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Domestic Relations

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DOMESTIC RELATIONS

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I. INTRODUCTION

This article reviews selected domestic relations cases decided during the Survey year. The article is divided into three sections: Jurisdiction, Custody and Visitation, and Property Division. The Property Division section includes a review of the Uniformed Services Former Spouses Protection Act.

II. JURISDICTION

The New Mexico Supreme Court decided two cases involving state court jurisdiction over Indians and Indian property in the context of family law during the Survey year.[1] In both cases the aggrieved party has sought review by the United States Supreme Court.

In *Lonewolf v. Lonewolf*,[2] Wife was non-Indian, Husband was Indian and an enrolled member of the Santa Clara Pueblo. Wife filed a petition for legal separation. Husband counterclaimed for divorce, and in his Answer and Counterclaim challenged the state court's jurisdiction over both the parties' real property located within the Santa Clara Pueblo and their personal property located on and off the reservation. The district court found it lacked jurisdiction over the real property on the reservation, but took jurisdiction to decide issues involving the parties' personal property.[3]

The parties then stipulated to the division of most of their personal property, but the stipulation failed to include the value or distribution of fifty-eight pieces of existing, but missing Indian pottery. After a hearing, the trial court determined the missing pottery was community property, and the value of the community interest in the pottery was $56,618. After ascertaining various deductions and credits, the court found that Husband owed Wife $18,309.[4] Husband appealed, and the supreme court affirmed the decision of the trial court.[5]

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1. Lonewolf v. Lonewolf, 99 N.M. 300, 657 P.2d 627, *cert. granted*, 52 U.S.L.W. 3422 (U.S. Nov. 29, 1983) (No. 82-1564); State *ex rel.* Dep't of Human Serv. v. Jojola, 99 N.M. 500, 660 P.2d 590, *cert. denied*, 52 U.S.L.W. 3260 (U.S. Oct. 4, 1983) (No. 82-2049).

2. 99 N.M. 300, 657 P.2d 627 (1983).

3. *Id.* at 301, 657 P.2d at 628.

4. *Id.*

5. *Id.* at 300, 657 P.2d at 627.

Quoting *Williams v. Lee*,[6] the supreme court set out the test for the exercise of state court power over matters involving Indians: "whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them."[7] The court further noted that *Chino v. Chino*[8] established three criteria in New Mexico for determining the application of the infringement test in *Williams:* "(1) whether the parties are Indians or non-Indians, (2) whether the cause of action arose within the Indian reservation, and (3) what is the nature of the interest to be protected."[9] Using these criteria, the supreme court held that by taking jurisdiction over the personal property in this case, the state did not infringe upon Indian self-government, and therefore, jurisdiction was proper.

Although the parties did not present the issue to the supreme court as one of first impression, this was the first case in New Mexico to address the narrow question of whether the state court has subject matter jurisdiction incident to a divorce to divide personal property acquired during marriage by an Indian and non-Indian. Applying the *Chino* criteria, it was undisputed that one of the parties was Indian and the other was non-Indian. The supreme court implicitly found that the second *Chino* criterion also was satisfied because the issue of the property settlement arose in connection with the divorce in state court. The court relied on N.M. Stat. Ann. §40-3-14 (1978)[10] to hold that Wife had the power to control and dispose of the community property and that this right traveled with her; it was not attached to tribal land.[11] The court did not analyze the third *Chino* criterion.

The court found that Husband submitted to the state court's jurisdiction when he filed his counterclaim and when he stipulated to the value and distribution of most of the parties' personal property. The court held that Husband could not then challenge the state court's jurisdiction as to only the pottery in question.[12] The court was correct in recognizing that by appearing in the action, Husband submitted himself to the personal jurisdiction of the court. The supreme court, however, did not specifically analyze whether it had subject matter jurisdiction over the property. Sub-

6. 358 U.S. 217 (1959).

7. *Id.* at 220.

8. 90 N.M. 203, 561 P.2d 476 (1977).

9. *Id.* at 206, 561 P.2d at 479.

10. 99 N.M. at 301, 657 P.2d at 628.

11. The statute provides that ". . . either spouse alone has full power to manage, control, dispose of and encumber the entire community personal property."

12. 99 N.M. at 302, 657 P.2d at 629. The court acknowledged that the property in question was located on the Santa Clara reservation. *Id.* at 300, 657 P.2d at 627. At the time of their separation and for several years before, the parties' home, studio, gallery, and business were on the reservation. Record at 75. The missing pots had been left in Husband's possession on the reservation. Record at 88.

ject matter jurisdiction cannot be conferred by consent.[13] This case could be viewed as involving the principle of "divisible divorce,"[14] whereby the state court has jurisdiction to alter the marital status of the parties, but may lack subject matter jurisdiction to divide personal property located on the reservation.[15]

State ex rel. Department of Human Services v. Jojola[16] involved a suit by the Department of Human Services ("DHS") against Jojola to establish paternity and to compel child support. DHS alleged that Jojola was the natural father of a minor child. The child's mother applied for public assistance and assigned her right to support to the state. Jojola, the mother, and the minor child were all residents and members of Isleta Pueblo. On Jojola's motion, the trial court dismissed DHS's petition for lack of subject matter jurisdiction.[17] The state appealed.

On appeal, Jojola argued that the Isleta Pueblo had exclusive jurisdiction to regulate the domestic relations of its members. The supreme court invoked both the *Williams* infringement test,[18] and the *Chino* criteria for determining whether the test was met.[19] The court considered each of the *Chino* criteria, found there was no infringement of Indian self-government, reversed the trial court, and remanded the case.[20] The supreme court held that when the mother assigned her right to compel support to DHS, a non-Indian party, DHS became subrogated to the mother's position and had the right as the real party in interest to compel support directly from the father. The suit, therefore, was between an Indian and a non-Indian. The mother's request for public assistance and the assignment of her right satisfied the second *Chino* criterion. In addition, the court agreed with DHS that the interest to be protected was the state's interest in the uniform enforcement of paternity determinations and child support obligations, and not the tribe's interest in regulating the domestic affairs of its members.[21]

In March 1983, Jojola appealed the supreme court decision to the United States Supreme Court.[22] In July 1983, DHS moved to dismiss the

13. *See* Chavez v. County of Valencia, 86 N.M. 205, 521 P.2d 1154 (1974).

14. Estin v. Estin, 334 U.S. 541, 549 (1948).

15. For a thorough analysis of the issues raised in *Lonewolf*, see Sheppard v. Sheppard, 104 Idaho 1, 655 P.2d 895 (1982).

16. 99 N.M. 500, 660 P.2d 590 (1983).

17. *Id.* at 501, 660 P.2d at 591. Jojola also moved to dismiss for lack of personal jurisdiction over him. The court found that it had personal jurisdiction over him because he had been served with the petition and summons at the campus of the Albuquerque Technical Vocational Institute outside of the Isleta Pueblo. *Id.* at 502, 660 P.2d at 592.

18. *See supra* text accompanying note 7.

19. *See supra* text accompanying note 8.

20. 99 N.M. at 500, 660 P.2d at 590.

21. *Id.* at 503, 660 P.2d at 593.

22. The Supreme Court denied certiorari. 52 U.S.L.W. 3260 (U.S. Oct. 4, 1983) (No. 82-2049).

appeal as moot because on July 1, 1983, DHS promulgated a new policy governing the procedure to be followed in all cases seeking to establish paternity and compel child support where the mother, the child, and the putative father are all Indians residing on a reservation.[23] The policy defers to Indian tribal sovereignty and recognizes the right of the tribes to regulate the domestic relations of their members. It provides that if all the parties are subject to tribal court jurisdiction, the natural mother will bring the paternity action in her own name in tribal court, and the Child Support Enforcement Bureau will not seek to sue the father in state court.[24] Pursuant to the regulation, the mother filed a paternity and child support action in Isleta Tribal Court, represented by a DHS attorney.[25] Before the case was heard on remand in the state district court, DHS moved to dismiss on the ground that the issue would be pursued in the Isleta Tribal Court. The motion was granted over Jojola's objection and the suit was dismissed without prejudice.[26]

III. CUSTODY AND VISITATION

During the Survey year, the supreme court decided the first two cases arising under the New Mexico Child Custody Jurisdiction Act (NMCCJA).[27] In each case, the court demonstrated how the Act is to be construed to determine which of two competing states has jurisdiction over visitation rights.

Olsen v. Olsen[28] was the first case to construe the NMCCJA. The mother and child had moved to New Mexico in 1976, and the parties were divorced in Wyoming in 1977. The divorce decree provided that the father would have summer visitation with the child starting in 1980, when the child was six years old. In the summer of 1980, the child visited the father in Wyoming. The father instituted change of custody proceedings there, and refused to return the child. The parties modified the visitation by stipulation entered in the Wyoming court. The child returned to New Mexico that summer and lived with her mother. The father moved to Oklahoma during 1981.

On April 7, 1981, before the effective date of the NMCCJA,[29] the mother brought suit in New Mexico to modify further the father's visitation rights. On October 18, 1981, after the effective date of the NMCCJA,

23. For a description of the policy, see 3 Dep't. of Human Serv. Income Support Div. Program Manual § 529 (1983).
24. *Id.*
25. 99 N.M. at 501, 660 P.2d at 591.
26. *Id.*
27. N.M. Stat. Ann. §§ 40-10-1 to -24 (Repl. Pamp. 1983).
28. 98 N.M. 644, 651 P.2d 1288 (1982).
29. The Act became effective on July 1, 1981. 1981 N.M. Laws ch. 119 § 26.

the court entered an order limiting the father to visiting with the child in Quay County for the first three visits, and thereafter for two or three days at a time only in New Mexico. The supreme court held that the case was controlled by the NMCCJA.[30] Under the Act, custody determination includes determination of visitation rights.[31]

The supreme court found that New Mexico had the necessary jurisdiction to modify the Wyoming decree.[32] New Mexico may modify a foreign custody decree only if the foreign court no longer has jurisdiction under requirements substantially in accordance with the NMCCJA or has declined to assume jurisdiction, and the New Mexico court has jurisdiction under the NMCCJA.[33] The court concluded that at the time of the New Mexico proceedings, the Wyoming court did not have jurisdiction to modify its decree.[34] In 1981, none of the prerequisites to jurisdiction were met in Wyoming.[35]

30. 98 N.M. at 646, 651 P.2d at 1290. In Tufares v. Wright, 98 N.M. 8, 644 P.2d 522 (1982), the court held that the Parental Kidnapping Protection Act (PKPA), 28 U.S.C. § 1738 (A) (Supp. IV 1980), controlled a case that was pending at the time the Act became effective.

31. N.M. Stat. Ann. § 40-10-3(B) (Repl. Pamp. 1983).

32. 98 N.M. at 647, 651 P.2d at 1291.

33. N.M. Stat. Ann. § 40-10-15 (Repl. Pamp. 1983).

34. 98 N.M. at 647, 651 P.2d at 1291.

35. N.M. Stat. Ann. § 40-10-4 (Repl. Pamp. 1983) provides that:

> A. A district court of New Mexico which is competent to decide child custody matters has jurisdiction to make a child custody determination by initial decree or modification decree under the following circumstances if:
>
> (1) New Mexico:
>
> (a) is the home state of the child at the time of commencement of the proceeding; or
>
> (b) had been the child's home state within six months before commencement of the proceeding and the child is absent from New Mexico because of his removal or retention by a person claiming his custody or for other reasons, and a parent or person acting as parent continues to live in New Mexico;
>
> (2) it is in the best interest of the child that a district court of New Mexico assume jurisdiction because:
>
> (a) the child and his parents, or the child and at least one contestant, have a significant connection with New Mexico; and
>
> (b) there is available in New Mexico substantial evidence concerning the child's present or future care, protection, training and personal relationships;
>
> (3) the child is physically present in New Mexico and:
>
> (a) the child has been abandoned; or
>
> (b) it is necessary in an emergency to protect the child because he has been subjected to or threatened with mistreatment or abuse or is otherwise neglected; or
>
> (4) it appears that:
>
> (a) no other state would have jurisdiction under prerequisites substantially in accordance with Paragraph (1), (2), or (3) of this subsection, or another state has declined to exercise jurisdiction on the ground that New Mexico is the more appropriate forum to determine the custody of the child; and

Following the provisions of the NMCCJA,[36] the supreme court then found that New Mexico had jurisdiction to modify the Wyoming decree.[37] New Mexico was the home state of the child, and she had significant connections with New Mexico. The trial court heard substantial evidence concerning the child's present and future care, protection, training, and personal relationships, and no other state appeared to have jurisdiction at the time of the New Mexico proceedings. The supreme court affirmed the trial court's assumption of jurisdiction.[38]

In *Serna v. Salazar,*[39] the supreme court reversed a trial court's determination that it lacked jurisdiction to modify visitation rights. The parties were divorced in California in 1977, and the decree awarded custody of two minor children to the mother and granted the father reasonable visitation rights. The mother and children moved to New Mexico in 1978, and the children remained here except for a visit to the father in California in the summer of 1980. In October 1980, the father sought to modify the divorce decree in California, and was granted one month's visitation rights. In May 1981, the mother brought an action in New Mexico to further modify the father's visitation rights. The trial court granted the father's motion to decline jurisdiction, and the mother appealed.

As in *Olsen,* the first inquiry was whether California still had jurisdiction under jurisdictional requirements substantially in accordance with the NMCCJA.[40] The supreme court found that it did not. California was not the home state of the children, and the children had no significant connection with California at the time of the New Mexico proceedings. The substantial evidence concerning the children's care, protection, training, and personal relationships was in New Mexico, not California. The children were not present in California at the time of the California

(b) it is in the best interest of the child that the New Mexico district court assume jurisdiction.

B. Except as provided under Paragraphs (3) and (4) of Subsection A of this section, physical presence in New Mexico of the child, or of the child and one of the contestants, is not alone sufficient to confer jurisdiction on a district court of New Mexico to make a child custody determination.

C. Physical presence of the child, while desirable, is not a prerequisite for jurisdiction to determine his custody.

The Wyoming CCJA has prerequisites for jurisdiction substantially in accordance with New Mexico's. *See* Wyo. Stat. § 20-5-104 (1977). Both New Mexico and Wyoming require compliance with only one of the prerequisites to establish jurisdiction.

36. N.M. Stat. Ann. § 40-10-4 (Repl. Pamp. 1983).

37. *Olsen,* 98 N.M. at 647, 651 P.2d at 1291.

38. *Id.* at 648, 651 P.2d at 1292. The father also appealed the trial court's holding that there was a change in circumstances sufficient to strictly limit his visitation rights in the child's best interest. The supreme court reviewed the record and affirmed the trial court on this issue. *Id.*

39. 98 N.M. 648, 651 P.2d 1292 (1982).

40. *Id.* at 650, 651 P.2d at 1294. The California Child Custody Jurisdictional Act's prerequisites for jurisdiction are practically identical to those of New Mexico. *See* Cal. Civ. Code § 5152(1) (West 1983).

modification, and the court found that it would be in the best interest of the children for New Mexico to assume jurisdiction. The supreme court then found that New Mexico had jurisdiction as the home state of the children when the action was commenced,[41] and reversed the trial court.[42] The conclusion that California did not have jurisdiction at the time of the New Mexico proceedings is not as clear as the conclusion about Wyoming's lack of jurisdiction in *Olsen*. In *Serna*, the California court did take jurisdiction in October 1980 to modify its decree at a time when the children's situation was the same as it was in May 1981. The supreme court noted that the situation in October 1980 was not relevant at the time of the New Mexico proceedings.

IV. PROPERTY DIVISION

A. Transmutation

The situation where divorced parties remarried each other and divorced again gave rise to the issue in two cases of the transmutation of separate property into community property.[43] Transmutation is a term to describe arrangements between spouses to change the legal status of their property from separate to community and from community to separate. The party alleging transmutation must establish it by clear and convincing evidence.[44]

In *Nichols v. Nichols*,[45] the parties first married in 1972, and resided in a house in Roswell that Husband had bought in 1970. This house remained Husband's separate property (subject to a community lien) at the time of the first divorce in May 1975. The parties remarried in June 1975. During the second marriage, Husband sold the Roswell house and placed the proceeds in the joint checking and joint savings accounts of the parties. The parties then bought a house in Ruidoso, with the down payment and all subsequent payments on the real estate contract for this property coming from the joint checking account. The parties placed the real estate contract in both their names.[46] At the time of the second divorce, the trial court found that husband had made a gift of his separate property to the community and further held that the Ruidoso house was community property.

41. N.M. Stat. Ann. § 40-10-4(A)(1)(a) (Repl. Pamp. 1983).

42. 98 N.M. at 651, 651 P.2d at 1295.

43. Nichols v. Nichols, 98 N.M. 322, 648 P.2d 780 (1982); Allen v. Allen, 98 N.M. 652, 651 P.2d 1296 (1982).

44. *Allen*, 98 N.M. at 654, 651 P.2d at 1298.

45. 98 N.M. 322, 648 P.2d 780 (1982).

46. *Id.* at 327, 648 P.2d at 785. The deed was not introduced into evidence at trial nor was it the subject of trial testimony. The testimony concerned only the real estate contract. 98 N.M. at 328 n.3, 648 P.2d at 654 n. 3.

On appeal, the supreme court reviewed the law in New Mexico regarding transmutation of separate property into community property. The analysis included a two-step process. The first step was to ascertain the original legal status of the property, which is fixed by the manner and the time of its acquisition. Property acquired by either spouse, or both, during marriage is presumed to be community property.[47] This presumption may be overcome by a preponderance of the evidence.[48] In this case, Husband rebutted the presumption by tracing the funds used to acquire the Ruidoso property to the proceeds of the sale of his Roswell house. Wife then had the burden of proving by clear and convincing evidence the second step of the analysis, the transmutation of this separate property into community property.[49] The supreme court concluded that Wife met this burden by proving Husband's intent to make a gift to the community of his separate property. That the real estate contract was in both parties' names, by itself, was not clear and convincing evidence of the gift. That fact, however, coupled with the commingling of Husband's separate funds in the joint account, and evidence that there had been community expenditures from the joint checking account other than payments on the house, was sufficient for the court to find the occurrence of transmutation.[50]

In *Allen v. Allen*,[51] the parties remarried on April 9, 1979. In August 1979, Wife bought the property in question with her separate funds and took title "as a single woman." Three months later, Wife executed a standard quit claim deed transferring the property to herself and Husband. The deed did not describe how the property was to be held. The parties did not dispute that the property was first purchased with separate funds, so the first step presumption did not apply. The supreme court found that the deed alone was not clear and convincing evidence of transmutation, and held that the property remained Wife's separate property.[52]

B. Value of Community Interest in Professional Corporation

In *Hertz v. Hertz*,[53] the supreme court again[54] reviewed the valuation of the community's interest in a professional corporation at the time of

47. N.M. Stat. Ann. § 40-3-12(A) (Repl. Pamp. 1983).

48. *Nichols*, 98 N.M. at 327, 648 P.2d at 785.

49. *Id.*

50. *Id.* at 330, 648 P.2d at 788.

51. 98 N.M. 652, 651 P.2d 1296 (1982).

52. *Id.* at 654-55, 651 P.2d at 1298-99. *See also* Corley v. Corley, 92 N.M. 716, 594 P.2d 1172 (1979).

53. 99 N.M. 320, 657 P.2d 1169 (1983). *Hertz* involved several issues of divorce law, including the award of alimony, award of attorney fees and costs, compensation to the spouse out of possession of the community residence, the right to immediate possession of a spouse's share of the community property, as well as the valuation of the community's interest in the business and the valuation of the community's interest in Husband's profit sharing plan. This article will discuss only the last two issues.

54. *See* Hurley v. Hurley, 94 N.M. 641, 615 P.2d 256 (1980).

dissolution. Husband was a shareholder in a large law firm. At trial, the essential difference between the parties was in the accounting method used to evaluate the worth of their 2,715 shares in the professional corporation.[55] Wife's expert used the accrual basis[56] to determine that each share was worth $17.32. Using a capitalization of excess earnings method, he then added $6.49 per share for goodwill, for an aggregate community's interest of $64,644.15. This amount included the corporation's deferred compensation plan, but not its profit sharing plan. Husband's expert, on the other hand, used a cash basis,[57] and put the value of each share at $4.28.[58] Husband added nothing for goodwill because the corporation had a stock restriction agreement that "[g]oodwill, leases, contract rights and the like will be valued in the aggregate at $1.00. . . ."[59] The trial court followed Wife's accrual accounting method. From the total value to the community of $64,644.15, the court subtracted the community's interest in the deferred compensation plan ($3,666). The court also subtracted $11,620, which was the number of shares multiplied by $4.28, the price per share fixed by the corporation in its stock transfer agreement.[60] The trial court awarded each party one-half of the remaining community value of $49,357.95.

On appeal, Husband argued successfully that the cash basis value of $4.28 per share by the corporation was the appropriate calculation, and that the value for goodwill was fixed at $1.00 by the stock restriction agreement. The supreme court reiterated its holding from *Hurley v. Hurley*[61] that once the existence of goodwill is established, it should be valued and divided as community property. In this case, Husband proved that the value of the goodwill was $1.00 by showing that all prior transfers of the corporation's stock were done on a cash basis value and were limited by the $1.00 value for goodwill as the shareholders had agreed. The supreme court held that because Husband was bound by the agreement of the shareholders, it would be inequitable to award Wife more than he would get if he terminated his employment.

55. The supreme court stated that parties owned 2,175 shares. *Hertz*, 99 N.M. at 324, 657 P.2d at 1173. This statement must have resulted from a transposition of numbers, as the subsequent mathematics is correct only if 2,715 shares were owned.

56. The wife's accrual basis figures included work in progress and accounts receivable.

57. The husband's cash basis figures excluded work in progress and accounts receivable.

58. 99 N.M. at 324, 657 P.2d at 1173. This was also the value per share that the corporation had established in its stock transfer agreement. *Id.*

59. *Id.* at 325, 657 P.2d at 1174.

60. *Id.* at 324, 657 P.2d at 1173. It is difficult to understand why the trial court subtracted this amount, because in arriving at the $64,644.15 total, the wife's expert had valued each share at $17.32 before adding anything for goodwill. It is possible that the court found as a fact that the corporation valued each share at $4.28 on a cash basis, but agreed with the wife that it was unreasonable not to include in the value such assets as work in progress and accounts receivable owned by the corporation at the time of the divorce, which she valued at over one million dollars.

61. 94 N.M. at 644, 615 P.2d at 259. In *Hurley*, the supreme court approved the capitalization of excess earnings method of valuing goodwill, but held it was not the exclusive method. *Id.*

C. Value of Profit-Sharing Plan

Another issue in *Hertz* was the valuation of the community interest in the corporation's profit-sharing plan. The plan provided for yearly valuation on June 30, the last day of the corporation's taxable year. The plan also provided that "all contributions to the trust will be considered for trust accounting purposes as having been made on the Valuation Date coincident with or next following the last day of the Company's taxable year for which the contribution is made, *regardless of when actually made*."[62] The board of directors of the corporation authorized the allocation of $5,000 per month for inclusion in the plan.

The total value of the plan on June 30, 1979 was $61,880.40. The date of the divorce was December 31, 1979. The trial court found the value of the plan to be $121,880.40, which was the value on June 30, 1980. The supreme court held that it was an abuse of the trial court's discretion to value the plan six months after the community was dissolved. The court held that the proper evaluation date was the date of divorce and the community should have the benefit of the $30,000 that had accrued to the plan between June and December 1979.[63]

D. Military Retirement Pay

During the Survey year, the supreme court, in *Whenry v. Whenry*,[64] consolidated six cases[65] for appeal to decide the issue of the retroactive application of *McCarty v. McCarty*,[66] in which the United States Supreme Court ruled that military retirement benefits were not property subject to division on dissolution of marriage. In each of the six cases, the trial court had granted the divorce and divided the military retirement pay between the spouses before the Court's decision in *McCarty*.[67] After *McCarty*, each of the six military spouses sought relief from the final divorce decree. In five of the cases, the trial court denied relief. In

62. 97 N.M. at 328, 657 P.2d at 1177 (emphasis added).

63. See Neerken, *New Mexico Community Property Law and the Division of Retirement Plan Benefits Pursuant to the Dissolution of Marriage*, 13 N.M.L. Rev. 641 (1983) for a discussion of how the New Mexico Supreme Court has divided various types of retirement plans upon divorce, and commending the court on its flexibility in valuing the plan in *Hertz* to reflect the increase at the time of dissolution. *Id.* at 651.

64. 98 N.M. 737, 652 P.2d 1188 (1982).

65. Whenry v. Whenry, Neave v. Neave, Bowden v. Bowden, Stroshine v. Stroshine, Durocher v. Durocher, and Atler v. Atler. The opinion for all six cases appears at 98 N.M. 737, 652 P.2d 1188 (1983).

66. 453 U.S. 210 (1981). Following *McCarty*, the New Mexico Supreme Court overruled prior New Mexico community property law and held that military retirement benefits were not community property. Espinda v. Espinda, 96 N.M. 712, 713, 634 P.2d 1264, 1266 (1981).

67. *McCarty* was decided on June 26, 1981. *McCarty*, 453 U.S. at 210. The six cases decided before *McCarty* were decided on the basis of well-established New Mexico law.

Stroshine, the trial court applied *McCarty* prospectively and relieved the military spouse of payments after September 24, 1981. On appeal, the supreme court reversed *Stroshine* and affirmed the five other decisions.[68] The court held that *McCarty* had no retroactive effect on final, unappealed judgments that were valid under prior New Mexico law subsequently overruled by *McCarty.*[69] In these cases, the portion of military retirement pay that was adjudged community property under prior New Mexico law was to remain community property.

The supreme court granted rehearing in *Stroshine,* the only case involving military disability retirement pay. On rehearing, the court held that this pay was community property subject to division.[70] The court found nothing in *McCarty* indicating federal preemption of the state's community property law with respect to disability retirement pay.[71] Reaffirming its order in *Whenry,*[72] the court ordered that Wife continue to receive her payments. Military disability retirement pay, therefore, continues to be community property in New Mexico even though the recent Uniformed Services Former Spouses' Protection Act specifically excludes such pay from its provisions.[73]

E. The Uniform Services Former Spouses' Protection Act

The Supreme Court in *McCarty* speculated that ". . . Congress may well decide . . . that more protection should be afforded a former spouse of a retired service member."[74] The year following *McCarty,* Congress enacted the Uniformed Services Former Spouses' Protection Act[75] (hereinafter the Act). The Act reverses *McCarty:* "[s]ubject to the limitations of this section,[76] a court may treat disposable retired or retainer pay payable to a member for pay periods beginning after June 25, 1981, either as property solely of the member or as property of the member and his spouse in accordance with the law of the jurisdiction of such court."[77] The Act does not require the marriage to have lasted any given number

68. 98 N.M. at 741, 652 P.2d at 1192.

69. *Id.* at 740, 652 P.2d at 1191. *See infra* text accompanying notes 76-137 for a discussion of the Uniformed Services Former Spouses' Protection Act, overruling *McCarty.*

70. 98 N.M. at 743, 652 P.2d at 1194.

71. *McCarty* specifically limited its holding to nondisability retirement pay. 453 U.S. at 213.

72. *See supra* text accompanying notes 69, 70.

73. 10 U.S.C. § 1408(a)(4) (1982) provides in pertinent part: "Disposable retired or retainer pay means the total monthly . . . pay . . . (other than the retired pay of a member retired for disability. . . .)" *See infra* text accompanying notes 76-138 for a discussion of that Act.

74. 453 U.S. at 235-36.

75. The Act amends certain sections of Title 10, United States Code. The bulk of the Act is in a new section, 10 U.S.C. § 1408 (1982).

76. For a discussion of the limitations see *infra* text accompanying notes 102-20.

77. 10 U.S.C. § 1408(c)(1) (1982).

of years in order to divide the retirement pay.[78] The Act became effective on February 1, 1983.[79]

Cases finally decided before *McCarty* should present no problems in New Mexico. At least since *LeClert v. LeClert*,[80] the New Mexico Supreme Court has considered military retirement pay community property, divisible upon divorce. Those cases remain unaffected by *McCarty* because *McCarty* was not given retroactive effect in New Mexico.[81] Those direct enforcement provisions under the Act, however, are available to former spouses only to enforce orders for payment that were in effect on June 26, 1981, without regard to subsequent modifications.[82]

Read literally, Section (c)(1) of the Act [83] could be interpreted to mean that courts may divide retirement pay only for those payments due after June 26, 1981. The Act, however, has a dual purpose. It authorizes courts to divide retirement pay according to the law of the jurisdiction. According to the legislative history, "[t]his power is returned to the courts retroactive to June 26, 1981."[84] The Act also provides for a direct payment procedure. Section 1408(c)(1) must be read with the effective date section for the direct payment provisions,[85] which were intended to be available only prospectively. As reflected in the conference report,[86] the intent of Congress clearly was to abrogate the effects of *McCarty*.[87] Modifications of pre-*McCarty* decisions, to effectuate that opinion finalized before the effective date of the Act, should not be given effect.

The same reasoning should yield the same result in those cases finally decided after *McCarty* but before the effective date of the Act: *McCarty* should not be given effect.[88] *Psomas v. Psomas*[89] was tried after *McCarty*

78. The enforcement mechanism for direct payments to the non-military spouse is available, however, only to former spouses whose marriage lasted for ten or more years of military service. *Id.* § 1408(d)(2) (1982). For the discussion of the direct enforcement provisions see *infra* text accompanying notes 121-32.

79. The first day of the first month more than 120 days after the President signed the Act. 10 U.S.C. § 1006 (1982).

80. 80 N.M. 235, 453 P.2d 755 (1969).

81. *See supra* text accompanying note 70.

82. 10 U.S.C. § 1006(b) (1982).

83. *See supra* text accompanying note 79.

84. S. Rep. No. 97-502, 97th Cong., 2d Sess. 16, *reprinted in* 1982 U.S. Code Cong. & Ad. News 1596, 1611.

85. 10 U.S.C. § 1006(b) (1982).

86. H. Rep. No. 97-749, 97th Cong., 2d Sess., 167-68, *reprinted in* 1982 U.S. Code Cong. & Ad. News 1569-73.

87. S. Rep. No. 97-502, 97th Cong., 2d Sess. 1, *reprinted in* 1982 U.S. Code Cong. & Ad. News 1596: "The primary purpose of the bill is to remove the effect of the United States Supreme Court decision in *McCarty v. McCarty*. . . ." *Id.*

88. Two commentators differ on this point. *Compare* Newton & Trail, *Uniformed Services Former Spouses' Protection Act: A Legislative Answer to the McCarty Problem*, 46 Tex. B.J. 291, 296 (agreeing with this result) *with* Peppy, *Reconsidering the Rules for Military Benefits*, 5 Fam. Advoc. 30, 33 (Spring 1983) (finding that the Act does not provide relief for aggrieved spouses who had final judgments entered after *McCarty* and before the effective date of the Act).

89. 99 N.M. 606, 661 P.2d 884 (1982).

but before the effective date of the Act. Husband filed for divorce in August 1981. The trial court deferred entering a final decree (for reasons other than the issue of military retirement pay) and certified for appeal a partial non-final decree on child support and alimony issues.[90] The issue of whether or not Husband's military retirement pay was community property was not litigated at trial[91] because of *McCarty* and *Espinda v. Espinda*.[92] After Wife filed her Answer Brief on appeal, she moved to reverse and remand the case based on the Act.[93] The supreme court denied the motion.[94] The court reasoned that by failing to cross-appeal on the issue of the community property status of Husband's military retirement pay, wife had failed to preserve the issue for appeal.[95] Moreover, the court found nothing in the Act indicating that Congress intended any part of it to have retroactive effect. That finding is incorrect.[96]

Reopening the final division of property in a case decided after *McCarty* and before the effective date of the Act could be difficult, notwithstanding the Act. A final nonmodifiable judgment of property settlement may be modified or set aside only on appeal or by filing a motion for relief under New Mexico Rule of Civil Procedure 60(b).[97] Under the rule, relief may be available on the grounds of fraud, misrepresentation, or other misconduct of the adverse party.[98] Those reasons usually would not be present in a property division based on *McCarty*, and those reasons are time-barred after one year.[99]

A court's authority to divide military retirement pay is subject to several significant limitations: a court may only divide disposable retired or re-

90. *Id.* at 607, 661 P.2d at 885. The husband also appealed the court's deferral of the final decree. *See infra* text accompanying note 134.

91. During the period when bills were submitted to Congress to overrule *McCarty*, California trial courts granted divorces but retained jurisdiction over property issues in order to give non-military spouses the benefit of whatever Congress did to ameliorate the effect of *McCarty*. See, e.g., *In re* Marriage of Bennett, 131 Cal. App. 3d 299, 182 Cal. Rptr. 283 (Ct. App. 1982), in which the California Supreme Court ordered that its opinion not be officially published.

92. 96 N.M. 712, 634 P.2d 1264 (1981), following the holding in *McCarty*.

93. *Psomas*, 99 N.M. at 609, 661 P.2d at 887. This motion was filed after the Act had been signed, but before its effective date. Wife's motion was filed pursuant to Rule 11 of the Rules of Appellate Procedure for Civil Cases. The motion was not responded to, and the issue of what effect, if any, the Act should have on the case was never briefed nor argued. Author's conversation with the wife's counsel on appeal, July 12, 1983.

94. 99 N.M. at 609, 661 P.2d at 887.

95. *Id.*

96. *See supra* text accompanying notes 86-90. The court corrected this finding in Walentowski v. Walentowski, ___ N.M. ___, 672 P.2d 657 (1983). The court held that the Act did apply retroactively to June 25, 1981 (the date of the *McCarty* decision) and overruled the statement in *Psomas* to the contrary. *Id.* at ___, 672 P.2d at 660. *Walentowski* did not discuss the problem of reopening a final division of property that was based on *McCarty* before the effective date of the Act. *See infra* text accompanying notes 99-101.

97. *See, e.g.*, Parks v. Parks, 91 N.M. 369, 574 P.2d 588 (1978).

98. *See, e.g.*, Unser v. Unser, 86 N.M. 648, 650, 654, 526 P.2d 790, 792, 796 (1974).

99. N.M. R. Civ. P. 60(b)(3) (Repl. Pamp. 1980); Wehrle v. Robison, 92 N.M. 485, 590 P.2d 633 (1979).

tainer pay as defined in the Act;[100] the non-military spouse may not transfer or otherwise dispose of the awarded portion of such pay;[101] a court may not order a military spouse to retire at a certain time in order to apply the Act;[102] and a court may not use the Act to divide such pay unless it has jurisdiction over the military spouse for reasons other than his residence in the jurisdiction only pursuant to military orders.[103]

Disposable retired or retainer pay may not remain a fixed dollar amount. It is defined[104] as the total monthly retired or retainer pay less required deductions for amounts owed to the United States by the military spouse,[105] amounts waived in order to receive compensation under Title 5 or Title 38,[106] and certain taxes and government life insurance premiums.[107] In addition, the military spouse may elect to provide an annuity under the Survivor Benefit Plan for the former spouse receiving payments under the Act,[108] and the payments for the annuity are deducted to determine disposable pay.[109] By making certain elections permitted by the Act, either before or after divorce, therefore, the military spouse can change the

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One possible way to reopen a final division of property based on *McCarty* would be a motion, within a "reasonable time," under N.M. R. Civ. P. 60(b)(5), which provides for relief from a final judgment because "a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application." No New Mexico cases were found construing this portion of Rule 60(b). Federal Rule 60(b)(5) is identical to that of New Mexico. Professor Moore's discussion of the rule indicates that seeking to use the rule as suggested would be unusual. The section of the rule providing for relief in a case when a prior judgment on which it is based is reversed has been used to reverse on appeal in a second case whose judgment was based on a prior case that was reversed on appeal in the same court. 7 J. Moore, Moore's Federal Practice ¶ 60.26[3] (2d ed. 1983). The section of the rule providing for relief when it is no longer equitable that the judgment have prospective application has been used chiefly to vacate a permanent injunction which, while proper when entered, has become of no benefit to the one whose rights were protected, or because of conditions occurring since the injunction, it would be inequitable to continue it. *Id.* at ¶ 60.26[4].

100. 10 U.S.C. §§ 1408(c)(1), 1408(a)(4) (1982).

101. *Id.* § 1408(c)(2).

102. *Id.* § 1408(c)(3).

103. *Id.* § 1408(c)(4). Domicile in the jurisdiction or consent to the jurisdiction suffice. *Id.*

104. *Id.* § 1408(a)(4).

105. *Id.* § 1408(a)(4)(A).

106. *Id.* § 1408(a)(4)(B). Title 5 provides for the reduction of retired or retainer pay of a retired military member who is employed in the civil service. 5 U.S.C. § 5532 (1982). Title 38 provides for a waiver of retirement pay to receive certain pensions or compensation from the Veterans' Administration. 38 U.S.C. § 3105 (1982).

107. 10 U.S.C. § 1408 (a)(4)(C), (D), (E) (1982).

108. *Id.* § 1447, 1448, 1450.

109. *Id.* § 1408(a)(F). If a military member is recalled to active duty, he no longer receives retired or retainer pay, and payments under the Act cease for the period of active duty. S. Rep. No. 97-502, 97th Cong., 2d Sess. 15, *reprinted in* 1982 U.S. Code Cong. & Ad. News 1596, 1610. See also Comment, McCartyism in New Mexico: McCarty v. McCarty and The Uniformed Services Former Spouses' Protection Act, 13 N.M.L. Rev. 665, 681 (1983), for a discussion of how the number of dependants of a military member affects the amount of retired pay.

amount of disposable retired or retainer pay. The amount also can change because of increases or decreases in taxes.[110] In New Mexico, courts should order fifty percent of the disposable pay rather than a fixed dollar amount to be paid to the non-military spouse[111] and divide all other community property equally to reduce the effect of some of these options granted to the military spouse.

The non-transferability of the award to the non-military spouse makes the disposable retired or retainer pay a kind of property other than community property.[112] Until the non-military spouse actually receives a payment under the Act, he cannot treat the award of his share as his separate property; it cannot be sold, assigned, transferred, or devised.[113]

The jurisdictional limitations for dividing disposable pay under the Act[114] were intended to prevent "forum shopping" by either party for the most advantageous jurisdiction in which to commence divorce proceedings.[115] This provision of the Act should not present significant problems in New Mexico because this state will look to the law of the state in which the parties acquired the property to be divided.[116] Thus, if a New Mexico court obtains jurisdiction to decree a divorce over a military spouse by virtue of N.M. Stat. Ann. §40-4-5,[117] and that spouse is in New Mexico only pursuant to a military assignment, the court can divide the disposable retired or retainer pay pursuant to the Act, so long as the court uses the law of the military spouse's domicile.[118]

The direct enforcement mechanism for payment pursuant to a property division to former spouses is available to those spouses who were married for ten years or more during which the military spouse earned credit toward retirement.[119] Direct enforcement is effected by service on the

110. The Act probably preempts a court's authority to enjoin a military spouse from exercising those rights that might reduce disposable pay. *See supra* notes 107-111 and the sections of the Act cited therein.

111. Either method is permitted by the Act. 10 U.S.C. § 1408 (a)(2)(C) (1982).

112. See LeClert v. LeClert, 80 N.M. 235, 453 P.2d 755 (1969), holding that retirement benefits are a form of employee compensation and the portion of the benefits earned during marriage is community property.

113. 10 U.S.C. § 1408(c)(2) (1982).

114. *See supra* note 105 and accompanying text.

115. S. Rep. No. 97-502, 97th Cong., 2d Sess. 8, *reprinted in* 1982 U.S. Code Cong. & Ad. News 1596, 1603.

116. See Stephens v. Stephens, 93 N.M. 1, 595 P.2d 1196 (1979), dividing Husband's military retirement according to the law of Tennessee, which was Husband's domicile.

117. N.M. Stat. Ann. § 40-4-5 (Repl. Pamp. 1983) provides for divorce jurisdiction over military members stationed in New Mexico.

118. S. Rep. No. 97-502, 97th Cong., 2d Sess. 9, *reprinted in* 1982 U.S. Code Cong. & Ad. News 1596, 1604. In this regard, the Act probably preempts California's "quasi-community property" law. Cal. Civ. Code §§ 4800, 4803 (West 1983).

119. 10 U.S.C. § 1408(c)(2) (1982). Direct enforcement of payments for alimony and child support is available, however, without regard to the ten year limitation. *Id.*

appropriate Secretary or his designated agent[120] of a final[121] court order of divorce, dissolution, annulment,[122] or legal separation, or a final order modifying a prior decree.[123] The service is effective if the "court order" is regular on its face,[124] identifies the military spouse and includes his social security number, and the order or other documents served with the order certify that his rights were observed pursuant to the Soldiers' and Sailors' Civil Relief Act of 1940.[125] The Secretary or his agent must begin payments under the Act within ninety days after service of the court order.[126] Payments may not exceed fifty percent of the disposable retired or retainer pay;[127] however, "any means available under law" including the garnishment provisions of 42 U.S.C. §659 may be used to satisfy amounts ordered by a court and unsatisfied by the Act.[128] Sixty-five percent of the disposable retired or retainer pay is the aggregate maximum that may be paid under the Act to satisfy a court order and legal process under 42 U.S.C. §659, or court orders from more than one former spouse.[129] Payments under the Act terminate by the terms of the court order or upon either the death of the military spouse or the non-military spouse, whichever occurs first.[130]

In *Psomas v. Psomas*,[131] the trial court deferred entering the final decree of divorce because of concern for Wife's health needs.[132] Military insurance could cover the expenses of an operation that Wife needed as long as no divorce had been granted. The supreme court held that when a statutory ground for divorce is proved, the court is without jurisdiction

120. Service may be personal or by certified or registered mail, return receipt requested. *Id.* § 1408(b)(1)(A).

121. Direct payments are not available pending an appeal. *Id.* § 1408(a)(3).

122. It is only in connection with a final decree or a court order that "annulment" appears in the Act. Elsewhere, the Act speaks of "spouses," "former spouses," and of "marriage." It appears that so long as state law provides for payments of child support or alimony upon the annulment of an invalid marriage, enforcement of those payments is available under the Act. *See, e.g.*, N.M. Stat. Ann. §40-1-9 (Repl. Pamp. 1983).

123. 10 U.S.C. § 1408(a)(2) (1982).

124. *See id.* § 1408(b)(2).

125. *Id.* § 1408(b)(1).

126. *Id.* § 1408(d)(1). The court order should be served as soon as it is final even if the military spouse has not yet retired at the time of the divorce. In that case, payments will begin within ninety days of the retirement date. *Id.*

127. *Id.* § 1408(e)(1).

128. *Id.* § 1408(e)(6).

129. *Id.* § 1408(e)(4)(B). Successive court orders will be satisfied on a first come, first served basis. *Id.* § 1408(e)(4)(A). The Act provides procedures for dealing with conflicting court orders, and orders providing for payment of more than the maximum allowed. *Id.* §§ 1408(e)(3)(A), 1408(c)(5).

130. *Id.* § 1408(e)(4).

131. *See supra* note 91.

132. 99 N.M. at 607, 661 P.2d at 885. In State *ex rel.* DuBois v. Ryan, 85 N.M. 575, 514 P.2d 851 (1973), the trial court denied a divorce for the same reason.

to deny or defer granting a divorce.[133] Under the Act, a former spouse such as Mrs. Psomas,[134] is entitled to continue as a dependent of the military spouse for the purposes of obtaining military medical benefits so long as she does not remarry, does not have medical coverage under an employer-sponsored health plan, and was married to the military spouse for at least twenty years of military service.[135]

The Act's restoration of a former spouse's right to share in the military spouse's retirement benefits is only partial because of the significant limitations discussed above.[136] The Act, however, provides to former spouses major new rights for direct enforcement of orders providing for payments for alimony, child support, and for the division of property.

133. 99 N.M. at 608, 661 P.2d at 886.

134. The parties were married in 1952. *Id.* at 607, 661 P.2d at 885.

135. 10 U.S.C. §§ 1072(2)(F), 1076(b), 1986(c) (1982). Certain unmarried former spouses also are entitled to commissary and post exchange privileges under the Act. *Id.* § 1005.

136. *See supra* text accompanying notes 102-20.