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# How Conflict Within the House Impacts a Military Spouse: An Evaluation of Combat-Related Special Compensation as a “Marital” Asset

*Anthony Cox Jr, Esq.\**

## I. Introduction

Imagine Hilary Joe marrying Donald Doe. Later, both individuals later realize the marriage is not in their best interest. As a result, the parties decide a divorce is proper and need the court’s guidance in determining the fate of each party’s respective assets. A common sub-issue that arises from this type of scenario is the issue of which assets the courts will consider as marital assets, for divorce purpose?

Now imagine that Hilary is a military spouse that began receiving Combat-Related Special Compensation<sup>1</sup> prior to the divorce. Combat-Related Special Compensation is a unique form of monetary compensation that is reserved for military individuals that are injured in combat.<sup>2</sup> Concisely, it is a statutory benefit that compensates military veterans who suffered from combat- related injuries.<sup>3</sup> How does adding Combat-Related Special Compensation into the mix impact the division of property phase of Hilary and Donald’s divorce? In fact, this makes the division of marital property phase of their divorce much more complex because courts, and particularly the United States Court of Appeals for the Third Circuit, have yet to set any precedent regarding the issue of whether Combat-Related Special Compensation should be considered a marital asset in the divorce context.

Should Combat-Related Special Compensation be considered a marital asset in the equitable distribution context? In short, the answer is yes, based on existing Third Circuit precedent. Part I of this Comment will shed light for both the Third Circuit and military couples across the country. Part II will highlight the Third Circuit’s approach to equitable

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<sup>1</sup>See 10 U.S.C. § 1413(a) (2016).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

distribution. Part III will evaluate some of the Third Circuit's precedent of its evaluation of some of the most common controversial marital assets. Part IV will provide some background on Combat-Related Special Compensation. Part V will evaluate Combat-Related Special Compensation in the equitable distribution context. Part VI will propose a solution to the Third Circuit regarding this issue, and Part VII will provide some final thoughts and address how this issue will impact Third Circuit divorce law moving forward.

#### A. BACKGROUND ON DIVORCE

Recent studies reveal that divorce rates are consistently increasing, particularly amongst couples over fifty years old.<sup>4</sup> When a couple agrees to marry, although the marriage is intended to last "till death do us part,"<sup>5</sup> this is statistically not always the case. In fact, over the past twenty years, the divorce rate amongst couples over fifty-years old commonly referred to as "gray divorces,"<sup>6</sup> has doubled.<sup>7</sup> As many individuals who receive Combat-Related Special Compensation are around fifty-years of age,<sup>8</sup> this "gray divorce" statistic is critical for the issue at hand. There needs to be critical background information with respect to evaluating this issue.

It is important to be aware of some common scenarios that result in a "gray divorce" because gray divorces are those that are likely to result in a dispute over Combat-Related Special Compensation. These scenarios include: an emotional disconnection between the couple, the couples' children moving out of the household, a desire to pursue self-fulfillment, changes in financial circumstances, and adultery.<sup>9</sup>

Now that a foundation has been set as to divorce, assume that the reason Hilary and Donald have decided to get a divorce is because the two recently experienced an emotional disconnect in their relationship. Legally, what is the next step for both Hilary and Donald? Generally speaking, both parties would seek some form of alternative dispute resolution in order to evaluate their decision to divorce and any related

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<sup>4</sup>Arlene G. Dubin & Rebecca A. Provder, *The Gray Divorce Phenomenon*, NEW YORK LAW JOURNAL, July 25, 2016.

<sup>5</sup> *Id.*

<sup>6</sup>The term "gray divorce" is a term commonly used in the family law context to refer to a divorce that consists of a couple where both parties are above fifty-years old. The term was created to correspond with the fact that it is common for men and woman above fifty years of age to develop gray hair. *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup>DUBIN & PROVDER, *supra* note 4.

legal issues.<sup>10</sup> Mediation is the most common method of alternative dispute resolution.<sup>11</sup> This is the preferred method in divorce proceedings because its relaxed environment and process compliments the emotional aspect of divorce proceedings.<sup>12</sup> Historically speaking, divorce proceedings were handled in court. However, this changed over time, as parties were not satisfied with the “win-lose” atmosphere that occurs in traditional court proceedings.<sup>13</sup>

Divorce mediations consist of a third party, typically a licensed family law practitioner,<sup>14</sup> who serves as a moderator for the parties involved in the dispute. While the third party does not have any impact on the result of the dispute, he or she strives to counsel both parties to reach a decision that is favorable to their needs and goals.<sup>15</sup> There are five common mediation models that mediators exercise: the facilitative model, the transformative model, the evaluative model, the technique of reality testing model, and the eleventh-hour divorce facilitation model.<sup>16</sup>

*i. Facilitative Model*

The first method that mediators use in divorce disputes is the facilitative model.<sup>17</sup> The goal of the facilitative model is to create an environment that enables the parties to reach a mutually agreeable decision.<sup>18</sup> Under the facilitative model, the mediator requires the parties to brainstorm and analyze potential solutions to their problems collaboratively.

*ii. Transformative Model*

The second method that mediators use in divorce disputes is the transformative model. The goal of the transformative model is to enable the parties to “recognize the interests, needs, and values of the other party.”<sup>19</sup> Specifically, the goal is to transform the relationship to a point

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<sup>10</sup>Jaime Abraham, *Divorce Mediation: Limiting the Profession to Family/Matrimonial Lawyers*, 10 CARDOZO J. CONFLICTS RESOL. 241 (2008).

<sup>11</sup>*Id.*

<sup>12</sup>*Id.*

<sup>13</sup>*Id.* at 245.

<sup>14</sup>Divorce lawyers are the only individuals allowed to serve as the neutral party in divorce mediation because they are best equipped to deal with the emotional aspect. *Id.* at 242.

<sup>15</sup>*Id.* at 244.

<sup>16</sup>Jaime Abraham, *Divorce Mediation: Limiting the Profession to Family/Matrimonial Lawyers*, 10 CARDOZO J. CONFLICTS RESOL. 241, 246 (2008).

<sup>17</sup>*Id.* at 247.

<sup>18</sup>*Id.*

<sup>19</sup>*Id.*

where the parties can recognize the needs of the other and understand each other more fluently.<sup>20</sup>

*iii. Evaluative Model*

The third method utilized by mediators in divorce disputes is the evaluative model.<sup>21</sup> This model is most parallels to traditional litigation, as it is the model where the mediator takes the most active role.<sup>22</sup> The unique thing about the evaluative model is unlike the first two models; it requires the mediator to provide each party with their individual analysis and advice on the respective issues surrounding the divorce.<sup>23</sup> The goal of this method is to give the parties with a snippet of how a trial judge would decide their respective legal issues<sup>24</sup> Specifically, this method strives to have the parties focus to find a mutually favorable decision, knowing that a trial judge may issue an unfavorable decision for one of the parties.<sup>25</sup>

*iv. Technique of Reality Testing Model*

The fourth method used by mediators in divorce disputes is the technique of reality testing model. This method is very popular; it is generally exercised when the parties are having an issue in reaching a solution.<sup>26</sup> This method consists of the mediator openly informing the parties of how a court is likely to decide on their differences.<sup>27</sup> This is commonly referred to as the “wake-up call” method, as it strives to force the parties to face reality.<sup>28</sup>

*v. Eleventh Hour Divorce Facilitation Model*

The fifth method used by mediators is the eleventh-hour divorce facilitation model.<sup>29</sup> This method is unique because unlike the other four methods that are used at the beginning of the dispute; this method is not used until the trial date begins approaching.<sup>30</sup> The goal of this method is not to prevent a trial; instead, it strives to provide parties with a different

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<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at 248.

<sup>22</sup> Jaime Abraham, *Divorce Mediation: Limiting the Profession to Family/Matrimonial Lawyers*, 10 CARDOZO J. CONFLICTS RESOL. 241,248 (2008).

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 249.

<sup>28</sup> Jaime Abraham, *Divorce Mediation: Limiting the Profession to Family/Matrimonial Lawyers*, 10 CARDOZO J. CONFLICTS RESOL. 241, 249 (2008).

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

perspective to increase the probability of the parties reaching a mutual decision at or before trial.<sup>31</sup>

#### B. LEGAL ISSUES ARISING FROM DIVORCE

Now that Hilary and Donald have chosen a method for mediation, it is important to evaluate some of the potential legal issues that may arise for the couple. The most common issues that arise from divorce include child custody, child support, and the division of the marital property.<sup>32</sup>

##### *i. Child Custody*

Assuming Hilary and Donald have children at the time they decide to divorce, they will face child custody issues. In assessing this issue, courts attempt to make a custody decision that is in the best interest of the children.<sup>33</sup> With the best interest of the children being the primary influence on a courts' decision regarding custody issues, there are four types of custody awards that courts can grant.<sup>34</sup> Those four types of custody include the following: sole custody, joint custody, divided custody, and split custody.<sup>35</sup> A court can award either sole legal custody or sole physical custody.<sup>36</sup> If a court awards sole legal custody, the custodial parent<sup>37</sup> maintains the legal rights regarding the children.<sup>38</sup> On the other hand, in a sole physical custody situation, the non-custodial parent<sup>39</sup> maintains limited rights and access to the children.<sup>40</sup> If a court awards sole physical custody, then the custodial parent maintains primary custody of the child, while the non-custodial parent is generally only entitled to visitation.<sup>41</sup>

Courts can award joint legal custody or joint physical custody.<sup>42</sup> If a court awards joint legal custody both parents retain the right to make

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<sup>31</sup> *Id.*

<sup>32</sup> DUBIN & PROVIDER, *supra* note 4.

<sup>33</sup> JOAN B. KELLY, *The Determination of Child Custody*, THE FUTURE OF CHILDREN, 1988, at 123.

<sup>34</sup> *Id.* at 124.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> The custodial parent is the parent who is given physical custody by a court order or the parent that the child is physically with for a majority of the time. BLACK'S LAW DICTIONARY (9th ed. 2009).

<sup>38</sup> JOAN B. KELLY, *supra* note 33.

<sup>39</sup> The non-custodial parent is the parent who does not have physical custody or the parent that the child is not physically with for a majority of the time. BLACK'S LAW, *supra* note 37.

<sup>40</sup> JOAN B. KELLY, *supra* note 33.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

decisions regarding the health and welfare of the children.<sup>43</sup> In contrast, if a court awards joint physical custody, the right to exercise residential care is granted to both parents. The day-to-day schedule for the child is left to the discretion of the parents.<sup>44</sup> The final two common types of custody are divided custody and split custody.<sup>45</sup> For divided custody, each parent maintains equal legal rights and will alternate physical custody.<sup>46</sup> Split custody gives each parent both sole legal and physical custody, it continues to be the most popular type of custody.<sup>47</sup> This is because courts generally find joint custody to be in the best interest of the child to have equal access to both parents.<sup>48</sup>

*ii. Child Support*

Child support is another issue that will likely challenge Hilary and Donald. Traditionally, child support has been defined as “cash contributions made on behalf of a minor child pursuant to a court order or an agreement between the parents.”<sup>49</sup> Before a court can award child support, it is important that one prerequisite is established.<sup>50</sup> Specifically, the party requesting child support has the burden of demonstrating that the opposing party is the biological parent of the child or has a relationship with the child to the extent where granting child support would be justified.<sup>51</sup> Assuming that the party requesting child support can meet this prerequisite, the court will assess general child support guidelines to determine the amount of child support it will award.<sup>52</sup> Income is the primary factor that courts use to consider the amount of child support that it will award.<sup>53</sup> As a result, the amount of child support that either Hilary or Donald would be entitled to would hinge upon the court’s income analysis.<sup>54</sup>

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<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup>Joan B. Kelly, *The Determination of Child Custody*, THE FUTURE OF CHILDREN, 1988, at 124.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup>*Establishment of Child Support Obligations*, Essentials for Attorneys in Children.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup>A child support income analysis requires courts to evaluate a spouse’s net income and the number of children involved. While the percentage of child support generally does not change, it is scaled based on the spouse’s net income and the number of children involved. Jane Venohr, *Review of the Pennsylvania Child Support Guidelines*, PENNSYLVANIA DEPARTMENT OF PUBLIC WELFARE, March 30, 2012.

*iii. Division of Marital Property*

Now it is time for Hilary and Donald to decide what legally will happen to the couples' property. This issue will depend upon the approach that Donald and Hilary's jurisdiction follows regarding the division of marital property.

## C. APPROACHES USED TO DIVIDE MARITAL ISSUES

There are three distinct approaches governing this issue: Community Property, Separate Property, and Equitable Distribution.<sup>55</sup> For the sake of brevity, this Comment will only discuss Community Property and Equitable Distribution, as these are the only approaches employed by the Third Circuit.<sup>56</sup>

*i. Community Property Approach*

The first approach that is used to address this issue is the Community Property Approach.<sup>57</sup> The majority of the Community Property states are west coast states including Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, and Washington.<sup>58</sup> In a community property jurisdiction, spouses have an equal interest in *all* income and assets that are acquired during the marriage.<sup>59</sup> In reference to any property that is acquired prior to the marriage, each party only maintains an interest in its respective income and assets.<sup>60</sup> Therefore, if Hilary and Donald divorce in a community property state, whether Hilary's Combat Special Relation Compensation would be a marital asset at the time of marriage would hinge upon whether Hilary acquired rights to Combat Related Special Compensation prior to or during the marriage.

*ii. Equitable Distribution Approach*

The next approach used in distributing marital property is the equitable distribution approach.<sup>61</sup> Equitable distribution jurisdictions view marriage as a partnership. Therefore, the primary goal of equitable distribution is to divide the property justly and fairly, while distributing the property without regard to the party that holds legal title to the piece

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<sup>55</sup>Benjamin Ellis, *Protecting the Right to Marital Property*, CARDOZA L. REV. 30:4 (2009).

<sup>56</sup>*Id.*

<sup>57</sup>James R. Ratner, *Distribution of Marital Assets in Community Property Jurisdictions: Equitable Doesn't Equal*, 72 LA. L. REV. 21.

<sup>58</sup>*Id.* at 21 n.1

<sup>59</sup>*Id.* at 22.

<sup>60</sup>*Id.*

<sup>61</sup>Divorce: Equitable Distribution Doctrine, 41 A.L.R. 4<sup>TH</sup> 481.



of property or asset.<sup>62</sup> Equitable distribution focuses on distributing the property in a manner that creates the most just and fair result.<sup>63</sup> This is why unlike the other approaches; the equitable distribution approach *recognizes both a party's economic and noneconomic contributions*, in order to ensure a fair result.<sup>64</sup> While the analysis regarding equitable distribution is state specific and governed by statutory law, each state's law strives to achieve the same goals described above.<sup>65</sup> For purposes of this Comment, assume that Hilary and Donald are residents of any Third Circuit jurisdiction, other than the Virgin Islands. Therefore, equitable distribution law will govern whether Hilary's Combat Related Special Compensation should be considered a marital asset with respect to Donald and Hilary's divorce.

## II. The Third Circuit's Approach: Relevant Law

As the Third Circuit is made up of Pennsylvania, Delaware, New Jersey, and the Virgin Islands,<sup>66</sup> this section will address each of these respective laws regarding the process of dividing marital property. The Virgin Island's law will not be discussed in detail, as it is the only Third Circuit territory and is not an equitable distribution jurisdiction.

### A. PENNSYLVANIA

In Pennsylvania, the Section 3501 four-step analysis governs this issue.<sup>67</sup> First, Pennsylvania courts determine whether the asset in dispute is to be considered property.<sup>68</sup> Second, if the asset is considered to be property, the courts then consider if the asset is "marital" property pursuant to Section 3501.<sup>69</sup> Third, the court will value the asset. Finally, the courts will divide the asset.<sup>70</sup>

The first step of the analysis under Pennsylvania law is to determine whether the asset involved is property, which is governed by the basic principles Pennsylvania property law.<sup>71</sup> Concerning real property, this step of the analysis is presumed.<sup>72</sup> On the other hand, Pennsylvania has not set

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<sup>62</sup>*Id.* at \*2.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup>THIRD CIRCUIT COURTS, <http://www.ca3.uscourts.gov/third-circuit-courts>.

<sup>67</sup>23 Pa. Cons. Stat. Ann. § 3501(a).

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup>*Id.* at (b).

a bright-line rule for intangible property. Pennsylvania's analysis regarding some of the most controversial intangible property will be discussed in a later section.

If the court determines that there is property involved in the divorce, then the next step is determining if the asset is "marital" property. Subsection (a) of Section 3501 governs this issue. Pursuant to subsection (a), marital property consists of all property acquired by either party during the marriage and any increases in the value of all other property during marriage.<sup>73</sup> On the other hand, marital property does not consist of the following:

[P]roperty acquired prior to marriage or property acquired in exchange for property acquired prior to the marriage; property excluded by valid agreement of the parties into before, during or after marriage; property acquired by gift;<sup>74</sup> property acquired after final separation until the date of divorce, except for property acquired in exchange for marital assets; property which a party has sold, granted, conveyed or otherwise disposed of in good faith and for value prior to the date of final separation, veteran's benefits exempt from attachment, levy or seizure pursuant to act of September 2, 1958; property to the extent to which the property has been mortgaged or otherwise encumbered in good faith for value prior to the date of final separation; and any payment received as a result of an award or settlement for any cause of action or claim which accrued prior to the marriage or after the date of final separation regardless of when the payment was received.<sup>75</sup>

Because statutory law governs this section, Pennsylvania courts rely solely on the statute in determining if the asset at issue is marital property.

If a Pennsylvania court finds an asset as marital pursuant to Section 3501, it then proceeds to the next step of the analysis; valuing the property. In determining the value of a marital asset, Pennsylvania courts uses the present division approach.<sup>76</sup> According to the present division approach, the determination as to the value is made at the time of trial.<sup>77</sup> The courts rely on valuation experts to provide an expert opinion as to the value of the asset in dispute at the time of trial.<sup>78</sup> Although the final decision

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<sup>73</sup>*Id.* at (a).

<sup>74</sup>It is important to note that this excludes property acquired by bequest, devise, descent, or property acquired in exchange for such property. *See* 23 PA. CONST. STAT. § 3501(a)(3).

<sup>75</sup>*Id.* at (a)(1)-(4).

<sup>76</sup>22 P.L.E. Divorce § 212 (2017).

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

regarding value is at the court's discretion, courts commonly give great deference to valuation experts.<sup>79</sup>

The final step of the analysis requires the court to divide the property; section 3502 governs this issue.<sup>80</sup> Section 3502 provides the court with a plethora of factors to utilize when analyzing the proper manner to divide the property.<sup>81</sup> While each factor assesses something slightly different, they all evaluate each party's economic and non-economic contribution to the marriage.<sup>82</sup> Contribution, both economic and non-economic, is an essential principle used by Pennsylvania family law courts when determining exactly how to divide the property.

#### B. DELAWARE

Regarding Delaware's approach to dividing marital property, uses Section 1513.<sup>83</sup> Like Pennsylvania, Delaware's governing statute details a four-step process.

First, Delaware courts begin by determining if the asset is considered property in the divorce context.<sup>84</sup> Unlike Pennsylvania, Delaware does not provide much guidance as to which assets should be considered property, giving complete deference to the plain language of the statute.<sup>85</sup> As a result, Delaware courts theoretically begin with the second step of the analysis, which is to determine if the asset at issue is a marital asset.<sup>86</sup> Pursuant to Section 1513, marital property includes both property acquired by either party subsequent to the marriage<sup>87</sup> and all property that is jointly titled real property<sup>88</sup> acquired prior to the marriage.<sup>89</sup>

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<sup>79</sup> *Id.*

<sup>80</sup>23 PA. CONST. STAT. § 3502 (2016).

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup>DEL. CODE. ANN. tit. 13, § 1513 (2016).

<sup>84</sup> *Id.*

<sup>85</sup>DEL. CODE. ANN. tit. 13, § 1513 (2016).

<sup>86</sup> *Id.*

<sup>87</sup>It is important to know that there are four exceptions to this general rule. Those four exceptions include the following: (1) Property acquired by an individual spouse by bequest, devise, or descent or by gift, except gifts between spouses, provided the gifted property is titled and maintained in the sole name of the done spouse, or a gift tax return is filed reporting the transfer of the gifted property in the sole name of the done spouse or a notarized document, executed before or contemporaneously with the transfer, is offered to demonstrate the nature of the transfer; (2) Property acquired in exchange for property acquired prior to the marriage; (3) Property excluded by valid agreement of the parties; (4) The increase in value of property acquired prior to the marriage.

<sup>88</sup>In this context, jointly titled property includes joint tenancy, tenancy in common, and any other form of co-ownership.

<sup>89</sup>DEL. CODE. ANN. tit. 13, § 1513 (2016).

Assuming the asset at issue meets the statutory definition of “marital property,” the courts proceed to determine how the property should be valued. In *Sayer v. Sayer*, a case from the Supreme Court of Delaware, Justice Moore provides some insight as to how Delaware courts value marital assets.<sup>90</sup> According to *Sayer*, Delaware courts use the present value of the asset in dispute.<sup>91</sup> The court assigns a monetary value to each asset in dispute, sometimes relying on testimony from financial professionals.<sup>92</sup>

The final step of the analysis is the actual division of the asset(s). Subsection (a) of Section 1513 governs this segment of the analysis.<sup>93</sup> Subsection (a) details eleven factors for courts to evaluate in determining exactly how to divide the assets involved. Those factors include the following:

- (1) [t]he length of the marriage;
- (2) Any prior marriage of the party;
- (3) [t]he age, health, station, amount and sources of income,
- (4) vocational skills, employability, estate, liabilities and needs of each of the parties;
- (5) [w]hether the property award is in lieu of or in addition to alimony;
- (6) [t]he opportunity of each for future acquisitions of capital assets and income;
- (7) [t]he contribution or dissipation of each party in the acquisition, preservation, depreciation or appreciation of the marital property, including the contribution of a party as homemaker, husband, or wife;
- (8) [t]he value of the property set apart to each party;
- (9) [t]he economic circumstances of each party at the time the division of property is to become effective, including the desirability of awarding the family home or the right to live therein for reasonable periods to the party with whom any children of the marriage will live;
- (10) [w]hether the property was acquired by gift, except those gifts excluded by paragraph (b)(1) of this section;
- (11) [t]he debts of the parties; and [t]ax consequences.<sup>94</sup>

Delaware courts weigh these factors to determine the proper method of division.

### C. NEW JERSEY

New Jersey assesses equitable distribution claims liberally, evidenced by N.J. Stat. § 2A:34-31.1.<sup>95</sup> Pursuant to the statute, New Jersey relies solely on sixteen factors in determining how to divide the property.<sup>96</sup>

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<sup>90</sup>*Sayer v. Sayer*, 492 A.2d 238 (Del. 1985).

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> DEL. CODE ANN. tit. 13, § 1513(a) (2016).

<sup>94</sup> *Id.*

<sup>95</sup> N.J. STAT ANN. § 2A:34-23.1 (2016).

<sup>96</sup> *Id.*

Although the substance of each factor differs, a common theme is that each factor assesses each party's economic and non-economic contribution to the asset in dispute. As a result, it is evident that this is the primary focus of New Jersey courts is each party's contribution to the asset at issue.<sup>97</sup>

#### D. VIRGIN ISLANDS

Unlike the other three jurisdictions in the Third Circuit, the Virgin Islands are the only jurisdiction that do not utilize the equitable distribution approach. The Virgin Islands exercises a community property approach. This Comment will not detail the community property approach, as this approach was discussed earlier.

### III. The Third's Circuit's Approach: Controversial "Marital" Assets

This section of the Comment will evaluate some of the more controversial assets, similar to Combat-Related Special Compensation and determine whether each Third Circuit jurisdiction, excluding the Virgin Islands, considers it to be a marital asset in the divorce context. The section evaluates pensions, disability, and military retirement pay.

#### A. PENSIONS

A pension is a type of retirement plan.<sup>98</sup> In particular, a pension is a fund managed by an employer that is awarded to an employee at the time of his or her retirement under circumstances when the employee meets the necessary length of employment requirements needed to obtain a pension.<sup>99</sup> There are two categories of pensions: vested and unvested pensions.<sup>100</sup> A vested pension is when employee is currently entitled to at the time of divorce, an unvested pension is a pension that an employee is not currently entitled to at the time of divorce.<sup>101</sup>

##### *i. Pennsylvania*

In Pennsylvania, it is well-established law that a pension, whether vested or unvested, is a marital asset in a divorce.<sup>102</sup> In *Braderman v. Braderman*, a case from the Superior Court of Pennsylvania, Judge

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<sup>97</sup> *Id.*

<sup>98</sup> 23 Valuation and Distribution of Marital Property § 23.02 (2015).

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> *Flynn v. Flynn*, 341 Pa. Super. 76, 491 A.2d 156 (1985).

Monttemuro addressed this issue in greater detail.<sup>103</sup> *Braderman* involved a husband and wife who decided to divorce. The court had to decide whether the husband's pension.<sup>104</sup> In assessing this issue, the Supreme Court of Pennsylvania relied on case law from other jurisdictions,<sup>105</sup> which had not been addressed in Pennsylvania prior to *Braderman*.<sup>106</sup> Specifically, the *Braderman* court relied on case law from one of its sister circuit, the United States Court of Appeals for the Seventh Circuit.<sup>107</sup> In ruling that a pension is always a marital asset at the time of marriage, the Seventh Circuit relied on its precedent that retirement benefits are marital assets because of the non-economic contribution that goes into assisting a spouse secure retirement benefits.<sup>108</sup> The *Braderman* court adopted this rationale; therefore holding that the husband's pension, and pensions in general, are marital assets in divorce disputes.<sup>109</sup> Post *Braderman*, it is evident that pensions are marital assets in the state of Pennsylvania.

*ii. Delaware*

In Delaware, a pension is a marital asset in divorce disputes.<sup>110</sup> In *Robert C.S. v. Barbara J.S.*, the Supreme Court of Delaware held that a pension that vests during the marriage is a marital asset in a divorce, primarily because holding on the contrary would be inconsistent with the basic principles of the equitable distribution doctrine.<sup>111</sup> Precisely, one of the primary purposes of the equitable distribution is to divide the property fairly.<sup>112</sup> As a result, the *Robert* court held that it would be fundamentally unfair to not entitle a non-employee spouse to a pension that vested, while the parties were married.<sup>113</sup>

The issue of whether an unvested pension is a marital asset in the divorce context, the *Robert* court relied on California case law in reaching its decision.<sup>114</sup> The Supreme Court of California held in *In re Marriage of Brown* that an unvested pension is deemed a marital asset.<sup>115</sup> The *Brown* court provided that since a pension is a form of property and a right to property is contractual, a non-employee spouse obtains rights to unvested

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<sup>103</sup>*Braderman v. Braderman*, 339 Pa. Super. 185, 488 A.2d 613 (1985).

<sup>104</sup>*Id.*

<sup>105</sup>*Id.* at 619.

<sup>106</sup>*Id.*

<sup>107</sup>*Id.*

<sup>108</sup>*Id.* (citing 442 N.E. 2d 556).

<sup>109</sup>*Id.*

<sup>110</sup>*Robert C.S. v. Barbara J.S.*, 434 A.2d 383 (Del. 1981).

<sup>111</sup>*Id.* at 386.

<sup>112</sup>*Id.*

<sup>113</sup>*Id.*

<sup>114</sup>*Id.*

<sup>115</sup>*In re Marriage of Brown*, 15 Cal. 3d 838, 126 Cal. Rptr. 633, 544 P.2d 561 (1976).

pensions when entering into a marital contract with an employee spouse.<sup>116</sup> Despite California being a community property state, the *Robert* court adopted the holding and rationale derived from *Brown*.<sup>117</sup> Currently, it is undisputed that both vested and unvested pensions are marital assets in the state of Delaware.<sup>118</sup>

*iii. New Jersey*

In New Jersey, “a pension that is legally or beneficially acquired during the marriage is subject to equitable distribution.”<sup>119</sup> The Superior Court of New Jersey in *Sternesky v. Salice-Sternesky* addressed this issue.<sup>120</sup> The *Sternesky* Court focused its analysis on the contribution that a non-employee spouse makes to an employee spouse obtaining a pension.<sup>121</sup> The court held that “[b]ecause both spouses contribute to the earning of pension, both justifiably expect to share the future enjoyment of the pension benefit.”<sup>122</sup> As a result, all of the contribution made to pensions in New Jersey, the court deemed a pension a marital asset.<sup>123</sup>

## B. DISABILITY INCOME

It is not uncommon for a spouse to be entitled to disability income. Disability income serves three primary purposes.<sup>124</sup> First, disability income tends to compensate for the loss of earnings resulting from compelled premature retirement and from a diminished ability to compete in the employment market.<sup>125</sup> Second, disability income strives to compensate the disabled person for suffering caused by the disability. Finally, disability income intends to replace a retirement pension by providing support for the disabled worker after he leaves his job.<sup>126</sup>

*i. Pennsylvania*

In Pennsylvania, whether a disability is a marital asset in the divorce hinges upon when the right to receive disability payment arises.<sup>127</sup> Judge Bender of the Superior Court of Pennsylvania shed light on this issue in

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<sup>116</sup>*Id.*

<sup>117</sup>*Robert C.S.*, 434 A.2d at 383.

<sup>118</sup>*Id.*

<sup>119</sup>*Sternesky v. Salice-Sternesky*, 933 A.2d 956 (N.J. Super. Ct. App. Div. 2007).

<sup>120</sup>*Id.*

<sup>121</sup>*Id.* at 965.

<sup>122</sup>*Id.* at 960.

<sup>123</sup>*Id.* at 965.

<sup>124</sup>*Ciliberti v. Ciliberti*, 542 A.2d 580, 582 (Pa. Super. Ct. 1988).

<sup>125</sup>*Id.*

<sup>126</sup>*Id.*

<sup>127</sup>*Yuhas v. Yuhas*, 79 A.3d 700, 702-703 (Pa. Super. Ct. 2013).

*Yuhas v. Yuhas*.<sup>128</sup> *Yuhas* involved a wife who was asserting that her husband's disability income policy was a marital asset pursuant to Pennsylvania case law.<sup>129</sup> Prior to the parties' agreeing to separate, the husband suffered a traumatic injury resulting in disability income.<sup>130</sup> The court held that this issue hinged upon whether the husband's right to seek compensation of the disability income accrued during the marriage.<sup>131</sup> Relying on the Supreme Court of Pennsylvania's holding in *Drake v. Drake*,<sup>132</sup> the *Yuhas* court held that assessing this issue requires the determination of when the husband obtained a legal right to the disability income.<sup>133</sup> In applying this standard to its specific case, the court denied the wife's request, ultimately holding that the husband's disability is not to be considered a marital asset because he did not obtain a legal right to the disability income until subsequent the marriage.<sup>134</sup> *Yuhas* makes it clear that disability income remains a controversial "marital" asset in Pennsylvania. It does set a clear standard to utilize in an equitable distribution analysis in determining if a spouse's disability in dispute is to be considered a marital asset.<sup>135</sup>

*ii. Delaware*

While Delaware has yet to adopt a clear rule on this issue, the Family Court of Delaware made it clear that it will decide this issue on a case-by-case basis.<sup>136</sup> The court specified that it would base its holding, when disability income is in dispute, on the amount of contribution both economic and non-economic contribution, which the party asserting disability income as a marital asset can demonstrate.<sup>137</sup> *Armstrong v. Armstrong*, a 1994 case from the Delaware Family court, illustrates as to how Delaware courts approach this issue. *Armstrong* involved a wife that was diagnosed with Lupus Erythematosus.<sup>138</sup>

In *Armstrong*, the wife began receiving disability income. At this time, the husband asserted that he agreed to become a "house husband," and take care of all of the household duties, while the wife handled all of

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<sup>128</sup>*Id.*

<sup>129</sup>*Id.*

<sup>130</sup>*Id.*

<sup>131</sup>*Id.* at 705.

<sup>132</sup>*Id.* (citing *Drake v. Drake*, 725 A.2d 717 (Pa. 1999)).

<sup>133</sup>*Yuhas*, 79 A.3d at 705.

<sup>134</sup>*Id.* at 706.

<sup>135</sup>*Id.*

<sup>136</sup>*Armstrong v. Armstrong*, 2994 WL 872666 (Del. Fam. Ct. 1994).

<sup>137</sup>*Id.* at \*6-7.

<sup>138</sup>*Id.* at \*1.



the financial burdens using her disability income.<sup>139</sup> Subsequently, the parties decided to divorce and a dispute arose as to whether the wife's disability income should be considered a marital asset within the marriage.<sup>140</sup> The court's analysis hinged upon the husband's contribution to the wife receiving her disability income.<sup>141</sup> The court held that the husband did not contribute at all, as he did not become a "house husband" until after the wife received her disability income.<sup>142</sup> While this case does not set a bright-line rule for the state of Delaware, it does specify that Delaware courts base its analysis, in evaluating the eligibility of disability income in the equitable distribution context, on the amount of contribution by the party not compensated by the disability income.<sup>143</sup>

*iii. New Jersey*

New Jersey takes an interesting approach regarding this issue. It is unique that New Jersey courts focus its analysis on the amount of the disability income that is eligible for division rather than whether disability income itself is eligible.<sup>144</sup> The Superior Court of New Jersey illustrates as to how New Jersey courts evaluate this issue in *Avallone v. Avallone*.<sup>145</sup> *Avallone*, involved a wife claiming that she was entitled to her husband's disability income in the equitable distribution segment of their divorce dispute.<sup>146</sup> While the husband contended that this issue should hinge upon the age of the disability income, the Superior Court of New Jersey disagreed.<sup>147</sup> The court held that this approach is inconsistent with the fundamental principle of fairness that underlies the doctrine of equitable distribution.<sup>148</sup> Furthermore, the court held that disability income could serve as a significant joint financial asset within a marriage.<sup>149</sup> The court ultimately held that while it will always consider disability income as a marital asset in equitable distribution disputes, it would evaluate the economic and non-economic contribution made by the party asserting its right to entitlement to determine the amount that is eligible for division.<sup>150</sup>

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<sup>139</sup>*Id.* at \*3.

<sup>140</sup>*Id.* at \*6-7.

<sup>141</sup>*Id.*

<sup>142</sup>*Armstrong*, 1994 WL 872666 at \*6-7.

<sup>143</sup>*Id.*

<sup>144</sup>*Id.*

<sup>145</sup>*Avallone v. Avallone*, 646 A.2d 1121 (N.J. Super. Ct. App. Div. 1994).

<sup>146</sup>*Id.*

<sup>147</sup>*Id.* at 1125.

<sup>148</sup>*Id.* at 1125-26.

<sup>149</sup>*Id.*

<sup>150</sup>*Id.*

## C. MILITARY RETIREMENT PAY

Military retirement pay is a common asset involved in a divorce dispute. Military retirement pay is a federal benefit available to members of the Army, Navy, Marine Corps, Air Force, and the Coast Guard.<sup>151</sup> To become eligible for military retirement pay, an individual must remain on active duty or serve in the reserves for the aforementioned military branches for a minimum of twenty years.<sup>152</sup>

*i. Pennsylvania*

Pursuant to Pennsylvania jurisprudence, military retirement pay is a marital asset in the divorce context.<sup>153</sup> In *Wagner v. Wagner*, a case from the Supreme Court of Pennsylvania, Justice Cappy held that military retirement pay is a marital asset in Pennsylvania, so long as the military spouse is subject to jurisdiction in Pennsylvania.<sup>154</sup> The court relied on the language of Section 1408(c)(4) of the Uniformed Services Former Spouses' Protection Act.<sup>155</sup> Although this generally would be an issue governed by federal law, pursuant to Section 1408:

A court may not treat the disposable retired pay of a member in the manner described in paragraph (1) unless the court has jurisdiction over the member by reason of (A) his residence, other than because of military assignment, in the territorial jurisdiction of the court, (B) his domicile in the territorial jurisdiction of the court, or (C) his consent to the jurisdiction of the court.<sup>156</sup>

As the *Wagner* court relied on the plain language of Section 1408 in determining if military retirement pay is a marital asset in the divorce context, its analysis hinged upon whether the husband, the military spouse, was subject to jurisdiction in Pennsylvania.<sup>157</sup> In fact, post-*Wagner* this issue hinges solely upon whether a military spouse is subject to jurisdiction in a state hearing the marital dispute.

*ii. Delaware*

Under Delaware law, military retirement pay is a marital asset in the divorce context.<sup>158</sup> Delaware adopted an analysis parallel to Pennsylvania,

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<sup>151</sup>Military Retirement Pay, COMPTROLLER, [http://comptroller.defense.gov/Portals/45/documents/cfs/fy1998/50\\_MRTFCFO98.pdf](http://comptroller.defense.gov/Portals/45/documents/cfs/fy1998/50_MRTFCFO98.pdf)

<sup>152</sup>*Id.*

<sup>153</sup>*Wagner v. Wagner*, 768 A.2d 1112 (Pa. 2001).

<sup>154</sup>*Id.* at 1114.

<sup>155</sup>*Id.* at 1116-17 (citing 10 U.S.C. § 1408(c) (2016)).

<sup>156</sup>*Id.*

<sup>157</sup>*Wagner*, 768 A.2d at 1115.

<sup>158</sup>*Geesman v. Geesman*, 1993 WL 777094 (Del. Fam. Ct. 1993).

holding that the plain language of Section 1408 gives state family law courts the discretion to consider military retirement pay as a marital asset.<sup>159</sup>

*iii. New Jersey*

New Jersey courts consider military retirement pay analogous to a pension, therefore holding it as a marital asset in the divorce context.<sup>160</sup> Specifically, the Supreme Court of New Jersey in *Kruger v. Kruger*, addressed the question of whether military retirement pay is a marital asset in the equitable distribution context.<sup>161</sup> *Kruger* involved a husband and wife that decided to divorce as a result of a marital disconnect.<sup>162</sup> At the equitable distribution stage of the divorce, the wife asserted that she was entitled to her husband's military retirement pay.<sup>163</sup> The Supreme Court of New Jersey held that the wife was entitled to her husband's military retirement pay.<sup>164</sup> The court reasoned that when a military spouse receives military retirement pay, it hinges upon the number of years he or she engaged in service, it should be treated analogously to a pension.<sup>165</sup> As a result, the court applied its precedent regarding pensions and set a concrete rule with respect to the eligibility of military retirement pay.<sup>166</sup>

## IV. Combat-Related Special Compensation

### A. HISTORICAL BACKGROUND

In December of 2002, Congress enacted 10 U.S.C. § 1413(a), the statute governing Combat-Related Special Compensation.<sup>167</sup> Congress created a form of special compensation to mitigate the loss of income that military individuals who suffer disabilities might experience.<sup>168</sup> Before the enactment of this statute, there was a prohibition against concurrent receipt of disability from both the Department of Defense and the Veteran Affairs, the two organizations responsible for providing the majority of military disability compensation.<sup>169</sup> Particularly Congress did not want military

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<sup>159</sup>*Id.* at \*4.

<sup>160</sup>*Kruger v. Kruger*, 375 A.2d 659 (N.J. 1977).

<sup>161</sup>*Id.* at 661.

<sup>162</sup>*Id.*

<sup>163</sup>*Id.*

<sup>164</sup>*Id.* at 663.

<sup>165</sup>*Id.*

<sup>166</sup>*Kruger*, 375 A.2d at 663.

<sup>167</sup>*Prohibition Against Duplication of Benefits*, I-9 VETERANS BENEFITS MANUAL 9.3 (2014).

<sup>168</sup>*Id.*

<sup>169</sup>*Id.*

individuals to be eligible for “duplicate” benefits, as a result of one disability.<sup>170</sup> In 2002, however, Congress created this concept of Combat-Related Special Compensation to make up for some of this loss of income.<sup>171</sup>

#### B. DISSECTING COMBAT-RELATED SPECIAL COMPENSATION

Section 1413(c) governs the eligibility requirements for receiving Combat Related Special Compensation benefits.<sup>172</sup> Under the statute, a military individual is eligible for these benefits if (1) they are entitled to retired pay by law and (2) has a combat-related special disability.<sup>173</sup> Concerning the first requirement, a military individual is eligible for retired pay when they have at least twenty years of service in their respective branch. Section 1413(e) provides some insight on the second requirement.<sup>174</sup> According to this section, a combat-related disability includes those disabilities that are attributable to an injury for which the member was awarded a Purple Heart.<sup>175</sup> Also, it refers to disabilities that occur: as a direct result of armed conflict; while engaged in hazardous service; in the performance of duty under conditions simulating war; or through an instrumentality of war.<sup>176</sup> It is important to note, however, that in 2008 Congress expanded the scope of eligibility to now include those individuals who have retired for disability, resulting in the inclusion of all individuals who were retired from military service regardless of the number of years the individual served prior to retirement.<sup>177</sup>

Now let’s assume that Hilary, a military spouse, has been deemed eligible for Combat- Related Special Compensation and begins to receive it. As she and Donald are now at the equitable distribution stage of the divorce, it is time for the two to decide which assets, including Hilary’s Combat-Related Special Compensation, are eligible to divide. Should Hilary’s Combat-Related Special Compensation be eligible? In short, the answer is yes pursuant to the relevant Third Circuit precedent.

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<sup>170</sup>*Id.*

<sup>171</sup>*Id.*

<sup>172</sup>10 U.S.C. § 1413 (2016).

<sup>173</sup>*Id.* at 1413(c)

<sup>174</sup>*Id.* at 1413(e)

<sup>175</sup>Talk about the requirements for receiving a purple heart.

<sup>176</sup>*Id.*

<sup>177</sup>*Prohibition Against Duplication of Benefits*, I-9 VETERANS BENEFITS MANUAL 9.3 (2014).

## V. An Evaluation of Combat-Related Special Compensation in Relation to other Controversial Assets

The Third Circuit has yet to decide whether Combat-Related Special Compensation should be considered a marital asset. When they do, however, there will be many issues to consider. It will be important for the Third Circuit to evaluate the three most important problems that its precedent indicates are most important when deciding which assets are marital. First, courts must consider the nature of Combat-Related Special Compensation about some of the other controversial intangible marital assets. Second, courts must consider the nature of non-economic contribution that a non-military spouse dedicates to a military spouse. Finally, courts must consider basic principles of fundamental fairness. In assessing these three factors, it is evident that there are compelling arguments both for and against deeming Combat-Related Special Compensation as a marital asset and the contrary.

### A. ACCEPTING COMBAT-RELATED SPECIAL COMPENSATION AS A MARITAL ASSET

The first compelling argument is recognition of the similarities between Combat-Related Special Compensation and some of the other common assets such as pensions, disability income, and military retirement pay. First, like both pensions and military retirement pay, eligibility for Combat-Related Special Compensation hinges at least partially on the length of employment. The Supreme Court of New Jersey in *Kruger* illustrates the role that similarities in eligibility requirements play in this analysis when it made its decision to deem military retirement pay a marital asset solely because of how its eligibility requirements compared to those of a pension.<sup>178</sup> The *Kruger* court held that military retirement pay should be treated consistent with pensions because like a pension, eligibility of military retirement pay hinges upon length of employment.<sup>179</sup>

Moreover, like pensions, disability income, and military retirement pay, Combat-Related Special Compensation is a monetary asset. This is critical, as the Third Circuit seems to treat most monetary assets similarly. This is because not entitling spouses to at least a portion of each other's respective money would contradict the purpose underlying equitable

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<sup>178</sup>*Kruger*, 375 A.2d 660.

<sup>179</sup>*Id.*

distribution, ensuring a fair division of property. Therefore, the Third Circuit has repeatedly treated all monetary assets equivalently to remain consistent with the purposes of equitable distribution.

The second argument in support of Combat-Related Special Compensation being accepted as a marital asset is the nature of contribution that a non-military spouse provides a military spouse. On the contribution factor, the analysis turns upon whether one finds a broader or narrow approach more appropriate. In accepting Combat-Related Special Compensation, courts would use a broad approach to non-economic contribution. Precisely, these courts would place the primary focus on a non-military spouse's contribution to a military spouse's career rather than the non-military spouse's contribution to the actual asset, Combat-Related Special Compensation, in dispute.

In using a broader approach, the question before the court is does a non-military spouse contribute to a military spouse's military career? The question at issue requires courts to evaluate the nature of non-economic contribution that a non-military spouse dedicates to a military spouses' military career. In sum, the nature of the non-economic contribution that non-military spouse contributes to a military spouse's military career is significant. For example, a non-military spouse dedicates emotional support to the military spouse, maintains the household, and serves as the primary caretaker for the children, assuming the couple has any.

A non-military spouse dedicates a plethora of emotional support to his or her non-military spouse. As a military career generally entails being away from family for an extended period, it is almost required for a non-military spouse to provide emotional support to his or her respective spouse. Let us use our Hilary and Donald Doe hypothetical to illustrate this emotional support. Assume that Hilary is away from his family during the holiday season due to combat-related military duties. Donald is likely calling Hilary and providing her with some emotional support, as she is unable to be at home with the family during the holiday season.

Second, a non-military spouse assists the military spouse in handling responsibilities regarding the children. For example, let us assume that Hilary is deployed to Italy for a year due to combat-related military duties. Because of the lengthy deployment, in this instance, Donald would be responsible for handling the duties involving the children. For instance, Donald would be required to ensure that the children got to school in a timely fashion and give parental guidance on homework.

Additionally, a non-military spouse assists the military spouse in maintaining the household. For example, if Hilary is away for military combat, then Donald will be responsible for ensuring that the house is

functioning property. In sum, it is evident that there is an abundance of non-economic contribution dedicated by non-military spouse.

The third argument in support of Combat-Related Special Compensation being accepted as a marital asset, is the basic principle of fairness; an essential concept used when exercising equitable distribution. Because of the nature of the non-economic contribution that a non-military spouse dedicates to a military spouse and the nature of military relationships, it would be unjust to not entitle the non-military spouse to at least a portion of the compensation. A military career requires a non-military spouse to travel constantly and spend long periods of time without being in the physical presence of his or her spouse, placing an emotional burden on non-military spouses. Despite this emotional burden, non-military spouses continue to support their military spouse in every aspect possible and ensure that their respective spouse has a successful military career.

#### B. REFUSING COMBAT-RELATED SPECIAL COMPENSATION AS A MARITAL ASSET

The first compelling argument in support of refusing Combat-Related Special Compensation as a marital asset is recognition of the differences between Combat-Related Special Compensation and the assets that the Third Circuit has already considered marital. Although obtaining Combat-Related Special Compensation centers *partially* on a length of employment.<sup>180</sup> Those who assert that Combat-Related Special Compensation is similar to some of the other controversial assets ignore this fact, as they inaccurately rely on the length of employment as the only criterion.

The second argument in support of refusing Combat-Related Special Compensation as a marital asset is the lack of non-economic contribution by the non-military spouse's contribution to the military spouse's Combat-Related Special Compensation itself. In refusing Combat-Related Special Compensation as a marital asset, courts would have to dismiss a broad approach and evaluate the nature of non-economic contribution much more narrowly. In doing so, the nature of non-economic contribution would be minimal, as the non-military spouse does not directly fight in combat or serve for the military spouse.

The third and final argument in support of refusing Combat-Related Special Compensation as a marital asset is the principle of fundamental

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<sup>180</sup>In addition to length of employment, eligibility for Combat-Related Special Compensation also requires being a military individual that is injured in combat. These requirements are arguably much more extensive than the other assets that the Third Circuit has already evaluated.

fairness. If the court wanted to reject Combat-Related Special Compensation as a marital asset, it would need to construe the principle of fundamental fairness in favor of the military spouse. Therefore, the argument is that it is fundamentally unfair to award a non-military spouse for all the physical stress that accompanies the military spouse as a result of engaging in combat.

## **VI. A Proposed Solution for the Third Circuit**

Although there are compelling arguments both for accepting and refusing Combat-Related Special Compensation as a marital asset, the majority of the precedent from Third Circuit jurisdictions supports the idea of holding Combat-Related Special Compensation as a marital asset in the equitable distribution context.

Beginning with the nature of Combat-Related Special Compensation in comparison to other marital assets within the marital assets, the similarities drastically outweigh the differences. Combat-Related Special Compensation is a monetary asset that derives from the length of employment like pensions, disability income, and military retirement pay. Although, the requirements to acquire Combat-Related Special Compensation might be slightly more extensive than the three other assets, that alone has never been enough for the Third Circuit to treat two assets differently. In *Kruger*, the Supreme Court of New Jersey supported this proposition. Further, the *Kruger* court rejected the argument that military retirement pay should not be treated analogously to pensions merely because the requirements to acquire military retirement pay are more enhanced than those needed to acquire a pension. The Supreme Court of New Jersey instead held that the two assets both resting at least partially on the length of employment was enough to treat the two similarly. As a result, the arguments accepting Combat-Related Special Compensation as a marital asset due to its similarities to other marital assets are more consistent with precedent, therefore more compelling than any opposition.

Additionally, the non-economic contribution that a non-military spouse provides to a military spouse's military career supports Combat-Related Special Compensation being accepted as a marital asset. While scholars in favor of rejecting Combat-Related Compensation as a marital asset will assert that a narrower approach to evaluating non-economic contribution should be accepted, this approach must be rejected because it is completely inconsistent with fundamental fairness, the primary principle underlying the Third Circuit's equitable distribution analysis. A



narrow approach would require the courts to overlook a non-military spouse's contribution to the military spouse's military career. This would be completely unfair as a military spouse is unable to have a successful enough career to achieve eligibility for Combat-Related Special Compensation, if injured, without the support from his or her spouse. As a result, a broader approach is more consistent with the Third Circuit's precedent. Therefore, supporting the proposition that Combat-Related Special Compensation should be accepted as a marital asset.

In sum, it is proper for all the equitable distribution states in the Third Circuit, Pennsylvania, Delaware, and New Jersey, to adopt a rule consistent with such. The Third Circuit, however, should not award a non-military spouse who is acting in bad-faith when asserting marital rights to a military spouse's Combat-Related Special Compensation. Therefore, each Third Circuit equitable distribution jurisdiction should adopt a holding that Combat-Related Special Compensation is a marital asset in all instances. The exception to this rule should be when the military spouse demonstrate that the non-military spouse has not dedicated any non-economic contribution to his or her military career. This will enable courts to prevent non-military spouses from acting in bad-faith. Specifically, it prevents a non-military spouse from asserting a right to an asset when he or she did not contribute to the military spouse's military career. It would then be up to the court to determine whether the military spouse has met his or her burden.

## VII: Conclusion

As we have seen, Third Circuit jurisdictions are very liberal in deciding which assets should be considered marital assets in the equitable distribution context. A decision to deem Combat-Related Special Compensation as a marital asset will likely not lead to the Third Circuit disregarding its liberal precedent. This decision, however, would likely create some uproar in military communities. A decision to deem Combat-Related Special Compensation as a martial asset would likely result in dissatisfaction with the law amongst the military community because of the personalized nature of military assets such as Combat-Related Special Compensation. Military individuals tend to take extensive pride in their military achievements and assets because of all the labor and dedication needed to have a successful military career; therefore, military spouses are likely to reluctant to share a military asset with his or her spouse.

Although much respect and honor should be given to military spouses, a rule contrary to the one proposed in this Comment would be

inconsistent with Third Circuit Precedent. If the Third Circuit adopts this rule, it would illustrate how serious the Third Circuit is in remaining consistent with the principles underlying equitable distribution. As this is what the Third Circuit has traditionally done, it should accept Combat-Related Special Compensation as a marital asset in the equitable distribution context.