

# TJAGSA Practice Notes

Faculty, The Judge Advocate General's School

## *Ethics Note*

### **The General Officer Aide and the Potential for Misuse**

#### *Introduction*

“Rank has its privileges.” That adage has some truth, at least when it comes to the benefits conferred upon general officers in the U.S. military. Along with respect and responsibility, promotion provides perks that are not available to lower ranking officers. When an Army officer pins on the first star, that officer also takes on additional privileges. As privileges increase, so does the potential for abuse of those privileges, and more importantly, so does the level of public scrutiny. To assist general officers, judge advocates must understand the issues. The purpose of this note is to educate attorneys on the selection and roles of general officer aides, identify potential areas for

abuse, and assist attorneys in protecting their general officers from allegations of unethical conduct.

#### *The Selection of Personal Aides*

The Army authorizes general officers to have the assistance of a personal staff, to include an officer aide de camp<sup>1</sup> and enlisted soldiers.<sup>2</sup> Although 10 U.S.C. § 3543 permits more than one officer aide contingent upon the general officer's grade,<sup>3</sup> the Army has traditionally limited general officers to one officer aide de camp.<sup>4</sup> The actual number of enlisted aides authorized is determined by the U.S. Total Army Personnel Command (PERSCOM) using a complex statutory formula.<sup>5</sup> Regulations explicitly establish the entitlement to aides for a few general officers,<sup>6</sup> but “budget constraints” and the general officer's specific requirements determine the entitlement for

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1. U.S. DEP'T OF ARMY, FIELD MANUAL 101-5, STAFF ORGANIZATION AND OPERATIONS 4-29 (31 May 1997) [hereinafter FM 101-5] (establishing the aide de camp as a member of the general officer's personal staff).

2. U.S. DEP'T OF ARMY, ARMY REG. 614-200, ENLISTED ASSIGNMENTS AND UTILIZATION MANAGEMENT para. 8-10 (31 Oct. 1997) [hereinafter AR 614-200].

3. See 10 U.S.C. § 3543 (2000).

§ 3543. Aides: detail; number authorized.

(a) Each major general of the Army is entitled to three aides selected by him from commissioned officers of the Army in any grade below major.

(b) Each brigadier general of the Army is entitled to two aides selected by him from commissioned officers of the Army in any grade below captain.

*Id.*

4. See U.S. DEP'T OF ARMY, ARMY REG. 614-16, PERSONAL STAFF FOR GENERAL OFFICERS para. 1-2 (7 June 1974) [hereinafter AR 614-16, 1974 version]. *Army Regulation (AR) 614-16* was superseded on 15 December 1981 by the then current version of *AR 614-200*. General officers “occupying a modification table of organization and equipment (MTOE) position” and general officers “in command of troops may be assigned an aide de camp.” U.S. DEP'T OF ARMY, ARMY REG. 614-16, PERSONAL STAFF FOR GENERAL OFFICERS para. 1-1 (C1, 7 Nov. 1975).

5. The congressionally established formula is found in 10 U.S.C. § 981, as follows:

§ 981. Limitation on number of enlisted aides.

(a) Subject to subsection (b), the total number of enlisted members that may be assigned or otherwise detailed to duty as enlisted aides on the personal staffs of officers of the Army, Navy, Marine Corps, Air Force, and Coast Guard (when operating as a service of the Navy) during a fiscal year is the number equal to the sum of (1) four times the number of officers serving on active duty at the end of the preceding fiscal year in the grade of general or admiral, and (2) two times the number of officers serving on active duty at the end of the preceding fiscal year in the grade of lieutenant general or vice admiral.

(b) Not more than 300 enlisted members may be assigned to duty at any time as enlisted aides for officers of the Army, Navy, Air Force, and Marine Corps.

10 U.S.C. § 981.

6. See, e.g., AR 614-200, *supra* note 2, para. 8-10a (establishing the Army Chief of Staff's entitlement to four enlisted aides); see also AR 614-16, 1974 version, *supra* note 4, para. 2-3. “General of the Army is authorized three enlisted aides, and generals and lieutenant generals in public quarters are authorized three and two aides respectively. General officers in selected O8 and O7 positions (when incumbent is in public quarters) will be authorized aides by separate HQDA (ODCSPER) letter.” *Id.* Table 2-1 of the 1974 version of *AR 614-16* indicates that major generals and brigadier generals who are specifically authorized an enlisted aide by HQDA (ODCSPER) may each have one enlisted aide in the grade of E-7 and E-6, respectively. *Id.* tbl. 2-1.

most general officers.<sup>7</sup> These soldiers normally work directly for the general officer.<sup>8</sup>

In most cases, the general officer personally selects the soldiers who will serve as aides. General officers may select an aide “from within their command or request aide nominations from the Officer Personnel Management Directorate (OPMD), PERSCOM.”<sup>9</sup> Whoever chooses the junior officer, selection as an aide de camp commonly distinguishes young officers from their peers.

The coveted aide de camp and enlisted aide positions bring laurels to those selected to serve a general officer. “There are few more subjective honors in the Army than being chosen as aide de camp, the personal assistants who cater to scores of the service’s top generals.”<sup>10</sup> The reason is clear. “The post is a strong indicator of success: one-third of the Army’s top generals were aides early in their careers.”<sup>11</sup>

The selection of enlisted aides is equally subjective. Enlisted soldiers may volunteer for enlisted aide duty, provided they meet certain eligibility requirements.<sup>12</sup> The “Sergeant Majors Branch, Enlisted Personnel Management Branch (EPMB), PERSCOM, nominates qualified soldiers for such

positions,” and the General Officer Management Office “manages the authorizations,”<sup>13</sup> but the individual general officer often chooses his own aides.

### *The Role of Personal Aides*

There is little official published guidance on the role of general officer aides. Aides may look to *Army Regulation (AR) 614-200* for guidance; however, *AR 614-200* pertains only to enlisted soldiers and does not contain any provisions that regulate aides de camp. *Army Regulation 614-16* regulated both officer and enlisted aides until 1975, when it was superceded by *AR 614-200*, which omits the provisions governing aides de camp.<sup>14</sup> Consequently, no current Army regulation covers aides de camp.<sup>15</sup> Nonetheless, a section in the General Officer Policies pamphlet provides guidance.<sup>16</sup> This guidance instructs aides de camp to “remain flexible” and that their “actual duties depend upon the personality of the general” for whom they work.<sup>17</sup>

While aides de camp fulfill a more public role, enlisted aides are normally less visible. The sole mission of enlisted aides is to assist the general in the performance of military and official

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7. AR 614-200, *supra* note 2, para. 8-10a.

8. *Field Manual 101-5* establishes the aide de camp as a member of the general officer’s personal staff. FM 101-5, *supra* note 1, at 4-29. It is not uncommon, however, for enlisted aides to work directly under the supervision of the aide de camp. General Officer Policies, General Officer Management Office (GOMO), October 1995, at 10 (unpublished, on file with GOMO and with author) [hereinafter GOMO Handbook].

9. GOMO Handbook, *supra* note 8, at 10.

10. Dana Priest, *A Male Prototype for Generals’ Protégés; In Choosing Aides de Camp, Army’s Leaders Nearly Always Exclude Female Officers*, WASH. POST, Dec. 29, 1997, at A1.

11. *Id.*

12. The prerequisites include the possession of a current food-handler’s certificate, at least twelve months of remaining active service, a minimum general technical score of ninety, a valid driving permit, and a Single-Scope Background Information (SSBI) or no information on record that may preclude a favorable SSBI. AR 614-200, *supra* note 2, para. 8-10d.

13. GOMO Handbook, *supra* note 8, at 10.

14. *See supra* note 4.

15. *Army Regulation 611-101, COMMISSIONED OFFICER CLASSIFICATION SYSTEM* (26 June 1995), contains a brief description of the aide de camp role, but does not outline required or permissible duties. Similarly, *AR 614-200, supra* note 2, contains brief coverage of enlisted aides’ duties. In the mid-70s, the Quartermaster’s School at Fort Lee, Virginia, produced an informational booklet entitled *The Enlisted Aide*. Efforts to obtain a copy have proven fruitless.

16. A section entitled “Aide de Camp Handbook” is included in the GOMO Handbook, *supra* note 8. This section is the only “official” written guidance available for aides de camp.

17. *Id.* at 33. The pamphlet states the aide de camp’s duties succinctly: “Your primary mission is simply to assist the general in the performance of his or her duties, a simple definition, but a monumental task.” *Id.* More practical guidance is outlined under the heading “What is an Aide?”

An aide has to be a secretary, companion, diplomat, bartender, caterer, author, and map reader as well as mind reader. He or she must be able to produce at a minutes notice timetables, itineraries, the speeds and seating capacity of various aircraft, trains, and sundry surface transportation . . . , must know the right type of wine for a meal, how many miles it is to Timbuktu, where to get the right information and occasionally, how the bosses steak or roast beef ought to be cooked . . . always look fresh, always know what uniform to wear, what is happening a week from today, have the latest weather report and in their spare time study to maintain military proficiency.

*Id.*

duties. They are “authorized for the purpose of relieving general and flag officers of those minor tasks and details which, if performed by the officers, would be at the expense of the officers’ primary military and official duties.”<sup>18</sup>

There are several limitations on enlisted aides’ duties, however. First, officers are prohibited by statute from using “an enlisted member of the Army as a servant.”<sup>19</sup> This generally precludes requiring an enlisted aide to perform duties that personally benefit the officer, as opposed to duties that professionally benefit the officer. Second, the duties of enlisted aides must “relate to the military and official duties of the [general officer] and thereby serve a necessary military purpose.”<sup>20</sup> The language of Department of Defense Directive (DODD) 1315.9 more specifically prohibits the use of enlisted soldiers for “duties which contribute only to the officer’s personal benefit and which have no reasonable connection with the officer’s

official responsibilities.”<sup>21</sup> Finally, the Standards of Ethical Conduct for the Executive Branch,<sup>22</sup> or the *Joint Ethics Regulation (JER)*,<sup>23</sup> further limit interaction between officers and their subordinates. Under the *JER*, subordinates’ official time may only be used for official duties.<sup>24</sup>

The types of authorized duties that a superior may assign to an enlisted aide are diverse. *Army Regulation 614-200* outlines a “not all inclusive” list of “official functions” or duties, including cleaning the officer’s quarters, uniforms, and personal equipment; shopping and cooking; and running errands.<sup>25</sup> Many of the enumerated duties seem personal in nature. But, “[t]he propriety of the duties is determined by the official purpose they serve, rather than the nature of the duties.”<sup>26</sup> In *United States v. Robinson*,<sup>27</sup> the Court of Military Appeals asserted that a different interpretation “which would apply the proscription to the kind of work done, and not to its ultimate

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18. DEP’T OF DEFENSE, DIR. 1315.9, UTILIZATION OF ENLISTED PERSONNEL ON PERSONAL STAFFS OF GENERAL AND FLAG OFFICERS para. III.A (26 Feb. 1975) [hereinafter DOD DIR. 1315.9].

19. 10 U.S.C. § 3639 (2000). This provision was originally part of the Army Appropriations Act of 15 July 1870, and was codified at § 14, 16 U.S. Stat. 319: “Sec. 14. And be it further enacted, That it shall be unlawful for any officer to use any enlisted man as a servant in any case whatever.” *Id.* The language was changed somewhat in 10 U.S.C. § 608 (1956): “§ 608. Officers using enlisted men as servants. No officer shall use an enlisted man as a servant in any case whatsoever.” *Id.* In *United States v. Robinson*, 20 C.M.R. 63 (C.M.A. 1955), the Court of Military Appeals determined that the

real purpose of the enactment was to prevent the use of enlisted men in assignments that contributed only to the convenience and personal benefit of individual officers which had no reasonable connection with the efficient employment of the armed services as a fighting force.

The word “servant” has a myriad of meanings, but as used in the context of the original act, we conclude that Congress intended to give it the meaning of one who labors or exerts himself for the personal benefit of an officer. Certainly, it could not have intended to prevent an enlisted man from laboring for officers in furtherance of their official duties. As enacted originally, the Act suggests that Congress was interested in having the enlisted men of the Army earn their pay in the performance of military duties, and not as personal servants attending to the physical comforts of their individual superior officers.

*Id.* at 68.

20. AR 614-200, *supra* note 2, para. 8-10b.

21. DOD DIR. 1315.9, *supra* note 18, para. III.B. *But see* AR 614-200, *supra* note 2 (stating that the “no reasonable connection” language of DODD 1315.9 was not included in the proscriptions of AR 614-200).

22. STANDARDS FOR ETHICAL CONDUCT FOR THE EXECUTIVE BRANCH, 5 C.F.R. § 2635 (1993) [hereinafter STANDARDS FOR ETHICAL CONDUCT].

23. DEP’T OF DEFENSE, DIR. 5500.7-R, JOINT ETHICS REGULATION (30 Aug. 1993).

24. STANDARDS FOR ETHICAL CONDUCT, *supra* note 22, § 2635.705b. This provision states that “[a]n employee shall not encourage, direct, coerce, or request a subordinate to use official time to perform activities other than those required in the performance of official duties or authorized in accordance with law or regulation.” *Id.*

25. The list is included in both AR 614-200, *supra* note 2, and DODD 1315.9, *supra* note 18. The following provisions are found at AR 614-200, paragraph 8-10b:

In connection with military and official functions and duties, enlisted aides may perform the following (list not all inclusive, provided only as a guide):

- (1) Assist with care, cleanliness, and order of assigned quarters, uniforms, and military personal equipment.
- (2) Perform as point of contact (POC) in the GO’s quarters. Receive and maintain records of telephone calls, make appointments, and receive guests and visitors.
- (3) Help plan, prepare, arrange, and conduct official social functions and activities, such as receptions, parties and dinners.
- (4) Help to purchase, prepare and serve food and beverages in the GO’s quarters.
- (5) Perform tasks that aid the officer in accomplishing military and official responsibilities, to include performing errands for the officer, providing security for the quarters, and providing administrative assistance.

AR 614-200, *supra* note 2, para. 8-10b.

26. 10 U.S.C. § 3639 (2000). Paragraph 8-10b of AR 614-200 repeats this language verbatim. *Cf.* AR 614-200, *supra* note 2, para. 8-10b.

purpose, would so circumscribe the military community that the preparation for, or the waging of, war would be impossible.”<sup>28</sup> The duties assigned to an enlisted aide only need to have a “reasonable connection” to the military duties of the general officer.<sup>29</sup>

The general officer himself often determines what duties his aides are to perform and whether the duties are reasonably connected to the general’s official duties. Aides perform many of these assigned duties inside the officer’s quarters. Consequently, little or no monitoring of the enlisted aides’ activities occurs. Whether the duties actually are official is seldom questioned or known. Enlisted aides would unlikely protest if the rules were bent. After all, working for the general is a privilege and the position is highly sought. Consequently, a Specialist, or even a Master Sergeant, is unlikely to tell a general officer, “No, sir. I think that assignment crosses the ethical line.” Even if the aide knows that the task is personal, rather than official, the aide may perform the assignment loyally without ever considering a complaint.

### *The Potential for Misuse*

Aides often develop very close relationships with their general officers.<sup>30</sup> The benefits of these long-term relationships did not go unnoticed by the military, which authorizes enlisted

aides to transfer with the general’s “household.”<sup>31</sup> Consequently, enlisted aides often develop close relationships with the officer’s family, as well. In such a relationship, it is not difficult to envision situations in which a general officer assigns “unofficial” duties to or asks “favors” from an aide. The general officer must remain mindful that he only assigns duties reasonably connected to the officer’s military duties.<sup>32</sup> Moreover, the general officer must take care to avoid requesting favors. Favors conjure the concept of personal, rather than official, requests. While requested favors may include chores reasonably related to the officer’s military duties, it may be more appropriate for the general to direct or order the performance of such official duties.

Favors may also require legal and ethical analysis. While an aide may voluntarily perform a favor, the nature of the aide’s willingness may be an issue. Whether a Specialist could freely decline to perform a requested favor is questionable.<sup>33</sup> Additionally, if in performance of the favor the aide “labors or exerts himself for the personal benefit of an officer,”<sup>34</sup> then the officer may be in violation of the prohibition against using a subordinate as a servant.<sup>35</sup>

Moreover, favors may be improper for other reasons. Aides may only perform official duties during official time. To the degree that it is improper to use official time for personal purposes,<sup>36</sup> it may be unethical for an aide to perform favors during

27. United States v. Robinson, 20 C.M.R. 63 (C.M.A. 1955).

28. *Id.* at 68.

29. DOD DIR. 1315.9, *supra* note 18, para. III.B (requiring a nexus between the duties and the officer’s official responsibilities).

30. “This relationship is one of slaps on the back, of genuine warmth.” Priest, *supra* note 10, at A1 (quoting a general officer explaining his relationship with his enlisted driver).

31. Paragraph 8-10e of AR 614-200 outlines the following guidance:

Enlisted aides serving on the GO’s staff may be reassigned with the GO provided—

- (1) The GO so desires.
- (2) The enlisted aide is authorized in the new assignment.
- (3) PERSCOM’s clearance is obtained.

AR 614-200, *supra* note 2, para. 8-10e.

32. *Id.* para. 8-10b.

33. Only enlisted soldiers who volunteer for duty as a general officer aide are assigned as such. *See id.* para. 8-10d. Volunteering to serve as an aide, however, does not necessarily imply that the aide volunteers to perform any particular duty.

34. United States v. Robinson, 20 C.M.R. 63, 68 (C.M.A. 1955).

35. 10 U.S.C. § 3639 (2000).

36. The prohibition against using official time for personal purposes is not absolute.

- (a) Use of an employee’s own time. Unless authorized in accordance with law or regulations to use such time for other purposes, an employee will use official time in an honest effort to perform official duties. An employee . . . has an obligation to expend an honest effort and *reasonable proportion* of his time in the performance of official duties.

STANDARDS FOR ETHICAL CONDUCT, *supra* note 22, § 2635.705a (emphasis added).

duty hours.<sup>37</sup> Furthermore, it follows that a supervisor may also violate ethical rules by allowing a subordinate to use official time for unofficial duties.<sup>38</sup> Cognizant of the proscription against using official time for unofficial duties, an aide may volunteer to perform personal duties after duty hours.<sup>39</sup>

An aide's "off-duty" performance of a "favor," however, could also be subjected to the Standards for Ethical Conduct's gift analysis. As a general rule, subordinate employees may not give gifts to superiors, and superiors may not directly or indirectly accept gifts from subordinates.<sup>40</sup> Although the Standards for Ethical Conduct provide several exceptions to the general rule,<sup>41</sup> these exceptions do not apply to the "gift" of services. As most people realize, time is money; people do not normally undertake responsibilities without some sort of compensation. Therefore, the time an aide spends conducting the general officer's unofficial or personal chores could be viewed as compensable. To the extent that the aide receives no remuneration, the favor may be a gift. That an aide conducts the service secretly should not affect the analysis.<sup>42</sup> Consequently, both

aides and general officers must be vigilant to ensure that aides' duties are official, rather than personal, in nature.

Another potential "gift" situation bears mention. General officers should also periodically ensure that their subordinates have not improperly subsidized either the general's personal or official expenses. Aides de camp often handle the general officer's petty cash fund.<sup>43</sup> The general officer routinely provides advance money<sup>44</sup> for the purchase of small items, like stamps or uniform accessories, or other small expenses, like lunches. Aides de camp are instructed to keep accurate records of such expenses, both for the general officer's income taxes and to avoid commingling funds. It is not unthinkable that an aide may "absorb" expenses for which a receipt was lost. Such a practice is comparable to the giving of a "gift" by the subordinate officer, however, and is prohibited by the Standards for Ethical Conduct.<sup>45</sup>

The aide's close relationship with and proximity to the officer's family may create other ethical problems. While

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37. The regulation does not define "reasonable proportion." Therefore, while it may be permissible for aides to perform unofficial favors during duty hours, it does not follow that such activities are expedient.

38. See STANDARDS FOR ETHICAL CONDUCT, *supra* note 22, § 2635.705b.

(b) Use of a subordinate's time. An employee shall not encourage, direct, coerce, or request a subordinate to use official time to perform activities other than those required in the performance of official duties or authorized in accordance with law or regulation.

*Id.* This proscription is more definite than the guidance found in section 2635.705a, which includes a "reasonable proportion" proviso.

39. Based upon the disparity between the ranks of the parties, an unbiased observer may question the "voluntary" nature of any service provided by an enlisted soldier for a general officer.

40. See STANDARDS FOR ETHICAL CONDUCT, *supra* note 22, § 2635.302. The Standards for Ethical Conduct generally prohibit subordinates from giving gifts to superiors. Moreover, the regulation makes it unlawful for a superior to solicit a gift from a subordinate.

41. The rule has both general and special exceptions:

(a) General exceptions. On an occasional basis, including any occasion on which gifts are traditionally given or exchanged, the following may be given to an official superior or accepted from a subordinate or other employee receiving less pay:

- (1) Items, other than cash, with an aggregate market value of \$10 or less per occasion;
- (2) Items such as food and refreshments to be shared in the office among several employees;
- (3) Personal hospitality provided at a residence which is of a type and value customarily provided by the employee to personal friends;
- (4) Items given in connection with the receipt of personal hospitality if of a type and value customarily given on such occasions; and
- (5) Leave transferred . . . .

(b) Special, infrequent occasions. A gift appropriate to the occasion may be given to an official superior or accepted from a subordinate or other employee receiving less pay:

- (1) In recognition of infrequently occurring occasions of personal significance such as marriage, illness, or birth or adoption of a child; or
- (2) Upon occasions that terminate a subordinate-official superior relationship, such as retirement, resignation, or transfer.

*Id.* § 2635.304(a)-(b).

42. An aide may undertake inappropriate duties on his or her own volition without the general officer's direction, knowledge or approval. This, however, does not diminish the inappropriate nature of the conduct.

43. GOMO HANDBOOK, *supra* note 8, at 44.

44. In addition to other authorized pay and allowances, 37 U.S.C. § 414 grants a "personal money allowance to general officers." 37 U.S.C. § 414 (2000).

45. See generally STANDARDS FOR ETHICAL CONDUCT, *supra* note 22, § 2635.302.

transporting the general's unaccompanied spouse or children on personal errands is clearly inappropriate for the general's aide or driver, other problem areas are less obvious. For instance, it is not uncommon for an aide, who routinely performs official household chores for the general, to perform "unofficial" duties or "favors" for the general officer's spouse. One particularly troublesome situation arises when an enlisted aide performs services for the Officers' Spouses Club when that private organization meets in the general officer's quarters. Less obvious, but equally improper, is the use of enlisted aides to assist an officer's spouse with Family Readiness Groups. Despite the fact that Army regulations authorize logistical support to Family Readiness Groups,<sup>46</sup> use of the general officer's aides to assist the general's spouse with organizational chores is inappropriate. The aides' statutory duties are to assist with the general officer's military and official duties, rather than that officer's spouse's "official" obligations.

Questions about the use of the general's aides are seldom raised. When concerns are voiced, they usually regard an aide's activities outside the general officer's residence. For example, the Inspector General's office may receive a telephone complaint that soldiers routinely mow the general's lawn or work in the general's vegetable garden, that someone saw the general's driver driving the general's son home from football practice, or that a visitor to the general's office saw the general's daughter's college application in the aide's typewriter. These clearly are tasks that, if performed by the officer, would be at the expense of the officer's military or official duties. But, these tasks are also highly personal in nature, and do not inherently serve a necessary military purpose. These examples illustrate the problems caused when officers assign aides tasks without a military nexus.

Discerning whether an aide's assigned duties are reasonably connected to a general officer's military duties often meets with great difficulty. Having an aide "run" an official errand is obviously related to the officer's duties. Having that aide hand-carry a general officer's household goods shipment claim is also reasonably related to military duty. The determination becomes much more questionable when the aide's duties relate to what would otherwise be considered personal matters. Cooking, cleaning, and personal errands may fall into this cat-

egory. Ostensibly, if there is a nexus between grocery shopping for a general officer and that officer's military duty, one could argue that a similar nexus exists between the same chore and a brigade commander's duties, or a battalion commander's, or a company commander's. If an enlisted soldier's completion of an officer's personal time-consuming tasks permits the officer more time to concentrate on his official duties, isn't the required nexus established? Is it permissible then for general officers to lawfully and ethically order soldiers to complete tasks that would be unlawful or unethical if performed for a more junior officer? The answer may simply be that rank has its privileges. Both *AR 614-200*<sup>47</sup> and *DODD 1315.9*<sup>48</sup> authorize enlisted aides to perform duties for general officers that would otherwise be prohibited if performed for lower ranking officers. There is, however, an overarching principle that cannot be violated: generals' aides are to perform official, rather than personal, duties.<sup>49</sup>

The line that separates "official" duties from duties that inure solely to the personal benefit of the officer, however, is often very fine. For instance, an enlisted aide's preparation of a meal for visiting dignitaries to consume in the general's quarters is an official duty. On the other hand, it would be inappropriate for the general officer to order that same soldier to prepare a candlelight dinner for the general officer and the officer's spouse. Between the two extremes lie more questionable duties, such as the preparation of a meal at which the general officer and a subordinate will discuss "business."

What does "official" really mean? Can a duty be both official and personal?<sup>50</sup> Is it proper to permit "official" duties that result in significant personal benefits? How does one determine whether a benefit that may be both personal and official is more of one than the other? After all, isn't the aides' purpose to perform time-consuming, lesser duties that enable the officer to attend to the more significant chores of managing the Army's affairs? No definitive interpretation of the term "official" assists in this analysis. Nonetheless, some nexus must exist between the aides' duties and the officer's military duties. Simply freeing-up the general officer's time to concentrate on official business is not enough. Maybe a more fitting question is when is it ever appropriate for a subordinate to perform tasks

46. See generally U.S. DEP'T OF ARMY, PAM. 608-47, A GUIDE TO ESTABLISHING FAMILY SUPPORT GROUPS (16 Aug. 1993). On 1 June 2000, the Department of the Army's Community and Family Support Center (CFSC) redesignated Family Support Groups (FSG) as Family Readiness Groups (FRG). Although this change purports to alter the status of FSGs/FRGs, the CFSC did not withdraw *Department of the Army 608-47*. Telephone Interview with Ms. Holly Gifford, Mobilization and Deployment Program Manager, Army Community Services (July 29, 2002); see also Memorandum, Department of the Army Community and Family Support Center (CFSC-SFA), to Family Readiness Groups, subject: Implementing Guidance for Transitioning from Family Support Groups (15 June 2000) (on file with author); U.S. DEP'T OF ARMY, REG. 210-22, PRIVATE ORGANIZATIONS ON DEPARTMENT OF THE ARMY INSTALLATIONS (22 Oct. 2001).

47. *AR 614-200*, *supra* note 2, para. 8-10b.

48. *DOD DIR. 1315.9*, *supra* note 18, para. III.A.

49. *Id.* para. III.B.

50. The Court of Military Appeals posited that the test was "whether these services were to be performed in the capacity of a private servant to accomplish a private purpose, or in the capacity of a soldier, i.e., to accomplish a necessary military purpose." *United States v. Robinson*, 20 C.M.R. 63, 69 (C.M.A. 1955) (quoting *United States v. Semioli*, 53 BR 65).

for a general officer that could otherwise be considered inappropriate if performed for a lower ranking officer?

The Standards for Ethical Conduct also explicitly prohibit the use of public office for private gain.<sup>51</sup> Undoubtedly, in drafting this provision, the authors primarily contemplated financial gain. However, it is conceivable that an officer might “lawfully” use subordinates (to assist with or decrease the officer’s “official” work) for the sole purpose of increasing the officer’s personal free time. While this use of subordinates may not constitute a violation of the Standards for Ethical Conduct’s prohibition against using one’s office for private gain, it may be inappropriate for no other reason than it creates the appearance of a violation.<sup>52</sup> Put simply, if a reasonable person would believe that an action violates the law or the standards of conduct, then most likely the action violates the Standards for Ethical Conduct. Applied to the facts in this scenario, this principle should serve to deter general officers from using subordinates in any questionable manner.

Avoiding the appearance of impropriety is crucial. In short, this may be the most important issue for general officers to remember. No reasonable officer would jeopardize their current position of respect or trade their future career for the embarrassment and minimal personal gain achieved through the misuse of subordinates. Intentional violations of the ethical rules are obvious to spot and are quick to draw unwanted public attention, but, unintentional or incidental misuse of subordinates is more likely to cause problems. In either case, the misuse of aides’ time or services is unethical. Consequently, general officers and their advisors must guard against both actual and perceived violations of the law.

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51. STANDARDS FOR ETHICAL CONDUCT, *supra* note 22, § 2635.702; *see also id.* § 2635.502; Exec. Order No. 12,674, 3 C.F.R. § 215 (1990).

52. STANDARDS FOR ETHICAL CONDUCT, *supra* note 22, § 2635.101(b)(14). This section of the Standards of Conduct was drafted to provide guiding principles to apply in situations not otherwise covered by the regulation.

Employees shall endeavor to avoid any actions creating the appearance that they are violating the law or the ethical standards set forth in this part. Whether particular circumstances create an appearance that the law or these standards have been violated shall be determined from the perspective of a reasonable person with knowledge of the relevant facts.

*Id.*

53. The regulations that do exist appear to have been written with deference to the common sense that generals and aides have shown in the past. More guidance may not be needed simply because general officers and their aides have heretofore acted responsibly, or that the parties have had the wisdom to make proper choices, or maybe that few complaints of abuse have been made. Regardless of the reason, more regulation may not be needed. In fact, this may be one reason why the aide de camp provisions, included in the former *AR 614-16*, were never reissued as part of a new regulation.

54. This note updates previous editions of the state-by-state analysis. *See, e.g.,* TJAGSA Practice Notes, Legal Assistance Items, *State-by-State Analysis of the Divisibility of Military Retired Pay*, ARMY LAW., July 1996, at 21. Many military attorneys and civilian practitioners located throughout the country have contributed to this guide throughout the last ten years. In order to maintain the accuracy and timeliness of this guide, please submit updates and suggested revisions to the Administrative & Civil Law Department, The Judge Advocate General’s School, U.S. Army, ATTN: JAGS-ADA-LA, Charlottesville, Virginia 22903-1781.

55. 10 U.S.C. § 1408 (2000).

56. 453 U.S. 210 (1981) (holding that states are preempted from dividing non-disability military retired pay). *See generally* H. R. CONF. REP. NO. 97-749, at 165 (1982); S. REP. NO. 97-502, at 1-3, 16 (1982).

57. 10 U.S.C. § 1408(c)(1).

## Conclusion

Many questions may remain regarding the proper duties of general officer aides. There truly is little guidance in this area, and the guidance that does exist is very “loose.” Skeptics may argue that general officers would like to keep it that way so as to maximize the privileges of rank, but the truth is that the overwhelming majority of general officers are only interested in the full utilization of the assets or privileges lawfully afforded to them. While few detailed rules exist, detailed rules may not be necessary. Although thin, the present regulations provide sufficient guidance, while retaining sufficient flexibility for officers to mold their aides’ duties to the fluid needs of the military. General officers are entrusted to do the right thing,<sup>53</sup> and previous promotions are generally proof that the officer has acted ethically and responsibly. Rank may indeed have its privileges, but it also has significant responsibilities. Major Tuckey.

## Legal Assistance Note

### State-by-State Analysis of Divisibility of Military Retired Pay<sup>54</sup>

#### Former Spouses’ Protection Act Update

The Uniformed Services Former Spouses’ Protection Act (USFSPA),<sup>55</sup> which legislatively overruled the Supreme Court’s decision in *McCarty v. McCarty*,<sup>56</sup> allows state courts to divide military pensions as marital property in accordance with the laws of the jurisdiction.<sup>57</sup> Therefore, to provide competent advice, legal assistance attorneys must not only understand the USFSPA, but also the law of their client’s state or territory.

By compiling state statutes and case law that address many issues concerning the division of a military pension upon divorce, this guide serves as an aid to legal assistance attorneys in learning the law of particular states and territories. Some of these issues include whether the state will divide a military pension as marital property, methods of valuation, vesting requirements, and other nuances of state law.

When using this guide, note that although *McCarty* overruled some then-existing state case law, many of these cases were reinstated after the USFSPA became effective. Also, note that in *Mansell v. Mansell*,<sup>58</sup> the Supreme Court held that states are preempted from dividing the value of waived military retired pay (to receive disability pay) because it is not “disposable retired pay” as defined by the USFSPA.<sup>59</sup> Thus *Mansell* overrules state case law to the extent such law suggests state courts have the authority to divide more than disposable retired pay. Major Stone.

### Alabama

**Divisible.** *Vaughn v. Vaughn*, 634 So. 2d 533 (Ala. 1993) (holding that disposable military retirement benefits accumulated during the course of the marriage are divisible as marital property). With *Vaughn*, the Supreme Court of Alabama overruled *Kabaci v. Kabaci*, 373 So. 2d 1144 (Ala. Civ. App. 1979), and cases relying on it that are inconsistent with *Vaughn*. Alabama had previously awarded alimony from military retired pay. See, e.g., *Underwood v. Underwood*, 491 So. 2d 242 (Ala. Civ. App. 1986) (awarding wife alimony from husband’s military disability retired pay); *Phillips v. Phillips*, 489 So. 2d 592 (Ala. Civ. App. 1986) (wife awarded fifty percent of husband’s gross military pay as alimony). Alabama Civil Code permits division of the present value of future or current “vested” pensions, and requires a ten-year marital overlap with the earning of such a pension. See ALA. CODE § 30-2-51 (2001).

### Alaska

**Divisible.** *Chase v. Chase*, 662 P.2d 944 (Alaska 1983) (affirming the superior court’s discretionary power to consider military retirement in the distribution of the marital assets); see ALASKA STAT. § 25.24.160(a)(4) (2001). Non-vested retirement benefits are divisible. *Lang v. Lang*, 741 P.2d 649 (Alaska 1987); see also *Morlan v. Morlan*, 720 P.2d 497 (Alaska 1986) (reversing the trial court’s order that a civilian employee must retire to ensure the spouse receives her share of a pension, and holding that the employee should have had the option of continuing to work and periodically paying the spouse the sums she would have received from the retired pay).

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58. 490 U.S. 581 (1989).

59. *Id.* at 589.

### Arizona

(community property state)

**Divisible.** *DeGryse v. DeGryse*, 135 661 P.2d 185 (Ariz. 1983) (holding that the USFSPA resurrects *Van Loan v. Van Loan*, 569 P.2d 214 (Ariz. 1977), and *Neal v. Neal*, 570 P.2d 758 (Ariz. 1977) as controlling the issue of military pension division). These cases hold that a military pension earned during the marriage is divisible as community property. See ARIZ. REV. STAT. §§ 25-211, 25-318(A) (2001); *Kelly v. Kelly*, 9 P.3d 1046 (Ariz. 2000); *Koelsch v. Koelsch*, 713 P.2d 1234 (Ariz. 1986) (holding that if a civilian employee is not eligible to retire at the time of the dissolution of the marriage, the court must order that the spouse begin receiving the awarded share of retired pay when the employee becomes eligible to retire, whether or not the employee does retire at that point); *Van Loan v. Van Loan*, 569 P.2d 214 (Ariz. 1977) (holding that a non-vested military pension is divisible as community property).

### Arkansas

**Divisible.** *Young v. Young*, 701 S.W.2d 369 (Ark. 1986); see ARK. CODE ANN. § 9-12-315 (2001). Arkansas has a vesting requirement. *Durham v. Durham*, 708 S.W.2d 618 (Ark. 1986) (holding military retired pay not divisible as marital property when the member had not served twenty years at the time of the divorce because the military pension had not vested. *But see Burns v. Burns*, 847 S.W.2d 23 (Ark. 1993) (dissenting) (rejecting twenty years of service as a prerequisite to “vesting” of a military pension).

### California

(community property state)

**Divisible.** *In re Fithian*, 517 P.2d 449 (Cal. 1974) (holding that a military pension is divisible so long as it vests during the marriage, even though it does not mature until later); see CAL. FAM. CODE § 2610 (2001). *But see In re Marriage of Brown*, 544 P.2d 561 (Cal. 1976) (holding that a husband’s contingent pension interest, vested or not vested, is a property interest of the community, overruling *In re Fithian* on this point).

**Jurisdiction.** *Tucker v. Tucker*, 226 Cal. App. 3d 1249 (Cal. Ct. App. 1991) (holding that a non-resident service member did not consent to California’s jurisdiction to divide his military pension, even though he consented to the court deciding dissolution, child support, and other property issues); see also *Hattis v. Hattis*, 242 Cal. Rptr. 410 (Cal. Ct. App. 1987) (requiring more than minimum contacts to establish jurisdiction to divide a military pension).

## Colorado

**Divisible.** *In re* Marriage of Beckman and Holm, 800 P.2d 1376 (Colo. 1990) (vested and non-vested military retirement benefits pensions are divisible as marital property); *see* COLO. REV. STAT. § 14-10-113 (2001); *In re* Hunt, 909 P.2d 525, (Colo. 1996) (holding that post-divorce increases in pay resulting from promotions are marital property subject to division) (approving the use of the following formula to define the marital share: final pay of the member at retirement is multiplied by a percentage defined by fifty percent of a fraction, wherein the numerator equals the number of years of overlap between marriage and service, and the denominator equals the number of years of total service of the member).

## Connecticut

**Probably Divisible.** *See* CONN. GEN. STAT. § 46b-81 (2001) (providing courts with broad discretion to divide property). In *Krafick v. Krafick*, 663 A.2d 365 (Conn. 1995), the Connecticut Supreme Court affirmed the division of a vested civilian pension as property under Connecticut General Statute section 46b-81. “Although we do not reach non-vested pension benefits here, we note that the same reasoning has been applied to find that such benefits also, as an initial matter, constitute property.” *Id.* at 373. In *Rosato v. Rosato*, 766 A.2d 429 (Conn. 2000), the supreme court stated, “We recognize that it is an open question whether non-vested pension benefits are subject to distribution in a dissolution order.” *Id.* at 436 n.19. *But see* *Bender v. Bender*, 758 A.2d 890 (Conn. App. Ct. 2000) (affirming division of a non-vested civilian pension). “It is important to note . . . [that] neither party challenges the authority of the court to award non-vested pension rights.” *Id.* at 893.

## Delaware

**Divisible.** *Memmolio v. Memmolio*, 576 A.2d 181 (Del. 1990) (stating pensions which accrue during a marriage, whether vested or not at the time of divorce, are normally considered marital property); *see* DEL. CODE ANN. tit. 13, § 1513 (2001); *Smith v. Smith*, 458 A.2d 711 (Del. Fam. Ct. 1983); *Donald R.R. v. Barbara S.R.*, 454 A.2d 1295 (Del. Super. Ct. 1982).

## District of Columbia

**Divisible.** *Barbour v. Barbour*, 464 A.2d 915 (D.C. 1983) (holding that a vested but non-matured civil service pension is divisible as marital property; suggesting in dicta that non-vested pensions are also divisible); *see also* D.C. CODE § 16-910 (2002).

## Florida

**Divisible.** *Pastore v. Pastore*, 497 So. 2d 635 (Fla. 1986) (holding vested military retired pay can be divided). *But see* FLA. STAT. § 61.075(3)(a)4 (2001) (allowing courts to divide vested or non-vested pension rights).

## Georgia

**Probably Divisible.** *Compare* *Courtney v. Courtney*, 344 S.E.2d 421 (Ga. 1986) (non-vested civilian pensions are divisible), *with* *Stumpf v. Stumpf*, 294 S.E.2d 488 (Ga. 1982) (military retired pay may be considered in establishing alimony obligations). *See also* *Hall v. Hall*, 51 B.R. 1002 (S.D. Ga. 1985) (Georgia divorce judgment awarding debtor’s wife thirty-eight percent of debtor’s military retirement, payable directly from the United States to the wife, granted the wife a non-dischargeable property interest in thirty-eight percent of the husband’s military retirement); *Holler v. Holler*, 54 S.E.2d 140 (Ga. 1987) (citing *Stumpf* and *Courtney*, the court “[a]ssum[ed] that vested and non-vested military retirement benefits acquired during the marriage are now marital property subject to equitable division,” but then decided that military retired pay could not be divided retroactively if not subject to division at the time of the divorce).

## Hawaii

**Divisible.** HAW. REV. STAT. ANN. §§ 580-47, 510-9 (2001); *Cassiday v. Cassiday*, 716 P.2d 1133 (Haw. 1986); *Linson v. Linson*, 618 P.2d 748 (Haw. 1981); *see also* *Jones v. Jones*, 780 P.2d 581 (Haw. Ct. App. 1989) (ruling that *Mansell’s* limitation on dividing Veteran’s Administration (VA) benefits cannot be circumvented by awarding an offsetting interest in other property; holding that *Mansell* applies to military disability retired pay and VA benefits); *Wallace v. Wallace*, 677 P.2d 966 (Haw. Ct. App. 1984) (ordering a Public Health Service employee to pay a share of retired pay upon reaching retirement age, whether he retires at that point or not).

## Idaho

(community property state)

**Divisible.** *Griggs v. Griggs*, 686 P.2d 68 (Idaho 1984) (overruling *Rice v. Rice*, 645 P.2d 319 (Idaho 1982); reinstating *Ramsey v. Ramsey*, 535 P.2d 53 (Idaho 1975) (holding that military retirement pay is divisible as community or separate property, depending on whether the service upon which it was earned occurred before or during the marriage)); *see* IDAHO CODE § 32-906 (2002); *Hunt v. Hunt*, 43 P.3d 777 (Idaho 2002) (explaining state formula for dividing retirement benefits); *Balderson v. Balderson*, 896 P.2d 956 (Idaho 1995) (affirming lower court’s decision ordering a service member to pay his spouse her community share of the military pension, even though he had decided to delay retirement); *Leatherman v.*

Leatherman, 833 P.2d 105 (Idaho 1992) (holding that a portion of husband's civil service annuity attributable to years of military service during marriage was divisible military service benefit, and thus subject to statute relating to modification of divorce decrees, to include division of military retirement benefits); *Mosier v. Mosier*, 830 P.2d 1175 (Idaho 1992); *Walborn v. Walborn*, 817 P.2d 160 (Idaho 1991); *Bewley v. Bewley*, 780 P.2d 596 (Idaho Ct. App. 1989) (holding that courts cannot circumvent *Mansell's* limitation on dividing VA benefits by using an offset against other property).

### Illinois

**Divisible.** *In re Brown*, 587 N.E.2d 648 (Ill. App. Ct. 1992) (holding that a military pension may be treated as marital property under Illinois law); *In re Korper*, 475 N.E.2d 1333 (Ill. App. Ct. 1985) (holding that a pension is marital property, even if it is not vested and a spouse is entitled to receive a share upon member eligibility); *see* 750 ILL. COMP. STAT. ANN. 5/503 (2001).

### Indiana

**Divisible.** IND. CODE § 31-1-11.5-2(d)(3) (2001) (providing that property for marital dissolution purposes includes "the right to receive disposable retired pay, as defined in 10 U.S.C. § 1408(a) acquired during the marriage, that is or may be payable after the dissolution of the marriage"); *see also* *Kirkman v. Kirkman*, 555 N.E.2d 1293 (Ind. 1990) (holding that non-vested national guard pension was properly excluded as marital property); *Arthur v. Arthur*, 519 N.E.2d 230 (Ind. Ct. App. 1988) (ruling that Indiana Code section 31-1-11.5-2(d)(3) cannot be applied retroactively to allow division of military retired pay in a case filed before the law's effective date—1 September 1985).

### Iowa

**Divisible.** *In re Howell*, 434 N.W.2d 629 (Iowa 1989) (holding that a military pension in Iowa is marital property and divided as such in a dissolution proceeding); *see* IOWA CODE ANN. § 598.21 (2001). *See generally* *In re Marriage of Anderson*, 522 N.W.2d 99 (Iowa Ct. App. 1994) (applying the Supreme Court's reasoning in *Rose v. Rose*, 481 U.S. 619 (1987), Iowa court held that a disabled veteran whose only source of income is his disability payments must still pay alimony, child support, or both in a divorce).

### Kansas

**Divisible.** KAN. STAT. ANN. § 23-201(b) (2001) (defining vested and non-vested military pensions as marital property); *In re Harrison*, 769 P.2d 678 (Kan. Ct. App. 1989) (overruling prior case law prohibiting division of military retired pay).

### Kentucky

**Divisible.** *Jones v. Jones*, 680 S.W.2d 921 (Ky. 1984) (holding that a vested military pension is a divisible marital property interest under Kentucky Revised Statute Annotated section 430.190); *Poe v. Poe*, 711 S.W.2d 849 (Ky. Ct. App. 1986) (non-vested military retirement benefits are marital property); *see* KY. REV. STAT. ANN. § 403.190 (2001).

### Louisiana

(community property state)

**Divisible.** *Swope v. Mitchell*, 324 So. 2d 461 (La. 1975) (affirming lower court's division of military retired pay as community property); *Little v. Little*, 513 So. 2d 464 (La. Ct. App. 1987) (non-vested and non-matured military retired pay is marital property); *see* LA. CIV. CODE ANN. art. 2336 (2002); *Warner v. Warner*, 651 So. 2d 1339 (La. 1995) (confirming that the ten-year test of 10 U.S.C. § 1408(d)(2) is a prerequisite for direct payment, but not for award of a share of retired pay to a former spouse); *Gowins v. Gowins*, 466 So. 2d 32 (La. 1985) (soldier's participation in divorce proceedings constituted implied consent for the court to exercise jurisdiction and divide the soldier's military retired pay as marital property); *Campbell v. Campbell*, 474 So. 2d 1339 (La. Ct. App. 1985) (awarding former spouse a share of disposable retired pay, not gross retired pay, and not VA disability benefits paid in lieu of military retired pay); *Jett v. Jett*, 449 So. 2d 557 (La. Ct. App. 1984); *Rohring v. Rohring*, 441 So. 2d 485 (La. Ct. App. 1983).

### Maine

**Divisible.** *Lunt v. Lunt*, 522 A.2d 1317 (Me. 1987) (affirming a lower court's division of a military pension as property); *see also* ME. REV. STAT. ANN. tit. 19 § 953 (2001).

### Maryland

**Divisible.** MD. CODE ANN., FAM. LAW. § 8-203(b) (2002) (defining military retirement as marital property); *Nisos v. Nisos*, 483 A.2d 97 (Md. Ct. Spec. App. 1984) (dividing military pension); *see* *Andresen v. Andresen*, 564 A.2d 399 (Md. 1989) (holding that decrees silent on division of retired pay cannot be reopened simply on the basis that Congress subsequently enacted the USFSPA); *Deering v. Deering*, 437 A.2d 883 (Md. 1981); *Ohm v. Ohm*, 431 A.2d 1371 (Md. 1981) (non-vested pensions are divisible).

### Massachusetts

**Divisible.** MASS. GEN. LAWS ANN. ch. 208, § 34 (2002) (defining vested and non-vested pensions as marital property subject to division upon marital dissolution); *Andrews v. Andrews*, 543 N.E.2d 31 (Mass. Ap. Ct. 1989) (affirming lower court's ali-

mony award from military retired pay, noting that the lower court could have awarded it as property, but did not).

### Michigan

**Divisible.** MICH. COMP. LAWS ANN. § 552.18 (2002) (vested or non-vested retirement benefits are part of the marital estate subject to award); *see* Vander Veen v. Vander Veen, 580 N.W.2d 924 (Mich. Ct. App. 1998); Keen v. Keen, 407 N.W.2d 643 (Mich. Ct. App. 1987); Giesen v. Giesen, 364 N.W.2d 327 (Mich. Ct. App. 1985); McGinn v. McGinn, 337 N.W.2d 632 (Mich. Ct. App. 1983).

### Minnesota

**Divisible.** MINN. STAT. § 518.54 subdiv. 5 (2001) (defining vested or non-vested pensions as marital property); Deliduka v. Deliduka, 347 N.W.2d 52 (Minn. Ct. App. 1984) (holding that a court may award a spouse a share of gross retired pay); *see also* Janssen v. Janssen, 331 N.W.2d 752 (Minn. 1983) (non-vested pensions divisible). *But see* Mansell v. Mansell, 490 U.S. 581 (1989) (holding that a court may only award a spouse a share of disposable retired pay).

### Mississippi

**Divisible.** Ferguson v. Ferguson, 639 So. 2d 921 (Miss. 1994) (adopting equitable distribution as the method of marital asset division); Powers v. Powers, 465 So. 2d 1036 (Miss. 1985) (affirming lower court's award to former spouse of permanent alimony equal to half of the husband's military pension, noting that the USFSPA authorized the lower court to divide it as property); Hemsley v. Hemsley, 639 So. 2d 909 (Miss. 1994) (defining marital property for the purpose of a divorce as "any and all property acquired or accumulated during the marriage"); *see also* Pierce v. Pierce, 648 So. 2d 523 (Miss. 1995) (noting that military pensions can be divided regardless of fault since, unlike alimony, the pension is property).

### Missouri

**Divisible.** Coates v. Coates, 650 S.W.2d 307 (Mo. Ct. App. 1983) (noting that the USFSPA nullifies *McCarty*, thus the lower court correctly divided a military pension as property); *In re* Marriage of Weaver, 606 S.W.2d 243 (Mo. Ct. App. 1980) (holding that military pensions are marital property subject to division upon dissolution); *see* Mo. REV. STAT. § 452.330 (2001); Moon v. Moon, 795 S.W.2d 511 (Mo. Ct. App. 1990) (holding that only disposable retired pay is divisible); Fairchild v. Fairchild, 747 S.W.2d 641 (Mo. Ct. App. 1988) (holding non-vested and non-matured military retired pay are marital property).

### Montana

**Divisible.** *In re* Marriage of Kecskes, 683 P.2d 478 (Mont. 1984) (holding that military retirement pay shall be included for purposes of establishing the marital estate); *In re* Marriage of Miller, 609 P.2d 1185 (Mont. 1980) (holding that military retirement pay is divisible as marital property), *vacated and remanded sub. nom.* Miller v. Miller, 453 U.S. 918 (1981); *see* MONT. CODE ANN. § 40-2-202 (2001).

### Nebraska

**Divisible.** NEB. REV. STAT. ANN. § 42-366(8) (2001) (military pensions are part of the marital estate, vested or not, and may be divided as property or alimony); Ray v. Ray, 383 N.W.2d 752 (Neb. 1986); Taylor v. Taylor, 348 N.W.2d 887 (Neb. 1984) (holding non-disability military retirements divisible).

### Nevada

(community property state)

**Divisible.** NEV. REV. STATE. ANN. § 125.150 (2001); Gemma v. Gemma, 778 P.2d 429 (Nev. 1989) (holding spouses can elect to receive their share when employee spouses become retirement eligible, whether or not retirement occurs at that point); Forrest v. Forrest, 668 P.2d 275 (Nev. 1983) (holding all retirement benefits are divisible community property, whether vested or not, and whether matured or not). *But see* Tomlinson v. Tomlinson, 729 P.2d 1303 (Nev. 1986) (holding a silent decree res judicata of *non*-division of retirement benefits). The Nevada Supreme Court has since held, however, that the parties to a divorce remain tenants in common of all assets omitted from the decree, whether by fraud or simple mistake. Williams v. Waldman, 836 P.2d 614 (Nev. 1992); Amie v. Amie, 796 P.2d 233 (Nev. 1990).

### New Hampshire

**Divisible.** N.H. REV. STAT. ANN. § 458:16-a (2002) (including vested and non-vested pensions as marital property subject to equitable division); Blanchard v. Blanchard, 578 A.2d 339 (N.H. 1990) (affirming the statutory language).

### New Jersey

**Divisible.** N.J. STAT. ANN. § 2A:34-23 (2002) (including pensions in equitable distribution of marital property); Castiglioni v. Castiglioni, 471 A.2d 809 (N.J. 1984) (retroactively dividing a pension under 10 U.S.C. § 1408); Whitfield v. Whitfield, 535 A.2d 986 (N.J. Super. Ct. App. Div. 1987) (holding that non-vested military retired pay is marital property); *see also* Moore v. Moore, 553 A.2d 20 (N.J. 1989) (holding that post-divorce cost-of-living raises in a police pension are divisible).

### New Mexico

(community property state)

**Divisible.** N.M. STAT. ANN. § 40-3-12 (2001); *Mattox v. Mattox*, 734 P.2d 259 (N.M. 1987) (suggesting that a court can order a member to begin paying the spouse his or her share when the member becomes eligible to retire even if the member elects to remain on active duty); *Walentowski v. Walentowski*, 672 P.2d 657 (N.M. 1983) (reinstating the law under *LeClert v. LeClert*, 453 P.2d 755 (N.M. 1969), which held military pensions are divisible as community property); *Stroshine v. Stroshine*, 652 P.2d 1193 (N.M. 1982) (holding that the disability portion of retired pay is divisible community property because it was earned during coverture); *see also White v. White*, 734 P.2d 1283 (N.M. Ct. App. 1987) (awarding a share of gross retired pay). *But see Mansell v. Mansell*, 490 U.S. 581 (1989) (holding that states are limited to dividing disposable retired pay).

### New York

**Divisible.** N.Y. DOM. REL. § 236 (2002); *Majauskas v. Majauskas*, 463 N.E.2d 15 (N.Y. 1984) (dividing a vested but non-mature police pension as marital property); *Lydick v. Lydick*, 516 N.Y.S.2d 326 (N.Y. App. Div. 1987) (stating that a military pension is marital property); *Gannon v. Gannon*, 498 N.Y.S.2d 647 (N.Y. App. Div. 1986) (affirming the lower court's division of a military pension as marital property); *West v. West*, 475 N.Y.S.2d 493 (N.Y. App. Div. 1984) (holding that disability payments are separate property as a matter of law, but a disability pension is marital property to the extent it reflects deferred compensation); *Damiano v. Damiano*, 463 N.Y.S.2d 477 (N.Y. App. Div. 1983) (dividing non-vested pension).

### North Carolina

**Divisible.** N.C. GEN. STAT. § 50-20(b)(1) (2001) (providing that "marital property includes all vested and non-vested pension, retirement, and other deferred compensation rights, and vested and non-vested military pensions eligible under the [USFSPA]"); *see also id.* § 50-20.1 (explaining pension valuation and methods of distribution).

### North Dakota

**Divisible.** N.D. CENT. CODE § 14-05-24 (2002); *Bullock v. Bullock*, 354 N.W. 2d 904 (N.D. 1984) (holding a non-vested military pension is divisible as a marital asset); *Delorey v. Delorey*, 357 N.W.2d 488 (N.D. 1984); *see also Knoop v. Knoop*, 542 N.W.2d 114 (N.D. 1996) (confirming that "disposable retired pay" as defined in 10 U.S.C. § 1408 limits what states are authorized to divide as marital property, but holding that the USFSPA does not require the term "retirement pay" to be interpreted as "disposable retired pay"); *Morales v. Morales*,

402 N.W.2d 322 (N.D. 1987) (affirming a 17.5% award to a seventeen-year spouse by considering equitable factors).

### Ohio

**Divisible.** OHIO REV. CODE ANN. § 3105.171 (2002); *King v. King*, 605 N.E.2d 970 (Ohio App. 1992) (holding that the trial court abused its discretion by retaining jurisdiction to divide a military pension that would not vest for nine years when no evidence of value demonstrated); *Lemon v. Lemon*, 537 N.E.2d 246 (Ohio App. 1988) (holding non-vested pensions are divisible as marital property *when some evidence of value demonstrated*). *But see Ingalls v. Ingalls*, 624 N.E.2d 368 (Ohio 1993) (affirming division of non-vested military retirement benefits consistent with agreement of the parties expressed at trial); *Cherry v. Figart*, 620 N.E.2d 174 (Ohio App. 1993) (distinguishing *King* by affirming division of non-vested pension when parties had agreed to divide the retirement benefits and suit was brought for enforcement only).

### Oklahoma

**Divisible.** *Messinger v. Messinger*, 827 P.2d 865 (Okla. 1992) (holding that only a vested pension at the time of the divorce is divisible); *Stokes v. Stokes*, 738 P.2d 1346 (Okla. 1987) (holding that a military pension may be divided as jointly acquired property).

### Oregon

**Divisible.** ORG. REV. STAT. § 107.105 (2001); *In re Richardson*, 769 P.2d 179 (Or. 1989) (holding that non-vested pension plans are marital property); *In re Manners*, 683 P.2d 134 (Or. App. 1984) (holding military pensions divisible).

### Pennsylvania

**Divisible.** 23 PA. CONS. STAT. ANN. § 3501 (2002); *Major v. Major*, 518 A.2d 1267 (Pa. Super. Ct. 1986) (holding non-vested military retired pay is marital property).

### Puerto Rico

**Not Divisible as Marital Property.** *Delucca v. Colon*, 119 P.R. Dec. 720 (P.R. 1987) (reestablishing retirement pensions as separate property of the spouses, consistent with its earlier decision in *Maldonado v. Superior Court*, 100 P.R.R. 369 (P.R. 1972), and overruling *Torres v. Robles*, 115 P.R. Dec. 765 (P.R. 1984), which held that military retired pay is divisible); *see also Carrero v. Santiago*, 133 P.R. Dec. 727 (P.R. 1993) (citing *Delucca* with approval); *Benitez Guzman v. Garcia Merced*, 126 P.R. Dec. 302 (P.R. 1990).

## Rhode Island

**Divisible.** R.I. GEN. LAWS § 15-5-16.1 (2001) (listing broad, statutory factors to effect an equitable distribution of the parties' property); *see* *Flora v. Flora*, 603 A.2d 723 (R.I. 1992) (rejecting implied consent to satisfy the jurisdictional requirements of 10 U.S.C. § 1408(c)(4)).

## South Carolina

**Divisible.** S.C. CODE ANN. § 20-7-472 (2001); *Tiffault v. Tiffault*, 401 S.E.2d 157 (S.C. 1991) (holding that vested military retirement benefits constitute an earned property right which, if accrued during the marriage, is subject to equitable distribution); *Ball v. Ball*, 430 S.E.2d 533 (S.C. Ct. App. 1993) (holding non-vested military retirement benefits subject to equitable division). *But see* *Walker v. Walker*, 368 S.E.2d 89 (S.C. Ct. App. 1988) (denying wife any portion to military retired pay because she lived with her parents during entire period of husband's naval service and made no homemaker contributions).

## South Dakota

**Divisible.** S.D. CODIFIED LAWS § 25-4-44 (2001); *Gibson v. Gibson*, 437 N.W.2d 170 (S.D. 1989) (holding that military retired pay is divisible); *see also* *Radigan v. Radigan*, 465 N.W.2d 483 (S.D. 1991) (holding that a husband must share with ex-wife any increase in his retired benefits that results from his own post-divorce efforts); *Caughron v. Caughron*, 418 N.W.2d 791 (S.D. 1988) (holding that the present cash value of a non-vested retirement benefit is marital property); *Stubbe v. Stubbe*, 376 N.W.2d 807 (S.D. 1985) (holding a civilian pension divisible, observing that "this pension plan is vested in the sense that it cannot be unilaterally terminated by [the] employer, though actual receipt of benefits is contingent upon [the worker's] survival and no benefits will accrue to the estate prior to retirement"); *Hansen v. Hansen*, 273 N.W.2d 749 (S.D. 1979) (holding that a vested civilian pension is divisible).

## Tennessee

**Divisible.** TENN. CODE ANN. § 36-4-121(b)(1)(B) (2001) (defining vested and non-vested pensions as marital property); *see also* *Towner v. Towner*, 858 S.W.2d 888 (Tenn. 1993) (affirming trial court's approval of a separation agreement after determining that the agreement divided a non-vested pension as marital property). Note that a disabled veteran may be required to pay alimony, child support, or both in divorce actions, even when his only income is veterans' disability and supplemental security income. *See, e.g.,* *Rose v. Rose*, 481 U.S. 619 (1987) (upholding the exercise of contempt authority by Tennessee court over veteran who would not pay child support, finding that VA benefits were intended to take care of not just the veteran).

## Texas

(community property state)

**Divisible.** TEX. FAM. CODE § 700.3 (2002); *Cameron v. Cameron*, 641 S.W.2d 210 (Tex. 1982); *see also* *Grier v. Grier*, 731 S.W.2d 931 (Tex. 1987) (awarding spouse a share of gross retired pay, but ruling that post-divorce pay increases constitute separate property). *But see* *Mansell v. Mansell*, 490 U.S. 581 (1989) (rejecting divisibility of "gross retired pay"); *Ex parte Burson*, 615 S.W.2d 192 (Tex. 1981) (holding that a court cannot divide VA disability benefits paid in lieu of military retired pay).

## Utah

**Divisible.** Utah Code Ann. § 30-3-5 (2001); *Greene v. Greene*, 751 P.2d 827 (Utah Ct. App. 1988) (holding marital property encompasses military retirement benefits accrued in whole or in part during the marriage); *see also* *Woodward v. Woodward*, 656 P.2d 431 (Utah 1982); *Maxwell v. Maxwell*, 796 P.2d 403 (Utah Ct. App. 1990) (ordering a military retiree to pay his ex-wife one-half the amount he had withheld in excess from his retired pay for taxes).

## Vermont

**Probably Divisible.** *See* VT. STAT. ANN. tit. 15, § 751 (2001) (listing broad factors in settling property division); *Milligan v. Milligan*, 613 A. 2d 1281 (Vt. 1992) (no general barrier to distributing pensions as marital assets); *McDermott v. McDermott*, 552 A.2d 786 (Vt. 1988) (holding pension rights acquired by a party to a divorce during the marriage constitute marital property and are subject to equitable distribution along with other assets).

## Virginia

**Divisible.** VA. CODE ANN. § 20-107.3 (2002) (defining marital property to include all pensions, whether or not vested); *see* *Owen v. Owen*, 419 S.E.2d 267 (Va. Ct. App. 1992) (holding a settlement agreement's guarantee/indemnification clause requiring the retiree to pay the same amount of support to the spouse, despite the retiree beginning to collect VA disability pay, does not violate *Mansell*); *Mitchell v. Mitchell*, 355 S.E.2d 18 (Va. Ct. App. 1987); *Sawyer v. Sawyer*, 335 S.E.2d 277 (Va. Ct. App. 1985) (holding that military retired pay is subject to equitable division).

## Virgin Islands

**Divisible.** *Fuentes v. Fuentes*, 41 V.I. 86 (Terr. Ct. 1999) (holding that a defined benefit retirement plan is marital property to the extent it was earned during the marriage); *see also* 16 V.I. CODE ANN. § 109 (2001).

### Washington

(community property state)

**Divisible.** WASH. REV. CODE § 26.09.080 (2002); Konzen v. Konzen, 693 P.2d 97 (Wash. 1985) (affirming lower court's division of military pension as property); Wilder v. Wilder, 534 P.2d 1355 (1975) (holding non-vested pension divisible); *see In re Smith* 657 P.2d 1383 (Wash. 1983); Payne v. Payne, 512 P.2d 736 (Wash. 1973).

### West Virginia

**Divisible.** W. VA. CODE ANN. § 48-5-610 (2001); Butcher v. Butcher, 357 S.E.2d 226 (W. Va. 1987) (vested and non-vested military retired pay is marital property subject to equitable distribution).

### Wisconsin

(community property state)

**Divisible.** Leighton v. Leighton, 261 N.W.2d 457 (Wis. 1978) (holding disability benefits not divisible); Rodak v. Rodak, 442 N.W.2d 489 (Wis. Ct. App. 1989) (holding that portion of civilian pension earned *before* marriage is included in marital prop-

erty and subject to division); Thorpe v. Thorpe, 367 N.W.2d 233 (Wis. Ct. App. 1985) (affirming lower court's retroactive division of military retirement); Pfeil v. Pfeil, 341 N.W.2d 699 (Wis. Ct. App. 1983).

### Wyoming

**Divisible.** WYO. STAT. ANN. § 20-2-114 (2001); Parker v. Parker, 750 P.2d 1313 (Wyo. 1988) (holding that non-vested military retired pay is marital property, and that the ten-year test is a prerequisite for direct payment of military retired pay as property, but not for division of military retired pay as property); *see also* Forney v. Minard, 849 P.2d 724 (Wyo. 1993) (affirming award of one-hundred percent of "disposable retired pay" to former spouse as property, but acknowledging only fifty percent of this award can be paid directly). This holding is inconsistent with the 1990 amendment to USFSPA, 10 U.S.C. § 1408(e)(1), which deems all orders dividing military retired pay as property satisfied once a threshold of fifty percent of the "disposable retired pay" is reached.