminski*, 1995 WL 106497 (Del. Chanc. Ct. 1995). In that case, the member had promised in his stipulated divorce decree to name his daughter from his first marriage as his irrevocable beneficiary. When he died leaving his second wife as sole beneficiary, the first wife's action seeking a constructive trust for the daughter was dismissed. The court said that the "narrow exception" for fraud was restricted to "extreme factual situations" unlike simple breach of contract.

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

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 a general proposition, justice is not often 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 them, by making enforceable through the military pay centers the rulings of those courts, and by 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 federal creation of special classes of litigants in divorces does more harm than good.

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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