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Family Law - Federal Preemption Doctrine - Military Retired Pay Not Subject to Division as Community Property

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CASE COMMENTS

FAMILY LAW — FEDERAL PREEMPTION DOCTRINE — MILITARY RETIRED PAY NOT SUBJECT TO DIVISION AS COMMUNITY PROPERTY

A military officer and his wife were divorced after nineteen years of marriage.[1] At the time of the divorce,[2] the husband had served approximately eighteen of the twenty years required for military retired pay under section 3911 of title 10 U.S.C.A.[3] In his dissolution of marriage petition, the husband requested that all his military retirement benefits be confirmed to him as his separate property, so as not to be part of the community property of the marriage,[4] which is divisible by California courts in marriage dissolutions.[5]

The California Court of Appeal, First Appellate District,

1. McCarty v. McCarty, 101 S. Ct. 2728 (1981). Richard and Patricia McCarty were married in Portland, Oregon, on March 3, 1957, during Richard McCarty's second year in medical school. In his fourth year of medical school, Richard commenced active duty in the United States Army. He was assigned successive tours of duty in Pennsylvania, Hawaii, Washington, D.C., California, and Texas. After these tours of duty, he was assigned to a hospital in San Francisco, where he held the rank of Colonel and became Chief of Cardiology. *Id.* at 2732-33.

2. *Id.* at 2733. Richard and Patricia McCarty were separated on October 31, 1976. On December 1, 1976, Richard filed a petition in the Superior Court of California in and for the City and County of San Francisco requesting dissolution of the marriage. *Id.*

3. 10 U.S.C.A. § 3911 (West 1959). Section 3911 provides that "[t]he Secretary of the Army may, upon the officer's request, retire a regular or reserve commissioned officer of the Army who has at least 20 years of service computed under section 3926 of this title, at least 10 years of which have been active service as a commissioned officer." *Id.*

4. 101 S. Ct. at 2733. Under California law, a court granting dissolution of a marriage must divide "the community property and the quasi-community property of the parties." CAL. CIV. CODE § 4800(a) (West Supp. 1981). Upon dissolution of a marriage in California, each spouse has an equal and absolute right to one-half interest in all community and quasi-community property. Each spouse retains his or her separate property, including the assets the spouse owned before the marriage or acquired separately during the marriage through gift. *See* Hisquierdo v. Hisquierdo, 439 U.S. 572, 578 (1979).

5. *See* Hisquierdo v. Hisquierdo, 439 U.S. at 577-78. Eight states, including Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, and Washington treat all property owned by either spouse during the marriage as community property. In these community property states, each spouse is deemed to make an equal contribution to the marital enterprise, and each is entitled to share equally in its assets. *Id.*

affirmed an award to the wife by a superior court[6] and held that the husband's military pensions and retirement rights were subject to division as quasi-community property.[7] In so ruling, the court declined to accept the husband's contention that the federal scheme of military retirement benefits preempts state community property laws.[8] The California Supreme Court denied the husband's petition for hearing.[9] The husband appealed to the United States Supreme Court,[10] which *held* that federal law precludes a state court from dividing military retired pay pursuant to state community property laws.[11] *McCarty v. McCarty,* 101 S. Ct. 2728 (1981).

Traditionally, the subject of domestic relations between husband and wife has belonged to the states and not to the laws of the United States.[12] Thus, before the supremacy clause of the United States Constitution[13] demands that state law be overridden, "'state family and family-property law must do 'major damage' to 'clear and substantial' federal interests.'"[14]

The issue of whether federal law preempts state community property laws was first addressed by the United States Supreme Court in *Wetmore v. Markoe.*[15] In *Wetmore* the Court held that state family law would be preempted only when Congress has

6. 101 S. Ct. at 2734. The decisions of the California Court of Appeal, First Appellate District, and the superior court are unpublished. *See* 8 COMM. PROP. J. 71-72 (1981).

7. 101 S. Ct. at 2733-34. The California intermediate court in *McCarty,* 1 Civ. No. 45056, Div. 4 (Cal. Ct. App. Feb. 6, 1980), affirmed the trial court's finding that the husband's military retirement pension was quasi-community property, to be divided by a formula based upon the ratio of the length of the husband's service during the marriage and the total length of service to retirement. *Id.* at 2734. Quasi-community property rules apply when parties who have acquired property rights in other states become domiciled in California and a divorce action is subsequently filed in that state. The husband in *McCarty* claimed domicile in Oregon. *See* 8 COMM. PROP. J. at 72.

8. 101 S. Ct. at 2734. The husband argued that the supremacy clause of the Constitution precluded the trial court from awarding his wife a portion of his military retired pay. 101 S. Ct. at 2734.

Article VI, clause 2 of the United States Constitution states the following:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. CONST. art. VI, cl. 2. Thus, the supremacy clause mandates that the United States Constitution and the laws of the United States cannot be impaired by any law of a state. If a state law conflicts with the United States Constitution, or with any valid law of the United States, it is utterly nugatory. *See* U.S.C.A. CONST. art. VI, cl. 2 n.1 (West 1968).

9. 101 S. Ct. at 2734.

10. *Id.* After postponing jurisdiction in 1980, the United States Supreme Court concluded that the *McCarty* case fell within the appellate jurisdiction of the Court. McCarty v. McCarty, 101 S. Ct. 314, 314 (1980). The conflict between the federal military retirement scheme and state community property laws made this a proper case for appellate jurisdiction of the United States Supreme Court under the supremacy clause. 101 S. Ct. at 2734 n.12 (citing U.S. CONST. art. VI, cl. 2).

11. 101 S. Ct. at 2743.

12. *See, e.g.,* Hisquierdo v. Hisquierdo, 439 U.S. at 581.

13. U.S. CONST. art. VI, cl. 2. For the text of article VI, clause 2, see *supra* note 8.

14. 439 U.S. at 581 (citing United States v. Yazell, 382 U.S. 341, 352 (1966)).

15. 196 U.S. 68 (1904).

"positively required by direct enactment"[16] that state law be preempted.[17]

The following year, however, the Court in *McCune v. Essig*[18] held that community property laws could be preempted by the Federal Homestead Act,[19] even though Congress had not made an express statement limiting ownership in the Federal Homestead Act.[20] The fact that the rights under the Federal Homestead Act already had been delineated was enough for the Court to find that those rights could not be modified further by state community property laws without frustrating the purpose behind their enactment.[21] Therefore, the pervasive regulation of the area by the Federal Homestead Act impliedly preempted the states from further action.[22]

In more recent cases the United States Supreme Court has pointed to express preemption of state regulation by identifying unequivocal statements of ownership in the appropriate federal statutes.[23] In *Wissner v. Wissner*[24] the Court refused to divide the proceeds of a National Serviceman's Life Insurance Policy purchased with community funds between the wife and the named beneficiary.[25] The *Wissner* Court stated that Congress had spoken "with force and with clarity in directing that the proceeds belong to the named beneficiary and no other."[26]

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16. Wetmore v. Markoe, 196 U.S. 68, 77 (1904).

17. *Id.* The Court in *Wetmore* held that a husband has a duty to support his wife and children and the Federal Bankruptcy Act was not intended to be a means of avoiding this obligation. *Id.*

18. 199 U.S. 382 (1905). The Court in *McCune* held that federal law, which permitted a widow to patent federal land entered by her husband, prevailed over the interest in the patent asserted by the daughter under the state inheritance law. *Id.* at 389. The Court noted that the daughter's contention "reverses the order of the statute and gives the children an interest paramount to that of the widow through the laws of the State." *Id.*

19. McCune v. Essig, 199 U.S. 382, 389 (1905) (construing Homestead Act of 1874, ch. 308, 18 Stat. 81) (recent version at 43 U.S.C.A. §§ 164, 171 (West 1964) (repealed 1976)).

20. *Id.* at 389. The actual conflict may occur in an implied manner, such as when Congress already had acted to regulate the right in question and its actions are so pervasive as to occupy the field. *See* L. TRIBE, AMERICAN CONSTITUTION LAW § 6-25 (1978).

21. 199 U.S. at 390.

22. *Id.* (construing Homestead Act of 1874, ch. 308, 18 Stat. 81) (recent version at 43 U.S.C.A. §§ 164, 171 (West 1964) (repealed 1976)).

23. *See, e.g.*, Hisquierdo v. Hisquierdo, 439 U.S. 572 (1979) (express conflict between Federal Railroad Retirement Act and state community property laws); Free v. Bland, 369 U.S. 633 (1962) (express conflict between state community property law and Federal Treasury regulations regarding United States Savings Bonds); Wissner v. Wissner, 338 U.S. 655, *reh'g denied,* 339 U.S. 926 (1950) (express conflict between National Service Life Insurance Act and California community property law).

24. 338 U.S. 655, *reh'g denied,* 339 U.S. 926 (1950). In *Wissner* a state court had ordered the named beneficiary of a National Serviceman's Life Insurance Policy, purchased through a federal program, to turn over one-half of the proceeds to the deceased soldier's widow as community property. *Id.*

25. Wissner v. Wissner, 338 U.S. at 658. The Supreme Court in *Wissner* held that the state order was invalid under the supremacy clause, because the congressional intent in forming the insurance plan was to give servicemen absolute discretion in choosing their benficiaries. Thus, state community property law could not be applied because it conflicted with federal law. *Id.* at 558-59.

26. *Id.*

In *Free v. Bland* [27] the Court held that, pursuant to specific federal survivorship provisions,[28] the sole owner of the United States Savings Bonds could be only the survivor of the registered owners, and therefore, no community property interest could attach.[29]

The most recent case prior to *McCarty* was *Hisquierdo v. Hisquierdo*.[30] In *Hisquierdo* the United States Supreme Court held that community property states could not apply their laws in dividing, as part of the community property, the benefits received under the Federal Railroad Retirement Act.[31] The Court applied a two-step test in order to determine whether the federal law preempted the state community property law.[32] Under the two-step preemption test, a state law will be preempted if the right asserted by the state actually conflicts with the express terms of the federal law and the application of state law threatens grave harm to "clear and substantial federal interests."[33] In *Hisquierdo* the Court noted a specific nonattachability clause in the Railroad Retirement Act that governed railroad worker's pensions[34] and a clause that entitled the spouse to a separate payment.[35] The existence of these

27. 369 U.S. 663 (1962). Federal Treasury regulations providing for the right of survivorship in the ownership of United States Savings Bonds were in express conflict with state community property laws. *Id.* at 665.

28. Free v. Bland, 369 U.S. at 667-68. The plaintiff sought community property rights in United States Savings Bonds, even though duly issued Treasury regulations provided that the designated co-owners would, upon the death of the other co-owner, be the "sole and absolute owner" of the bonds. Treas. Reg. § 315.61 (currently codified at 31 C.F.R. § 315.61 (1981)).

29. 369 U.S. at 670.

30. 439 U.S. 572 (1979). The California community property award to the wife of interest in the husband's expected benefits under the Railroad Retirement Act of 1974, was held to impermissibly conflict with the Federal Railroad Retirement Act. *Id.* at 590-91 (construing 45 U.S.C.A. §§ 231-231t (West Supp. 1981)).

31. *Id.* (construing 45 U.S.C.A. §§ 231-231t (West Supp. 1981)).

32. *Id.* at 583. The first issue the Court in *Hisquierdo* considered was whether the asserted state right conflicted with the express terms of federal law. Applying the second step of the federal preemption test, the Court considered whether the consequences of applying the state law sufficiently injured the objectives of the federal program and therefore required nonrecognition of that state right. *Id.*

33. *Id.* at 581 (quoting United States v. Yazell, 382 U.S. 341, 352 (1966)).

34. *Id.* Section 14 of the Railroad Retirement Act of 1974 provides:

> 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.

45 U.S.C.A. § 231m. (West Supp. 1981).

The closest analogue to section 14 of the Railroad Retirement Act in the Military Retirement Statutes, which are involved in the *McCarty* case, is section 701(a), title 37, of the United States Code Annotated. Section 701(a) provides the following: "Under regulations prescribed by the Secretary of the Army or the Secretary of the Air Force, as the case may be, a commissioned officer of the Army or Air Force may transfer or assign his pay account, when due and payable." 37 U.S.C.A. § 701(a) (West 1968).

35. 439 U.S. at 584-85. Under the Railroad Retirement Act, a spouse is entitled to a separate benefit, which terminates upon divorce. 45 U.S.C.A. § 231d (c) (3) (West Supp. 1981). No similar separate spousal entitlement, terminable upon divorce, exists in statutes governing military retired pay. *See* 101 S. Ct. at 2746.

specific clauses indicated that Congress had provided for that interest already.[36] Therefore, state community property laws were not to interfere with the interest provided for by the federal statute.[37]

In *McCarty v. McCarty*[38] the Court had to decide whether federal military retired pay statutes preempted state community property law.[39] The Court applied the *Hisquierdo* two-step test to decide the issue.[40] The United States Supreme Court in *McCarty* held that federal law precludes a state court from dividing military retired pay pursuant to state community property laws.[41]

In analyzing the first step of the *Hisquierdo* test, the *McCarty* Court looked to several factors and found a conflict between the terms of the federal military statutes and the state community property right asserted by the wife.[42] The Court noted that the military retirement system conferred no entitlement to retired pay upon the retired service member's spouse.[43] Therefore, the Court viewed the system as embodying not even a limited community property concept.[44] Also, the Court noted that Congress had explicitly stated that "historically military retired pay has been a *personal entitlement* payable to the retired member himself as long as he lives."[45]

The *McCarty* Court looked to several other features of the military retirement scheme to demonstrate that military retired pay was meant to be the "personal entitlement" of the retiree.[46] One factor was that a service member has the freedom to designate someone other than the spouse or ex-spouse as a beneficiary to receive unpaid arrearages in retired pay.[47] Another factor the Court considered was that the language, structure, and legislative

36. 439 U.S. at 585.
37. *Id.* at 589.
38. 101 S. Ct. 2728 (1981).
39. *Id.* at 2730.
40. *Id.* at 2735.
41. *Id.* at 2730. In determining whether the federal statute preempted state community property law, the Court in *McCarty* reasoned that the first step was to determine whether the state right, as asserted, conflicted with the express terms of the federal law involved. If there was a conflict, the second step was to determine whether the consequences of the application of the state law sufficiently injured the objectives of the federal program to require nonrecognition of the state right. *Id.* at 2735 (citing Hisquierdo v. Hisquierdo, 439 U.S. at 583).
42. 101 S. Ct. at 2735.
43. *Id.* at 2737-41.
44. *Id.* at 2737.
45. *Id.* (quoting S. REP. No. 1480, 90th Cong., 2nd Sess. 6, *reprinted in* 1968 U.S. CODE CONG. & AD. NEWS 865, 3294 (emphasis added by the Court)).
46. 101 S. Ct. at 2737. The wife argued that Congress's use of the term "personal entitlement" in this context signified only that retired pay ceases upon the death of the service member. *Id.*
47. *Id.* (citing 10 U.S.C.A. § 2771 (West 1975)). The fact that section 2771 was designed to permit the soldier to designate a beneficiary other than his spouse for his retired pay demonstrates that Congress did not use the term "personal entitlement" in so limited a fashion as to mean only that retired pay ceases upon the death of the service member, as the wife contended. *Id.* at 2737.

history of the Retired Serviceman's Family Protection Plan (R.S.F.P.P.)[48] and the Survivor Benefit Plan (S.B.P.)[49] indicated that military retired pay was a "personal entitlement."[50] Under these statutes, the service member has the freedom to elect to provide no annuity at all, or to provide an annuity payable only to surviving children and not to the spouse.[51] The Court used this fact to conclude that if military retired pay was intended to be community property, the service member could not deprive the spouse of his or her interest in the property as provided by statute.[52]

The Court also considered the fact that under the federal military retired pay statutes,[53] an ex-spouse is not an eligible beneficiary of an annuity under either the R.S.F.P.P. or S.B.P.[54] In addition, the Court noted that deductions from retired pay for a spouse's annuity under the R.S.F.P.P. automatically cease upon divorce,[55] so as "[t]o safeguard the participant's future retired pay when . . . divorce occurs. . . ."[56]

The Court found it clear that Congress had intended that military retired pay "actually reach the beneficiary"[57] by looking to the fact that the retired pay cannot be attached to satisfy a property settlement incident to the dissolution of a marriage.[58] The Army officer may assign his retired pay only when it is due and payable.[59]

The Court recognized that the legislative history and amendments of other federal retirement systems gave weight to the

48. 10 U.S.C.A. §§ 1431-1446 (West 1975 & Supp. 1981). Generally, military retired pay ceases upon the death of the service member, but the Retired Serviceman's Family Protection Plan (R.S.F.P.P.) and the Survivor Benefit Plan (S.B.P.) allow the service member to reduce the retired pay in order to provide an annuity for the surviving spouse or children, if the service member so elects. *Id.*

49. 10 U.S.C.A. §§ 1447-1455 (West 1975 & Supp. 1981).

50. 101 S. Ct. at 2738.

51. 10 U.S.C.A. §§ 1434, 1450 (West 1975 & Supp. 1981). The fact that the service member is free to elect whether to provide an annuity for the spouse indicates that the retired pay was meant to be a "personal entitlement," under the sole control of the retired service member, rather than community property. 101 S. Ct. at 2738.

52. 101 S. Ct. at 2738.

53. 10 U.S.C.A. §§ 1434(a), 1447(3), 1450(a) (West Supp. 1981). Section 1434(a) refers to the R.S.F.P.P., and sections 1447(3) and 1450(a) refer to the S.B.P. *Id.*

54. 101 S. Ct. at 2739.

55. 10 U.S.C.A. § 1434(c) (West 1975).

56. S. REP. NO. 1480, 90th Cong., 1st Sess. 9 (1967), *reprinted in* 1968 U.S. CODE CONG. & AD. NEWS 865, 3294.

57. *See* Hisquierdo v. Hisquierdo, 439 U.S. at 584.

58. 101 S. Ct. at 2739. Legislative history shows that Congress rejected a proposal that would have allowed attachment of up to 50% of military retired pay to comply with a court order in favor of a spouse, former spouse, or child. H. R. REP. NO. 481, 92d Cong., 2d Sess. 1, *reprinted in* 1972 U.S. CODE CONG. & AD. NEWS 816, 3288. S. REP. NO. 1089, 92d Cong., 2d Sess. 25, *reprinted in* 1972 U.S. CODE CONG. & AD. NEWS 816, 3288.

59. 37 U.S.C.A. § 701(a) (West 1968). While an Army officer may transfer or assign his pay account, he may do so only when the account is "due and payable." 37 U.S.C.A. § 701(a) (West 1968). Even if section 701 is not considered to be an explicit prohibition against anticipation, the Court stated that "it is clear that the injunction against attachment is not to be circumvented by the simple expedient of an offsetting award." 101 S. Ct. at 2739 n.22.

Court's conclusion that there was a conflict between the federal military retirement scheme and the community property right asserted.[60] In 1975 Congress amended the Social Security Act to provide that all federal benefits, including military benefits, be subject to legal process to enforce child support or alimony obligations.[61] In 1977, however, the Court further noted that Congress defined "alimony" so as not to include any payment or transfer of property in compliance with any community property settlement or equitable distribution of property.[62]

The Court also noted that the Civil Service statutes were amended recently to require that the United States recognize community property division of Civil Service retirement benefits by state courts.[63] The Foreign Service Amendments were also amended so that an ex-spouse is entitled to a pro rata share of Foreign Service retirement benefits.[64] From these amendments to similar federal retirement statutes, the *McCarty* Court implied that since Congress had not authorized or required the community property division of military retired pay, that pay continued to be the personal entitlement of the retiree.[65] Therefore, the first step of

60. 101 S. Ct. at 2740-41. The Court looked at the legislation concerning other types of federal pay, because Congress had determined that the problem of the attachment of military retired pay should be considered in the context of "legislation that might require all Federal pays to be subjected to attachment." 110 CONG. REC. 30151 (remarks of Rep. Pike). The Court noted that Congress subsequently had acted to amend other federal pay systems regarding attachability but did not amend the Federal Military Retired Pay statutes. 101 S. Ct. at 2741.

61. 42 U.S.C.A. § 659 (West Supp. 1981). Monies due from, or payable by, the United States or the District of Columbia to any individual, including members of the armed services, are subject to legal process brought for the enforcement of the individual's legal obligation to pay child support or alimony, in like manner and to the same extent as if the United States or the District of Columbia were a private person. *Id.*

62. 42 U.S.C.A. § 662(c) (West Supp. 1981). Congress added a new definitional section, which provides that the term "alimony" in section 659(a) of title 42, United States Code Annotated, does not include 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. *Id.*

63. 5 U.S.C.A. § 8345(j) (1) (West 1980). Section 8345(j) (1) reads as follows:

> Payments under this subchapter which would otherwise be made to an employee, Member, or annuitant based upon his service shall be paid (in whole or in part) by the Office to another person if and to the extent expressly provided for in the terms of any court decree of divorce, annulment, or legal separation, or the terms of any court order or court-approved property settlement agreement incident to any court decree of divorce, annulment, or legal separation. Any payment under this paragraph to a person bars recovery by any other person.

Id.

64. Foreign Service Act of 1980, Pub. L. No. 96-465, § 814, 94 Stat. 2113. A former spouse who was married to a foreign service member for at least 10 years of service is entitled to a pro rata share of up to 50% of the member's retirement benefits, unless otherwise provided by court order or spousal agreement. The former spouse also may claim a pro rata share of the survivor's annuity provided for the member's widow. The foreign service member cannot elect not to provide for a survivor's annuity without the consent of his spouse or former spouse. *Id.*

65. 101 S. Ct. at 2741. After noting that similar legislation affecting military retired pay was introduced in the 96th Congress and none of those bills were reported out of committee, the *McCarty* Court stated: "Thus, in striking contrast to its amendment of the Foreign Service and Civil Service retirement systems, Congress has neither authorized nor required the community property division

the *Hisquierdo* preemption test was met.

The second step of the preemption test was to determine whether the application of community property principles to military retired pay sufficiently injured the objectives of the federal program so as to require nonrecognition.[66] The Court found that the application of state community property law had the potential to frustrate the federal goals of inducing enlistment and reenlistment into the armed forces, encouraging retirement after twenty years of service to provide for a youthful military, and providing for the retired service member.[67] The Court also found that the application of state community property law might disrupt the carefully balanced federal scheme that Congress devised to encourage a service member to set aside a portion of his or her military pay as an annuity for a surviving spouse or dependent children.[68]

The Court found a "clear and substantial" federal interest in attracting and retaining personnel for the military forces, which are essential for the national defense.[69] Thus, the states should not interfere by lessening the incentive to enlist and retire set up by Congress.[70]

The *McCarty* Court thus held that federal law precludes a state court from dividing military retired pay pursuant to state

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of military retired pay. On the contrary, that pay continues to be the personal entitlement of the retiree." *Id.* at 2740-41.

Legislation has been introduced in the 97th Congress that would require pro rata division of military retired pay. *See* 8 COMM. PROP. J. 288, 290 (1981), *referring to* H. R. REP. No. 3039, 97th Cong., 1st Sess. (1981); S. REP. No. 888, 97th Cong., 1st Sess. (1981).

66. 101 S. Ct. at 2741. The *McCarty* Court quoted the language used in the *Hisquierdo* decision to describe the second step: " '[a] mere conflict in words is not sufficient'; the question remains whether the 'consequences of that [community property right] sufficiently injure the objectives of the federal program to require nonrecognition.' " *Id.* (quoting Hisquierdo v. Hisquierdo, 439 U.S. at 581-83).

67. *Id.* Under the United States Constitution, Congress has the power to raise and support armies, to provide and maintain a navy, and to make rules for the government and regulation of the land and naval forces. U.S. CONST. art. 1, § 8, cls. 12-14.

68. 101 S. Ct. at 2741. The *McCarty* Court stated the following: "By diminishing the amount available to the retiree, a community property division makes it less likely that the retired service member will choose to reduce his or her retired pay still further by purchasing an annuity for the surviving spouse, if any, or children." *Id.*

69. *Id.* at 2742. The wife in *McCarty* conceded that there is a substantial federal interest in attracting and retaining personnel for the military forces. She argued, however, that this federal interest would not be impaired by allowing a state to apply its community property laws to retired military personnel in the same manner that the state applies those laws to civilians. The Court found that this argument ignored two essential characteristics of military service: the military forces are nationwide in operation; and the members of the military, unlike civilian employees, are not free to choose their place of residence. *Id.* Thus, the value of the military retired pay as an inducement for enlistment and reenlistment would be diminished to the extent that the service member recognizes that he or she could be involuntarily transferred to a community property state that will divide that pay upon divorce. *Id.*

70. *Id.* at 2743. The Court emphasized that "in no area has the Court accorded Congress greater deference than in the conduct and control of military affairs." *Id.* The Court stated that the decision concerning community property division of military retired pay is for Congress alone. Absent any congressional decision, as in the Civil Service and Foreign Service contexts, the Court held that the states may not apply community property laws to federal military retired pay. *Id.*

community property laws.[71] The Court found a conflict between the terms of the state and federal laws, and viewed the application of the state law as having the potential to sufficiently injure the objectives of the federal program so as to require nonrecognition of the state right.[72]

The *McCarty* decision will bring changes in the application of state law to military retirement pay in many states.[73] Prior to the *McCarty* decision, six of the eight community property states considered military retirement pay as a community asset and therefore divisible upon divorce.[74] Non-community property states were divided on the issue of whether military retired pay could be considered marital property subject to division upon divorce.[75]

The North Dakota Supreme Court held in *Webber v. Webber*[76] that the *McCarty* decision applies to the distribution of a former husband's military retirement benefits in the North Dakota courts.[77] Even though North Dakota is not a community property state, the North Dakota Supreme Court applied the holding in *McCarty,* such that the former husband's military retired pay could not be attached to satisfy a property settlement incident to

71. *Id.* The judgment of the California Court of Appeal was reversed, and the case was remanded for further proceedings not inconsistent with the opinion. *Id.*

72. *Id.* at 2741-42.

The dissent was bothered by the fact that Congress had not "positively required by direct enactment" that state community property laws be preempted by the federal provisions governing military retired pay. *Id.* at 2743 (Rehnquist, Brennan, & Stuart, JJ., dissenting) (quoting Wetmore v. Markoe, 196 U.S. 68, 77 (1904)).

The dissenters also stated that marriage law questions should be left to the states, as they have been in the past, unless there is the "clearest direction from Congress." *Id.* at 2744. The dissenters did not find this "clear direction" in the federal military statutes. *Id.* The dissenters stated that a policy issue such as this was for Congress alone to decide, and since Congress had not explicitly acted to prevent the application of state community property laws to military retired pay, the state law should not be preempted by the federal military retirement system. *Id.* at 2748.

73. *See* 8 COMM. PROP. J. 187, 194-95 (1981) (discussion on the effect of *McCarty* on alimony, off-sets, in-hand retired pay, and equitable distribution of marital property).

74. The highest state courts in California, Arizona, Idaho, New Mexico, and Washington have considered military retired pay a community asset. *See, e.g.,* Czarnecki v. Czarnecki, 123 Ariz. 466, 600 P.2d 1098 (1979); Marriage of Milhan, 27 Cal. 3d 765, 613 P.2d 812, 166 Cal. Rptr. 533 (1980); Ramsey v. Ramsey, 96 Idaho 672, 535 P.2d 53 (1979); Stephens v. Stephens, 93 N.M. 1, 595 P.2d 1196 (1979); Payne v. Payne, 82 Wash. 2d 573, 512 P.2d 736 (1973). *But see* Trahan v. Trahan, 609 S.W.2d 820 (Tex. Civ. App. 1980). Nevada does not appear to have spoken authoritatively on the subject.

The Court of Appeal of Louisiana held that the federal supremacy clause prohibited application of community property law to military retired pay. DeDon v. DeDon, 390 So. 2d 937 (La. Ct. App. 1980).

75. Some courts in non-community property states have held that military retired pay is not part of the marital property subject to division upon divorce. *See, e.g.,* Cose v. Cose, 592 P.2d 1230 (Alaska 1979); Russell v. Russell, 605 S.W.2d 33 (Ky. Ct. App. 1980); Hill v. Hill, 47 Md. App. 460, 424 A.2d 779 (1981); Howard v. Howard, 196 Neb. 351, 242 N.W.2d 884 (1976).

Courts in other non-community property states have held that federal law did not prevent state courts from giving consideration to the husband's military retired pay when formulating the economic terms of a marriage dissolution decree. *See, e.g.,* Marriage of Schissel, 292 N.W.2d 421 (Iowa 1980); Chisnell v. Chisnell, 82 Mich. App. 699, 267 N.W.2d 155, *cert. denied,* 442 U.S. 940, *reh'g denied,* 444 U.S. 887 (1978); Ebert v. Ebert, ___ Mont. ___, 616 P.2d 379 (1980).

76. 308 N.W.2d 548 (N.D. 1981).

77. Webber v. Webber, 308 N.W.2d 548, 549 (N.D. 1981).

dissolution of the marriage.[78] The *McCarty* decision, however, left unanswered the issue of whether military retired pay should be classified as deferred compensation or current income.[79] Thus, the *Webber* decision was based on the fact that the *McCarty* Court found the military retirement benefits to be the former serviceman's "personal entitlement," not subject to express partition according to state community property law.[80]

It is likely that the *McCarty* decision will be applied to military disability pensions.[81] It may be argued that Congress intended the disability pay to be the "personal entitlement" of the disabled service member, and that the federal goals in providing military disability pay would be frustrated in much the same manner as explained in *McCarty*.[82]

It is unclear whether the *McCarty* decision could be applied in community property states in such an inequitable manner as to allow the retired service member to receive a portion of his or her spouse's nonmilitary pension, while the service member's spouse would not be able to receive a portion of the military retired pay.[83] Some community property states may need to reevaluate their laws on equitable distribution of property.[84]

Unless Congress acts to amend the military retired pay statutes in the near future,[85] spouses of service members should plan their retirement accordingly. Spouses who have relied upon sharing the pension of a military service member must turn to Congress for an amendment to the current military retired pay statutes.

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78. *Id.*
79. 308 N.W.2d at 549 (citing McCarty v. McCarty, 101 S. Ct. at 2736).
80. 308 N.W.2d at 549.
81. 10 U.S.C.A. §§ 1201-1221 (West 1975 & Supp. 1981).
82. 101 S. Ct. 2741-43.
83. *See* Reppy, *Learning to Live with Hisquierdo*, 6 COMM. PROP. J. 5, 10 (1979) (the author suggests various inequitable applications of the ruling in *Hisquierdo*).
84. *Id.* Divorce courts in Idaho, Washington, or Texas can make an unequal division of community property to achieve a just distribution of property at divorce. *Id.*
85. *See* 101 S. Ct. at 2743. The Court in *McCarty* recognized that "Congress may well decide, as it has in the Civil Service and Foreign Service contexts, that more protection should be afforded a former spouse of a retired service member." *Id.* The Court would defer to Congress in any such congressional enactment. *Id.*