A Family Law Practitioner's Road Map to the Uniformed Services Former Spouses Protection Act

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I. INTRODUCTION

Members of the United States Armed Forces join and remain in the military for a full career for a wide variety of reasons. Patriotism and job satisfaction are two of the most common reasons; becoming rich from military pay is not one of the reasons. Many service members, however, do have a financial motivation for remaining in the service for at least twenty years: they can retire with a pension.¹

Military retired or retainer pay is based upon the number of years of creditable military service and the rank achieved by the member.² Upon retirement, military retired pay and benefits become important components in a former member's livelihood.³ Thus, when a military member divorces, the asset of military retired pay can be a key point of contention.⁴

³ The author recognizes that military members involved in divorce actions may be women or men. For the sake of consistency, the author will use the male gender to refer to the military member and the female gender to refer to the spouse since this represents the vast majority of Uniformed Services Former Spouses Protection Act (USFSPA) cases.
⁴ At the time of entering the military, approximately 83% of members are not married. At retirement, 88% of military members are married. Moreover, at retirement, 63% of members are married to their first spouse. More than 90% of
The Uniformed Services Former Spouses Protection Act (USFSPA) is the federal law that governs division of military retired pay. The USFSPA is probably the most controversial law that impacts military members and their spouses. Since a significant portion of military legal assistance deals with domestic relations questions, civilian and military attorneys must understand the USFSPA in order to provide effective assistance to military members and their spouses regarding divorce. The division of military retired pay often is the most important concern of military members involved in divorce actions, even above issues such as child and spousal support.

When a client is the spouse of the military member, the attorney needs to discuss the spouse's future rights regarding military-provided medical care and other base privileges, such as the commissary and base exchange. These rights, particularly medical care, can be extremely important to a middle-aged woman who perhaps has not developed a career of her own and may have trouble obtaining a job that provides adequate health insurance. Many civilian practitioners have great apprehension about dealing with military matters and understanding the complexities of the military bureaucracy, particularly in this area of the law.

Although almost all legal representation in this area will involve an impending divorce, the USFSPA is also a concern for a military member who is contemplating a prenuptial agreement. The domestic relations attorney thus must be able to explain the statutory provisions dealing with the division of military retired pay and the retention or loss of a spouse's other military benefits whether the client is the military mem-

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5. Commissaries are the same as grocery stores, but they normally are less expensive and are not subject to state taxes. Base exchanges carry clothing, appliances, toys, and other items as a store and, like commissaries, often are cheaper than civilian stores.

6. High divorce rates have contributed to the fact that more than 60% of adults below the federal poverty line are women, the majority of whom are white. After a divorce, a woman typically suffers a 73% drop in her standard of living while the ex-husband’s living standard rises 42%. Claudia Wallis, Onward, Women!, TIME, Dec. 4, 1989, at 85-86.
ber or the spouse, in any prenuptial, separation or divorce action.

This article will examine the history of the Uniformed Services Former Spouses Protection Act, the primary provisions and concomitant controversies of the USFSPA, and some of the problems and proposed revisions to the USFSPA.

II. THE UNIFORMED SERVICES FORMER SPOUSES PROTECTION ACT (USFSPA)

A. History of the USFSPA

States traditionally have had the authority to pass laws concerning domestic relations. The right of each state to enact the laws appropriate for people within that state's jurisdiction was reserved by the Framers of the Constitution in the Tenth Amendment. The laws of each state form a complex and diverse body of rights and responsibilities, which, granted the traditional reluctance of the Supreme Court to interfere, are within that state's discretion to alter at will. The only area in which the Court has limited the states' prerogative is when the state statutes deny individuals Constitutionally guaranteed rights.

Until the United States Supreme Court decided McCarty v. McCarty in 1981, states were free to consider military retired

7. U.S. CONST. amend. X. The Tenth Amendment to the United States Constitution provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." Id. The United States Supreme Court has held that states control the laws concerning domestic relations. See, e.g., In re Burrus, 136 U.S. 586, 593-94 (1890), in which the Court stated: "[t]he whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States." Moreover, on the rare occasion when state domestic relations law is alleged to conflict with a federal statute, the Court has limited its review to determine whether the state law must fail under the Supremacy Clause due to Congress having positively required by direct enactment that state law be preempted. Wetmore v. Markoe, 196 U.S. 68, 77 (1904); see also U.S. CONST. art. VI.


pay within the context of their community property laws or their common and statutory law. Community property states and some common law states considered military retired pay a marital asset, which was divisible by the state court in a divorce action. On the other hand, some common law states found that federal preemption prohibited them from dividing military retired pay as a marital asset. Other common law states simply considered military retired pay to be the military member's separate property and not subject to division.

Colonel Richard J. McCarty married his wife, Patricia, in 1957 while he was a medical student. After entering active duty in the United States Army in 1959, he eventually filed for divorce after completing approximately 18 of the 20 years of active duty service required to receive military retirement benefits. Based upon its finding that military retired pay was part of the marital community, the California trial court awarded Mrs. McCarty 45% of Colonel McCarty's future monthly military retired pay. The California Supreme Court subsequently denied Colonel McCarty's petition for a hearing. Colonel McCarty appealed to the United States Supreme Court challenging the ruling of the California Superior Court that his prospective military retired pay was community property and therefore subject to division as marital property.

12. Id.
13. Id.
15. Id. A military member must serve at least 20 years active duty service to be eligible to retire with benefits from the military. 10 U.S.C. § 3911 (1988). The amount of retired military pay is determined by a formula found in 10 U.S.C. § 3991 (1988). Moreover, military retired pay is adjusted annually for any increase in the Consumer Price Index. 10 U.S.C. § 1401(a) (1988).
17. Id. at 216-19.
18. Colonel McCarty argued that military retired pay is current compensation for reduced services and not deferred compensation for active duty service. Id. at 221. The military retirement system is noncontributory and no vesting occurs until the member actually retires. On the other hand, most private pension plans are contributory and often vest after five years. Based upon these facts, some interested parties advocate a revision to the USFSPA requiring a marriage that encompasses at least ten years of creditable service in order for the state court to divide military retired pay as property. Furthermore, unlike private sector pensions, retired military officers continue to be subject to the Uniformed Code of Military Justice (10 U.S.C. § 802(a)(4) (1988)) and can be recalled to active duty (10 U.S.C.
Writing for the six member majority, Justice Blackmun reversed the California court decision, finding that federal law preempts a state from dividing military retired pay as marital property regardless of whether retired pay is defined as current or as deferred compensation. The Court employed a two-step analysis in considering the preemption issue. First, the Court found that a conflict existed between California community property law and the statutes covering military retired pay. The Court then examined whether "the application of community property principles to military retired pay threatens grave harm to 'clear and substantial' federal interests." The Court held that division of military retired pay in a divorce action would frustrate the two objectives of the federal military retirement system: to provide for the retired service member and to meet the personnel management needs of the active duty military forces. Furthermore, the Court noted that "in no area has the Court accorded Congress greater deference than in the conduct and control of military affairs." Finally, the Court invited Congress to statutorily overrule its decision and provide a different result.

§ 688 (1988)).

19. The preemption doctrine is based upon the Supremacy Clause, which states: "[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof ... shall be the supreme Law of the Land." U.S. CONST. art. VI, cl. 2.

20. The Court relied upon the two-pronged test employed in Hisquierdo v. Hisquierdo, 439 U.S. 572, 578 (1979), in which it held that in a divorce action the application of community property law to a pension paid under the Railroad Retirement Act of 1974 would threaten the federal interest of providing for the economic security of retired railroad employees. Id. at 578-80. Hisquierdo was only one of five cases prior to McCarty in which the Supreme Court invalidated state laws governing marital community property issues. See also Yiatchos v. Yiatchos, 376 U.S. 306 (1964); Free v. Bland, 369 U.S. 663 (1962); Wissner v. Wissner, 338 U.S. 655 (1950); McCune v. Essig, 199 U.S. 382 (1905).


24. Id. at 236.

25. Id. at 235-36. Writing for the three dissenting justices, Justice Rehnquist strongly argued that the majority was misapplying and rewriting the test for pre-emption that had been used in Hisquierdo by basing the alleged conflict with federal law upon "vague implications from tangentially related enactments or Congress' failure to act." Id. at 237.
The Supreme Court made explicit that military retired pay was not subject to division by a state in a divorce action. The Court did not discuss, however, the issues of the extent to which military retired pay could be considered in determining spousal or child support and the extent to which military retired pay could be considered in equitable division of other property. 26

State courts consequently have held that McCarty does not preclude them from considering military retired pay in establishing the amount of spousal or child support. 27 The McCarty Court distinguished between awards for support and the equitable distribution of property, noting that Congress provided for garnishment of retired pay for support, but not for distribution of property. 28 Thus, if courts can garnish retired pay in order to satisfy support awards, they logically are allowed to consider them in setting the amount of spousal support. 29

Although McCarty explicitly prohibits using military retired pay as an offsetting property award in the division of property, several state courts have considered the value of military retirement in dividing marital property. The two factors that help explain this treatment are a general perception that the result in McCarty was not fair and the Supreme Court's failure to explain extending the prohibition against offset awards, discussed earlier in Hisquierdo v. Hisquierdo. 30

B. The Birth of the USFSPA

The McCarty decision was strongly criticized by legal commentators and by the American Bar Association. 31 The criticism focused on the difference between the treatment of


27. McKnight, supra note 26, at 506-07. See also Davis v. Davis, 777 S.W.2d 230 (Ky. 1989) (noting that disability pay, which is expressly excluded from the USFSPA definition of "disposable retired or retainer pay," may be considered in awarding spousal and child support).


29. McKnight, supra note 26, at 507.

30. McKnight, supra note 26, at 506.

spouses of military members and other spouses and the Court's use of federal preemption.92

Within five months of the McCarty decision, Republican Senator Roger Jepsen of Iowa introduced legislation that would provide protection to former spouses of military members.33 The legislation, known as the Uniformed Services Former Spouses Protection Act (USFSPA), was designed to return to the states the primary responsibility for determining the character of military retired pay as marital or separate property. During testimony before the Senate Manpower and Personnel Subcommittee, Committee on Armed Services, Senator Jepsen stated that his bill was a direct response to the Supreme Court ruling in McCarty. Senator Jepsen's bill was passed by Congress, signed into law by President Reagan on September 8, 1982, and went into effect on February 1, 1983.34 Notwithstanding the enactment of the USFSPA, the storm of controversy has continued to grow, and no relief is in sight.

C. The Effect of the USFSPA

1. What the USFSPA Does Not Do

With enactment of the USFSPA, Congress substantially reversed the McCarty decision by providing that each state may determine, in accordance with state law, whether military retired pay is divisible as a marital asset in a divorce action.55 Many practitioners do not realize that although states have the primary power of controlling military retired pay in divorce actions, states must stay within parameters established by the USFSPA. While the affirmative requirements imposed by Congress through the USFSPA are paramount, the absence of key issues is equally important to practitioners.

92. See McKnight, supra note 26, at 504-05.
35. Retired military members have sued the United States with the claim that the passage of the USFSPA was unconstitutional based upon a violation of the Fifth Amendment takings clause. The plaintiffs also argued that retroactive application of the USFSPA constituted an unconstitutional impairment of contract and that retroactive application of the USFSPA was unduly harsh and oppressive. The plaintiffs lost. See Fern v. United States, 908 F.2d 955 (Fed. Cir. 1990).
Congress did not require a division of military retired pay in divorce actions; instead, the states once again have unbridled discretion in categorizing military retired pay as marital or separate property as they do with any private sector pension plan. Currently, all states, except Alabama, consider military retired pay to be divisible as a marital asset or part of the marital community. Alabama considers military retired pay as an offset and as a factor in establishing support. Therefore, military retired pay is not protected as purely separate property in any jurisdiction within the United States.

Moreover, the USFSPA does not create an automatic entitlement to a certain portion of military retired pay based upon the length of the marriage. Instead, states can create their own methods of division. The USFSPA allows a state court to award the former spouse either a percentage or a specific amount of military retired pay. Most court orders, however, are phrased in terms of a percentage.

In calculating the percentage of military retired pay to award a military spouse, many states use the formula of dividing the total number of years of marriage while in the service by the total number of years of creditable military service, and then dividing this result by two. Under this formula if a member has been married for 10 years while on active duty...

36. Attorneys should ensure that a thorough review of state law and case precedent is accomplished. In Rodak v. Rodak, 442 N.W.2d 489 (Wis. Ct. App. 1989), the Wisconsin Court of Appeals held that all of a pension, including that portion earned before the marriage, could be considered marital property and was subject to equitable distribution. See Family Law Note–Uniformed Services Former Spouses' Protection Act Update, Army Law., Dec. 1989, at 39. See also Blanchard v. Blanchard, 578 A.2d 339 (N.H. 1990) (where the Supreme Court of New Hampshire provides a good discussion of the philosophy of other states in holding that military retired pay is a divisible asset in a New Hampshire divorce action).


39. For case citations for every state, the District of Columbia, Puerto Rico and the Canal Zone, see Family Law Note–Uniformed Services Former Spouses’ Protection Act Update, Army Law., June 1989, at 43-47.


41. A court order that provides for a division of military retired pay by means of a formula that is not readily understood or apparent on the face of the court order will not be honored unless clarified by the court. 32 C.F.R. § 63.6(b)(8) (1990).

and retires after 20 years of active military service, the spouse will receive 25% of her husband's military retired pay.

2. The Ten-Year Rule and Direct Payment

Probably one of the most frequently misunderstood provisions of the USFSPA, and a key area for potential malpractice, is the direct payment provision. Former spouses can have the Defense Finance and Accounting Service (DFAS) directly pay them their court-ordered share of military retired pay if the marriages encompassed at least ten years of creditable military service. This requirement is known as the "ten-year rule," but is not applicable if the payment represents spousal or child support rather than a division of marital property.

Many military members hold the misconception that a former spouse can receive a portion of military retired pay only if the marriage lasted for ten years. This is not correct! The ten-year rule only affects the former spouse's ability to obtain direct payment of her court-awarded share of the member's military retired pay on a monthly basis. The rule actually is one of economics. If no time requirement existed, the military services' administrative burden would be extraordinary since courts can, and often do, award a portion of a member's retired pay to the former spouse for marriages that did not last ten years. In this manner, the DFAS is only required to administer direct payments in significant cases. The brunt of ensuring payment of the former spouse's share of military retired pay therefore is squarely placed on the former spouse if the marriage lasted less than ten years. No additional burden is placed on the former spouse by not having direct payment than is placed on the former spouse with other payments.

43. See 10 U.S.C. § 1408(d)(2) (1988). More than 14,000 former spouses are receiving a portion of military retired pay from a military finance center as marital property. Ninety-four percent of affected members retired after 1968. Hearings, supra note 4. Due to recent changes in the Department of Defense, the individual military service accounting and finance centers have been combined to from the Defense Finance and Accounting Service (DFAS).


45. State courts do not have the authority to order the military to pay the former spouse more frequently than on a monthly basis or to vary normal pay and disbursement cycles. Id. § 1408(d)(3).
In order to receive direct payment from the DFAS, the former spouse must personally serve or mail, through certified or registered mail with return receipt, to the designated agent for the respective service\(^4\) a certified copy of the court order\(^5\) and a completed Department of Defense Form 2293.\(^6\) The DFAS requires that the established procedures be followed precisely and to the letter.\(^7\) If the spouse or her counsel does not comply with the requirements of the law and implementing regulations, the request will be rejected and arrearages may accrue.\(^8\) Effective service also is crucial in that the DFAS will satisfy court orders on a first-come, first-served basis when several court orders are served regarding a member's retired pay.\(^9\)

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46. See 32 C.F.R. § 63.6(b)(5) (1990) for a list of the designated agents for each military service.

47. A Qualified Domestic Relations Order (QDRO) does not apply to military retired pay. For direct payment purposes, the former spouse must submit a court order as defined by the USFSPA; QDROs do not meet this criteria unless incorporated by reference in the divorce decree. See 10 U.S.C. § 1408(a)(2) (1988). While QDROs often are complex, a divorce decree or court order need only state that the former spouse is awarded X% of the member's military retired pay. Another issue can be the acceptance of a foreign divorce decree. Unless one of the parties to the divorce is a bona fide resident of the country granting the divorce or unless the divorce is recognized by a court of competent jurisdiction in the United States, benefits will not be initiated or terminated based upon the decree. See 55 COMP. GEN. 533 (1975); 36 COMP. GEN. 121 (1956); see also Shaff v. United States, 695 F.2d 1138 (9th Cir. 1983), cert. denied, 464 U.S. 821 (1983).

48. See 10 U.S.C. § 1408(b)(1)(A) (1988); 32 C.F.R. § 63.6(b)(1) (1990). The former spouse, not the attorney, should sign the DD Form 2293. Any evidence supporting the former spouse's claim that the marriage lasted ten years will be sufficient. Examples of adequate evidence include marriage certificates, court records, birth certificates, and military documents.

49. The USFSPA protects the United States and any officer or employee of the United States from liability with respect to payments made under the USFSPA pursuant to a court order that is regular on its face if such payment is made in accordance with the law and regulations. 10 U.S.C. § 1408(b)(1) (1988). See also 32 C.F.R. § 63.6(g) (1990). Obviously if the DFAS does not comply with the USFSPA or the regulations, the aggrieved party can sue the United States. An example of such a violation would be if the DFAS were to begin direct payments to a former spouse without having received a certified court order in accordance with 32 C.F.R. § 63.6(b)(1)(ii) (1990). See Booyer v. Van Buskirk, No. 84-4093-CV-C-5 (W.D. Mo. 1989) (federal district court granting summary judgment to plaintiff for improper management by Air Force Accounting and Finance Center).

50. Arrearages of military retired pay based upon a division of property, as opposed to spousal or child support, cannot be obtained through direct payment by the military service. See infra note 78 and accompanying text.

As part of the application by the former spouse for direct payment of military retired pay, the spouse must agree in her written application that any future overpayments are recoverable and subject to involuntary collection from the former spouse or from her estate.\textsuperscript{52} Another condition precedent to the DFAS making direct payments is that the spouse must agree to notify the DFAS promptly if the operative court order upon which payment is based is vacated, modified, or set aside.\textsuperscript{53} Notice must be given if the former spouse has remarried if the part of the payment is for spousal support.\textsuperscript{54} Notice of a change in eligibility for child support must be given if part of the payment is for child support.\textsuperscript{55}

If the DFAS receives conflicting court orders directing different amounts to be paid per month to the same former spouse from a military member's retired pay, the DFAS will authorize payment on the court order directing payment of the lesser amount.\textsuperscript{56} The difference in amounts will be retained by the DFAS pending resolution by the court that has jurisdiction or by agreement of the parties.\textsuperscript{57}

The DFAS can require the former spouse to provide a certification of eligibility that attests that the former spouse continues to be eligible to receive direct payment of military retired pay.\textsuperscript{58} The attestation must include a notice of change in status or circumstances that affect eligibility.\textsuperscript{59} After notice to the former spouse, payments may be suspended or terminated if the former spouse fails to comply with the requested certification.\textsuperscript{60}

3. \textit{Jurisdiction Required by the USFSPA}

In order for a state court to make a division of military retired pay, the court must have jurisdiction over the military member based upon one of the following: (1) domicile, (2)
residence by the military member other than by military assignment, or (3) consent.\textsuperscript{61} Note that this statutory requirement only applies to division of military retired pay as marital property. The USFSPA jurisdictional requirements do not apply to orders for spousal or child support.\textsuperscript{62}

Counsel for military members must be extremely careful not to make any type of appearance or the court may claim jurisdiction. Attorneys should not answer summons or service of process if any possibility exists that the court might claim jurisdiction. A state court could find jurisdiction based upon even a letter opposing jurisdiction.

Remember that a state court judge is not bound by the USFSPA jurisdictional requirements for spousal support. If the judge is upset by an argument that the court lacks jurisdiction to divide the military retired pay as marital property, the judge may grant the motion to dismiss based upon lack of jurisdiction, and then respond by ordering a larger amount of spousal support. Accordingly, counsel should be very cautious to avoid placing clients in a lose-lose situation.

The total amount of the member's retired pay payable by the DFAS directly to a spouse cannot exceed 50% of the member's disposable retired pay.\textsuperscript{63} If the member's pay is garnished for spousal or child support in addition to a payment under the USFSPA, the combined total direct payments may not exceed 65% of the member's disposable retired pay.\textsuperscript{64}

\begin{footnotesize}
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\item See Petters v. Petters, 560 So. 2d 722, 725 (Miss. 1990), in which the Supreme Court of Mississippi held that the state long-arm statute was overridden by the USFSPA to the extent that Mississippi law exceeded USFSPA limitations. The dissent argued, however, that the USFSPA jurisdiction residency prong be applied based upon past contact rather than the domicile prong, based upon the belief that congressional intent was to prevent forum shopping in order to protect military personnel.
\item Because of this fact, a situation may occur in which the DFAS will accept the court order for purposes of spousal or child support, but refuses to honor the order for division of military retired pay because the USFSPA provisions were not satisfied.
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Naturally, this provision does not relieve former military members of their liability for paying the remaining amount of spousal support, child support, or other payments required by court order, above the amount directly paid by the DFAS. If the military member was on active duty at the time an order was issued for the military to make direct payment to the spouse, and the member was not represented by counsel in court, the court order or allied documents must specify that the court complied with the Soldiers' and Sailors' Civil Relief Act. The Soldiers' and Sailors' Civil Relief Act may allow a stay of the proceedings for the military member; thus the USFSPA seeks to ensure that the military member's rights were not violated.

4. **Defining “Disposable Military Retired or Retainer Pay”**

One of the most controversial USFSPA parameters that must be observed by state courts is that states may only consider "disposable retired or retainer pay" in accordance with state law in divorce actions. "Disposable retired or retainer pay" is defined by the USFSPA as the total monthly retired pay less (1) debts owed to the United States; (2) legitimate amounts withheld for federal, state, and local taxes; (3) government life insurance premiums; and (4) disability pay. The eye of this
storm centers primarily on the exclusion of disability pay from the definition of "disposable retired or retainer pay" and state court jurisdiction. Military members normally will elect to waive a portion of their retired pay for disability pay because disability pay is tax-exempt.

Until recently, many states ignored the statutory mandate that disability pay, which is difficult to obtain, cannot be considered as part of the disposable military retired pay over which state courts hold jurisdiction. In order to include disability pay as disposable military retired pay, courts interpreted the USFSPA as a vehicle by which Congress intended to return to the states total authority to divide military retired pay, as in the pre-McCarty era. Courts stretched to accomplish this result in order to avoid what they perceived would be an economic disaster to the spouse.

The game changed when the United States Supreme Court held in Mansell v. Mansell that federal law means what it says. In Mansell, the Court noted that the language of the USFSPA is "both precise and limited." The Court held that

member's ability to earn a living has been impaired. 38 U.S.C. §§ 314, 355 (1988).

71. A military retiree must waive his retired pay to the extent of the amount of disability pay that he receives in order not to have an unfair windfall. See 38 U.S.C. § 3105 (1988). The portion of a member's retirement pension that is classified as disability pay is tax-exempt. 38 U.S.C. § 3101(a) (1988). Of the 1.6 million military retirees on September 30, 1989, approximately 150,000 were not receiving military retired pay due to VA disability compensation or other reductions. An additional 135,000 members were receiving disability retired pay; of these, 63% had insufficient years of service to qualify for nondisability retirement. Overall 82% of all retired members were receiving nondisability retired pay. Hearings, supra note 4.

74. Id. at 593.
75. Id. at 594-95.
76. Id. at 588. In addition to the seemingly explicit wording of the USFSPA, legislative history further supports the Mansell decision. See Uniformed Services Former Spouses Protection Act: Hearings on S. 1453, S. 1648, and S. 1814 Before the Subcomm. on Manpower and Personnel of the Senate Comm. on Armed Services, 97th Cong., 1st and 2d Sess. I, 70- 71, 131-34, 182-84 (1982); S. REP. No. 502, 97th Cong., 2d Sess. (1982); H.R. CONF. REP. NO. 749, 97th Cong., 2d Sess. 165 (1982). Notwithstanding the victory that Major Mansell enjoyed with the United States Supreme Court, he was not able to prevail on remand based upon several issues, including his signing a marital property settlement agreement and res judicata. See Mansell v. Mansell, 265 Cal. Rptr. 227 (Ct. App. 1989). See also Mansell v. Mansell: An Epilogue, ARMY LAW, Apr. 1990, at 74-75; Elliott v. Elliott, 797 S.W.2d 388 (Tex. Ct. App. 1990) (Texas Court of Appeals refusing to give
state courts only have the authority to treat disposable retired pay, as defined by federal law, as marital property.\textsuperscript{77}

Since receiving the clear message of Mansell, courts appear to have complied with the proscription of the USFSPA.\textsuperscript{78} Interestingly, the state courts still may be able to circumvent the apparent USFSPA intention that disability pay not be considered by the state courts as marital property. The method by which this end run can be accomplished is by the state court awarding spousal or child support or awarding other marital property as an offset in those cases in which a perceived inequity arises based upon disability pay being the separate property of the military member.\textsuperscript{79}

Realizing that what the legislature will not do, the judiciary sometimes tries to do, another possible tactic is for a court to construe Mansell very narrowly. A court conceivably can hold that although Mansell precludes an award of disability pay under Chapter 11 of Title 38 of the United States Code, the Court did not address disability payments made under Chapter 61 of Title 10.\textsuperscript{80} Chapter 61 disability payments thus arguably can be reached by state courts for division in divorce actions. This interpretation, however, appears to violate the mandates of the USFSPA and flies in the face of the Mansell decision.

Military members can attempt to restrain courts from creating their own law in this area by considering a provision in the federal regulations. The Code of Federal Regulations requires that in order for the former spouse to receive direct

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\item Mansell retroactivity regarding division of gross military retirement benefits); Berry v. Berry, 786 S.W.2d 672 (Tex. 1990) (Texas Supreme Court refusing to retroactively apply the USFSPA definition of disposable retired pay to a Texas divorce decree that was final prior to the enactment of the USFSPA).
\item See 32 C.F.R. § 63.6(a) (1990).
\item Chapter 11 of Title 38 of the United States Code establishes disability compensation for illness or disease that manifests during active duty or after completion of military service. 38 U.S.C. § 310 (1988). See also Davis v. Davis, 777 S.W.2d 290, 291 (Ky 1989).
\end{enumerate}
payment in the case of a division of property, the court order "must specifically provide that payment is to be made from disposable retired pay." If the court order served upon the DFAS does not contain this representation, the military member should challenge the propriety of any direct payments made by the DFAS. Moreover, the DFAS should verify that this requirement is satisfied and reject flawed court orders since they have an interest in ensuring compliance with federal fiscal law and can be held civilly liable for such a mistake.

Another controversy that is beginning to form on the horizon centers on the Voluntary Separation Incentive (VSI) program. In the Fiscal Year 1992 Department of Defense Authorization Act, Congress approved allowing military service departments offering an annuity or a lump-sum cash award to certain members who volunteer to separate from the military prior to retirement. Under the newly-created 10 U.S.C. section 1175, many members may be eligible to separate with an annuity that will run for twice the amount of time they served on active duty. Thus, a major with 13 years of service may receive an annuity for 26 years if he voluntarily separates rather than remains on active duty.

Military members who are contemplating a divorce, and active duty members who already have divorced and have had a portion of their future military retired pay awarded to their former spouses, may decide to separate with VSI benefits in order to avoid the USFSPA. Since VSI payments clearly are not military retired pay, but rather merely incentive pay to separate, the USFSPA cannot be applied to VSI payments. Members contemplating divorce must recognize, however, that courts can consider VSI as marital property. Divorced active duty members must carefully examine their state laws to ensure former spouses cannot modify their decrees if they choose to separate with VSI rather than remain on active duty until retirement.

81. Id. § 63.6(a)(1).
82. The former spouse's property interest in the former military member's military retired pay cannot be discharged through a declaration of Chapter 7 bankruptcy. See Bush v. Taylor, 912 F.2d 989 (8th Cir. 1990); Tidwell v. Tegtmeier, 117 Bankr. 739 (S.D. Fla. 1990); MacMeeken v. MacMeeken, 117 Bankr. 642 (Kan. 1990).
5. Payments to the Former Spouse

If the court awards a spouse a percentage of a member's retired pay, that income is considered the separate property of the spouse. Unlike spousal support, which normally terminates upon the spouse's remarriage, or child support, which normally terminates upon the emancipation or the attainment of a specified age by the children, the spouse will continue to receive the court-awarded share of military retired pay until one of the following occurs: (1) the court order limits the period of time for the spouse to receive the military retired pay and that time elapses; (2) the spouse dies; or (3) the military member dies.

The USFSPA does not grant the former spouse a property interest that can be devised, assigned, or transferred in any manner. Obviously, however, if the court attempts to ignore the dictates of Mansell by considering disability pay in establishing support payments, the court will have to design the award to continue the payment notwithstanding events such as remarriage.

Another point of contention is when the military member can be ordered to begin paying a portion of his military retired pay to his former spouse. The USFSPA explicitly precludes a state court from ordering a military member to retire in order to begin payments to the former spouse. Undaunted by written law, some courts nevertheless order active duty military members to begin paying their spouses a portion of their prospective military retired pay once the member attains

84. Id. § 1408(d)(4); 32 C.F.R. § 63.6(h)(3) (1990). Former spouses who are applicants under the Aid to Families with Dependent Children (AFDC) program must assign all rights of support to the state child support enforcement agency. Such an assignment is not valid for purposes of the USFSPA. The former spouse is the only one who can apply to have direct payment initiated. 50 Fed. Reg. 2665 (1985) (to be codified at 32 C.F.R. § 63).
retirement eligibility, which is twenty years of creditable military service. Thus, when military members attain twenty years of service, even if they choose to remain on active duty and not retire, they must begin paying their former spouses as if they had retired. Realistically, this action forces members to retire and denies the military the best ten years of a member's career.

Payments ordered under the USFSPA must be accomplished through a final decree, which is defined as:

[A] decree from which no appeal may be taken or from which no appeal has been taken within the time allowed for taking such appeals under the laws applicable to such appeals or a decree from which timely appeal has been taken and such appeal has been finally decided under the laws applicable to such appeals.

Upon receiving effective service of the court order, the DFAS has ninety days in which to begin direct payments to the former spouse. The DFAS, however, only can make prospective payments; the DFAS does not have authority to pay accrued arrearages through direct payment to the former spouse.

Obviously, arrearages will be created at the beginning of every direct payment case since effective service of the DFAS must be accomplished, after which the DFAS has 90 days to begin payments. The military member naturally is liable for these payments, which sounds nice, but does not mean that all members gladly will pay arrearages. Moreover, a spouse may


89. Id. § 1408(a)(3).
90. Id. § 1408(b)(1).
91. If the military member is not yet entitled to retired pay, payments normally will begin within 90 days after the member is entitled to receive retired pay. Id.
92. 32 C.F.R. § 63.6(h)(10) (1990) provides that "[p]ayments made shall be prospective in terms of the amount stated in the court order. Arrearages will not be considered in determining the amount payable from retired pay."
find herself facing a recalcitrant person who will do his best to reduce the amount of disposable retired pay in order to prevent his former spouse from receiving any part of his retired pay.

Members can reduce their disposable retired pay by creating debts to the United States.\textsuperscript{93} Retired military members have thought of various methods by which to create debts to the federal government, such as not paying federal income tax or writing bad checks on military installations. A completely legal way in which members can reduce their amount of disposable retired pay, however, is to declare themselves as single for federal income tax withholding.

The USFSPA allows the member to have military retired pay withheld for taxes to the extent authorized "if such member claimed all dependents to which he was entitled."\textsuperscript{94} The statute only discusses number of dependents and is silent regarding declaration of marital status. Moreover, although a spouse may be an exemption, she is not a dependent for tax purposes. In establishing income tax withholding, a member who remarries and has no additional children, can classify himself as single with no dependents, thereby decreasing the amount available as disposable military retired pay.

If the former spouse has been awarded a percentage of the member's retired pay, she is quickly placed in an unenviable position. On the other hand, if the former spouse has been awarded a specific dollar amount, the member will have to create real debts in order to affect the payment to the spouse. Counsel for former spouses must consider this potential problem in deciding whether to petition the court for a

\textsuperscript{93} 10 U.S.C. § 1408(a)(4)(C) (1988). The member also can have state taxes withheld to the extent that he can demonstrate liability. Id.

\textsuperscript{94} One of the considerations is that unless the former spouse has the court award a percentage of military retired pay, she will not benefit from cost of living increases in military retired pay. See \textit{In re Bocanegra}, 792 P.2d 1263, 1268-69 (Wash. App. 1990), in which the Washington Court of Appeals held that all cost of living increases received by the former military member can be ordered to be paid to the former spouse, notwithstanding that the order will result in more than 50% of the disposable military retired pay being awarded to the former spouse; the amount over 50%, the court recognized, will have to be paid directly by the member to the former spouse rather than through the military service. Moreover, because the cost of living increases will be net increases to the military member that will be subject to taxation, the court stated that if this does not reflect the actual tax rate, the member should fix it himself.
specific dollar amount or a percentage of the member's retired pay. 95

A spouse who faces this problem may ask the court to order a temporary increase in the monthly payments of retired pay in consideration of the arrearages. 96 The court order, however, cannot create a payment to the spouse over the maximum percentage authorized to be paid under the USFSPA. The only other possible way to receive the arrearage directly from the DFAS is to petition the court to classify the arrearages as spousal support, which allows the member's retired pay to be garnished.

III. THE SURVIVOR BENEFIT PLAN AND THE USFSPA

A military member's retired pay terminates upon his death unless he elects at retirement to participate in the Survivor's Benefit Plan (SBP). In a nutshell, the SBP authorizes a tax-free deduction from a member's monthly retired pay to purchase a survivor annuity for the benefit of his spouse, former spouse, or other allowed beneficiary, which will begin when the member dies. 97 The USFSPA does not prohibit a state court from requiring a military member to elect to participate in the SBP and to maintain his former spouse as the beneficiary. 98

Upon attaining retirement eligibility, military members are automatically covered by SBP without cost for the remainder of the time they serve on active duty. 99 A trap for the unwary practitioner is if an active duty military member who is retire-

95. The restriction on payment of USFSPA arrearages, located in 32 C.F.R. § 63.6(l)(10) (1990), is directed to the military services. This restriction does not prevent an amendment of the operative court order to increase the monthly amount payable in consideration of the accrued arrears. See 50 Fed. Reg. 2667 (1985).

96. 10 U.S.C. §§ 1431-1455 (1988); 10 U.S.C. § 1408(a)(4)(F) (1988). If the former spouse was awarded a percentage of the member's military retired pay, she will receive less by the member participating in the SBP since the member's SBP contributions reduce disposable military retired pay. See 10 U.S.C. § 1408(a)(4) (1988). After Mansell, courts will find deviating from the strict definition of disposable military retired pay very difficult.


98. Id. § 1448.

ment eligible has designated his spouse as the SBP beneficiary, the member must redesignate the spouse as beneficiary within one year of the dissolution or the SBP election of the now former spouse will automatically lapse.\footnote{100}

If the member dies while on active duty during this election period without having designated the former spouse as the beneficiary in accordance with court orders, the former spouse will have priority over other claimants, such as a new spouse, and will be considered the beneficiary of the SBP annuity.\footnote{101} Thus, if the member had redesignated his SBP beneficiary to be his new wife, contrary to court order, the former spouse can override the member’s election if the member died during the one year election period after the divorce.\footnote{102}

The former spouse can protect her SBP interest by requesting the DFAS to make a “deemed election” by submitting a written request to change the member’s SBP from spouse coverage to former spouse coverage and by providing a certified copy of the court order.\footnote{103} If neither the spouse nor the member recertifies the SBP election in the proper fashion, the spouse will be ineligible for SBP coverage.\footnote{104} The significance of this benefit is exemplified by the fact that SBP for a colonel (O-6) with twenty-five years of creditable military service is worth approximately $1600.00 per month for the remainder of the spouse’s life.

If an attorney for the former spouse were to forget this important aspect of the USFSPA and military benefits, the spouse can petition for a modification of the divorce decree. Such a modification or clarification can start another year during which the former spouse can seek a “deemed election.” A mere reiteration of the neglectful court order, however, will

\footnote{100} Id. § 1148(d)(3).
\footnote{101} Note, however, that a former spouse only may receive one SBP annuity. In the example provided, if the former spouse remarries prior to age 55, the SBP annuity obtained through the divorce court order will terminate. If the former spouse’s second husband dies and she again is the SBP beneficiary, she must elect which one of the two SBP annuities she prefers to receive. See 10 U.S.C. § 1450(b) (1988).
\footnote{102} See id.
\footnote{103} See id. § 1448(b).
\footnote{104} Once the member makes an SBP election in compliance with the court order, the member cannot change the election without evidence from the court that such a change is authorized. Id. § 1450(f)(2) (1988).
NOT be sufficient to obtain another year during which to correct the problem.

Based upon federal sovereignty, states do not have the authority to order the military to initiate the SBP on behalf of the member for the benefit of his spouse. The court therefore should require proof of compliance if the divorce decree includes an order to maintain SBP for the benefit of the spouse.  

Counsel for former spouses must realize that military members can respecify the amount of SBP coverage until the member begins receiving retired pay. Court orders thus should specify the degree of required coverage to be maintained by the member. The author is not aware of any specific cases dealing with this problem or, if any exist, how they were resolved. One possible avenue is the Board of Corrections for Military Records. Another avenue, of course, is to seek a private relief bill in Congress. A final and obvious alternative is to forget SBP, and simply require the member to maintain a life insurance policy with the former spouse as beneficiary.

Due to changes made by Congress in the Military Survivor Benefits Improvement Act of 1989, Congress passed a one-year open enrollment period that begins on April 1, 1992, and will allow the following: (1) persons not currently participating in the SBP to elect coverage; (2) persons who are participants in the SBP to increase coverage; and (3) persons who are participants in the SBP to elect supplemental coverage. Former spouses may be able to take advantage of this open enrollment period to obtain revisions to past court orders.

105. Id. § 1448 (1988).
107. Current pay administration procedures treat all military retired pay as though paid to the member. Pursuant to Treas. Reg. § 31.3401(a)-1(b)(1)(ii) (1990), military retired pay is considered wages for withholding purposes. Thus, withholding is mandatory and based upon allowances claimed by the member subject to limitations imposed by the Comptroller General. See 63 COMP. GEN. 322 (1984).
IV. THE USFPSA AND TAX IMPLICATIONS

Federal taxes are withheld from the member's gross retired pay based upon the total amount and the withholding allowances successfully claimed by the member.¹⁰⁸ The amount payable to the former spouse for court ordered spousal or child support or division of property is considered a deduction from the retired pay that does not affect the amount of tax to be withheld. No federal statute or Internal Revenue Service (IRS) regulation has provisions regarding the withholding of taxes on USFSPA direct payments because no employer-employee relationship exists.

One of the consequent problems for former military members is completing their tax forms. Only the member will receive a W-2 form at the end of the year; the former spouse will not receive a W-2. The member's W-2 will show the entire amount of retired pay paid to both the member and the former spouse. When filing taxes, the member should exclude the amount paid to the former spouse, identify the former spouse within the area for alimony, and provide an explanation through a footnote. The former spouse, of course, must report any taxable amount directly to the IRS and make estimated tax payments when appropriate.

Former spouses in the above situation sometimes complain that they should be given a credit against the member since the member has had federal and state taxes withheld based upon the entire amount of military retired pay.¹⁰⁹ The former spouse has to pay income tax on the amount of retired pay that she received from the member. At the same time, however, the member has had the benefit of having taxes withheld based upon the total retired pay, and now recovers some of the withheld taxes through his tax returns. Moreover, the member's disposable military retired pay was reduced by the additional tax withholdings, to which he was not entitled, resulting in a smaller amount of retired pay for the former

¹⁰⁸ In opposing this argument, members can focus on the Mansell decision, which clearly considers after-tax income. See Mansell v. Mansell, 490 U.S. 581 (1989).

spouse if she was receiving a set percentage of the disposable retired pay.

Recent private letter rulings of the Internal Revenue Service have indicated that former spouses may be entitled to a refundable federal income tax credit for a portion of the taxes withheld from military retired pay.110 Private letter rulings, however, are only applicable to those taxpayers who requested them and may not be used as legal precedent. Nevertheless, private letter rulings are indicative of the likely position of the IRS. Due to the uncertainty of this issue, the IRS has been asked to clarify the tax laws in this area for dissemination by the military to affected parties.111

The simple solution is for the government to issue a W-2 to the member and a W-2 to the former spouse reflecting the amount of retired pay each has received. Although this is not solve the problem for spouses who do not receive direct payments from the military, the suggestion will benefit many people.

V. OTHER MILITARY BENEFITS AVAILABLE TO FORMER SPOUSES

Former spouses also may be eligible for other military benefits such as medical care,112 commissary, post exchange (PX), and theater privileges. If a former spouse was married to the military member for at least twenty years during which the member performed at least twenty years of creditable service in determining the member's eligibility for retired pay, the former spouse is eligible for commissary, PX, and theater privileges. If the spouse remarries, the spouse loses these privileges, but can regain them if the remarriage ends.

With respect to hospital care, former spouses, who have been married to members for at least twenty years of creditable military service, are eligible for medical care at military facilities if they certify in writing that they have no medical coverage under an employer-sponsored health plan. If the

110. Letter from Assistant Secretary of Defense Grant S. Green, Jr. to Senator Sam Nunn, Congressman Les Aspin, and Mr. James J. McGovern of the IRS (Oct. 7-8, 1988). At the time of this writing, no definitive explanation from the IRS had been provided.

111. See DEPT OF DEFENSE, Instruction 1000.13, Enclosure 4, Attachment 1.

112. Instructors, The Judge Advocate General's School, TJAGSA Practice Notes, ARMY LAW., June 1988, at 56.
former spouse does not have an employer-sponsored health plan and also is not entitled to Medicare Part A hospital insurance through the Social Security Administration, the spouse is eligible to receive benefits from the Civilian Health and Medical Program for the Uniformed Services (CHAMPUS). Again, if the former spouse remarries, all military medical benefits, including CHAMPUS, are forfeited. With medical benefits, however, once the spouse has lost them, they cannot be regained.

If the spouse was married to the military member for at least fifteen years of creditable service and the final divorce decree was before April 1, 1985, the spouse is given the same benefits described above for spouses who were married for twenty years of creditable service.

If the marriage ended on or after April 1, 1985 and the unremarried former spouse was married to the member for a least fifteen years, but less than twenty years of creditable military service, then all entitlements, including medical care if the spouse is under no other health plan, will continue for two years after the divorce or until December 31, 1988, whichever is later. If the marriage ended on or after September 30, 1988, the unremarried former spouse is only eligible to receive one year medical care after the divorce, assuming the spouse has no other health care plan; in this scenario, the spouse is not eligible for any other privileges.

Perhaps the most critical additional benefit a former spouse could lose is medical care. Besides being extremely expensive, middle-aged women often have difficulty obtaining acceptable coverage. Through negotiations between the Department of Defense and the private insurance industry, Mutual of Omaha has created the Uniformed Services Voluntary Insurance Plan. The plan was designed by Mutual of Omaha for soldiers who leave active duty prior to retirement and for former spouses who lose their military health benefits due to divorce.113 Although the premiums for this private plan are more expensive and the coverage is more restrictive than CHAMPUS, the former spouse can obtain reasonable health insurance at a group rate below that charged for a standard individual insurance plan. Moreover, qualified persons who

113. Id.
submit timely applications will be provided insurance coverage regardless of current health conditions.  

VI. CONCLUSION

The Uniformed Services Former Spouses Protection Act generates more heated controversy than any other law impacting military families. Regardless of any person's feelings, the USFSPA is here to stay. The immediate task at hand is to ensure that family law practitioners understand the USFSPA in order to provide effective assistance to military members and their spouses. Practitioners also need to recognize and master the complex issues involved in the USFSPA, which will affect every military member contemplating a divorce or a prenuptial agreement.

Regardless of this author's efforts to explain the USFSPA and some of the practical approaches that should be considered, questions will arise as new issues in a particular case evolve. Moreover, each service may vary slightly on some of their internal DFAS procedures. If questions arise regarding a service's procedures, following are the addresses and phone numbers of the DFAS offices that handle each military service:

For the Army:
Director, DFAS-IN
Defense Finance and Accounting Service
Attn: DGG
Indianapolis, IN 46249
(317) 542-2155

For the Air Force:
Director, DFAS-DE
Defense Finance and Accounting Service
Attn: DGG
Denver, CO 80279-5000
(303) 370-7524

For the Navy:
Director, DFAS-CL
Defense Finance and Accounting Service

114. Id.
Attn: DGG
1240 E. 9th Street
Cleveland, OH 44199-2087
(216) 522-5301

For the Marine Corps:
Director, DFAS-KC
Defense Finance and Accounting Service
Attn: DGG
Kansas City, MO 64197-0001
(816) 926-7103

For the Coast Guard:
Pay and Personnel Center
444 Quincy Street
Topeka, KS 66683-3591
(913) 295-2516