

## Memorandum 81-66

Subject: Study F-620 - Federal Military and Other Federal Pensions  
(Resolution to Congress)

It is a continuing question whether pension and retirement benefits that are created or controlled by federal law are divisible as community property or are the separate property of the covered spouse. The issue frequently is whether Congress has intended a statutory scheme that preempts the subject of disposition so as to preclude a court in a dissolution proceeding from characterizing and dividing a particular benefit as community property. See generally Gold, Norton, & Ross, Special Problems of Property Division: the Family Residence, Pension Benefits, the Small Business or Professional Practice, in 1 California Marital Dissolution Practice §§ 9.28-9.34 (Cal. Cont. Ed. Bar 1981).

The leading case of Hisquierdo v. Hisquierdo, 439 U.S. 572 (1979) held that retirement benefits received by a husband under the Railroad Retirement Act of 1974 (45 U.S.C. §§ 231-231t) were not divisible as community property in a marital dissolution proceeding. The Supreme Court construed the federal law as manifesting a deliberate congressional decision to exclude the spouse of the employee from the benefits; this federal law thus preempts state law on division of community property.

Although Hisquierdo involved the fairly limited area of federal railroad pensions, the Supreme Court has recently applied the Hisquierdo reasoning to military retired pay, which of course has much broader and farther-reaching implications. In McCarty v. McCarty, 452 U.S. \_\_\_\_ (69 L. Ed.2d 589, 101 S. Ct. 2728, 49 U.S.L.W. 4850) (1981), the Supreme Court noted that military retired pay is not technically a pension but is really reduced compensation for reduced current services (suggesting that the retired pay is in fact separate rather than community property to the extent it is paid after separation or dissolution of marriage), and held that the congressional intent is that retired pay not be subject to division and that inconsistent California community property law is preempted.

The McCarty decision was a 6-3 split with Justice Rehnquist, who is from a community property jurisdiction, writing a dissenting opinion. It is arguable that with Justice O'Connor, a woman and also from a

community property jurisdiction, now on the Court the tide may turn and the Court will be less likely to find federal preemption of state community property laws. The issue is certain to come up again, since the Hisquierdo approach requires a case-by-case analysis of each federal law that creates each type of federal pension.

Meanwhile, what can be done to assure the spouses a fair and equitable division of the marital assets at dissolution? One obvious solution would be not to attempt to divide the federal pension at dissolution, but simply to give the non-pension spouse an offset for the value of the pension. Unfortunately, this approach was specifically precluded by Hisquierdo.

A possible variation on the offset idea is not to require an equal division of community assets, but simply to provide an "equitable" division of assets that would allow the court to take into account the non-divisible assets of the spouses. However, courts in equitable division jurisdictions have suggested that Hisquierdo precludes even taking the federal pension into account at all. See, e.g., Larango v. Larango, 93 Wash.2d 460, 610 P.2d 907 (1980). Moreover, an equitable division scheme would be considered a step backwards in California jurisprudence by persons who over the years have fought for no-fault division of assets with its inherent equity and relative simplicity from the standpoint of judicial administration.

A more promising alternative is to take the federal benefits of a spouse into account in awarding spousal support to the other spouse. Hisquierdo expressly recognizes that federal law permits federal benefits to be reached for child and spousal support. California law states as one of the factors the court must consider in awarding support to a spouse the "obligations and assets, including the separate property, of each." Civ. Code § 4801(a)(3).

It should be noted, however, that at least one jurisdiction, which does not permit spousal support, has held that it would violate Hisquierdo to change the law on spousal support in order to give one spouse access to the other's federal pension. Eichelberger v. Eichelberger, 582 S.W.2d 395 (Tex. 1979). Spousal support is also not an adequate substitute for division of the community property because it ordinarily terminates on remarriage or death of the supported spouse, thereby leaving the spouses ultimately in a position of inequality. See Reppy, Learning to Live with Hisquierdo, 6 Community Prop. L.J. 5 (1979). Moreover, spousal support is based more on reasonable needs of the parties than on a

comparison of the assets of the parties; reliance on spousal support as a means of achieving equity in division or of equalizing the positions of the parties obscures the policy behind spousal support and tends to undermine the concept of equal division of community assets.

A better and more direct approach to the problem is to obtain authority for the state to make an equal division of federal pension benefits at dissolution. At least this should be an option available to the state in considering how best to treat federal as well as other pension and retirement benefits. This requires congressional action (absent a change in construction by the Supreme Court).

There are currently two measures before Congress addressing this problem--H.R. 3039 and S. 1453. The staff believes it would be useful for California to go on record as supporting congressional action to permit the states a free hand in treating federal pensions for domestic relations purposes. To this end we have prepared the attached resolution to Congress which, if the Commission approves it, we will have introduced in the Legislature. The staff believes the Commission needs to be able to consider all possible approaches in this area if it is to make sound recommendations in the community property study.

Respectfully submitted,

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STAFF DRAFT

## RECOMMENDATION

relating to

## FEDERAL MILITARY AND OTHER FEDERAL PENSIONS AS COMMUNITY PROPERTY

Whether a federal pension or other federal benefits are divisible as community property at dissolution of marriage is determined by the congressional intent in the statutory scheme that provides for the benefits.<sup>1</sup> The leading case of Hisquierdo v. Hisquierdo<sup>2</sup> held that retirement benefits received by a husband under the Railroad Retirement Act of 1974 are not divisible as community property in a marital dissolution proceeding. This case was followed in 1981 when the Supreme Court held in McCarty v. McCarty<sup>3</sup> that military retired pay is not divisible under the California community property laws.

Military retired pay and other federal pensions and benefits are sometimes the major asset in a marriage. The inability of the state to provide for division of these benefits in a marital dissolution proceeding or to otherwise deal with the property seriously impairs the effort to achieve fairness and equity in domestic relations. Attempts to equalize the positions of the spouses by allowing an offset for the value of the federal benefits or by providing spousal support are either impermissible<sup>4</sup> or inadequate.<sup>5</sup>

If the state is to have a just marital property system it must have available to it the broadest possible range of options to deal with marital property, including federal military and other federal pensions and benefits. For this purpose it is necessary that Congress enact legislation that makes clear its intent not to preempt the domestic

1. See, e.g., Gold, Norton, & Ross, Special Problems of Property Division: The Family Residence, Pension Benefits, the Small Business or Professional Practice, in 1 California Marital Dissolution Practice §§ 9.28-9.34 (Cal. Cont. Ed. Bar 1981).
2. 439 U.S. 572 (1979).
3. 452 U.S. \_\_\_\_ (69 L. Ed.2d 589, 101 S. Ct. 2728, 49 U.S.L.W. 4850) (1981).
4. Hisquierdo v. Hisquierdo, 439 U.S. at 588 (1979).
5. Reppy, Learning to Live with Hisquierdo, 6 Comm. Prop. J. 5 (1979).

relations laws of the states as applied to federal benefits. The Law Revision Commission recommends that the Legislature adopt a joint resolution that memorializes the President and Congress of the United States to enact legislation recognizing and not preempting the right of the states to treat federal benefits as separate or community property in accordance with the marital property laws of the states. Legislation is currently before Congress that addresses this issue, and as such the Legislature's resolution would be timely.

The Commission's recommendation would be effectuated by adoption of the following joint resolution:

WHEREAS, The United States Supreme Court has recently held that federal law governing military retired pay preempts state law relating to division of community property; and

WHEREAS, The effect of this decision is to seriously impair the ability of the several states to provide fair and equitable rules governing the property rights of spouses during marriage and on dissolution of marriage in accordance with the marital property laws of the states; and

WHEREAS, It is necessary that federal legislation be enacted authorizing the several states to characterize, divide, and otherwise treat military and other forms of retirement, pension, insurance, and like benefits provided by federal law as separate or community property in accordance with the marital property laws of the states in order to achieve justice in domestic relations; and

WHEREAS, Legislation has been introduced in both the United States Senate and House of Representatives to address this issue; now, therefore, be it

Resolved by the Assembly and the Senate of the State of California, jointly, That the Legislature of the State of California respectfully memorializes the President and the Congress of the United States to enact legislation recognizing and not preempting the right of the several states to characterize, divide, and otherwise treat the military retirement of a member or former member of the Armed Forces of the United States or any other retirement, pension, insurance, or like benefits provided by federal law as separate or community property in accordance with the marital property laws of the states; and be it further

Resolved, That the Chief Clerk of the Assembly transmit copies of this resolution to the President and Vice President of the United States, to the Speaker of the House of Representatives, to each Senator and Representative from California in the Congress of the United States, and to the Chairman of each Committee of the Senate and House of Representatives that the Chief Clerk finds has legislation that addresses this issue under consideration.