

1 **FROM:** Marcus Bell
2 **TO:** Attorney
3 **RE:** John Doe v. Jane Doe
4 **Date:** 11/23/2010

5
6 **LEGAL MEMORANDUM**

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8 **Facts:**

9 John and Jane Doe hereafter, referred husband and wife were married on June 1, 1988 and
10 separated on June 1, 2007 for a total of 19 years at the time of separation. The couple separated
11 prior to filing for dissolution and mutually agreed \$1,700.00 per month was fair and equitable for
12 child and spousal support hereafter, referred to as "support obligation". Support obligation was
13 distributed between spousal support and child support in the following allotment per written
14 agreement:
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17 ***1. Spousal support in the amount of \$800.00 per month***
18 ***2. Child support in the amount of \$900.00 per month***

19 Parties stipulated to the allotted support obligation on June 1, 2007 as indicated in the stipulated
20 agreement between both parties.

21 Husband receives a military pension for 22 years of service. The support obligation of 1,700.00
22 monthly is disbursed from husband's pension specified as an allotment categorized as
23 "Miscellaneous Discretionary" indicating Wells Fargo as the payee.
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26 Respondent contends the allotment satisfies wife's division entitlement to the pension.
27 However, since support obligations are being paid from the pension, neither party is receiving
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1 their fair and equitable share of the pension if divisible as a community property asset.
2 Husband does not dispute spouse's entitlement to pension as evidenced by allotment of 1,700.00
3 monthly although disbursed to a Wells Fargo account shown on **Retiree Account Statement**. A
4 review of husband's financial documents and/or agreements show **under no circumstances is**
5 **the pension divided as entitlement, but instead assumed through payment of support**
6 **obligations**. Rightfully spousal award is a separate property assets.
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10 **Issue:**

11 Is wife entitled to arrearages where support obligations were paid from a divisible community
12 property asset?

13 Because support obligations are being paid from a divisible community property asset, wife is
14 not receiving a fair and equitable share and should therefore be entitled to arrearages as well as
15 an increase in support.
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17 However, because equitable division of husband's pension relies on the determination or
18 distinction between community or separate property, wife's right to entitlement and/or arrearages
19 are presupposed.
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21 Assuming wife is entitled by way of a community property asset, the following is taken into
22 consideration.

23 Where equitable division is concerned, neither party is receiving fair and equitable division of
24 husband's pension. ***"Because the division of community property is premised on absolute***
25 ***ownership of community assets by both parties, each must receive a respective full share."***

26 ***[HN] 192 Cal. App. 3d 1022; 237 Cal. Rptr. 764***
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1 No dispute arose as to wife's entitlement to military pension between husband and wife.
2 Husband disputes the overall support wife is requesting in addition he is seeking sole physical
3 custody of the minor child "Doe Jr."
4
5 Husband's support obligation is aided by a divisible community property asset. He contends wife
6 is receiving pension benefits because support obligations are paid through his pension by
7 allotment. This demonstrates wife shares in paying support obligations assigned to husband and
8 cannot therefore be considered to receive the full share of support or any portion of a divisible
9 community property asset (pension aka "Retired Pay").
10
11 Spousal Support is considered discretionary and independent.

12 SEPARATE PROPERTY

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14 Under Federal law the pension can be subjected to treatment as separate property therefore, not
15 subject to division [as "sole and separate property," and for that reason, it is no longer a
16 community asset to which an "absolute right" exist]. *In re Marriage of Brown (1976) 15 Cal.3d*
17 *838, 848 [126 Cal.Rptr. 633, 544 P.2d 561, 94 A.L.R.3d 164*
18
19 The Uniformed Services Former Spouses' Protection Act (USFSPA) authorizes courts in
20 community property states to treat "disposable retired pay" as community property.
21 10 U.S.C. § 1408(c)(1).

22 23 ***10 U.S.C. 1408(7)(c) AUTHORITY FOR COURT TO TREAT RETIRED PAY AS PROPERTY OF THE*** 24 ***MEMBER AND SPOUSE:***

25 **(1)** Subject to the limitations of this section, a court may treat disposable retired pay payable to a
26 member for pay periods beginning after June 25, 1981, either as property solely of the member
27 or as property of the member and his spouse in accordance with the law of the jurisdiction of
28 such court. A court may not treat retired pay as property in any proceeding to divide or partition
any amount of retired pay of a member as the property of the member and the member's spouse
or former spouse if a final decree of divorce, dissolution, annulment, or legal separation
(including a court ordered, ratified, or approved property settlement incident to such decree)

1 affecting the member and the member's spouse or former spouse (A) was issued before June 25,
2 1981, and (B) did not treat (or reserve jurisdiction to treat) any amount of retired pay of the
3 member as property of the member and the member's spouse or former spouse.

4 (4) A court may not treat the disposable retired pay of a member in the manner described in
5 paragraph (1) unless the court has jurisdiction over the member by reason of (A) his residence,
6 other than because of military assignment, in the territorial jurisdiction of the court, (B) his
7 domicile in the territorial jurisdiction of the court, or (C) his consent to the jurisdiction of the
8 court.

9 Prior to court ordered support parties stipulated to arrangements which included spousal
10 and child support. Husband presently asserts that wife is also receiving pension benefits through
11 support obligations although not indicated in any stipulated agreement between the parties.

12 Husband's contention alone acknowledges pension is being regarded as a community property
13 asset with no dispute over entitlement. Husband is prepared to show the court that wife is
14 receiving pension entitlement through evidences of allotment for support obligations paid
15 directly from pension, therefore 10 U.S.C. 1408 (7)(c) should reserve no jurisdiction to treat
16 pension as husband's separate property. Because support is husband's separate liability and being
17 paid through husband's "retired pay" to which wife has entitlement, wife should be further
18 entitled to arrearages because "*.....where such liability is satisfied by withdrawing funds*
19 *from the community prior to the division of the property, and the case is one in which an equal*
20 *division is required, the court may direct that the other spouse receive a credit in order to make*
21 *the division equal". In re Marriage of Jafeman (1972, Cal App 1st Dist) 29 Cal App 3d 244,*
22 *105 Cal Rptr .*

23 **SPOUSAL SUPPORT**

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27 Wife currently receives spousal support of \$713.00 per court order. Wife also earns a wage of
28 approximately \$1,200 monthly. If husband's pension is deemed separate property, although

1 wife's monthly income is limited, the court still maintains the ability to deny pension entitlement
2 per Family Code Section § 4321(a). **Denial of support from separate property of other party**

3 *"In a judgment of dissolution of marriage or legal separation of the parties, the court may deny*
4 *support to a party out of the separate property of the other party in any of the following*
5 *circumstances:*

6
7 (a) *The party has separate property, or is earning the party's own livelihood, or there is*
8 *community property or quasi-community property sufficient to give the party proper*
9 *support".*

10
11 In the event the court reserves the right to deny wife entitlement to said community property
12 asset or arrearages, a modification to increase spousal award should be sought because
13 Husband's total income then becomes ["sole and separate property," and for that reason, it is no
14 longer a community asset to which Bernice has an "absolute right."] (*In re Marriage of White,*
15 *192 Cal. App. 3d 1022; 237 Cal. Rptr. 764*) (*In re Marriage of Brown (1976) 15 Cal.3d 838,*
16 *848 [126 Cal.Rptr. 633, 544 P.2d 561]*)

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19 Conclusion:

20 Determination of monetary awards in this case will be based on whether husband's "Retired Pay"
21 (pension) is considered community or separate property. Husband's acknowledgement of
22 entitlement through contention that wife is receiving pension benefits enhances wife's position.
23 Additionally child and spousal support awarded per court order show reasonable support
24 amounts. In viewing what the court deems reasonable, we can thus argue/establish, the prior
25 agreement for support fails to extend beyond anything other than support deemed reasonable.
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1 The community assets in no way can be considered divided equitably where the difference of
2 \$200 dollars is the difference between reasonable support obligations only. The "Retired Pay" is
3 approximately \$2000 monthly which shows husband treats pension as separate property though
4 claiming wife receives more than an equitable share. Fair and equitable division is not
5 established where wife receives \$200 from the pension aside from child and spousal support.
6 Husband's acknowledgement to wife's entitlement further displays that wife assist in paying
7 husband's support obligation. Husband's support payments are paid with wife's portion of
8 entitlement of the community asset. The estimated difference between original support
9 agreement by parties and the court established support order is reduced approximately \$200.
10 Additionally, husband's proposed payment of \$300 for health primarily establishes the same
11 payment arrangements that existed prior to court order. In any case, no entitlement to the
12 community property asset is shown although stated by husband. The "retirement pay" is clearly
13 treated as "sole and separate" property which husband has allocated at his discretion and not by
14 way of entitlement.
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Marcus Bell