

**Testimony of Leslie Love Engle, Chair, Family Law Section
of the Philadelphia Bar Association, before the
Task force on Domestic Relations of the House Judiciary Committee, July 27, 1998**

Good morning. My name is Leslie Love Engle. I am the Chair of the Family Law Section of the Philadelphia Bar Association, and I am here to testify in opposition to the bill you are considering today, HB 2265, providing for division of military pensions.

I must tell you that I have read this proposed legislation with great puzzlement. I have been unable to grasp the purpose to be served by providing that an equitable distribution award of a share of a military pension can be forfeited by certain behavior of the recipient spouse. Let me give you some examples to illustrate the problem I am having, preceded by a brief review of the Divorce Code, 23 Pa.C.S.A. §3101 et seq., and case law, because I think that the drafter of this legislation has confused alimony and equitable distribution.

As you know, under the Divorce Code, marital misconduct is one of the factors that the Court must consider before making an award of alimony, §3701(b)(14). And alimony is terminated upon remarriage (pursuant to the federal Tax Code; without this termination provision built into an alimony award, the payor is not allowed to deduct the payment from his federal taxes) or cohabitation with a member of the opposite sex other than a family member (§ 3706 of the Divorce Code). The rationale here, I would suppose, is that the Legislature found offensive the idea that a person would be required to pay support to a remarried or cohabiting ex-spouse.

The opposite is true about the determination of a fair division of marital property, where marital misconduct is specifically excluded as a factor to be considered (§3502(a)), and where there is no provision for forfeiture of an equitable distribution award due to remarriage or cohabitation after divorce. The rationale for this exclusion is based on a recognition of the fact that marital misconduct (that is, conduct that rises to the level of grounds for divorce) has little to do with the economic partnership of a marriage. As the Supreme Court said in *Zullo v. Zullo*, 531 Pa. 377, 613 A.2d 544 (1992), "The primary purpose of alimony is to provide one spouse with sufficient income to obtain the necessities of life." Equitable division of marital property, on the other hand, has been held to be a method for dealing with the property rights of the spouses, *Kadel v. McMonigle*, 425 Pa.Super 253, 624 A.2d 1059 (1993). It is a division of the assets created by the economic partnership.

Like child support, alimony can be attached from the wages of the payor spouse. Sometimes an alimony award covers a period of time after retirement of the payor, in which case the payor's retirement benefits are attached -- not as an award of a share of that pension to the recipient spouse, but as alimony paid from the payor-spouse's income (which just happens to be pension benefits). Since they are alimony, these payments will terminate upon the recipient's remarriage or cohabitation with a person of the opposite sex who is not a family member. More often, however, a share of the pension of an employee spouse is awarded to the non-employee spouse as part of an equitable division of marital property. As the Superior Court found in *Flynn v. Flynn*, 341 Pa. Super. 76, 491 A.2d 156 (1985), pension rights accumulated during marriage constitute a form of marital property subject to equitable distribution without regard to the contingent nature of the pension or whether it has vested or matured. When an award of pension is made as part of the equitable division of marital property, it is a permanent transfer of ownership of a portion of the employee spouse's pension to the non-employee spouse. As such, this pension award is not affected by remarriage or cohabitation -- unless, of course, this proposed legislation becomes law, in which case an equitable distribution award of a military pension would be forfeited upon the remarriage or cohabitation of the recipient spouse. Let's move to those examples I mentioned earlier to see how this plays out.

#1: a divorcing husband and wife have only three major assets: a pension, a house, and some cash investments. Suppose the pension is in the husband's name and the house and investments are in joint names. If the marital pot is divided more-or-less equally, often the wife will get the house, husband will keep his pension, and the liquid assets will be split between them in some way to balance out the final numbers. Now: if the wife remarries or cohabits after the divorce, the house and the cash assets awarded to her do not revert to husband. In other words, the assets are divided without regard to marital fault, and they stay divided without regard to post-divorce behavior, because this is an economic division of property rights.

#2: the only major assets of the marriage are two pensions, one from husband's employment and one from wife's. Suppose that wife had worked much longer at a higher paying job, so her pension is considerably larger than husband's, and when the marital pot gets divided, husband gets not only his pension but also a portion of wife's. Husband receives an ownership interest in wife's pension. Of course, husband will not receive a lump sum because, unlike the situation with the house or investments, pensions cannot be cashed in. Nor does he have any rights greater than wife's (for example, he cannot get benefits paid to him before wife reaches retirement age under the rules of her pension plan, even if he is older than she is). Husband is granted a deferred distribution of his property -- the right to receive monthly payments from wife's pension beginning on her retirement date, and continuing regardless of his remarriage or cohabitation -- just as the wife in the first hypothetical keeps the house and investments regardless of whether or not she remarries or cohabits.

#3: husband was in the military and married to wife for more than the 10 years required by federal statute, and the parties have no other major asset (no house because they've been moving around). After a hearing, a Court decides, based on wife's contributions to the marriage, that she has earned the right to a piece of husband's military pension. Under the present law, she would be awarded a property right to a portion of his pension that would be as much hers as if she had been awarded a piece of real estate. However, if HB 2265 were to become law, then if wife ever remarries or cohabits, she will lose those property rights that she earned. Again, let us be clear on this: we are not dealing with alimony, which the Divorce Code and federal tax regulations require to be terminated in the case of cohabitation or remarriage. We are talking about stripping from a former spouse the property rights he/she was found to be entitled to, either by agreement of the parties or by Court order, based on his/her economic contribution to the marriage.

Why? Why should this former military wife's right to her fair share of the marital property -- the pension -- depend on her remaining single? What purpose does it serve to terminate those benefits if she cohabits or remarries? Punishment of military ex-spouses? Regulation of the conduct of military ex-spouses? Why only military pensions? Is this proposed legislation intended to be the opening wedge of an attempt to make all equitable distribution awards contingent on future actions? But what public policy is served by regulating post-divorce behavior?

As I said when I began, I am puzzled. I am here to raise these questions in the hope of learning from you just how this proposed legislation furthers the public policy goals set out in §3102 of the Divorce Code, 23 Pa.C.S.A. §3101 et seq., "to: . . . [e]ffectuate economic justice between parties who are divorced or separated and grant or withhold alimony according to the actual need and ability to pay of the parties and insure a fair and just determination and settlement of their property rights." Or, in the absence of any such rationale, I am here to do my best to convince you that this proposed legislation is a bad idea.

From: Jeffrey L. Newman
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June 30, 1998

To: Thomas P. Gannon, Member
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Subj: Public Hearing, July 27, 1998, House Bill 2265 (Roberts)

Mr. Gannon,

I fully support amending Title 23 (Domestic Relations) of the Pennsylvania Consolidated Statutes (Enclosure 1), providing for division of certain military pensions. I especially support Section 1, Chapter 3509, Paragraph (b), concerning forfeiture based on remarriage and cohabitation.

I am currently a Lieutenant Colonel on active duty in the United States Air Force, stationed at Fort Meade, Maryland. My wife of 23 years is divorcing me for someone else. She plans to remarry as soon as her divorce is completed and the paramour's divorce is completed. I have done all humanly possible to save the marriage... offered reconciliation and offered to go to counseling. However, she has her agenda and will not depart from it. Thus, I will possibly lose half of my retirement due to this unfair law regarding the Uniform Services Former Spouse Protection Act (USFSPA)... under No-Fault Divorce rules and the property laws (Equitable Distribution) governing Domestic Relations in Pennsylvania. The PA State Courts are suppose to treat military retired pay as either 1) property "solely" of the military member or 2) property of the member and the spouse. The courts have a very bad track record of treating the retired pay as "solely" property of the military member... time and time again, the military member did no wrong to bring the marriage to an end, but are "punished" by garnishing their federal military retired pay.

I plan to attend the July 27 meeting on HB 2265 and am willing to testify upon request (as a private citizen, on leave from the military).

Respectfully,

Encl: Proposed HB 2265 (3 pages)

Jeffrey L. Newman

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