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McCarty v. McCarty: The Moving Target of Federal Pre-Emption Threatening All Non-Employee Spouses Symposium - Texas Community Property Law in Transition.

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McCARTY v. McCARTY: THE MOVING TARGET OF FEDERAL PRE-EMPTION THREATENING ALL NON-EMPLOYEE SPOUSES

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I. INTRODUCTION

Military retirement pay is not subject to division or equitable distribution under community property or other variations of marital property laws.

The decision of the Supreme Court of the United States in *Mc-*

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Carty v. McCarty[1] upset the structure of property division where military pensions are involved for almost all states. Insofar as Texas has no provisions for alimony,[2] or garnishment of wages,[3] the *McCarty* decision could lead to Texas becoming a dumping ground for the ex-wives of our nation's military. Certainly, the migration to Texas by military personnel seeking to shed their spouses and enjoy Texas' less onerous divorce laws in light of *McCarty* has begun. This article will analyze the *McCarty* decision, note its sweeping effects not only in relation to divorce laws but also to the Employment Retirement Income and Security Act of 1974 (ERISA), and suggest remedies for its harsh effects.

II. *McCarty v. McCarty*

A. *Facts of the McCarty Case*

Richard John McCarty, Colonel, United States Army, in 1976 filed a petition for dissolution of his marriage to Patricia Ann McCarty in California. He was then on active duty, had served 18 years, and sought, in his petition, to have his military retirement set aside to him as his separate property. He retired after 20 years of service. The trial court held that the military retirement was quasi-community property, and divided it by a formula giving Mrs. McCarty approximately 45% of each payment.[4]

Retired Colonel McCarty appealed. His claim that the supremacy clause precluded a state court from dividing or interfering with his military retirement benefits, was rejected by the California Court of Appeals.

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1. ___U.S.___, 101 S. Ct. 2728, 69 L. Ed. 2d 589 (1981).

2. *See* Francis v. Francis, 412 S.W.2d 29, 32 (Tex. 1967) (Texas only state not allowing alimony after judgment of divorce).

3. *See* TEX. CONST. art. XVI, § 28; TEX. REV. CIV. STAT. ANN. art. 4099 (Vernon 1966).

4. *See* McCarty v. McCarty, ___U.S.___, ___, 101 S. Ct. 2728, 2734, 69 L. Ed. 2d 589, 597 (1981); CAL. CIV. CODE § 4800(a) (Deering Supp. 1981). This forumula is quite similar to what is known in Texas as the *Cearley—Taggart* formula which gives the non-employed spouse a certain percentage of military retirement "if, as, and when the benefits are received by the employee spouse." Cearley v. Cearley, 544 S.W.2d 661, 666 (Tex. 1976) (contingent interest in military pension deemed community asset); *see* Taggart v. Taggart, 552 S.W.2d 422, 424 (Tex. 1977) (fractional interest for division of military pension equals months of marriage over months in military).

B. The Majority Decision

The United States Supreme Court reversed.[5] The majority speaking through Justice Blackmun, held that there was "a conflict between the terms of the federal military retirement statutes and the community property rights" asserted by Mrs. McCarty.[6] Furthermore, military retirement is a personal entitlement and a spouse has no entitlement to it, not even under a limited quasi-community property statute.[7] Moreover, the application of community property principles to military pay threatens grave harm to "clear and substantial" federal interests.[8]

1. *Rationale*

The majority supports its decision by finding a Congressional intent behind the military retirement system to insure a "youthful and vigorous army".[9] Moreover, military retirement pay represents "reduced compensation for reduced current services" inasmuch as the retired officers remain subject to recall to active duty at any time.[10]

To determine whether the federal pre-emption doctrine was applicable, the Court purportedly utilized the test as enuciated in *Hisquierdo v. Hisquierdo*,[11] that is, inasmuch as "[t]he whole subject of the domestic relations of husband and wife . . . belongs to the laws of the States and not to the laws of the United States . . . [s]tate family and family-property law must do 'major damage' to 'clear and subtantial' federal interests before the supremacy clause will demand that state law be overridden."[12] Furthermore, as the

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5. *See* McCarty v. McCarty, ___U.S.___, ___, 101 S. Ct. 2728, 2741, 2743, 69 L. Ed. 2d 589, 608 (1981).

6. *Id.* at ___, 101 S. Ct. at 2741, 69 L. Ed. 2d at 605.

7. *See id.* at ___, 101 S. Ct. at 2738, 69 L. Ed. 2d at 606.

8. *See id.* at ___, 101 S. Ct. at 2741, 69 L. Ed. 2d at 606; *cf.* Hisquierdo v. Hisquierdo, 439 U.S. 581, 581 (1979) (Railroad Retirement Act benefits not divisible under community property law); United States v. Yazell, 382 U.S. 341, 352 (1966) (federal interest not sufficient to overrule state law of coverture).

9. *See* McCarty v. McCarty, ___U.S.___, ___, 101 S. Ct. 2728, 2742, 69 L. Ed. 2d 589, 606-07 (1981).

10. *See id.* at ___, 101 S. Ct. at 2736, 69 L. Ed. 2d at 599; United States v. Tyler, 105 U.S. 244, 245 (1881); 10 U.S.C. § 688(a) (Supp. IV 1980).

11. 439 U.S. 572 (1979).

12. *Id.* at 581; *see* McCarty v. McCarty, ___U.S.___, ___, 101 S. Ct. 2728, 2735, 69 L. Ed. 2d 589, 598 (1981).

Hisquierdo Court noted, if the federal pre-emption doctrine is to be applied, Congress must, by explicit statutory language, direct that the state law be pre-empted.[13] Justice Blackmun, finding no explicit statutory language directing federal pre-emption, found explicit expression in legislative history that "the rights in retirement pay accrue to the retiree . . . . "[14] Therefore, the *McCarty* Court found not just "a conflict" between the terms of the state and federal law but found that application of community principles to military retired pay threatens grave harm to "clear and substantial" federal interests.[15] Justice Blackmun, however, noted that the threat of grave harm to "clear and substantial" federal interests was only a potentiality.[16] The Court recognized "that the plight of an ex-spouse of a retired service member is often a serious one" which could possibly be ameliorated through social security benefits and garnishing the military retirement for support, presumably after the military person receives the monthly check.[17] In conclusion, *McCarty* noted the great deference the Court has accorded Congress in respect to the control of military affairs explicitly stating that it was within the sphere of Congress to provide a former spouse of a retired service member more protection.[18]

B. The Dissent

Justice Rehnquist—having been educated and having practiced law in a community property state, filed a scholarly, if not bitter dissent.[19] Joined by Justices Brennan and Stewart, he states that the "majority's opinion convinces me it is both unprecedented and wrong."[20]

Justice Rehnquist points out that the majority has not quoted or applied the *Hisquierdo* test for pre-emption, stating that: "the

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13. *See* Hisquierdo v. Hisquierdo, 439 U.S. 572, 581 (1979).

14. *See* McCarty v. McCarty, ___U.S.___, ___, 101 S. Ct. 2728, 2738, 69 L. Ed. 2d 589, 602 (1981) (quoting H.R. Rep. No. 481, at 9 (1971)); Hisquierdo v. Hisquierdo, 439 U.S. 572, 584 (1979) (Congress intended railroad retired pay "actually reach the beneficiary").

15. *See* McCarty v. McCarty, ___U.S.___, ___, 101 S. Ct. 2728, 2741, 69 L. Ed. 2d 605-06 (1979).

16. *See id.* ___, 101 S. Ct. at 2741, 69 L. Ed. 2d at 606.

17. *See id.* at ___, 101 S. Ct. at 2742-43, 69 L. Ed. 2d at 608.

18. *See id.* at ___, 101 S. Ct. at 2743, 69 L. Ed. 2d at 608.

19. *See id.* at ___, 101 S. Ct. at 2743, 69 L. Ed. 2d at 608 (Rehnquist, J., dissenting).

20. *See id.* at ___, 101 S. Ct. at 2746, 69 L. Ed. 2d at 613 (Rehnquist, J., dissenting).

Court cannot, even to its satisfaction, plausibly maintain that Congress has 'positively required by direct enactments that California's community property law be preempted by the provisions governing military retired pay.' "[21] Justice Rehnquist further notes that the majority's opinion of Congressional intent and history misses the point of the case, that is, "community property rights, which are quite distinct from rights to alimony or child support."[22]

Justice Rehnquist then compares the only previous Supreme Court cases concerning federal pre-emption of community property law, *McCune v. Essig*,[23] *Wissner v. Wissner*,[24] *Free v. Bland*,[25] *Yiatchos v. Yiatchos*,[26] and *Hisquierdo*,[27] and concludes "that there is no precedent supporting admission of the [*McCarty*] case to the exclusive club."[28] At most, Justice Rehnquist concludes, the majority should have struck down California's community property law only to the extent of its conflict with federal law.[29]

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21. *See id.* at ___, 101 S. Ct. at 2746, 69 L. Ed. 2d at 608 (Rehnquist, J., dissenting).

22. *See id.* at ___, 101 S. Ct. at 2743, 69 L. Ed. 2d at 609 (Rehnquist, J., dissenting).

23. *Compare id.* at ___, 101 S. Ct. at 2744, 69 L. Ed. 2d at 609 (Rehnquist, J., dissenting) ("Congress has not enacted a schedule governing rights of ex-spouses to military retired pay") *with* McCune v. Essig, 199 U.S. 382, 389 (1905) (United States statute relating to perfecting of homestead claim specifically provided for succession of interests and in conflict with Washington community property law as relates to intestate succession).

24. *Compare* McCarty v. McCarty, ___U.S.___, ___, 101 S. Ct. 2728, 2744-45, 69 L. Ed. 2d 589, 610-11 (1981) (Rehnquist, J., dissenting) ("forceful and unambiguous language of [Wissner] . . . has no parallel so far as military retired pay is concerned") *with* Wissner v. Wissner, 338 U.S. 655, 658-59 (1950) (Congress specifically provided that servicemen had the right to designate any beneficiary and to subsequently change named beneficiary).

25. *Compare* McCarty v. McCarty, ___U.S.___, ___, 101 S. Ct. 2728, 2745, 69 L. Ed. 2d 589, 611 (1981) (Rehnquist, J., dissenting) (language evidencing Congressional intent for federal pre-emption not found in military retired pay section) *with* Free v. Bland, 369 U.S. 663, 666-68 (1962) (community property law prohibiting married couple from benefits of survivorship provisions of treasury regulation conflicted with and was pre-empted by federal regulation).

26. *Compare* McCarty v. McCarty, ___U.S.___, ___, 101 S. Ct. 2728, 2745, 69 L. Ed. 2d 589, 611 (1981) (Rehnquist, J., dissenting) (military retired pay section lacks specific language for federal pre-emption) *with* Yiatchos v. Yiatchos, 376 U.S. 306, 307 (1964) (pre-emption of state community property law when federal treasury regulation clearly conflicted).

27. *Compare* McCarty v. McCarty, ___U.S.___, ___, 101 S. Ct. 2728, 2745, 69 L. Ed. 2d 587, 611 (1981) (Rehnquist, J., dissenting) (*McCarty* "is not *Hisquierdo* revisited") *with* Hisquierdo v. Hisquierdo, 439 U.S. 572, 590 (Congress by clear and specific language in Railroad Retirement Act intended benefits go to retired worker alone and not spouse).

28. McCarty v. McCarty, ___U.S.___, ___, 101 S. Ct. 2728, 2744, 69 L. Ed. 2d 587, 609 (1981) (Rehnquist, J., dissenting).

29. *See id.* at ___, 101 S. Ct. 2728, 2744, n.1, 69 L. Ed. 2d 589, 610 n.1 (Rehnquist, J.,

III. PRACTICAL EFFECTS

The dissenting opinion by Justice Rehnquist is better reasoned and finds more support in case law. There are, however, practical effects of the majority's decision not discussed by Justice Rehnquist, which further militate against the decision adopted by the majority in *McCarty*. First, *McCarty* will give an unexpected windfall to all military personnel, both active and retired. In Texas, where there are a significant number of military retirees, there is no doubt that this number will increase inasmuch as Texas law does not provide for court ordered ex-spousal support,[30] or garnishment of wages,[31] and allows a great amount of exempt property.[32] Moreover, since the *McCarty* court designates military retirement as current compensation, an ex-spouse in Texas has only a "fair share" of community property at the time of divorce and in California a "substantially equal division" of community property, sans military pay.[33]

Since military families move often—by some statistics 13.7 times in an average 20 year career[34]—the military family usually does not purchase the family home and furniture that are a significant portion of most marital estates. This pattern of many moves often precludes the non-military spouse from pursuing a career of her own. Even if she does obtain a job, she seldom remains in one location long enough to acquire any retirement interests or significant promotions. The military spouse is an integral part of military organization and traditionally moves the possessions, transfers the children to their new school, unpacks in the new house, and does

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dissenting). Justice Rehnquist argues that *McCarty* does not present "the rare occasion where state family law has come into conflict with the federal statute [thereby giving] this Court . . . limited review under the Supremacy Clause to a determination whether Congress has 'positively required by direct enactment' that state law be pre-empted." *Id.* at ___, 101 S. Ct. at 2743, 69 L. Ed. 2d at 608 (Rehnquist, J., dissenting) (quoting Hisquierdo v. Hisquierdo, 439 U.S. 572, 581 (1979)).

30. *See* Francis v. Francis, 412 S.W.2d 29, 32 (Tex. 1967).

31. *See* TEX. CONST. art. XVI, § 28; TEX. REV. CIV. STAT. ANN. art. 4099 (Vernon 1966).

32. *See* TEX. CONST. art. XVI, §§ 49, 50, 51 (as amended in 1973); TEX. REV. CIV. STAT. ANN. arts. 3833-3836 (Vernon 1966 & Supp. 1982).

33. *See* CAL. CIV. CODE § 4800(b)(1) (Deering Supp. 1981); TEX. FAM. CODE ANN. § 3.63 (Vernon Supp. 1982).

34. *See* Statistics Compiled by ACTION for Former Military Wives, *reprinted in* Action, The Supreme Court Cuts Lifeline To Thousands Of Women And Children (available from AFMU, 2102 Teri Road, Austin, Texas 78744).

all the necessary settling while the military man is off on his new assignment. Denying the non-military spouse participation in the retirement benefits can leave that ex-spouse with no resources while the military spouse has a secured income for life.

A. Texas Cases—Pre-McCarty

In *Busby v. Busby*,[35] the Texas Supreme Court held that military retirement pay was a community asset divisible at divorce.[36] Moreover, in *Cearley v. Cearley*,[37] the supreme court held that military retired pay was divisible whether the retirement entitlement was "vested" or "unvested."[38] Subsequent to the *Hisquierdo* decision, the Texas Supreme Court in *Eichelberger v. Eichelberger*,[39] ruled that Railroad Retirement Act benefits were not divisible by a Texas decree.[40] A similar result for Veterans Administration disability payments was reached in *Ex parte Johnson*.[41] Finally, in *Ex parte Burson*,[42] the supreme court upheld a disabled serviceman's election to receive disability pay rather than military retired pay on the ground that the supremacy clause pre-empted division of the disability pay.[43] The *Burson* court upheld the election despite the fact that the trial court had ordered the serviceman to pay a portion of his retired pay to his ex-wife.[44]

B. McCarty—The Aftermath

There have been predictable reactions from various special inter-

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35. 457 S.W.2d 551 (Tex. 1970).

36. *See id.* at 554.

37. 544 S.W.2d 661 (Tex. 1976).

38. *See id.* at 666.

39. 582 S.W.2d 395 (Tex. 1979).

40. *See id.* at 401.

41. 591 S.W.2d 453, 456 (Tex. 1980); *see also Ex parte* Pummill, 606 S.W.2d 707, 709 (Tex. Civ. App.—Fort Worth 1980, no writ) (prospective VA benefits not divisible).

42. 615 S.W.2d 192 (Tex. 1980).

43. *See id.* at 196.

44. *See id.* at 196. *Compare Ex parte* Johnson, 591 S.W.2d 453, 456 (Tex. 1980) (VA benefits not divisible pursuant to community property law) *and* 38 U.S.C. § 3101 (1976 & Supp. III 1979) (nonassignability and exempt status of VA benefits) *with* Busby v. Busby, 457 S.W.2d 551, 554 (Tex. 1970) (military retired pay divisible under Texas community property law) *and* 10 U.S.C. § 1201 (1976) (no specific determination of whether military retirement pay is a personal entitlement). *But see* McCarty v. McCarty, ___U.S.___, ___ 101 S. Ct. 2728, 2742, 69 L. Ed. 2d 589, 605 (1981).

est groups regarding *McCarty*. Servicemen's organizations have reacted triumphantly,[45] ex-spousal organizations with disbelief and regret,[46] and disinterested groups with concern.[47]

The Court itself suggested the answer to the problem lay with

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45. *See Afterburner*, 23 U.S.A. NEWS OF RETIRED PERSONNEL 4 (1981).

46. *See* Scannell, *Military Divorcees: 'We Also Served'*, Wash. Post, Dec 4, 1980, at 8, col. 3.

47. *See* Foster & Freed, *McCarty v. McCarty: Farewell To Arms?*, 1981 N.Y.L.J. 1; Kornfeld, *Military Pensions*, 2 EQUITABLE DISTRIBUTION REP. 1 (1981). Also, the American Bar Family Law Section passed a resolution at its annual meeting in August, 1981, stating as follows:

> WHEREAS the U.S. Supreme Court's recent ruling in *McCarty* has changed the traditional property rights of individuals who work for various branches of the Federal Government; and
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> WHEREAS the *McCarty* ruling has created a broad area of uncertainty for family planning for retirement, and has now created an atmosphere of potential injury and drastic displacement to individuals who are least able to protect their interest; and
>
> WHEREAS it has traditionally been the prerogative of the individual states to define the property rights of their citizens and virtually all states have now adopted legislation creating rights in property as between spouses; and
>
> WHEREAS Congress has shown the sophistication to make various specific exemptions form state property laws, an example being social security;
>
> NOW, THEREFORE, BE IT RESOLVED, that the ABA call upon Congress to enact legislation making all Federal deferred compensations, pensions, retired pay and other compensations, pensions, retired pay and other compensations of that nature subject to state property law.

The Family Law Section of the State Bar of Texas passed a similar resolution at its annual meeting in 1981, and the Board of Directors of the State Bar of Texas directed the Chair of the section to contact all members of the Texas delegation in Congress concerning the resolution.

The resolution was condensed to the following form:

> Be it resolved that the American Bar Association calls upon Congress to inact legislation making all deferred compensation derived from federal employment, such as, pensions, retired pay and other income of that nature, subject to state property law, except as specifically exempted by explicit federal legislation.

This resolution, number 112, was passed by the ABA House of Delegates on January 25, 1982 and has the full force and effect of being the official position of the American Bar Association on the subject. This resolution was passed in direct response to the *McCarty* decision.

In response to the *Ridgway* decision the Family Law Section of the ABA in January 1982, passed a resolution which expands the previous *McCarty* resolution to include "any" employment and not just "federal" employment.

Congress currently has many bills under consideration with hearings held in various committees. *See generally* Statement of Stanford E. Lerch, Chairman, Section of Family Law, Michael E. Barber, Council Member Section of Family Law, and Robert D. Arenstein, Chairman on Interstate and Federal Support Laws and Procedures Section of Family Law, on behalf of the American Bar Association, before the Subcommittee on Manpower and Personnel Committee on Armed Services of the United States Senate concerning S. 1814 (Feb. 10, 1982).

Congress.[48] As of January 1, 1982, however, none of several bills were reported out of subcommittees even after hearings.[49] There remains the hopeful possibility that legislation will be enacted changing the statute under which the Court based its decision.

1. Offsetting Military Retired Pay to Reach Fair and Just Division of Property

Insofar as *McCarty* holds that military retired pay is not marital property subject to division under state community property laws the issue still remains whether retired pay can be considered in allocating property to the other spouse under the "just and right" provision of the Texas Family Code section 3.63.[50] *Hisquierdo*, clearly disallows awards of property from the retired railroad employee to his spouse to offset the benefits received under the Railroad Retirement Act.[51] *McCarty* indicates that the same prohibition against offsetting property must also be followed regarding military retired pay.[52] If military retired pay is not marital prop-

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48. *See* S. 1814, 97th Cong., 1st Sess. (1981) (state courts have power to distribute community or equitable interest in retirement pay); S. 1772, 97th Cong., 1st Sess. (1981) (non-pre-emption of state law for military retired pay); S. 1648, 97th Cong., 1st Sess. (1981) (military spouse retirement equity act); S. 1453, 97th Cong., 1st Sess. (1981) (disposition of retired benefits between member and spouse). S. 888, 97th Cong., 1st Sess. (1981) (bill to assure equality of economic opportunities); S. 530, 97th Cong., 1st Sess. (1981) (amendment of Railroad Retirement Act to provide for divorced or surviving spouses if married for ten years or more); H. 1926, 97th Cong., 1st Sess. (1981) (amend Railroad Retirement Act so as not to pre-empt state property law); H. 1641, 97th Cong., 1st Sess. (1981) (to amend IRC and ERISA to provide for greater protection for women in private pension plans); H. 1265, 97th Cong., 1st Sess. (1981) (amendment of Railroad Retirement Act to eliminate the years of service limitation credit for military service to war time service); H. 195, 97th Cong., 1st Sess. (1981) (provision for benefits to divorced person under Railroad Retirement Act); H.R. 3117, 97th Cong., 1st Sess. (1981) (assure equality); H.R. 3039, 97th Cong., 1st Sess. (1981) (provide ten year spouse portion of annuity); H.R. 1711, 97th Cong., 1st Sess. (1981) (authorize court ordered payments).

49. *See* S. 1453, 97th Cong., 1st Sess. (1981) (disposition of retired benefits between member and spouse); S. 1648, 97th Cong., 1st Sess. (1981) (military spouse retirement equity act); H.R. 1711, 97th Cong., 1st Sess. (1981) (authorize court ordered payments); H.R. 3039, 97th Cong., 1st Sess. (1981) (provide ten year spouse portion of annuity); H.R. 3117, 97th Cong., 1st Sess. (1981) (assure equality).

50. *See* McCarty v. McCarty, ___U.S.___, ___, 101 S. Ct. 2728, 2742, 69 L. Ed. 2d 589, 607 (1981); TEX. FAM. CODE ANN. § 3.63 (Vernon Supp. 1982).

51. *See* Hisquierdo v. Hisquierdo, 439 U.S. 572, 590 (1979); Eichelberger v. Eichelburger, 582 S.W.2d 395, 401 (Tex. 1979).

52. *See* McCarty v. McCarty, ___U.S.___, ___, 101 S. Ct. 2728, 2742, 69 L. Ed. 2d 589, 607 (1981).

erty in a divorce proceeding, it follows that it is not marital property during the marriage either. Inasmuch as military retired pay is not marital property during the marriage, a significant problem arises in tracing assets procured with military retired pay. As the Texas Supreme Court noted in *Eggemeyer v. Eggemeyer*,[53] the separate property of a spouse is not subject to divestment in a divorce proceeding if invested in real estate.[54] Texas, as a result of the present laws, will certainly become a haven for military personnel or military retirees contemplating divorce.

IV. The Question of Retroactivity

Although the majority seems to limit its ruling in *McCarty* only to the military retirement issue before the Court, the question of the effect of *McCarty* on any divorce judgment involving anything to do with the military or anything to do with retirement remains open.

A. Enforcement of Pre-McCarty Orders by Contempt

The retroactivity question is, of course, totally intertwined with enforcement of existing final decrees. Texas, in the eyes of some commentators, has extremely weak and ineffective enforcement procedures.[55] The Texas Supreme Court, however, has upheld enforcement by contempt of a clear and specific award of retirement payments in *Ex parte Gorena*.[56]

In light of *McCarty* several military retirees have quit paying military retired pay (which had been divided by a court decree prior to *McCarty*) to their ex-spouses. In *Ex parte Rodriguez*[57] the serviceman was found in contempt by the district court for failure to pay a portion of military retired pay to his ex-spouse.[58] His application for habeas corpus to the Fourth Court of Appeals was denied on the grounds that *McCarty* was not to be given retroactive effect.[59] The *Rodriguez* panel adopted the dissenting opinion

53. 554 S.W.2d 137 (Tex. 1977).

54. *See id.* at 142. A receiver to collect and disburse rents and income received from the real property can, however, be appointed to support a spouse's child. *See id.* at 152.

55. *See* Foster & Freed, *McCarty v. McCarty: Farewell To Arms*?, 1981 N.Y.L.J. 1, 4 n.17 (Texas's only state that refuses to award alimony, restricts enforcement).

56. 595 S.W.2d 841, 846-47 (1979).

57. No. 04-81-00333-CV, slip op. (Tex. Ct. App. Dec. 10, 1981).

58. *See id.* at 1.

59. *See id.* at 6. *But see Ex parte* Buckhanan, No. 4-81-00243-CV, slip op. (Tex. Ct.

of Associate Justice Klingeman in the case of *Ex parte Buckanan*.[60] Justice Klingeman, relying upon the retroactivity test of *Chevron Oil Co. v. Huson*,[61] determined that substantial inequitable results would follow if *McCarty* was given retroactive effect.[62] Furthermore, the *Rodriguez* court found nothing in *McCarty* which would suggest that the Supreme Court "intended to invalidate, or otherwise render unenforceable, prior valid and subsisting state court judgments."[63] The Third Court of Appeals in *Ex parte Gaudion*[64] also held that *McCarty* should not have retroactive application.[65]

Moreover, a California Appellate Court in *In re Sheldon*[66] declared that McCarty should only have retroactive application if the military spouse requested that the trial court reserve jurisdiction in the character of the interest in the pensions, or timely raised and briefed the federal pre-emption issue on appeal.[67] Furthermore, as the Supreme Court noted in *Chicot County Drainage*

App. Oct. 15, 1981) (panel of Fourth Court of Appeals held *McCarty* rendered district court's judgment void). The Fourth Court of Appeals recently sat en banc in the case of *Ex parte Hobermale* to determine whether that court would hold *McCarty* retroactive.

60. *See* 4-81-00243-CV, slip op. at 9 (Tex. Ct. App. Oct. 15, 1981) (Klingeman, J., dissenting).

61. 404 U.S. 97, 106-07 (1971). The test for retroactivity is set forth as follows:

> In our cases dealing with the nonretroactivity question, we have generally considered three separate factors. First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, . . . or by deciding an issue of first impression whose resolution was not clearly foreshadowed, ... Second, it has been stressed that 'we must . . . weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation.' Finally, we have weighed the inequity imposed by retroactive application, for '[w]here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of nonretroactivity.'

Id. at 106-07 (citations omitted).

62. *See Ex parte* Rodriguez, No. 04-81-00333-CV, slip op. at 6 (Tex. Ct. App. Dec. 10, 1981) (quoting *Ex parte* Buckhanan, No. 4-81-00243-CV, slip op. at 12 (Tex. Ct. App. Oct. 15, 1981) (Klingeman, J., dissenting)).

63. *Id.* at 7; *see* Erspan v. Badgett, 659 F.2d 26, 28 (5th Cir. 1981).

64. No. 13, 642 T2-82-06-139, slip op. (Tex. Ct. App. Feb. 3, 1982).

65. *See id.* at 4. The Eighth Court of Appeals in *Ex parte* Acree, No. 08-81-00256-CV slip op. (Tex. Ct. App. Nov. 25, 1981) followed *Ex parte Buckanan* to hold that *McCarty* was to be given retroactive effect. Therefore, the Texas Supreme Court will have to rectify the decisions of the various courts of appeals.

66. 177 Cal. Rptr. 380 (1981).

67. *See id.* at 385.

Dist. v. Baxter State Bank,[68] "[t]he past cannot always be erased by a new judicial declaration."[69]

Unfortunately *Ridgway v. Ridgway*,[70] enunciates a powerful indication of total retroactivity. In *Ridgway*, husband and wife, after long negotiations, agreed to a divorce. In the divorce decree the husband-serviceman was ordered to, and also by agreement contracted to keep the children of the marriage as the beneficiaries of his Servicemen's Group Life Insurance (SGLIA). The husband remarried, and then effectively changed the beneficiary of his insurance to his new wife. Upon his death, the Maine Supreme Court invoked a constructive trust in favor of the children on the proceeds from the policy.[71]

The United States Supreme Court reversed, holding that the husband-serviceman's designation of his new wife as beneficiary prevails over the constructive trust upon the insurance proceeds as agreed, and also as ordered by the state court.[72] The Supreme Court justified this pre-emption of state law by demonstrating that the provisions of the Serviceman's Group Life Insurance Act of 1965 allowing the insured service member the right to alter or change his beneficiary designation at any time by the proper procedure will prevail over and displace any inconsistent state law.[73] The second reason given by the Supreme court in *Ridgway* is that a constructive trust would be a forbidden seizure of the proceeds, because the SGLIA has provisions exempting policy proceeds from the claims of creditors and from attachment, levy or seizure "by any legal process."[74] By this reason, the Court sanctified its earlier disinfranchising of spouses of military retirees in *McCarty* and extended this logical result by placing children of a spouse in the same class as ordinary creditors of that spouse. *Ridgway* sparked a vigorous dissent by Justice Powell, who called the majority's decision "uniquely unjust", and was joined by Justice Rehnquist, the

68. 308 U.S. 371 (1940).

69. *Id.* at 374.

70. 50 U.S.L.W. 4006 (U.S. Nov. 10, 1981).

71. *See* Ridgway v. Prudential Ins. Co. of America, 419 A.2d 1030, 1035 (Me. 1980).

72. *See* Ridgway v. Ridgway, 50 U.S.L.W. 4006, 4011 (U.S. Nov. 10, 1981).

73. *See id.* at 4008-10; 38 U.S.C. § 770 (1976).

74. *See* Ridgway v. Ridgway, 50 U.S.L.W. 4006, 4010 (U.S. Nov. 10, 1981); 38 U.S.C. § 770(g) (1976).

author of the *McCarty* dissent.[75] Justice Stevens also dissented, expressing doubt that Congress intended to pre-empt the serviceman's support obligations to this family dependents, noting that even "spendthrift trusts" can be reached for family support.[76] He found additional support for this argument in the 1975 Congressional Amendments which allow a serviceman's pay to be attached for support or alimony.[77]

Combining *Ridgway* and *McCarty*, one can argue that no court award of military retirement is enforceable either by contempt or by contract, insofar as these decisions indicate that neither the parties nor the court had the ability to agree or to order such an award in the first place.

V. THE NIGHTMARE OF *McCarty*: ITS APPLICABILITY TO ERISA

Admittedly, a minority of divorced spouses are affected by the Railroad Retirement Act, Veterans Administration disability, military retirement, or GI Insurance. In the aftermath of *Hisquierdo*, *McCarty*, and *Ridgway*, the larger question is what other "benefits" are not subject to division in any divorce.

Before *Hisquierdo*, Texas cases had held that many non-tangible items were divisible by the divorce court: vested retirement,[78] unvested retirement,[79] non-divided items in decree,[80] non-government benefits,[81] Federal Civil Service Retirement,[82] state or local government pensions,[83] and earned property rights.[84] After *Hisquierdo*, the Texas courts held that *Hisquierdo* determined the award of "benefits" and ruled that railroad retirement,[85] military readjust-

75. *See* Ridgway v. Ridgway, 50 U.S.L.W. 4006, 4011 (U.S. Nov. 10, 1981) (Powell, J., dissenting).

76. *See id.* at 4013, 4014 (Stevens, J., dissenting).

77. *See id.* at 4013, 4014 (Stevens, J., dissenting).

78. *See* Busby v. Busby, 457 S.W.2d 551, 554 (Tex. 1970).

79. *See* Cearley v. Cearley, 544 S.W.2d 661, 666 (Tex. 1977).

80. *See* Taggert v. Taggert, 552 S.W.2d 442, 423 (Tex. 1977).

81. *See* Herring v. Blakely, 385 S.W.2d 843, 847-48 (Tex. 1965).

82. *See In re* Batten, 543 S.W.2d 147, 150 (Tex. Civ. App.—Texarkana 1976, writ dism'd).

83. *See* Collida v. Collida, 546 S.W.2d 708, 709 (Tex. Civ. App.—Beaumont 1977, writ dism'd).

84. *See* Simmons v. Simmons, 568 S.W.2d 168, 170 (Tex. Civ. App.—Dallas 1978, writ dism'd).

85. *See* Eichelberger v. Eichelberger, 582 S.W.2d 395, 401 (Tex. 1979).

ment allowance,[86] and VA disability compensation payments[87] are not subject to division as property.

Now there is concern that all retirement benefits will be affected under the majority reasoning in *McCarty*.

A. *ERISA*

ERISA covers a wide range of private benefit plans for employees and their beneficiaries, and contains both pre-emption and anti-alienation provisions.[88] Virtually all private retirement plans are regulated by ERISA.[89] Although the majority opinion in *Hisquierdo* distinguished ERISA regulated plans because they are created by private contract, *McCarty* and *Ridgway* suggest that the issue may not be settled.[90] As Justice Rehnquist noted in *McCarty* "I am not certain whether the analysis was wrong in *Hisquierdo* or in this case, but it is clear that both cannot be correct. One is led to inquire where this moving target will next appear."[91]

The *Hisquierdo* test, as used in *McCarty* and *Ridgway*, requires only a minimal "clear expression" of Congressional intent that state property law should be pre-empted. It is clear under section 1144 of ERISA that Congress intended to preempt state law in regard to employee benefit plans.[92]

The extent of federal pre-emption in regard to ERISA benefits is undetermined. As the Supreme Court noted in *Alessi v. Raybestos-Manhattan, Inc.*[93] several "courts have reached varying conclusions as to the meaning of ERISA's pre-emptive language in other contexts."[94] *Alessi* held that a New Jersey statute which calculated

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86. *See* Perez v. Perez, 587 S.W.2d 671, 673 (Tex. 1979).

87. *See Ex parte* Johnson, 591 S.W.2d 453, 456 (Tex. 1979).

88. *See* 29 U.S.C. § 1001 (1976 & Supp. 1981).

89. *See id.* § 1003 (1975).

90. *Compare* Ridgway v. Ridgway, 50 U.S.L.W. 4006, 4009-10 (U.S. Nov. 10, 1981) (Congress allowed servicemen right to change beneficiary which could derogate rights of family under state law) *and* McCarty v. McCarty, ___U.S.___, ___, 101 S. Ct. 2728, 2747, 69 L. Ed. 2d 589, 613 (1981) (Rehnquist, J., dissenting) (*McCarty* not logical extension of *Hisquierdo*) *with* Hisquierdo v. Hisquierdo, 439 U.S. 572, 590 n.24 (1979) (Congress intended to merely regulate ERISA).

91. McCarty v. McCarty, ___U.S.___, ___, 101 S. Ct. 2728, 2747, 69 L. Ed. 2d 589, 613 (1981) (Rehnquist, J., dissenting).

92. *See* 29 U.S.C. § 1144 (1976).

93. ___U.S.___, 101 S. Ct. 1895, 69 L. Ed. 2d 402 (1981).

94. *See id.* at ___, 101 S. Ct. at 1907 n.21, 68 L. Ed. 2d at 418 n.21.

pension benefits without integrating other pension benefits was in direct clash with ERISA's provisions for integrating workmen's compensation awards.[95] The *Alessi* Court specifically refused to address the issue of pre-emption in regard to state court division of ERISA benefits pursuant to applicable community property law.[96] Lower federal courts and state courts have generally held that such divisions are not pre-empted by ERISA.[97] In *Stone v. Stone*,[98] the Court of Appeals for the Ninth Circuit held that ERISA did not pre-empt California's community property laws and upheld the state court's division of ERISA benefits.[99] Moreover, the Texas Supreme Court in *Burson* noted the holding of the *Stone* court and decisions of other jurisdictions with approval.[100]

Burson, however, is a prime example of the dangers in relying upon state and lower federal court decisions as to whether federal statutorily created retirement and benefit plans pre-empt state community property laws.[101] The Texas Supreme Court in *Burson*, after noting that the United States Supreme Court had recently heard oral argument in the *McCarty* case, stated that military retirement pay was subject to state community property law.[102] Similarly, the California Supreme Court, in *Hisquierdo*, held that benefits received under the Railroad Retirement Act were subject to that state's community property laws; this decision too was reversed by the United States Supreme Court.[103] Recently, in *Ridgway* the United States Supreme Court reversed the Maine Supreme Court to hold that under SGLIA a serviceman could change his beneficiary in derogation of state community property law.[104]

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95. *See id.* at ___, 101 S. Ct. at 1905-1907, 68 L. Ed. 2d at 415-418.

96. *See id.* at ___, 101 S. Ct. at 1907 n.21, 68 L. Ed. 2d at 418 n.21.

97. *See* Stone v. Stone, 632 F.2d 740, 741-42 (9th Cir. 1980); Operating Engineers Local No. 428 v. Zamborsky, 470 F. Supp. 1174, 1175-76 (D. Ariz. 1979); *In re* Marriage of Compa, 152 Cal. Rptr. 362, 365-68 (Cal. App. 1979); *Ex parte* Burson, 615 S.W.2d 192, 195 n.5 (Tex. 1981). *But see* Francis v. United Technologies Corp., 458 F. Supp. 84, 85-87 (N.D. Cal. 1978).

98. 632 F.2d 740 (9th Cir. 1980).

99. *See id.* at 741-42.

100. *See Ex parte* Burson, 615 S.W.2d 192, 195 n.5 (Tex. 1981).

101. *See id.* at 193-194 n.2 (Texas court construes military retirement act not to pre-empt state court division under community property).

102. *See id.* at 193-94 n.2.

103. *See In re* Marriage of Hisquierdo, 139 Cal. Rptr. 590, 593, 566 P.2d 224, 227 (Cal. 1977), *rev'd*, 439 U.S. 572, 583-587 (1979).

104. Ridgway v. Ridgway, 50 U.S.L.W. 4006, 4011 (U.S. Nov. 10, 1981).

As Justice Rehnquist noted in *McCarty*, it is difficult to ascertain where the "moving target" of federal pre-emption "will next appear."[105] It would be safe to project that ERISA could be the next "target" for federal preemption.

VI. The Future

Although the United States Supreme Court since *Hisquierdo* has denied certiorari on questions of pre-emption of state law and division of property, one contemplates the results of the next case that the court decides in the family law area. While on the one hand, the Chief Justice notes that the federal courts are over-burdened, the Court's incursions into matters which have previously been exclusively state matrimonial law concerns will not lessen the federal court's load. Congress has the power to change the statutes; the lobbies—the more powerful one aligned with the military spouse—will have their influence in the slow process of legislative enactment and change.

The burden of *McCarty* and *Ridgway* is crushingly heavy in Texas. The liberal exemption laws, lax enforcement procedures, and the lack of any legal mechanism to correct the sudden and dramatic effect of these decisions mandates urgent action by the Texas Legislature for some sort of spousal support after divorce. Some Texas jurists foresaw the trend at the time of the *Hisquierdo* decision.[106] The Texas Legislature could choose to join the other 49 states in allowing some kind of ex-spousal support. But until Congress or state legislatures enact changes or the United States Supreme Court rules again, it is clear that chaos will reign in divorce courts over retirement questions.

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105. *See* McCarty v. McCarty, ___U.S.___, 101 S. Ct. 2728, 2747, 69 L. Ed. 2d 589, 613 (1981) (Rehnquist, J., dissenting).

106. Justice Quentin Keith of the Beaumont Court of Appeals correctly predicted the trend to follow *Hisquierdo* in his presentation to the Family Law Section of the State Bar of Texas, June 27, 1979, in San Antonio, Texas. Justice Keith further implored the urgent necessity for Texas to finally adopt a spousal support statute, i.e., limited alimony in an *Eichelburger* situation. *See* Address by Justice Quentin Keith, State Bar of Texas, Family Law Section (June 27, 1979).