

BEFORE CRYING FOUL: AN INCOMPLETE ALIGNMENT OF ARIZONA'S COMMUNITY PROPERTY DOCTRINE AND THE UNIFORMED SERVICES FORMER SPOUSES' PROTECTION ACT

Grant D. Wille^{*}

Who would ever deny that both military veterans and their spouses deserve the respect and admiration of this Nation for the sacrifices they make? Yet when these couples divorce, the courts must determine whether and how to divide retirement and disability benefits between these two groups of individuals. Arizona's community property doctrine, which favors the division of community property between spouses, directly conflicts with the federal government's historic interpretation of military retirement and disability benefits. To resolve the conflict, the Arizona legislature recently enacted sections 25-318.01 and 25-530 of the Arizona Revised Statutes. Though these statutes represent a drastic change within Arizona's family courts, the statutes' prohibition against dividing military disability benefits is not as comprehensive as federal law suggests it should be. This Note explores the incomplete alignment of state and federal law, what implications it may have for practitioners, and the policy considerations that laymen, attorneys, and legislators should keep in mind before crying foul at the enactment of these statutes or their incomplete alignment of federal and state law.

^{*} J.D. Candidate, University of Arizona James E. Rogers College of Law, 2013. The author would like to give special thanks to Major Mark Beres, United States Air Force (Retired), and all of those service members and their spouses who have sacrificed and continue to sacrifice for this great Nation.

TABLE OF CONTENTS

INTRODUCTION.....	830
I. DIVISION OF MILITARY BENEFITS UNDER ARIZONA AND FEDERAL LAW.....	832
A. Arizona Community Property	832
B. Arizona Spousal Maintenance	834
C. The USFSPA and the Division of Military Benefits	836
II. ALIGNING FEDERAL AND STATE LAW: SECTIONS 25-318.01 AND 25-530	
OF THE ARIZONA REVISED STATUTES	839
A. Title 38 VA Disability Benefits, Retirement Pay, and Indemnification	840
B. Title 10, Chapter 61: Disabilities That End Active Duty, and Their	
Benefits.....	844
C. Initial Responses to the Effect of the New Arizona Statutes	846
CONCLUSION.....	847

INTRODUCTION

During a divorce, a family court’s role is to call an equitable truce and draw a just line between the property of a former couple. Arizona’s community property doctrine assists in this division, ensuring that nonemployed spouses receive a fair portion of property earned through the labors of the marital “community.”¹ This fundamental doctrine is not always the sole guiding principle when it comes to dividing a divorced couple’s property though. Courts and the Arizona legislature continue to grapple with whether and how to divide military disability benefits.

This conflict between community property and the divisibility of military benefits escalated to the national level when the U. S. Supreme Court ruled in 1981 that federal law preempted states from dividing military retirement pay under state community property laws.² Congress responded by enacting the Uniformed Services Former Spouses’ Protection Act (“USFSPA”), which allows division except in the case of disability benefits.³ More recently, the Arizona legislature took steps to follow Congress’s lead, enacting sections 25-318.01 and 25-530 of the Arizona Revised Statutes.⁴

Arizona courts had previously divided military disability benefits despite federal preemption against such division, utilizing indemnification clauses or awarding greater portions of other community property in order to give former spouses “their share” of the disability benefits—a necessary step due to the fact that directly dividing these benefits is preempted by federal law.⁵ The new statutes

1. See *Flowers v. Flowers*, 578 P.2d 1006, 1010 (Ariz. Ct. App. 1978) (Jacobson, J., concurring).

2. See *McCarty v. McCarty*, 453 U.S. 210, 232 (1981).

3. 10 U.S.C. § 1408 (2012).

4. ARIZ. REV. STAT. ANN. §§ 25-318.01, -530 (2012).

5. See *Mansell v. Mansell*, 490 U.S. 581, 588–89, 594–95 (1989); *Danielson v. Evans*, 36 P.3d 749, 755 (Ariz. Ct. App. 2001).

take steps to align state law with the USFSPA. Specifically, these statutes prohibit family courts from considering or acknowledging disability benefits awarded to veterans through the Department of Veterans Affairs (“VA”) under title 38, chapter 11 of the U.S. Code.⁶ The statutes also prohibit the use of indemnification clauses and other legal strategies during the division of community property in order to maneuver around the federal prohibition.⁷

The Arizona statutes do not, however, completely align federal and state approaches to military benefits. Unlike the USFSPA, they do not address disability benefits awarded pursuant to title 10 of the Federal Code. Nor do they prohibit the use of legal strategies like indemnification clauses within spousal maintenance hearings held after community property has been divided. This Note seeks to explore these discrepancies.

In the world of retirement and disability benefits, military benefits are unique. Military disability benefits are enumerated across titles 38 and 10 of the Code. While benefits under title 38 (Department of Veterans Affairs benefits) provide funds to any veteran with a service-related disability, title 10 benefits provide funds specifically tailored to veterans deemed no longer fit to perform their duties because of their disability, whether their relief from duty is temporary, permanent but before retirement (“separation” benefits), or a form of true and permanent retirement.⁸ Adding to the complexity under title 10, Congress has made the eligibility requirements, award calculations, and waiver provisions of each benefit idiosyncratic.⁹

The complexity of these statutes makes it difficult to decide whether and how to divide each type of benefit under Arizona law, even with the new Arizona statutes in place.¹⁰ Because the statutes do not prohibit consideration of title 10 disability benefits (unlike the USFSPA), a family court still may apply Arizona’s standard community property and spousal maintenance laws when exercising jurisdiction over a veteran receiving such benefits. Moreover, indemnification clauses and similar strategies used to avoid the federal preemption against direct division of disability benefits still may be applied to title 10 benefits or title 38 benefits to some degree during spousal maintenance hearings.

Thus, although Arizona’s new statutes attempt to align Arizona and federal law, discrepancies between Arizona and federal law may still occur when

6. 10 U.S.C. § 1408(a)(4); ARIZ. REV. STAT. ANN. §§ 25-318.01(1), -530.

7. ARIZ. REV. STAT. ANN. § 25-318.01(2), (3); *see In re Marriage of Downing*, 265 P.3d 1097, 1098–99 (Ariz. Ct. App. 2011).

8. 38 U.S.C. §§ 1110, 1130 (2012); 10 U.S.C. §§ 1201–1206, 1212 (2012) (providing benefits to service members taken off of active duty temporarily, for permanent separation before retirement, or permanent retirement).

9. Federal law even takes into account and compensates veterans for injuries incurred during funeral service duty. 10 U.S.C. § 1206(2)(B)(i).

10. *See* *McCarty v. McCarty*, 453 U.S. 210, 212–14, 222 (1981) (noting, for example, that retirement benefits paid to veterans are actually a form of retainer pay, allowing older officers to leave active duty and making space for a more youthful military force while keeping retired veterans subject to recall to active duty).

dealing with military disability benefits. For those who thought Arizona's status quo appropriate, this may provide relief—the statutes are not as dramatic a change as one would first think. The statutes only exclude title 38 benefits and prohibit a court from going after other property to make up for this “loss.” On the other side, those who favored the alignment of Arizona and federal law may feel that the statutes do not go far enough. In particular, supporters of state and federal alignment may believe that the statutes discriminate against those veterans who receive title 10 benefits while providing special protection to benefactors of the Department of Veterans Affairs. While the exclusion of title 38 benefits is significant because most veterans receive these benefits, this discrimination between different veterans is disconcerting. Why not protect all disabled veterans?

This Note examines the interplay of Arizona's new property division statutes and the federal government's disability benefits law and highlights policy inconsistencies between the two doctrines. Fundamentally, this area of law implicates a question of federal preemption and the state courts' maneuvering between conflicting directives from the states, Congress, and the U. S. Supreme Court. Acknowledging that this is an issue to look into, this Note will instead focus on the practical implications of the current legal structure after the enactment of the new Arizona statutes. Part I will discuss Arizona's community property doctrine and spousal maintenance statutes, as well as the USFSPA division provisions. Part II will discuss Arizona's decision to enact sections 25-318.01 and 25-530 of the Arizona Revised Statutes and explore the implications of the new Arizona statutes when grappling with the division of various military benefits.¹¹

I. DIVISION OF MILITARY BENEFITS UNDER ARIZONA AND FEDERAL LAW

A. *Arizona Community Property*

Arizona is a community property state.¹² Married couples hold either community or separate property, depending on when and how the property is earned or acquired. When a spouse acquires property with community funds or labor—that is, labor exerted by a married individual—there is a strong

11. The sacrifices that veterans make when serving this Nation, as well as the sacrifices that military spouses make during their marriage to these service members, should both be respected. In this area of the law, however, a conflict between these two policy rationales is inevitable. It is the sincerest hope of this Author to present the following analysis with respect to both sides of the debate. In order to do so, any comparison as to the validity of either view has been kept to a minimum. Instead, this Note will focus on the practical implications of sections 25-318.01 and 25-530 of the Arizona Revised Statutes in order to assist attorneys and this state's legislature should they ever revisit this issue.

12. ARIZ. REV. STAT. ANN. § 25-318(A) (2012). In the United States there are only a handful of community property states, including Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, Washington, and Wisconsin. *See* John E. Kirchner, *Division of Military Retired Pay*, 43 FAM. L.Q. 367 app. A (2009) (listing the divisibility of military retired pay per state).

presumption that it is community property.¹³ A party can overcome this presumption by presenting clear and convincing evidence that the property is not a community interest.¹⁴ This distinction becomes particularly important, of course, when a marriage is dissolved. Community property is presumptively divided equitably and shared by the former spouses, but separate property is not.¹⁵

As a general rule, Arizona courts only consider those assets gained through the use of community funds or labor during the length of the marriage as community property.¹⁶ Courts often describe this property as earned under “onerous title.”¹⁷ For example, retirement benefits paid into or earned during a marriage are considered community property.¹⁸ Additionally, when a worker is given disability benefits, such as workers’ compensation or state civil service disability benefits, the benefits are meant to compensate for lost labor capacity. Therefore, they also represent the lost labor capacity to the community and are considered divisible community property for that reason.¹⁹

In contrast, spouses may gain separate property earned under “lucrative title,” such as property acquired by “gift, succession, inheritance, or the like.”²⁰ Another example of lucrative title property would be a payment made to compensate an individual for pain and suffering incurred due to serious personal injuries he or she has received (whether before or after dissolution).²¹

13. *Kroloff v. United States*, 487 F.2d 334, 335 (9th Cir. 1973); *see also* *Smith v. Smith*, 227 P.2d 214, 215 (Ariz. 1951); *Porter v. Porter*, 195 P.2d 132, 136 (Ariz. 1948), *declined to be followed on other grounds by* *Cockrill v. Cockrill*, 601 P.2d 1334 (Ariz. 1979).

14. *See* *Flowers v. Flowers*, 578 P.2d 1006, 1010 (Ariz. Ct. App. 1978) (Jacobson, J., concurring).

15. *Id.* A family court has the discretion to award a larger portion of community property to one spouse or another. ARIZ. REV. STAT. ANN. § 25-318. This distinction is particularly important when it comes to maneuvering around the federal preemption against direct division of military disability benefits. MARK E. SULLIVAN, *THE MILITARY DIVORCE HANDBOOK: A PRACTICAL GUIDE TO REPRESENTING MILITARY PERSONNEL AND THEIR FAMILIES* 445 (2006); *see infra* Part II.A.

16. *Davies v. Beres*, 233 P.3d 1139, 1143 (Ariz. Ct. App. 2010).

17. *Id.*; *Flowers*, 578 P.2d at 1009–10 (Jacobson, J., concurring).

18. *Neal v. Neal*, 570 P.2d 758, 761 (Ariz. 1977); *Van Loan v. Van Loan*, 569 P.2d 214, 216 (Ariz. 1977); *Davies*, 233 P.3d at 1143.

19. *In re Marriage of Kosko*, 611 P.2d 104, 105 (Ariz. Ct. App. 1980) (“[Worker’s compensation d]isability benefits have some similar characteristics [to retirement benefits] in that the right to them may arise by reason of the employment, the right may be paid for by the employer or the employee, and, upon the happening of the specified future circumstances, they will be paid to the employee-spouse.”); *Bugh v. Bugh*, 608 P.2d 329, 332 (Ariz. Ct. App. 1980) (holding civil service disability benefits divisible).

20. *Flowers*, 578 P.2d at 1010 (Jacobson, J. concurring).

21. *See* ARIZ. REV. STAT. ANN. § 25-318(A) (2012) (“[T]he court shall assign each spouse’s sole and separate property to such spouse.”); *Jurek v. Jurek*, 606 P.2d 812, 814 (Ariz. 1980) (“In the case at issue the serious injuries to the appellant are personal to him. In the same fashion . . . the body which he brought into the marriage is certainly his separate property.”); *Flowers*, 578 P.2d at 1008 (“Pain, suffering, disfigurement or the loss of a limb,

Of course, a court's task in distinguishing community and separate property is seldom this simple. A family court often faces a tangled mess of property consisting of both onerous and lucrative title elements earned before, during, and after a dissolution.²² Consider a paid benefit that merges retirement and disability benefits earned both during and outside of a marriage—that is, the employed spouse worked before the marriage or continued to be employed after the dissolution. Here, a court must determine what portion of those benefits earned during the marriage fall into the onerous title category and then divide that portion equitably between the dissolved community.²³ This becomes especially problematic because some employers require an employee to elect exclusively either retirement or disability benefits. If the working spouse voluntarily elects to receive nondivisible disability benefits, the court will calculate the amount the individual could or did receive under both plans, then award the nonworking spouse an equitable portion of the amount of retirement benefits that the working spouse *could* have received as community property.²⁴

B. Arizona Spousal Maintenance

Once community and individual property has been delegated, a court may order spousal maintenance if one spouse will still suffer due to significant need.²⁵ Generally, spousal maintenance ensures that one spouse will not face inequitable poverty, a substantial loss in his or her standard of living after the dissolution, or an investment loss from sacrificing their own employment, earning capacity, or educational opportunities for the benefit of the other spouse.²⁶ In effect, spousal maintenance reaches beyond the community property doctrine and can divide even

as here, is the peculiar anguish of the person who suffers it, it can never be wholly shared even by a loving spouse and surely not after the dissolution of a marriage . . .” (quoting *In re Marriage of Jones*, 531 P.2d 420, 424 (Cal. 1975)).

22. See *Rickman v. Rickman*, 605 P.2d 909, 910 (Ariz. Ct. App. 1980) (holding that VA disability benefits awarded after the dissolution of a marriage are separate property); *Luna v. Luna*, 608 P.2d 57, 59–60 (Ariz. Ct. App. 1979) (holding that Social Security benefits, like benefits received under the Railroad Retirement Act, are similar to funds in a trust, and therefore cannot be divided if they have not yet “accrued”); *Everson v. Everson*, 537 P.2d 624, 628 (Ariz. Ct. App. 1975) (holding that separately earned property retains its separate status even if exchanged for other property during the marriage).

23. *Perras v. Perras*, 726 P.2d 617, 617–19 (Ariz. Ct. App. 1986); *Luna*, 608 P.2d at 60; *Flowers*, 578 P.2d at 1010 (Jacobson, J. concurring); see also *Villasenor v. Villasenor*, 657 P.2d 889, 892 (Ariz. Ct. App. 1982).

24. See, e.g., *Perras*, 726 P.2d at 618–19.

25. ARIZ. REV. STAT. ANN. § 25-319(A) (2012). The decision to award spousal maintenance, although guided by this particular statute, lies within the family court's discretion. *Id.* (“[T]he court *may* grant a maintenance order for either spouse . . .”).

26. See *id.* Specifically, section 25-319 of the Arizona Revised Statutes states that maintenance is appropriate when a spouse “[l]acks sufficient property . . . to provide for that spouse's reasonable needs,” cannot be self-sufficient through employment, has custody of a child that requires a stay-at-home parent, has “[c]ontributed to the educational opportunities” of the other (increasing the other's earning capacity at their own expense), or “[h]ad a marriage of long duration and is of an age that may preclude the possibility of gaining employment adequate to be self-sufficient.” *Id.* § 25-319(A)(1)–(4).

an individual's separate property in order to prevent an inequitable future for a former spouse.²⁷

If the family court decides to exercise this discretion, the statute provides 13 factors to guide the calculation of a proper award.²⁸ The factors do not only take into account the needs of the spouse seeking maintenance. They also consider the burden on the other spouse, the spouses' comparative abilities to find employment, and other means of financial support.²⁹ The analysis requires the court to probe into the details of each individual's life and analyze facts such as the "age, employment history, earning ability, and physical and emotional condition of the spouse seeking maintenance," as well as a spouse's ability to gain education or employment in the future to establish his or her own self-sufficiency.³⁰ Finally, the

27. *Id.* § 25-319.

28. *Id.* § 25-319(B).

29. *Id.* § 25-319(B)(4), (5), (9).

30. A full list of the factors reads as follows:

1. The standard of living established during the marriage.
2. The duration of the marriage.
3. The age, employment history, earning ability and physical and emotional condition of the spouse seeking maintenance.
4. The ability of the spouse from whom maintenance is sought to meet that spouse's needs while meeting those of the spouse seeking maintenance.
5. The comparative financial resources of the spouses, including their comparative earning abilities in the labor market.
6. The contribution of the spouse seeking maintenance to the earning ability of the other spouse.
7. The extent to which the spouse seeking maintenance has reduced that spouse's income or career opportunities for the benefit of the other spouse.
8. The ability of both parties after the dissolution to contribute to the future educational costs of their mutual children.
9. The financial resources of the party seeking maintenance, including marital property apportioned to that spouse, and that spouse's ability to meet that spouse's own needs independently.
10. The time necessary to acquire sufficient education or training to enable the party seeking maintenance to find appropriate employment and whether such education or training is readily available.
11. Excessive or abnormal expenditures, destruction, concealment or fraudulent disposition of community, joint tenancy and other property held in common.
12. The cost for the spouse who is seeking maintenance to obtain health insurance and the reduction in the cost of health insurance for the spouse from whom maintenance is sought if the spouse from whom maintenance is sought is able to convert family health insurance to employee health insurance after the marriage is dissolved.
13. All actual damages and judgments from conduct that results in criminal conviction of either spouse in which the other spouse or child was the victim.

Id. § 25-319(B).

spousal maintenance statute asks the court to recognize that spousal maintenance need not permanently burden a party. A court can place a time limit on the duration of a spousal maintenance award.³¹

Spousal maintenance may be discretionary, but a family court must consider a broad array of considerations before exercising this discretion. For some, this discretion in the hands of a family court is disconcerting, particularly when recognizing the complexity of various retirement and disability benefits.³² The thought of a local court taking disability benefits away from, for example, an injured veteran in the form of alimony is unsettling. Many would feel more comfortable if an elected legislature wielded the discretion of whether and how to divide such benefits. On the other hand, giving a family court this discretion seems appropriate: Every dissolved marriage involves a unique set of individuals, and the court's position on the front lines gives it the best vantage point from which to comprehend the complex situation of the former spouses. Even though we may wish to respect a veteran's sacrifice and injury, there may be individual cases that arise where the desperate circumstances of the veteran's former spouse may still warrant spousal maintenance from the veteran.

C. The USFSPA and the Division of Military Benefits

The Arizona Supreme Court has ruled that military benefits, like retirement or disability benefits received by a working civilian, can "be treated as community property to the extent attributable to community efforts."³³ In contrast, the U. S. Supreme Court noted in *McCarty v. McCarty* that military benefits are not awarded for retirement but instead are "retainer" pay.³⁴ The Court held that federal law preempted states from dividing this pay as community property.³⁵ The Court described these benefits as current income earned under onerous title and therefore held that they were not divisible if received after dissolution.³⁶ Despite the unique nature of these benefits, the federal government responded by enacting the Uniformed Services Former Spouses Protection Act. The USFSPA pushed the pendulum back to the states, yielding authority to the states to determine whether military retirement benefits could be considered community property.³⁷ This federal law moves beyond the historic distinction explained in *McCarty* that described military retirement pay as a nondivisible, current retainer pay for non-

31. See *id.* § 25-319(B); *In re Marriage of Downing*, 265 P.3d 1097, 1098 (Ariz. Ct. App. 2011).

32. Before the enactment of the new Arizona statutes, Senator Antenori stated that the new legislation was needed to curtail "alimony abuses." Press Release, Frank Antenori, Arizona Senate Passes Bill Protecting Disabled Veterans (April 12, 2010), available at http://www.azleg.gov/FormatDocument.asp?inDoc=/press/Senate/49leg/2R/04_12_10_DISABLED_VETERANS_BILL_ANTENORI.DOC.htm&Session_ID=93.

33. *Davies v. Beres*, 233 P.3d 1139, 1142 (Ariz. Ct. App. 2010) (citing *Van Loan v. Van Loan*, 569 P.2d 214, 215-16 (Ariz. 1977)).

34. 453 U.S. 210, 212-13, 226 n.19 (1981).

35. *Id.*

36. *Id.*

37. *Davies*, 233 P.3d at 1142.

active duty veterans. It does not, however, permit the division of military disability benefits.³⁸

The federal government originally considered military benefits distinct from other forms of retirement or disability benefits because of the historic definition of military retainer or retirement pay. The federal government first instituted military retirement pay after the Civil War in order to encourage older service members to leave the ranks, ensuring a “young and vigorous military force.”³⁹ The pay allowed portions of the standing army to retire, more or less, while still being subject to recall to active duty should the need arise.⁴⁰ Today, there are multiple plans that a service member may retire under, none of which is contributory—that is, “neither the service member nor the Federal Government makes periodic contributions to [the] fund during the period of active service.”⁴¹ Perhaps it is because the service member makes no contribution to these benefits that a spouse or child has no claim to the retirement benefits if the service member passes away, though some death benefits may be available.⁴²

In light of these characteristics, *McCarty* held that a state court could not divide a veteran’s retirement benefits as community property during the dissolution of a marriage.⁴³ In particular, the Court noted that the division of such property would imply that the benefits were earned under onerous title for labor *previously* exerted by the community during the marriage. Instead, the Court construed these retainer benefits as “current income.”⁴⁴ In other words, the portion of these benefits that are paid out after a dissolution might be earned under onerous title, but they are also earned under onerous title *at the time of payment*. Therefore, the Court reasoned that if the benefit pay was received after dissolution, it could

38. 10 U.S.C. § 1408(c)(1) (2012).

39. *McCarty*, 453 U.S. at 212–13 (citing Preliminary Review of Military Retirement Systems: Hearings Before the Military Compensation Subcommittee of the House Committee on Armed Services, 95th Cong., 1st and 2d Sess., 5 (1977–1978) (Military Retirement Hearings) (statement of Col. Leon S. Hirsh, Jr., USAF, Director of Compensation, Office of the Assistant Secretary of Defense for Manpower, Reserve Affairs, and Logistics)).

40. *Id.* at 221–22 (citing *United States v. Tyler*, 105 U.S. 244 (1882)); see 10 U.S.C. § 802(a)(4) (2012).

41. *McCarty*, 453 U.S. at 214. Many other retirement benefits are contributory and divisible, such as those from Social Security, to which, “since 1957, military personnel have been required to contribute.” *Id.* (citing Servicemen’s and Veterans’ Survivor Benefits Act, Pub. L. No. 84-881, 70 Stat. 857, 870 (1956)).

42. *Id.* at 214–15; see ARMY RET. SERVS. & HUMAN RES. COMMAND - FORT KNOX, PRE-RETIREMENT COUNSELING GUIDE 29–30 (2011) (“RETIRED PAY STOPS WITH THE DEATH OF THE RETIRED SOLDIER.”). For this reason, Congress enacted a separate program that a service member may join that will provide benefits to survivors, but the program requires that the member contribute to the fund, unlike retirement pay. 10 U.S.C. §§ 1447–1455 (2012) (establishing the Survivor Benefit Plan); see Pre-Retirement Counseling Guide, *supra*, at 29–30.

43. *McCarty*, 453 U.S. at 220–21.

44. *Id.* at 235.

not be subject to community division.⁴⁵ A state court could not divide the retainer pay and imply that the now-dissolved marital community had invested its labor in the funds during the marriage when the veteran actually earned that pay after the dissolution.⁴⁶

Congress later revisited the issue in 1982 and passed the USFSPA.⁴⁷ The Act gives to the various states the discretion to determine whether or not retainer benefits are divisible, in effect disregarding the historic distinction noted in *McCarty*.⁴⁸ The USFSPA then directs the Defense Finance and Accounting Services (“DFAS”) to observe family court orders and to divide a veteran’s “disposable retired pay” when requested.⁴⁹

What constitutes disposable retired pay, however, is a more nuanced issue.⁵⁰ Though Congress let the states decide how to divide retirement benefits, the USFSPA does not allow states to divide disability benefits awarded under title 38 or title 10 of the Federal Code.⁵¹ Congress apparently felt that although the division of normal retirement pay could be left to the states, the division of an injured veteran’s disability benefits was antithetical to the respect to which disabled veterans are entitled. These exclusions effectively side-step any onerous or lucrative title analysis,⁵² so that even if a military disability benefit looks like it compensates a veteran for lost earning capacity (onerous title), the federal DFAS will not honor state court orders that attempt to divide the benefit.

The adverse effects of this distinction on former spouses of veterans are especially pronounced when a service member elects to receive disability benefits through the VA under title 38, instead of normal retirement benefits.⁵³ In order to receive VA benefits, a veteran must waive the same amount of his or her retirement benefits, which are awarded without consideration of disability.⁵⁴ Though this seems like a zero-sum choice for the veteran, the newly classified disability benefits are free from taxation and are not subject to division under the USFSPA.⁵⁵ This means that even though a former military spouse could have received a share in the full retirement funds, under the USFSPA, a service member

45. *Id.*

46. *Id.*

47. Department of Defense Authorization Act of 1983, Pub. L. No. 97-252, § 1002(a), 96 Stat. 718, 730 (1982) (codified at 10 U.S.C. § 1408 (2012)).

48. 10 U.S.C. § 1408(a)(2) (2012); *accord McCarty*, 453 U.S. at 220 (“[T]he whole subject of the domestic relations of husband and wife . . . belongs to the laws of the States and not to the laws of the United States.” (quoting *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 581 (1979)) (alteration in original) (internal quotation marks omitted)).

49. 10 U.S.C. § 1408(a)(2).

50. *Id.* § 1408(a)(4).

51. *Id.* § 1408(c).

52. *See supra* Part I.A.

53. *See Mansell v. Mansell*, 490 U.S. 581, 601–02 (1989) (O’Connor, J., dissenting).

54. 38 U.S.C. § 5305 (2012).

55. *Id.* § 5301(a)(1).

can shelter his or her benefits from division by electing to take VA benefits.⁵⁶ Thus, federal law favors excluding military disability benefits from any community property or spousal maintenance analysis.

II. ALIGNING FEDERAL AND STATE LAW: SECTIONS 25-318.01 AND 25-530 OF THE ARIZONA REVISED STATUTES

Despite the language of the USFSPA, Arizona courts still included title 38 and title 10 disability benefits in the community property analysis.⁵⁷ Of course, federal law would preempt a court from directly ordering a division of military disability benefits.⁵⁸ Until recently though, a family court could maneuver around the federal prohibition by calculating what portion of the benefit a spouse would have received if the USFSPA did not prohibit paying out disability benefits and then award the nonmilitary spouse a greater portion of other community property to compensate for the loss (for efficiency, the Note will refer to this legal strategy as “compensation clauses”).⁵⁹ Or, if a couple divorced prior to the military spouse’s retirement, a court could indemnify the military spouse in a divorce decree for any retirement funds lost when waiving retirement benefits for disability benefits.⁶⁰ A court could state in the final divorce decree that if the veteran reduced his disposable retired pay by electing title 38 VA benefits or requesting more disability pay under the armed services’ title 10 (both nondivisible under the USFSPA), the veteran would still be responsible for providing his or her former spouse with funds equal to the original award.

Arizona courts had opted to maintain its community property doctrine and continued dividing military disability benefits despite the USFSPA’s prohibitions,⁶¹ perhaps because the issue is highly polarized. There are reasons both to support alignment with federal law and to maintain some distinction. At best, the decision to align with federal law by excluding these benefits from community property represents a respect for the sacrifice that our veterans make in serving this Nation. Excluding the benefits would allow an injured veteran to enjoy his or her entire disability pay allotment. At worst, however, the exclusion leaves

56. This process under the USFSPA is completely contrary to Arizona’s community property doctrine, under which a former spouse would still be entitled to a half-interest in the amount of retirement benefits that the service member hypothetically could have received before the waiver. *See, e.g.,* *Perras v. Perras*, 726 P.2d 617, 618–19 (Ariz. Ct. App. 1986).

57. *See Danielson v. Evans*, 36 P.3d 749, 755 (Ariz. Ct. App. 2001). Not all state courts or judges agree with this position. *See Ratkowski v. Ratkowski*, 769 P.2d 569, 572 (Idaho 1989) (Shepard, C.J., dissenting) (“In the instant case, although the result is unfair, and palpably unjust, nevertheless I feel it mandated by the insulation afforded by the federal [USFSPA] statutes.”).

58. *Harris v. Harris*, 991 P.2d 262, 264–65 (Ariz. Ct. App. 1999) (citing *Mansell*, 490 U.S. at 588–89, 594–95).

59. *Id.*; *In re Marriage of Crawford*, 884 P.2d 210, 214 (Ariz. Ct. App. 1994).

60. *Danielson*, 36 P.3d at 754–55.

61. *See id.* at 755; *In re Marriage of Gaddis*, 957 P.2d 1010, 1013 (Ariz. Ct. App. 1997).

military spouses with less of a claim to the earning capacity of their marital community than the spouses of individuals receiving workers' compensation or civil service disability benefits.⁶² Although the former spouses of civilian workers are entitled to the lost earning capacity of their community, adopting the federal exclusion would leave former military spouses with no such claim.

In 2010, the Arizona legislature enacted sections 25-318.01 and 25-530 to put a stop to the division of service-related disability benefits, particularly because the legislature felt that federal law preempted even indirect attempts to divide service-related disability benefits.⁶³ Like the USFSPA, the statutes prohibit the consideration of VA disability benefits received under title 38.⁶⁴ In addition, the statutes specifically restrict a court's ability to use indemnification or compensation clauses to recoup funds lost from community property when a veteran elects VA disability benefits.⁶⁵

The statutes succeed to some extent in their effort to align the two views on military benefits with regards to VA disability benefits awarded under title 38. But the federal and state laws are still distinct. The new Arizona statutes do not address benefits awarded under title 10, unlike the USFSPA. In addition, the prohibition against legal tactics, such as indemnification clauses, is not extended to the spousal maintenance analysis.

Neglecting to include title 10 disability benefits or to extend the prohibition against compensation or indemnification clauses within the spousal maintenance analysis might not have much of an adverse impact on the legislature's goal of protecting disabled veterans. Most veterans with disabilities elect VA benefits under title 38, which are excluded.⁶⁶ Still, the omission will likely impact some individual veterans and former spouses in the years to come. For this reason, this Note will now explore exactly how the new Arizona statutes interact with the various forms of military disability benefits.

A. Title 38 VA Disability Benefits, Retirement Pay, and Indemnification

Title 38 disability benefits are awarded to service members for disabilities incurred either during war or peacetime.⁶⁷ In order to receive these benefits, a

62. See *supra* note 19.

63. Military Disability Benefits, 2010 Ariz. Legis. Serv. Ch. 70 § 2–3 (H.B. 2348) (2010); see Antenori, *supra* note 32.

64. ARIZ. REV. STAT. ANN. §§ 25-318.01(1), -530 (2012).

65. ARIZ. REV. STAT. ANN. § 25-318.01(2), (3). Note that these subsections refer to “the benefits,” which when read in context with subsection (1), implies that these prohibitions also only apply to VA benefits. See *id.*; *In re Marriage of Priessman*, 266 P.3d 362, 265–66 (Ariz. Ct. App. 2011) (holding that the interpretation of section 25-530 should be limited to its plain language).

66. SULLIVAN, *supra* note 15, at 441–42; 10 U.S.C. § 1408(c) (2012).

67. Specifically, benefits may be awarded “[f]or disability resulting from personal injury suffered or disease contracted in line of duty, or for aggravation of a preexisting injury suffered or disease contracted in line of duty, in the active military, naval,

veteran must waive the same amount in retirement benefits.⁶⁸ The newly classified disability benefits are free from taxation and are not subject to division under the USFSPA.⁶⁹

The VA awards these benefits based on a disability determination that describes the veteran's disability in terms of a percentage—e.g., a veteran can be classified as 10% disabled due to specific diseases incurred during active military service. These disability ratings increase by increments of ten, with a higher disability benefit payment for each increase.⁷⁰ For example, in 2012, a veteran with 10% disability is entitled to a monthly compensation of \$123, while a veteran with 100% disability can receive a monthly compensation of \$2673.⁷¹ In addition, veterans may receive additional compensation for lost limbs, blindness, and similar disabilities.⁷² Lastly, these benefits can increase if the service member has a spouse or children.⁷³

Under the new Arizona statutes, a court cannot incorporate these benefits when dividing community property, nor grant a larger share in other interests to make up for lost benefits when a veteran elects to receive VA benefits instead of retirement benefits.⁷⁴ In contrast, before the new statutes were enacted, existing Arizona community property law would have prohibited a veteran from sheltering his or her benefits by voluntarily waiving retirement benefits for VA disability benefits.⁷⁵

However, attorneys representing former military spouses need not throw their hands up in despair. The federal government initiated a program in 2004, referred to as Concurrent Retirement and Disability Pay (“CRDP”), that pays certain military veterans their previously waived retirement benefits.⁷⁶ For veterans with a 50% or higher disability rating, the program will effectively erase the

or air service.” 38 U.S.C. § 1110 (2012) (benefits for injuries incurred during war); *id.* § 1131 (benefits for injuries incurred during peacetime).

68. *Id.* § 5305.

69. *Id.* § 5301(a)(1); 10 U.S.C. § 1408(a)(4)(B).

70. 38 U.S.C. § 1114(a)–(j) (2012); 6 WEST'S FED. ADMIN. PRAC. § 6605 (3d ed. 2012).

71. 38 U.S.C. § 1114(a)–(j). For a quick, useful, and up-to-date breakdown of the various amounts of VA benefits that a disabled veteran may receive, see *2010 VA Disability Compensation Rates*, MILITARY.COM, <http://www.military.com/benefits/veterans-health-care/va-disability-compensation-rates.html> (last visited Aug. 1, 2012).

72. 38 U.S.C. § 1114(k)–(p).

73. *Id.* § 1115(1)(A)–(C). A childless disabled veteran receives an addition \$150 for a spouse, while a married veteran with one child can receive \$259. Each additional child garners \$75. *Id.* § 1115(1)(A)–(B).

74. ARIZ. REV. STAT. ANN. § 25-318.01 (2012); see *In re Marriage of Downing*, 265 P.3d 1097, 1100 (Ariz. Ct. App. 2011). *Contra* *Danielson v. Evans*, 36 P.3d 749, 754–56 (Ariz. Ct. App. 2001).

75. See *Perras v. Perras*, 726 P.2d 617, 618–19 (Ariz. Ct. App. 1986) (holding that when a former spouse elects to receive a nondivisible form of benefit, the other spouse is still entitled to his or her share of what would have been the retirement pay).

76. National Defense Authorization Act for Fiscal Year 2004, Pub. L. No. 108-136, §§ 641–42, 117 Stat. 1392 (2003) (codified at 10 U.S.C. § 1414 (2012)).

impact of his or her waiver.⁷⁷ Each year since 2004, the CRDP has paid these veterans an increasing portion of their formerly waived retirement benefits on top of their disability benefits and by 2014 will fully recoup these veterans for any waived retirement benefits.⁷⁸

These new benefits are not excluded from division under the USFSPA.⁷⁹ This means that the former spouses of CRDP recipients will eventually be able to receive all of the retirement funds to which they were originally entitled, regardless of a veteran's waiver for VA benefits. Though CRDP is only available to retired veterans with at least a 50% disability rating, the program should help alleviate some of the negative impacts of the new Arizona statutes.⁸⁰ In fact, it seems that the CRDP, within the structure of the USFSPA, helps further align state and federal law by allowing veterans to receive their full disability benefits without division, while also allowing former spouses a chance to receive a community portion of the newly restored retirement benefits.

Though the CRDP helps align federal law with the Arizona doctrine when dealing with veterans with disability ratings of 50% or higher,⁸¹ the two approaches once again diverge if a veteran received his or her injury in actual combat. When a veteran's injury is incurred in actual combat or similarly dangerous situations, the veteran may opt for Combat-Related Special Compensation ("CRSC") instead of CRDP benefits.⁸² These benefits work essentially the same way as the CRDP benefits, recouping a veteran for waived retirement benefits. The key difference between CRSC and CRDP, though, is that

77. 10 U.S.C. § 1414 (2012).

78. *Id.*

79. Nor do the new Arizona statutes exclude these benefits from division. *See In re Marriage of Priessman*, 266 P.3d 362, 364–65 (Ariz. Ct. App. 2011) (holding that similar benefits awarded under title 10, chapter 71, are unaffected by the new statutes).

80. 10 U.S.C. § 1414(a)(2). CRDP is also available to individuals who are retired for disability under title 10, chapter 61 of the U.S. Code, so long as they have served for 20 years. *Id.* § 1414(b). Although a former spouse would also be entitled to benefits increased under the CRDP, the discussion of title 10 benefits below will not focus on seeking CRDP benefits. *See infra* Part II.B. This is because the new Arizona law failed to exclude title 10 benefits, even though USFSPA states that they are nondivisible. *Compare* ARIZ. REV. STAT. ANN. §§ 25-318.01, -530 (2012) (excluding only title 38 benefits), *with* 10 U.S.C. § 1408(a)(4) (excluding both title 10 and title 38 benefits). In other words, there are greater concerns when it comes to title 10 disability benefits than CRDP benefits.

81. Former spouses can still maintain their claim to a community portion of benefits, with the exception of service-related disability benefits.

82. 10 U.S.C. § 1413a (2012) (“[C]ombat-related disability’ means a disability that is compensable under the laws administered by the Secretary of Veterans Affairs and that—(1) is attributable to an injury for which the member was awarded the Purple Heart; or (2) was incurred (as determined under criteria prescribed by the Secretary of Defense— (A) as a direct result of armed conflict; (B) while engaged in hazardous service; (C) in the performance of duty under conditions simulating war; or (D) through an instrumentality of war.”). *Id.* § 1413a(e).

the federal agency in charge of dividing military pay pursuant to family court orders (the DFAS) has a policy of not dividing these benefits.⁸³

Despite this agency's policy, it appears that Arizona family courts may still consider such benefits in a community property analysis, even under the recently enacted statutes.⁸⁴ The Arizona Court of Appeals has held that the plain language of the new statutes does not imply that benefits awarded pursuant to title 10, chapter 71 (such as CRSC benefits) should be excluded.⁸⁵ Moreover, applying Arizona's community property doctrine to CRSC benefits seems logically appropriate. These benefits do not represent service-related disability pay. Instead, like the Concurrent Receipt benefits, CRSC pay recoups veterans for their waived *retirement* benefits, which have always been viewed as divisible.⁸⁶ Lastly, even the USFSPA's plain language suggests that these benefits are divisible. Even though it is the policy of the federal agency responsible for distributing divided community property not to divide CRSC benefits, the USFSPA itself makes no mention of these benefits when discussing what is and is not divisible.⁸⁷

Because both the USFSPA and Arizona's community property doctrine suggest that these benefits should be divisible, proponents of stronger protections for veterans' disability benefits should not be alarmed by the division of CRSC. If warranted, a family court should not hesitate to apply legal structures, such as indemnification or compensation clauses, to properly divide CRSC benefits under the community property doctrine.

In addition to using such clauses with regards to the CRDP and CRSC benefits mentioned above, attorneys should also note that these tools, particularly indemnification clauses, may also be available during spousal maintenance division. While Arizona Revised Statutes section 25-318.01 prohibits courts from indemnifying a service member or giving unequal proportions of other property to

83. SULLIVAN, *supra* note 15, at 444. DFAS apparently will not divide these benefits because they are not "longevity" pay, despite the fact that these CRDP benefits do not represent disability benefits and are not excluded under the USFSPA. *Id.* Arizona courts, however, have historically not accepted any distinction based on "longevity." *In re Marriage of Crawford*, 884 P.2d 210, 213 (Ariz. Ct. App. 1994) (holding that Special Separation Benefits, a type of lump-sum early retirement buy-out in lieu of normal retirement benefits, are divisible despite the fact that they are not awarded pursuant to the length or longevity of the veteran's service).

84. ARIZ. REV. STAT. ANN. §§ 25-318.01, -530 (2012).

85. *In re Marriage of Priessman*, 266 P.3d 362, 364–65 (Ariz. Ct. App. 2011) (holding that under the plain language of section 25-530 of the Arizona Revised Statutes, benefits awarded pursuant to title 10 of the U.S. Code may be considered); *see Danielson v. Evans*, 36 P.3d 749, 755 (Ariz. Ct. App. 2001).

86. The language of the CRSC statute is confusing in this regard. To be eligible, a veteran must have received a Purple Heart or an injury during combat, hazardous service, war games, or work with an "instrumentality of war." 10 U.S.C. § 1413a(e). This language, however, denotes when a veteran is eligible to regain previously waived retirement benefits, not disability benefits.

87. *Id.* § 1408(a)(4)(C) (excluding *disability* benefits received pursuant to title 10). *But see supra* note 83.

compensate for nondivisible VA benefits, section 25-530 is silent on the issue within the context of spousal maintenance. This means that although a court may not consider these benefits when dividing community property,⁸⁸ if spousal maintenance is warranted, a former spouse of a veteran could request an indemnification clause within the maintenance award.⁸⁹ Hypothetically, the decree would state that if a veteran's military retirement benefits were reduced, the veteran would still be liable for his or her former spouse's portion of those benefits. This decree could be stated in terms that do not "directly or indirectly tak[e] into account the fact that he receives veterans' disability income."⁹⁰

Of course, spousal maintenance only comes into play under particular circumstances, such as when a former spouse faces a substantial loss in his or her standard of living.⁹¹ Moreover, a veteran could simply ask for a modification of the spousal maintenance award after waiving his or her retirement benefits, and thereby nullify the indemnification clause.⁹² Still, this omission may give a sliver of hope to attorneys representing former spouses of VA beneficiaries. If an attorney manages to move beyond the division of community property and convince a family court that spousal maintenance is appropriate, the former spouse might successfully attempt to gain an indemnification clause in the final divorce decree to safeguard against future waiver to some degree.

B. Title 10, Chapter 61: Disabilities That End Active Duty, and Their Benefits

Title 10, chapter 61 of the U.S. Code addresses temporary relief, "separation," and retirement from active duty due to a physical disability.⁹³ These contrast with title 38 VA benefits, for which veterans may qualify even if the disability was not the reason for their retirement.⁹⁴ A member qualifies for title 10 benefits by being unable to perform the duties of active service because of a disability, whether the disability is permanent or not.⁹⁵ For instance, a member qualifies for the Temporary Disability and Retirement List ("TDRL") if the disability is "indeterminable as to its permanent and stable nature."⁹⁶

88. See *In re Marriage of Downing*, 265 P.3d 1097, 1098 (Ariz. Ct. App. 2011).

89. Compensation clauses would still be prohibited here because they would require the court to consider the portion of retirement benefits that a former spouse was entitled to, less the amount of VA benefits, and then award a greater interest in other property to make up for the waived retirement benefits. This original calculation of benefits waived by the veteran would be prohibited. ARIZ. REV. STAT. ANN. § 25-530 (2012).

90. *In re Marriage of Dougall*, No. 2 CA-CV 2011-0182, 2012 WL 1808838, at *1 (Ariz. Ct. App. May 17, 2012).

91. See *supra* Part I.B.

92. *Downing*, 265 P.3d at 1099.

93. 10 U.S.C. §§ 1201-22 (2012). Separation from the armed services functions similarly to a forced early retirement for veterans who have not yet reached 20 years of active service. *Id.* § 1203.

94. 38 U.S.C. §§ 1110, 1131 (2012).

95. 10 U.S.C. §§ 1201-06.

96. *Id.* §§ 1202, 1205; see *Davies v. Beres*, 233 P.3d 1139, 1142 (Ariz. Ct. App. 2010).

Unlike the USFSPA, the new Arizona statutes do not exclude benefits received under title 10, chapter 61 of the U.S. Code from division as community property.⁹⁷ Had the statute excluded these benefits as well, TDRL benefits and permanent disability benefits awarded to veterans “separated” or retired for physical disability would not be considered in the community property analysis.

A recent Arizona case discussed the divisibility of title 10 benefits, even after the passage of the new Arizona statutes. After the dissolution of his marriage and the division of his retirement benefits as community property, the United States Air Force placed a husband on the military’s TDRL.⁹⁸ After this change in benefits, the former husband and wife returned to the courts to reassess the former couple’s division of property. The Arizona Court of Appeals ultimately held that TDRL benefits were divisible because of their nature as a disability benefit compensating an individual for lost earning capacity, but only if earned before the dissolution of marriage.⁹⁹ This caveat spared the husband from any division of his disability benefits because the Air Force placed him on the TDRL only after the dissolution of his marriage.¹⁰⁰

Significant for the purposes of this Note, however, is the fact that the husband’s appeal occurred after the passage of the new Arizona statutes. The new statutes had absolutely no effect on the divisibility of TDRL, separation, or permanent disability retirement benefits. Unlike the USFSPA, sections 25-318.01 and 25-530 only address title 38 benefits and do not address benefits found under title 10, chapter 61.¹⁰¹

It is true that most veterans waive title 10 benefits such as these and choose to receive tax-free title 38 VA disability benefits instead.¹⁰² Therefore, the majority of veterans will still fall within the exclusion provisions of the new Arizona statutes. Moreover, even if a veteran decides to stay under the purview of title 10, the federal government will not distribute these funds.¹⁰³ This means that those attorneys representing former nonmilitary spouses will still have to go to

97. Compare 10 U.S.C. § 1408(a)(4)(C) (2012), with ARIZ. REV. STAT. ANN. § 25-318.01(1), -530 (2012). See *In re Marriage of Priessman*, 266 P.3d 362, 364–65 (Ariz. Ct. App. 2011).

98. *Davies*, 223 P.3d at 1141.

99. *Id.* at 1144.

100. *Id.*

101. Compare ARIZ. REV. STAT. ANN. §§ 25-318.01, -530 (excluding consideration of title 38 benefits) and *Davies*, 233 P.3d at 1142 (suggesting that TDRL benefits, which are found under title 10, are divisible if earned during the marriage), with 10 U.S.C. § 1408(a)(4) (excluding both title 10 and 38 benefits from division).

102. 38 U.S.C. § 3101(a) (2012); 10 U.S.C. § 1408(a)(4)(B); see SULLIVAN, *supra* note 15, at 441–42.

103. DFAS will still distribute benefits while a veteran is placed on a disabled or retired list under title 10, chapter 61, but will exclude from that total the amount of benefit that the veteran was entitled to when first placed on this disabled list, according to his or her original VA disability rating. 10 U.S.C. § 1408(a)(4)(C).

lengths using indemnification and compensation clauses when drafting final divorce decrees before their clients can receive a share of these benefits.¹⁰⁴

Although the new statutes protect most disabled veterans, and even though veterans receiving benefits under title 10 are still protected by federal law from direct division, those concerned primarily with protecting disabled veterans may nonetheless find the omission of title 10 benefits within the new statutes disconcerting. The Arizona legislature enacted these statutes to protect veterans with service-related disabilities.¹⁰⁵ But the statutes, whether intentionally or unintentionally, only grant this special protection to veterans receiving VA benefits.¹⁰⁶ This in turn means that those who still receive benefits under title 10—that is, those veterans whose active duty ended specifically due to their service-related disability—are discriminated against by these statutes.

C. Initial Responses to the Effect of the New Arizona Statutes

Neither side of this debate is likely to feel satisfied with the new statutes put in place by the Arizona legislature. Proponents of stronger disability exclusions should be hesitant to declare a victory after their enactment. Title 10 is absent from the exclusion provisions of these statutes, and even benefits under title 38 may still be subject to indemnification and other forms of circumvention within the spousal maintenance analysis. In contrast, opponents of the new law may consider the exclusion of divisible benefits under title 38 as a huge blow to former spouses, particularly because most veterans elect to receive this type of disability benefit and waive divisible retirement pay if possible.

This sort of mixed conclusion seems strangely appropriate in the field of divorce law. It is safe to say that during the dissolution of marriage, there are no real “winners.” Instead, the new Arizona statutes have simply redrawn the equitable lines as to where the courts should call a truce between opposing parties.

Still, both sides of this debate have good reason to be dissatisfied with the new compromise established by sections 25-318.01 and 25-530. On one hand, the exclusion of military disability benefits implies that the role of military spouses

104. *Mansell v. Mansell*, 490 U.S. 581, 588–89, 594–95 (1989) (holding that the USFSPA prohibits direct division of military disability benefits); *Danielson v. Evans*, 36 P.3d 749, 754–55 (Ariz. Ct. App. 2001) (indirectly dividing military disability benefits through an indemnification clause). While section 25-318.01(2) and (3) of the Arizona Revised Statutes prohibit indemnification and the awarding of other income or property to make up for disability pay that the DFAS cannot distribute, those sections refer to “the disability benefits,” which seems to allude to “federal disability benefits awarded to a veteran for service-connected disabilities pursuant to 38 United States Code chapter 11” in subsection (1) of the statute. In other words, the prohibition against indemnification and compensation clauses does not apply to benefits received under title 10.

105. *See* Antenori, *supra* note 32.

106. *Compare* ARIZ. REV. STAT. ANN. §§ 25-318.01, -530 (excluding consideration of title 38 benefits) *and* *Davies v. Beres*, 563, 233 P.3d 1139, 1142 (Ariz. Ct. App. 2010) (suggesting that TDRL benefits, which are found under title 10, are divisible if earned during the marriage), *with* 10 U.S.C. § 1408(a)(4) (excluding both title 10 and 38 benefits from division).

within their marriage is less respected than those held by spouses of individuals receiving workers' compensation or civil service disability benefits, which suggests the law should be repealed.¹⁰⁷ On the other, the incomplete alignment of state and federal approaches to the division of military disability benefits creates a form of implicit discrimination against those veterans who have served and sacrificed for our country and are now receiving benefits under title 10, chapter 61 of the U.S. Code. This may lead one to question whether a watered-down and discriminatory exclusion that only accounts for VA benefits is acceptable, even if one disagrees with the underlying purpose of aligning the federal and state approaches.

CONCLUSION

Parties have debated whether and how to divide military disability benefits for decades, and with the incomplete exclusion of disability benefits under sections 25-318.01 and 25-530 of the Arizona Revised Statutes, the trend is likely to continue.

Arizona's community property doctrine and spousal maintenance analysis, as well as the federal government's hesitancy to divide military benefits, are both firmly rooted in policies that respect the sacrifices of former spouses and military veterans, respectively. The new Arizona statutes have attempted to align the two doctrines in favor of military veterans but omitted key provisions regarding the exclusion of title 10 benefits and prohibition of indemnification and compensation clauses within the spousal maintenance analysis. As a result, a veteran may find his or her benefits completely secure, such as a veteran receiving VA benefits. In other cases, veterans may find themselves unaffected by the new statutes and still subject to the division of their disability benefits, particularly those who receive temporary disability or other benefits under title 10 of the U.S. Code.

While this Note has examined these discrepancies for practitioners, it is the hope of this Author that both factions will not lose sight of the high stakes of this debate going forward. Of course, a question of federal preemption still looms in the background of this national debate, and this Note as well. But as a practical matter, for those in Arizona impacted by the new statutes, we must remember before crying foul that it is the courts' role not to declare a "winner" between a divorcing couple but rather to find an equitable truce.

107. See *supra* notes 19, 62 and accompanying text.