

## **Appendix C**

### **Information Addressing State Applications and Interpretations of the USFSPA**

**[Source: Army JAG School]**

## Alabama

Divisible as of August 1993 when the Alabama Supreme Court held that disposable military retirement benefits accumulated during the course of the marriage are divisible as marital property, Vaughn v. Vaughn, 634 So.2d 533 (Ala. 1993). Kabaci v. Kabaci, 373 So. 2d 1144 (Ala. Civ. App. 1979) and cases relying on it that are inconsistent with Vaughn are expressly overruled. Note that Alabama has previously awarded alimony from military retired pay, Underwood v. Underwood, 491 So. 2d 242 (Ala. Civ. App. 1986) (wife awarded alimony from husband's military disability retired pay); Phillips v. Phillips, 489 So. 2d 592 (Ala. Civ. App. 1986) (wife awarded 50% of husband's gross military pay as alimony).

## Alaska

Divisible. Chase v. Chase, 662 P.2d 944 (Alaska 1983), overruling Cose v. Cose, 592 P.2d 1230 (Alaska 1979), cert. denied, 453 U.S. 922 (1982). Non-vested retirement benefits are divisible. Lang v. Lang, 741 P.2d 649 (Alaska 1987). Note also Morlan v. Morlan, 720 P.2d 497 (Alaska 1986) (the trial court ordered a civilian employee to retire in order to ensure the spouse received her share of a pension--the pension would be suspended if the employee continued working; on appeal, the court held that the employee should have been given the option of continuing to work and periodically paying the spouse the sums she would have received from the retired pay; in reaching this result, the court cited the California *Gillmore* decision). See also Clausen v. Clausen, 831 P.2d 1257 (Alaska 1992) which held that while *Mansell* precludes division of disability benefits received in lieu of retirement pay, it does not preclude consideration of these payments when making an equitable division of marital assets.

## Arizona

Divisible. DeGryse v. DeGryse, 135 Ariz. 335, 661 P.2d 185 (1983); Edsall v. Superior Court of Arizona, 143 Ariz. 240, 693 P.2d 895 (1984); Van Loan v. Van Loan, 116 Ariz. 272, 569 P.2d 214 (1977) (a nonvested military pension is community property). A civilian retirement plan case (Koelsch v. Koelsch, 148 Ariz. 176, 713 P.2d 1234 (1986)) held that if the employee is not eligible to retire at the time of the dissolution, the court must order that the spouse begin receiving the awarded share of retired pay when the employee becomes eligible to retire, whether or not he or she does retire at that point.

## Arkansas

Divisible, but watch for vesting requirements. Young v. Young, 288 Ark. 33, 701 S.W.2d 369 (1986); *but see* Durham v. Durham, 289 Ark. 3, 708 S.W.2d 618 (1986) (military retired pay not divisible where the member had not served 20 years at the time of the divorce, and therefore the military pension had not "vested"). See also Burns v. Burns, 31 Ark. 61, 847 S.W.2d 23 (1993) (In accord with *Durham*, but strong dissent favors rejecting 20 years of service as a prerequisite to "vesting" of a military pension).

## California

Divisible. In re Fithian, 10 Cal. 3d 592, 517 P.2d 449, 111 Cal. Rptr. 369 (1974); In re Hopkins, 142 Cal. App. 3d 350, 191 Cal. Rptr. 70 (1983). A non-resident servicemember did not waive his right under the USFSPA to object to California's jurisdiction over his military pension by consenting to the court's jurisdiction over other marital and property issues, Tucker v. Tucker, 226 Cal. App. 3d 1249 (1991) and Hattis v. Hattis, 242 Cal. Rptr. 410 (Ct. App. 1987). Nonvested pensions are divisible; In re Brown, 15 Cal. 3d 838, 544 P.2d 561, 126 Cal. Rptr. 633 (1976). In re Mansell, 265 Cal. Rptr. 227 (Cal. App. 1989) (on remand from Mansell v. Mansell, 490 U.S. 581 (1989), the court held that gross retired pay was divisible since it was based on a stipulated property settlement to which *res judicata* had attached). State law has held that military disability retired pay is divisible to the extent it replaces what the retiree would have received as longevity retired pay (In re Mastropaolo, 166 Cal. App. 3d 953, 213 Cal. Rptr. 26 (1985); In re Mueller, 70 Cal. App. 3d 66, 137 Cal. Rptr. 129 (1977), but the *Mansell* case raises doubt about the continued validity of this proposition. If the member is not retired at the time of the dissolution, the spouse can elect to begin receiving the award share of "retired pay" when the member becomes eligible to retire, or anytime thereafter, even if the member remains on active duty. In re Luciano, 104 Cal. App. 3d 956, 164 Cal. Rptr. 93 (1980); *see also* In re Gillmore, 29 Cal. 3d 418, 629 P.2d 1, 174 Cal. Rptr. 493 (1981) (same principle applied to a civilian pension plan).

## Canal Zone

Divisible. Bodenhorn v. Bodenhorn, 567 F.2d 629 (5th Cir. 1978).

## Colorado

Divisible. In re Marriage Of Beckman and Holm, 800 P.2d 1376 (Colo. 1990) (nonvested military retirement benefits constitute marital property subject to division pursuant to § 14-10-113, C.R.S. (1987 Repl.Vol. 6B)). *See also* In re Hunt, 909 P.2d 525, (Colo. 1996), reversing a previous decision of its own, the Colorado Supreme Court holds that post-divorce increases in pay resulting from promotions are marital property subject to division and approves use of a formula to define the marital share. In the formula discussed, final pay of the member at retirement is multiplied a percentage defined by 50% of a fraction wherein the numerator equals the number of years of overlap between marriage and service, and the denominator equals the number of years of total service of the member.

## Connecticut

Probably divisible. Conn. Gen. Stat. 46b-81 (1986) gives courts broad power to divide property. *Note* Thompson v. Thompson, 183 Conn. 96, 438 A.2d 839 (1981) (nonvested civilian pension is divisible).

## **Delaware**

Divisible. Smith v. Smith, 458 A.2d 711 (Del. Fam. Ct. 1983). Nonvested pensions are divisible; Donald R.R. v. Barbara S.R., 454 A.2d 1295 (Del. Sup. Ct. 1982).

## **District of Columbia**

Divisible. *See* Barbour v. Barbour, 464 A.2d 915 (D.C. 1983) (vested but unmatured civil service pension held divisible; dicta suggests that nonvested pensions also are divisible).

## **Florida**

Divisible. As of October 1, 1988, all vested and nonvested pension plans are treated as marital property to the extent that they are accrued during the marriage. Fla. Stat. § 61.075(3)(a)4 (1988); see also § 3(1) of 1988 Fla. Sess. Law Serv. 342. These legislative changes appear to overrule the prior limitation in Pastore v. Pastore, 497 So. 2d 635 (Fla. 1986) (only vested military retired pay can be divided). This interpretation was recently adopted by the court in Deloach v. Deloach, 590 So.2d 956 (Fla. Dist Ct. App. 1991).

## **Georgia**

Probably divisible. *Cf.* Courtney v. Courtney, 256 Ga. 97, 344 S.E.2d 421 (1986) (nonvested civilian pensions are divisible); Stumpf v. Stumpf, 249 Ga. 759, 294 S.E.2d 488 (1982) (military retired pay may be considered in establishing alimony obligations) *see also* Hall v. Hall, 51B.R. 1002 (1985) (Georgia divorce judgment awarding debtor's wife 38% of debtor's military retirement, payable directly from the United States to the wife, granted the wife a nondischargeable property interest in 38% of the husband's military retirement); Holler v. Holler, 257 Ga. 27, 354 S.E.2d 140 (1987) (the court "[a]ssum[ed] that vested and nonvested military retirement benefits acquired during the marriage are now marital property subject to equitable division," citing *Stumpf* and *Courtney*, but then decided that military retired pay could not be divided retroactively if it was not subject to division at the time of the divorce).

## **Hawaii**

Divisible. Linson v. Linson, 1 Haw. App. 272, 618 P.2d 748 (1981); Cassiday v. Cassiday, 716 P.2d 1133 (Haw. 1986). In Wallace v. Wallace, 5 Haw. App. 55, 677 P.2d 966 (1984), the court ordered a Public Health Service employee (who is covered by the USFSPA) to pay a share of retired pay upon reaching retirement age whether or not he retires at that point. He argued that this amounted to an order to retire, violating 10 U.S.C. § 1408(c)(3), but the court affirmed the order. In Jones v. Jones, 780 P.2d 581 (Haw. Ct. App. 1989), the court ruled that *Mansell's* limitation on dividing VA benefits cannot be circumvented by awarding an offsetting interest in other property. It also held that *Mansell* applies to military disability retired pay as well as VA benefits.

## Idaho

Divisible. Ramsey v. Ramsey, 96 Idaho 672, 535 P.2d 53 (1975) (reinstated by Griggs v. Griggs, 197 Idaho 123, 686 P.2d 68 (1984)). Courts cannot circumvent *Mansell's* limitation on dividing VA benefits by using an offset against other property. Bewley v. Bewley, 780 P.2d 596 (Idaho Ct. App. 1989). See Leatherman v. Leatherman, 122 Idaho 247, 833 P.2d 105 (1992). A portion of husband's civil service annuity attributable to years of military service during marriage was divisible military service benefit and thus subject to statute relating to modification of divorce decrees to include division of military retirement benefits. See also Balderson v. Balderson, 896 P.2d 956 (Idaho Sup. Ct. 1995) (cert. denied by the U.S. Supreme Court, 116 S.Ct. 179 (mem.) (affirming a lower court decision ordering a servicemember to pay spouse her community share of the military pension, even though he had decided to put off retirement), Mosier v. Mosier, 122 Idaho 37, 830 P.2d 1175 (1992), and Walborn v. Walborn, 120 Idaho 494, 817 P.2d 160 (1991).

## Illinois

Divisible. In re Brown, 225 Ill. App. 3d 733, 587 N.E.2d 648 (1992); the Court cites Congress' enactment of the Spouses' Protection Act (Pub.L. No. 97-252, 96 Stat. 730-38 (1982) as the basis to permit the courts to treat pay of military personnel in accordance with the law of the jurisdiction of the court (In re Dooley, 137 Ill. App. 3d 407, 484 N.E.2d 894 (1985)). The court in *Brown* held that a military pension may be treated as marital property under Illinois law and is subject to the division provisions of 5/503 of the Illinois Marriage and Dissolution of Marriage Act (Dissolution Act). See In re Korper, 131 Ill. App. 3d 753, 475 N.E.2d 1333 (1985). *Korper* points out that under Illinois law a pension is marital property even if it is not vested. In *Korper*, the member had not yet retired, and he objected to the spouse getting the cash-out value of her interest in retired pay. He argued that the USFSPA allowed division only of "disposable retired pay," and state courts therefore are preempted from awarding the spouse anything before retirement. The court rejected this argument, thus raising the (unaddressed) question whether a spouse could be awarded a share of "retired" pay at the time the member becomes eligible for retirement (even if he or she does not retire at that point); see In re Luciano, 104 Cal. App. 3d 956, 164 Cal. Rptr. 93 (1980) for an application of such a rule. Note also Ill. Stat. Ann. ch. 40, para. 510.1 (Smith-Hurd Supp. 1988) (allows modification of agreements and judgments that became final between 25 June 1981 and 1 February 1983 unless the party opposing modification shows that the original disposition of military retired pay was appropriate).

## Indiana

Divisible, but watch for vesting requirements. Indiana Code § 31-1-11.5-2(d)(3) (1987) (amended in 1985 to provide that "property" for marital dissolution purposes includes, inter alia, "[t]he right to receive disposable retired pay, as defined in 10 U.S.C. § 1408(a), acquired during the marriage, that is or may be payable after the dissolution of the marriage"). The right to receive retired pay must be vested as of the date the divorce petition in order for the spouse to be entitled to a share (Kirkman v. Kirkman, 555 N.E.2d 1293 (Ind. 1990)), but courts should consider the nonvested military retired benefits in adjudging a just and reasonable division of property. In re Bickel, 533 N.E.2d 593 (Ind. Ct. App. 1989). See also Arthur v. Arthur, 519

N.E.2d 230 (Ind. Ct. App. 1988) (Second District ruled that § 31-1-11.5-2(d)(3) cannot be applied retroactively to allow division of military retired pay in a case filed before the law's effective date, which was 1 September 1985). *But see Sable v. Sable*, 506 N.E.2d 495 (Ind. Ct. App. 1987) (Third District ruled that § 31-1-11.5-2(d)(3) can be applied retroactively).

### **Iowa**

*Divisible.* See especially *In re Howell*, 434 N.W.2d 629 (Iowa 1989). In *Howell*, the member had already retired in this case, but the decision may be broad enough to encompass nonvested retired pay as well. The court also ruled that disability payments from the Veterans Administration, paid in lieu of a portion of military retired pay, are not marital property. Finally, it appears the court intended to award the spouse a percentage of gross military retired pay, but it actually "direct[ed] that 30.5% of [the husband's] disposable retired pay, except disability benefits, be assigned to [the wife] in accordance with section 1408 of Title 10 of the United States Code..." (emphasis added). The U.S. Supreme Court's *Mansell* decision may have overruled state court decisions holding courts have authority to divide gross retired pay.

(Note: A disabled veteran may be required to pay alimony and/or child support in divorce actions, even where his only income is veterans' disability and supplemental security income. See *In re Marriage of Anderson*, 522 N.W.2d 99 (Iowa App. 1994), applying *Rose v. Rose*, 481 U.S. 619, 107 S.Ct. 2029, 95 L.Ed.2d 599 (1987). The Iowa Court of Appeals ruled: "It is clear veteran's benefits are not solely for the benefit of the veteran, but for his family as well.")

### **Kansas**

*Divisible.* Kan. Stat. Ann. § 23-201(b) (1987), effective July 1, 1987 (vested and nonvested military pensions are now marital property); *In re Harrison*, 13 Kan. App. 2d 313, 769 P.2d 678 (1989) (applies the statute and holds that it overruled the previous case law that prohibited division of military retired pay).

### **Kentucky**

*Divisible.* *Jones v. Jones*, 680 S.W.2d 921 (Ky. 1984); *Poe v. Poe*, 711 S.W.2d 849 (Ky. Ct. App. 1986) (military retirement benefits are marital property even before they "vest"); Ky. Rev. Stat. Ann. § 403.190 (1994), expressly defines marital property to include retirement benefits.

### **Louisiana**

*Divisible.* *Swope v. Mitchell*, 324 So. 2d 461 (La. 1975); *Little v. Little*, 513 So. 2d 464 (La. Ct. App. 1987) (nonvested and unmatured military retired pay is marital property); *Warner v. Warner*, 651 So. 2d 1339 (La. 1995) (confirming that 10-year test found in 10 U.S.C. § 1408(d)(2) is a prerequisite to direct payment, but not to award of a share of retired pay to a former spouse); *Gowins v. Gowins*, 466 So. 2d 32 (La. Sup. Ct. 1985) (soldier's participation in divorce proceedings constituted implied consent for the court to exercise jurisdiction and divide the soldier's military retired pay as marital property); *Jett v. Jett*, 449 So. 2d 557 (La. Ct. App. 1984); *Rohring v. Rohring*, 441 So. 2d 485 (La. Ct. App. 1983). See also *Campbell v. Campbell*,

474 So.2d 1339 (Ct. App. La. 1985) (a court can award a spouse a share of disposable retired pay, not gross retired pay, and a court can not divide VA disability benefits paid in lieu of military retired pay; this approach conforms to the dicta in the *Mansell* concerning divisibility of gross retired pay).

### **Maine**

Divisible. Lunt v. Lunt, 522 A.2d 1317 (Me. 1987). *See also* Me. Rev. Stat. Ann. tit. 19, §722-A(6) (1989) (provides that the parties become tenants-in-common regarding property a court fails to divide or to set apart).

### **Maryland**

Divisible. Nisos v. Nisos, 60 Md. App. 368, 483 A.2d 97 (1984) (applies Md. Fam. Law Code Ann. § 8-203(b), which provides that military pensions are to be treated the same as other pension benefits; such benefits are marital property under Maryland law; see *Deering v. Deering*, 292 Md. 115, 437 A.2d 883 (1981)). *See also* Ohm v. Ohm, 49 Md. App. 392, 431 A.2d 1371 (1981) (nonvested pensions are divisible). "Window decrees" that are silent on division of retired pay cannot be reopened simply on the basis that Congress subsequently enacted the USFSPA. Andresen v. Andresen, 317 Md. 380, 564 A.2d 399 (1989).

### **Massachusetts**

Divisible. Andrews v. Andrews, 27 Mass. App. 759, 543 N.E.2d 31 (1989). Here, the spouse was awarded alimony from military retired pay; she appealed, seeking a property interest in the pension. The trial court's ruling was upheld, but the appellate court noted that "the judge could have assigned a portion of the pension to the wife [as property]."

### **Michigan**

Divisible. Keen v. Keen, 160 Mich. App. 314, 407 N.W.2d 643 (1987); Giesen v. Giesen, 140 Mich. App. 335, 364 N.W.2d 327 (1985); McGinn v. McGinn, 126 Mich. App. 689, 337 N.W.2d 632 (1983); Chisnell v. Chisnell, 82 Mich. App. 699, 267 N.W.2d 155 (1978). *Note also* Boyd v. Boyd, 116 Mich. App. 774, 323 N.W.2d 553 (1982) (only vested pensions are divisible, but what is a vested right is discussed broadly and discretion over what is marital property left to the trial court).

### **Minnesota**

Divisible. Military retired pay not specifically addressed in statute. Case law has treated it as any other marital asset, subject to equitable division. Deliduka v. Deliduka, 347 N.W.2d 52 (Minn. Ct. App. 1984). This case also holds that a court may award a spouse a share of gross retired pay, but *Mansell* may have overruled state court decisions that they have the authority to divide gross retired pay. *Note also* Janssen v. Janssen, 331 N.W.2d 752 (Minn. 1983) (nonvested pensions are divisible).

## Mississippi

Divisible. Powers v. Powers, 465 So. 2d 1036 (Miss. 1985). In July, 1994, a deeply divided Mississippi Supreme Court formally adopted the equitable distribution method of division of marital assets. Ferguson v. Ferguson, 639 So. 2d 921 (Miss. 1994), and Hemsley v. Hemsley, 639 So. 2d 909 (Miss. 1994). Marital property for the purpose of a divorce is defined as being "any and all property acquired or accumulated during the marriage." This includes military pensions which are viewed as personal property and while USFSPA does not vest any rights in a spouse, a military pension is subject to being divided in a divorce. Pierce v. Pierce, 648 So. 2d 523 (Miss. 1995). In *Pierce*, the Court expressly held that a claim for division of property can only be viewed as separate and distinct from a claim for alimony. Since property division is made irrespective of fault or misconduct, military pensions may be divided even where the spouse has committed adultery, assuming that the facts otherwise justify an equitable division of property.

## Missouri

Divisible. Only disposable retired pay is divisible. Moon v. Moon, 795 S.W.2d 511 (Mo. Ct. App. 1990). Fairchild v. Fairchild, 747 S.W.2d 641 (Mo. Ct. App. 1988) (nonvested and nonmatured military retired pay are marital property); Coates v. Coates, 650 S.W.2d 307 (Mo. Ct. App. 1983).

## Montana

Divisible. In re Marriage of Kecskes, 210 Mont. 479, 683 P.2d 478 (1984); In re Miller, 37 Mont. 556, 609 P.2d 1185 (1980), *vacated and remanded sub. nom.* Miller v. Miller, 453 U.S. 918 (1981).

## Nebraska

Divisible. Ray v. Ray, 222 Neb. 324, 383 N.W.2d 756 (1986); Neb. Rev. Stat. § 42-366(8) (1993) (military pensions are part of the marital estate whether vested or not and may be divided as property or alimony).

## Nevada

Probably divisible. Tomlinson v. Tomlinson, 729 P.2d 1303 (Nev. 1986) (the court speaks approvingly of the USFSPA in dicta but declines to divide retired pay in this case involving a final decree from another state). *Tomlinson* was legislatively reversed by the Nevada Former Military Spouses Protection Act (NFMSPA), Nev. Rev. Stat. § 125.161 (1987) (military retired pay can be partitioned even if the decree is silent on division and even if it is foreign). The NFMSPA has been repealed, however, effective March 20, 1989; see Senate Bill 11, 1989 Nev. Stat. 34. The Nevada Supreme Court subsequently has ruled that the doctrine of res judicata bars partitioning military retired pay where "the property settlement has become a judgment of the court"; see Taylor v. Taylor, 775 P.2d 703 (Nev. 1989). Nonvested pensions are community property. Gemma v. Gemma, 778 P.2d 429 (Nev. 1989). The spouse has the right to elect to



receive his or her share when the employee spouse becomes retirement eligible, whether or not retirement occurs at that point. *Id.*

### **New Hampshire**

Divisible. "Property shall include all tangible and intangible property and assets...belonging to either or both parties, whether title to the property is held in the name of either or both parties. Intangible property includes...employment benefits, [and] vested and non-vested pensions or other retirement plans.... [T]he court may order an equitable division of property between the parties. The court shall presume that an equal division is an equitable distribution...." N.H. Rev. Stat. Ann. § 458:16-a (1987) (effective Jan 1, 1988). This provision was relied on by the New Hampshire Supreme Court in Blanchard v. Blanchard, 578 A.2d 339 (N.H. 1990), when it overruled Baker v. Baker, 120 N.H. 645, 421 A.2d 998 (1980) (military retired pay not divisible as marital property, but it may be considered "as a relevant factor in making equitable support orders and property distributions").

### **New Jersey**

Divisible. Castiglioni v. Castiglioni, 192 N.J. Super. 594, 471 A.2d 809 (N.J. 1984); Whitfield v. Whitfield, 222 N.J. Super. 36, 535 A.2d 986 (N.J. Super. Ct. App. Div. 1987) (nonvested military retired pay is marital property); Kruger v. Kruger, 139 N.J. Super. 413, 354 A.2d 340 (N.J. Super. Ct. App. Div. 1976), *aff'd*, 73 N.J. 464, 375 A.2d 659 (1977). Post-divorce cost-of-living raises are divisible; Moore v. Moore, 553 A.2d 20 (N.J. 1989) (police pension).

### **New Mexico**

Divisible. Walentowski v. Walentowski, 100 N.M. 484, 672 P.2d 657 (N.M. 1983)(USFSPA applied); Stroshine v. Stroshine, 98 N.M. 742, 652 P.2d 1193 (1982); LeClert v. LeClert, 80 N.M. 235, 453 P.2d 755 (1969). *See also* White v. White, 105 N.M. 800, 734 P.2d 1283 (Ct. App. 1987) (court can award share of gross retired pay; however, *Mansell* may have overruled state court decisions holding courts have authority to divide gross retired pay). In Mattox v. Mattox, 105 N.M. 479, 734 P.2d 259 (1987), in dicta the court cited the California *Gillmore* case with approval, suggesting that a court can order a member to begin paying the spouse his or her share when the member becomes eligible to retire - even if the member elects to remain in active duty.

### **New York**

Divisible. Pensions in general are divisible; Majauskas v. Majauskas, 61 N.Y.2d 481, 463 N.E.2d 15, 474 N.Y.S.2d 699 (1984). Most lower courts hold that nonvested pensions are divisible; *see, e.g.*, Damiano v. Damiano, 94 A.D.2d 132, 463 N.Y.S.2d 477 (N.Y. App. Div. 1983). Case law seems to treat military retired pay as subject to division; *e.g.*, Lydick v. Lydick, 130 A.D.2d 915, 516 N.Y.S.2d 326 (N.Y. App. Div. 1987); Gannon v. Gannon, 116 A.D.2d 1030, 498 N.Y.S.2d 647 (N.Y. App. Div. 1986). Disability payments are separate property as a matter of law, but a disability pension is marital property to the extent it reflects deferred compensation; West v. West, 101 A.D.2d 834, 475 N.Y.S.2d 493 (N.Y. pp. Div. 1984).

## North Carolina

Divisible but watch for vesting requirements. N.C. Gen. Stat. § 50-20(b) (1988) expressly declares vested military pensions to be marital property; the pension must be vested as of the date the parties separate from each other. In Milam v. Milam, 373 S.E.2d 459 (N.C.App. 1988), the court ruled that a warrant officer's retired pay had "vested" when he reached the 18-year "lock-in" point. In George v. George, 444 S.E.2d 449 (N.C.App. 1994), the court held that an enlisted member's right to retirement benefits vests when he/she has completed twenty years of service. In Lewis v. Lewis, 350 S.E.2d 587 (N.C.App. 1986) the court held that a divorce court can award a spouse a share of gross retired pay, but, because of the wording (at that time) of the state statute, the amount cannot exceed 50% of the retiree's disposable retired pay; *Mansell*, 490 U.S. at 589, may have overruled the court's decision in part as to dividing gross pay. The parties are not, however, barred from a consensual division of military retired pay, even though it is "nonvested" separate property, and an agreement or court order by consent that divides such pension rights will be upheld. Hoolapa v. Hoolapa, 412 S.E.2d 112 (N.C.App. 1992). Attorneys considering valuation issues should also review Bishop v. Bishop, 440 S.E.2d 591 (N.C.App. 1994), which held that valuation must be determined as of the date of separation and must be based on a present value of pension payments that the retiree would be entitled to receive if he or she retired on the date of marital separation, or when first eligible to retire, if later. Subsequent pay increases attributable to length of service or promotions are not included.

## North Dakota

Divisible. Delorey v. Delorey, 357 N.W.2d 488 (N.D. 1984). *See also* Morales v. Morales, 402 N.W.2d 322 (N.D. 1987) (equitable factors can be considered in dividing military retired pay, so 17.5% award to 17-year spouse is affirmed), and Knoop v. Knoop, 542 N.W.2d 114 (N.D. 1996) (confirms that definition of "disposable retired pay" as defined in 10 U.S.C. § 1408 provides a limit on what states are authorized to divide as marital property, but holds that the USFSPA does not require the term "retirement pay" to be interpreted as "disposable retired pay." *Knoop* is also of interest because it addresses a waiver of retirement pay associated with the Dual Compensation Act, and the court acknowledges that once 50% of "disposable retired pay" is paid out in satisfaction of one or more orders dividing military retired pay as property, the orders are deemed satisfied by federal law (referencing 1990 amendment to 10 U.S.C. § 1408(e)(1)).

## Ohio

Divisible. *See* Lemon v. Lemon, 42 Ohio App. 3d 142, 537 N.E.2d 246 (1988) (nonvested pensions are divisible as marital property where some evidence of value demonstrated). *But also see*, King v. King, 78 Ohio App. 3d 599, 605 N.E.2d 970 (1992) (Trial court abused its discretion by retaining jurisdiction to divide a military pension that would not vest for nine years where no evidence of value demonstrated); Cherry v. Figart, 86 Ohio App. 3d 123, 620 N.E.2d 174 (1993) (distinguishing *King* by affirming division of nonvested pension where parties had agreed to divide the retirement benefits and suit was brought for enforcement only - the initial judgment incorporating the agreement had not been appealed); and Ingalls v. Ingalls, 624 N.E.2d 368

(Ohio 1993) (affirming division of nonvested military retirement benefits consistent with agreement of the parties expressed at trial).

### **Oklahoma**

Divisible. Stokes v. Stokes, 738 P.2d 1346 (Okla. 1987) (based on a statute that became effective on 1 June 1987). The state Attorney General had earlier opined that military retired pay was divisible, based on the prior law. Only a pension vested at the time of the divorce, however, is divisible, Messinger v. Messinger, 827 P.2d 865 (Okla. 1992). A former spouse is entitled to retroactive division of retiree's military pension pursuant to their property settlement agreement that provided that the property settlement was subject to modification if the law in effect at the time of their divorce changed to allow such a division at a later date.

### **Oregon**

Divisible. In re Manners, 68 Or. App. 896, 683 P.2d 134 (1984); In re Vinson, 48 Or. App. 283, 616 P.2d 1180 (1980). *See also* In re Richardson, 307 Or. 370, 769 P.2d 179 (1989) (nonvested pension plans are marital property). The date of separation is the date used for classification as marital property.

### **Pennsylvania**

Divisible. Major v. Major, 359 Pa. Super. 344, 518 A.2d 1267 (1986) (nonvested military retired pay is marital property).

### **Puerto Rico**

Not divisible as marital property. Delucca v. Colon, 119 P.R. Dec. 720 (1987) (citation to original Spanish version; English translation can be found at 119 P.R. Dec. 765), overruling Torres v. Robles, 115 P.R. Dec. 765 (1984), which had held that military retired pay is divisible. In overruling Torres, the court in Delucca reestablished retirement pensions as separate property of the spouses consistent with its earlier decision in Maldonado v. Superior Court, 100 P.R.R. 369 (1972). *See also* Carrero v. Santiago, 93 JTS 103 (1993) (citation to original Spanish version; English translation not yet available), which cites Delucca v. Colon with approval. Note that pensions may be considered in setting child support and alimony obligations.

### **Rhode Island**

Divisible. R.I. Pub. Laws § 15-5-16.1 (1988) gives courts very broad powers over the parties' property to effect an equitable distribution. Implied consent by the soldier cannot be used, however, to satisfy the jurisdictional requirements of 10 U.S.C. § 1408(c)(4). Flora v. Flora, 603 A.2d 723 (R.I. 1992).

## South Carolina

Divisible. Tiffault v. Tiffault, 401 S.E.2d 157 (S.C.1991), holds that vested military retirement benefits constitute an earned property right which, if accrued during the marriage, is subject to equitable distribution. Nonvested military retirement benefits are also subject to equitable division, Ball v. Ball, 430 S.E.2d 533 (S.C. Ct. App. 1993) (NCO acquired a vested right to participate in a military pension plan when he enlisted in the army; this right, which is more than an expectancy, constitutes property subject to division). *But see* Walker v. Walker, 368 S.E.2d 89 (S.C. Ct. App. 1988) (wife lived with parents during entire period of husband's naval service; since she made no homemaker contributions, she was not entitled to any portion of the military retired pay).

## South Dakota

Divisible. Gibson v. Gibson, 437 N.W.2d 170 (S.D. 1989) (the court states that military retired pay is divisible--in this case, it was reserve component retired pay where the member had served 20 years but had not yet reached age 60); Radigan v. Radigan, 17 Fam. L. Rep. (BNA) 1202 (S.D. Sup. Ct. Jan. 23, 1991) (husband must share with ex-wife any increase in his retired benefits that results from his own, post divorce efforts); Hautala v. Hautala, 417 N.W.2d 879 (S.D. 1987) (trial court awarded spouse 42% of military retired pay, and this award was not challenged on appeal); Moller v. Moller, 356 N.W.2d 909 (S.D. 1984) (the court commented approvingly on cases from other states that recognize divisibility but declined to divide retired pay here because a 1977 divorce decree was not appealed until 1983). See generally Caughron v. Caughron, 418 N.W.2d 791 (S.D. 1988) (the present cash value of a nonvested retirement benefit is marital property); Hansen v. Hansen, 273 N.W.2d 749 (S.D. 1979) (vested civilian pension is divisible); Stubbe v. Stubbe, 376 N.W.2d 807 (S.D. 1985) (civilian pension divisible; the court observed that "this pension plan is vested in the sense that it cannot be unilaterally terminated by [the] employer, though actual receipt of benefits is contingent upon [the worker's] survival and no benefits will accrue to the estate prior to retirement").

## Tennessee

Divisible. Tenn. Code Ann. § 36-4-121(b)(1) (1988) specifically defines all vested pensions as marital property. In 1993, the Tennessee Supreme Court affirmed a trial court's approval of a separation agreement after determining that the agreement divided a non-vested pension as marital property. Towner v. Towner, 858 S.W.2d 888 (Tenn. 1993). In 1994, the Tennessee Court of Appeals held that the Tennessee code's reference to vested pensions was illustrative and not exclusive. As a result, the court determined that non-vested military pensions can properly be characterized as marital property. Kendrick v. Kendrick, 902 S.W.2d 918 (Tenn.Ct.App. 1994). (Note: A disabled veteran may be required to pay alimony and/or child support in divorce actions, even where his only income is veterans' disability and supplemental security income. See Rose v. Rose, 481 U.S. 619, 107 S.Ct. 2029, 95 L.Ed.2d 599 (1987) (Supreme Court upheld exercise of contempt authority by Tennessee court over veteran who would not pay child support, finding that VA benefits were intended to take care of not just the veteran. Justice White in dissent argued unsuccessfully that the state's authority was preempted by the bar to

garnishing VA disability payments, and federal discretion to divert some of the VA benefits to family members in certain cases.))

### **Texas**

Divisible. Cameron v. Cameron, 641 S.W.2d 210 (Tex. 1982). *See also* Grier v. Grier, 731 S.W.2d 936 (Tex. 1987) (a court can award a spouse a share of gross retired pay, but post-divorce pay increases constitute separate property; *Mansell* may have overruled *Grier* in part). Pensions need not be vested to be divisible. Ex Parte Burson, 615 S.W.2d 192 (Tex. 1981), held that a court cannot divide VA disability benefits paid in lieu of military retired pay; this ruling is in accord with *Mansell*.

### **Utah**

Divisible. Greene v. Greene, 751 P.2d 827 (Utah Ct. App. 1988). The case clarifies that non-vested pensions can be divided under Utah law, and in dicta it suggests that only disposable retired pay is divisible, not gross retired pay. *But see* Maxwell v. Maxwell, 796 P.2d 403 (Utah App. 1990) (because of a stipulation between the parties, the court ordered a military retiree to pay his ex-wife one-half the amount he had overwithheld from his retired pay for taxes).

### **Vermont**

Probably divisible. Vt. Stat. Ann. tit. 15, § 751 (1988) provides that "The court shall settle the rights of the parties to their property by...equit[able] divi[sion]. All property owed by either or both parties, however and whenever acquired, shall be subject to the jurisdiction of the court. Title to the property . . . shall be immaterial, except where equitable distribution can be made without disturbing separate property." The Connecticut Supreme Court recently held in Krafik v. Krafik, 21 Fam. Law Rep. 1536 (1995), that vested pension benefits are divisible as marital property in divorce. Although the issue was not raised in *Krafik*, the court noted that the legislative and logical basis for dividing vested pension benefits would apply to unvested pension benefits as well.

### **Virginia**

Divisible. Va. Ann. Code § 20-107.3 (1988) defines marital property to include all pensions, whether or not vested. *See also* Mitchell v. Mitchell, 4 Va. App. 113, 355 S.E.2d 18 (1987); Sawyer v. Sawyer, 1 Va. App. 75, 335 S.E.2d 277 (Va. Ct. App. 1985) (these cases hold that military retired pay is subject to equitable division). Also see Owen v. Owen, 419 S.E.2d 267 (Va.Ct.App. 1992) (settlement agreement's guarantee/indemnification clause requires the retiree to pay the same amount of support to the spouse despite the retiree beginning to collect VA disability pay - held not to violate *Mansell*).

### **Washington**

Divisible. Konzen v. Konzen, 103 Wash. 2d 470, 693 P.2d 97, *cert. denied*, 473 U.S. 906 (1985); Wilder v. Wilder, 85 Wash. 2d 364, 534 P.2d 1355 (1975) (nonvested pension held to be

divisible); Payne v. Payne, 82 Wash. 2d 573, 512 P.2d 736 (1973); *In re Smith*, 98 Wash. 2d 772, 657 P.2d 1383 (1983).

### **West Virginia**

Divisible. Butcher v. Butcher, 357 S.E.2d 226 (W.Va. 1987) (vested and nonvested military retired pay is marital property subject to equitable distribution, and a court can award a spouse a share of gross retired pay; however, *Mansell* may have overruled state court decisions holding courts have authority to divide gross retired pay)

### **Wisconsin**

Divisible. Thorpe v. Thorpe, 123 Wis. 2d 424, 367 N.W.2d 233 (Wis. Ct. App. 1985); Pfeil v. Pfeil, 115 Wis. 2d 502, 341 N.W.2d 699 (Wis. Ct. App. 1983). *See also* Leighton v. Leighton, 81 Wis. 2d 620, 261 N.W.2d 457 (1978) (nonvested pension held to be divisible) and Rodak v. Rodak, 150 Wis. 2d 624, 442 N.W.2d 489, (Wis. Ct. App. 1989) (portion of civilian pension that was earned before marriage is included in marital property and subject to division).

### **Wyoming**

Divisible. Parker v. Parker, 750 P.2d 1313 (Wyo. 1988) (nonvested military retired pay is marital property; 10-year test is a prerequisite to direct payment of military retired pay as property, but not to division of military retired pay as property). *See also* Forney v. Minard, 849 P.2d 724 (Wyo. 1993) (affirms award of 100% of "disposable retired pay" to former spouse as property, but acknowledges that only 50% of this award can be paid directly). Note that this holding is inconsistent with 1990 amendment to USFSPA at 10 USC § 1408(e)(1) which deems all orders dividing military retired pay as property satisfied once a threshold of 50% of the "disposable retired pay" is reached - see the discussion in *Knoop v. Knoop* referenced under the North Dakota section of this guide.)