McCarty v. McCarty: A Former Spouse's Claim to a Service Member's Military Retired Pay Is Shot Down

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INTRODUCTION

Recently, both pension fund assets and the number of divorces in the United States have increased significantly.¹ The combination of these two facts has presented state courts with a difficult issue: whether, and how, to divide what is probably the largest and most complex asset a couple owns when they petition for a dissolution of their marriage. Most jurisdictions recognize an ex-spouse's claim to a portion of a working spouse's pension.² Courts and commentators, however, have been divided over the question

¹. In 1970, the total amount of assets in public and private pension funds was $264.1 billion. By 1979, the figure reached $639.6 billion. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, Statistical Abstract of the United States 344 (101st ed. 1980). Divorces in the United States increased from 708,000 in 1970 to 1,170,000 in 1979. Id. at 83.

². See In re Marriage of Brown, 15 Cal. 3d 838, 847, 544 P.2d 561, 566 (1976); Cearley v. Cearley, 544 S.W.2d 661, 666 (Tex. 1976); Note, Community Property—Military Retirement Benefits—Prior to Accrual, Military Retirement Pension Earned During Coverture is Community Property Subject to Division at Time of Divorce, 9 ST. MARY'S L.J. 135, 141 (1977).


of the distribution of military retired pay upon dissolution of a marriage. In *McCarty v. McCarty,* the United States Supreme Court resolved this issue, holding that military retired pay is not subject to division between spouses as part of a property settlement.

Although regulation of domestic relations falls within the power of the states, the Supreme Court has assumed jurisdiction in this area when a federal right is at issue. In *Hisquierdo v. Hisquierdo,* the Supreme Court held that the federal statutory scheme governing Railroad Retirement benefits precluded California from applying its community property laws and dividing a spouse’s Railroad Retirement pension. The decision was interpreted narrowly and restricted to its facts by state courts across the country. As a result, even after *Hisquierdo,* military retired


7. *Id.* at 236.
12. 439 U.S. at 591.
13. See *Czarnecki v. Czarnecki,* 123 Ariz. 466, 600 P.2d 1098 (1979); *In re Marriage of
pay continued to be divided between former spouses upon divorce in accordance with state laws.\textsuperscript{14}

The increasingly liberal attitude of the state courts in granting an ex-spouse a property interest in retired pay was substantially restricted by the \textit{McCarty} decision. Before \textit{McCarty}, many courts had rejected the argument that Congress, by creating the statutory framework governing military benefits, had intended to pre-empt state law.\textsuperscript{15} In \textit{McCarty}, however, the Supreme Court held that in its enactment of the military retired pay law Congress acted with "force and clarity" and intended to prevent the division of retired pay upon divorce.\textsuperscript{16}

This note will trace the state court treatment of pension benefits, and in particular military retired pay, prior to the \textit{McCarty} decision. It will then examine the \textit{McCarty} decision and critically evaluate the Supreme Court's rationale in light of \textit{Hisquierdo} and other precedents. The practical implications of the decision and its potential impact on future decisions will also be analyzed. The note will conclude with a brief review of legislation pending before Congress in regard to an ex-spouse's right to retired pay.

\textbf{STATE POLICY ON DIVORCE AND DISTRIBUTION OF PENSION BENEFITS}

In the United States, nine jurisdictions follow community property laws in distributing assets upon divorce.\textsuperscript{17} Under these prop-

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\item \textsuperscript{15} For the purposes of this note, the terms "marital property" and "community property" will be used synonymously. There are nine jurisdictions following community distribution of assets upon divorce (Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, Washington and Puerto Rico) and forty jurisdictions following equitable distribution upon divorce (all remaining states and the District of Columbia except Mississippi, Virginia and West Virginia). Freed & Foster, \textit{Divorce in the Fifty States: An Overview}, 14 \textit{FAM. L.Q.} 229, 249-52 (1981) [hereinafter cited as Freed & Foster]. The equitable division jurisdictions incorporate the theory that marriage is a shared enterprise to which both spouses contribute, and that upon divorce, assets acquired during the marriage should be divided equally and/or justly. See Uniform Marriage and Divorce Act, 9A U.L.A. 91, 93 (1979) (Commission-
property laws, assets acquired during the marriage are community property.\(^8\) Assets acquired prior to the marriage, assets acquired subsequent to a legal separation, and assets acquired during the marriage by gift, devise, or bequest are separate property.\(^9\) At the time of divorce, each spouse is awarded his or her separate property and the remaining property is divided between them. Only three community property states require an equal division; the others require an equitable division.\(^10\)

With the exception of only three states,\(^11\) the remaining forty jurisdictions follow a system of equitable distribution of marital assets at the time of divorce. The Illinois Marriage and Dissolution of Marriage Act (IMDMA)\(^12\) is typical of the legislation many states have enacted.\(^13\) The IMDMA provides that upon dissolution, all marital property\(^14\) shall be divided in just proportion after con-

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\(^10\) Three states, Mississippi, Virginia and West Virginia, distribute property based on title alone. Freed & Foster, supra note 17, at 249-251.


\(^13\) The IMDMA defines marital property as all property which is not excluded as non-marital property. ILL. REV. STAT. ch 40, ¶ 503 (1981). Non-marital property is defined as follows:

(1) property acquired by gift, bequest, devise or descent;
sideration of all relevant factors. The definition of marital property excludes from division many of those assets which, under community property law, are treated as separate property. After the non-marital property awards are made, however, the marital assets are divided equitably, not equally, based upon consideration of such factors as the duration of the marriage, the need for support, the value of each spouse's separate property and the contributions of each party to the marriage.

Both community property laws and the marital property laws are based on the theory that marriage is a shared enterprise, analogous to a partnership. Upon termination, the assets of the marriage should be divided as justly as possible. This theory recognizes the

(2) property acquired in exchange for property acquired before the marriage or in exchange for property acquired by gift, bequest, devise or descent;

(3) property acquired by a spouse after a judgment of legal separation;

(4) property excluded by valid agreement of the parties;

(5) the increase in value of property acquired before the marriage; and

(6) property acquired before the marriage.

On February 22, 1979, Illinois Representative Leinenweber introduced H.B. 554 in the Illinois House of Representatives to amend ¶ 503(a) to include a seventh category which would exclude non-vested pensions from consideration as marital property. The bill was passed by the House and sent to the Illinois Senate. On January 14, 1981, the legislative session ended before the bill was passed. To date, similar legislation has not been introduced.

25. The following factors are relevant:

(1) the contribution or dissipation of each party in the acquisition, preservation, or depreciation or appreciation in value, of the marital and non-marital property, including the contribution of a spouse as a homemaker or to the family unit;

(2) the value of the property set apart to each spouse;

(3) the duration of the marriage;

(4) the relevant economic circumstances of each spouse when the division of property is to become effective, including the desirability of awarding the family home, or the right to live therein for reasonable periods, to the spouse having custody of the children;

(5) any obligations and rights arising from a prior marriage of either party;

(6) any antenuptial agreement of the parties;

(7) the age, health, station, occupation, amount and sources of income, vocational skills, employability, estate, liabilities, and needs of each of the parties;

(8) the custodial provisions for any children;

(9) whether the apportionment is in lieu of or in addition to maintenance; and

(10) the reasonable opportunity of each spouse for future acquisition of capital assets and income.

26. Id.

27. See Uniform Marriage and Divorce Act, 9A U.L.A. 91, 93 (1979) (Commissioners' Prefatory Note); ILL. ANN. STAT. ch. 40, ¶ 503 (Smith-Hurd 1980) (Historical and Practice Notes).
value of each spouse’s contributions to the marriage and underlies decisions regarding the division of pension benefits in divorce proceedings in both types of jurisdictions.28

Initially, state courts refused to classify non-vested pension benefits as property,29 although vested pension benefits were subject to division.30 Because an employee, by terminating employment, might never fulfill a retirement plan’s vesting requirements to receive the pension, the present non-vested right was considered by the courts as merely an expectancy. Before satisfaction of a plan’s vesting requirements, the employee did not have an enforceable legal claim. Nor did courts recognize a present value for this possible future benefit, where the value of the right was too speculative to be considered marital property.31

The prevailing reluctance to recognize presently non-vested pension benefits troubled courts, however, in cases where the employee was close to completing the age or service requirements to vest his pension, which made the probability of benefit forfeiture unlikely. Consequently, courts characterized these interests as contingency interests subject to divestment.32 This characterization is both more realistic and appropriate, in the opinion of some courts, since pension benefits are earned over an often substantial period of years, and not on the day they become vested. With each addi-

28. See infra cases cited in note 4.

29. A pension is “vested” when the employee has fulfilled a retirement plan’s stated vesting requirements such as a minimum number of years of service with the same employer. Once a pension is vested, the participant’s interest cannot be forfeited by the termination of employment. Retirement plans are generally either contributory or noncontributory plans. A contributory plan requires specific contributions by the employee and thus always includes funds of the employee. Noncontributory pension plans are funded entirely by the employer. When an employee has an unconditional right to immediately begin to receive his pension benefits, his pension rights are said to be “matured.” Pensions that are not matured, however, may still be vested if the employee has completed the required years of service but has not reached a specified retirement age, upon which he can elect to begin receiving his benefits. See In re Marriage of Brown, 15 Cal. 3d 838, 842, 544 P.2d 561, 563 (1976); Kent, supra note 3, at 448; Pattiz, supra note 5, at 202-05.


tional month of employment, an employee increases both the amount and his interest in the pension.33

Another approach taken by some courts relies on the nature and purpose of pension plans. Rejecting the argument that pensions are a gift from the employer,34 these courts have held that such plans are more accurately classified as deferred compensation for past services.35 Where an employee is entitled to receive a vested pension, the right to receive it does not depend on the employer’s generosity. Pension plans are designed partly to reward employees for long years of service with the same company.36 Because benefit amounts under most pension plans are determined by the plan participant’s employment history, the courts’ view of pension benefits as additional, although deferred, compensation for past services is consistent and convincing.

The most significant change in the courts’ characterization of pension benefits occurred when the spouse’s right to receive money in the future was accorded present value.37 Once the courts acknowledged the present value of future pension rights, the issue of how to properly divide such rights arose.

When pension benefits are included as a marital asset, the courts have faced difficulties trying to divide benefits which, in most cases, have not been received.38 A general consensus prevailed that granting an offsetting portion of the marital property was inequitable if the pension never subsequently vested or matured.39 Awarding the former spouse a share of the present value of the pension, therefore, involved analysis of actuarial data on the expected lifespan of the employee. In addition to life expectancy, the courts were forced to weigh other uncertain facts such as the likelihood of the employee fulfilling the vesting requirements or the future sol-

38. Although the courts acknowledged the administrative problems in valuing pensions and supervising their distribution, it was not so burdensome so as to require that pensions be excluded from the marital assets. See In re Marriage of Brown, 15 Cal. 3d 838, 848, 544 P.2d 561, 567 (1976).
vency of the employer and the pension fund. A more practical approach taken by the courts was to award a percentage of the retirement benefits “if, as and when” they are received by the employee.40 Under this approach, the spouse would not receive any benefits at the dissolution, but only as the pension was paid. Although this increased the administrative burden on the court, it eliminated many of the valuation problems inherent in an immediate distribution at the time of dissolution.

In divorce proceedings involving military retired pay, state courts had applied substantially the same non-military benefits analysis and treated military retirement pay as a marital asset subject to division.41 The Supreme Court, in the McCarty case, however, analyzed the statutory framework governing military retired pay and concluded that military retired pay could not be appropriately analogized to benefits derived from private pension plans.42

The Statutory Framework of Military Retired Pay

Unlike private pension plans which vary from employer to employer,43 military retired pay was created by Congress and is regulated to achieve federal objectives. It serves as an inducement for recruiting and re-enlistment and it is used to provide an ordered system for promotion and retirement.44

41. See supra note 5.
42. 453 U.S. at 211-16, 221.
Under this statutory framework, regular or reserve commissioned officers are entitled to nondisability retired pay after twenty years of service in the Armed Forces.\footnote{4} Retired pay is calculated on the basis of the members' rank at retirement and number of years served.\footnote{6} Although retired pay terminates on the members' death, members may designate a beneficiary to receive any payments in arrears.\footnote{47} Rather than accept retired pay, members have the option to receive a pension from the Veterans Administration.\footnote{48}

Congress also established two programs to provide annuities for the survivors of military members. The Retired Serviceman's Family Protection Plan (RSFPP)\footnote{49} is an elective system where deductions from the service member's retired pay are used to fund an annuity payable to the surviving spouse or children upon the member's death. These deductions cease automatically upon the death or divorce of the service member's spouse.\footnote{50} The second program is the Survivor's Benefit Plan (SBP)\footnote{51} in which all retired members participate. Under this plan, an annuity is paid to the member's widow or widower upon the death of the service member, and upon death or ineligibility of the widow or widower, to the member's surviving children.\footnote{52}

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\item \textsuperscript{4} See also Rev. Rul. 63-169, 1963-2 C.B. 14.
\item \textsuperscript{46} 10 U.S.C. § 3991 (1976) (Army); 10 U.S.C. § 8991 (1976) (Air Force); 10 U.S.C. § 6325 (1976) (Navy and Marine Corps). The formula used to calculate retired pay is the basic pay of the retired grade times two and one-half percent times the number of years of creditable service. Retired members are eligible for a minimum of 50\% and a maximum of 75\% of the basic pay of their retired grade.
\item \textsuperscript{47} 10 U.S.C. § 2771 (1976).
\item \textsuperscript{49} 10 U.S.C. §§ 1431-1446 (1976 & Supp. IV 1980). The RSFPP was funded entirely by voluntary deductions from retired pay. Due to the substantial deductions required, the plan had few participants. S. Rep. No. 1089, 92d Cong., 2d Sess. 11, reprinted in 1972 U.S. Code Cong. & Ad. News 3288.
\item \textsuperscript{50} 10 U.S.C. § 1434(c) (1976 & Supp. IV 1980).
\item \textsuperscript{51} 10 U.S.C. §§ 1447-1455 (1976 & Supp. IV 1980). The SBP is a mandatory program created to increase participation in annuity plans. Because it is not self-financed, but partially funded by the government, participation is less expensive. 453 U.S. at 215-16.
\item \textsuperscript{52} 10 U.S.C. § 1450 (1976 & Supp. IV 1980).
\end{itemize}
State courts, while aware of such federal programs, did not view them as including a congressional intent to pre-empt state laws. The federal pre-emption argument of retired service members was consistently dismissed until the Supreme Court decided *McCarty v. McCarty*.  

**PRIOR FEDERAL PRE-EMPTION OF COMMUNITY PROPERTY LAWS**

When a state statute and a federal statute conflict, the federal statute will prevail and pre-empt the state statute. The Supreme Court has applied a two step analysis in examining pre-emption issues. The Court initially determines whether Congress has “positively required by direct enactment” that state law be pre-empted. The Court next examines whether the state law does “major damage [to] clear and substantial” federal interests. When each of these questions is answered in the affirmative, federal law will pre-empt state law.

Before *McCarty*, the Supreme Court had found that federal law pre-empted state community property laws in only five cases. Four of these cases involved the disposition of property after the death of the owner. The most recent case involved an ex-spouse’s claim to property at the time of the divorce. Each of these five pre-emption cases were relied upon by the *McCarty* majority.

The first case to pre-empt community property law, *McCune v. Essig*, was decided in 1905, where the Supreme Court held that the Homestead Act superseded a state statute which granted an interest in homestead property to the homesteader’s daughter. The federal law at issue included a schedule which directed the disposition of the property upon the homesteader’s death. The Act granted the homesteader’s widow an absolute right to the land, and therefore their daughter could claim the land only when both the homesteader and his spouse were deceased. The federal law clearly prescribed procedures for transferring the ownership of the

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54. U.S. Const. art. VI, § 2 cl. 2; Gibbons v. Ogden, 22 U.S. 1, 210-11 (1824).
58. 199 U.S. 382 (1905).
60. 199 U.S. at 388.
property which was in direct conflict with the state laws. Having applied the two step pre-emption analysis, the Court concluded that the state statute was pre-empted and could not operate to pass title to the land.\textsuperscript{63}

It was not until 1950 that the Supreme Court next found that a federal law pre-empted a state community property law. In \textit{Wissner v. Wissner},\textsuperscript{65} a serviceman used community property funds to subscribe to a National Service Life Insurance (NSLI) Policy. He named his parents as beneficiaries under the policy and upon his death, his widow brought a claim for one-half of the proceeds.\textsuperscript{64} Congress established the NSLI program to provide a comprehensive insurance plan for service members and veterans. Subscribers are entitled to designate any beneficiary they choose and the proceeds are exempt from "any legal process whatever, either before or after receipt by the beneficiary."\textsuperscript{65} The Court held Congress had acted with "force and clarity" to ensure that only the named beneficiary would receive proceeds under an NSLI policy.\textsuperscript{66} The Court concluded that application of the state law would "frustrate the deliberate purpose of Congress" and as such must be pre-empted.\textsuperscript{67}

Federal regulations governing the ownership of United States Savings Bonds were found to conflict with state community property law in \textit{Free v. Bland}\textsuperscript{68} and \textit{Yiatchos v. Yiatchos.}\textsuperscript{69} As such, the Supreme Court found that those regulations pre-empted the state laws. In \textit{Bland}, the Court upheld a widower's claim to savings bonds purchased with community funds and made payable to either spouse. Under state law and the decedent's will, the decedent's son claimed a one-half interest in the bonds.\textsuperscript{70} The Court found a valid federal law in conflict with a state law.\textsuperscript{71} In denying the son's right to any interest in the bonds, the Court held that

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  \item \textsuperscript{62} 199 U.S. at 389. The Court noted that the application of the state law reversed the order of the federal statute and gave the daughter an interest paramount to the widow. \textit{Id.}
  \item \textsuperscript{63} 338 U.S. 655 (1950).
  \item \textsuperscript{64} \textit{Id.} at 657-58. At the time the serviceman entered the Army, he and his wife were estranged. At the time he subscribed to the insurance policy, the serviceman contacted an attorney seeking ways to get a divorce. \textit{Id.} at 657.
  \item \textsuperscript{65} 38 U.S.C. \textsection 454a (1952).
  \item \textsuperscript{66} 338 U.S. at 658.
  \item \textsuperscript{67} \textit{Id.} at 659.
  \item \textsuperscript{68} 389 U.S. 663 (1962).
  \item \textsuperscript{69} 376 U.S. 306 (1964).
  \item \textsuperscript{70} 369 U.S. at 664-65.
  \item \textsuperscript{71} \textit{Id.} at 667-68. The Court cited the general regulations governing entitlements, 31 C.F.R. \textsection 315.61, which specifically states that the surviving owner of savings bonds issued to co-owners "will be recognized as its sole and absolute owner," \textit{quoted in} 369 U.S. at 667.
\end{itemize}
application of state law would "[interfere] with a legitimate exercise of the power of the Federal Government to borrow money."\textsuperscript{72}

In \textit{Yiatchos}, the Supreme Court addressed the question of savings bonds ownership where the circumstances indicated possible fraud or breach of trust. There, the decedent used a substantial amount of the community funds to purchase bonds, and named his brother as owner upon his death. The Court held that federal law could not be used as a shield to deprive the spouse of community property rights.\textsuperscript{73} The \textit{Yiatchos} Court reiterated a prior Supreme Court decision, however, holding that in the absence of fraud or breach of trust, federal law requires that savings bonds would pass to the beneficiary designated by the owner.\textsuperscript{74}

The final case illustrating the pre-emption of community property law and one on which the \textit{McCarty} Court placed the greatest reliance was \textit{Hisquierdo v. Hisquierdo}.\textsuperscript{75} In that case, the California courts awarded an ex-spouse an interest in the petitioner's Railroad Retirement Act benefits\textsuperscript{76} at the time of the divorce pursuant to the state community property laws. The trial court refused to find that an interest existed in the possible future benefits,\textsuperscript{77} and the California Court of Appeals affirmed the decision.\textsuperscript{78} The Supreme Court of California reversed, holding that the benefits were earned, in part, during the marriage and thus were community property subject to division.\textsuperscript{79}

Certiorari was granted to the United States Supreme Court and the petitioner argued that the Act pre-empted the application of state law, and that any retirement benefits which he might receive were subject to congressional control under the provisions of the federal statute. He contended that under the Act, the state courts could not divide his future benefits or grant an offsetting award to his former wife as part of a property settlement.\textsuperscript{80} The Supreme

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\item \textsuperscript{72} 369 U.S. at 669.
\item \textsuperscript{73} 376 U.S. at 308-09.
\item \textsuperscript{74} \textit{Id.} at 312. The Court remanded the case to determine whether the widow consented to the purchase of the bonds or ratified such purchase. If she had, she would not have any claim to them under state law. \textit{Id.} at 309.
\item \textsuperscript{75} 439 U.S. 572 (1979).
\item \textsuperscript{76} 45 U.S.C. §§ 231-231u (1976). [hereinafter referred to as "Act"].
\item \textsuperscript{77} 439 U.S. at 579.
\item \textsuperscript{78} \textit{In re} Hisquierdo, 63 Cal. App. 3d 230, 133 Cal. Rptr. 684 (1976).
\item \textsuperscript{79} \textit{In re} Hisquierdo, 19 Cal. 3d 613, 566 P.2d 224 (1977).
\item \textsuperscript{80} 439 U.S. at 583. The petitioner argued that because his benefits could be withdrawn at any time by Congress, he did not have any right to them until they were received. He contended that the state courts had created a right which did not exist under federal law.
\end{itemize}
Court examined the congressional purpose and the language of the statute and concluded that the state laws conflicted with the Railroad Retirement Act. Because the Court further found that application of the state community property laws frustrated the federal interests, the Court held that the Act pre-empted the state laws.\textsuperscript{81}

The \textit{Hisquierdo} Court based its decision on its interpretation of section 231m of the Railroad Retirement Act\textsuperscript{82} and section 659 of the Social Security Act.\textsuperscript{83} Section 231m clearly prohibits the anticipation of the payment of Railroad Retirement benefits and exempts the benefits from any legal process. Section 659 provides only one exception to the exemption: in order to insure that individuals receiving federal benefits do not avoid alimony or support obligations, Congress allowed ex-spouses to garnish federal benefits to satisfy financial obligations arising from a divorce. The definition of alimony, however, does not include community property settlements or equitable property division.\textsuperscript{84} The Court held that these provisions were a sufficient indication that Congress required the pre-emption of state law. After applying the first part of its test, the Court was next required to determine whether the state law did major damage to federal interests.

The Court focused on the Act's strong anti-attachment provision and reasoned that this provision indicated a congressional intent that nothing interfere with the beneficiary's receipt of his benefits.\textsuperscript{85} In the Court's view, this provision also ensured uniform implementation of the Act and protection of the retiree's income level established by Congress.\textsuperscript{86}

Another indication of Congress' intent, according to the \textit{Hisquierdo} majority, was the limited community property concept within the Act itself. The Railroad Retirement Act grants a benefit to spouses of the employees covered by the Act.\textsuperscript{87} These benefits

\textsuperscript{81} Id. at 590.
\textsuperscript{82} 45 U.S.C. § 231m (1976).
\textsuperscript{83} 42 U.S.C. § 659 (1976).
\textsuperscript{84} 42 U.S.C. § 662(c) (Supp. IV 1980). The Court found a distinction between garnishing benefits because of need and garnishing benefits to settle property claims not based on need. 439 U.S. at 587.
\textsuperscript{85} 439 U.S. at 583-84. The Court also noted the statutes involved in \textit{Hisquierdo} were more specific than the statute in the \textit{Wissner} case where it had held that community property law could not interfere with the beneficiary's right to life insurance proceeds.
\textsuperscript{86} Id. at 485.
\textsuperscript{87} 45 U.S.C. § 231a(c)(1) (1976).
are, however, discontinued when the couple is divorced. Thus, Congress made a deliberate choice to favor spouses over ex-spouses, and, in contrast to the traditional concept of community property, Congress thereby limited recognition of the spouse's contributions to the marriage.

In addition to deciding that ex-spouse's claims would interfere with the employee's receipt of benefits, the Court also believed that such claims would frustrate congressional objectives of maintaining an adequate labor force. Contrary to a policy encouraging retirements, awarding an ex-spouse a share in benefits provides incentives for the employee to keep working because the salary earned would be separate or non-marital property. A spousal award would also reduce the amount of money received by the retiree, leaving him or her with less pension income than Congress thought necessary for support. These considerations highlighted the conflict between state and federal law, mandating pre-emption of state community property law.

89. Income earned after a legal separation or divorce is separate or non-marital property. See, e.g., CAL. CIV. CODE §§ 5107, 5108 (West Supp. 1981); ILL. REV. STAT. ch. 40, ¶ 503(a) (1981).
90. 439 U.S. at 585. The Court rejected respondent's argument that a current offsetting property award would not interfere with the Railroad Retirement Act. To the contrary, the majority saw the potential for even greater harm. Not only did an offsetting, current property award anticipate the payment of benefits, it also was inequitable for the retired employee if the benefits were never received due to death or termination of employment in the railroad industry.
91. Justices Stewart and Rehnquist dissented in *Hisquierdo*. 439 U.S. at 591. Their opinion focused on the purpose of community property law to define ownership. In the pre-emption cases prior to *Hisquierdo*, the Court had express statutes which directed ownership of the property at issue. *Id.* at 595. Those cases concerned federal laws that not only conflicted with the state law but also directed the disposition of property in a way clearly in variance with the state law. *Id.* at 596. In *Hisquierdo*, the majority could not point to a statute which described the ownership of retirement benefits. *Id.* at 597.

Furthermore, according to the dissent, the majority's reliance on the anti-attachment provision was erroneous. Traditionally, anti-attachment provisions were enforceable against creditors, but here the question was not one of indebtedness. In *Hisquierdo*, the issue was ownership. Both parties had an equal interest in the community property when it was earned during the marriage. *Id.* at 598.

The argument that the prohibition against anticipation conflicted with state law was also rejected by the dissenters. The employee's inability to receive lump sum benefits was not held comparable to a prohibition against an offsetting property award to the ex-spouse. According to the dissenters' definition of "anticipation," such a judgment would not conflict with the employee's receipt of benefits. *Id.* at 601.

The last point raised by the dissent was the technical problem of granting a current award to the ex-spouse when the employee might never receive any retirement benefits. This problem was not so great as to require a finding of pre-emption. As the dissent noted, the state
Following *Hisquierdo*, federal retirement benefits, other than those under the Railroad Retirement Act, continued to be divided between spouses at the time of divorce.\(^{98}\) The lower courts, in applying state property law provisions, emphasized the *Hisquierdo* Court's reliance on the express and strong anti-attachment provision of the Railroad Retirement Act. In areas where similar provisions were not present, state courts refused to find the area preempted. Many of the arguments raised in *Hisquierdo* were subsequently raised in divorce actions involving military retired pay. The state courts had almost uniformly held that retired pay is community or marital property subject to division at the time of divorce. Finally, in *McCarty v. McCarty*,\(^{98}\) the Supreme Court accepted that case to decide whether military retired pay was the separate property of the retired member, and whether Congress had pre-empted the application of state law in the area of military retired pay.

**THE MCCARTY DECISION**

*The Facts*

Richard and Patricia McCarty were married in 1957 while appellant Richard was attending medical school. Upon graduation, he commenced his career with the United States Army. In 1976, the couple separated and appellant filed a petition for dissolution of the marriage in California. At the time of the divorce he had served eighteen years in the Army and had attained the rank of colonel.\(^{96}\)

In his petition the appellant requested the Superior Court of California to confirm his listed assets, including his military retired pay, as his separate property. The court, however, in agreement with appellee's request, divided the prospective retirement benefits as quasi-community property in accordance with California law.\(^{98}\)

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\(^{94}\) Appellant was assigned tours of duty in Pennsylvania, Hawaii, Washington, D.C., California and Texas. *Id.* at 216. Of these, only California and Texas are community property jurisdictions.

\(^{95}\) *Id.*

\(^{96}\) CAL. CIV. CODE § 4803 (West Supp. 1981). Quasi-community property includes all property acquired elsewhere which, had it been acquired while the spouse was domiciled in
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Appellant was ordered to pay a pro-rata share of his retired pay, upon receipt, to his ex-spouse. The court retained jurisdiction to supervise the distribution.

After completing twenty years of active duty, appellant retired and in 1978 began receiving his military retired pay. At that time he sought review of the decree awarding his ex-spouse a share in his benefits, contending that the federal law governing military benefits pre-empted the state community property law, thus prohibiting the state from allocating a portion of his retired pay to his former spouse. This argument was rejected and the award to the spouse was affirmed by the California Court of Appeals. The California Supreme Court denied a petition for rehearing. After noting its appellate jurisdiction, the United States Supreme Court reversed.

The Decision

Appellant presented two arguments to the Supreme Court. First, he argued that military retired pay, unlike other retirement income, was not deferred compensation for past services but reduced compensation for current, reduced services. Therefore, the appellant concluded because retired pay is more appropriately considered current income, it should not be divided as community property. Justice Blackmun, writing for the majority, noted the substantial restrictions on a retired serviceman's freedom and agreed that retired pay could be characterized as reduced compensation. However, the Supreme Court did not decide whether fed-
eral law prohibited the states from defining retired pay as deferred compensation. Instead, the Court based its decision on appellant's second argument that federal law pre-empts the application of state law as it applies to military retired pay.

Citing *Hisquierdo v. Hisquierdo*, the Court analyzed the statutory scheme governing the armed forces and concluded that federal law pre-empted the area of military benefits and compensation. For the majority, Congress' intent in granting a "personal entitlement" to retired service members precluded California from dividing military retired pay as community property in a divorce proceeding. The Court used a three point analysis in arriving at this conclusion.

First, the Court looked to the provisions allowing service members to designate beneficiaries to receive any retired pay in arrears at the time of their death. Congress stated with "force and clarity" that this designation barred recovery by any individual other than the named beneficiaries. Consequently, the Court

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102. The opinion of the Court states that the question of state court treatment of retired pay as deferred compensation need not be decided. 453 U.S. at 223.
103. Id.
104. 439 U.S. 572 (1979). *Hisquierdo* arose in California where the state supreme court held retirement benefits under the Railroad Retirement Act were community property subject to division upon dissolution of marriage. The United States Supreme Court reversed, holding that federal law regulating such benefits pre-empted California's application of community property law. Id. at 591-92.

Unlike military retired pay, the Railroad Retirement Account is funded by the employees as well as the employers. The Act contains a clear provision against assignment or anticipation of benefits. The statute provides in pertinent part:

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


The Act also incorporates a limited community property concept in that it grants an annuity to spouses which terminates upon divorce. See generally supra notes 87-88 and accompanying text.

105. S. REP. No. 1480, 90th Cong., 2d Sess. 6 (1968).
106. 453 U.S. at 224-30.
108. *Wissner v. Wissner*, 338 U.S. 655, 658 (1950). *Wissner* involved a statute which gave a service member the right to designate a life insurance policy beneficiary. After the service-man's death, the Court refused to award his estranged wife a community property interest in the life insurance proceeds where another beneficiary had been named. The issue as to whether a spouse has a claim to the retired pay used to purchase the insurance policy was not reached by the Court.
reasoned that if service members could defeat a community property claim to part of their retired pay, none of their retired pay could be treated as community property.110

Second, the provisions of the voluntary annuity plans111 led the Court to conclude that retired pay was the “personal entitlement” of the service member. The annuity plans allowed service members to direct a portion of their retired pay to beneficiaries other than their spouses. In the Court’s view, retired pay could not be characterized as community property where members could avoid their spousal sharing of such benefits. Furthermore, the annuity plans indicated to the Court a congressional policy favoring widows and widowers because former spouses could not receive annuities under either plan.112

Finally, the Court stated that Congress’ intent was to insure that military retired pay “actually reach the beneficiary.”113 In discussing this intent, the Court remarked that Congress had failed to pass an attachment provision for the purpose of enforcing court orders favoring spouses, ex-spouses or children.114 Attachment provisions relating to all federal benefits were later passed, but those provisions applied only to the enforcement of child support and alimony obligations.115 Legislation requiring federal benefits to be paid pursuant to a court ordered or court approved property settlement applied only to Civil Service and Foreign Service employ-


111. See supra notes 49-52 and accompanying text.

112. 10 U.S.C. § 1434(a) (1976) (RSFPP); 10 U.S.C. §§ 1447(3), 1450(a) (1976) (SBP). The Court observed that because retired pay carries no right of survivorship, if community property laws were applied, a widow would be left with nothing while an ex-spouse could receive an immediate offsetting award of community property representing her interest in the future benefits. Under 10 U.S.C. § 1450(b) (1976) an SBP annuity is discontinued if the surviving spouse remarries prior to age 60, whereas the ex-spouse’s award would not terminate. The widow’s annuity is also offset by Social Security payments, 10 U.S.C. § 1451 (1976), whereas a property division is not. The Court concluded that Congress could not have intended these “anomalous results.” 453 U.S. at 227-28 n.21.

113. Hisquierdo v. Hisquierdo, 439 U.S. 572, 584 (1979), cited in McCarty v. McCarty, 453 U.S. at 228. The Hisquierdo Court stressed the importance of the anti-attachment provision in the Railroad Retirement Act protecting the payments from any legal process. A similar provision is not included in the statutory scheme for military benefits.


115. 42 U.S.C. § 659 (1976). Subsequent legislation provided that alimony “does not include any payment or transfer of property . . . in compliance with any community property settlement, equitable distribution of property, or other division of property between spouses or former spouses.” 42 U.S.C. § 462(c) (Supp. IV. 1980).
The Court stated that because Congress had not included military benefits, in such legislation, they could not be reached by a former spouse seeking a property division.

Applying this three point analysis, the Supreme Court held that a conflict did exist between the federal statutes governing military retired pay and the state community property laws. Having found a conflict, the Court's inquiry then shifted to whether the assertion of a community right would damage "clear and substantial" federal interests. The Supreme Court recognized that awarding a share of the retirement benefits to the former spouse would decrease the income level that Congress thought necessary for the retired service member and reduce participation in the annuity plans. Further, the Court agreed that such awards would disrupt military personnel management and reduce the value of retired pay as an inducement to re-enlist. At the same time, older service members would be more likely to remain on active duty since their earned income would be separate property. The added incentive on the part of older members to continue working would result in the demise of a "youthful and vigorous" military force. Thus, finding that the application of community property laws conflicted with legitimate goals of Congress and frustrated federal objectives, the Supreme Court held that military retired pay was the separate


117. See United States v. Yazell, 382 U.S. 341 (1966). There, the Small Business Association (SBA) tried to collect a loan made to a Texas couple. Under Texas coverture law, a married woman could not enter a contract to bind separate property. The Court declined to adopt the arguments of the SBA to ignore Texas law and allow the government to claim the wife's assets. The Court held state interests "should be overridden by the federal courts only where clear and substantial interests of the National Government, which cannot be served consistently with respect for such state interests, will suffer major damage if the state law is applied." Id. at 352.


119. The Court thought a serviceman would be less likely to set aside a portion of his pay for an annuity where a community property division has already diminished the amount available to him. Citing McCune v. Essig, 199 U.S. 382, 389 (1905), the Court refused to reverse the "order of the statute" and grant an ex-spouse greater rights than a widow. 453 U.S. at 233.

120. 453 U.S. at 234.
property of the retired member. While recognizing the inequities in its decision, the Court deferred to Congress the responsibility of changing the laws.122

The Dissent

In a strong dissent, Justice Rehnquist, joined by two other justices,123 criticized the majority’s purported reliance on *Hisquierdo* and other pre-emption cases, their diverting analysis of tangential statutes and legislative history, and their finding of pre-emption by “negative implication” rather than by direct action of Congress.124 The dissent argued that in *Hisquierdo*, the Supreme Court had found only limited powers of review in family law questions “to determine whether Congress has ‘positively required by direct enactment’ that state law be pre-empted.”125 According to the dissent, the *McCarty* majority disregarded this language because it was not able to find the requisite “direct enactment” by Congress.126

To support its argument, the dissent took notice of the fact that the Supreme Court had pre-empted community property law on only five prior occasions.127 Justice Rehnquist charged the majority with an illogical extension of precedent since each of the past decisions involved a clear statement of congressional intent to direct property interests contrary to the state community property laws. The statutory scheme covering military retirement benefits, in con-

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121. As an indication of just how the lower courts will handle the inequities which the Supreme Court avoided, the court in *Erspan v. Badgett*, 659 F.2d 26 (5th Cir. 1981), discussed a simple example. Under *McCarty*, if a couple had $50,000 of community property and the husband was entitled to $50,000 in military retired pay, upon dissolution the husband would receive $75,000 and the wife, only $25,000. But, as the Court stated, “[p]resumably, . . . [the] court, finding that a $50,000 award to the former wife is essential to a ‘just and right’ division, will allocate a larger share of the divisible community estate to the former wife.” *Id.* at 28 n.2. However, this would not be possible in California, Louisiana or New Mexico where the state law requires an equal division.

122. 453 U.S. at 235. The Court offered some consolation when it noted ex-spouses may be entitled to Social Security benefits, see 42 U.S.C. §§ 402(a)-402(f) (1976 & Supp. IV 1980), and may be able to garnish retired pay for support, see *supra* note 115 and accompanying text.

123. Justices Brennan and Stewart joined in the dissenting opinion.

124. 453 U.S. at 236-46.


126. 453 U.S. at 236-37.

Further, the dissenters objected to the majority's reliance upon
and inconsistent application of Hisquierdo. The Railroad Retire-
ment Act at issue in Hisquierdo, the dissent noted, embodied a
limited community property concept, evidencing a conscious choice
by Congress to draw a line with respect to the interests of a di-
vorced spouse. Even though the statutory scheme for military re-
tired pay did not include community property concepts indicating
Congress had addressed the issue, the dissent noted that the McC-
arty majority found total pre-emption. Thus, the dissenters ar-
gued, the majority found an intent to pre-empt based not on con-
gressional action, but on congressional inaction.

Conceding that annuities and unpaid arrearages may be ex-
cluded from community property treatment, the dissent suggested
that state law be overridden only to the extent it conflicts with the
federal law. They also suggested that the leap from a narrow

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128. The McCarty court cited the McCune case where an earlier court had held that the
Homestead Act, which included a schedule directing the land title to pass to a home-
steader's widow, superseded a state statute granting an interest in the property to the home-
steader's daughter. Congress did not, however, list a priority for those having an interest in
military retired pay, so that the application of community property law neither conflicted
with nor could reverse the order of the statute, as the majority contends. 453 U.S. at 238.

In Free v. Bland and Yiatchos v. Yiatchos, Treasury Regulations mandating that upon
the death of one co-owner of savings bonds, the other became "sole and absolute" owner,
were upheld over community property claims of the surviving spouse. The McCarty case
does not include such language. Id. at 241.

In Wissner, a serviceman's federal right to designate a beneficiary as the sole owner of the
proceeds of a National Servicemen's Life Insurance (NSLI) policy could not be frustrated
by the imposition of a community property claim. No decision was rendered as to whether
the retired pay used to purchase the policy could be treated as community property. With-
out justification, the McCarty opinion took an "analytic jump," ruling that retired pay could
not be community property because a portion of it could not be treated as community prop-
erty. Id. at 239-41.

Finally in Hisquierdo, the Court held Railroad Retirement benefits could not be treated
as community property because the statute contained a strong anti-attachment provision.
Justice Rehnquist contended that the comparable provision for military retired pay was
actually the opposite of an anti-attachment provision. The Court cited 37 U.S.C. § 701(a)
(1976) as support for its position that enlisted men cannot assign pay. 453 U.S. at 241-44.

On December 19, 1977, the Department of Defense Military Pay and Allowances Entitle-
ments Manual was amended, permitting retired members to authorize allotments to former
spouses. See Erspan v. Badgett, 674 F.2d 550, 553 n.1 (5th Cir. 1981); 37 U.S.C. § 701(d)
(1976).

129. 453 U.S. at 244.

130. Id. See also In re Marriage of Milhan, 13 Cal. 3d 129, 528 P.2d 1145, cert. denied,
421 U.S. 976 (1974) (the court cannot divest control of a beneficiary's proceeds under an
NSLI policy, but other available community assets can be used for equitable division); In re
pre-emption to complete pre-emtion in the area of military retired pay infringes on the states’ power to regulate marriage and divorce in the absence of Congress’ “direct enactment.”

ANALYSIS

The Pre-Emption Test is Disregarded

The Supreme Court’s decision in McCarty disregarded that Court’s established pre-emption test. The majority was unable to show that Congress, by direct enactment, required that state law be pre-empted, or that the application of state law caused major damage to clear and substantial federal interests. Because these elements of the pre-emption test were not met, the Court erred in striking down California’s law as it applied to military retired pay.

In Hisquierdo, the Court found the asserted state right conflicted with the express terms of federal law. A careful reading of that case reveals the Court’s emphasis on section 231m of the Railroad Retirement Act. The Hisquierdo Court repeatedly noted that railroad retirement benefits were exempt from any legal process whatsoever. Provisions in the Railroad Retirement Act, in the Court’s view, were intended to preclude any person from making any claim to the benefits or reducing the amount of benefits received by the employee. The Court inferred that the anti-attachment section excluded claims by former spouses, and the Court expressly indicated that the employee was the sole owner of any benefits.

Although the Supreme Court applied reasoning substantially similar to Hisquierdo in the McCarty decision, it failed to focus on the lack of an express federal provision similar to section 231m.

Marriage of Milhan, 27 Cal. 3d 765, 613 P.2d 812 (1980), vacated and remanded sub nom. Milhan v. Milhan, 453 U.S. 918 (1981) (the pertinent federal objectives of the NSLI Act are to protect the choice of a beneficiary, not to secure an economic stake in retired pay); cf. Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ware, 414 U.S. 117 (1973) (conflicting law should be pre-empted only to the extent necessary); In re Marriage of Hunt, 78 Ill. App. 3d 653, 397 N.E.2d 511 (1979) (under ERISA, Congress did not intend to pre-empt the division of pension benefits, only their regulation).

131. 453 U.S. at 246. Justice Rehnquist is unable to agree that because an ex-spouse can garnish retired pay for support, she cannot obtain a portion in a property division. This is a “negative implication” and not the “positive requirement” of Congress which is necessary for a finding of pre-emption.

132. 439 U.S. at 583-84.

133. Id. at 590.

134. As the dissent pointed out, the only applicable federal statute governing military retired pay permits, rather than prohibits, assignment. See supra note 118 and accompany-
Relying on a Senate statement that retired pay was historically the personal entitlement of the service member, the majority analyzed several features of the statutory scheme governing retired pay and concluded that Congress had spoken with force and clarity to pre-empt California law. The statutes on which the Court relied, however, were statutes granting a right to designate beneficiaries to receive annuities or unpaid arrearages and were not a clear expression by Congress as to the ownership of the retired pay itself. The established rights of a beneficiary other than the spouse to claim payments subsequent to the service member’s death is an inappropriate analogy, and should not have been the basis of an argument for defeating a former spouse’s claim to retired pay during the member’s lifetime. The majority disregarded the fact that Congress had not acted to designate the owners of retired pay, and instead discussed such tangential issues as proposed legislation which was never enacted and tangential federal provisions affecting other federal employees. The military provisions did not satisfy the Court’s articulated pre-emption requirement of a direct enactment by Congress. In addition, because the federal statutes were silent as to the ownership of retired pay, California’s community property law was not in direct conflict with them.

The McCarty majority found that the application of California law interfered with several federal objectives. First, it noted the need for uniformity in national programs. According to the Court, allowing each state to apply its own laws defeated this goal. Although uniformity is a valid federal interest, Congress recognizes the ultimate differences between state and federal law, and acts “against the background of the total corpus juris of the states.” The areas of domestic relations and property law are ones traditionally reserved to the states’ authority. The McCarty Court

136. See supra notes 49-52 and accompanying text.
137. See supra note 47 and accompanying text.
138. 453 U.S. at 244. See Goldberg, supra note 5, at 17.
139. See Goldberg, supra note 5, at 14. Judge Goldberg recognizes the retirement statutes are silent as to whether Congress intended to adopt or pre-empt state law. His position is the latter. Justice Rehnquist also found the federal statutes silent but he argued for adoption. 453 U.S. at 245.
140. 453 U.S. at 234.
chose to discard state law entirely in this instance, rather than reconciling it with the federal scheme for retired pay.\textsuperscript{142}

The majority also reasoned that the application of California law would do major damage to congressional power to raise and manage a young and vigorous Army.\textsuperscript{143} Dividing retired pay between the service member and the former spouse may, arguably, provide an incentive for the service member to remain on active duty. In so doing, the member continues to receive active duty pay, which is clearly separate property earned after divorce, while the former spouse receives none of this income. In utilizing this line of reasoning, the Court rather simply reduces a service member’s decision as to whether to remain on active duty to a decision based on only one factor. Moreover, even if the decision to retire was based on this single consideration, the Court never indicated how many older service members would actually be affected.\textsuperscript{144} There was no evidence that a reduced incentive to retire among older and divorcing service members would cause a significant disruption in the orderly promotion of younger members. The Court’s assumptions failed to show that applying state law would cause major damage to the federal interest.

Finally, the Court reasoned that allowing state law to reduce the amount of benefits received by the retired member would interfere with federal law. The Court stated that Congress had specified an income amount that it thought necessary for the retired member, and awarding a former spouse a portion of the retired pay would upset the income balance encompassed in the statute. This argument is weakened, however, by the fact that Congress did not include an anti-attachment provision insuring the service members’ receipt of full retired pay.\textsuperscript{145} Not only could creditors reduce the

\textsuperscript{142} See 453 U.S. at 240-41. Justice Rehnquist accuses the majority of an “analytic jump” from parts of retired pay as separate property to all of retired pay as separate property.

\textsuperscript{143} Id. at 234. The majority compared the ownership provisions for savings bonds as an inducement to purchase with the personal entitlement of retired pay as an inducement to enlist or reenlist. Because the retired pay statutes are not clear as to the ownership of the benefits, it is a faulty comparison. A savings bond purchaser can rely on the federal law which designates the beneficiary as the sole owner upon the purchaser’s death. Retired service members do not have a statute on which they could rely.

\textsuperscript{144} The majority opinion does not contain any statistics as to the number of service members who would be in a position to turn down retirement in favor of remaining on active duty.

\textsuperscript{145} Military pay cannot be attached prior to receipt by the service member. See Buchanan v. Alexander, 45 U.S. 20 (1846). But see 45 U.S.C. § 231m (1976) (Railroad Retirement benefits cannot be attached before or after receipt).
members' pay, but a former spouse could garnish a portion of the retired pay to satisfy alimony or support obligations. The community property rights of the former spouse would not necessarily upset the financial balance of the statute any more than other allowable claims. The Court was interested in protecting service members' retired pay, but the state law interference it found was not supported by a clear conflict between the state and federal statutes nor by factual evidence of major damage to federal interests as required by the Court's pre-emption test. The federal military objectives could have been preserved without denying the states' power to regulate divorces. Even if substantial federal interests were injured, the Court did not structure the pre-emption to protect those interests only, but found pre-emption of California law in the entire area of military retired pay.

POLICIES OF THE MILITARY AND THE STATE

Goals for the Military Against Goals for the Family

The McCarty decision disregarded not only the Supreme Court's pre-emption test, but also the state courts' treatment of domestic relations, property ownership, and military retired pay. Thus, the decision can be criticized for its legal soundness as well as its soundness in light of established state policies.

In the area of domestic relations, many state legislatures have passed statutes recognizing the contributions of both spouses to the marriage. They have also indicated a preference for abolishing or limiting the use of alimony in favor of property settlements. Consistent with such policies, the state courts have tradi-

146. See supra notes 114-15 and accompanying text.
147. 453 U.S. at 236-37.
148. Id. at 245. The dissenters would override community property law only as far as it conflicts with federal law. To find a conflict, the majority relied on the annuity provisions and the statute allowing for the designation of a beneficiary to receive unpaid arrearages. Neither of these statutes deals with the whole of retired pay. See Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ware, 414 U.S. 117, 126-27 (1973).
150. See ILL. ANN. STAT. ch. 40, § 503 (Smith-Hurd 1980) (Historical and Practice Notes). As the Illinois Supreme Court stated in In re Marriage of Aschwanden, 82 Ill. 2d 31, 111 N.E.2d 238 (1960): "Where the property available to the [spouse] is sufficient to satisfy that spouse's need and entitlements, the use of maintenance should be limited. . . . If there is not sufficient marital property, however, maintenance should be considered." Id. at 38, 111 N.E.2d at 242. Texas has abolished all but contractual alimony between the former spouses. Freed & Foster, supra note 17, at 252-57.
tionally characterized military retired pay as an asset of the marriage.

The McCarty Court not only rejected that approach but in its opinion further assumed that property distributions are not based on need. Using this assumption, denying a former spouse an interest in retired pay does not deprive the spouse of a means of support; ideally, a former spouse in need of support should look to alimony. There are several problems with this line of reasoning. First, it forces the states to revert to the concept that property earned during marriage belongs to the spouse holding title. Property principles based on title undermine the theory that marriage is a partnership to which both spouses contribute. Second, the Court's assumption about property distributions is incorrect. Many states consider the respective financial positions and support needs of the spouses as relevant facts in determining the allocation of property between them. Third, the Court's position leaves some former spouses with no means of support in those states which have either abolished alimony or substantially restricted its use.

In addition to overriding established state policy in the area of domestic relations, the McCarty decision replaces an ex-spouse's established interest in military retired pay under state law with an admittedly less valuable and more tentative right to alimony. The Court relies on state alimony laws and Social Security to soften the potential hardships the denial of military benefits imposes on former spouses. State alimony laws, however, are an inadequate substitute for the interest which the Court abolished.

Prior to McCarty, many state courts awarded an interest in a service member's retired pay to the former spouse "if, as and when" it was paid. The former spouse received a periodic payment similar to alimony. The right to receive a portion of the payments ended upon the death of the retired member.

151. 453 U.S. at 230.
152. See Freed & Foster, supra note 17, at 249.
154. Several states still require that the ex-spouse is faultless before they will award alimony. Freed & Foster, supra note 17, at 249.
155. 453 U.S. at 235-36.
nation parallels the termination of alimony payments where no provisions have been made to continue payments after the death of the supporting spouse. However, two significant distinctions between property awards and alimony leave the former spouse in an unfavorable position where only alimony is received. First, a property right is a permanent interest in the retired pay. An alimony award, on the other hand, received by the voluntary payments of the retired member or by attachment of retired pay, is subject to modification or discontinuation. This feature of alimony gives either spouse an opportunity to modify the terms of the divorce agreement to reflect their changing financial positions. Frequently, alimony is discontinued when a former spouse remarries, whereas ownership of property awarded pursuant to a divorce agreement continues indefinitely.

The second distinction of importance to a former spouse is that a property right can be transferred, assigned or inherited, while alimony is for the sole benefit of the former spouse and terminates upon death. Prior to the McCarty decision, one court held that a spouse's property interest in her former husband's military retired pay could pass to her estate should she predecease him. Although the McCarty Court was not attempting to equate the payment of alimony with a property right in retired pay, the decision's practical effect is to preclude former spouses from sharing in a previously recognized state property right.

The Impact of McCarty on a Service Member's Divorce

The McCarty decision is, on its face, a favorable decision for service members. In practical application, however, the decision may actually place the retired members at a disadvantage. Military retired pay is a substantial asset in most marriages and the overwhelming majority of states allow their courts wide discretion in

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160. Id.

equitably dividing marital assets. McCarty precludes state courts from directly awarding retired pay to the former spouse, although other award alternatives are available. Depending on a couple’s financial position prior to the divorce, such alternatives may have varying effects.

First, as the Supreme Court noted, the former spouse might be entitled to alimony. Using this method to allocate the couple's assets, the retired member receives a tax advantage. Although retired pay is taxable as income, the member is entitled to a deduction for any amounts paid to the former spouse as alimony or maintenance. As previously noted, alimony is much less valuable to the former spouse than a property award of retired pay. An award of a property interest, however, would not offer tax advantages to the retired member.

A second alternative available to the courts is to give the former spouse a current, offsetting award. If a divorcing service member has not served the required twenty years to become vested in the retired pay, the former spouse may receive a much larger share of marital assets immediately, while the member has only a possible future benefit. If the member ultimately does not receive the retired pay, due to death or some other disqualification, the former spouse would have received more than an equitable share of the property. Even if the retired pay is subsequently received by the member, the former spouse has already received non-taxable property with immediate enjoyment, while the retired member has a right to taxable income at a date in the future.

The effects of the McCarty decision on the division of marital assets will vary based upon the amount of total assets available for distribution. Where a couple has, in addition to military retired pay, no other substantial assets and the former spouse qualifies for alimony, the retired member will probably be at an advantage due to the available tax deductions. Where a couple has substantial assets beyond the retired pay, the courts may employ the second alternative and grant an offsetting award. In these circumstances, a

162. Freed & Foster, supra note 17, at 249-51.
165. Most courts, in dividing retired pay prior to McCarty, took into consideration the possibility that the pension might never vest and reduced the ex-spouse's award accordingly. The advantages and disadvantages of an alimony award instead of a property settlement are also complicated by the fact that alimony can be modified or terminated. See supra notes 158-60.
wealthy service member is treated differently than a less wealthy member.

Finally, the courts may be faced with a situation where a service member is entitled to military retired pay and the former spouse is entitled to a private pension. The member may have a claim in both retirement benefits while the former spouse will be left with only a portion of the private pension upon dissolution of the marriage. This would probably be a rare occurrence, however, because most service members are frequently transferred and their spouses are not in one location long enough to acquire a vested pension. The variation of marital property situations which may face the courts is limitless. Following McCarty, in order to continue a system of fair distribution of marital assets and equitable recognition of each spouse's contributions to the marriage, the states will have to place greater reliance on the intelligence and discretion of the divorce judges and the prompt action by Congress setting rational guidelines.

PROPOSED LEGISLATION: THE MILITARY SPOUSE RETIREMENT EQUITY ACT

On April 6, 1981, Representative Schroeder introduced House of Representatives Bill 3039 to amend Title 10 of the United States Code.\(^\text{167}\) Before the Supreme Court's decision in McCarty, several members of Congress recognized the problems and inequities faced by the former spouses of military members. The proposed legislation, titled the "Military Spouse Retirement Equity Act," would grant a former spouse up to a fifty percent interest in the member's military retired pay\(^\text{168}\) and up to a fifty-five percent interest in any annuities.\(^\text{169}\)

In order to qualify for the interest, the bill requires the former spouse to have been married to the service member for at least ten years, during which the member performed creditable duty in the military services.\(^\text{170}\) The interest is disqualified only upon the former spouse's remarriage before reaching age sixty or upon death.\(^\text{171}\) The former spouse's right to retired pay is also discontinued if the service member dies, but in that event, the ex-spouse may be enti-


\(^{168}\) Id. at 4, line 3.

\(^{169}\) Id. at 12, line 23.

\(^{170}\) Id. at 2, line 10.

\(^{171}\) Id. at 5, line 1.
tled to an annuity.\textsuperscript{172}

Administratively, the service member's pay or the present spouse's annuity would be reduced and a portion directed to the former spouse pursuant to a divorce agreement or divorce decree for maintenance, or a property settlement. Proposed section 1465 specifically states that this Act will not pre-empt the rights of any spouse under any law of the states.\textsuperscript{173} Because the \textit{McCarty} decision pre-empted all state rights in this area, the provision would be clearer if redrafted to express the extent to which a state can apply its own laws.

This legislation, if enacted, would more closely harmonize state policies on domestic relations with the federal laws. The Act reflects congressional awareness of each spouse's contribution to the marriage. The Act would insure the uniformity which the Supreme Court noted was essential for national programs by providing guidelines for the state courts.

These guidelines would protect service members from inequitable distributions of marital assets by making clear that the right of the former spouse is contingent on the member's actual receipt of retired pay. Such a provision is similar to the state courts' "if, as and when" distribution concept.\textsuperscript{174} Under the proposed legislation, the former spouse would be entitled to a portion of the retired pay in the future, enabling the courts to divide current marital assets more equally. This also would avoid awarding the former spouse a larger asset share to offset the member's anticipated retired pay. The Act will also protect former spouses where their interest in retired pay will be deemed an absolute right with attributes similar to property rights and alimony. Unlike alimony, which is based on the needs of the former spouse and the court's discretion, a former spouse will be automatically entitled to an interest in retired pay. In order to eliminate collection problems, the payments due the former spouse would be sent directly by the government to the former spouse, rather than to the retired member. The Act provides, however, that the spouse's interest terminates upon the remarriage of that spouse prior to reaching the age of sixty or upon the death of that spouse. This provision is a compromise between the position of the state courts, which had awarded former spouses a complete property interest, and the position of the \textit{McCarty} court,

\begin{itemize}
\item \textsuperscript{172} \textit{Id.} at 5, line 4.
\item \textsuperscript{173} \textit{Id.} at 7, line 25.
\item \textsuperscript{174} For a discussion of this concept, see \textit{supra} note 40 and accompanying text.
\end{itemize}
which awarded retired pay entirely to the retired member.

The legislation is currently pending in the House of Representa-
tives following an assignment to the House Committee on Armed
Forces.175

CONCLUSION

In McCarty, the Supreme Court decided that the state courts
were not free to apply community property laws to military retired
pay, and held that the federal statutory framework pre-empted
community property law. The decision rested on the inference
that, because the military retirement statutes were silent, Congress
intended to pre-empt state law in the area of domestic relations
where a federal right was involved. Although the majority dis-
cussed a wide range of federal statutes relating to military retired
pay and other federal benefits in arriving at its conclusion, it failed
to address well established state policies in the area of domestic
relations.

The dissent noted that the Court's opinion failed to address and
comply with the well accepted requirements for a finding of pre-
emption. In the absence of a clear statute directing ownership of
military retired pay, the dissenters would have allowed the states
to continue to apply their own laws.

The McCarty decision appears to offer protection to service
members. In practical effect, however, the decision may be advan-
tageous or disadvantageous to a service member, depending on
other facts and circumstances. State courts have wide discretion to
equitably divide assets pursuant to a divorce proceeding. Even in
light of McCarty, this discretion will continue to play an important
role.

Legislation has recently been introduced in Congress which
would grant a former spouse an automatic right to military retired
pay and annuities. This legislation, if enacted, would provide state
courts with guidelines for a just distribution of what is potentially
a valuable asset. Neither the McCarty decision nor the proposed
legislation will resolve all the problems associated with the marital
allocation of military retired pay. However, the proposed legisla-
tion is a significant reflection of congressional recognition and sup-
port for those important state policies which affirm marriage as a
shared enterprise entitling each spouse to a share of all the marital

175. 2 Cong. Index (CCH) 28,305 (97th Cong. 1981-1982).
assets. Congress should act to pass this legislation or similar provisions to establish a federal position on military retired pay with respect to the states’ policy to protect former spouses.

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