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<b>1. REPORT DATE (DD-MM-YYYY)</b> 30-04-2020		<b>2. REPORT TYPE</b> Master of Military Studies (MMS) thesis		<b>3. DATES COVERED (From - To)</b> AY 2019-2020	
<b>4. TITLE AND SUBTITLE</b> Uniformity of Process in Military Pension Division: A Necessary Change				<b>5a. CONTRACT NUMBER</b> N/A	
				<b>5b. GRANT NUMBER</b> N/A	
				<b>5c. PROGRAM ELEMENT NUMBER</b> N/A	
<b>6. AUTHOR(S)</b> Capasso, Christopher N. (Major)				<b>5d. PROJECT NUMBER</b> N/A	
				<b>5e. TASK NUMBER</b> N/A	
				<b>5f. WORK UNIT NUMBER</b> N/A	
<b>7. PERFORMING ORGANIZATION NAME(S) AND ADDRESS(ES)</b> USMC Command and Staff College Marine Corps University 2076 South Street Quantico, VA 22134-5068				<b>8. PERFORMING ORGANIZATION REPORT NUMBER</b> N/A	
<b>9. SPONSORING/MONITORING AGENCY NAME(S) AND ADDRESS(ES)</b> N/A				<b>10. SPONSOR/MONITOR'S ACRONYM(S)</b>	
				<b>11. SPONSOR/MONITOR'S REPORT NUMBER(S)</b> N/A	
<b>12. DISTRIBUTION/AVAILABILITY STATEMENT</b> Approved for public release, distribution unlimited.					
<b>13. SUPPLEMENTARY NOTES</b>					
<b>14. ABSTRACT</b> Currently, due to a lack of federal guidance, the manner in which military pension division in divorces is handled, including if it can be divided and how, is determined by the state that takes jurisdiction of the divorce proceedings. Additionally, state courts often have little experience with, or knowledge of the unique aspects of military service required to make informed decisions regarding pension division. Consequently, servicemembers experience wildly dissimilar outcomes depending solely on the					
<b>15. SUBJECT TERMS</b> military retirement; military pension; military pension division; military divorce; military retired pay; division of military retired pay; time-rule; Uniformed Services Former Spouse's Protection Act; USFSPA; McCarty v. McCarty; frozen benefits					
<b>16. SECURITY CLASSIFICATION OF:</b>			<b>17. LIMITATION OF ABSTRACT</b>	<b>18. NUMBER OF PAGES</b>	<b>19a. NAME OF RESPONSIBLE PERSON</b>
<b>a. REPORT</b>	<b>b. ABSTRACT</b>	<b>c. THIS PAGE</b>			USMC Command and Staff College
Unclass	Unclass	Unclass	UU		<b>19b. TELEPHONE NUMBER (Include area code)</b> (703) 784-3330 (Admin Office)

*United States Marine Corps  
Command and Staff College  
Marine Corps University  
2076 South Street  
Marine Corps Combat Development Command  
Quantico, Virginia 22134-5068*

MASTER OF MILITARY STUDIES

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**Uniformity of Process in Military Pension Division: A Necessary Change**

SUBMITTED IN PARTIAL FULFILLMENT  
OF THE REQUIREMENTS FOR THE DEGREE OF  
MASTER OF MILITARY STUDIES

AY 2019-20

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Date: 30 April 2020

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Date: 30 April 2020

## Executive Summary

**Title:** Uniformity of Process in Military Pension Division: A Necessary Change

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**Thesis:** While current federal law allows for state courts to divide military pensions as marital or communal property, it offers no formula, guidance, or considerations for doing so, leaving it solely to the states to decide. This results in widely dissimilar outcomes for similarly situated parties, depending solely on the location of the divorce; harsh and unjust results for servicemembers and spouses due to the application of draconian rules and formulas, and lengthy, complex, and expensive litigation. Accordingly, statutory change is necessary to help establish uniformity of process when dividing military pensions.

**Discussion:** Currently, the Uniformed Services Former Spouses' Protection Act (USFSPA) allows for state courts to divide military pensions as marital or communal property, but offers no formula, guidance, or considerations for doing so. Instead, it is left solely to individual states to decide. The results include: similarly situated individuals experience widely different outcomes in military pension division, dependent solely on the location of the divorce; harsh and unjust results for servicemembers and spouses due to state courts applying draconian rules and formulas; and lengthy, complex, and expensive litigation. Accordingly, statutory change is necessary in order to help establish uniformity when dividing military pensions. However, uniformity of outcomes is not likely practicable in the realm of divorce, where there frequently exist significant differences in the circumstances of the relevant parties. Therefore, what is needed is uniformity of process. Specifically, state courts should be mandated to consider several identified factors prior to determining if a military pension should be divided, and the appropriate breakdown of the division. Additionally, state laws concerning the non-division of unvested pensions, like those of Indiana and Arkansas, and the fully indivisible nature of pensions in Puerto Rico, should be superseded by federal law such that there is uniformity amongst the jurisdictions. Only then can true equity and fairness exist.

**Conclusion:** Countless servicemembers and spouses make untold sacrifices in service of the United States. After twenty years of service these sacrifices are uniquely recognized with a military pension, which often becomes the most valuable asset of servicemembers and their spouses. The United States government owes servicemembers and spouses a recognition of their sacrifices and fairness in dealing with this most precious of assets. Ensuring uniformity of process is a major step towards achieving this.

## **Table of Contents**

	Page
EXECUTIVE SUMMARY .....	i
TABLE OF CONTENTS.....	ii
PREFACE .....	iii
INTRODUCTION.....	1
HISTORY OF MILITARY PENSION DIVISION .....	4
McCarty v. McCarty .....	4
USFSPA .....	6
CURRENT STATE OF THE LAW .....	7
PROBLEM .....	9
Draconian and Unfair Pension Division Rules.....	9
Jurisdiction .....	10
Delay .....	13
Complicated Litigation .....	14
Policy Implications .....	15
SOLUTION.....	17
CONCLUSION.....	24
BIBLIOGRAPHY .....	26

## *Preface*

I was commissioned in the Marine Corps in 2006 and then attended law school as an individual ready reservist from 2006 – 2009. Since graduating law school, passing the state bar of Massachusetts, and graduating from the Naval Justice School I have been serving as an active duty Marine Corps Judge Advocate. I have held various billets within the judge advocate community for over ten years in litigation, operational law, and command legal advice. I have also served as an officer-in-charge of a Marine Corps legal assistance office. In this capacity, I have advised and assisted countless clients concerning various areas of family law, including military pension division. My personal knowledge, training, and experiences have helped me formulate many of the statements and opinions throughout this paper.

Throughout my time in the Marine Corps, I have been troubled by the issue of military pension division in divorces. Specifically, it always seemed fundamentally flawed that state court law would dictate something that clearly appears to be a federal issue. Furthermore, I was disturbed by seeing similarly situated clients experience drastically different processes and outcomes concerning military pension division based solely on the jurisdiction which handled the divorce. Accordingly, this paper is meant to analyze these issues and suggest changes.

I have received significant mentorship and guidance throughout my career from various Marine Corps and Navy judge advocates, and while I cannot name them for purposes of this paper, I wish to acknowledge the fact that their actions have greatly influenced my opinions concerning this important topic. I also want to recognize Dr. Jill Goldenziel, my MMS mentor,

for her guidance and assistance with this paper, and LtCol Patrick Eldridge for graciously serving as a second reader.

## **I. Introduction**

Lieutenant Colonel (LtCol) Amanda Hardcharger was born and raised in the small town of Hot Springs, Arkansas. Following college, she decided that she wanted to “see the world,” rather than simply return to Arkansas. She applied to become a United States Marine Corps officer, attended Officer Candidate School, and was commissioned as a Second Lieutenant in United States Marine Corps in August 1999. In September 1999, she married Daniel, her childhood sweetheart, who also grew up in Hot Springs. Daniel and Amanda appeared to have an ideal marriage, and had three children together over the next several years. Although Daniel had a graduate degree in computer science, and significant earning capacity, he elected to remain unemployed. Unbeknownst to Amanda, however, Daniel carried on various adulterous affairs throughout their marriage. In September 2016, LtCol Hardcharger received orders to Marine Corps Base Camp Pendleton, California. Shortly after arriving, they purchased a home, and Daniel got a job on base. This was meant to be LtCol Hardcharger’s final tour, and she planned to retire in September 2019. In the fall of 2017 however, things changed. Daniel had left his email account open on the couple’s home computer, and LtCol Hardcharger noticed several messages which were generated from an online dating account. As she investigated further, she discovered evidence of Daniel’s numerous infidelities throughout their marriage. LtCol Hardcharger confronted Daniel about it that evening and an argument ensued, resulting in Daniel striking her.

LtCol Hardcharger began the process of filing for divorce the following day. She had always retained legal resident status in Arkansas based on her intent to return there following her military service. In fact, she had an Arkansas driver’s license, was registered and voted in

Arkansas elections, and filed her state income taxes in Arkansas. Accordingly, LtCol Hardcharger filed her divorce paperwork in the state of Arkansas. Daniel fought this, arguing that Arkansas lacked jurisdiction over their divorce, and that, in fact, California was the proper venue. Daniel pointed to the fact that they owned a house together in California, that their children attended school in the California, and that Daniel was employed in California and paid taxes to the state. The issue of jurisdiction became highly contested during their divorce and they each expended significant money and resources in litigating this issue. The source of ~~such~~ this contentious litigation was one thing, LtCol Hardcharger's military pension. If Arkansas had jurisdiction over the military pension, Daniel would not be entitled to any of it. Arkansas law specifically states that unvested pensions are not subject to division. If, however, California had jurisdiction over the pension, Daniel would likely be awarded 1/2 of the pre-vested pension for the overlapping time period of the Hardcharger's marriage and LtCol Hardcharger's military service.<sup>1</sup>

Although the above are fictitious characters, the contentious issue of military pension division is real. This example is just a single illustration that servicemembers and their spouses can experience starkly different results in division of military pensions simply based on jurisdiction. The reason for this is a combination of the courts having little to no option under existing state laws, and a lack of knowledge, experience, and understanding of military service

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<sup>1</sup> The National Defense Authorization Act of 2016 brought about the Blended Retirement System, which became effective on 1 January 2018. The Blended Retired System restructured the current legacy retirement program, creating a contribution portion along an outlined benefit one. The precedent resulting from the various states in handling the division of military pensions under the Blended Retirement System may ultimately affect the current state of the law. Most notably, states that do not allow for military pensions to be divided until they are vested may determine that the contribution portion of the pension may be divided even in the case of divorces occurring prior to 20 years of service — reasoning that the contribution portion has in fact vested. Since this issue remains ambiguous, this paper will only consider the retirements under the legacy retirement program.

and the pension system. Although the Uniformed Services Former Spouses' Protection Act (USFSPA) currently allows for state courts to divide military pensions as marital or communal property, it offers no formula, guidance, or considerations for doing so. It leaves this issue solely to the states to decide, resulting in the widely dissimilar potential outcomes described in the LtCol Hardcharger example, dependent solely on the location in which the divorce occurs. Accordingly, statutory change is necessary in order to help guarantee uniformity when dividing military pensions. However, uniformity of outcomes is not likely practicable in the realm of divorces, where there are frequently significant differences in the circumstances of the relevant parties. What is needed therefore is uniformity of process. Specifically, state courts should be mandated to consider several identified factors prior to determining if and how a military pension should be divided. Additionally, the state laws concerning the non-division of unvested pensions — Indiana and Arkansas — and the fully indivisible nature of pensions in Puerto Rico, should be superseded by federal law regarding military pensions, such that there is uniformity in amongst the jurisdictions. Only then can true equity and fairness exist. Countless servicemembers and spouses make untold sacrifices in service of the United States. After twenty years of service these sacrifices are uniquely recognized with a military pension, which often becomes the most valuable asset for servicemembers and their spouses. The United States government owes servicemembers and spouses a recognition of these sacrifices and fairness in dealing with this most precious of assets.

## **II. History of Military Pension Division**

a. *McCarty v. McCarty*

Pursuant to 10 U.S.C. 3929, servicemembers are eligible to retire after twenty years of active duty service.<sup>2</sup> Originally, however the Code offered nothing concerning the implications of divorce on military pensions. One result was division between the state courts as to whether military pensions could be divided at all in divorces.<sup>3</sup> The question was whether military retired pay was “income,” in which case it could not be divided, or if it was “property” which could be. This issue eventually made its way to the United States Supreme Court in 1981, in the case of *McCarty v. McCarty*. The basic facts of *McCarty* involved a marriage dissolution in California between an active duty Army Colonel (Col), who had served for approximately eighteen years, and his wife.<sup>4</sup> Under California family law, each spouse was entitled to a half interest in all community and quasi-community property.<sup>5</sup> Anything deemed to be “separate property” was retained by the respective spouse.<sup>6</sup> Separate property included: all property owned by the person before marriage; all property acquired by the person after the marriage by gift, bequest, devise, or descent; and certain rents, issues, and profits.

Col McCarty requested that his military pension be treated as separate property, and therefore be solely retained by him after the dissolution of his marriage.<sup>7</sup> The California Superior Court ruled against Col McCarty, finding that military pensions are quasi-community property. This ruling was upheld by the California Court of Appeal, and upon his retirement, Col McCarty’s former spouse was entitled to 45% of his retired pay. However, upon review, the

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<sup>2</sup> 10 U.S.C. § 3929 (2011).

<sup>3</sup> Sullivan, Mark E., *The Military Divorce Handbook: A Practical Guide to Representing Military Personnel and Their Families*, Third Edition, Volume 2, 2019, 637.

<sup>4</sup> *McCarty v. McCarty*, 453 U.S. 210, 101 S. Ct. 2728, 69 L. Ed. 2d 589 (1981).

<sup>5</sup> California Family Code § 770 (1992).

<sup>6</sup> *Id.*

<sup>7</sup> *McCarty v. McCarty*, 453 U.S. 210, 101 S. Ct. 2728, 69 L. Ed. 2d 589 (1981).

United States Supreme Court overturned the lower court's decision, finding that, under the Supremacy Clause, the current federal law, in fact, prohibited the division of military pensions.<sup>8</sup> First, they found that, since there was no stated entitlement to retired pay to the spouse, there was not even a limited "community property concept."<sup>9</sup> The Court further found under a statutory analysis that the retired pay was a personal entitlement of the retiree.<sup>10</sup> Next, the Court held that applying community property law to military retired pay threatened "clear and substantial" federal interests.<sup>11</sup> The reasoning was that Congress had determined what was appropriate and necessary to pay retired servicemembers, so reducing those amounts would undermine the Congressional intent of effectively providing for military retirees.<sup>12</sup> Finally, the Court held that allowing military retirement benefits to be divided at divorce could remove an incentive for servicemembers to continue serving, thus weakening the military institution.<sup>13</sup>

The *McCarty* decision had a damaging impact to public policy. On its face, it seemed inherently unfair that spouses, who experienced the often difficult aspects of serving as a military service spouse, including deployments, frequent moves, and lack of career options, would receive no portion of the retired pay upon dissolution of the marriage. Accordingly, Congress passed the USFSPA.

#### b. USFSPA

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<sup>8</sup> Id.

<sup>9</sup> Id.

<sup>10</sup> Id.

<sup>11</sup> Id.

<sup>12</sup> Id.

<sup>13</sup> Id.

In the aftermath of the *McCarty* decision, Congress drafted the USFSPA in order to explicitly allow states to treat military retired pay as marital property. The Act took effect on 1 February 1983 and applies to all divisions of retired pay payable after 25 June 1981, the day of the *McCarty* decision.<sup>14</sup> Notably, the Act does not mandate that retired pay be treated as divisible property.<sup>15</sup> It leaves it instead up to the respective state's discretion.<sup>16</sup> Next, the USFSPA addresses state court jurisdiction. Specifically, the Act holds that a state court has jurisdiction to address military retired pay division if the servicemember is domiciled in the respective state, the servicemember consents to the jurisdiction, or the servicemember resides within the court's jurisdiction, unless that residence is due to military assignment.<sup>17</sup> Therefore, multiple states can have jurisdiction over a particular servicemember for purposes of retired pay division.

The USFSPA was amended in 2016, adding "the Frozen Benefit Rule." This was also included in Section 641 of the National Defense Authorization Act of 2017 and applies to all divorces occurring after 23 December 2016. The basic overview of the amendment is the requirement that all states use the current rank of the servicemember at the time of the divorce for purposes of pension division.<sup>18</sup> This had significant implications. Prior to the amendment, nearly all states divided military retired pay based on the rank of the

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<sup>14</sup> Sullivan, Mark E., *The Military Divorce Handbook: A Practical Guide to Representing Military Personnel and Their Families*, Third Edition, Volume 2, 2019, 638.

<sup>15</sup> 10 U.S.C. § 1408 (d)(2).

<sup>16</sup> Sullivan, Mark E., *The Military Divorce Handbook: A Practical Guide to Representing Military Personnel and Their Families*, Third Edition, Volume 2, 2019, 638.

<sup>17</sup> 10 U.S.C. § 1408(c)(4).

<sup>18</sup> *Id.*

servicemember at the time of retirement.<sup>19</sup> For example, if a servicemember and his or her spouse divorce when the servicemember is an O-2, and that servicemember subsequently retires as an O-6, the retired pay division would be based on the O-6 pay. The justification for the amendment was that former spouses were receiving a major windfall under the time rule, receiving additional pay based on military promotions which occurred after marriage dissolutions.<sup>20</sup> Beyond the text of the amendment was also a clear message from Congress that military retired pay is different from other retired pay. Indeed, there are numerous other forms of public service retirement, such as that of teaching, law enforcement, government services, etc., none of which are afforded a similar federal protection.

### III. Current State of the Law

The current nature of military retired pay division in divorces amongst the states is one of variability. Specifically, servicemembers can expect different outcomes based solely on the jurisdiction where the divorce occurs. The most extreme examples of this are the states of Indiana and Arkansas, and the territory of Puerto Rico. In Indiana and Arkansas, a pension must be vested in order for a court to have jurisdiction to divide it.<sup>21</sup> In Arkansas, an unvested pension is considered non-divisible separate property of the servicemember.<sup>22</sup> In Indiana, the military pension must have vested by the date of the divorce petition in order for the spouse to receive a portion.<sup>23</sup> In Puerto Rico, military pensions cannot be divided in divorces at all.<sup>24</sup>

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<sup>19</sup> Sullivan, Mark E., *The Military Divorce Handbook: A Practical Guide to Representing Military Personnel and Their Families*, Third Edition, Volume 2, 2019, 730.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at 662.

<sup>22</sup> *Id.* at 652; *Christopher v. Christopher*, 316 Ark. 215, 871 S.W.2d 398 (1994).

<sup>23</sup> Sullivan, Mark E., *The Military Divorce Handbook: A Practical Guide to Representing Military Personnel and Their Families*, Third Edition, Volume 2, 2019, 652; *Kirkman v. Kirkman*, 555 N.E. 2d 1293 (Ind. 1990).

Furthermore, even for the jurisdictions that do allow for military pension division, there is no universal calculation method.

The vast majority of states use what is commonly known as the “time rule.”<sup>25</sup> The time rule is a simple formulaic approach to dividing military retired pay. While some jurisdictions may consider other factors as a means from deviating from the formula, others do not. The time rule is a mathematical equation, however, there are three distinct methods of calculation depending on jurisdiction and when the divorce occurred.

For divorces that occurred prior to 24 December 2016, most states determine the retired pay division based on the servicemember’s pay at the time of the retirement. Under this method, an equation is used where the numerator is the period of marriage which overlapped with the servicemember’s military service, and the denominator is the total period of pension service. Courts then multiply this fraction by the pension benefit at the date of retirement.<sup>26</sup> Therefore, if servicemembers and their spouses divorced when the servicemember was an O-4, and then subsequent to the divorce the servicemember retired at the rank of O-6, the pension would be divided using the O-6 pay rather than the O-4 pay.

A minority of states — Florida, Kentucky, Oklahoma, Tennessee, and Texas — use a “frozen benefits” approach even to divorces which occurred prior to 23 December 2016. Therefore, in applying the time rule for military pension division, the numerator is again the

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<sup>24</sup> Sullivan, Mark E., *The Military Divorce Handbook: A Practical Guide to Representing Military Personnel and Their Families*, Third Edition, Volume 2, 2019, 652; *Delucca v. Colon*, 119 P.R. Dec. 720 (1987).

<sup>25</sup> Sullivan, Mark E., *The Military Divorce Handbook: A Practical Guide to Representing Military Personnel and Their Families*, Third Edition, Volume 2, 2019, 714.

<sup>26</sup> *Id.*

total overlapping time of marriage and military service and the denominator is the overlapping service up to the point of the divorce, or in some cases legal separation.<sup>27</sup>

Finally, for all divorces occurring after 23 December 2016, as discussed, federal law mandates that all states use the Frozen Benefits Rule in calculating military retired pay division.

#### **IV. Problem**

Due to non-universal treatment of military pension division and the failure to adequately safeguard the interests of servicemembers and former spouses, the division of military pensions is draconian, confusing, inequitable, ripe for exploitation, and correspondingly causes significant complex and expensive litigation. This is apparent by (1) formulaic pension division calculations regardless of marital actions by either party, (2) widely different outcomes based primarily on jurisdiction, and (3) resulting litigation tactics such as forum shopping and delay. Furthermore, this system disincentivizes servicemembers continuing to serve following the filing or completion of a divorce.

##### **a. Draconian and Unfair Pension Division Rules**

First, using the same method for military pension division, regardless of the circumstances surrounding the divorce, can be extremely draconian and unfair. Things like infidelity, emotional and physical abuse, cruelty, abandonment, substance abuse, and criminal convictions, will frequently have little or no effect on the pension division. Thus, the drug using, abusive, adulterous, etc., spouses get the same percentage as those spouses who spend twenty years moving, raising children and sacrificing for their families, and are ultimately abandoned by an adulterous servicemember spouse.

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<sup>27</sup> Id at 717.

## b. Jurisdiction

For several reasons, various issues related to jurisdiction present arguably the most controversial and complex aspects of military divorces. First, determining which court has jurisdiction is not as simple as where a servicemember may currently reside. While jurisdiction in civilian divorce cases typically turns on where the parties are domiciled, where the divorce is filed, and/or consent to a particular jurisdiction, the somewhat nomadic lifestyle of servicemembers complicates matters. Second this question of jurisdiction can have enormous implications based on the rules concerning pension division for the respective jurisdiction. As discussed these can range from pensions being undividable to servicemembers losing over half of their pension regardless of the actions of their spouses. Ultimately, this invites significant fighting over domicile status and forum shopping by all parties.

10 U.S.C. 1408 holds that a state or territory will only have jurisdiction over a military divorce if the servicemember is domiciled there, the servicemember consents to the jurisdiction, or the servicemember resides within the jurisdiction for reasons unrelated to their military assignment.<sup>28</sup> As with all other cases, a state or territory must also have personal and subject matter jurisdiction over the case pursuant to their respective laws. As mentioned, domicile is frequently not a simple answer. Servicemembers frequently move throughout the continental United States and overseas to locations where they have little to no relationship other than military assignment. Congress recognized this conundrum and in 2003 passed 50 U.S.C. 3901-4043, the Servicemembers Civil Relief Act (SCRA). The SCRA serves as an expansion of protections for servicemembers initially provided under the Soldiers' and Sailors' Civil Relief

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<sup>28</sup> 10 U.S.C. § 1408(c)(4).

Act of 1940. Relevant to this topic, the SCRA allows a servicemember to retain the domicile or legal residence where the servicemember resided prior to beginning military service or where they formed their new domicile after beginning military service.<sup>29</sup> Generally, to change domicile to a new location, a servicemember would have resided there for some period of time and formed an intent to return indefinitely at the end of military service.<sup>30</sup> Accordingly, under the Act, a servicemember will not lose this domicile or legal residence as a result of being moved to a different jurisdiction for military service. Therefore, according to military divorce expert, Army Col (Ret.) Mark E. Sullivan, domicile requires two elements, physical presence and intent to remain.<sup>31</sup> The physical presence simply means where the servicemember is living at the time. Intent to remain, however, is more complex and can be shown through both direct evidence such as statements of the servicemember, and circumstantial evidence, such as payment of state income and property taxes, voter registration, accounts, vehicle registration, state of driver's licenses, home ownership, business ownership, etc.<sup>32</sup> Consequently, and for good reason, domicile often becomes a hotly contested matter in military divorces. Indeed, in the realm of military pensions, a more favorable domicile could mean the difference of millions of dollars over the course of a lifetime. This leads to the very common tactic of forum shopping.

Forum shopping refers to when a party to litigation purposefully attempts to gain or

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<sup>29</sup> Legal residence or domicile should not be confused with residence. Servicemembers can have any number of residences, but only one legal residence or domicile.

<sup>30</sup> Headquarters Marine Corps, Servicemembers Civil Relief Act (U.S. 2010), [https://www.hqmc.marines.mil/Portals/135/Docs/JAL/The%20Servicemember's%20Civil%20Relief%20Act%20-%20AFLA%20\(17%20Jun%2010\).pdf](https://www.hqmc.marines.mil/Portals/135/Docs/JAL/The%20Servicemember's%20Civil%20Relief%20Act%20-%20AFLA%20(17%20Jun%2010).pdf).

<sup>31</sup> Sullivan, Mark E., *The Military Divorce Handbook: A Practical Guide to Representing Military Personnel and Their Families*, Third Edition, Volume 2, 2019, 644.

<sup>32</sup> *Id* at 645.

avoid jurisdiction in a particular state based on the laws within that jurisdiction. The incentive for such actions is particularly high in military divorces. Indeed, certain jurisdictions — Indiana and Arkansas — do not even allow for military pensions to be divided until they are vested. Furthermore, Puerto Rico does not allow any form of pension division. In contrast, numerous jurisdictions will award the spouse fifty percent of the overlapping marriage/military service time, often regardless of circumstances. Consequently, the incentives for servicemembers and spouses to seek out these more favorable jurisdictions is substantial and can create financial swings of hundreds of thousands or even millions of dollars, depending on rank and lifespan. Moreover, under the current construct, a state through its legislature or courts can decide to modify their rules or statutes regarding how they handle military pensions at any time.

This construct is fundamentally unfair. Servicemembers and spouses make universally similar sacrifices throughout military careers, and those sacrifices are not lessened or increased based on what state a divorce occurs in. As it stands, however, the division of military retired pay, the reward and recognition for those sacrifices, can drastically fluctuate based on domiciliary factors that arguably have little to no relevance to those sacrifices. These include where a servicemember's military record states they are domiciled, what state a servicemember's driver's license is from, where a servicemember is registered to vote, and hearsay statements that a servicemember stated an intent to live in a particular state after leaving military service. In reality, servicemembers join the military, sometimes right out of high school, and lose their allegiance to a particular state or jurisdiction. This is particularly true for career military members who are most effected by pension division. The fact is that they pick up and move every three to four years making effectively the relevant service their

domicile, not a state in which they lived years before. However, this extraneous requirement of domicile often serves as sword and a shield in military divorces. Specifically, a servicemember or spouse may know that a particular jurisdiction is advantageous to their respective position and therefore seek to meet domicile requirements. Conversely, a servicemember can challenge any claim of domicile over them and can increase their chances of success by advantageously using the discussed domicile factors (voter registration, driver's license, etc.). Moreover, servicemembers can even pre-emptively attempt to domicile themselves in an advantageous jurisdiction by doing things in the jurisdiction such as registering to vote, obtaining a P.O. Box, changing their driver's license, filing a state tax return, and updating their DD Form 2058 (State of Legal Residence Certificate). Furthermore, in some circumstances, delay can become a viable weapon for spouses or servicemembers to use and further complicate these jurisdictional matters.

c. Delay

Delay as a tactic in military pension division can best be understood with a hypothetical. Consider a female servicemember who is unquestionably domiciled in a state where pensions cannot be divided until they vest. Her husband, of 18 overlapping years of marriage and military service, leaves her for another woman. The servicemember quickly files for divorce, meets the relevant statutory waiting period, and then seeks to dissolve the marriage. Knowing that if the marriage is dissolved before the pension is vested (20 years), the husband uses various tactics to delay, such as, challenging the servicemembers claim of domicile/jurisdiction, continuance requests, changing attorneys, etc. Under some circumstances, these delaying tactics may seem entirely appropriate and in fact serve as the only way for spouses to acquire a

portion of military pensions, which they may have greatly sacrificed for. In other, cases, such as the hypothetical above, it may appear more nefarious. However, the real problem is that there is a drastic incentive for this tactic to exist at all. Logically, the location where a military pension is divided should have no effect on how it is divided, or if it is in fact divisible at all. And issues such as this and the previously discussed complexities concerning jurisdiction result in significant time and money spent on complicated litigation.

#### d. Complicated Litigation

Clearly military divorce, and more specifically military pension division, is a niche area of the law, resulting in lengthy, complex, and correspondingly expensive litigation. It is not uncommon for servicemembers to spend tens or even hundreds of thousands of dollars litigating military divorces, and a large portion of these costs and efforts are spent fighting for or attempting to protect the most financially valuable asset, the military pension. Furthermore, this problem is exacerbated by the lack of knowledge and expertise concerning military pension division. Active duty military attorneys exist in all branches of the military. A portion of these lawyers are assigned to billets that are commonly referred to as legal assistance, which consists of providing eligible clients with legal advice in areas such as family law, contracts, landlord/tenant issues, wills, powers of attorney, and other basic legal issues. These attorneys receive baseline training at their military occupation specialty schools concerning pension division and then receive follow-on training once assigned as legal assistance attorneys.<sup>33</sup> Unfortunately, they are not authorized to represent clients in family court. Therefore, these resident experts are only able to provide basic advice regarding pension divisions. Ultimately,

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<sup>33</sup> U.S. Navy, Judge Advocate General's Corps, Legal Services, Legal Assistance (U.S. 2019), [https://www.jag.navy.mil/legal\\_services/legal\\_services\\_faq.htm](https://www.jag.navy.mil/legal_services/legal_services_faq.htm).

in the case of contested divorces, it is a civilian attorney who will represent the client in court. However, in many cases, the civilian attorneys will have little to no experience with the nuances involved in military pension division, and the clients will be the ones to suffer the consequences, which frequently come in the form of hefty legal bills for inadequate advice. While contested divorces may bring other complexities requiring significant litigation such as child support, child custody, physical property division, etc., some standardization to the process of pension division would greatly reduce such litigation.

e. Policy Implications

In addition to the problems described above come the numerous consequences, many of which run completely counter to the public and federal policy concern of ensuring that the United States has a strong and well-prepared military. Specifically, there exists a real danger of servicemembers deciding to leave the military based on the implications of military pension division. For example, consider a servicemember who becomes divorced from his spouse after ten years of marriage, all of which overlapped with military service. The judge decides to use the time rule formula as is common in this state. Therefore, once the pension vests at twenty years, one-quarter of it will belong to his former spouse whom he divorced ten years prior. That is a significant disincentive to continue serving. Furthermore, these feelings will likely be substantially exacerbated if the divorce was a result of, for example, infidelity on the part of the former spouse.<sup>34</sup> This consideration is not without merit, and in fact, has precedent.

Specifically, in *McCarty*, much of the United States Supreme Court's analysis involved

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<sup>34</sup> As a legal assistance attorney, the author advised numerous servicemembers whose spouses were unfaithful to them. Upon learning that a court could award a portion of their retirement to these unfaithful spouses, many of the servicemembers expressed that they would get out of the military rather than continue serving with the knowledge that they were working and sacrificing for their former spouse.

considerations that allowing for any military pension division could disincentivize continued military service.<sup>35</sup> As explained by former Supreme Court Justice Blackmun in *McCarty*, the purpose of the military retirement system is not simply to provide the necessary retired pay to members of the military who meet the mandated prerequisites, but also to incentivize people to join the military in the first place and ultimately re-enlist, thus retaining a “young and vigorous,” and experienced military force.<sup>36</sup> The same logic applies here. Although Congress has expressed that military pensions can be divided, they have provided little guidance as to how it should be done and has instead left it to the states. Consequently, there is no uniformity and therefore, similarly situated servicemembers who are divorced in different jurisdictions can have vastly different outcomes concerning their retirement pay. It seems questionable as to whether or not Congress in fact intended to create such a landscape, or if they at least appreciated the implications, when they passed the USFSPA. Regardless, however, it certainly can and has affected servicemembers’ decision as to continued service. Moreover, the seemingly arbitrary nature of how this can be affected by the state that is ultimately determined to have jurisdiction over the pension muddies the landscape further.

## V. **Solution**

The above illustrates that the problems with the current construct of military pension division are numerous and apparent. While there are clearly several problems with the current system, a solution, or at least vast improvement, is reasonably simple and can be summed up in one word, uniformity. Uniformity is quite familiar to servicemembers and their families. Although

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<sup>35</sup> *McCarty v. McCarty*, 453 U.S. 210, 101 S. Ct. 2728, 69 L. Ed. 2d 589 (1981).

<sup>36</sup> *Id.* at 213.

these things differ slightly between services, the military and federal government mandate: what servicemembers are paid, the training they receive, the clothes they wear, the rules and regulations they must follow, the length and style of their hair, where they can and cannot travel, their weight, and the food they eat on base. In fact, one would not be far off by suggesting that the military instructs, or at minimum influences, servicemembers in all aspects of their lives. This is reflective in the old Marine Corps adage regarding whether or not a Marine should get married: *If the Marine Corps wanted you to have a spouse, they would have issued you one.* When it comes to military pensions however, the culminating asset derived from a lifetime of service, the military's and federal government's position is to leave it up to the states.

For purposes of military pension division, uniformity should not be confused with complete consistency in outcomes. Indeed, due to their very nature, divorces and corresponding asset division can never be completely uniform in their outcomes. Specifically, unique facts and circumstances are always present, and will typically drive the outcomes. Military divorces with highly similar facts and circumstances should, however, be expected to result in at least similar outcomes, and this is currently not the case. That is where uniformity becomes relevant, because if complete standardization of outcomes is not desirable, the best way of ensuring equity and consistency is uniformity of the process. Therefore, a military pension division conducted in Indiana would use the same process and follow the same considerations as one in Florida. Two major changes to current policies will help to accomplish this uniformity of process. First, would be the blocking of various states' laws prohibiting the division of military pensions wholly or when they have not vested. Second, a standard list of

considerations should be drafted and state court judges should be required to apply them prior to determining whether a military pension should be divided, and if so, in what manner.

Regarding the updating of the USFSPA or the passing of a new statute to prohibit states and territories from unilaterally limiting when, if at all, military pensions can be divided is necessary in order to create uniformity of process. The fact that the exact same divorce conducted in Arkansas versus California can result in no pension division to fifty-five percent of the overlapping time of marriage and military service, defies logic and is intolerably unfair to military spouses. Under this construct in Arkansas, military spouses can faithfully sacrifice with their families through multiple military moves, deployments, and all of the stresses and hardships associated with that lifestyle, have their divorce finalized after nineteen years and three-hundred and sixty-four days of marriage and receive no portion of the military pension. And the reason for this is simply the arbitrary location of the servicemembers' domicile. Furthermore, there is currently nothing to stop any state from following the Puerto Rico model of making military pensions entirely indivisible. This clearly unfair statutory gap can be easily fixed by updating the law to ban any state or territory from requiring military pensions to vest prior to division and/or declaring them entirely indivisible. Doing so would serve as the first step towards uniformity of process by making all military pensions actually divisible. Accordingly, steps should then be taken to ensure that the same factors are considered by all courts, regardless of jurisdiction, when determining if a military pension should be divided, and, if so, in what manner.

Removing the arbitrary and unfair provisions which serve to limit or fully block military pension division ensures that all military divorces play out on the same field. Next, steps must

be taken to ensure all military pension divisions follow the same rules. Strict criteria and mathematical formulas have little place in this realm because circumstances amongst parties in various divorces are often unique. However, there must be recognition that military pension division is also unique and should not fall under the same rules as division of other assets. Indeed, the United States Supreme Court in *McCarty* recognized this, as did Congress when they passed the USFSPA. Accordingly, the best way to ensure all military pension divisions follow the same rules and thus ensure uniformity of process, is to create a series of considerations that all courts must apply prior to determining if, and in what manner, a military pension should be divided. The exact considerations are something that should be extensively considered, however, the author offers the following for contemplation:

1. Adultery/Unfaithfulness. It seems obvious enough that unfaithful and adulterous actions by a particular party are relevant as to why many military marriages are ultimately dissolved.

2. Abuse. Physical and/or emotional abuse by a party should, as with adultery, be considered with military pension divisions because it is often a major reason for the dissolution of-the marriage.

3. Spousal Retirement. If the servicemember's spouse has his/her own non-military retirement, it seems fundamentally unfair that a servicemembers pension could be reduced without first considering if the spouse's retirement should prohibit division entirely, or if the spouses retirement should also be divided.

4. Spousal Health and Dental Insurance. Often it is the servicemember who provides

health insurance for the spouse. If this is the case, that fact should be considered when determining the details of pension division since the spouse will likely have to pay for health insurance once dissolution occurs.

5. Support Provided by Servicemember for Spouse Employment. It is common for servicemembers to provide financial support and military specific benefits to their spouses for them to continue their training and education and thus become more employable. The most common of these is the post-9/11 G.I. Bill, which provides up to 36-months of education benefits, basic allowance for housing, and a book stipend and is transferable between servicemembers and dependents.<sup>37</sup>

6. Deployments and Moves. Much of what drove the passing of the USFSPA were the appropriate feelings of unfairness concerning the *McCarty* ruling. Specifically that, in many cases, military spouses sacrifice significantly in service of the country. Much of these sacrifices relate to frequent deployments where the servicemember leaves for 6-12 months at a time. Furthermore, it relates to military moves, whereby, spouses are frequently — every three to four years — moved through the continental United States and overseas. Of course, not all military marriages are the same. Servicemembers' deployments are variable based on their jobs, preferences, and the current geopolitical situation. Moreover, some servicemembers move far more often than others. Although the standard is that servicemembers are eligible to move every three or four years, this is not a fixed policy. In fact, servicemembers frequently remain in the same area for five, ten, or more years. Therefore, since the sacrifices of spouses

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<sup>37</sup> United States Department of Veteran's Affairs, Education and Training: Post-9/11 G.I. Bill (U.S. 2019), [https://www.benefits.va.gov/gibill/post911\\_gibill.asp](https://www.benefits.va.gov/gibill/post911_gibill.asp).

are much of what drove the decision to allow for pension division under the USFSPA, then the degree of those sacrifices is relevant when making decisions regarding pension division.

The above is not meant to be a comprehensive list of considerations when contemplating military pension division. Numerous other factors are typically considered by many state courts when determining asset division in divorces, such as abandonment, spousal employment or employability, real property division, etc., that may also be appropriate to consider in military pension divisions. Rather, this list represents a sample of some common issues in military divorces for consideration in achieving fairness and uniformity.

A potential criticism of these proposed changes is that pension division is an issue for state courts to address and the federal government should not be involved. First, it is generally true that the division of pensions is a state court issue. This is even the case for federal jobs such as the various intelligence agencies and the State Department. However, military pensions have always been treated as something unique, even from other federal pensions. In fact, this distinction is even recognized in the vast majority of state tax codes. Indeed, (21) states specifically exempt military retired pay entirely from state income taxes, (9) states collect no state income taxes, and (13) states have carved out various special rules for military retired pay, including retired pay being tax free after the retiree reaches a certain threshold age, varying tax percentages based on the retirees' age, exempting military retired pay from taxes if the member served more than five years, exempting military retired pay up to 75 percent, and other various deductions specifically for military retirees.<sup>38</sup> Only (7) states tax military pensions

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<sup>38</sup> Military.com, *State Tax Information for Military Members and Retirees*, Military.com (U.S. 2020), <https://www.military.com/money/personal-finance/taxes/state-tax-information.html>.

in accordance with standard federal tax rules.<sup>39</sup> Additionally, one need look no further than the USFSPA for confirmation that military pensions are viewed by Congress as something that is not solely a state issue. The passing of the Act and its recent Amendment are acknowledgments by Congress that these pensions are inherently different from other retired pay and required specific regulations. Specifically, they gave states permission to divide military pensions, absent which, they would have no authority to do so. Furthermore, with the 2016 Amendment, Congress created the Frozen Benefits Rule, which effectively limited the amount of money a former spouse could receive to be based on the servicemember's rank at the time of the divorce rather than the retirement rank. Thus, both the states and Congress recognize that military retirements are unique and accordingly merit additional regulation.

Comprehending that both Congress and the states accept that military pensions are unique and not solely a state issue, it is puzzling that Congress proverbially "punted" the issue by allowing the states to control something that is distinctly federal. This is exacerbated by the fact that no guidance was provided to states other than the facts that the pensions **could be** divided and that the division will be based on the rank the servicemember held at the time of the divorce and not that held at the time of retirement. The above solution serves as a sensible compromise between the federal and state issues present in military pensions and simultaneously serve to lessen the outcome disparities that often occur as a result of jurisdiction. This is further demonstrated by a reexamination of the LtCol Hardcharger hypothetical from the introduction to this paper. To summarize, LtCol Hardcharger was engaged in aggressive litigation with her adulterous husband in an attempt to protect her

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<sup>39</sup> Id.

military pension. If Arkansas took jurisdiction of the divorce, Mr. Hardcharger would receive none of LtCol Hardcharger's pension. If California took jurisdiction. Mr. Hardcharger likely would receive one half of the pension for the time that the Hardcharger's marriage and military service overlapped. However, if the suggested changes to existing federal law were made and true uniformity of process existed, no such litigation would have occurred. Indeed, there would be no need to fight over jurisdiction because, at least concerning military pension division, all states would be required to apply the same standards. Undoubtedly, different outcomes may occur in different jurisdictions and under different judges and magistrates, but uniformity of process would significantly mitigate this. Additionally, the Hardcharger's would enter divorce negotiations with a significantly clearer picture as to what the ultimate outcome would be. Specifically, LtCol Hardcharger would know that regardless of the jurisdiction, all state courts have the authority to award her husband a portion of the pension. Additionally, Mr. Hardcharger would know that his actions during the marriage would be considered by the judge prior to determining if or what portion of the pension he would receive. In fact, active duty judge advocates could provide this information to the Hardcharger's at no cost. Such a construct would provide the Hardchargers with substantially more information and may make reaching an amicable agreement between them more likely, thus entirely avoiding this complex and costly litigation.

## **VI. Conclusion**

The sacrifices of United States servicemembers are substantial and unremitting. They sacrifice physically and emotionally. They deploy for three, six, or even twelve months, often to combat,

and away from their loved ones. However, servicemembers are not alone in their sacrifices. Rather, military families, particularly spouses, make substantial sacrifices in service of the nation including, a loss of employment opportunities and other challenges in maintaining a career, the need to forgo education, and harm to their mental wellness due to frequent moves, deployments, and other relevant aspects of military life. Unfortunately, and many times resulting from the difficulties of military life, many military marriages end in divorce and when these divorces occur, the military pension is often the most valuable marital asset. Accordingly, fairness and uniformity are standards that military pension division should strive for. However, as this paper has shown, these do not exist within the current environment. Vastly different outcomes can and do occur in various military divorces with similarly situated parties based entirely on the jurisdiction where the divorce occurs. Moreover, in certain jurisdictions military pension division is either limited to already vested pensions or, in some cases, entirely indivisible. No federal law prevents any state or territory from changing their state laws in any manner they choose. As discussed, this construct has glaring issues. Specifically, draconian rules and formulas used by state courts do not account for unique aspects of a particular military divorce, complex jurisdictional issues heavily influence pension division outcomes, and litigation tactics such as forum shopping and delay attempt to take advantage of this environment and result in a drawn out and expensive process. Furthermore, in some cases, these issues disincentivize continued service, which is contrary to the public and government policy goal of maintaining a high quality and experienced military. While it is impossible to ensure uniformity of outcomes — nor would this be appropriate in the realm of pension division — uniformity of procedure is certainly possible and is the best means of guaranteeing

fairness and equity for all servicemembers and spouses. This can be accomplished by taking the two steps of closing the gap of jurisdictions limiting or not allowing pension division, and by drafting a list of considerations that all state courts must apply prior to deciding if and in what manner a military pension can be divided. These two seemingly simple solutions will resolve many of the issues associated with the unfairness and significant variation amongst similarly situated parties in a military divorce.

### **Bibliography**

10 U.S.C. § 3929 (2011)

10 U.S.C. § 1408 (2011)

California Family Code § 770 (1992).

*Christopher v. Christopher*, 316 Ark. 215, 871 S.W.2d 398 (1994).

*Delucca v. Colon*, 119 P.R. Dec. 720 (1987).

Headquarters Marine Corps. *Servicemembers Civil Relief Act* (U.S. 2010)

[https://www.hqmc.marines.mil/Portals/135/Docs/JAL/The%20Servicemember's%20Civil%20Relief%20Act%20-%20AFLA%20\(17%20Jun%2010\).pdf](https://www.hqmc.marines.mil/Portals/135/Docs/JAL/The%20Servicemember's%20Civil%20Relief%20Act%20-%20AFLA%20(17%20Jun%2010).pdf).

*Kirkman v. Kirkman*, 555 N.E. 2d 1293 (Ind. 1990).

Mark E. Sullivan. *The Military Divorce Handbook: A Practical Guide to Representing Military Personnel and Their Families, Third Edition, Volume 2*. (American Bar Association 2019).

*McCarty v. McCarty*, 453 U.S. 210, 101 S. Ct. 2728, 69 L. Ed. 2d 589 (1981).

Military.com. *State Tax Information for Military Members and Retirees*. Military.com (U.S. 2020). <https://www.military.com/money/personal-finance/taxes/state-tax-information.html>.

United States Department of Veteran's Affairs. Education and Training: Post-9/11 G.I. Bill. (U.S. 2019), [https://www.benefits.va.gov/gibill/post911\\_gibill.asp](https://www.benefits.va.gov/gibill/post911_gibill.asp).

United States Navy. Judge Advocate General's Corps, Legal Services, Legal Assistance (U.S. 2019), [https://www.jag.navy.mil/legal\\_services/legal\\_services\\_faq.htm](https://www.jag.navy.mil/legal_services/legal_services_faq.htm).