

1-15-1978

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### Recommended Citation

Henry Alan Pattiz *In a Divorce or Dissolution Who Gets the Pension Rights: Domestic Relations Law and Retirement Plans*, 5 Pepp. L. Rev. Iss. 2 (1978)

Available at: <https://digitalcommons.pepperdine.edu/plr/vol5/iss2/1>

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# *In a Divorce or Dissolution Who Gets the Pension Rights: Domestic Relations Law and Retirement Plans*

HENRY ALAN PATTIZ\*

## INTRODUCTION

When a marriage begins, it is made in heaven and will last "forever."<sup>1</sup> However, when a marriage is legally over there is the rough sundering of dreams and hopes for the future and the need to sort out amongst the former life companions what is *legally* the property of each. This article will explore the evolv-

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1. See generally 55 C.J.S. *Marriage* § 1 (1948), 32 CAL. JUR. 2d, *Marriage* § 2 (1956), BLACK'S LAW DICTIONARY 1123 (4th rev. 1968). The legal definition of marriage is stated to include the intention of husband and wife to agree to live together forever as long as they both shall live.

ing legal process<sup>2</sup> which divides the property rights acquired during marriage in a retirement plan which was intended to act as a shield against deprivation of the marriage partners in their mutually shared old age.

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2. The state of the law as to the existence of "marital property" in retirement plans has been evolving rapidly. This is especially true in community property states. *See French v. French*, 17 Cal. 2d 775, 112 P.2d 235, Annot., 123 A.L.R. 366 (1941); and *In re Marriage of Brown*, 15 Cal. 3d 838, 544 P.2d 561, 126 Cal. Rptr. 553 (1976). *See also* the list of cases in *Taggart v. Taggart*, 552 S.W.2d 422, 423 (Tex. 1977) wherein a series of cases on the same subject has been developed by the Texas courts. In *Taggart, supra*, it is noted that the Texas courts have admonished counsel and trial judges to bear in mind the community property aspects of retirements plans. This particular approach of admonishment has been going on by the courts since *Busby v. Busby*, 457 S.W.2d 551 (Tex. 1970).

California courts have been less lenient to the legal profession in insisting that attorneys remain up to date with the evolving state of the law. In *Smith v. Lewis*, 13 Cal. 3d 349, 530 P.2d 589, 118 Cal. Rptr. 621 (1975), the Supreme Court of California (over a strong dissent by Justice Clark) upheld a malpractice verdict of \$100,000 against a divorce attorney who had failed in 1967-68 to assert community property interests in a military pension plan pursuant to a divorce proceeding where the attorney was representing the wife. The case illustrates lack of "due diligence" by the attorney, but also illustrates a very rapid progression in the change in the law in this area and by hind-sight amply shows what the attorney might have been able to guess, but failed to do. *See especially id.* at 355, 530 P.2d at 562-63, 118 Cal. Rptr. at 624-25 (1975).

The court states further:

[W]e believe an attorney assumes an obligation to his client to undertake reasonable research in an effort to ascertain relevant legal principles and to make an informed decision as to a course of conduct based on intelligent assessment of the problem. *Id.* at 359, 530 P.2d at 595, 118 Cal. Rptr. at 627.

The court also states that the attorney failed to undertake research. "Even as to doubtful matters, an attorney is expected to perform sufficient research to enable him to make an informed and intelligent judgment on behalf of his client." *Id.* at 360, 530 P.2d at 596, 119 Cal. Rptr. at 628. *See especially* strong dissent, *id.* at 369-70, 530 P.2d 102-03, 118 Cal. Rptr. 634-35, illustrating a very uncertain state of the law in 1967-68. In dissent, Justice Clark is willing to concede possible negligence, but does not grant that there was any adequate showing of \$100,000 damages.

Subsequent cases illustrate more clearly that California attorneys must be exceptionally careful to avoid malpractice in this area.

The first, *Bucquet v. Livingston*, 57 Cal. App. 3d 914, 219 Cal. Rptr. 514 (1976) (illustrates that a California attorney will be held responsible for the tax implication of whatever advice is given where such tax matters may have a major impact on the value of the services rendered to the client. *See Part V, infra*, dealing with the difficulty in valuing an interest of a retirement plan where tax implication may be involved. *See also* *In re Marriage of Fonstein*, 17 Cal. 3d 739, 552 P.2d 1169, 131 Cal. Rptr. 973 (1971), *citing* *Weinberg v. Weinberg*, 67 Cal. 2d 557, 432 P.2d 709, 63 Cal. Rptr. 13 (1967), for the principle that normally tax implications will only be considered where a tax can be expected as of the time of the court deliberation. *Bucquet, supra*, involved an attorney doing estate planning work and the preparation of a trust on behalf of a decedent. The cause of action arose in favor of intended beneficiaries of the decedent. The second California case, *Cline v. Watkins*, 66 Cal. App. 3d 174, 135 Cal. Rptr. 838 (1977) refused to allow the dismissal of a malpractice action against a first attorney in a divorce action who had failed to note the probable community property status of a military pension plan. The first attorney had undertaken to continue the

To begin, the reader must first understand the *purpose* of marriage and the *purpose* of the retirement plan. Society, for its own continuation, for the "procreation of the race," has endowed the union of men and women with special status and has encouraged the man and the woman to join together for their own pleasure and security. The overriding purpose is the harmonious continuation of society. Society, by legal rules, insures the privacy of the parties and aims to give them economic security. To each party there has been the promise of recognition and encouragement. Society asks, in turn, that the partners in the marriage give their legal assurances<sup>3</sup> that society will not be burdened by the financial expense of providing for each of them and for raising their children. Society thereby gets its continuation, unencumbered by their debts.<sup>4</sup>

In short, society grants recognition and the chance of shared financial security. In exchange society receives a new genera-

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representation. The second attorney had also been negligent in failing to cite the community property status of the pension and had allowed the matter to continue to final judgment thereby establishing *res judicata* against the wife for any interests she may have had in such pension. Again, a vigorous dissent argued against holding the first attorney liable for malpractice.

[I]n summary, we have the following situation: attorney Watkins protected the issue in the complaint he filed before he was substituted out; he had no say in the selection of and was not in privity with the subsequent attorney; he was a complete stranger to and had no control over participation in the OSC in the trial which culminated in the Interlocutory Decree of Divorce.

By reason of the above, I conclude that attorney Watkins could not reasonably foresee the failure, if any, of the subsequent attorney (attorney Scott) to protect the community interest of Wife in Husband's federal military retirement pension. *Id.* at 180, 135 Cal. Rptr. at 848.

In short, California courts have been prone to hold attorneys liable for malpractice in failing to anticipate (a) changes in court decisions; and (b) the failure of subsequent counsel to continue to protect the interests of a client. In addition, tax implications seem to have been placed at a high priority level in representing a client's interests in this particular area.

3. See CAL. WELF. & INST. CODE § 11350 (West Supp. 1977). The State takes a keen interest in seeing that the responsibility for support and maintenance of close family relatives (in California, the spouse, children and parents, when in need) so that the welfare burden for other members of society is minimized.

See Los Angeles Times, Jan. 20, 1978, § 1, at 13. The article briefly illustrates an effort, in fiscal 1977 (ended September 30th) to assist the states in collecting child support from runaway parents (a total of \$258 million spent). The department of HEW collected \$818 million in the fiscal year 1977. See also 42 U.S.C. § 659 (1977).

4. Wisconsin, in a recent attempt to protect the State Treasury against responsibility for the welfare of unsupported children, passed a statute which

tion, bred and raised at the primary expense of the parents.

For the worker, a pension is the promised reward for the long years of heavy toil—the pot of gold at the end of the rainbow—the shield against deprivation and want when his personal labors no longer yield a full measure of the needed daily bread.<sup>5</sup> The employer receives better work because the morale of the employee is improved. The employer also feels better as a human being (paternalistic) in that he can be assured that the employee will not be cast out on the slag heap when his days of productive labor are ended.

Society offers incentives for both—mainly in the form of tax advantages<sup>6</sup>—for the establishment and maintenance of the pension program. Again, society gets the best of the bargain, for it obtains cheaply a strong partnership of employer and employee in production without having to bear the financial burden of the employee's retirement. Marriage provides a safe place for raising the young; retirement plans, a safe place for the aged and infirm.

There is generally no conflict between the purposes of marriage and of retirement plans—except when the marriage relationship ends. Then, the property rights in the retirement plan must be divided or passed on to others. Here, the emphasis shall be on the end of marriage by divorce (dissolution), although some reference will also be made to marriage termination by death of husband or wife.

Who are the players on this stage? Who must be considered when discussing family law and pension plans? To begin, there is, of course, husband and wife—one or both of whom will also

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forbade the issuance of a marriage license to a father who could not prove that children of prior marriages were being supported in such a manner as not to become public charges. The U.S. Supreme Court in *Zablocki v. Redhall*, No. 76-879 (decided Jan. 18, 1978), held such a statute invaded the individual's right to privacy. See *Los Angeles Times*, Jan. 19, 1978, § 1, at 11.

5. See R. NADER, K. BLACKWELL, *YOU AND YOUR PENSION* (1973); ALAN, MELONE AND ROSENBLUM, *PENSION PLANNING* (3d ed. 1976); D.M. MCGILL, *FUNDAMENTALS OF PRIVATE PENSIONS* (1975).

6. See I.R.C. §§ 401, 501. Generally, (a) Employer contributions will be deductible when made; (b) Neither Employer nor Employee will be subject to tax on earnings of fund; and (c) Employee may receive favorable tax treatment upon receipt of distribution from retirement plan. See *BUSINESS WEEK*, Nov. 7, 1977, 104, "Pensions Land in Divorce Court." Increasingly, the intermediaries who merely hold the money on behalf of the plan find themselves facing an impossible choice between protecting the interests of the plan participant as required by federal law and following the obligations imposed by state court in accounting for some or all of the benefits to a divorcing spouse.

7. See note 2, *supra*. The issue of malpractice for professionals is especially important in the State of California.

have the status of employee and of participant/member in a retirement plan. There will also be the employer and the trustees and other fiduciaries managing the pension plan. Then there are the advisors, including attorneys, accountants, actuaries, and others, for all of the above. Aside from the husband and wife, the other actors merely wish a clear set of ground rules so they may continue to carry out their functions. The emphasis here will be on providing those ground rules for these others.<sup>7</sup> For the financial intermediary and for the advisors,<sup>8</sup> a logical and consistent set of rules is necessary. Without such guidelines making retirement plan administration predictable, qualified fiduciaries and advisors will be increasingly reluctant to provide their services and retirement plans can be expected to disappear.<sup>9</sup>

The emphasis throughout this article will be on purpose and predictability. To that end, the essential definitions of marriage (Part I), of retirement plans (Part II), and of property rights (Part III) begin this article. Some of the more important clauses found in retirement plans (those which limit alienability of benefits and which provide a basis for payment of benefits) and the statutory and other legal bases for retirement plans are discussed in Part IV. Because the United States consists of a number of different jurisdictions, each of which has its own legal

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8. With the best of intent, Congress passed the Employee Retirement Income Security Act, 29 U.S.C. §§ 1001-1381 (1975) (hereinafter referred to as ERISA). Section 2 of ERISA sets forth Congress' intention of fostering the continued healthy development of employee benefit programs, and most specifically, retirement plans. 29 U.S.C. § 1001 (1975).

However, in a study requested by Congress, the Internal Revenue Service revealed that approximately *thirty percent* (30%) of the pension plans in existence when ERISA was enacted could be expected to terminate because of the added costs incident to complying with the new law. [Jul. 25, 1977] 147 PENSION REPORTER (BNA) A-10; [Aug. 19, 1977] 125 PENSION PLAN GUIDE (CCH) § 25 at 176.

9. In the United States, and its possessions, there are nine (9) community property jurisdictions. Of these, Louisiana has adopted the Napoleonic code approach to community property, while Arizona, California, Idaho, Nevada, New Mexico, Puerto Rico, Texas and Washington have adopted the Spanish and Mexican approach. Of the above, Idaho and Washington have adopted a specifically statutory system. Hawaii, because of the mixture of its sources of law, combines elements of the common law and of community property and of East Asian and of Polynesian principles. For somewhat similar reasons, Alaska has certain specialized concepts of property law. The remaining States and the District of Columbia, apply one form or another of the English common law concept as to determination of rights and property.

system,<sup>10</sup> there has been a continuing dispute over whether or not federal law preempts and supersedes local law as it relates to retirement plans. This issue is presented in Part V.

Assuming for the moment that local jurisdiction may reach property interests in retirement plans incident to divorce (dissolution) proceedings, how such interests are to be valued (Part VI), division made (Part VII), and such orders of division enforced (Part VIII) will then be discussed.

Remember, the objective is to harmonize as much as possible the various diverse purposes of the spouses, the employer, the fiduciaries and society. This reconciliation is carried out in practice by the actual valuation, division and pay-out of plan benefits. If the spouses move to different jurisdictions (state-to-state, or from the United States to a foreign country, or vice versa) their legal relationships and their interest in the retirement plan may change markedly. The real and potential conflicts that arise from such peregrinations are explored in Part IX. Part X will illustrate by example some of the more horrendous difficulties that can (and do!) occur.

There have been social changes amounting to a revolution in society in the last several decades. The advent of artificial birth control, coupled with markedly increased life expectancy, has undercut the traditional purposes of marriage<sup>11</sup> and of retirement plans and has also led to a substantial increase in the number of women in the work force. In addition, people are far more mobile and therefore tend to come under more legal jurisdictions than before. This social revolution is not easily assimilated into our legal system. For this author, all of these changes must be reflected in any solution to the conflict of purposes for marriage and for retirement plans. The conclusion to this article is an attempt to integrate these changes in arriving at a solution. It is believed that marriage is becoming a more consensual and less societal contract and that the traditional "retirement plan" is being broadened to provide a source of funds for needed change in circumstances during the working life of the participant. Since people live longer and are freer to

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10. See generally *Marvin v. Marvin*, 18 Cal. 3d 660, 557 P.2d 106, 134 Cal. Rptr. 815 (1976). This case and the substantial commentaries that have occurred because of it, are discussed below in Part I; see also Kay and Amyx, *Marvin v. Marvin: Preserving the Options*, 65 CAL. L. REV. 937 (1977). California does not allow common law marriages to be established under its state law. CAL. CIV. CODE §§ 4100-01 (West 1977).

11. See 1978 Cal. Stats. ch. 851, which bans all mandatory retirement ages. Presently, a similar statute is in Congress which would raise the Federal mandatory age from 65 to 70. (Effective Jan. 1, 1979).

move, there is a *longer* period of time for interests in a retirement plan to be subject to divergent legal jurisdictions. For these reasons, a uniform *national statute* applicable to the rights of participants in plans which will allow them, under certain circumstances (such as divorce), to create rights in others, is suggested. Such a statute should allow for employer *or* employee registration of plan interests and should also establish clear, but flexible, guidelines for valuing and distributing interests in retirement plans. Such a statute could also allow individuals to contract with their employers, their spouse, state agencies (but not normal creditors), and other specially placed persons for any reasonable variation in the normal right to earn and receive benefits from the plan, *so long as* consistent with the *purposes* of the plan (to be specified in writing in the plan document). This consensual element leaves flexibility and individual choice.

Finally, the holder of the plan assets, the trustee, and other plan fiduciaries must be protected. If the system leaves doubt as to proper recipients and plan fiduciaries remain liable for mistaken payment of benefits,<sup>12</sup> there will be substantial added administrative expense for running plans<sup>13</sup> and less incentive to establish and continue them.

Briefly;

1. There should be some *national uniformity* to define rights in plans.
2. Individuals should have some *personal flexibility* to transfer interests in plans to others, especially in domestic relations areas without adverse tax effect.<sup>14</sup>
3. Always, the *purposes* of plans and of marriage (as changing) should be kept uppermost in mind when problems arise.

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12. ERISA requires that a plan fiduciary "shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries . . ." 29 U.S.C. § 1104 (1975); *see also* Kerbow v. Kerbow, 421 F. Supp. 1253 (N.D. Texas 1976), where the Federal District Court held that wives attempting to collect pension benefits directly from the pension plan, which had been ordered paid to them by a Texas divorce court, were not participants or beneficiaries under the plan and therefore had no rights under the Federal law to maintain a cause of action to obtain such benefits.

13. *See* note 8, *supra*. *See* Fox v. Smith, 531 S.W.2d 654 (Tex. 1975), where the court allowed the trustee to pay into the court the disputed fund and to deduct its costs from the funds to be distributed. The court treated the proceeding as to the trustees as in the nature of an interpleader.

14. I.R.C. § 61 (a)(11) requires the recipient of retirement interests to treat



4. Plan fiduciaries must be allowed to *administer the plan without undue expense or liability*.

## PART I

### MARRIAGE: *What is it, where is it today and how does it end?*

Marriage has been "defined" as a civil contract between a man, a woman<sup>15</sup> (and the state<sup>16</sup>) wherein they, having the legal capacity to do so, agree to live together for life as husband and wife.<sup>17</sup> Marriage is a relationship favored by the law. The public policy is to make it a permanent and public institution and to prevent separations.<sup>18</sup>

Society, the state, wishes to have a next generation and wishes parents to raise their own children at their own expense. The celebration<sup>19</sup> of marriage is in the nature of an open and notorious announcement that one man and one woman are now joined to each other in marriage and are hereafter out-of-bounds to all others. In this way a man may be sure that he is the father of any children born of the relationship and will therefore be willing to provide support for the wife and children.

In some states, excluding California, a common law marriage will occur when a man and a woman join together and hold themselves out by agreement as husband and wife. Even where such marriage would not be permissible in one state, it generally will be recognized for persons properly so married in another jurisdiction.<sup>20</sup> California does, however, recognize a "pocket" marriage which may be entered into without a license for persons who have been living together as husband and wife. Such a marriage need only be recorded on the books of a church, but need not be entered otherwise in the public record by the par-

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them as part of gross income. In addition, distributions on account of certain limited circumstances give favorable tax effect to the recipient. *See* I.R.C. § 402. The Internal Revenue Code needs a specific authorization to treat as untaxed any division of marital property or similar transaction not carried out with a primary purpose towards tax avoidance. *See also* *Comm'r v. Wilkerson*, 386 F.2d 553 (9th Cir. 1966), which indicates the community property treatment of retirement benefits under the federal tax laws; and I.R.C. §§ 402(e)(4)(G), 408(g) which is illustrative of the provisions in the Internal Revenue Code which could allow tax flexibility for division of marital property.

15. CAL. CIV. CODE §§ 4100-01 (West 1970).

16. 55 C.J.S. *Marriage* § 1(b), 808 n.23 (1948).

17. 32 CAL. JUR. 2d *Marriage* § 2, 329 (1956).

18. 55 C.J.S. *Marriage* § 1(b), 806, 808 (1948).

19. CAL. CIV. CODE § 4104 (West 1970) requires a solemnization and certificate. In 1895, statutory authorization for common law marriage was deleted.

20. CAL. CIV. CODE § 4104 (West 1970); *Tatum v. Tatum*, 241 F.2d 401 (9th Cir. 1957); *In re Gosnell's Estate*, 63 Cal. App. 2d 38, 145 P.2d 42 (1944); 55 C.J.S. *Marriage* § 6816 (1948).

ties, although the clergymen must file notice with the county clerk.<sup>21</sup>

When a marriage has been established, whether by ceremonial means or as a common-law marriage, no subsequent denial of such relationship by the parties may terminate the marriage,<sup>22</sup> except by formal judicial state action.<sup>23</sup> There is no such thing as a common law divorce.

By the recent case of *Marvin v. Marvin*,<sup>24</sup> the Supreme Court of California has recognized changing social mores<sup>25</sup> and allowed economic relationships to be judicially recognized for two people, man and woman, living together apparently as husband and wife, though not lawfully married. In previous cases, the courts had been jealous of the marriage relationship, had refused to condone any such economic arrangement, and had taken the position, generally, that such contracts must fail as based on unlawful consideration, viz., meretricious sex.<sup>26</sup>

The *Marvin* court specifically rules out application of the Family Law Act but does allow a contract claim to be heard, and even suggests that a claim in quasi contract (implied in law) for quantum meruit (fair value) would be appropriate.<sup>27</sup> In any

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21. CAL. CIV. CODE § 4213 (West Supp. 1978); see Leff, *Instant Marriages, Popular in California, May Spread in U.S.*, Wall Street Journal, Sept. 14, 1977 at 1.

22. Estate of Winder, 98 Cal. App. 2d 78, 219 P.2d 18 (1950).

23. 32 CAL. JUR. 2d *Marriage* § 3, 330 n.8 (1956), citing Sharon v. Sharon, 67 Cal. 185, 7 P. 456 (1895).

24. 18 Cal. 3d 660, 557 P.2d 106, 134 Cal. Rptr. 815 (1976).

25. *Id.* at 665 n.1, 557 P.2d at 109 n.1, 134 Cal. Rptr. 818 n.1 (1976). The court noted:

In summary, we believe that the prevalence of nonmarital relationships in modern society and the social acceptance of them, marks this as a time when our courts should by no means apply the doctrine of the unlawfulness of the so-called meretricious relationship to the instant case. As we have explained, the nonenforceability of agreements expressly providing for meretricious conduct rested upon the fact that such conduct, as the word suggests, pertained to and encompassed prostitution. To equate the nonmarital relationship of today to such a subject matter is to do violence to an accepted and wholly different practice. *Id.* at 683, 557 P.2d at 122, 134 Cal. Rptr. at 831.

26. *Id.* at 669-71, 557 P.2d at 112-14, 134 Cal. Rptr. at 821-23. See also *In re Marriage of Cary*, 34 Cal. App. 3d 345, 109 Cal. Rptr. 862 (1973).

27. *Marvin v. Marvin*, *supra* note 10 at 665, 557 P.2d at 110, 134 Cal. Rptr. at 819.

We conclude (1) the provisions of the Family Law Act do not govern the distribution of property acquired during a nonmarital relationship; such a relationship remains subject solely to judicial decision. (2) The courts should enforce express contracts between nonmarital partners

case, the form of relationship discussed in *Marvin* is not a marriage and creates no rights in domestic relations.<sup>28</sup>

Marriage today is a legally acknowledged status which allows a man and a woman to be properly, and lawfully labeled husband and wife. The institution of marriage, while thriving,<sup>29</sup> is no longer as permanent as it once was.<sup>30</sup> In California the judicial procedure that terminates a marriage is the dissolution proceeding. In other states it is a divorce.<sup>31</sup> In California, the economic sharing of community property ends when actual separation occurs (as to earnings and accumulations).<sup>32</sup> However,

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except to the extent that the contract is explicitly founded on the consideration of meretricious sexual services. (3) In the absence of an express contract, the courts should inquire into the conduct of the parties to determine whether that conduct demonstrates an implied contract, agreement of partnership or joint venture, or some other tacit understanding between the parties. The courts may also employ the doctrine of quantum meruit, or equitable remedies such as constructive or resulting trusts, when warranted by the facts of the case.

28. Any division of assets by reason of an express contract right would not *presently* be within the ambit of the main topic of this article. However, different problems do exist here which illustrate the need for reform to allow greater flexibility of individual choice. As an example, in the Appeal of Rebecca Smith Randolph, Calif. Bd. of Equalization, August 16, 1977, a woman was denied the favorable tax status as "head of household" because she was unmarried, even though she was allowed to treat her male roommate as a dependent. [1977] CAL. TAX. RPTR. (CCH) §§ 205-756. Federal law is generally not of like import. I.R.C. §§ 2(b), 152(a)(9), 152(b)(5). However, if, as in *Marvin*, the woman is entitled to payment for her "household" services such payments to her would be taxable income, under I.R.C. § 6(1) but *would not* be deductible to the man. There is no authority under federal law for unmarried individuals to split their income. Therefore, as one must report *all* and pay *gift taxes* on amounts given to the other, one must report *all* and find some business or other deductible reason for making payments to the other, and as a result, one must pay tax on 100%, while the other is obligated to pay on 50% (as was allegedly due in *Marvin*) received; or if after a valid marriage and divorce, an arrangement for alimony can be devised to allow income splitting. See I.R.C. § 71.

For a more extensive discussion of the implications of *Marvin*, see Kay and Hill, *Marvin v. Marvin, Preserving the Options*, 65 CAL. L. REV. 938 (1977); Comment, *Domestic Relations-Expansion of the Property Rights of Non-Marital Partners*, 11 SUFFOLK U.L. REV. 1327 (1977); Comment, *The Scope of Equity with Respect to Non-Marital Relationships*, 5 PEPPERDINE L. REV. 49 (1977).

For the possibility of enforcement of division of property, see Part VIII, *infra*, especially the discussion related to constructive trusts. In *Marvin*, the court made specific reference to the possibility of courts applying, when appropriate, constructive or resulting trusts. *Marvin v. Marvin, supra* at 684, 557 P.2d at 123, 134 Cal. Rptr. at 831; see also Barnett, *From Meretricious to Marvin, or Common Law Marriages Must Beget Common Law Divorces*, Vol. 12 No. 1 FAM. L. NEWSLETTER 12 (1977).

29. U.S. Statistical Abstract, Bureau of Census (1976) Marriages: (latest year: 1974): California, 160,900; U.S. 2,229,700. Marriage trend between 1960-1974 (based on per 100,000 population): 1960, 8.5; 1974, 10.5.

30. *Id.* Divorces: California, 121,700; U.S. 977,000.

31. See generally Freed, *Grounds for Divorce in the American Jurisdictions* [as of June 1, 1977], 8 FAM. L.Q. 401 (1974). See CAL. CIV. CODE §§ 4501, 4503, 4506-15 (West 1977).

32. CAL. CIV. CODE § 5118 (West 1971). In re Marriage of Bouquet, 16 Cal. 3d

*valuation* of community property is to be determined as close as possible to the actual date of trial.<sup>33</sup> Alternatively, the court may grant a dissolution and reserve for further proceedings a division of property and/or a grant of support.<sup>34</sup> Unless it is made clear that rights to divide property are reserved however, the grant of dissolution becomes *res judicata* as to all property rights decided or which were decided by implication in the final judgment.<sup>35</sup> The law in other states is otherwise. For instance, in New Jersey marital property ceases to accumulate only when a petition is filed.<sup>36</sup> However, in most other states which use the standard "fair, just and equitable" distribution of marital property, the precise date is not so important. Since California *requires* an equal division, the date of cut-off of accumulation has immediate and real impact.<sup>37</sup>

Marital property rights end at "divorce" which may be at different times in different states. Because of "divisible divorce" however, the property and support rights may be

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583, 546 P.2d 1371, 128 Cal. Rptr. 457 (1976) held that § 5118 governs all property rights whenever acquired, that have not been finally adjudicated by a judgment from which the time to appeal had lapsed. However, "separation" must be actual *and apparent*. Where husband left and went to live with girlfriend, but ate at home almost every night and otherwise was with wife (not sexually) to "keep up appearances," the court said § 5118 would not insulate his earnings from community property. In re Marriage of Baragry, 73 Cal. App. 3d 444, 140 Cal. Rptr. 779 (1977). The court stated "One who enjoys the benefit of a polygamous lifestyle must be prepared to accept its accompanying financial burdens. (Marvin v. Marvin (1976) 18 Cal. 3d 660; 557 P.2d 106, 134 Cal. Rptr. 815; CAL. CIV. CODE § 3521)." *Id.* at 449, 140 Cal. Rptr. at 782.

33. CAL. CIV. CODE § 4800(a) (West Supp. 1978).

34. In re Marriage of Van Sickle, 68 Cal. App. 3d 729, 137 Cal. Rptr. 568 (1977); Irwin v. Irwin, 69 Cal. App. 3d 317, 138 Cal. Rptr. 9 (1977). *See also* In re Marriage of Adams, 64 Cal. App. 3d 181, 134 Cal. Rptr. 298 (1976) wherein the court granted dissolution January 31, 1972; child support and spousal support March 21, 1973; and only in March, 1975, did the court divide community property in the pension.

For the federal basis of "divisible divorce" see Vanderbilt v. Vanderbilt, 354 U.S. 416 (1957). One state allowed to adjudicate divorce if *either* partner is domiciliary, but may not adjudicate personal property rights without personal jurisdiction; Williams v. North Carolina, 317 U.S. 287 (1942).

35. Irwin v. Irwin, 69 Cal. App. 3d 317, 321, 138 Cal. Rptr. 9, 11 (1977). However, in this case the court "rescued" a wife who appeared in *pro per* and who failed to note probable jurisdiction over husband's military pension; *see also* In re Marriage of Bouquet, 16 Cal. 3d 583, 546 P.2d 1371, 128 Cal. Rptr. 457 (1976) and note 32, *supra*.

36. Tucker v. Tucker, 121 N.J. Super. 539, 298 A.2d 91 (1972).

37. CAL. CIV. CODE § 4800 (West Supp. 1978). Only Louisiana among the

litigated at a date subsequent to the actual sundering of the marriage relationship. Now, most states divide marital property (see Part III, below) based on a standard of equity.<sup>38</sup>

## PART II

### RETIREMENT PLANS: *What they are and how they work.*

When used in the context of this article "retirement plans" include plans established by an employer to provide deferred benefits for employees. These benefits are primarily intended to be paid after the employee terminates service with the employer or after a normal retirement age has been reached. Such plans may or may not be "qualified,"<sup>39</sup> and may or may not be subject to ERISA.<sup>40</sup> Such plans as a group are generally referred to as

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other community property states requires a substantially equal division. LA. CIV. CODE art. 2406 (1971).

38. Foster and Freed, *From a Survey of Matrimonial Laws in the United States, Distribution of Property Upon Dissolution*, 3 COMMUNITY PROP. J. 231 (1976). As of 1976, only eight states and the District of Columbia do not follow some form of equity division: District of Columbia, Florida, Mississippi, New York, Rhode Island, South Carolina, Tennessee, Virginia and West Virginia.

39. See I.R.C. § 401. A plan which is established by a qualified employer for the exclusive benefit of employees and which provides benefits on a non-discriminatory basis, and otherwise meets the requirements of I.R.C. § 401 will obtain three major tax advantages: a) employer contributions will be currently deductible, I.R.C. § 404; b) employer contributions and all fund earnings are not currently taxable to employee/participants, see I.R.C. §§ 501-04 and c) funds eventually paid out to recipients may have substantial tax advantages or may even be partially or wholly exempt from income and/or estate and gift taxes, I.R.C. §§ 101(b), 402, 2039(c), 2517.

According to most recent Internal Revenue Service and Department of Labor figures, there are presently over 500,000 private plans of one sort or another which have been established as qualified plans in the United States. Probably, because several hundred thousand have not reported in, the figure could actually exceed 700,000 corporate and Keogh (Self-employed) Plans. Initial statistics show nearly 2,000,000 IRA's have been established. IR 1949, Jan. 31, 1978 - IRA statistics for tax year 1975-1976.

To get an idea of the *immensity* of these pension plans, consider these figures:

- a. As of September 30, 1977, the 106 largest local and state retirement systems had \$112.7 billion in assets. [Jan. 2, 1978] 169 PENS. RPTR. (BNA) A-25.
- b. A 1975 survey revealed that 30 million workers were covered by retirement plans. As of the end of that year total private non-insured pension plans had assets in excess of \$145 billion; the Social Security Bulletin, Nov. 1977.
- c. If insured plans, IRA's and other non-federal government plans are aggregated, total funds in pension plans totals over \$400 billion.

For a graphic and easily readable (and brief) history of pensions, see Hewitt Associates, *Employee Retirement Systems: How it all Began*, PENSION WORLD, July, 1976 at 6. Amongst highlights, the first private pension plan was established in 1875 (American Express). By 1925 only about 400 plans, total, existed. See also D. MCGILL, FUNDAMENTALS OF PRIVATE PENSIONS ch. 1 (3d ed. 1975).

40. ERISA is a *comprehensive* program of federal regulation of the *private*

pension plans.<sup>41</sup>

The primary distinctions between types of plans which will be of importance for this article are the following:

1. *Defined benefit vs. defined contribution plans.*<sup>42</sup>

A defined *benefit* plan is always a pension plan and, except where fully insured, does not have individual segregated accounts.<sup>43</sup> These plans promise a definite benefit upon "retirement." Because there are no individual accounts, valuation of an interest in the plan at any time will require the services of an actuary.

On the other hand a defined *contribution* plan has *only* individual accounts. At any point in time each participant's accrued benefit is the balance in that individual's account.

2. *Contributory vs. non-contributory plans.*

Employee funding is always fully vested in ERISA covered plans. Plans which require mandatory employee contributions must therefore *always* have a vested interest for a participant consisting at least of the mandatory contributions. In many states this element of contribution with vesting is very important in determining whether or not pension interests are

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pension systems in the United States. Several categories of plans are not covered, for this article the most important of which is governmental plans. See 29 U.S.C. §§ 1002(32), 1003(b)(1). In addition to the statutory treatment, a rather substantial *majority* of the cases dealing with pension benefits in divorce have been governmental plans, and most specifically U.S. military pensions.

41. The text which follows describes some of the more important variations in types of plans and their features which factors are important in characterizing, valuing and ultimately dividing retirement benefits amongst spouses. For the greater assistance of the reader there is an appendix to this article which gives in greater detail a list of the variations most often encountered.

Excellent texts for an even more thorough grounding in pensions include MCGILL, *FUNDAMENTALS OF PRIVATE PENSIONS* (3d ed. 1975); ALLEN, MELONE & ROSENBLUM, *PENSION PLANNING* (3d ed 1976). Shorter expositions dealing directly with pensions and divorce in the community property setting include, Dickerson, *The Divorce Situation-Role of Retirement Plans*, 10 REAL PROP. PROB. & TR. J. 644 (1975); Doyle, *ERISA and the Non-Employee Spouse's Community Interest in Retirement Pay*, 4 COMMUNITY PROP. J. 3 (1977).

42. 29 U.S.C. §§ 1002(34), 1002(35) (1975); I.R.C. §§ 414(i), 414(j).

43. *But see* contributory versus non-contributory *infra*. Some contributory defined benefit plans, especially government plans, are hybrids. See I.R.C. § 414(k).

characterized as marital property.<sup>44</sup> A *non-contributory* plan need not have early vesting of any benefits. Such plans also have considerably simpler accounting.

### 3. *Government plans.*

Government plans are not subject to ERISA. They are therefore also not subject to a uniform standard of regulation which now seeks to insure the financial stability of all private plans. In addition, some government plans specifically reserve to the government the right to unilaterally abrogate its largess. Such plans have therefore sometimes been classed as "gratuities."<sup>45</sup>

### 4. *"Widow" vs. Beneficiaries plan.*

Some private, and many governmental, plans provide a lifetime benefit to the participant, and, upon death, a separate benefit to the then surviving spouse. Such "widow" plans allow the participant no opportunity to leave any part of the pension to any other beneficiary.<sup>46</sup> Traditionally, larger defined benefit plans have had a forfeiture of benefits at death. ERISA discourages this.<sup>47</sup>

### 5. *Disability Assets.*

Some compensation programs provide disability in addition to, or in lieu of, similar benefits. In California some or all disability benefits may be classed as separate, non-divisible assets, while in other states the rule may be otherwise. When a disabili-

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44. Cf. *In re Marriage of Ellis*, 538 P.2d 1347 (Colo. App.), *aff'd*, 552 P.2d 506 (Colo. 1975) with *In re Marriage of Pope*, 544 P.2d 639 (Colo. App. 1975).

45. *Lynch v. United States*, 292 U.S. 571 (1934), concerning military pensions and similar benefits. See also 38 U.S.C. § 802(i) (1977) denying *any* person a vested right in National Service Life Insurance proceeds; see Rennick, *Appointment of Community Property Interests in Prospective Military Retirement Benefits Upon Divorce*, 9 ST. MARY'S L.J. 72, 74 n.10-11 (1977) specifically deferring to various military retirement codes.

See also *Packer v. Board of Retirement*, 35 Cal. 2d 212, 217 P.2d 660 (1950) where the Board actually did make a change in benefits, which stripped the widow of a previously present benefit. (Husband had election at a cost to continue widow's benefit, but chose not to do so): "... [T]he wife of a public employee does not acquire a vested interest in a pension until it becomes payable to her." *Id.* at 217, 217 P.2d at 664.

46. See *Benson v. City of Los Angeles*, 50 Cal. 3d 355, 384 P.2d 649, 33 Cal. Rptr. 257 (1963).

47. See 29 U.S.C. § 205 (1975); I.R.C. § 401(a)(11); requiring, in most cases, a qualified joint and survivor annuity.

A "widow's" plan is sometimes used in smaller employers for estate and tax planning purposes. Sometimes the results are *not as planned*. See *M.S.D., Inc. v. United States*, 434 F. Supp. 85 (N.D. Ohio 1977).

ty benefit is electable in lieu of pension there appears to be no justification for characterizing the disability payments as separate, at least to the extent of any pension entitlements.

Retirement programs come in different shapes and sizes. Remember, however, that they were designed for *someone's* individual purposes. Before a firm and meaningful rule can be established as to a logical division of such benefits, the purpose must be clear, and the mode in which that purpose has been actually carried-out must be carefully examined.

### PART III

#### PROPERTY RIGHTS IN RETIREMENT PLANS

To say that an interest in a plan is "property" is to state a conclusion. In truth, property is whatever the courts say it is, and nothing more. Logically, property should be defined as something of value which is not free, but logic does not always prevail. The reason it is necessary to determine if there exists a property right in a retirement plan is to be able to determine whether or not there is "marital property," in California, community property, which may be divided upon divorce or dissolution. To assist themselves in reaching the ultimate conclusion of whether or not a pension interest is "property", courts have developed several rules of analysis.

A survey of the current state positions on property interests in retirement plans follows. The most striking facts from the survey are the substantial divergences that exist and the small minority of states which have actually encountered litigation in this area.

There are eight community property states.<sup>48</sup> These jurisdictions treat property acquired during marriage as the property of husband and wife as partners.<sup>49</sup>

Of the community property states, California has seen the most litigation in this area. California law requires an equal

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48. Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, and Washington. In addition, Puerto Rico is also a community property jurisdiction.

49. See Foster & Freed, *From a Survey of Matrimonial Laws in the United States: Distribution of Property Upon Dissolution*, 3 COMMUNITY PROP. J. 231, 235 (1976); see also Foster, *Pensions and Marital Property*, Vol. 17 No. 4 FAM. L. NEWSLETTER 6, 13 (1977).



division of community assets<sup>50</sup> upon dissolution. Retirement interests, whether or not "vested" or "matured,"<sup>51</sup> are community property and are to be divided as a part of the dissolution. This is true for private pensions,<sup>52</sup> military pensions<sup>53</sup> and railroad pensions,<sup>54</sup> but evidently not for Social Security OASDI.<sup>55</sup> In addition, governmental pensions from state or local entities are divisible.<sup>56</sup> Pension interests are divisible community property whether or not vested and whether or not matured.<sup>57</sup>

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50. CAL. CIV. CODE § 687 (West 1954), community property defined, *id.* at § 5118 (earnings and accumulations after separation are separate property); *id.* § 4800 (community property to be equally divided, value to be determined as of trial date).

51. "Vesting" has two meanings; one for community interest, the other, as to pension plans. An interest is vested for community property reasons when a property interest first occurs so that, all things being equal, no third person (the employer as to pension plans) may unilaterally repudiate such interest. As to pension plans, vested means the participant may not lose whatever pension interest is vested should service with employer be interrupted. "Matured" means that there is an unconditional right to immediate receipt for enjoyment. *In re Marriage of Brown*, 15 Cal. 3d 838, 842, 544 P.2d 561, 563, 126 Cal. Rptr. 633, 635 (1976).

52. *Id.* at 843, 544 P.2d at 564, 126 Cal. Rptr. at 636; *see note 51, supra*; *see also In re Marriage of Carl*, 67 Cal. App. 3d 542, 136 Cal. Rptr. 703 (1977), where husband successfully claimed an interest in wife's invested pension interest.

53. *In re Marriage of Fithian*, 10 Cal. 3d 592, 544 P.2d 561, 111 Cal. Rptr. 633, *cert. denied* 419 U.S. 925 (1974).

54. *In re Marriage of Hisquierdo*, 19 Cal. 3d 613, 566 P.2d 1203, 138 Cal. Rptr. 590 (1977).

55. *In re Marriage of Kelley*, 64 Cal. App. 3d 82, 134 Cal. Rptr. 259 (1976); *In re Marriage of Nizenkoff*, 65 Cal. App. 3d 136, 135 Cal. Rptr. 189 (1976), *citing as authority* *Weinberger v. Salfi*, 422 U.S. 749 (1975) and *Flemming v. Nestor*, 363 U.S. 603 (1960) that Social Security is in the nature of social insurance and is not a form of deferred compensation akin to a pension. The Supreme Court had held previously that OASDI benefits are non-contractual and do not give rise to any vested benefits which could arise from a pension system. *Weinberger v. Salfi, supra* at 2469.

To like effect in *Caughey v. Employment Secur. Dept.*, 81 Wash. 2d 597, 503 P.2d 460, Annot., 56 A.L.R. 3d 513 (1972), wherein the receipt of social security was held not to be compensation for services rendered, while a federal civil service pension was to be so treated.

It is ironic that at the present time many state workers and all federal civil service and military employees and some other industries (such as railroads, *see Hisquierdo, supra*) have separate pension systems in lieu of Social Security OASDI. Query: If Social Security is "social welfare" and such government pensions are in lieu of Social Security is the community property distinction logical and is it justified?

56. *Waite v. Waite*, 6 Cal. 3d 461, 492 P.2d 13, 99 Cal. Rptr. 325 (1972) (judge's pension); *Phillipson v. Board of Administration*, 3 Cal. 3d 32, 473 P.2d 765, 89 Cal. Rptr. 61 (1970) (state pension); *Benson v. City of Los Angeles*, 60 Cal. 2d 355, 384 P.2d 649, 33 Cal. Rptr. 257 (1963) (city pension); *Berry v. Board of Retirement*, 23 Cal. App. 3d 757, 100 Cal. Rptr. 549 (1972) (county pension). *See also In re Marriage of Peterson*, 41 Cal. App. 3d 642, 115 Cal. Rptr. 184 (1974) (federal civil service pension).

57. *In re Marriage of Brown, supra* note 2 at 851 n.14, 544 P.2d at 569 n.14,

Even though California classifies pension interests as community property, it *limits* the rights of the non-participant spouse to those received during the joint lives of the divorcing partners. This is known as the "terminable interest rule."<sup>58</sup> It has been severely criticized as an unwarranted limitation of the rights *in property* of the non-participant spouse.<sup>59</sup> The rule is not followed in Texas and Louisiana, also community property states.<sup>60</sup>

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126 Cal. Rptr. at 641 n.14 (1976); *see also* notes 53, *supra*, and 62, *infra*; *Brown* retroactively (as to all cases which had not gone to final judgment of dissolution wherein property rights had been resolved) extended community property status to non-vested pension interests.

58. *See* note 56, *supra*; the rule which denies the spouse a right in any survivor's benefits or the right by devise to name a beneficiary for any after-death benefits is justified in *Waite* as follows:

The state's concern, then, lies in provision for the subsistence of the employee and his spouse, not in the extension of benefits to such persons or organizations the spouse may select as the object of her bounty. *Waite v. Waite*, *supra* note 56 at 473, 492 P.2d at 21, 99 Cal. Rptr. at 325.

59. *See* note 56, *supra*; *In re Marriage of Peterson*, *supra* note 56 at 656, 115 Cal. Rptr. at 194 the court stated:

Reading the cases discussed above, we are bound to hold that Elizabeth's entitlement in this case is limited to Roy's pension rights while he is living, and that she has no "vested" interest in any amounts payable after his death, even though these amounts are part of the pension package purchased with community funds.

We do not believe the rule which we must follow is fair. Roy's pension rights constitute a bundle to which Elizabeth, as a partner in the community during the years of marriage contributed her equal share. Why should she be deprived of her right to any single stick in the bundle? (*See Kent*, 25 Stan. L. Rev., 462-463.) We must, however, follow *Benson*, *Phillipson* and *Wilson*.

The apparent reason for the rule in *Wilson* that the wife be awarded only a percentage of each pension payment is a wish to limit the immediate burden on the husband where the primary, if not the sole, community asset is the prospective pension. However, where, as here, the pension package allows a survivor's pension and possibly lump-sum death benefits, any hardship is created by the husband's paying the wife projected pension amounts before he receives them, he need only designate the wife as survivor and beneficiary.

*See also Ramsey v. Ramsey*, 96 Idaho 672, 535 P.2d 53 (1975), wherein Mr. Justice Baker (dissenting) argues that the community property law is mongrelized by the "terminable interest rule":

If the husband's military retirement pay was in fact community property, and one half of it belonged to the wife, it would be an absolute property right which would pass to the wife's heirs like any of the other community property which the wife is awarded in the divorce. It certainly mongrelizes recognized property law concepts to say that upon her death that property right terminates in order to avoid a result which would point up the obvious inconsistencies with the congressional intent in establishing military retirement pay. *Id.* at 684, 535 P.2d at 65.

60. *Laffite v. Laffite*, 253 So. 2d 120 (La. 1971). *See Busby v. Busby*, 457 S.W.2d 551 (Tex. 1970).

It is this author's view that the "terminable interest rule" should be abrogated by the courts since it was grafted into law by them. There is no statutory basis for an altered form of post-dissolution separate property,<sup>61</sup> and the abolition of the rule need not interfere with the pension contract between employer and employee if the spouse is merely given an undivided right in whatever may be received *from a pension program*, including any specific annuity arrangement which allows the participant to choose the beneficiary. The type of plan which allows a survivor benefit to the "widow" would not be altered because the ex-spouse is not the "widow." However, if that type of pension had allowed participant/husband to make a selection of a beneficiary which could, by the terms of the plan, include his ex-wife, then such a selection could be ordered to be made by the court in dividing the interest in the dissolution proceeding. Likewise, there appears to be absolutely no justification not to allow the ex-spouse to name an heir to receive whatever interest might still be due if the spouse should die before the participant.<sup>62</sup>

A personal injury claim not reduced to judgment by time of separation is separate property of the injured spouse.<sup>63</sup> Likewise, disability pay received after separation, not in lieu of a pension, is the injured person's separate property.<sup>64</sup> Not surprisingly, therefore, a non-contributory military disability pension, not in lieu of a regular pension, is the separate property of the disabled spouse.<sup>65</sup> The same rule applies to a contributory disa-

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61. CAL. CIV. CODE § 687 (West 1954) defines community property as *any* such property acquired during marriage. CAL. CIV. CODE § 4800 (West Supp. 1978) requires an equal division of such community interest upon dissolution. In re Marriage of Brown, *supra*, says even unvested pension interests are community property. Brown also quotes Phillipson, to indicate the favored form of payout is to allow the participant to retain the pension intact and transfer to the spouse other community property to compensate, but also suggested other modes, such as "when and as received" might also be used. 15 Cal. 3d at 848, 554 P.2d at 950-951, 126 Cal. Rptr. at 639. Query: If alternative property is given to the spouse in lieu of the pension interest, then the spouse dies, does not the logic of the "terminable interest rule" call for a return of the other property to the participant instead of allowing it to descend to the heirs of the spouse? See also Waite v. Waite, *supra* note 56 at 473-74, 492 P.2d at 21-22, 99 Cal. Rptr. at 333-34.

62. Perhaps as was suggested by the wife in In re Marriage of Bruegal, 47 Cal. App. 3d 201, 120 Cal. Rptr. 597 (1975) the California courts could utilize a modified community property insurance approach, however, the court in Bruegal declined to do so. For insurance California uses a "premiums paid" allocation between separate and community. Polk v. Polk, 228 Cal. App. 2d 763, 39 Cal. Rptr. 824 (1964).

63. CAL. CIV. CODE § 5126(a)(2) (West Supp. 1978); Washington v. Washington, 47 Cal. 2d 249, 302 P.2d 569 (1956).

64. In re Marriage of Robinson, 54 Cal. App. 3d 682, 126 Cal. Rptr. 779 (1976).

65. In re Marriage of Jones, 13 Cal. 3d 457, 531 P.2d 420, 119 Cal. Rptr. 108

bility plan for a policeman, even one which is an alternative to a regular pension.<sup>66</sup> However, the better rule seems to be that disability payments are separate property *only* if (a) not direct compensation for actual pain and suffering; and, (b) only to the extent such payments exceed the regular pension. By this rule part of the pension might be separate and part community.<sup>67</sup>

Sometimes other unusual property interests, akin to deferred compensation, are argued to be community property interests. For instance, insurance renewals, denominated employment termination fees, have been held to be community property.<sup>68</sup> Likewise, an "earned" but as yet unreceived legal contingency fee has been held divisible.<sup>69</sup> However, a wife was unsuccessful in having a value placed on her husband's legal education which she helped finance so that it could be divided.<sup>70</sup> Courts are willing to consider a professional practice to be divisible community property, however, despite the argument of the spouse/professional that to do so is to attempt to value and

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(1975); *In re Marriage of Loehr*, 13 Cal. 3d 465, 531 P.2d 425, 119 Cal. Rptr. 113 (1975).

66. *In re Marriage of Olhausen*, 48 Cal. App. 3d 190, 121 Cal. Rptr. 444 (1975). Citing *Jones and Loehr*, as authority, the court ruled that the disability pension of the husband was entirely separate property. This type of pension was elected by the husband to fulfill the public policy of the state in aiding injured peace officers, even though such a policy would detrimentally affect the community interests of their ex-wives. *Id.* at 193, 121 Cal. Rptr. at 445.

67. *In re Marriage of Cavnar*, 62 Cal. App. 3d 660, 133 Cal. Rptr. 267 (1976). *In re Marriage of Mueller*, 70 Cal. App. 3d 66, 137 Cal. Rptr. 129 (1977).

Disability pensions are considered divisible in Idaho: *Guy v. Guy*, 98 Idaho 205, 560 P.2d 876 (1977); Texas: *Busby v. Busby*, 457 S.W.2d 551 (Tex. 1970); *Dominey v. Dominey*, 481 S.W.2d 374 (Tex. Ct. App. 1972), *cert. denied*, 409 U.S. 1029 (1972); Washington: all property, whether separate or community, is divisible: *Morris v. Morris*, 69 Wash. 2d 506, 419 P.2d 129 (1966); Missouri, all property divisible: *In re Marriage of Powers*, 527 S.W.2d 949 (Mo. Ct. App. 1975); and New Jersey, all property divisible: *Painter v. Painter*, 65 N.J. 196, 320 A.2d 484 (1974); *Kruger v. Kruger II*, 73 N.J. 463, 375 A.2d 659 (1977).

68. *In re Marriage of Skaden*, 19 Cal. 3d 679, 566 P.2d 249, 139 Cal. Rptr. 615 (1977), "We think it clear from the foregoing that the termination benefits contemplated by the subject contract were, like pension benefits, 'a form of deferred compensation for services rendered.'" *Id.* at 687, 566 P.2d at 252-53, 139 Cal. Rptr. at 618-19. The court declined to guess its approach to insurance renewals which were "unvested." *Id.* at 686 n.6, 688 n.7, 566 P.2d at 252 n.6, 253 n.7, 139 Cal. Rptr. at 618 n.6, 619 n.7; *see also* *In re Marriage of Brown*, note 52 *supra*; Texas law may be contra, *Vibroek v. Vibroek*, 549 S.W.2d 775 (Tex. Ct. App. 1977).

69. *Waters v. Waters*, 75 Cal. App. 2d 265, 170 P.2d 494 (1946).

70. *Todd v. Todd*, 272 Cal. App. 2d 786, 73 Cal. Rptr. 131 (1969).

divide future earning power, an argument akin to the division of an education.<sup>71</sup>

When community property is not divided in a dissolution proceeding, the spouses remain tenants in common and may seek partition at a later date.<sup>72</sup> Such a partition may occur for a pension plan interest.<sup>73</sup> California also has a peculiar legal theory called "quasi-community property" which causes separate property acquired in another jurisdiction to be treated as community property if it would have been such had it been acquired while the marriage had been domiciled in California. This characterization attaches as soon as the marriage becomes domiciled in California<sup>74</sup> and the inchoate community interest becomes vested as soon as the petition for dissolution is filed.<sup>75</sup> Moreover, quasi-community characterization could very well be applied to pension interests in the future.<sup>76</sup>

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71. *In re Marriage of Lopez*, 38 Cal. App. 3d 93, 113 Cal. Rptr. 58 (1974); *In re Marriage of Fonstein*, 17 Cal. 3d 738, 552 P.2d 1169, 131 Cal. Rptr. 873 (1976).

72. *Fieger v. Fieger*, 28 Cal. App. 2d 736, 83 P.2d 526 (1938); *Becker v. Becker*, 36 Cal. 2d 329, 223 P.2d 479 (1950). The *Becker* case illustrates a trap for the unwary attorney: if the divorce decree purports to dispose of all marital property, when the decree becomes final, the decree is non-modifiable and *res judicata* as to any community interest. See *Smith v. Lewis*, 13 Cal. 3d 349, 530 P.2d 589, 119 Cal. Rptr. 621 (1975) and *Irwin v. Irwin*, 69 Cal. App. 3d 317, 138 Cal. Rptr. 9 (1977).

73. *Irwin v. Irwin*, 69 Cal. App. 3d 317, 138 Cal. Rptr. 9 (1977), wherein the court was generous in allowing wife to seek interest in pension of husband; see also *Bodle v. Bodle*, No. 4 Civ. 14821 (Cal. App. Jan. 11, 1978) wherein the court refused to allow reconsideration of a 1968 divorce decree for interest in pension after change in law in *Brown* which was specifically made retroactive, but only as to cases which had not yet gone to final judgment. See *In re Marriage of Cobb*, 68 Cal. App. 3d 855, 860 n.1, 137 Cal. Rptr. 670, 674 n.1 (1977).

Since neither the pleadings nor the judgment in the dissolution action mention Loren's pension as a community asset, the court was without jurisdiction to consider the matter at a modification hearing. Property which is not mentioned in the pleadings as community property and which is left unadjudicated by a decree of divorce or dissolution is subject to future litigation, the parties being tenants in common meanwhile (*In re Marriage of Brown*, 15 Cal. 3d 838, 850-51 [126 Cal. Rptr. 633, 544 P.2d 561]; *In re Marriage of Elkins*, 28 Cal. App. 3d 899, 903 [105 Cal. Rptr. 59]; *Estate of Williams*, 36 Cal. 2d 289, 292-93 [233 P.2d 248, 22 A.L.R. 2d 716]). The property rights of tenants in common cannot be adjudicated in a motion or order to show cause, and can only be settled in an independent action. The trial court properly dismissed the part of the order to show cause requesting a division of Loren's pension, but its comment about *res judicata* should be disregarded since the court lacked jurisdiction to modify its judgment with respect to property rights.

74. CAL. CIV. CODE § 4803 (West Supp. 1978). See Thiede, *The Community Property Interest of the Non-Employee Spouse in Private Employee Retirement Benefits*, 9 U.S.F.L. Rev. 635, 658 (1975). The article formed part of the basis for the change in position of the California Supreme Court in *In re Marriage of Brown*, *supra* note 2 at 847, 544 P.2d at 566, 126 Cal. Rptr. at 638.

75. *Cooper v. Cooper*, 269 Cal. App. 2d 6, 74 Cal. Rptr. 439 (1969); *Addison v. Addison*, 62 Cal. 2d 558, 399 P.2d 897, 43 Cal. Rptr. 97 (1965).

76. See *Cooper v. Cooper*, 269 Cal. App. 2d 6, 74 Cal. Rptr. 439 (1969),

California courts will not take jurisdiction over separate property in a dissolution proceeding;<sup>77</sup> will not allow alimony (spousal support) to be substituted for a division of community property;<sup>78</sup> and have found it improper for a separate property obligation of one spouse to be used to "fund" an otherwise difficult community property division.<sup>79</sup> In short, community property must provide its own logical basis of division without the aid of the separate property interests of the marriage partners.<sup>80</sup>

The other community property states have had considerably less litigation in this area; however except for Nevada, which, according to this author's research, has had no decisions on the topic, each of the remaining six community property state courts have had something to say—and almost invariably concerning the specific interest in military pensions.

The one case on the subject in Arizona, *Everson v. Everson*,<sup>81</sup> recited the authorities from New Mexico and Texas and ordered the husband's pension interest valued and divided equally with the wife to the extent earned during marriage. The court neatly avoided any difficulties about future supervision by ordering an accounting to wife immediately.

There are two cases in Idaho, one dealing with a military

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wherein the court applied the concept to stock options a mode of deferred compensation. That case was particularly interesting because the husband had originally obtained options while in New York, had then changed the domicile of the marriage to California, where a divorce was initiated, then moved back to New York. Only after he had returned to New York did options mature. Still California maintained jurisdiction over them as quasi-community property.

See also I.R.S., Private Letter Ruling 7742042, July 22, 1977, acknowledging no tax cost upon division of quasi-community stock in California dissolution.

77. See Thiede, *The Community Property Interest of the Non-Employee Spouse in Private Employee Retirement Benefits*, 9 U.S.F.L. REV. 635, 649 (1975). Also see *In re Marriage of Hopkins*, 74 Cal. App. 3d 591, 141 Cal. Rptr. 597 (1977).

78. *In re Marriage of Cobb*, 68 Cal. App. 3d 855, 137 Cal. Rptr. 670 (1977); *In re Marriage of Brown*, 15 Cal. 3d 838, 848, 544 P.2d 561, 567, 126 Cal. Rptr. 633, 639 (1976).

79. *In re Marriage of Hopkins*, 74 Cal. App. 3d 591, 141 Cal. Rptr. 597 (1977); *In re Marriage of Tammen*, 63 Cal. App. 3d 927, 134 Cal. Rptr. 161 (1st App. Dist.

80. See McNamara, *Community Property Aspects of Executive Compensation*; presented to the U.S.C. Tax Institute, Jan. 17, 1978; to be published in the U.S.C. Tax Institute late in 1978.

81. 24 Ariz. App. 239, 537 P.2d 624 (1975).

pension and National Service Life Insurance; the other, with disability payments. The first, *Ramsey v. Ramsey*,<sup>82</sup> held that National Service Life Insurance could not be a community asset, following the opinion of *Wissner v. Wissner*,<sup>83</sup> but that the military pension, which was fully vested and matured, could be divided. The Court analyzed the California cases of *In re Marriage of Fithian*<sup>84</sup> and *In re Marriage of Milhan*<sup>85</sup> and came to the conclusion that a characterization of the pension as community property, so long as it did not interfere with the rights and obligations of the United States, was unobjectionable. The *Ramsey* Court, in quoting *Fithian*, found no conflict between federal purposes and state interests in protecting its citizens by application of the principles of community property.<sup>86</sup>

The more interesting issue in *Ramsey* was whether the marriage had been domiciled in Idaho when the pension was "earned." The Court held that the portion earned while the marriage was domiciled in Idaho would be community property. But the husband had been in the service for three years when he married his wife while he was stationed in Georgia. Their stops for the next seventeen years included Georgia, Germany, Korea, South Carolina, Utah and two years in California. The husband argued that his domicile was outside of Idaho, but the Court disagreed, and held that the seventeen year marriage had been domiciled in Idaho despite the fact husband and wife had not lived there until after the husband was released from the service to return to Idaho and go to work for his father. The final matter to be decided was the mode of "payout." This, under Idaho law, was to be done immediately with the husband being required to "buy" the wife's interest at its current actuarial values, the payments due in their entirety within a reasonable time.<sup>87</sup>

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82. 96 Idaho 672, 535 P.2d 53 (1975).

83. 338 U.S. 655 (1950). This case will be more fully discussed in Part V below, dealing with federal preemption.

84. 10 Cal. 3d 592, 517 P.2d 449, 111 Cal. Rptr. 369 (1974).

85. 13 Cal. 3d 129, 528 P.2d 1145, 117 Cal. Rptr. 809 (1974).

86. *Ramsey v. Ramsey*, 96 Idaho 672, 676, 535 P.2d 53, 57 (1975); *In re Marriage of Fithian*, 10 Cal. 3d 592, 597, 517 P.2d 449, 451-52, 111 Cal. Rptr. 369, 371-72 (1974), where the court enunciated the basic test:

When there have been questions of property law involving a conflict between a state decision and a valid federal statute, the United States Supreme Court has determined that the supremacy clause requires the state law to yield no matter how clearly the subject matter otherwise falls within the state's acknowledged sphere of power. (Citations) Our task, therefore, is to ascertain whether the application of California community property law to husband's federal military retirement pay interferes in any way with the accomplishment of the goals of Congress in creating the current military retirement scheme.

87. For an alternative argument, akin to that of the two dissenters in *Ram-*

The other Idaho case, *Guy vs. Guy*,<sup>88</sup> held disability benefits payable under an employee group policy were "acquired" during the marriage and that they may be equitably divided. Idaho normally follows the "inception of title" doctrine<sup>89</sup> which normally would have classed the proceeds as separate; however, using a life insurance analogy, the court likened the disability program to a term policy and then reasoned that it started anew each year. Therefore, the community property was to be divided on an "as received" basis.

Louisiana has very different community property rules, stemming from the fact that their laws emanate from the Napoleonic Code rather than the Spanish-Mexican tradition. Under Louisiana law there are some substantial differences in ownership rights, and the legal terminology is entirely unique in the United States. Predominant to the Louisiana system are the two concepts of absolute inviolability of the community *partnership* of husband and wife and forced heirship distribution upon death. The latter dictates who may be an effective beneficiary of plan benefits, the former grants literally full ownership powers to an ex-spouse in any plan interests. However, diverging from these principles, life insurance is treated differently. To the extent life insurance is separate property at inception,<sup>90</sup> the owner need not account to the community for any premium payments and also has complete freedom to name any beneficiary.<sup>91</sup>

Upon the dissolution of the community, each spouse is entitled *as an owner* to receive an accounting for interests in a retirement plan.<sup>92</sup> The rights of ownership include all the rights granted by the plan including the right to elect optional settlement.<sup>93</sup> However, normally the marriage partners in divorce

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*sey, see Bowman, Lump Sum Division of Military Retired Pay: A Dissenting View*, Vol. 3, No. 3 COMMUNITY PROP. J. 135 (1976).

88. 98 Idaho 205, 560 P.2d 876 (1977).

89. This doctrine says property originally acquired as separate property remains such and is not transmuted merely because community assets are used to continue its up-keep, although the community may be entitled to reimbursement for such expenditures. 560 P.2d at 879.

90. See note 89, *supra*.

91. T.L. James & Co., Inc. v. Montgomery, 332 So. 2d 834, 844 (La. 1976).

92. *Id.* Laffite v. Laffite, 253 So. 2d 120 (La. 1971).

93. *Id.*



arrange a settlement whereby the participant will retain the plan interest in exchange for an agreed purchase price.<sup>94</sup> However, where such an agreement is not carried out and where the divorce court makes a disposition of the plan interest, the parties remain co-owners.<sup>95</sup> When co-ownership occurs on the dissolution of the community, payout to the respective owners may be made only when called for in the plan contract.<sup>96</sup> If payout from a plan should occur on account of death however, the proceeds may be claimed by the takers in forced heirship despite the contractual right in the plan for the owner to name a beneficiary.<sup>97</sup> The analogy of such death benefits to insurance, which as noted above, is an exception to forced heirship, is not acceptable short of statutory change.<sup>98</sup>

The allocation of interest in pension plans is made based on the ratio of contributions made during any period to the total contributions made cumulatively,<sup>99</sup> or alternatively based on the actuarial values of interests.<sup>100</sup> Louisiana, like the other community property states, has had the occasion to consider military pension rights. The court in *Swope v. Mitchell*<sup>101</sup> upheld the community status of such pensions and divided them based on the formula of number of years in coverture over the number of years in service, sometimes referred to as the "time rule." Benefits are to be vested "when and as received."<sup>102</sup> Another interesting feature of *Swope* was the issue of domicile.<sup>103</sup> The husband argued for domicile where he had been stationed. The court turned him down, holding domicile to have been continuous in Louisiana for the full time of the community.<sup>104</sup>

At an early stage New Mexico considered the question of military pensions and decided that, if vested, such deferred compensation benefits, by whatever name they may be called,

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94. *T.L. James & Co., Inc. v. Montgomery*, 332 So. 2d 834, 851 n.2 (La. 1976).

95. *See Lynch v. Lawrence*, 293 So. 2d 598 (La. App. 1974); *Laffite v. Laffite*, 253 So. 2d 120 (La. 1971); *T.L. James & Co., Inc. v. Montgomery*, 332 So. 2d 834 (La. 1976).

96. *See note 95 supra*.

97. *T.L. James & Co., Inc. v. Montgomery*, 332 So. 2d 834, 854-55 (La. 1976).

98. *Id.* at 834.

99. *Id.*

100. *See Lynch v. Lawrence*, 293 So. 2d 598, 600 (La. App. 1974).

101. *Swope v. Mitchell*, 324 So. 2d 461 (La. App. 1975).

102. *Id.* at 462.

103. *See Ramsey v. Ramsey*, 96 Idaho 672, 535 P.2d 53 (1975).

104. For the reader skilled in the arcane (to the author) terminology of Louisiana or the avid student desiring to explore this area more fully see the Comment by Stephen Kupperman, *The Relation of Community Property and Forced Heirship to Employee Retirement Plans*, 51 TUL. L. REV. 645 (1977).

are community property.<sup>105</sup> The allocation of the benefits between community and separate is to be done based on the amount of time during which the marriage is domiciled in a community property jurisdiction divided by the total amount of service time. This concept is commonly referred to as the "time rule."<sup>106</sup> Division was proper between the spouses as and when received.<sup>107</sup>

Texas has had a great deal of litigation in this area. At present the standard is that all pension interests, whether or not vested or matured, are community property subject to being divided upon divorce.<sup>108</sup> The measure for allocation is the "time rule"—how many months of the time in employment were also months in coverture.<sup>109</sup> Like California, the rules for division of pensions in Texas have been evolving rapidly.<sup>110</sup> However, Texas applies the rule of equitable distribution for division of community property. Its courts therefore have an easier time deciding how to accommodate the changing law.<sup>111</sup>

At present, the "time rule" utilized measures value at time of divorce (current rank, if military; current actuarial value otherwise) instead of at retirement.<sup>112</sup> Also, any ancillary benefits, including payments for disability are considered available for

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105. *LeClert v. LeClert*, 80 N.M. 235, 453 P.2d 755 (1969); *Otto v. Otto*, 80 N.M. 331, 455 P.2d 642 (1969).

106. *LeClert v. LeClert*, 80 N.M. 235, 236, 453 P.2d 755, 756 (1969) "That portion of the retirement pay which was earned during coverture became property of the community."

107. *Id.*, 453 P.2d at 757.

108. *Cearley v. Cearley*, 544 S.W.2d 661 (Tex. 1976). This decision cites with favor and quotes extensively from the opinion of *In re Marriage of Brown*, 15 Cal. 3d 838, 544 P.2d 561, 126 Cal. Rptr. 633 (1976).

109. *Id.*

110. The first major case deciding vested, matured military pensions are to be subject to division; *Mora v. Mora*, 429 S.W.2d 660 (Tex. Ct. App. 1968); eight years later *Cearley*, *supra* note 108, was decided.

111. TEX. FAM. CODE ANN. § 3.63 (Vernon 1976) "fair and just."

112. *Mora v. Mora*, 429 S.W.2d 660, 663 (Tex. Ct. App. 1968).

A proper valuation of the community interest in this case is, obviously not free of complications. A proper valuation must take into account the possibility that appellant might, despite a record of military service which appellant conceded to be 'excellent' be dishonorably discharged, or that he might die while in the service. In addition, there is the problem of determining present value as against future value. This problem is particularly troublesome where it is contemplated that the husband will make an immediate cash settlement in payment of the wife's interest. However, in partitioning the community estate, a trial court is vested with a wide discretion. Perhaps the trial court may conclude that con-

division.<sup>113</sup> This, too, is a change from prior law. The Texas courts so far have been patient in coaxing the bar and the bench to note the change and to recognize that community property will apply to all pension interests, whether or not vested.<sup>114</sup>

Unlike California where a final decree ostensibly litigating rights to marital property is *res judicata*,<sup>115</sup> Texas courts allow long-since final decrees to be reopened to hear claims for lost pensions.<sup>116</sup> These continually re-emerging cases on petition to divide a tenancy in common in previously undivided community property also have no statute of limitation.<sup>117</sup> Further, since Texas is a state which divides all community assets as equitable, these proceedings will seldom be heard by a judge acquainted with the factors justifying a previous division; which leaves the court no choice but to evenly divide the tenancy in common even where such a division would not have been made earlier.<sup>118</sup> A similar problem of reopening cases was foreseen by the California Supreme Court in *In re Marriage of Brown* when it limited the retroactive effect of the change to cases not yet final.<sup>119</sup> The law in Texas is evolving by court interpretation.

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siderations of fairness to both parties compel the entry of a decree that the husband pay the wife her portion of the retirement benefits if, as, and when he receives them. We know of no reason why a divorce could or would lack power to enter such a decree.

113. *Busby v. Busby*, 457 S.W.2d 551 (Tex. 1970); *Dominey v. Dominey*, 481 S.W.2d 473 (Tex. Ct. App. 1972). Compare California law, note 61, *supra*.

114. *Busby v. Busby*, 457 S.W.2d 551 (Tex. 1970); *Cearley v. Cearley*, 544 S.W.2d 661, 666 (Tex. 1976); *Taggart v. Taggart*, 552 S.W.2d 441, 443 (Tex. 1977).

115. See *Smith v. Lewis*, 130 Cal. 349, 530 P.2d 589, 119 Cal. Rptr. 621 (1975).

116. See *Taggart v. Taggart*, *supra* note 115, a case of a petition for a divorce in 1968, suit having been brought to partition the pension in 1974.

117. *Constance v. Constance*, 537 S.W.2d 488 (Tex. Ct. App. 1976).

118. See *Taggart v. Taggart*, 552 S.W.2d 422, 424 (Tex. 1977). In the dissent, Mr. Justice Yarborough objects to retroactive application of a major court-created change in the law, stating that:

At the time of their divorce in 1968, military retirement benefits payable in the future were assumed to be of a contingent, non-vested character, and therefore outside the jurisdictional power of the court, and accordingly not subject to division by inclusion in court approved and/or drafted property settlements. Notwithstanding that assumption, which we now recognize to have been erroneous, courts were then free to make virtually any distribution of the remaining community and separate property as seemed just and appropriate, in order to do equity among the partners. We cannot know to what extent if any, the expectation of retirement benefits influenced the various courts in dividing properties among divorcing partners. The bounds of judicial discretion in divorce property settlements have known little appellate limitation or review, and what courts could not do officially, they have often done unofficially. It is more than a 'reasonable assumption' that such benefits have been in many if not most instances, of major consideration to the court in effecting a property settlement between partners.

119. See note 73, *supra*; *In re Marriage of Brown*, 15 Cal. 3d 838, 851, 544 P.2d 561, 126 Cal. Rptr. 633 (1976). See also as an example *Thibodeaux v. Thibodeaux*, 546 S.W.2d 662 (Tex. Ct. App. 1977), wherein a plea of *res judicata* for a final

Like in California, the changes aim for greater equity, but may well cause at least temporary "growing pains."<sup>120</sup>

In Washington, by statute, all property, whether community or separate, may be equitably divided in a divorce.<sup>121</sup> Since the standard of division of property is equitable in nature,<sup>122</sup> the characterization of items as community or separate property is not as important as in other states. Still, Washington has been earliest in holding that unvested, unmatured pension interests are subject to a divorce court distribution, including interests in military retirement pensions.<sup>123</sup> The Washington courts seem to have avoided the helter-skelter court-made changes of its sister-community property states to the south without any loss to the rights of its citizens. Equity has been the key and the legislature has entrusted the courts, the experts in equity, with great flexibility and all the "property" to see that the fullest measure of just distribution can be accomplished.<sup>124</sup>

Few states, other than the community property states, have had much litigation in this area. Of those that have, most have opted for including pensions in assets subject to marital division.

Arkansas, as an example, is not in the majority. Citing a Colorado decision,<sup>125</sup> the Arkansas Supreme Court tersely ruled that a military pension was not "personalty" which, by statute, must be divided one-third to the wife in divorce. The court criticized the community property states for allowing military

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decree issued in 1972 was denied and a redetermination of rights in husband's pension was granted wife. The court was sympathetic to the wife who had been unrepresented by counsel in her divorce.

120. See Note, *Military Retirement Benefits: Community Property as Earned During Marriage*, 14 HOUS. L. REV. 925 n.86 (1977).

121. WASH. REV. CODE ANN. § 26.08.110 (1961).

122. WASH. REV. CODE ANN. § 16.09.070 (1961).

123. *Morris v. Morris*, 69 Wash. 2d 506, 419 P.2d 129 (1966) (vested military pension); *DeRevere v. DeRevere*, 5 Wash. App. 741, 491 P.2d 249 (1971) (the husband's AT&T non-contributory unvested pension); *Payne v. Payne*, 82 Wash. 2d 573, 512 P.2d 736 (1973) (unvested military pension); *Wilder v. Wilder*, 85 Wash. 2d 364, 534 P.2d 1355 (1975) (*with great caution*, an unvested military pension which required another tour of duty of husband before it would vest at all).

124. See also *In re Marriage of Pea*, 17 Wash. App. 728, 566 P.2d 212 (1977).

125. *In re Marriage of Ellis*, 538 P.2d 1347 (Colo. App.) *aff'd*, 522 P.2d 506 (Colo. 1975).

pensions to be reached.<sup>126</sup>

Colorado has gone both ways. Division III of the Court of Appeals in *Ellis*,<sup>127</sup> ruled a non-contributory but vested military pension was not to be considered marital property. After reviewing the authorities in the community property states and criticizing the "terminable interest rule," the court considered the lack of assignability of the pension and held it was not "property."<sup>128</sup> On the other hand, Division II of the Court of Appeals, in *In re Marriage of Pope*,<sup>129</sup> held a contributory state pension plan, which was fully vested, to be marital property. The rationale being that in Colorado lump-sum military retirement payments are considered marital property.<sup>130</sup>

The Court in *In re Marriage of Graham*<sup>131</sup> addressed the issue of whether a husband's education, to which the wife had contributed, was divisible marital property. The lower court ruled affirmatively to the tune of \$33,134.00. The Court of Appeals reversed, citing *Todd v. Todd*.<sup>132</sup>

Missouri has ruled that a vested but unmatured pension plan interest comes within the statutory authority as *considered* "property acquired during marriage."<sup>133</sup> The position taken is quite similar to that of New Jersey, discussed below.

Michigan, after exhaustively reviewing practically every position from all states yet heard from, determined a vested, contributory government pension interest was most similar to the facts of *In re Marriage of Pope*,<sup>134</sup> and opted for including the pension interest in the definition of "marital property."<sup>135</sup> The court also criticized references to "vesting," which it indicated were not included in the Michigan law.<sup>136</sup>

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126. *Fenney v. Fenney*, 259 Ark. 858, 537 S.W.2d 367 (1976), "In effect the community property jurisdictions treat armed forces' retirement pay as alimony; otherwise it is not collectible, 42 U.S.C. § 659 (1974)." On this point, a Florida court agreed with the Arkansas Supreme Court allowing a garnishment under 42 U.S.C. § 659 (1974) for "alimony" and "child support" in order for a wife to collect the interest in her husband's military pension assigned to her by a Texas court decree. *Williams v. Williams*, 338 So. 2d 869 (Fla. App. 1976).

127. See note 125, *supra*.

128. *Id.*

129. 544 P.2d 639 (Colo. App. 1975).

130. *In re Marriage of Moore*, 531 P.2d 995 (Colo. App. 1975), cited in the dissent of *Ellis*, note 125, *supra*.

131. *In re Marriage of Graham*, 555 P.2d 527 (Colo. 1976).

132. See 272 Cal. App. 2d 786, 73 Cal. Rptr. 131 (3d App. Dist. 1969). See also *Stern v. Stern*, 66 N.J. 340, 331 A.2d 257 (1975), which is discussed below.

133. *In re Marriage of Powers*, 527 S.W.2d 949 (1975).

134. See note 129 *supra*.

135. *Hutchins v. Hutchins*, 71 Mich. App. 361, 248 N.W.2d 272 (1977).

136. *Id.* at 376, 248 N.W.2d at 277, citing similarity to New Jersey statutes.

New Jersey has, by statute and by court decision, become by far the most active non-community property state in this area. The courts have criticized any requirement of "vesting" when determining whether any pension interest is property "acquired during marriage."<sup>137</sup> However, no reported case has actually found that a non-vested pension interest is marital property. In the case of *Painter v. Painter*<sup>138</sup> the New Jersey Supreme Court reiterated that the law of that state requires all property "acquired during marriage" to be distributed during divorce, regardless of the source of such property or its otherwise exempt character.<sup>139</sup> The statute is intended to be comprehensive, and the courts are instructed to so construe it.<sup>140</sup> Since New Jersey uses a "fair and equitable" standard, similar to the Washington statute, the inclusion of all property cannot work an injustice. Dealing specifically with pensions, the New Jersey courts have allowed a broad scope to the injunctions of the statute as expostulated in *Painter*.<sup>141</sup>

The issue of the value of future earnings has also arisen in New Jersey.<sup>142</sup> The court acknowledged the difficulty of

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137. *Stern v. Stern*, 66 N.J. 340, 348, 331 A.2d 257, 262 (1975). "We take the opportunity . . . to suggest that the concept of vesting should probably find no significant place in the developing law of equitable distribution." See also *McGrew v. McGrew*, 151 N.J. Super. 515, 516, 377 A.2d 697, 698 (1977).

138. 65 N.J. 196, 320 A.2d 484 (1974).

139. *Id.* at 216-18, 320 A.2d at 495.

140. N.J. STAT. ANN. § 2A:34-23 (1977), see also *Painter v. Painter*, *supra* note 67 at 494-95.

We think the Legislature used the word in a more comprehensive sense to include not only property title to which is the direct or indirect result of an expenditure of effort on the part of a spouse, but also, assets title to which is received by gift or inheritance, or indeed in any other way. We therefore hold the legislative intent to be that all property, regardless of its source, in which a spouse acquires an interest during the marriage shall be eligible for distribution in the event of divorce.

141. *Blitt v. Blitt*, 139 N.J. Super. 213, 219, 353 A.2d 144, 147 (1976).

In short, the portion of a pension plan, whether contributory or noncontributory, acquired during marriage and over which an employee has complete control, even though enjoyment may be postponed, should be an asset subject to equitable distribution. The postponement of enjoyment should be considered in determining the manner in, and the time at which, this portion of the plan is divided.

*Kruger v. Kruger*, 73 N.J. 464, 471, 375 A.2d 659, 663 (1977) wherein the court stated that the "[H]usband's military retirement payments constituted property subject to equitable distribution in divorce action even though until the payments were received they were not assignable and were exempt from attachment, levy, or seizure."

142. *Stern v. Stern*, 66 N.J. 340, 346 n.5, 331 A.2d 257, 261 n.5 (1975).

separating the future earning power of a well-known professional (not property) from the value of his legal practice (property), but was willing to accept the task as required in making a fair distribution of marital property.<sup>143</sup>

Wisconsin has also chosen to include pension interests when determining marital property,<sup>144</sup> especially where it consists of property which comes from the joint efforts of husband and wife and where it is the largest available asset in the marital estate. The courts have not required the current "realization" of the pension plan<sup>145</sup> but have suggested that courts might impose a constructive trust on the pension interest in order to ensure future proper division when any sums are, in fact, realized.<sup>146</sup>

With divorces rising to over 1,000,000 a year and with pension assets over \$400 billion, it will probably not be long before the other states and the District of Columbia, which are not listed in this survey, will be heard from. The present trend seems to be to include all employee benefits in the property to be divided upon dissolution. This would be consistent with the trend of no-fault divorce and to equitable distribution of those assets which are available.

#### PART IV SELECTED RETIREMENT PLAN PROVISIONS AND THE STATUTORY SETTING

Retirement benefits as a major source of family assets in the property division pursuant to a marital dissolution is a relatively recent development. Moreover, since the state of the law is still in its developmental stages, our courts are faced with a myriad of specific issues, each of which are tainted with a specific policy consideration in effecting a just and equitable division of this valuable asset.

The plan is the contract, the blue print, which defines all rights, whether set forth in statute (primarily governmental plans) or in a separate document (mostly private plans including those which are fully insured).<sup>147</sup> The following issue delineation

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143. *Id.*

144. *Pinkowski v. Pinkowski*, 67 Wisc. 2d 176, 226 N.W.2d 518 (1975). The court here reviewed all prior state authorities. The pension was vested and worth \$23,551.00 in an estate with no other substantial liquid assets.

145. *Id.* at 179-81, 226 N.W.2d at 520.

146. *Id.* at 184-85, 226 N.W.2d at 522. *See also Parsons v. Parsons*, 68 Wisc. 2d 744, 751, 299 N.W.2d 629, 633 (1975), "[T]he value of the retirement fund must be taken into account in making the division of the [marital] estate."

147. An excellent publication which explains the application of ERISA and then illustrates how the law is to be applied by specimen language and with

presents a simplified view of the plan provisions which should be reviewed by the careful practitioner and by the court when determining the best resolution of the disputed rights.

1. *When did participation begin; how long has it lasted; have there been any breaks or changes in the character of participation; how is participation measured by the plan?*<sup>148</sup>

The divorce courts have attempted, in many circumstances, (especially related to military pensions which are defined benefit plans) to allocate pension interests on the basis of "time" in the plan.<sup>149</sup> Most *private* pension plans today, because of the

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sample or model plans (for plans subject to ERISA) is R.A. BILDERSEE, PENSION REGULATION MANUAL (rev. ed. 1977). This "book" is supplemented monthly by newsletters and periodically (generally, semi-annually) with revised Specimen Plan language.

For Social Security, there are a number of publishers who print annual summaries, such as 1978 Social Security Benefits-Including Medicare January 1, 1978, CCH (1978).

See also H.A. PATTIZ, PENSION PLAN LANGUAGE AFTER ERISA (1976). This work was prepared as course material for the continuing education programs regularly offered by the California C.P.A. Foundation.

For texts which review the history and purposes of retirement plans as well as discuss legal requirements and illustrate some plan language, D. MCGILL, FUNDAMENTALS OF PRIVATE PENSIONS (3d ed. 1975) and ALLEN, MELONE AND ROSENBLUM, PENSION PLANNING (3d ed. 1976).

An excellent book explaining pensions from the management and accounting viewpoint is POMERANTZ, RAMSEY AND STEINBERG, PENSIONS: AN ACCOUNTING AND MANAGEMENT GUIDE (1976).

148. 29 U.S.C. § 1052 (1976); ERISA § 202; I.R.C. § 410. Textual references to "ERISA" and "I.R.C." refer to the Employee Retirement Income Security Act of 1974 and the Internal Revenue Code of 1954 as amended respectively. Care must be taken when determining "time in the plan" to consider "eligibility" aside from "entry." On occasion, an employee will not enter a plan even though eligible. On other occasions "entry" may be retroactive to a date earlier than eligibility. And on other occasions, a plan may allow years of service credit for the employee's time before plan entry.

There may be periods of time after an employee begins to participate that his participation will be interrupted, such as a break in service or leave of absence, or the type of participation may change, from active to inactive. When measuring the period of participation, it is often important to give differing weight to similar time periods because the character of participation has changed.

149. This is known as the "time rule." See *In re marriage of Fithian*, 10 Cal. 3d 592, 517 P.2d 449, 111 Cal. Rptr. 369 (1974); *In re Marriage of Wilson*, 10 Cal. 3d 851, 519 P.2d 165, 112 Cal. Rptr. 405 (1974); *In re Marriage of Freiberg*, 57 Cal. App. 3d 204, 127 Cal. Rptr. 792 (1976); *In re Marriage of Anderson*, 64 Cal. App. 3d 36, 134 Cal. Rptr. 252 (1976). See *In re Marriage of Judd*, 68 Cal. App. 3d 515, 137 Cal. Rptr. 318 (1977) expounding on the "momentum theory" (earlier years give momentum to a career and to value of pensions):



requirements of ERISA, now have extensive, technical definitions of how *eligibility*, *entry*, and *participation* occur and how they are to be measured.<sup>150</sup> ERISA requires such records to be kept by the Plan Administrator and by the employer.<sup>151</sup> The regulations issued by the Department of Labor recognize that for years prior to ERISA (pre-1975, generally) such records may not exist; but the regulations do call for a good-faith effort to reconstruct them or otherwise develop a fair substitute.<sup>152</sup>

2. *How are benefits (potential benefits) described; how are they "earned" (accrued), how are they denominated and as of when, how are accruals measured and valued by the plan; are benefits guaranteed, either by the plan, the employer or otherwise; has the measure of benefits changed during the period of participation (increased or decreased); and are benefits subject to adjustment for cost of living, plan earnings or otherwise?*<sup>153</sup>

The plan must define the mode of benefit calculation and how such benefits are earned.<sup>154</sup> In addition, because of Department

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Where the total number of years served by an employee-spouse is a substantial factor in computing the amount of retirement benefits to be received by that spouse, the community is entitled to have its share based upon the length of service performed on behalf of the community in proportion to the total length of service necessary to earn those benefits. The relation between years of community service to total years of service provides a fair gauge of that portion of retirement benefits attributable to community effort. *Id.* at 522-23, 137 Cal. Rptr. at 321.

150. 29 U.S.C. § 1052 (1975); ERISA § 202; I.R.C. § 410. See R.A. BILDERSEE, PENSION REGULATION MANUAL ch. 2 n.1 (rev. ed. 1977). See also note 152 *infra*, for the regulations which define the elements of "time" to be included in maintaining a plan.

151. 29 U.S.C. §§ 1021-25 (1975); ERISA §§ 101-05 for plan administration; for administrator and employer see 29 U.S.C. § 1027 (1975); ERISA § 107.

152. 29 C.F.R. Part 2530 (1976). These regulations provide for periods of service to be calculated on "years of service" (generally, 1000 "hours of service" during an applicable "computation period").

The determination of time in service ("years in service") must be maintained for each employee for all years of service (with exceptions) for a) eligibility and participation; b) accrual of benefits, and c) for vesting.

Records must be maintained (and have been maintained) so as to allow a plan to calculate "hours of service" and "years of service." If such records have previously not existed (pre-ERISA), the regulations allow an educated "guess."

153. 29 U.S.C. § 1054 (1975); ERISA § 204; I.R.C. § 411(b). Generally, benefits are "earned" in defined contribution plans by funding contributions, generally annually (or more often) and generally by employer (sometimes with employee mandatory or voluntary contributions). For a defined benefit plan, benefits (as projected at retirement) are "earned" over time, based on the completion of accrual years of service (years of plan participation).

The variety of benefit formulas to be found in plans is very large. R.A. BILDERSEE, PENSION REGULATION MANUAL ch. 3A (rev. ed. 1977).

154. 29 U.S.C. § 1102(a) (1975); ERISA § 402(a) requires each plan to be *in writing*. 29 U.S.C. § 1102(b)(1) (1975); ERISA § 402(b)(1) requires a funding policy and 29 U.S.C. § 1102(b)(4) (1975); ERISA § 402(b)(4) requires a description of the procedures for making payment of benefits.

of Labor reporting requirements, the plan must be able to periodically inform the participant of the value of benefits earned thus far.<sup>155</sup> As a starting point, such information will be useful to the disputants and to the court; but it is important to remember that such statements of plan benefits *for plan purposes* will not necessarily be usable without substantial adjustment for *divorce purposes*.<sup>156</sup>

3. *How are the benefits funded, whether by the employer and/or by the employee; what contributions have been received*

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155. 29 U.S.C. § 1025(a) (1975); ERISA § 105(a). See also *Daniel v. Int'l Brotherhood of Teamsters*, 561 F.2d 1223 (7th Cir. 1977). In the *Daniel* case, the Federal District Court in Chicago held that the anti-fraud provisions of federal securities law apply to the receipt (by a "sale") of an interest (a "security") in non-contributory mandatory pension plan. The anti-fraud provisions provide relief if misrepresentations are made *or if all material facts* are not stated *prior* to the time the investment decision is made in the "purchase of a security." Here, such full disclosure would have to be made *prior to first employment*. ERISA, in a comprehensive list of record keeping requirements, only requires such disclosure *after* employment has begun and after an individual has either become a participant or, if a beneficiary, has begun to receive benefits. 29 U.S.C. § 1024(b) (1975); ERISA §§ 104(b), 105.

Whether or not securities law disclosures will be required by the *Daniel* decision is still being widely discussed. Whether or not "required" by law, such disclosures would be prudent for a plan fiduciary wishing to short-circuit any *Daniel*-type subsequent dispute. Such disclosure would also be very expensive.

156. Such information for defined contribution plans will show account balances as of the last valuation date. 29 U.S.C. § 1002(23)(B) (1975); ERISA § 3(23)(B). For a defined benefit plan it will show the amount of an *annual benefit beginning at normal retirement date*. 29 U.S.C. § 1002(23)(A) (1975); ERISA § 3(23)(A). See also 29 U.S.C. § 1054(C)(3) (1975); ERISA § 204(C)(3) requiring any other form of benefit to be the "actuarial equivalent" to single life and Qualified Joint and Survivor Annuity beginning at normal retirement date.

For divorce purposes appropriate values are needed for the court *as of the divorce date*. Even for defined contribution plans, appropriate discounts need to be considered for the delay before benefits are to be paid and for the possibility that some or all benefits may never be paid at all. See *In re Marriage of Brown*, 15 Cal. 3d 838, 544 P.2d 561, 126 Cal. Rptr. 633 (1976), "In dividing nonvested pension rights as community property the court must take into account the possibility that death or termination of employment may destroy those rights before they mature." *Id.* at 848, 544 P.2d at 567, 126 Cal. Rptr. at 639.

So far, no court seems to have considered a *premium* for defined contribution accrued benefits which will be allowed to accumulate earnings without paying tax currently (a true "tax shelter") and because, when received, such benefits will obtain favored tax treatment.

For defined benefit plans the rate of accrual may be substantially less than the actual funding level for benefits. This is because the actual cost for benefits in younger years is lower than in later years. There is a rising curve for funding of the same amount of benefit as a participant gets older. For a brief (and readable) explanation of actuarial valuations see POMERANTZ, RAMSEY AND STEINBERG, *PENSIONS: AN ACCOUNTING AND MANAGEMENT GUIDE* (1976).

*on behalf of this participant; and has the account of this participant received funds from other sources, such as from forfeitures?*<sup>157</sup>

The source of funding has often been an important consideration to divorce courts, especially in community property states.<sup>158</sup> The measure of contributions to the plan also has been a factor in *allocating* interests in the plan.<sup>159</sup> Some plans require employee contributions generally, government and large private plans, others permit voluntary contributions.<sup>160</sup>

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157. Defined contribution plans have accrued benefits which accumulate from contributions and from earnings. Certain of these plans—plans other than pension plans—may also have accrued benefits derived from forfeitures. See I.R.C. § 401(a)(8). A defined benefit plan will not have separate accounts (generally, unless “full insured” with individual contracts). Earnings will go to reduce employer’s obligation to make *future* funding.

158. See *Crossan v. Crossan*, 35 Cal. App. 2d 39, 94 P.2d 609 (1939). Husband had made contributions to state retirement plans, which were, at the least, refundable. This was held to be community property. *But see* *In re Marriage of Olhausen*, 48 Cal. App. 3d 190, 121 Cal. Rptr. 444 (1975). Husband made contributions to “retirement plan,” which were returnable in all events. When husband “elected” disability pension, court held pension to be separate property and denied wife’s request for “reimbursement of community.”

Even more to the point was the distinguishing of *In re Marriage of Ellis*, 538 P.2d 1347 (Colo. App. 1975) by the court in *In re Marriage of Pope*, 544 P.2d 639 (Colo. App. 1975). In *Ellis* the court ruled a military pension could not be considered property subject to division in a divorce. In *Pope*, the court was impressed by the fact that the retirement benefits had been funded in part by employee contributions and held the plan interest to be marital property. Colorado is a common-law state.

To like-effect is Michigan, a common-law state, *Hutchins v. Hutchins*, 71 Mich. App. 361, 248 N.W.2d 272 (1976); and Texas, a community-property state, *Taylor v. Taylor*, 449 S.W.2d 368 (Tex. Ct. App. 1969).

159. See *T.L. James & Co., Inc. v. Montgomery*, 332 So. 2d 834 (La. 1976). The court allocated shares of the plan between two claimant wives of two different marriages and to the separate property heirs (for the time in between marriages and before the first) based on contributions of employer made during each period of being married or being single.

160. Generally, qualified retirement plans under I.R.C. § 401 may allow voluntary employee contributions which may not exceed *on a cumulative basis* 10% of covered compensation during the total periods of active plan participation. IRS Publication 778, par. 4(h) *Guides for Qualification of Pension, Profit-Sharing and Stock Bonus Plans*, Feb. 1972. Rev. Rul. 70-658, 1970-2 C.B. 86. The IRS has previously ruled that mandatory employee contributions may not discriminate (i.e.-force lower-paid employees “out,”) and therefore should not exceed 6% of compensation. IRS Publication 778, par. 4(g), Treas. Reg. § 1.401-3(d) (19\_\_). Evidently, incorporating some of the “flavor” of this 6% limitation the *maximum* funding provisions (I.R.C. § 415) count some of any employee contributions, whether or not mandatory, which exceed 6% against total allowable funding to a qualified plan. I.R.C. § 415(c)(2)(B).

See *Taylor v. Taylor*, 449 S.W.2d 368 (Tex. Ct. App. 1969) wherein the court emphasized the purely voluntary nature of the plan and of contributions in deciding it was appropriate to force husband to leave plan before normal retirement to pay wife for her share of community property.

4. *How are plan assets invested; may they be invested in a loan to the participant to allow a "purchase" of the spouse's interest; and are the plan assets available, or can they otherwise be made available, prior to retirement, disability or death for the aid of the divorce disputants?*<sup>161</sup>

Divorce courts have generally been reluctant to force plan participants to "realize" their interests in the plan to accommodate the divorce.<sup>162</sup> If the plan allows its assets to be made available without otherwise causing a disruption in the employee/spouse's participation, this concern can be substantially alleviated.<sup>163</sup>

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161. ERISA, generally, has sharply restricted the use of any plan assets (whether or not a tax qualified plan) which might be used to aid the personal desires of any "party in interest" (a very broad category, defined in 29 U.S.C. § 1002(14) (1975); ERISA § 3(14) and including participants). 29 U.S.C. § 1106 (1975); ERISA § 406; I.R.C. § 4975(c).

But many plans, especially single employer plans which have been thoroughly restated to comply with ERISA, now allow loans to participants. ERISA has a specific exception to the prohibited transaction rules for such loans. 29 U.S.C. § 1108(b)(1) (1975); ERISA § 408(b)(1); I.R.C. § 4975. If a plan does allow such loans, especially if the plan sponsor is willing to cooperate, there is often a ready source of funds to give the non-participant spouse a payment in full for the community interest in the plan.

Thereafter, the participant may repay the loan over a period of time at appropriate interest. Such repayment in effect constitutes a repayment by the participant to himself.

162. *But see* Taylor v. Taylor, 449 S.W.2d 368 (Tex. Ct. App. 1969). *See* In re Marriage of Freiberg, 57 Cal. App. 3d 304, 127 Cal. Rptr. 792 (1976)

The time when the monthly retirement payments will commence and the amount of those payments as between the husband and the wife, are entirely within the control of the husband (gen; see Waite v. Waite, 6 Cal. 3d 461, 472; In re Marriage of Martin, 50 Cal. App. 3d 581, 584; Bensing v. Bensing, 25 Cal. App. 3d 889, 893). *Id.* at 311, 127 Cal. Rptr. at 797.

163. In California, the "terminable interest rule" forces a nonparticipant spouse to "gamble" on the life span of husband and of wife and to depend on the options chosen by participant spouse in the plan. *Berry v. Board of Retirement*, 23 Cal. App. 3d 757, 100 Cal. Rptr. 549 (1972); *In re Marriage of Petersen*, 41 Cal. App. 3d 396, 115 Cal. Rptr. 184 (1974); *Ball v. McDonnell Douglas Corp.*, 30 Cal. App. 3d 624, 106 Cal. Rptr. 662 (1973). The "cashing out" of the non-participant spouse by a plan loan to the participant avoids these difficulties and ends the partnership between them, which is the whole purpose of the dissolution of marriage anyway. *See* Sutherland, *Community Property, Nonvested Retirement Benefits In re Marriage of Brown*, Vol. 2 No. 1, FAM. LAW SECTION NEWSLETTER 19 (1976).

164. *See* generally, discussion in part V, below, Preemption. Normally no direct assignment is possible in government plans (for their convenience). *See* United States v. Smith, 393 F.2d 319 (5th Cir. 1968), and may be prohibited by federal law (ERISA) for other plans. But see California's recent amendment to its Civil Code to allow joinder of plans in a divorce action and a direct divorce

5. *Can an interest in the plan be "assigned" or otherwise transferred to the non-participant spouse?*<sup>164</sup>

Non-alienation, spend thrift clauses are included in nearly all plans and are required in all plans subject to ERISA.<sup>165</sup> Whether or not such clauses can or should operate to deprive a divorcing spouse of a *direct* interest in the plan is discussed more fully in Parts V (pre-emption) and VIII (enforcement) below.

6. *Are accrued benefits "vested"; will the other benefits not yet vested vest, and, if so, when and how; what forfeiture has or can occur, and will such forfeitures ever be reversible; and can or will the period of service of the employee/spouse generate vested benefits in the future?*<sup>166</sup>

"Vesting" for purposes of pension plans is concerned with the issue of whether a participant will lose benefits accrued if the participant ceases employment or dies prior to receipt of such

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court order against the plan. Cal. Stats. ch. 860 p. 2523 (1977), amending CAL. CIV. CODE §§ 4351, 4363 and adding §§ 4363.1, 4363.2 and 4363.3.

165. 29 U.S.C. § 1056(d)(1) (1975); ERISA § 206(d)(1); I.R.C. § 401(a)(13). There is an exception to the non-alienation provision to allow a lien in *favor of the plan* for loans to participants. See note 163 *supra*.

166. The matter was not extensively discussed in the Committee Reports by Congress when ERISA was passed. The *purpose* of non-alienation provisions, aside from serving the convenience of the plan sponsor, is to prevent funds accumulated for one purpose to be diverted to another. See P. MCGILL, FUNDAMENTALS OF PRIVATE PENSIONS 125 n.1 (3d ed. 1975).

Many courts have previously held that benefits which have not "vested" (become certain to be paid) are not to be divided at the time of divorce. The rationale was that such non-vested interests were not "property" (See Part III, *supra*) or were too difficult to value. The argument in favor of this position is well presented In re Marriage of Ellis, 538 P.2d 1347 (Colo. App. 1975). See also French v. French, 17 Cal. 2d 775, 112 P.2d 235 (1941) (overruled on this point in In re Marriage of Brown, 15 Cal. 3d 838, 544 P.2d 561, 126 Cal. Rptr. 633 (1976)).

Prior to ERISA, it was not unusual for plans to not allow vesting except after many years or even not until retirement. See Grayck, *Compensation and Fringe Benefits*, J. CORP. TAX. 158 (1978). Since ERISA, for all covered plans, at least 50% vesting by 10 years, with 100% by at least 15 years, is now the rule. 29 U.S.C. § 1053 (1975); ERISA § 203; I.R.C. § 411.

Even assuming there is some "vesting," benefits may still be forfeitable because of death prior to retirement (or thereafter), see Ball v. McDonnell Douglas Corp., 30 Cal. App. 3d 624, 106 Cal. Rptr. 662 (1973); 29 U.S.C. § 1043(a)(3)(A) (1975); ERISA § 203(a)(3)(A); I.R.C. § 411(a)(3)(A).

In government plans, post retirement misconduct may cause a loss of benefits. Ables v. Ables, 540 S.W.2d 769 (Tex. Ct. App. 1976). This is no longer true for plans covered by ERISA. See 29 U.S.C. § 1053 (1975); ERISA § 411; I.R.C. § 411. See also Merrill Lynch v. Ware, 414 U.S. 117 (1973) wherein a pre-ERISA "forfeiture for cause" provision was ruled ineffective under California law as an unreasonable forfeiture of wages (then CAL. LABOR CODE § 229 (West 1971) and CAL. BUS. & PROF. CODE § 16600 (West 1964)).

benefits.<sup>167</sup> Vested benefits are those which are non-forfeitable. Moreover, vesting has been a major factor in those jurisdictions which have evaluated whether pension interests are "property" subject to distribution upon divorce. In other states however, specifically California, Texas and Washington, vesting has been rejected as a primary standard for evaluating whether ownership interests exist.<sup>168</sup>

7. *On what occasions are benefits normally payable by the plan; are there optional forms of pay-out available to the participant; does the plan recognize the possibility of claims adverse to the participant; would a division of benefit payments unduly burden the plan administration; is a Qualified Joint and Survivor Annuity provided;<sup>169</sup> who are the persons who may be designated beneficiaries under the plan; and are there any ancillary benefits, such as annuities for "widows."*<sup>170</sup>

Retirement plans, consistent with their purposes, are intended to accumulate benefit credits to be paid after many years of

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167. In re Marriage of Brown, 15 Cal. 3d 838, 842, 544 P.2d 561, 563, 126 Cal. Rptr. 633, 635 (1976).

168. *Id.* *Cearley v. Cearley*, 544 S.W.2d 661 (Tex. 1976); *De Revere v. De Revere*, 5 Wash. App. 741, 491 P.2d 249 (1971); and *Payne v. Payne*, 82 Wash. 2d 573, 512 P.2d 736 (1973). *See also* *McGrew v. McGrew*, 151 N.J. Super. 515, 377 A.2d 697 (1977). "The concept of 'vesting,' as developed within the law of future interest, has little meaning in the equitable distribution of a marital estate . . . *Stern v. Stern*, 66 N.J. 340, 348-349 (1975)." *Id.* at 517, 377 A.2d at 698.

169. See discussion below I.R.C. § 401(a)(11); ERISA § 205.

170. The occasion upon which benefits may be payable is an important factor in valuing a plan interest. For instance, if benefits are not payable until normal retirement at age 65 and are subject to alteration in amount until then or even to forfeiture on account of death in the interim, and if the participant is now 35, the valuation will be difficult. However, if death does not work a forfeiture and if some benefits are payable on account of disability or for early retirement, or, as in thrift plans, merely because funds have been accumulated for several years, the valuation of benefits is less speculative.

If the plan pays benefits for "disability" prior to retirement, how is "disability" defined? Is it total and permanent, or is it some lesser loss of ability?

If the plan allows retirement "after 15 years of service," is that term defined to include service for other employers?

Some plans allow the choice of beneficiaries for the payment of a death benefit; others do not. Where there is a choice (other than in California which applies the "terminable interest rule") the designation as beneficiary of the spouse may alleviate many difficulties. *But see* *Budee v. Pierce*, 375 A.2d 984 (Vt. 1977), where the court allowed the second wife to elect against the husband's will which *by a prior divorce decree* was required to leave property to his

service, generally only on account of death, disability or retirement. For these reasons plans seldom have allowed pay-out to be made for other reasons, such as a division between spouses incident to a divorce. Also, especially for larger private plans and for government plans, a life-time annuity for the participant is the normal form of benefit, with all plan interests being forfeited upon the death of the participant. In lieu of allowing the participant to name a beneficiary for any value of benefits not paid prior to death, such plans often include an ancillary annuity for the "widow" of the participant.<sup>171</sup> A similar provision has been engrafted on other plans by ERISA which now requires a Qualified Joint and Survivor Annuity for most, if not all, retirement programs.<sup>172</sup> The court in a dissolution proceeding must understand the available options allowed by the plan, but should not attempt to override the contract between the employer and the employee.<sup>173</sup>

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children of the first marriage. *Compare* *In re Marriage of Peterson*, 41 Cal. App. 3d 642, 115 Cal. Rptr. 184 (1974).

171. *Benson v. City of Los Angeles*, 60 Cal. 2d 355, 384 P.2d 649, 33 Cal. Rptr. 257 (1963); *Berry v. Board of Retirement*, 23 Cal. App. 3d 757, 100 Cal. Rptr. 549 (1972).

172. The Qualified Joint and Survivor Annuity (QJ&SA) was added as a requirement by ERISA in order to protect the "spouse" who was dependent on the participant for support from being cut-off entirely upon the participant's untimely demise. H.R. REP. No. 93-533 93rd Cong., reprinted in [1974] U.S. CODE CONG. & AD. NEWS, 4639, 4732. There are some very complicated rules (too complicated?) which govern this retirement option. IRS Regulations published 42 FED. REG. 1463, 26 C.F.R. Part 1 (1977).

Briefly, a plan which provides any form of annuity (whether or not optional to the plan) must provide at normal retirement a QJ&SA, and all defined benefit plans (and some others) which allow early retirement may have to offer a QJ&SA earlier. The QJ&SA value must be not less than equal to the actuarial value of a straight life annuity for the participant (an annuity for the participant's life with no guaranteed pay out) and must provide a survivor's benefit for the life of the spouse, (the regulations are *not* clear whether it need be to the spouse) of not more than 100% nor less than 50% of the benefit paid during the life of the participant. The *participant* must have the option to say no to the QJ&SA unless it is the only form of payout.

The QJ&SA appear to be a "widow's" plan—that is, if elected, or if required as the only mode of payout, the beneficiary must evidently be the person who is the *spouse* as of the time of death, (and perhaps as of the time benefits begin) according to Treas. Reg. § 1.401(a) 11(d)(3), and not the "ex-wife."

Query: Does the QJ&SA express a Congressional purpose to override community property rules, or does the QJ&SA merely demonstrate a lack of Congressional foresight that the provision might complicate the rights of former spouses?

Second query: So long as the plan does not have the QJ&SA as the *only* form of payout, may not the divorce courts *order* the participant to elect another form of benefit? *See Phillipson v. Board of Administration*, 3 Cal. 3d 32, 48, 473 P.2d 765, 775-76, 89 Cal. Rptr. 61, 71-72 (1970).

173. *See In re Marriage of Brown*, 15 Cal. 3d 838-39, 544 P.2d 561, 567-68, 126 Cal. Rptr. 633, 639-40 (1976). *But see Taylor v. Taylor*, *supra* notes 160 and 162.

8. *Are there any other plan provisions or employee benefits ancillary to the plan which substantially affect the property interests in the plan?*

On occasion an employer may tie retirement plan benefits to other employee benefits, such as stock options, life insurance, and the like. Also plans may be integrated with Social Security so that the actual benefits receivable from the plan may be reduced if Social Security benefits increase.<sup>174</sup> These relationships, if any, should be researched on behalf of the divorcing husband and wife so that the court may have such information before it when it attempts to value and properly divide those property interests which actually exist.

A retirement program may be likened to an office building which is constructed to house diverse businesses over a long period of time. Just as the building can be expected to last for an indefinite period, so too, the program is expected to persist. Just as the desires and goals of diverse businesses may be accommodated in the office building, so too, numerous individual participants may enter into and depart from the retirement program. In each case, the purpose of the building and of the plan allows for such diversity. However, no rational owner of an office building would think to maintain the structure and accommodate the interests of the tenants without a good set of blueprints so that the sections of the building can be graphically seen and maintained. So too, the plan document of the retirement program is the blueprint of its existence and the practitioner must be thoroughly conversant with the terms of the document to be sure that its utility for all its participants is not altered or destroyed to accommodate the immediate needs of one participant. The divorce court must be thoroughly conversant with the terms of the plan and with its purposes so that, in

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174. See Rev. Rul. 71-446, 1971-41; I.R.C. 401(a)(15) does not allow changes in the Social Security base occurring after termination of employment or after benefits begin to affect pension benefits.

For defined benefit plans (but not for Social Security integrated defined contribution plans, because they work differently) if final benefits are "offset" (reduced) in one way or another by the amount of Social Security benefits to be received, as Social Security entitlement rises, pension plan entitlement falls. Since Social Security interests are not considered divisible property in a divorce, the rise in Social Security reduces divisible marital property. In re Marriage of Kelley, 63 Cal. App. 3d 82, 134 Cal. Rptr. 259 (1976).



ministering to the needs of the parties to the dissolution the court will not inflict harm upon the other "tenants" (participants) in the "office building" (retirement plan).

## PART V PRE-EMPTION

The question of whether federal law pre-empts state law on pension interests has been carried to the United States Supreme Court for resolution,<sup>175</sup> but the ultimate answer has yet to be determined. Perhaps this is because the question is really several *different* questions which can only be answered separately!

1. The states have primary concern for marital interests,<sup>176</sup> and, in that regard, for the proper division of property rights upon the dissolution of the marital union. Does federal law preempt state law when determining, *as between* the marriage partners, whether there are property interests in retirement plans and, if so, how those interests are to be shared?
2. Does federal law pre-empt the manner in which the state may *direct the plan* in recognizing any state acknowledged rights in retirement plans?
3. Does federal law pre-empt state law as to federally created retire-

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175. *Wissner v. Wissner*, 338 U.S. 655 (1950); *see also* *Free v. Bland*, 369 U.S. 663 (1962) and *Yiatchos v. Yiatchos*, 376 U.S. 306 (1964), wherein the Court ruled Treasury regulations concerning United States bonds overrode state community property rules to like effect.

The issue of pre-emption by federal securities rules of California labor and pension law also reached the Supreme Court. *Merrill Lynch, Pierce, Fenner & Smith v. Ware*, 414 U.S. 117 (1973). In that case, the Court upheld local regulation, saying

In contrast with *Silver v. New York Stock Exchange*, 373 U.S. 341 (1963), we are not confronted here with conflicting federal regulatory schemes. The present controversy concerns the interrelationship between statutes adopted, respectively, by the Federal Government and a State. The analytical framework of *Silver* is instructive, nonetheless. There the Court reviewed carefully the securities exchange regulatory scheme that Congress had adopted in order to identify the character and purposes to the Act and the extent to which instances of exchange self-regulations were necessary to the furtherance of congressional aims and objectives. 373 U.S. at 349-361, 83 S. Ct. at 1252. It was mindful, also, of the purposes behind the conflicting statutes which, in that case, were the antitrust laws. So here, we may not overlook the body of law relating to the sensitive interrelationship between statutes adopted by the separate, yet coordinate, federal and state sovereignties. Our analysis is also to be tempered by the conviction that the proper approach is to reconcile the operation of both statutory schemes with one another rather than holding one completely ousted.

176. *Id.* at 389-90. In re *Marriage of Pardee*, 409 F. Supp. 666, 669 (D.C. Cal. 1976). The Court stated in *In re Burrus*, 136 U.S. 586, 594 (1890) that:

The whole subject of the domestic relations of husband and wife . . . belong to the laws of the States and not to the laws of the United States. And the Ninth Circuit has declared that, "domestic relations is a field peculiarly suited to state regulation and control, and peculiarly unsuited to control by federal courts." *Buechold v. Ortiz*, 401 F.2d 371, 373 (9th Cir. 1968). *See also* *State of Ohio ex rel. Popovici v. Angler*, 280 U.S. 379, 50 S. Ct. 154, 74 L. Ed. 489 (1930); *Barber v. Barber*, 62 U.S. (21 How.) 582, 16 L. Ed. 226 (1858).

ment rights, including interests in military and civil service plans, as they may be divided *between the marriage partners*?

4. Does federal law pre-empt state direction to *federally created retirement* plans to acknowledge such rights of the husband and wife?

5. To what extent has federal law established *standards for organization and management* of retirement plans which will preclude state regulations?

6. Finally, recognizing the increased mobility of our society and the changing social mores, what limits has federal law placed on state law enforcement of marital property and support rights against pension plan interests?

### A. *The Argument for Preemption*

All retirement plans, whether federally created or otherwise, have a substantial effect on interstate commerce.<sup>177</sup> With respect to plans subject to ERISA (generally, all non-government and non-church retirement plans),<sup>178</sup> Congress has specifically and clearly pre-empted *all* state law, except in the fields of insurance, banking and securities laws of general application.<sup>179</sup> The language used by Congress is clear and unambiguous and is buttressed by the legislative history represented by the speeches of Senators Javits and Williams, and Representatives Dent and Erlenbour, who were the majority and minority leaders in the Conference Committee which drafted the precise language on pre-emption in the statute.<sup>180</sup>

Further, ERISA is an extremely comprehensive statute intended to regulate the *entire* field of employee benefits, including retirement plans.<sup>181</sup> Congress has affirmatively decided to brook no state regulation or law, however well-intentioned such state action may be, because Congress is aiming at *national uniformity* and attempting to encourage the spread of employee benefit programs.<sup>182</sup> This goal may only be achieved if plan

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See also Paoli, *Pension Rights and Community Property: From French to Brown*, 4 WEST. STATE U.L. REV. 91, 102 (1976).

177. 29 U.S.C. § 1001 (1975); ERISA § 2.

178. 29 U.S.C. § 1003(b) (1975); ERISA § 4(b).

179. 29 U.S.C. § 1144(b)(2)(A) (1975); ERISA § 514(b)(2)(A). Also, criminal laws of general application are not preempted. 29 U.S.C. § 1144(b)(4) (1975); ERISA § 514(b)(4).

180. Such legislative history is extensively quoted in *Hewlett-Packard v. Barnes*, 425 F. Supp. 1294, 1298-99 (N.D. Cal. 1977). See also *Azzaro v. Harnett*, 414 F. Supp. 374 (S.D.N.Y. 1976), *aff'd without opinion*, 553 F.2d 93 (2d Cir.) *cert. denied*, 98 S. Ct. 71 (1977).

181. *Hewlett-Packard v. Barnes*, *Id.* See also *Standard Oil of California v. Agsalud*, No. C-76-2740-CBR (N.D. Cal. filed Nov. 21, 1977).

182. 29 U.S.C. § 1001 (1975); ERISA § 2; *Hewlett-Packard v. Barnes*, *Id.*

participants and plan sponsors can be assured that the benefits provided in the contract of the plan document will not vary merely because the employee/participant should move from one state to another.<sup>183</sup>

As to federally created governmental retirement rights, there is substantial and unrebutted authority that such pension interests are the personal entitlement of the employee,<sup>184</sup> and that the granting of such rights were deemed necessary to insure the morale and loyalty of government workers and to ensure a continuing stream of willing applicants for such positions.<sup>185</sup> Because the federal government has facilities across the

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183. For instance, should a plan participant take up residence in a common-law marriage state (see discussion in part II, *supra*), which state did not have community property, then move to California, which has by statute quasi community property, CAL. CIV. CODE § 4803 (West Supp. 1978) which has been held to allow a *retroactive effect* in reaching separate property acquired elsewhere, (see the discussion of *Addison v. Addison*, 62 Cal. 2d 558, 399 P.2d 897, 43 Cal. Rptr. 97 (1965) in *In re Marriage of Bouquet*, 16 Cal. 3d 583, 546 P.2d 1371, 129 Cal. Rptr. 427 (1976)).

The application of the quasi community property legislation to property acquired before its effective date clearly impaired the husband's vested property rights; prior to the enactment to the legislation he had been the sole owner of certain property and afterwards the property belonged to the community. Nonetheless, we deemed the retroactive application of the legislation a proper exercise of the police power. The state's paramount interest in the equitable distribution of marital property upon dissolution of the marriage, we concluded, justified the impairment of the husband's vested property rights. (See generally *Williams v. North Carolina* (1942) 317 U.S. 287, 298 [87 L.Ed. 279, 285, 286, 63 S.Ct. 207, 143 A.L.R. 1273]). *Id.* at 593, 546 P.2d at 1377, 128 Cal. Rptr. at 433.

Any plan in which such a participant had an interest, even though such interest was unvested at the time the participant was in California, could find itself contesting the claim of a person who claimed to be an ex-spouse because of a California dissolution. This would be so even though the participant could show the plan fiduciaries that no marriage recognized in California had occurred, that no interest in the plan had vested or matured while there, and that the participant had never been properly made a party to an alleged dissolution proceeding in California by the "ex-spouse" because the participant had never been served in California and had had no continuing contract before or since.

In short, the plan could be faced with numerous "sophisticated" legal issues which had naught to do with the plan's primary function of providing benefits to employees of the plan sponsor.

See *Tatum v. Tatum*, 241 F.2d 401 (9th Cir. 1957) (California recognizes common-law marriages from other jurisdictions even though it has no such relationship allowed under its law); and *Cooper v. Cooper*, 269 Cal. App. 2d 6, 74 Cal. Rptr. 439 (1969) (California quasi community property reaches stock options granted while husband in New York and matured after husband left California to return to New York).

184. S. REP. NO. 1480, 90th Cong., 2d Sess. (1968), reprinted in [1968] U.S. CODE CONG. & AD. NEWS 3294, 3300. See also Note, *Military Retirement Benefits-Prior to Accrual, Military Retirement Pension Earned During Coverture is Community Property Subject to Division at Time of Divorce*, 9 ST. MARY'S L.J. 136, 142 (1977). See also *Ramsey v. Ramsey*, 96 Idaho 672, 683, 535 P.2d 53, 64 (dissent 1975).

185. *Id.* Cf. *Waite v. Waite*, 6 Cal. 3d 461, 492 P.2d 13, 99 Cal. Rptr. 325 (1972).

country and around the world which must be manned continuously and which have a steady turnover of personnel, the imposition of differing state laws on government employees would severely interfere with the federal government's need to position persons where their services would be most needed. For example, if the preemption doctrine was not available to protect the government-granted rights of an employee, to request a resident of New York<sup>186</sup> to relocate to California for a few years would allow the employee's spouse to file for a dissolution of marriage and thereby obtain a *vested* right in the employee's government pension which had been earned entirely outside of California.<sup>187</sup>

The Internal Revenue Service and the Congress have become concerned that retirement plans in existence when ERISA was passed have begun to terminate, or just disappear, in large numbers.<sup>188</sup> Part, if not most, of the problem has been the increased administrative cost of amending the plan to bring it into compliance with ERISA as well as to prepare reports for filing with the IRS, Department of Labor (DOL), the Pension Benefit Guarantee Corporation (PBGC),<sup>189</sup> and making full disclosure to participants and beneficiaries.<sup>190</sup> If another layer of regulation is to be applied to the already burdened retirement plan industry because of each state having different determinations of the rights of non-employee spouses in such plans, there will

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186. New York is a "title state." All property in divorce remains owned by the person who holds title. Foster and Freed, *From a Survey of Matrimonial Laws in the United States: Distribution of Property Upon Dissolution*, 3 COMMUNITY PROP. J. 231, 232 (1976).

187. See *Cooper v. Cooper*, 269 Cal. App. 2d 5, 74 Cal. Rptr. 439 (1969).

188. [1977] 147 PENS. RPTR. (BNA) A-10. The IRS has reported that, based on a preliminary survey about 30% of the plans in existence before ERISA have now or will soon terminate. The cost of converting such "old" plans to ERISA requirements had been stated to be a major cause of such terminations.

189. IRS is the Internal Revenue Service; DOL is the Department of Labor; PBGC is the Pension Benefit Guarantee Corporation. All three agencies have substantial delegated responsibility under ERISA for regulation of covered plans.

190. ERISA originally called for full disclosure by plans to the DOL and to participants by early in 1975. Numerous delays occurred because the forms were in a steady state of being issued-criticized-withdrawn-amended-delayed-issued-criticized-withdrawn, etc. The plan description, EBS-1, as originally issued was a "monster," calling for extensive essay-type answers. It was re-drafted so that information to be submitted can be given by checking boxes or by simple fill-ins. That took over a year.

be an accelerating loss in the number of plans. This result is directly contrary to the intent of Congress.<sup>191</sup>

For the reasons stated above, federal plans never could be subject to state control and ERISA has pre-empted any further direct state regulation or interference with employee plan rights.<sup>192</sup> However, assuming *arguendo* that states may have the right *as between the marriage partners* to determine rights in the *property* interest of the plan, except to the extent of making available reports which are already required by ERISA to be prepared for the proper administration of the plan, the plan and its advisors cannot, because of preemption, be required in any way to reflect the rights of the non-employee spouse other than as specifically provided in the plan document.<sup>193</sup> The plan trustee is obligated<sup>194</sup> in state and federal court to account to the plan participants and beneficiaries<sup>195</sup> named by plan participants or by the terms of the plan. It must be noted that a former or soon-to-be former spouse is neither a participant nor a beneficiary.<sup>196</sup>

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The annual reports (form 5500 series) was originally proposed in different format for IRS and DOL and in fact, was required for initial years to be submitted separately to each. The forms themselves have been revised *at least* annually and are projected to be used for filing all information for IRS, DOL and PBGC in *one* form at *one* date for later years.

The Summary Plan Description (SPD) is intended to be the primary source of plan information for plan participants. It was to have been available in 1975, or at least 1976. Final regulations provided for delivery November 16, 1977, or, later, if "good cause" could be shown.

Federal regulation has been evolving so that plans now begin to understand how to respond. If state rules are to be overlaid on the federal structure, plan administration will remain in chaos forever.

191. 29 U.S.C. § 1001 (1975); ERISA § 2. *See also* 29 U.S.C. §§ 1222, 1231 and 1302 (1975); ERISA §§ 3022, 3031, 4002.

192. If it is argued that any preemption must only be prospective and that any retroactive effect would be a taking of property without due process of law and in interference with the right of contract, ERISA by its terms applies preemption only as of January 1, 1975. 29 U.S.C. § 1144(a) (1975); ERISA § 514(a). However, there is an exception to the due process requirements where a "change" in vested rights is necessary to carry-out a strong public policy in accord with the police power. *See Addison v. Addison*, 62 Cal. 2d 558, 399 P.2d 897, 43 Cal. Rptr. 97 (1965) and *In re Marriage of Bouquet*, 16 Cal. 3d 583, 546 P.2d 1371, 128 Cal. Rptr. 427 (1976).

193. ERISA does recognize divorce in limited situations. I.R.C. §§ 402(e)(4)(G); 408(g); ERISA §§ 2002(b), 2005. Congress knew divorces could be a problem and specifically considered the matter. Congress does not wish to go any further. 29 U.S.C. § 1144 (1975); ERISA § 514 is comprehensive.

194. 29 U.S.C. § 1132 (1975); ERISA § 502.

195. 29 U.S.C. § 1132(a)(1) (1975); ERISA § 502 allows only "participants and beneficiaries" to bring actions (other than governmental agencies) to enforce plan provisions and insure rights. Ex-spouses are not participants or beneficiaries. *Kerbow v. Kerbow*, 421 F. Supp. 1253, 1260 (N.D. Tex. 1976), "It was not the purpose of Congress to embroil either the employers or the federal court system in state divorce proceedings."

196. *Id.* at 1259.

To the extent the Congress wishes, it may provide a remedy for the enforcement of rights arising out of family law against plan interests.<sup>197</sup> Where Congress has pre-empted the field, however, as it has here, if Congress does not create such a right, the states may not fill the void "in the interest of justice." Arguably, if the states can ensure that the integrity of the plan will be maintained and that there will be no increased costs, the state courts could be allowed a proceeding in the nature of an interpleader to resolve conflicting rights.<sup>198</sup> However, the arguments in favor of such a proceeding are faulty because they do not recognize the right of the plan to deal only with the participant. Additionally such a court proceeding would also interfere with some of the optional modes of pay-out present in nearly all plans, which options are normally made by the plan fiduciaries.<sup>199</sup> Also, if such an interpleader were to be undertaken, the plan participant would lose the tax advantages which are available for certain forms of pay-out from plans,<sup>200</sup> a result which would *impair* the incentives for such plans clearly and concisely created by Congress.<sup>201</sup>

Congress has spoken, not once, but several times, to encourage retirement plans for employees. Congress has seen state interference disrupt the even-handed administration of such plans and has therefore chosen after many years of deliberation

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197. Congress has seen fit to do so for enforcement of "support" obligations by garnishing federally-held funds. 42 U.S.C. § 659 (1977). This law, effective January 1, 1975, goes no further than to allow state law to reach funds in the hands of the United States. It does not encourage or abet such proceedings by providing a forum, and the scope of the new provision is limited to assist only for support. See *Morrison v. Morrison*, 408 F. Supp. 315 (N.D. Tex. 1976).

198. *E.g.*, *Fox v. Smith*, 531 S.W.2d 654 (Tex. Ct. App. 1975), and *T.L. Jones & Co., Inc. v. Montgomery*, 332 So. 2d 834 (La. 1976).

199. The plan fiduciaries owe a duty of total loyalty to the plan participants and beneficiaries and may be held *personally* liable if they did not so proceed. 29 U.S.C. §§ 1004 and 1132 (1975); ERISA §§ 404 and 502.

200. [1977] 149 PENS. RPTR. (BNA) J-4. A plan participant who received payment from court which *would have* come from plan but for discrimination by employer could not rollover such amounts (I.R.C. § 402(a)(5) because *not* received from the plan). If amounts are received from court proceeding, especially if "interpleader" action holds funds for an extended period of time, query whether funds retain attributes as distribution *from* plan?

201. See, *e.g.*, I.R.C. § 101(b) (\$5000 excluded from income tax for death benefit) I.R.C. § 402 (capital gains; 10-year forward averaging; preferred income tax on lump sum payouts) I.R.C. § 408 (rollovers); I.R.C. § 2039(c) (estate tax exclusions).

to enact a comprehensive statute to regulate all employee benefit programs which is intended to usurp the field and exclude *all* other regulation. For these reasons, pre-emption will apply (a) as to rights between a participant and a spouse; (b) as between the non-employee spouse and the plan; (c) as to *all* federally created employee benefits; (d) as to enforcement against the plan of any state created marital rights, except those *specifically* authorized by Congress; and (e) as to any state court proceeding which would have the plan or its fiduciaries made subject to state court jurisdiction, including the supplying of plan information to any person other than the participant and including paying any sums into court or otherwise making pay-out other than as selected by the plan fiduciary strictly in accord with the terms of the plan and payable to the participant and/or his beneficiaries.

### *B. The Argument Against Preemption*

The federal government has the *power* and the *right*<sup>202</sup> to exclude state regulation from any field such as employee benefits which is within the United States Constitutional grant of power to the federal government. However, the federal government is an authority of delegated responsibility and the states as sovereign entities retain all jurisdiction over matters not specifically and clearly undertaken by the federal government,<sup>203</sup> so long as state regulation is not in conflict with a legitimate federal purpose.<sup>204</sup>

The Supreme Court has previously considered federal pre-emption<sup>205</sup> in the employee benefits area, and has specifically left open the extent to which state regulation of individual rights

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202. U.S. CONST. art. 6, § 2.

203. U.S. CONST. amend. X.

204. See *Merrill Lynch, Pierce, Fenner & Smith v. Ware*, 414 U.S. 117 (1973); *Carlson v. Carlson*, 11 Cal. 3d 474, 521 P.2d 1114, 113 Cal. Rptr. 722 (1974) in distinguishing *Wissner* (National Service Life Insurance) from federal group life insurance, "Congress has not spoken with force and clarity," to override the strong state policy in favor of community property. *Id.* at 476-77, 521 P.2d at 1115, 113 Cal. Rptr. at 723.

205. *Wissner v. Wissner*, 338 U.S. 655 (1950); *Merrill Lynch, Pierce, Fenner & Smith v. Ware*, 414 U.S. 117 (1973); *Dominey v. Dominey*, 481 S.W.2d 473 (Tex. App.), *cert. denied*, 409 U.S. 1028 (1972) (Military disability pension held to be community property subject to division in divorce); *In re Marriage of Fithian*, 10 Cal. 3d 592, 517 P.2d 449, 111 Cal. Rptr. 369, *cert. denied*, 419 U.S. 825, *rehearing denied*, 419 U.S. 1060 (1974) (Military pension held to be community property, divided in marriage dissolution).

See also *Daniel v. International Brotherhood of Teamsters*, 561 F.2d 1223 (7th Cir. 1977).

may be subject to state regulation.<sup>206</sup> As a matter of fact, the Court has been crystal clear in *not* eliminating state court jurisdiction over pension interests where a legitimate and strong state concern is at stake.<sup>207</sup>

Marriage and divorce are matters peculiarly within the areas of greatest concern to the states and this has been recognized by the federal courts.<sup>208</sup> Only the *clearest* of congressional statements can be allowed to preempt the policies of the states.<sup>209</sup>

The state does not delve into the private affairs of the members of the family;<sup>210</sup> it only concerns itself with the legitimacy of the marital relationship<sup>211</sup> and that, on its dissolution, the legitimate claims for marital property and for support of the family members are met and properly enforced by the state courts.<sup>212</sup>

With respect to federal pension rights, Congress has long been aware of the argument made by the states that division of such interests would occur *under state law* when the marriage had been dissolved.<sup>213</sup> What was Congress' response? Did it spring to the fore to "cut 'em off at the pass," before those dastardly

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206. *Wissner v. Wissner*, 338 U.S. at 659-60 *supra* note 205.

207. *Merrill Lynch, Pierce, Fenner & Smith v. Ware*, 414 U.S. at 130-31 *supra* note 204.

208. *Gersten v. C.I.R.*, 267 F.2d 195 (9th Cir. 1959); *Lee v. C.I.R.*, 550 F.2d 1201 (9th Cir. 1977); *C.I.R. v. Wilkerson*, 44 T.C. 718 (1965), *aff'd*, 368 F.2d 552 (8th Cir. 1966).

209. *In re Marriage of Karlin*, 24 Cal. App. 3d 25, 101 Cal. Rptr. 240 (1972). *Merrill Lynch, Pierce, Fenner & Smith v. Ware*, 414 U.S. 117 (1973); *In re Marriage of Jones*, 13 Cal. 3d 457, 531 P.2d 420, 119 Cal. Rptr. 108 (1975):

Congress, of course, may determine the community or separate character of a federally created benefit and such determination binds the states. (*Free v. Bland* (1962) 369 U.S. 633, 668 [8 L.Ed. 2d 180, 184, 82 S.Ct. 1089]; *Wissner v. Wissner* (1950) 338 U.S. 655, 660-661 [94 L.Ed. 424, 429-430, 70 S.Ct. 398].) (lb) We find nothing in the statutes providing military disability pay, however, or in the history of the enactment and administration of those statutes, to suggest that Congress intended itself to determine whether the right of a married veteran, resident in a community property state, to disability pay is a community asset. We may, therefore define the nature of the treatment to be accorded this benefit according to principles of California community property law so long as the result does not frustrate the objectives of the federal legislation. (*In re Marriage of Fithian*, *supra*, 10 Cal. 3d 592, 597 & fn.4). *Id.* at 461, 531 P. at 423, 119 Cal. Rptr. at 111.

210. *Zablocki v. Redhall*, 46 U.S.L.W. 4093 (U.S. Jan. 18, 1978).

211. *See Marvin v. Marvin*, 18 Cal. 3d 660, 557 P.2d 106, 134 Cal. Rptr. 815 (1976).

212. *See Tatum v. Tatum*, 241 F.2d 401 (9th Cir. 1957). *See also* 42 U.S.C. § 659 (1977).

213. *See In re Marriage of Fithian*, 10 Cal. 3d 592, 596, 517 P.2d 449, 451, 111 Cal. Rptr. 369, 371 (1974) and cases cited therein.



spouses made off with the loot? No. Congress specifically recognized marital rights in federal pensions by waiving federal immunity to garnishment of such interests on account of *state* claims for support.<sup>214</sup>

The proponents of pre-emption argue that Congress has spoken and spoken clearly. We agree. Congress has said, "yes," to marital claims against federally created rights and thereby acknowledged the superior interests of the states to ensure the legitimate family expectations to equitable rights in property, including pensions, and to state created rights of support.

Congress did however pre-empt direct state regulation of the administration, organization and structure of plans.<sup>215</sup> Even there, though, Congress has acknowledged and continued state regulation in banking, insurance and securities areas.<sup>216</sup> Clearly a state may no longer require reports on retirement systems, except to aid in its taxing authority.<sup>217</sup> Nor may it require licensing of employee benefit plans;<sup>218</sup> but how has Congress clearly and *consciously* spoken to eliminate marital claims? Such a sweeping pre-emption of long established state interests must be much more specific than Congress was in ERISA.<sup>219</sup> Besides, pre-emption, as included in ERISA, was *created* in the Conference Committee and the broad sweep was not intended to advocate the banning of legitimate state interests in maintaining the family. No expression of such an intent was mentioned on the floor of either the House or Senate nor reflected in the Conference Committee Report.<sup>220</sup>

Those in favor of preemption cite legislative history consisting of the floor sponsors from the House and Senate. However, none of these gentlemen represent community property

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214. 42 U.S.C. § 659 (1977). *See also* Conference Committee Report, as to ERISA § 206, "For purposes of this rule [non-alienation], a garnishment or levy is not to be considered a voluntary assignment." Prepared by U.S. Senate Subcommittee on Labor & Public Welfare, Vol. 3, pp. 4319, 4320 (April 1976).

215. 29 U.S.C. § 1144 (1975); ERISA § 514.

216. 29 U.S.C. § 1144(b)(2)(A) (1975); ERISA § 514(b)(2)(A).

217. *But see* National Carriers Conference Committee v. Heffernan, No. N-77-191 (Conn., filed Sept. 29, 1977.) Reported in [Oct. 31, 1977] 161 PENS. RPTR. (BNA) A-11, D-2. Federal District Court refused to rule out suit seeking to enjoin Connecticut from taxing pension benefits. Court upholds right of private plaintiff's to sue to enforce federal preemption.

218. *Hewlett-Packard v. Barnes*, 425 F. Supp. 1294 (N.D. Cal. 1977); *Standard Oil of California v. Agsalud*, No. C-76-2740 CBR (N.D. Cal. filed Nov. 21, 1977).

219. *In re Marriage of Fithian*, 10 Cal. 3d 592, 517 P.2d 449, 111 Cal. Rptr. 369 (1974); *In re Marriage of Karlin*, 24 Cal. App. 3d 25, 101 Cal. Rptr. 240 (1972).

220. *See Hewlett-Packard v. Barnes*, 425 F. Supp. 1294 (N.D. Cal. 1977), for a discussion of the legislative history.

states,<sup>221</sup> or, for that matter, any of the common law states which have taken the most active interest in insuring marital property rights in retirement plans.<sup>222</sup>

It would be an idle exercise to grant the state courts the authority to divide marital property, including rights in a pension, and then refuse the courts the authority, *where appropriate*, to enforce the claims of the non-participant spouse against the plan.<sup>223</sup> Further, the courts must have the opportunity to get an expert opinion of the plan terms, the available options, and the valuation of interests under each optional form of pay-out.<sup>224</sup> Since the plan is already required by ERISA to maintain records of this information,<sup>225</sup> and since the plan fiduciaries are intimately acquainted with the plan as it is administered, it would be an unnecessary expense to the marriage partners and society to have outside "experts," who could not be as disinterested as the plan fiduciaries, retained by the husband and wife to prepare such information for the court. In addition, the states, following the lead of the federal government, have established fair procedures which impinge as little as possible on the plan.<sup>226</sup> To the extent any increase in costs may occur, they will

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221. The floor sponsors were Senators Javitts (New York) and Williams (Delaware), and Representatives Erlenborn (Illinois) and Dent (Pennsylvania). The community property states are Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas and Washington.

222. The common-law states which have been most active in this area are New Jersey, Wisconsin and, to some extent, Colorado.

223. See the effect of providing limited enforcement which finally led the court to break new ground in finding a remedy. *In re Marriage of Fithian*, 10 Cal. 3d 592, 517 P.2d 449, 111 Cal. Rptr. 369 (1974). See *Collida v. Collida*, 546 S.W.2d 708 (Tex. Ct. App. 1977) (Court allowed direct action against public pension board because no other means was available to provide wife with benefit since husband had become a total reprobate). See *In re Marriage of Milhan*, 13 Cal. 3d 129, 528 P.2d 1145, 117 Cal. Rptr. 809 (1974):

*Wissner* does not forbid the states from applying their community property laws to achieve an equitable division of marital property, so long as the operation of those laws does not frustrate congressional intent. *Id.* at 132, 528 P.2d 1147, 117 Cal. Rptr. at 811.

224. See Parts VI, VII and VIII, below, for Valuation, Division and Enforcement of court orders concerning pension interests in divorce.

225. See Part IV above, and, especially, 29 U.S.C. §§ 1021-27 (1975); ERISA §§ 101-07.

226. 1977 Cal. Stats. ch. 860 p. 2522 amending CAL. CIV. CODE §§ 4351 and 4363 and adding 4363.1, 4363.2, and 4363.3. This amendment setting forth some basic guidelines for joinder of plans to a dissolution action arose out of the somewhat *ad hoc* joinders which had occurred under the CAL. R. CT. 1250, 1252 and 1254 (Rev. July 1, 1977) and the case of *In re Marriage of Sommers*, 53 Cal. App. 3d 509, 126 Cal. Rptr. 220 (1975), upholding such joinders.

be minimal.<sup>227</sup> The figures which show previously existing plans being terminated after ERISA<sup>228</sup> may reflect the recognition of employers of alternative employee benefits, such as IRA's,<sup>229</sup> or may reflect the increased rigor of federal regulation in general. There is absolutely no evidence, however, that plans have terminated because of the conferring of marital property rights on non-employee spouses.<sup>230</sup>

The states are the guardians of the family, which is the bastion of our society and the strength of our future. Congress has clearly recognized this role and has equally clearly confirmed to the states their policies of protecting family interests. Only the most hard-hearted would rob the spouse and children of the protection afforded by a retirement plan, which may well be the largest single asset of the family,<sup>231</sup> created by the sweat and tears of many years of communal effort. Certainly Congress has not done so.

### 3. Summary

Putting all the arguments together, the state has historically defended the institution of marriage and each state has seen that the parties to the marriage are protected as to any marital property. To overthrow the role guardian of the family for administrative convenience and to further the relatively recent institution of the retirement plan will require a full and open discussion, which has yet to occur.

Congress has moved to encourage pensions. The states in protecting the family should be careful not to undercut these incentives unless unusual circumstances make an extreme posi-

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The giving of direction to a plan to protect the interests of a spouse originated in *Phillipson v. Board of Administration*, 3 Cal. 3d 32, 473 P.2d 765, 89 Cal. Rptr. 61 (1970) because the husband had left the state and was therefore not amenable to the court's control. See also *Collida v. Collida*, 545 S.W.2d 708 (Tex. Ct. App. 1977).

Where the plan has no costs, an interpleader cannot be objectionable. *Fox v. Smith*, 531 S.W.2d 654 (Tex. Ct. App. 1975). However, the present joinder procedure does not remove the burden of legal and other expenses from the plan.

227. There are presently over 70 million persons covered by one form or another of retirement plan. For 1977 it is estimated that over 1,000,000 divorces occurred and the number is not expected to decrease.

228. See note 188 *supra*.

229. ERISA added I.R.C. §§ 219, 408 and 409 to the Code to allow for the first time employees not covered under a qualified plan to put funds away in their own plan. The deduction limits and certain other rules were amended by the Tax Reform Act of 1976 so that now non-working spouses may also participate.

230. See *Wadsworth v. Whaland*, 562 F.2d 70 (1st Cir. 1977) (court upholds regulation by state of coverage to be provided in all group medical insurance policies. Court indicates no adverse effect on plans by state's regulation).

231. *In re Marriage of Brown*, 15 Cal. 3d 838, 847, 544 P.2d 561, 566, 126 Cal. Rptr. 633, 638 (1976).

tion necessary. The state court should recognize marital rights in pensions because those interests are "earned" by the family unit and because otherwise, society may be burdened with the expense of the non-participant spouse and perhaps of children. Why should "society" bear the brunt of other people's mistakes, at least when they, the husband and wife, have assets available to pick up the tab?

The state court should not routinely make an order against a plan. The plan has information the court needs and which the plan can supply at little or no additional cost. If the plan is forced to respond as a *party* to a legal action however, or if a direct court order is to be issued *against* the trustee or other plan fiduciaries, then administrative expenses will increase markedly, probably to the detriment of the continued growth of plans.

Although these extra expenses are worth the cost, they are avoidable. However, where the participant will not cooperate and the regular administration of the court can be expected to be burdened because of continuing enforcement proceedings, then, after a proper finding of unusual lack of cooperation by the participant, the court could order the interest in the plan to be brought before the court so that the court could *directly* order a proper division. If this happened, tax benefits and personal financial flexibility for the participant could have been lost, but only because the participant chose to be intransigent.

#### PART VI VALUATION

ERISA requires all plans subject to its provisions to provide, at least annually, upon request of a participant, a statement showing the participant's current "accrued interest"<sup>232</sup> in the plan and telling what amount of the accrued benefits is vested, if any, or when vesting will occur.<sup>233</sup> In addition the participant must have ready access to all plan documents including the plan and trust, any collective bargaining agreement, the plan description (Form EBS-1), the latest summary plan description,

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232. "Accrued benefits" are defined differently for defined contribution and for defined benefit plans. 29 U.S.C. §§ 1002(23), 1205(b) (1975); ERISA § 3(23).

233. 29 U.S.C. § 1025(a) (1975); ERISA § 105(b).

the annual report (Form 5500) and other documents by which the organization and operation of the plan is controlled.<sup>234</sup> Whenever a plan is submitted for a determination as to its qualified status under the Internal Revenue Code, an application form is prepared (5300 series of forms) and must be made available to "interested persons", who, generally, are the present employees of the sponsoring employer, any other person with an interest in the plan and all plan participants.<sup>235</sup> Notice to "interested persons" must be delivered before application may properly be received by the IRS.<sup>236</sup>

Each plan participant or beneficiary is entitled to receive a summary plan description (the plan booklet) which is supposed to briefly but thoroughly explain in layman's language precisely what the plan provides, how and by whom it is run and the procedures for obtaining benefits.<sup>237</sup>

After having gathered the information from plan documents and disclosure and having determined the "accrued benefit"<sup>238</sup> of the participant, one must then determine how much, if any, of the accrued benefit is not "property"<sup>239</sup> under the law of the jurisdiction hearing the divorce. Next, for the part that is property one must determine under local law when marital property ceased to be added,<sup>240</sup> and, if different, the date as of which a

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234. 29 U.S.C. § 1024(b) (1975); ERISA § 104(b)(2).

235. I.R.C. § 7476(b)(2); Treas. Reg. § 1.7476-1, Treas. Reg. § 1.7476-2 (19 ).

236. Treas. Reg. § 1.7476-2; Treas. Reg. § 601.201-3(0).

237. The Summary Planning Description Regulations were first issued in 42 FED. REG. 14,266 (1977) in interim and "final" form. They were then reissued in final form (with some minor changes) in 42 FED. REG. 37,178 (1977). These last regulations provide for delivery of the SPD to all plan participants by November 16, 1977, or for "good cause" within 60 days thereafter (January 15, 1978). In addition for certain plans seeking determination letters from the IRS, the SPD's may be delayed for from 90 days to 6 months (depending on type of plan) after a determination letter is received. 28 C.F.R. 2520 (1978).

Incidentally, the regulations call for a "Plain English" booklet (SPD), but take over 20 pages, double column, small print, to say, somewhat imprecisely, exactly how that is to be done!

238. See notes 232, 233, *supra*. The "accrued benefit" of a participant will be the basic information conveyed to a participant by the plan.

239. See Part III, *supra*. "Property" may require "vesting" (Louisiana, perhaps; Wisconsin, Missouri, Idaho, New Mexico); or "matured benefits" (Arkansas, and perhaps, Colorado as to non-contributory plans); or some other feature. For instance, in California disability benefits, not in lieu of retirement payments, are separate property (In re Marriage of Jones, 13 Cal. 3d 457, 531 P.2d 420, 119 Cal. Rptr. 108 (1975)); but in Texas such benefits are community property. (Dominey v. Dominey, 481 S.W.2d 473 (Tex. Ct. App.), *cert. denied*, 409 U.S. 1028 (1972)).

240. In California, after separation, all added property is "separate." CAL. CIV. CODE § 5118 (West Supp. 1978). In New Jersey, accretions continue to be marital property until the petition for divorce is filed. Stern v. Stern, 66 N.J. 340, 331 A.2d 257 (1975).

valuation is to be made.<sup>241</sup> In some cases, especially for military pensions<sup>242</sup> or for defined benefit pension plans, no current valuation will be needed because the court will choose to merely allocate pension interests between separate and community and allow the non-employee spouse a share "when, as and if" paid.<sup>243</sup> More on this mode of division and payout will be discussed later. First, the following questions must be examined: What kind of plan are we valuing? Are there any unusual features, such as "tandem" arrangements with other plans<sup>244</sup> which require inclusion of those plans in making a determination of value? Do pay-out options materially differ from normal plans? Are there any guarantees of payment to heirs or beneficiaries that must be valued?<sup>245</sup>

A defined contribution plan, a plan with all assets allocated to individual participant accounts which accounts are valued at least annually at fair market value,<sup>246</sup> will be valued at the most recent accrued benefit value for the participant, less an appropriate discount, if any, because the participant may forfeit the accrued benefit.<sup>247</sup> Thereafter, an appropriate discount may al-

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241. In California valuation is to be done as close to trial date as possible. CAL. CIV. CODE § 4800 (West Supp. 1978). See *In re Marriage of Imperato*, 45 Cal. App. 3d 432, 119 Cal. Rptr. 590 (1975).

242. *Ables v. Ables*, 540 S.W.2d 769 (Tex. Ct. App. 1976).

243. This mode of division of benefits is especially useful where non-vested pension interests are being divided. This is so because the value of such interests is highly speculative, since it depends on the continuing work of the employee/spouse with the employer sponsoring the plan. See *In re Marriage of Brown*, 15 Cal. 3d 838, 848, 544 P.2d 561, 567, 126 Cal. Rptr. 633, 639 (1976).

244. See *M.S.D. Inc. v. United States*, 434 F. Supp. 85 (N.D. Ohio 1977). Employee was entitled to a non-qualified deferred compensation payment if he lived. If he died it was forfeited. However, if he died there was a widow's payment of approximately the same value as the life-time payments.

245. In California the "terminable interest rule" (see discussion in Part III, *supra*) limits the continuing interest of the non-participant spouse to the joint lives of the participant and spouse. *Benson v. City of Los Angeles*, 60 Cal. 2d 355, 384 P.2d 649, 33 Cal. Rptr. 257 (1963). There is therefore no interest to be inherited through the spouse. The law is to the contrary in Texas: *Taggart v. Taggart*, 552 S.W.2d 422 (Tex. Ct. App. 1977); Idaho: *Ramsey v. Ramsey*, 96 Idaho 672, 535 P.2d 53 (1975); Arizona: *Everson v. Everson*, 24 Ariz. App. 239, 537 P.2d 624 (1974); Louisiana: *Laffite v. Laffite*, 253 So. 2d 120 (La. 1971), and perhaps other jurisdictions.

246. 29 U.S.C. §§ 1002(23), (34), 1023(b)(3)(A), 1025(a) (1975); ERISA §§ 3(23), (24), 103(b)(3)(A), 105(a), Rev. Rul. 70-125, 1970-1 C.B. 87; see also IR-1631, allowing "suspense" accounts for defined contribution plans to comply with I.R.C. § 415 limitations. See also, Rev. Rul. 74-340, 1974-28 C.B. 26.

247. *Mora v. Mora*, 429 S.W.2d 663 (Tex. Ct. App. 1968), *Blitt v. Blitt*, 139 N.J.

so be taken to reflect the present value versus future value of the benefit.<sup>248</sup>

In a defined benefit plan, a plan guaranteeing a future benefit based on years of service and average compensation, but without individual accounts and without allocation of assets (except upon separation from the plan) to individual participants, it is necessary to obtain the services of a qualified actuary well-acquainted with retirement plans who may calculate the level of benefit "accrued" (earned) to date, its future value as of projected retirement date and its present value.<sup>249</sup> Such calculation may take into consideration actuarial assumptions such as (a) discount for future value, generally, approximating an interest return on long investments; (b) mortality expectations, if relevant and (c) other factors reflecting on probability of forfeitures.<sup>250</sup> Also, if benefits finally payable are to use final average pay or some similar formula, the actuary may include an assumption about increasing compensation to normal retirement age.<sup>251</sup> In some jurisdictions a further discount may be in order

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Super. 213, 218-19, 353 A.2d 144, 147 (1976). In re Marriage of Brown, 15 Cal. 3d at 848, 544 P.2d at 567, 126 Cal. Rptr. at 639.

248. No case so far noted seems to have considered a *premium* in evaluating an interest in the plan. Such a premium may be justified because earnings will accumulate without current tax, plan interests will be free from the liens of creditors, and interests when received will receive substantial tax benefits. To be balanced against these very real advantages will be the detriment that the funds will not be available until a later date.

249. For an excellent article on the valuation of benefits, see Presentation of Commissioner Herbert Ross, *Valuing and Dividing Pension Benefits Upon Dissolution of Marriage*, 1976 FAM. LAW SYMP. 213 (L.A. Co. B.A. 1976 and Supp. 1977). A substantially similar article by the same author appears in Ross, *Handling Retirement Plans in Marriage Dissolution*, Practical Law Course, Appendix A-2 (1977). A well-reasoned article on actuarial valuations appears in Projector, *Valuation of Retirement Benefits in Marriage Dissolutions*, Practice Law Course, Appendix A-1 originally published in 50 L.A.B. BULL. 229 (1975). See also in the same publication Firestone, *Valuation of the Community Interest of Retirement Benefits Upon Dissolution of Marriage*, 50 L.A.B. BULL. 229 (1975). For a straight forward presentation of the available choices in actuarial methods to value interests in a plan see POMERANZ, RAMSEY & STEINBERG, PENSIONS: AN ACCOUNTING AND MANAGEMENT GUIDE ch. 2 (1976).

Recently the Interprofessional Pension Actuarial Advisory Group released its report *Exposure Draft on Standardizing Actuarial Terms* [Oct. 21, 1977] PENSION AND PROFIT SHARING RPTR. (P-H) §§ 135, 346. This somewhat more technical document explains the various terms in common usage and attempts to unify the underlying concepts into a logical system which may be commonly understood by all involved in the field.

250. See Firestone, *supra*, in particular; and the Practical Law Course, *supra* in general.

251. Compare Schappell v. Schappell, 544 S.W.2d 807 (Tex. Ct. App. 1977) (Spouse to share in benefit based on rank of officer as of divorce), with Judd v. Judd, 68 Cal. App. 3d 515, 137 Cal. Rptr. 318 (1977) (the "Momentum Theory"—each month of effort to earn a pension builds the momentum to reach the final level—no period is worth more than any other).

to reflect the income tax cost to the participant as if the participant were to incur the tax and then make a net, nontaxable distribution to the spouse.<sup>252</sup>

There are a number of special circumstances that will need to be considered when making a valuation. These include optional pay-outs, possible early retirement, "non-property" ancillary benefits available "in lieu" of regular pensions,<sup>253</sup> possible alternative claims on the plan benefits,<sup>254</sup> prior marital divisions, if any, obligations of spousal or child support which may subsequently be allowed against plan benefits<sup>255</sup> and other peculiar features of which the parties to the divorce may be aware.

Perhaps as important as any other factor in determining the proper mode of valuation of the pension interest is a knowledge of the *expected* mode of division to be exercised by the court. As an example, in Idaho it is the normal rule of the court to require immediate, or as close to it as possible, division of community property interests.<sup>256</sup> Accordingly, the appraiser-actuary, will have to establish a current value so that the court may give judgment for the community property share of the spouse in an amount equal to the proper division.<sup>257</sup>

On the contrary, the normal procedure in Louisiana is to confirm to each spouse their continuing share interest in the

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252. *Troutenko v. Troutenko*, 503 S.W.2d 686 (Tex. Ct. App. 1974) *cf.* *Kruger v. Kruger*, 139 N.J. Super. 413, 354 A.2d 340 (1976) (consider tax cost when valuing marital interest) with *Kruger v. Kruger*, 73 N.J. 464, 375 A.2d 659 (1977) and *Stern v. Stern*, 66 N.J. 339, 331 A.2d 256 (1975) (the valuation does *not* consider tax cost of distribution).

253. *In re Marriage of Olhausen*, 48 Cal. App. 3d 190, 121 Cal. Rptr. 444 (1975) (disability benefits elected by participant in lieu of retirement pension is separate property). *But see* *In re Marriage of Mueller*, 70 Cal. App. 3d 66, 137 Cal. Rptr. 129 (1977) (only disability payment in excess of normal pension is separate property).

254. *See* 29 U.S.C. § 1056(d) (1975); ERISA § 206(d); I.R.C. § 401(a)(13), which allow a lien in favor of the plan for loans to participants.

255. *See, e.g.*, CAL. CODE CIV. PROC. § 690.18 (West Supp. 1977) exempts plan interests from attachment or garnishment *except* for support obligations. *See also* Conference Committee Report, 29 U.S.C. § 1056 (1975), wherein a garnishment is distinguished as an involuntary alienation and therefore not within the ban of 29 U.S.C. § 1056(d) (1975).

256. *Ramsey v. Ramsey*, 96 Idaho 672, 679, 535 P.2d 53, 60 (1975).

257. *Id.* The court in *Ramsey*, entered a judgment against husband (the participant) for the wife's share in the pension, to bear 6% to 8% interest until paid, and to be paid "within a reasonable time."



pension as joint owners.<sup>258</sup> In one case the court allocated interests between conflicting claimants based on contributions made at each period during the time the pension was maintained as compared to all contributions which had been made.<sup>259</sup> In another case, the court determined the wife's relative share based on discounted present and future values.<sup>260</sup> In both cases an immediate division of interests was neither expected nor, evidently, allowable.

In California, prior to *In re Marriage of Brown*,<sup>261</sup> only "vested" pension interests were treated as property.<sup>262</sup> Under those circumstances the preferred method of division was to value currently the pension interest and then to allocate *other* community property to the non-employee spouse instead of having the parties retain a continuing partnership relationship in the property.<sup>263</sup> However, since *Brown*, non-vested interests in plans may be included. This makes current valuation exceptionally difficult because it will necessarily involve an estimation of the probability of the participant spouse staying on the job.<sup>264</sup> Under such circumstances, the California courts have utilized the "time rule" to allocate community property interests in the total pension, but thereby avoid "valuation" until the time pen-

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258. T.L. James & Co. Inc. v. Montgomery, 332 So.2d 834 (La. 1976).

259. *Id.* at 852-53. In effect, when the plan interest vests, it is distributed retroactively to all persons having an interest.

260. Lynch v. Lawrence, 293 So.2d 598 (La. App. 1974).

261. 15 Cal. 3d 838, 544 P.2d 561, 126 Cal. Rptr. 633 (1976).

262. French v. French, 17 Cal. 2d 775, 112 P.2d 235, Annot., 134 A.L.R. 366 (1941), *overruled*, *In re Marriage of Brown*, 15 Cal. 3d 838, 544 P.2d 235, 126 Cal. Rptr. 633 (1976).

263. Phillipson v. Board of Administration, 3 Cal. 3d 32, 473 P.2d 765, 89 Cal. Rptr. 61 (1970).

264. *In re Marriage of Brown*, 15 Cal. 3d at 848 n.10, 544 P.2d at 567 n.10, 126 Cal. Rptr. at 689 n.10:

(3) In dividing nonvested pension rights as community property the court must take account of the possibility that death or termination of employment may destroy those rights before they mature. In some cases the trial court may be able to evaluate this risk in determining the present value of those rights. (citations omitted). But if the court concludes that because of uncertainties affecting the vesting or maturation of the pension that it should not attempt to divide the present value of pension rights, it can instead award each spouse an appropriate portion of each pension payment as it is paid.<sup>10</sup> This method of dividing the community interest in the pension renders it unnecessary for the court to compute the present value of the pension rights, and divides equally the risk that the pension will fail to vest.

10. Our suggestion in *Phillipson v. Board of Administration*, *supra*, 3 Cal. 3d 32, 46, that when feasible the trial court should award the employee all pension rights and compensate his spouse with other property of equal value was not intended to tie the hands of the trial court. That court retains the discretion to divide the community assets in any fashion which complies with provisions of Civil Code Section 4800.

sion benefits are actually paid.<sup>265</sup>

The "time rule" allocates as community assets that part of the pension "earned" during coverture (marriage) as compared to the total period spent in earning the pension.<sup>266</sup> As an example, if a participant now 55, expected to retire at 65, had 15 years in the plan, but had been married longer than that, *at retirement* 15/25 of the plan would have been earned during the marriage and one-half of that, or 30%, would be spouses community interest.<sup>267</sup> In California, the courts consider time to be equal in value and therefore will allow the non-employee spouse to share in increased pension benefits because of future salary or rank promotions.<sup>268</sup> In essence, the courts leave inviolate the right of the participant to choose a retirement date but, in exchange,

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265. *Judd v. Judd*, *supra* note 251; *In re Marriage of Lopez*, 38 Cal. App. 3d 93, 113 Cal. Rptr. 58 (1974), for an alternative means of allocating between community and separate property. *See also*, *In re Marriage of Bruyl*, 47 Cal. App. 3d 201, 120 Cal. Rptr. 597 (1975) rejecting the "insurance premium" allocation between community and separate property set forth in *Polk v. Polk*, 228 Cal. App. 2d 763, 39 Cal. Rptr. 824 (1964).

266. *In re Marriage of Anderson*, 64 Cal. App. 3d 36, 134 Cal. Rptr. 252 (1976); *In re Marriage of Adams*, 64 Cal. App. 3d 181, 134 Cal. Rptr. 298 (1976); *Matter of Marriage of Gongwer*, 554 S.W.2d 49 (Tex. Ct. App. 1977).

267. California requires as nearly an equal division as possible. CAL. CIV. CODE § 4800 (West Supp. 1978). The "time method" of allocation implies equal value for all years of service. In other words, it implies pension benefits are a reward for seniority, rather than compensation for any particular period or periods of employment. *Alabama Power Co. v. Davis*, 97 S. Ct. 2002, 2009 (1977).

Other aspects of pension plans like the one established by petitioner<sup>18</sup> suggest that the "true" nature of the pension payment is a reward for length of service.

18. Petitioner's plan is a "defined benefit" plan, under which the benefits to be received by employees are fixed and the employer's contribution is adjusted to whatever level is necessary to provide those benefits. The other basic type of pension is a "defined contribution" plan under which the employer's contribution is fixed and the employee receives whatever level of benefits the amount contributed on his behalf will provide. *See* 29 U.S.C. § 1002(34)(35); Note, *Fiduciary Standards and the Prudent Man Rule Under the Employee Retirement Income Security Act of 1974*, 88 Harv. L. Rev. 960, 961-63 (1975). We intimate no views on whether defined contribution plans are to be treated differently from defined benefit plans under the Military Service Act. *Id.* at 2009 n.18.

*See also* *Judd v. Judd*, *supra* note 251, (The Momentum Theory) and *Schappell v. Schappell*, 544 S.W.2d at 809.

Since all of the military retirement benefits are being earned throughout the twenty years' service, and the last day of the last year is no more important than the first day of the first year, those benefits should be recognized as a valuable property right, and should be considered as vested when the service begins and earned when the twenty years are completed.

268. *Judd v. Judd*, *supra* note 251; *In re Marriage of Freiberg*, 57 Cal. App.

exact continuing participation for the spouse.<sup>269</sup> In Texas, the "time rule" is also used, but the spouse does not share in promotions.<sup>270</sup> In those states which favor immediate pay-out, a current valuation will fix forever the rights between the parties and terminate their partnership. This, after all, is what a divorce is about.<sup>271</sup>

In California, there is a further complicating factor: if no immediate pay-out of the spouse is made, then the interest of the non-employee spouse *terminates* upon the death of *either* husband or wife (known as the "terminable interest rule").<sup>272</sup> This court-created theory arose out of the ancillary benefit of a "widow's" pension under the government plans which were first considered by the courts. It has been severely criticized since<sup>273</sup> and the rule has no general application in any other jurisdiction.<sup>274</sup>

Before valuing a pension interest, the court, counsel and parties must know what it is and must know it is "property" under state law. This requires careful gathering of information,<sup>275</sup> most of which can be obtained from the information required to be retained by the plan. Of the various methods available for valuation and of the factors to be considered in making that determination, the appraiser should start with a view to the expected *mode of division*. This requires research of prior

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3d 304, 127 Cal. Rptr. 792 (1976).

269. In re Marriage of Brown, 15 Cal. 3d at 849, 544 P.2d at 568, 126 Cal. Rptr. at 690; In re Marriage of Freiberg, 57 Cal. App. 3d at 311, 127 Cal. Rptr. at 797, citing Waite v. Waite, 6 Cal. 3d 461, 492 P.2d 13, 99 Cal. Rptr. 325 (1972). *But see* In re Marriage of Martin, 50 Cal. App. 3d 581, 123 Cal. Rptr. 634 (1975), where the court noted husband's control and therefore ordered him to begin *immediate* payments to wife akin to what she would have received if he had chosen to retire.

270. Schappell v. Schappell, *supra* note 251; Rennick, *Apportionment of Community Property Interests in Prospective Retirement Benefits Upon Divorce*, 9 ST. MARY'S L.J. 72, 76 (1977).

271. J. Sutherland, *Community Property: Non-vested Retirement Benefits—In re Marriage of Brown* (1976), 15 Cal. 3d 838, 126 Cal. Rptr. 633," Vol. 2, No. 1 FAM. L. NEWSLETTER 19, 20 (Spring 1976).

272. Waite v. Waite, *supra* note 269; Benson v. City of Los Angeles, *supra* note 245. *Cf. In re Marriage of Bruyl* with *Polk v. Polk*, *supra* note 265. The "insurance premium" rule set forth in *Polk*, but rejected in *Bruyl*, allocates death benefits from insurance based on the source of funds to pay insurance premiums.

273. In re Marriage of Peterson, 41 Cal. App. 3d 642, 656, 165 Cal. Rptr. 184, 194 (1974); Ramsey v. Ramsey, *supra* note 245, 535 P.2d at 65 (dissent). *See also*, commentary above in Part III of this article.

274. The "terminable interest rule" was recognized at one time in New Jersey. *See*, Kruger v. Kruger, 139 N.J. Super. 413, 354 A.2d 340 (1976), overruled on this issue 73 N.J. 464, 375 A.2d 659 (1977).

275. *See*, Firestone, *supra* note 249 and Part IV above. The careful gathering of answers requires a more than passing acquaintance with the questions.

cases or a knowledge of current court practice. In any case, a valuation should serve the purpose of facilitating the property division. Now that property rights include intangible and unmeasurable elements such as unvested pensions and numerous optional modes and dates of pay-out, the courts seem to be more inclined to leave the parties in partnership as to the pension in lieu of making an arbitrary division which can almost be assured of punishing one or the other of husband or wife.

#### PART VII DIVISION OF PENSION INTERESTS

Once a court has determined that an interest in a pension is marital or community property and has valued it, or has chosen to delay such evaluation, it must decide an appropriate form of division. In some states, the court will order an immediate division to be funded by *other* property.<sup>276</sup> This step is effective provided there is other property and provided also that the evaluation was "fair." For instance, if a court should decide to order the participant spouse to pay the non-participant one-half the current value of a profit sharing interest, and then the participant should lose such an interest because of a break in employment, the participant has *not* been fairly treated. To the contrary, if a deep discount is taken because of the unexpected future vesting of the interest, if the interest does vest, the non-participant may be unfairly treated.<sup>277</sup> An immediate division works best close to retirement where contingencies are few and especially where the participant has the *option* of realizing the benefit or not.<sup>278</sup> Alternatively, if a current valuation can be reached and if the pension interest is "matured"<sup>279</sup> so that the participant may choose to receive benefits immediately, or

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276. Arizona: *Everson v. Everson*, 24 Ariz. App. 239, 537 P.2d 624 (1975); Idaho: *Ramsey v. Ramsey*, 96 Idaho 672, 535 P.2d 53 (1975); Wisconsin: *Parsons v. Parsons*, 68 Wis. 2d 744, 229 N.W.2d 629 (1975). *See also*, *Phillipson v. Board of Administration*, 3 Cal. 3d 32, 473 P.2d 765, 89 Cal. Rptr. 61 (1970).

277. Sutherland, *Community Property: Nonvested Retirement Benefits—In re Marriage of Brown* (1976) 15 Cal. 3d 838, 126 Cal. Rptr. 633," Vol. 2, No. 1 FAM. L. NEWSLETTER (Spring 1976).

278. *See, e.g.*, *Ramsey v. Ramsey*, *supra* note 276.

279. *In re Marriage of Brown*, 15 Cal. 3d 838, 544 P.2d 561, 126 Cal. Rptr. 633 (1976). "[A] vested pension right must be distinguished from a 'matured' or unconditional right to immediate payment." *Id.* at 842, 544 P.2d at 563, 126 Cal. Rptr. at 635.

choose not to do so, the court may order the participant to either retire and begin payments to the spouse or, pay to the spouse what benefits otherwise would have been payable if retirement had begun currently.<sup>280</sup> The rule may be too harsh for some courts if it would force the participant to leave the plan.<sup>281</sup> For these courts "current pay-out" may be made by counting the pension value in making division of other available property.<sup>282</sup> In other states such "property" as a pension may also be considered in making awards for support,<sup>283</sup> but in California, a decision whether or not to award support may *not* be based on a division of property.<sup>284</sup> When a pension is too difficult to value or when there are no other assets to allocate in exchange for an assignment to the participant of the entire plan interest,<sup>285</sup> the courts have been increasingly prone to favor a "when, as and if" division calling for pay-out to the non-employee spouse only

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280. *In re Marriage of Martin*, 50 Cal. App. 3d 581, 123 Cal. Rptr. 634 (1975). *Cf. In re Marriage of Freiberg*, 57 Cal. App. 3d 304, 312, 127 Cal. Rptr. 792, 798 (1976) where the court stated:

As a general rule, in selecting a method to effect distribution of the community interest in retirement rights the court acts in the exercise of judicial discretion and its determination respecting such will not be interfered with on appeal unless an abuse of discretion is shown. The criterion governing judicial action is reasonableness under the circumstances. The method adopted may vary with the facts in each case.

*See In re Marriage of Wilson*, 10 Cal. 3d 851, 519 P.2d 165, 112 Cal. Rptr. 405 (1974) where the court denied a "discount" to reflect future versus present value of pension interest when "realization" was within husband's control; *see also Taylor v. Taylor*, 449 S.W.2d 368 (Tex. Ct. App. 1970).

281. *See Taylor, supra* note 280, wherein the court recognized appellant's argument that withdrawal from the plan constituted a "penalty" but nevertheless, the husband was forced out of the plan in order to pay his wife her interest in the plan. *Cf. Pinkowski v. Pinkowski*, 67 Wis. 176, 226 N.W.2d 518, 520 (1975) wherein the court noted:

The trial court in its directions for findings of fact and conclusions of law said, 'It is clear that Mr. Pinkowski should not be required to terminate his employment so that the proceeds of his retirement program would be available for division.' We agree. However, the present value of the fund as determined by the trial court must be included in the assets to be divided between the parties.

282. *Pinkowski v. Pinkowski, supra* note 281, and *Parsons v. Parsons*, 68 Wis. 2d 744, 229 N.W.2d 629 (1975) where the court used the "legal rate" of 5% to determine the current plan value.

283. Colorado: *In re Marriage of Ellis*, 538 P.2d 1347 (Colo. App. 1975) (military non-contributory pension not "property"); *In re Marriage of Pope*, 544 P.2d 639 (Colo. App. 1975) (Government contributory pension is "property"); Missouri: *In re Marriage of Powers*, 527 S.W.2d 949 (Mo. App. 1975) (unmatured pension is "property" to be divided and/or considered when setting support); Michigan: *Hutchins v. Hutchins*, 71 Mich. App. 361, 248 N.W.2d 272 (1977) (contributory government pension, refundable, is "property").

284. *In re Marriage of Brown, supra* note 279, 15 Cal. 3d at 848, 544 P.2d at 567, 126 Cal. Rptr. at 639; *In re Marriage of Cobb*, 68 Cal. App. 3d 855, 137 Cal. Rptr. 670 (1977).

285. *See In re Marriage of Milhan*, 13 Cal. 3d 129, 528 P.2d 1145, 117 Cal. Rptr. 809 (1974), *cert. denied* 421 U.S. 976 (1974) where the court divided other commu-

when the participant chooses to retire.<sup>286</sup> When a division is to be made and under what terms is relatively straight forward. Once a proper valuation and definition of the property rights is available to the court it may decide in the best interest of the community and in accord with state law how such a division is to occur. However, what if the property is ignored or, by mistake, excluded from the divorce consideration? In community property states, the property is held in a tenancy in common, subject to a subsequent action of division.<sup>287</sup> Upon the partition of such tenancy there will be an equal division.<sup>288</sup> Recognizing

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nity property after valuing a National Service life insurance policy and assigning as a part of his share to husband—an indirect equalization.

286. In re Marriage of Freiberg, 57 Cal. App. 3d 304, 127 Cal. Rptr. 792 (1976) (husband and wife as partners, sharing profits and losses); *Mora v. Mora*, 429 S.W.2d 660 (Tex. Ct. App. 1968); and see Rennick, *Apportionment of Community Property Interests in Prospective Military Retirement Benefits Upon Divorce*, 9 ST. MARY'S L.J. 72, 77 n.27 (1977). Blitt v. Blitt, 139 N.J. Super. 213, 353 A.2d 144 (1976) (wife to share profits and losses of combined defined contribution plans); *Laffite v. Laffite*, 253 So.2d 120 (La. App. 1971) (total partnership between husband and wife in profit sharing plan); *Lynch v. Lawrence*, 293 So.2d 598 (La. App. 1974) (same as *Laffite*, except court specifically orders valuation as of retirement by present values at that date); *Cearley v. Cearley*, 544 S.W.2d 661 (Tex. 1976) (nonvested military pension to be shown when, as and if payments received). See Rennick, *supra* at 76. Query: whether base for dividing pension is at divorce or at retirement. *But see* Schappell v. Schappell, 544 S.W.2d 807 (Tex. Ct. App. 1977) (division as of base at divorce); and In re Marriage of Pea, 17 Wash. App. 728, 566 P.2d 212 (1977) (division as of divorce date).

287. In re Marriage of Cobb, *supra* note 284; In re Marriage of Brown, *supra* note 284; *Taggart v. Taggart*, 552 S.W.2d 422 (Tex. 1977) ("time rule" for military pensions); *Busby v. Busby*, 457 S.W.2d 551 (Tex. 1970) (military disability pension); *Constance v. Constance*, 537 S.W.2d 488 (Tex. Ct. App. 1976) (there is no statute of limitations for a partition of a tenancy in common in a pension because the right is a continuing right). See also, T.L. James & Co., Inc. v. Montgomery, 332 So.2d 834, 851 n.2 (La. 1975).

Although at the time of dissolution of the community, the right to share in the funds' proceeds may be a mere expectancy without marketable order or redeemable cash value, the wage earner and his spouse may at that time agree upon its value and partition it, along with the other assets of the community. In practice, usually this is done after a separation or divorce, by the wage earner paying his spouse for the discounted value of her half of the community asset, either by cash or by the spouse receiving in exchange an agreed-upon equivalent share of other community assets. See Comment, 25 La. L. Rev. 108, 140-141 (1964).

In the present case, however, the husband did not settle with his first wife for her interest in the contractual right to receive these proceeds eventually, and therefore, to the extent of the value of the contribution of the first community in these funds, the first community's interest remains an unpartitioned assets of that community. See *Lanlinais v. David*, 289 So.2d 343 (La. App. 3d Cir. 1974).

288. See *Taggart v. Taggart*, *supra* note 287 at 424-25 (dissenting opinion).

this possibility, the Supreme Court of California in *Brown*,<sup>289</sup> limited the retroactive effect of the ruling so as not to open up long-since final dissolution decrees.

A court may order a judgment or other accounting by one spouse to another to properly distribute marital property, in Idaho,<sup>290</sup> but may not in California.<sup>291</sup> The California courts reason such a division unfairly allows community assets to one spouse by substituting the less valuable personal note of the other spouse. In difficult cases, courts make unusual decisions. When husband ran off with all but wife, the California court on behalf of wife, and because husband was out-of-reach, ordered the state pension plan to make payment to wife.<sup>292</sup> Since husband had, by his conduct, dissipated all other community property, the court awarded his entire pension interest to wife and further took upon itself the opportunity to allow such court supervision of participant elections to protect the community.<sup>293</sup> In short, the court, of necessity, directed a pension plan to pay to wife even though the plan had a contract giving husband the election only. When limited to its facts, i.e., an errant and unconscionable husband, it is clear that the court had little choice. Unfortunately, this difficult case has been cited for authority in subsequent cases on the point when the subsequent cases have no similar facts dictating judicial activism. It was this difficult case which is so often quoted to favor as the preferred mode of distribution, the assignment to participant of the plan interest,

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At the time of their divorce in 1968, military retirement benefits payable in the future were assumed to be of a contingent, non-vested character, and therefore outside the jurisdictional power of the court, and accordingly not subject to division by inclusion in court approved and/or drafted property settlements. Notwithstanding that assumption, which we now recognize to have been erroneous, courts were then free to make virtually any distribution of the remaining community and separate property as seemed just and appropriate, in order to do equity among the partners. We cannot know to what extent if any, the expectation of retirement benefits influenced the various courts in dividing properties among divorcing partners. The bounds of judicial discretion in divorce property settlements have known little appellate limitation or review, and what courts could not do officially, they have often done unofficially. It is more than a 'reasonable assumption' that such benefits have been, in many if not most instances, of major consideration to the court in effecting a property settlement between partners.

289. *Supra* note 279 at 851, 544 P.2d at 569, 126 Cal. Rptr. at 641: "Our decision will apply retroactively, however, to any case in which the property rights arising from the marriage have not yet been adjudicated to such rights if such adjudication is still subject to appellate review, or if in such adjudication the trial court has expressly reserved jurisdiction to divide pension rights."

290. *Ramsey v. Ramsey*, *supra* note 276 at 679, 535 P.2d at 60.

291. *In re Marriage of Tammen*, 63 Cal. App. 3d 927, 134 Cal. Rptr. 161 (1976); *In re Marriage of Hopkins*, 74 Cal. App. 3d 591, 141 Cal. Rptr. 597 (1977).

292. *Phillipson v. Board of Administration*, *supra* note 276.

293. *Id.* at 48, 473 P.2d at 775, 89 Cal. Rptr. at 71.

with a compensating grant of other community assets to spouse.<sup>294</sup> As noted above, such a mode of distribution becomes a "gamble" for each spouse when unvested benefits are involved.

One final word should be noted about terminable interests to the non-participant spouse. In establishing "equal value" for divisions of community property, as required by statute, how many California courts have actually evaluated the *increased* value of the participant's spouse "inheritance" upon the participant's or the non-participant's death? Equality requires such a calculation. If actually applied the result would be a large, perhaps a much larger, share of each pension payment being made to the non-participant so long as both spouses survived.

#### PART VIII ENFORCEMENT

Once the court has determined there is an interest in the pension plan and has determined its value and made an order as between the parties to the divorce concerning the future respective rights in the pension the question then arises, how may the court's order be enforced?<sup>295</sup> Additionally, if the parties have discussed the matter and come to an agreement, can they ask the court to make a determination binding on the plan itself? Even if they do not agree, can the court make such an order?

In California, and probably in other jurisdictions, court rules allow the *joinder*<sup>296</sup> of persons who claim any interest in the property or whose presence before the court would be indispensable for a determination or necessary to the enforcement of court orders.<sup>297</sup> However, can a court order a plan to account to a person other than a participant or beneficiary? After all, plans subject to ERISA are required to have language which would prohibit any assignment or alienation of any interest in the

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294. *Id.* at 46, 473 P.2d at 764, 89 Cal. Rptr. at 70. *See* In re Marriage of Brown, *supra* note 280 at 848 n.10, 544 P.2d at 565 n.10, 126 Cal. Rptr. at 639 n.10.

295. Most of Part VIII will focus on California enforcement procedures. There is a large variation between individual states on how court orders are made and enforced. In the area of family law, this tendency is even more pronounced because of the different backgrounds of the various states in defining the marriage relationship. *See* Part II, *supra*.

296. CAL. R. CT. 1250-55 (Rev. July 1, 1977).

297. *Id.* at 1254.



plan?<sup>298</sup> Not only is such a clause mandatory,<sup>299</sup> but ERISA also contains language that purports to preempt the court from making any such ruling.<sup>300</sup> California and other state courts have ruled that the ERISA prohibition does not apply to community property interests because a spouse claims as an owner and *not* as a creditor.<sup>301</sup> Additionally any pre-emption provision which Congress might wish to institute would need to be clearer and more specific than the one presently in ERISA.<sup>302</sup>

The court may join the plan and/or trust as a necessary party.<sup>303</sup> What if the court order conflicts with the plan or what if the court decides to be nice to the non-employee spouse by ordering an early pay-out? At one time that was a problem, but California has changed the law. Now, a plan has the right to have been served and formally joined and then may raise as a defense against any such order, among other defenses, that the court order would expand the rights of the participant or spouse or both.<sup>304</sup> In other words, the plan must be formally joined and the court will only make an order which will not expand the obligations of the plan.

The plan is still to operate under the federal law, solely and

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298. 29 U.S.C. § 1056(d)(1) (1975); ERISA § 206(d); I.R.C. § 401.

299. ERISA covers nearly all plans, whether or not "tax qualified" excepting for the most part only government plans and some church plans. 29 U.S.C. § 1003(b) (1975); ERISA § 4(b).

300. 29 U.S.C. § 1144 (1975); ERISA § 514. See discussion in Part V, *supra*.

301. This is a legal fiction, utilized by the court to deftly avoid a confrontation with the clear language of ERISA. In re Marriage of Fithian, 74 Cal. App. 3d 397, 403, 141 Cal. Rptr. 506, 512 (1977). "A spouse with a community property interest in the other spouse's retirement pay 'claims not as a creditor, but as an owner with a present, existing and equal interest,' (citations omitted)."

302. Or, at least, that is the opinion of the California courts. See, In re Marriage of Milhan, 13 Cal. 3d 129, 132, 528 P.2d 1145, 1147, 117 Cal. Rptr. 809, 811, *cert. denied* 421 U.S. 976 (1974), "Clearly, given the express congressional intent" the state courts would have to bow to the supremacy of the federal jurisdiction. See also Carlson v. Carlson, 11 Cal.-3d 474, 521 P.2d 1114, 113 Cal. Rptr. 722, *cert. denied* 419 U.S. 1105 (1974).

303. In re Marriage of Sommers, 53 Cal. App. 3d 509, 126 Cal. Rptr. 220 (1975) applying CAL. R. CT. 1250, 1252, and 1254 [Rev. July 1, 1977]. The court accepts joinder as proper because, "The trust holds community assets." However, this is not so. In fact the community asset is the *interest in the plan* and is akin to a share of stock in a corporation (for these purposes, the analogy may work. For *Daniel v. Int'l Brotherhood of Teamsters, supra*, the interest in a plan is *not* the kind of "security" intended to be subjected to the watchful eye of the SEC). Just as a couple which owns, say, a share of General Motors stock cannot join that corporation to their divorce (dissolution) action, so should the trust holding the plan assets be free from joinder. The effect of allowing joinder is to materially increase the legal and other costs for the plan which now must become a party to a marital dispute which truly does not concern it. To date, the courts do not agree with this analysis.

304. 1977 Cal. Stats. ch. 860 *amending* CAL. CIV. CODE §§ 4351, 4363 (West 1970) and *adding* CAL. CIV. CODE §§ 4363.1, 4363.2, 4363.3 (West Supp. 1978).

exclusively in the interest of the participants and their beneficiaries.<sup>305</sup> A federal district court in Texas has held that spouses of participants are neither participants nor beneficiaries.<sup>306</sup> How can the plan fulfill its obligation to the court and still follow federal law? The answer is that federal law is not pre-eminent in divorce matters.<sup>307</sup> The states have jurisdiction in that area and, having such jurisdiction, impliedly have the right and power to enforce their own orders. A federal district court in California has twice ruled in favor of state authority to determine spousal rights in pension plans incident to a divorce.<sup>308</sup>

The issue of whether a pension plan may be joined in a state court dissolution proceeding has, at least temporarily, been resolved in favor of state jurisdiction.<sup>309</sup> If the court issues its order directly to the plan, then compliance can be assured. However, if the plan is not amenable to service or otherwise has not been joined, what then? The order of the court for a division of property was originally thought not to be enforceable by contempt<sup>310</sup> because enforcement by imprisonment would violate the constitutional prohibition against imprisonment for

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305. 29 U.S.C. § 1104 (1975); ERISA § 404(a)(1).

306. *Kerbow v. Kerbow*, 421 F. Supp. 1253 (N.D. Tex. 1976).

307. In re Marriage of Pardee, 408 F. Supp. 666 (C.D. Cal. 1966). See Paoli, *Pension Rights and Community Property: From French to Brown*, 4 WEST. ST. U.L. REV. 91, 102 (1976) discussing *Pardee*. In *So. Cal. IBEW v. Superior Court*, No. CV 76-1768-F (C.D. Cal. filed July 16, 1976). Judge Ferguson again ruled ERISA was not intended to preempt state law in the domestic relations proceedings. This opinion does not appear in the official reports (Federal Supplement), but was reported in [Sept. 27, 1976] 105 PENS. RPTR. (BNA) D-18.

308. *Id.* at 669 n.5, 29 U.S.C. § 1055(a) (1975): "[ERISA § 205] provides that annuity plans must provide for payment of benefits in a form having the effect of a qualified joint and survivor annuity. The trust divines an intention from this section (which appears merely to attempt to provide protection for surviving spouses) to invalidate community property laws. If that was the intention Congress surely selected an indirect and cryptic method of expressing its views. Even more remote is the assertion that the community property laws operate as prohibited assignments in derogation of 29 U.S.C. § 1056(d). See *Phillipson v. Board of Administration*, 3 Cal. 3d 32, 473 P.2d 765, 89 Cal. Rptr. 61 (1970). Of course, if Congress intended to regulate this area, it has the power to do so. Cf. *Wissner v. Wissner*, 338 U.S. 655 (1950); *Hoffman v. United States*, 391 F.2d 195 (9th Cir. 1968).

309. See the forms for joinder in the Practical Law Course, *supra* note 249, discussed in Part VII.

310. Presentation of Herbert Ross, *Contempts*, 1976 FAM. LAW SYMP. 251, 256 (L.A. Co. B.A. 1976 and Supp. 1977) citing *In re Fontana*, 24 Cal. App. 3d 1008, 101 Cal. Rptr. 465 (1972).

debt.<sup>311</sup> However, contempt was often used to enforce payment of child or spousal support, which were treated as fulfillment of a legal obligation and not as payment of a debt.<sup>312</sup> Prior to recent statutory amendment, pension interests were exempt from attachment and could not be reached for support payments.<sup>313</sup>

Contempt can now be used to enforce a court ordered division of a pension. Recently, California has joined the other states that recognize that the participant is a constructive trustee on behalf of the spouse and that any failure to account is a breach of a *fiduciary* duty which is punishable by contempt.<sup>314</sup> However, contempt requires personal service and a present ability to do what is requested. What if the interest to be reached, such as a military pension, is exempt from legal process? If the participant can get the military to acknowledge the claim of the spouse, then contempt may still be used.<sup>315</sup> Often however, the

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311. CAL. CONST. art. I § 16. *Bradley v. Superior Court*, 48 Cal. 2d 509, 310 P.2d 634 (1957).

312. *In re Fontana*, *supra* at 1010, 101 Cal. Rptr. at 466; Ross, *Contempts*, *supra*, note 310. See *Tilghman v. Superior Court*, 40 Cal. App. 3d 599, 115 Cal. Rptr. 195 (1974), wherein the court ruled an order for support, even though a part of an integrated property settlement, is always enforceable by contempt.

313. *Ogle v. Heim*, 69 Cal. 2d 7, 9-10, 442 P.2d 659, 660-61, 69 Cal. Rptr. 579, 580-81 (1968) wherein the court held pension assets themselves were exempt, but stated the husband could be held in contempt for a failure to provide support. *Miller v. Superior Court*, 69 Cal. 2d 14, 442 P.2d 663, 69 Cal. Rptr. 583 (1968). CAL. CODE CIV. PROC. § 690.18 was amended in 1975 and 1976 to allow all pensions (including HR-10 Keogh plans) to be reached for support obligations. California, along with the other states in the United States, has enacted the Uniform Reciprocal Enforcement Support Act. Presentation of Commissioner Richard Denner, *Uniform Reciprocal Enforcement of Support Law*, 1976 FAM. LAW SYMP. 299 (L.A. Co. B.A. 1976 and Supp. 1977). This uniform law has been interpreted in California to give rise to an independent and always modifiable right to support, even in derogation of a sister state's previous judgment. *Elkind v. Byck*, 68 Cal. 2d 453, 459, 439 P.2d 316, 320, 67 Cal. Rptr. 404, 408 (1967). There it was argued that California must give "full faith and credit" to the Georgia judgment of nonmodifiable child support. (U.S. CONST. art. IV § 1, 28 U.S.C. § 1738 (1975)). The court stated:

The purpose of the full faith and credit clause is to establish throughout the federal system the salutary principle of the common law that a litigation once pursued to judgment shall be as conclusive of the rights of the parties in every other court as in that where the judgment was rendered. . . . (Citation). But . . . the federal system now espouses the principle that no state may freeze the obligations flowing from the continuing relationship of parent and child.

314. *In re Marriage of Fithian*, 74 Cal. App. 3d 397, 141 Cal. Rptr. 506 (1977). Other states have previously utilized the concept of constructive trust and allowed contempt proceedings to enforce marital property divisions: Wisconsin: *Pinkowski v. Pinkowski*, 67 Wis. 2d 176, 183-85, 226 N.W.2d 518, 522 (1975); New Jersey: *Callahan v. Callahan*, 142 N.J. Super. 325, 328-30, 361 A.2d 561, 563 (1976); Texas: *Marshall v. Marshall*, 511 S.W.2d 72, 75 (Tex. Ct. App. 1974). Those cases which have actually enforced a contempt action for failure to divide a marital interest in a pension are few, but do include: *Ex Parte Sutherland*, 526 S.W.2d 536 (Tex. 1975) and *Ex Parte Anderson*, 541 S.W.2d 286 (Tex. Ct. App. 1976).

315. See Ross, *Contempts*, *supra* note 310 at 252.

military cooperation is not present.<sup>316</sup> Although the Social Security law was amended effective January 1, 1975, to waive United States immunity to service of process for garnishment for any amount due from the United States for any claim for alimony or child support,<sup>317</sup> such provision may not apply to a division which is *not a support claim*. However, when suit was brought in Texas<sup>318</sup> and in Florida,<sup>319</sup> for "support" to divide retirement benefits, the courts held that a division of marital property served the same function as alimony and therefore allowed the garnishment.<sup>320</sup>

Even assuming that garnishment will be appropriate, the limits on what can be reached are defined by state law, which may deny recovery entirely.<sup>321</sup> In such cases, the federal courts have gone both ways; sometimes "reaching" to allow a pension division as within the Social Security amendments and sometimes not. The federal government is willing to prevent deadbeats from leaving the states with a welfare burden or abandoning their family, but it also wants to avoid unnecessary investigation of claims and alleged "assignments."<sup>322</sup> Either the federal

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316. See *Brown v. Brown*, 21 N.C. App. 435, 438, 204 S.E.2d 534, 536 (1974) wherein North Carolina was requested, and did agree, to enforce a Texas property division in husband's military pension. The court, in explaining the need for the action by North Carolina, noted the refusal to cooperate by the Army in the division. See also, *Marshall v. Marshall*, *supra*, 511 S.W.2d at 74 wherein the Air Force declined to cooperate in the division, necessitating an imposition of a constructive trust by the court.

317. Social Security Act § 459; 42 U.S.C. § 659 (1975). The courts have interpreted this new provision as *not* providing an independent basis for federal court jurisdiction. *Wilhelm v. United States Department of Air Force*, 418 F. Supp. 162 (S.D. Tex. 1976); *Morrison v. Morrison*, 408 F. Supp. 315 (N.D. Tex. 1976). However, where appropriate, and only after certification of need by the Secretary of HEW, Congress has allowed the federal courts to enforce support obligations. 42 U.S.C. § 660 (1975). See *Bolling v. Howland*, 398 F. Supp. 1313 (M.D. Tenn. 1975).

318. *United States v. Stelter*, 553 S.W.2d 227 (Tex. Ct. App. 1977).

319. *Williams v. Williams*, 338 So.2d 869 (Fla. App. 1976).

320. See *Popple v. United States*, 416 F. Supp. 1227 (W.D.N.Y. 1976) wherein the husband attempted to enjoin Georgia enforcement of a garnishment against his military pension (under the authority of 42 U.S.C. § 459 (1975) *supra*) but the federal court, though sympathetic, again reiterated that there was no independent federal jurisdiction under 42 U.S.C. § 459 (1975) to enjoin its improper application by the states. The federal courts have rejected the theory that a property division of military pensions is akin to "alimony" under 42 U.S.C. § 459 (1975). *Marin v. Hatfield*, 546 F.2d 1230 (5th Cir. 1977).

321. See *Samples v. Samples*, 414 F. Supp. 773 (W.D. Okla. 1976).

322. *United States v. Smith*, 393 F.2d 318, 321 (5th Cir. 1968), "The purpose of [The Anti-Assignment Act, 31 U.S.C. § 203] is 'to prevent possible multiple payment of claims, to make unnecessary the investigation of alleged assignments, and to enable the Government to deal only with the original claimant,'

government might help or the plan could have joined. However, what if it is a state government plan, not subject to ERISA, but containing similar non-alienation provisions? Perhaps the *title* to the interest in the plan could be tried.<sup>323</sup> The court has jurisdiction to try title to all property which is claimed in a dissolution, including being able to sell the property to the highest bidder. This is in the interest of avoiding a multiplicity of actions.<sup>324</sup>

If that type of joinder is not enough, the court may choose to treat a particular case as sufficiently unusual so that it will issue its order directly to the retirement board.<sup>325</sup> At the very least, if the plan is amenable, perhaps it will consent to an action akin to an interpleader. This has been done before and the courts have granted the plan its costs out of the funds to be distributed.<sup>326</sup>

Certainly, the court, if it can find other property, can award the difficult-to-reach assets to the participant while making available to the non-participant spouse any assets which can be found.<sup>327</sup> This approach has been taken where an equitable distribution of assets is all that is necessary,<sup>328</sup> but it can be utilized in California, too, since the law requires equality by total value and not as to each individual asset.<sup>329</sup> In some jurisdictions, excluding California,<sup>330</sup> it would be permissible to order alimony for the spouse, if needed.<sup>331</sup> The difficulty with that approach is that the recipient has "traded" away a permanent

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United States v. Aetna Casualty and Surety Co., (1949), 338 U.S. 366, 373, 70 S. Ct. 207, 211, 94 L. Ed. 171."

323. See *In re Marriage of Davis*, 68 Cal. App. 3d 294, 303, 137 Cal. Rptr. 265, 279 (1977), ". . . either party to the divorce action may bring in third parties claiming an interest in property alleged to be community and adjudicate the claims of such party in the divorce action." See *In re Marriage of Sommers*, *supra*, note 303.

324. *Id.* at 302, 137 Cal. Rptr. at 273, *citing* *Elms v. Elms*, 4 Cal. 2d 681, 52 P.2d 223, Annot., 102 A.L.R. 811 (1935).

325. *Phillipson v. Board of Administration*, 3 Cal. 3d 32, 35, 473 P.2d 765, 769, 89 Cal. Rptr. 61, 64-5 (1970), there is no "assignment" since the spouse claims as "owner." See note 301, *supra*. For a case of similar import in Texas, see *Collida v. Collida*, 546 S.W.2d 708 (Tex. Ct. App. 1977).

326. *Fox v. Smith*, 531 S.W.2d 654 (Tex. Ct. App. 1975). *T.L. James & Co., Inc. v. Montgomery*, 332 So.2d 834 (La. 1976). *In re Marriage of Milhan*, *supra* note 302. See also, *Phillipson v. Board of Administration*, *supra* note 325; and *Waite v. Waite*, 6 Cal. 3d 461, 492 P.2d 13, 99 Cal. Rptr. 325 (1972).

327. See, e.g., *Pinkowski v. Pinkowski*, *supra* note 314.

328. *Waite v. Waite*, *supra* note 269; *Phillipson v. Board of Administration*, 3 Cal. 3d at 47, 473 P.2d at 775, 89 Cal. Rptr. at 71, ". . . it has never been supposed that each asset must be cleaved in twain, without regard to the wishes of the parties or the justice of the matter."

329. *In re Marriage of Cobb*, 68 Cal. App. 3d 855, 137 Cal. Rptr. 670 (1977).

330. Subject, in California, to the "terminable interest rule," discussed in Part III and elsewhere in this article.

331. See, e.g., *Colorado: In re Marriage of Ellis*, 538 P.2d 1347 (Colo. App.

property right<sup>332</sup> for a temporary support payment. If either party died, alimony would stop, but a property right might continue.

A final point of caution should be considered. If the court's enforcement order allows the participant to make an election and the participant chooses (putting aside the intentionally nasty selection)<sup>333</sup> the wrong option, the non-participant spouse has no recourse against the employer.<sup>334</sup> Likewise, if the participant is allowed to deal with the plan without any monitor of the communication, some affirmative statement to the plan that the participant must account to another, and the plan pays off the participant, there can be no recovery against the employer.<sup>335</sup>

Enforcement<sup>336</sup> must be very carefully pursued to be sure that interests of the parties, especially the non-participant spouse, are protected. Any slip along the way and the participant could flee with the boodle, leaving the practitioner red-faced and, perhaps, considerably poorer. Court orders against federal plans now allow garnishment, at least in some state courts. In any case, a constructive trust will be held to exist as to the participant for any sums received. The constructive trustee will be held accountable by contempt if necessary. In some, if not all, jurisdictions the court will allow, and perhaps encourage, the joinder of the plan in deciding the division of plan interests. If a court order goes directly to the plan, with the court retaining jurisdiction to supervise compliance, the interests of the spouse

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1975), and *In re Marriage of Pope*, 544 P.2d 639 (Colo. App. 1975). But, in California, for a contrary reference to *Cobb see Waite v. Waite*, 6 Cal. 3d at 474, 492 P.2d at 21-2, 99 Cal. Rptr. at 333-34.

332. *See, e.g.*, *Phillipson v. Board of Administration*, *supra* note 325.

333. *Ball v. McDonnell Douglas Corp.*, 30 Cal. App. 3d 624, 106 Cal. Rptr. 662 (1973).

334. CAL. CIV. CODE § 5106 (West Supp. 1978); *Schneider v. Standard Oil Co. of California*, 55 Cal. App. 3d 1018, 128 Cal. Rptr. 141 (1976). Query whether a "loan to a participant" made before a benefit payout was otherwise due, which loan created a lien in favor of the plan against the participant's interest, could be "utilized" to covertly allow the participant to receive benefits without having to account to the spouse?

335. For a more elaborate and thorough discussion of the numerous (and complicated) possibilities of enforcement of marital court orders see Presentation of Commissioner Norman Pittluck, *Enforcement of Orders or Judgments for the Payment of Support Money-Other than by Contempt*, 1976 FAM. LAW SYMP. 263 (L.A. Co. B.A. 1976 and Supp. 1977).

336. Review again the earlier discussion of malpractice and especially note the \$100,000 judgment against counsel in *Smith v. Lewis*, 13 Cal. 3d 349, 530 P.2d 589, 118 Cal. Rptr. 621 (1975). *See* note 2, *supra*.

will be protected. Where the plan may not be joined and if the participant is not amenable to personal service to be brought before the court, perhaps the court will allow the plan interest to be brought before the court to determine title to that property. There are numerous available tools of enforcement. Whichever ones are to be utilized, the practitioner must continue to be vigilant lest the money in the plan be disbursed and thereby the plan be released from further liability.

## PART IX MULTIPLE JURISDICTIONS

The cases cited and the matters discussed heretofore have focused on the resolution of the pension interest in a divorce in *one* jurisdiction. In this section the focus will be on some of the difficulties which have arisen when *more than one* jurisdiction is involved.

For a state to grant an effective divorce *one* of the marriage partners must be domiciled within its jurisdiction.<sup>337</sup> However, without further contacts with the other partner, the order of the state may not make a determination of support and property rights.<sup>338</sup> The Supreme Court has stated that a determination of the support obligations and of property interests requires that that state perfect *in personam* jurisdiction over the parties to be bound.<sup>339</sup> However, the divorce decree determining the status of

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337. *Williams v. North Carolina I*, 317 U.S. 287 (1942); Annot., 143 A.L.R. 1273 (1943); *Williams v. North Carolina II*, 325 U.S. 226 (1944); Annot., 157 A.L.R. 1366 (1945).

338. *Hudson v. Hudson*, 52 Cal. 2d 735, 344 P.2d 295 (1959). *Carmichael v. Carmichael*, 216 Cal. App. 2d 674, 31 Cal. Rptr. 514 (1963) when the domicile in another state is fraudulent (nonexistent) then even the decree of divorce need not be given "full faith and credit." See also *Waite v. Waite*, 6 Cal. 3d 461, 492 P.2d 13, 99 Cal. Rptr. 325 (1972), and *In re Marriage of Van Sickle*, 68 Cal. App. 3d 728, 137 Cal. Rptr. 568 (1977) giving effect to a Nevada divorce (in rem), but denying effect to support and property determinations made in Nevada without in personam jurisdiction as to the California spouse.

339. *Vanderbilt v. Vanderbilt*, 354 U.S. 416 (1957). See also, *Storer v. Storer*, 346 So.2d 994 (Fla. 1977) wherein the court noted:

Historically the jurisdiction of courts to render judgment in personam is grounded on their de facto power over the defendant's person. Hence his presence within the territorial jurisdiction of a court was prerequisite to its rendition of a judgment personally binding him. *Pennoyer v. Neff*, 95 U.S. 714, 733, 24 L. Ed. 565, 572. But now that the *capias* ad respondendum has given way to personal service of summons or other form of notice, due process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice." *Id.* at 995, citing *Pinebrook v. Pinebrook*, 329 So.2d 343, 347 (Fla. 1976).

The Court pointed out that the minimum contact held sufficient to satisfy due

a person domiciled within a state's borders must be given full faith and credit.<sup>340</sup> This leads to the concept of the "divisible divorce,"<sup>341</sup> meaning that the status of the parties may be determined without prejudicing the future opportunity of the parties to have their property and support rights determined.<sup>342</sup>

In order for a state to establish *in personam* jurisdiction, the state must see that either (a) the person to be bound is personally served within the state or (b) the person consents to the court's jurisdiction, either in person or by counsel or (c) there is established sufficient contact related to the subject matter for the individual within the forum state to satisfy the fundamental standard of fairness and to make constructive service sufficient to appraise the individual of the proceeding. The nature of such "service" must be in accord with a "long-term statute" of the forum state.<sup>343</sup> It has been argued that long-arm statutes were limited to commercial dealings, but the courts have ruled that the reach of the statutes is particularly useful in divorce matters because of the relatively ambulatory nature of some persons at the time of divorce.<sup>344</sup>

Sometimes more than one state will have sufficient contact with the marriage or the parties to allow both or more states to

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process has consisted of as simple an act as maintenance of the last marital domicile within the forum state, coupled with one spouse's continued residence in the forum state.

340. *Waite v. Waite*, *supra*, note 338; *Mizner v. Mizner*, 84 Nev. 268, 439 P.2d 679, *cert. denied*, 393 U.S. 972, *reh'g denied*, 393 U.S. 972 (1968). *Pierrakos v. Pierrakos*, 148 N.J. Super. 574, 372 A.2d 1331 (1977).

341. *Vanderbilt v. Vanderbilt*, *supra*, note 339. For an example of "divisible divorce" see *In re Marriage of Adams*, 64 Cal. App. 3d 181, 134 Cal. Rptr. 298 (1976) where the dissolution was granted January 31, 1972, support was set March 21, 1973, and benefit plan division was heard March, 1975.

342. *Hudson v. Hudson*, *supra* note 338, at 742, 743, 344 P.2d at 299:

In a divorce action in a foreign state upon constructive service the court there has authority to adjudicate status (in rem) of a person residing in that state but has not jurisdiction to adjudicate away (in personam) any of the then vested property rights of the absent spouse who does not reside in such state, who is not personally served with process in that state and who does not appear in the action. The personal rights of the spouses in property not within the jurisdiction of the acting court remain subject to litigation in the proper forum. It seems to me that the right of a wife, or in a proper case, the husband, to support from the other spouse as of the date of the order is a property right which can be adjudicated only by a court having jurisdiction in personam. (Schauer, J. concurring in *De Young v. De Young*, 27 Cal. 2d 521, 527 [165 P.2d 457].)

343. *Mizner v. Mizner*, *supra* note 340, 439 P.2d at 680.

344. *Id.* at 681. *Wright v. Wright*, 114 N.J. Super. 439, 276 A.2d 878 (1971).



undertake divorce actions.<sup>345</sup> It then becomes a race to judgment,<sup>346</sup> or one state may recognize the others predominant interest i.e., comity.<sup>347</sup> The test for whether one state shall honor the actions of another is to see if the judgment presented appears to be in proper order, and, if so, then to require the antagonist to the judgment to establish its invalidity.<sup>348</sup> For example, if Arizona had sufficient contacts, even though Texas, the forum state, may have had more, and good constructive service had been made, then an Arizona judgment will not be set aside.<sup>349</sup>

In matters related to the determination of pension rights one case will illustrate the setting. In *Brown v. Brown*,<sup>350</sup> the North Carolina court was asked to assist in the enforcement of a Texas divorce decree which divided the interest in a military pension between the husband and the wife. In 1973, after obtaining a Texas divorce decree, both parties moved to North Carolina. The wife sought payment directly from the army, but the army refused to make payment to anyone other than the retired officer. The wife sued to enforce her claim "in the nature of alimony." The husband countered that Texas, the state with original jurisdiction, does not allow permanent alimony, so the wife's claim must fail. The North Carolina court, having researched Texas law, determined the division of pension interests was probably a division of community property and was therefore not invalid under Texas law and would be enforced. The court of one state issued its divorce decree which appeared proper on its face. It was challenged in another state as to the application of the law of the initial jurisdiction. The court of the enforcing state sought, and in this case was able to find, a basis for sustaining the sister state's decree and then consented to enforce it.<sup>351</sup>

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345. In *Scott v. Scott*, 554 S.W.2d 274 (Tex. Ct. App. 1977), the Texas court refused to give full faith and credit to a California determination of domicile/residence because it had not become final. The case demonstrates the "race to judgment" needed in such matters.

346. *Id.* at 278. The court emphasizes that the full faith and credit clause requires a *judgment* before there is an obligation of one state to abide by the decision of another.

347. *Id.* The court noted:

The general rule on comity is: 'While . . . the pendency of a prior suit involving the same parties and subject matter strongly urges the court of the local forum to stay the proceedings, pending determination of the prior suit, yet the rule is not mandatory upon the court nor is it a matter of right to the litigant. It is after all, a matter resting within the sound discretion of the court.' *Mills v. Howard*, 228 S.W.2d 906, 908 (Tex. Civ. App. 1950, no writ).

348. *Mitchim v. Mitchim*, 518 S.W.2d 362 (Tex. 1975).

349. *Id.*

350. 21 N.C. App. 435, 204 S.E.2d 534 (1974).

351. Social Security Act § 459, 42 U.S.C. § 659 (1975) effective January 1, 1975.

Minimum contact as to the subject matter sufficient to satisfy the concept of fairness<sup>352</sup> is always needed if out-of-state service is to be enforced. Contact such as prior domicile in the state of decree will nearly always be enough if coupled with the barest extra additional contact.

In *Wright v. Wright*,<sup>353</sup> the husband departed from New Jersey, the last domicile of the marriage, to move to New York. His only continuing contact with New Jersey was a weekly column he wrote which he sent from New York to New Jersey. Such contact was deemed sufficient by the New Jersey court which held him liable under the state long-arm statute to make him account for the support of his "abandoned wife and child."

In *Mitchim v. Mitchim*,<sup>354</sup> the wife sued in an Arizona court for divorce, alimony and child support, serving her husband in Texas. The couple had lived in Arizona for five years, but had decided to move to Texas (or the husband had at any rate). The wife never really settled in Texas, returning after only three days to Arizona. She obtained judgment against him in Arizona and proceeded to sue to enforce the judgment in Texas. Among the minor contacts the husband continued to have with Arizona, was his sending child support checks and mortgage payments through the mail. The Texas court enforced the Arizona order, deeming such contact sufficient to warrant jurisdiction.

Perhaps the most persuasive element in establishing minimum contact was the fact that the state of decree was, in each case, the last real domicile of the marriage. The implication is that it was in that state that the final break-up of the marriage occurred. Again, in *Fox v. Fox*,<sup>355</sup> where New Jersey had been the last domicile of the marriage, a long-arm service was upheld in an action for arrearages for support. To like effect a California decree against a husband who had moved to Utah, served by mail, as to the sale of Florida property was

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*See also* discussion in Part VIII, above, concerning the controversy over enforcement of "support" orders when in fact the decree is for division of marital property.

352. *See Storer v. Storer*, *supra* note 339 at 995, *citing* *International Shoe Co. v. Washington*, 326 U.S. 310 (1945).

353. 114 N.J. Super. 439, 276 A.2d 878 (1971).

354. *See* note 347, *supra*.

355. 526 S.W.2d 180 (Tex. Ct. App. 1975).

upheld since California had been the last domicile of the marriage and since wife continued to live there.<sup>356</sup>

*In re Marriage of De Lotel*<sup>357</sup> confronted another issue when a husband moved to Oregon and his wife sought to execute against his pension for unpaid support. The husband argued Oregon law, which exempted his pension from execution, ought to apply. The California court held that California law would apply because comity is not to be given to procedural and remedial provisions of another state. Besides, California had issued the original support order which was now in default and would not hear an argument to evade its judgments.<sup>358</sup> Logic would indicate California would be most reluctant in allowing the law of another jurisdiction to permit exemption for California ordered support.

California has a peculiar institution called "quasi-community property." By statute in 1961,<sup>359</sup> California retroactively<sup>360</sup> created an inchoate property right akin to community property for any property which *would have been* community if it had been acquired while the marriage was domiciled in California. The inchoate property right "vests" upon the filing of the petition for dissolution or, as in 1969, at the time of the interlocutory decree.<sup>361</sup> In a peculiar case involving stock options, the husband received options *as compensation* while in New York, then came to California. The wife filed for divorce and thereafter the husband's options "matured." The wife obtained an interlocutory decree in which the court held the options were quasi-community and were therefore divisible with the wife. Whether California has a legitimate interest in reaching such property is debatable. At any rate, this is the kind of decision that will certainly discourage the itinerant executive from taking up residence.

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356. *Pinebrook v. Pinebrook*, 329 So.2d 343 (Fla. D.C. App. 1976). *See also* *Storer*, *supra* note 339 which recites the full catalogue of cases. *Storer* involved a Wyoming marriage and divorce with long-arm service being made in Florida.

357. *In re Marriage of DeLotel*, 73 Cal. App. 3d 21, 140 Cal. Rptr. 553 (1977).

358. *Id.*

359. Former CAL. CIV. CODE § 140.5, *repealed by* 1969 Cal. Stats. ch. 1608 § 3, now CAL. CIV. CODE § 4803 (West Supp. 1978) added by 1970 Cal. Stats. ch. 312 § 3.

360. *Addison v. Addison*, 62 Cal.2d 558, 399 P.2d 897, 43 Cal. Rptr. 97 (1965), Annot., 14 A.L.R. 3d 391 (1967). *See* The more honest acknowledgment of retroactive application of *Addison* in *In re Marriage of Bouquet*, 16 Cal.3d 583, 593, 546 P.2d 1371, 1376, 128 Cal. Rptr. 427, 432 (1976). *Bouquet* itself involved the retroactive application of a statute (CAL. CIV. CODE § 5118) which interfered with previously "vested" rights.

361. *Cooper v. Cooper*, 269 Cal. App. 2d 6, 11, 74 Cal. Rptr. 439, 443 (1969). *See also* IRS Private Letter Ruling, No. 7742052 issued July 22, 1977, discussing tax effects of quasi community property division on account of a dissolution.

In an easier case<sup>362</sup> to understand, the Florida state court stretched the law a bit so that a wife's allocated community property interest in her husband's military pension plan could be garnished.<sup>363</sup> Florida was willing to assist in the enforcement of the Texas decree but was limited in the remedies available since the asset to be reached was an entitlement from the United States. The court stated: "Like the well-known rose by another name, these post-marital benefits of the Texas decree are tantamount to alimony for the purposes of statutes of the United States securing the enforcement of state alimony awards."

As if the combination of diverse purposes of pension and family law were not enough, when matters become entangled with more than one jurisdiction which may have markedly different legal developments, the permutations and combinations become like an advanced jig-saw puzzle: fitting the pieces together to even resemble a reasonable result may be beyond the limits of the system.

#### PART X PROBLEMS

The fact situations below are offered to illustrate problems. Sometimes an answer may be apparent, but most often, no satisfactory solution is possible given the current state of the law.

1. A doctor, age 45, making very good money and newly incorporated, establishes a defined benefit pension plan. The plan provides for a \$50,000 per year benefit for the doctor at normal retirement age of 65, but also provides an early retirement option *at full pension* at age 55 with 10 years of service. There are also six other employees, none of whom is over thirty, but all of whom may receive pensions based on salary of \$10,000 per year at age 65, or at age 55 if they are living. As expected, turnover is very high. The plan accrues benefits at 3% of final projected benefits, but accruals are 100% at normal or early retirement if an employee has twenty years service. Vesting is 50% after five years, reach-

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362. *Williams v. Williams*, 338 So.2d 869, 870 (Fla. App. 1976).

363. Social Security Act § 459; 42 U.S.C. § 659 (1975) allows garnishment against the United States only for "support" obligations.

ing 100% at ten years. In the past, in fifteen years of practice none of the doctor's staff has stayed five years.

Using aggressive *funding* assumptions, the plan receives contributions of \$80,000 per year for the doctor plus \$45,000 for the other employees. Actually minimum funding is much less. For the doctor it would be approximately \$30,000, and for staff, perhaps \$10,000. Funding is level each year, but the value of accrued, earned but not yet vested, benefits is minimal. Accrued benefits for the doctor in the first year, 3% of final pension of \$50,000 or \$1,500 per year at age 65 at current value, is worth less than \$10,000. If an employee leaves early, and all have in the past, all benefits are forfeited. Annual funding is \$125,000 (actual, very aggressive), \$40,000 (minimum level, assuming high turnover); and accrued benefits for the doctor in the first year is \$10,000 (or less).

If the doctor gets divorced, what is the value of his wife's community interest? Is it one-half of the accrued benefit of the doctor? Is it one-half of minimum funding for the doctor? Is it one-half of maximum funding for the doctor? In truth, the doctor is socking away \$125,000 per year.<sup>364</sup> The wife may be entitled to as little as \$5,000!

2. Louisiana, Texas and California are all community property states. However, the community property rights differ somewhat. Louisiana follows the Napoleonic Code. Each spouse, upon break-up of marriage, obtains full and complete ownership of one-half of the community. This includes the right to select options available under pension plans. Louisiana uses the concept of "vesting" to determine whether community property exists, but applies attribution retroactively as soon as vesting does occur, even if that should happen after the divorce. Marital interest in pensions are inheritable from the non-participant spouse.<sup>365</sup>

Texas allows the participant spouse to maintain all plan options, as a constructive trustee, but does endow the non-participant spouse with all other ownership rights, such as the right to have the interest passed on to his or her heirs. Texas does not require "vesting" to create a property right for the community. Unlike Louisiana and California, Texas

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364. In re Marriage of Imperato, 45 Cal. App. 3d 432, 119 Cal. Rptr. 590 (1975). Normally, the owner of a corporation will not be heard to question its existence. May the spouse do so where the corporation is being utilized to accumulate funds for long term retirement such as this problem?

365. T.L. James & Co., Inc. v. Montgomery, 332 So.2d 834 (La. 1976).

does not require equal division of community property; instead it follows the "equitable distribution" rule.<sup>366</sup>

California considers unvested pension interests as community property. Generally, participant options are left with the participant and do not pass to the non-participant spouse. California also has the "terminable interest rule" which prevents heirs of the spouse from inheriting any plan benefit. California has quasi-community property, unlike Texas and Louisiana, which would create a "vested" right in the spouse as soon as a petition in divorce was filed<sup>367</sup> as to any other property which would have been community, if acquired in California during marriage.<sup>368</sup> Assume that husband and wife marry in Louisiana. On the same day husband enters the regular army. After seven years, they move the marital domicile to Texas and, after seven more years, they move the marital domicile to California. After seven years in California, the husband retires and gets a divorce.

Does the wife have community property interest as to one-half under California rules or as to one-sixth each for Louisiana, Texas and California? Are the wife's interests which arose in Texas and Louisiana inheritable? Do California's quasi-community laws alter the nature of Texas and Louisiana community interests?

3. Texas has common law marriage, California does not. Husband and wife believe California does and believe they are married at common law. They have lived together for five years. The wife has a pension interest from Sears where she works. Does the husband have any rights in the pension, either under *Marvin* or otherwise?

Husband and wife move to Texas for five years. Under Texas law they are now married. Does this alter the answer as to the husband's rights in the wife's Sears pension? Suppose husband and wife first lived in Texas, then came to California. A different result?

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366. *Cearley v. Cearley*, 544 S.W.2d 661 (Tex. 1976).

367. CAL. CIV. CODE § 4803 (West Supp. 1978), *Addison v. Addison*, 62 Cal. 2d 558, 399 P.2d 897, 43 Cal. Rptr. 897 (1965).

368. See *In re Marriage of Brown*, 15 Cal. 3d 838, 544 P.2d 561, 126 Cal. Rptr. 633 (1976); *Waite v. Waite*, 6 Cal. 3d 461, 492 P.2d 13, 99 Cal. Rptr. 325 (1972); *In re Marriage of Freiberg*, 57 Cal. App. 3d 304, 127 Cal. Rptr. 792 (1976).

4. Husband and wife met at college and dated for a while in Louisiana. Husband moves to Iowa, a common law state, in order to join the army and take graduate courses in agronomy. Wife comes from Louisiana and they marry in Iowa. Both still treat Louisiana as "home" in the sense that it is where family is. Nineteen years pass. Husband is very successful and is promoted to colonel as special consultant to other countries on the rapid development of agricultural technology. He is constantly on the move around the world. The wife comes along wherever there is housing for herself and the two boys, now age 12 and 7. Husband is assigned to Denver to work on the desalination projects along the Colorado River. Before his wife joins him from New Mexico, he meets Tania. Wife moves into military housing with the boys, but husband is almost never there, being "busy" with important work. Wife finds out. They talk. He finds Tania, "the woman he always wanted." Wife heads back to Louisiana for the first time in twenty-one years. Husband stays on with Tania.

Wife sues husband for divorce in Louisiana, obtaining jurisdiction by the long-arm statute. She contends the marriage has been domiciled in Louisiana since it began, never having had any other permanent location.<sup>369</sup> On this basis, serving husband by certified mail, return receipt requested, she is awarded custody, alimony of \$700 per month, child support of \$300 per month, plus one-half of the pension earned during coverture (21 years). Husband does not appear and wife obtains default. She then seeks to garnish wages and his pension under Louisiana law.<sup>370</sup>

Husband has in the interim sued for a Colorado divorce and has affected service on wife in Louisiana by Colorado's long-arm statute. He argues a six-month domicile in Colorado with wife and boys, which was last domicile of marriage before break-up.<sup>371</sup> He also alleges in his petition that the marriage had originally been domiciled in Iowa and that it had never been domiciled in Louisiana.<sup>372</sup> Wife does not appear. Husband obtains default, leaving wife custody, no alimony (she deserted) and \$200 per month child support.

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369. *Swope v. Mitchell*, 324 So.2d 461 (La. App. 1975); *Ramsey v. Ramsey*, 96 Idaho 672, 535 P.2d 53 (1975).

370. Social Security Act § 459; 42 U.S.C. § 659 (1975) effective January 1, 1975.

371. *Williams v. Williams*, 338 So.2d 869 (Fla. App. 1976); *United States v. Stelter*, 553 S.W.2d 227 (Tex. Ct. App. 1977).

372. *Scott v. Scott*, 554 S.W.2d 274 (Tex. Ct. App. 1977).

Colorado confirmed to him his military pension as his separate property.<sup>373</sup>

He now quits the army, having received a lucrative offer from the Shah to develop some agriculture and technology at Abadan. He instructs the military retirement office to send checks directly to him and encloses a copy of the Colorado order confirming his *sole* right in the pension. Promptly each month he sends \$200 child support. Wife refuses to cash or accept them and each month the letter is sent to Abadan or to the dead letter office.<sup>374</sup>

Does wife have a claim for support? Does husband have a valid support order which he may honor? Does Colorado and/or Louisiana have sufficient minimal contact to allow the matter to be decided in its courts? What does the United States answer in response to wife? Where is Tania? Does she have a sister?

#### PART XI A SOLUTION

Marriage is changing as an institution. People are living together without benefit of clergy and without children, generally by choice. Yet, marriage is thriving. Now, those who marry choose to do so. Retirement plans are changing the face of America. They are not big, they are *huge*. They also are no longer just retirement plans. In truth they have become the one source of financial security for the family to fall back on in case of severe need. Commerce between the states, of goods and of people, is more active than ever. People move about more and more. There is a choice and more Americans are choosing to live in the sun. However this mobility and migration bring different values from around the country into confrontation. National policy favors uniformity. However, a person is still free and encouraged to choose local alternatives. So too, pension plans must be uniform in installation and in operation, but not necessarily in the diversity of individual rights which they ef-

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373. *In re Marriage of Ellis*, 538 P.2d 1347 (Colo. App. 1975).

374. *United States v. Smith*, 393 F.2d 318 (5th Cir. 1968).



fect. Retirement plans would not be harmed if their funds were to be *assignable* because of divorce to a spouse or as a trust to support children; nor would an option to divert some of the funds to a child's education be detrimental to the plans or to the need to strengthen the family. Marriage creates the family in our society, but the family can only continue to thrive as an institution if we can afford it. The traditions and historically diverse backgrounds of the states has not crippled their growth or that of this country. Diversity does cause problems, however, it gives a choice.

Pensions can be made subject to state court order on distribution of assets in divorce. This, however, should be done by *Congressional* action, if there is to be uniformity; otherwise we will continue to have the anomalies of two or more different states ruling on the same marital rights in a pension plan.

The states protect the family, the federal government controls and protects the retirement system. Let there be an understanding by both of the purposes of the other. Then they may work together.

To impliment this understanding we need:

1. A national policy, in law, to allow "pension" plans to be the security source from major family crises, such as divorce, illness or college for children.
2. A national policy, in law, to advise state courts *how to* protect the interest of the family without conflicting with the interests of the plans.
3. As much personal choice as possible since from diversity comes progress.
4. A type of *voluntary* national register of rights in pension plans which would allow for interests in plans for very specific purposes to pass *without tax or penalty* from one person to another.
5. A broad discussion of purposes, i.e., what are we doing this for?

The law is conservative. The bar and bench respond to change. That is their nature. If the changes recommended here-in make sense and are needed, it rests with the legislature and the executive to initiate the move. We need diversity; we need personal choice; we also need *family* because it insures continuation. We *can* have it all.

## APPENDIX

### PRINCIPAL TYPES OF PLANS AND THEIR MAJOR DIFFERENCES

This appendix is intended to give the reader most of the major differences between various types of qualified retirement plans. The appendix is presented in three separate parts: first, a list of factors of analysis; second, a list of the major types of plans with a brief description of each; and third, a detailed presentation of the differences between the various types of plans. It is hoped that this cross-reference procedure will prove most useful in allowing the reader to distinguish a plan by the language presented in the document.

#### PART I FACTORS OF ANALYSIS

1. Purposes
2. Definitions
3. Administration
4. Eligibility
5. Funding
  - A. Allowable (maximum)
  - B. Required (minimum)
  - C. Deductible
6. Accrued Benefits and Allocations
7. Vesting
8. Allowable Investments
9. Benefits
10. Termination and Amendment

#### PART II TYPES OF PLANS

1. *Money Purchase Pension Plan.* A retirement income plan intended to replace a portion of normal earned compensation after separation from service which is funded by a specific percentage of compensation for covered employees each year. The benefits paid are the benefits that can be purchased with the balance standing to the account of the participant at the time of benefit pay-out.
2. *Defined Benefit Pension Plan.* A retirement income plan intended to replace a portion of normal earned compensation after separation from service, where benefits are calculated based on average compensation over a period of time, and the benefit level is determined by a formula set forth in the document. Funding is generally carried out by the employer, and investment results do not increase or decrease the available benefit to participants. In effect, the employer "guarantees" the benefit payable to the participants at the time the benefits are paid.

3. *Target Benefit Plan.* A retirement income plan intended to replace a portion of normal earned compensation after separation from service. This plan is a hybrid of the Money Purchase and Defined Benefit Pension Plan in that a projected final benefit is calculated, based on actuarial assumptions established at plan set up, and level annual contributions are calculated based on the final benefit. However, the benefit payable is based on the balance in the account of a participant at the time of benefit pay-out, and the investment results are not guaranteed in any way by the employer. For plan limitation purposes, a Target Benefit Plan is considered a Defined Contribution Plan.
4. *Profit Sharing Plan.* A plan intended to allow participants to share in the profits, either current or accumulated, of the employer, which has a definite formula for the allocation of contributions amongst participants. Normal benefits are payable at an established retirement date, but they may be payable after a specified period of time on account of a predetermined event prior to the normal retirement date, and without the requirement of separation from service with the employer.
5. *Stock Bonus Plan.* A plan similar to a Profit Sharing Plan, except that contributions need not be calculated on the basis of available profits, and distribution from the plan must be made in the form of employer stock.
6. *Employee Stock Ownership Plan (ESOP or ESOT).* An employee benefit plan (not necessarily a retirement income plan) which includes at least a Stock Bonus Plan, and may include also a Stock Bonus and Money Purchase Pension Plan. The difference between an ESOP and a Stock Bonus Plan in general is that the ESOP is exempted from the prohibited transaction rules in terms of borrowing funds to acquire assets, and that it is designed principally to invest in qualified employer securities.
7. *HR-10 or Keogh Plan.* A retirement plan, either Profit Sharing, Money Purchase, or Defined Benefit type, which provides benefits in part for self-employed individuals and their common law employees. Please note that a Keogh Plan may be of a Profit Sharing or Pension type, with corresponding characteristics. The main variation in Keogh Plans is the limitation on funding for self-employed individuals.
8. *Subchapter S Corporations.* A corporation which qualifies as an electing small business corporation under Subchapter S of the Internal Revenue Code (Sections 137.-1379), and which elects a retirement plan, is limited in the amount of deductible contributions which may be made on behalf of stockholder employees (more than five percent owner of outstanding stock of corporations) and some other minor provisions, but is in general considered to be a qualified corporate retirement plan.

9. *Tax Sheltered Annuity.* A 501(c)(3) organization may, pursuant to Section 403(b) of the Internal Revenue Code, provide by purchase of annuity or similar funding mechanisms, retirement benefits on a selective basis for its employees. In effect, the individual employee chooses to purchase a non-transferrable annuity for his retirement, but only those employees who choose to participate obtain any benefits. All benefits are non-forfeitable.
10. *Individual Retirement Accounts (IRA).* An individual who is not an active participant for a calendar year in *any* other qualified plan, may elect to deposit in cash for the year, a certain percentage of his income earned for the performance of personal services in a bank, savings and loan, or annuity contract or retirement bond. The funding is purely discretionary with the individual involved, and all amounts deposited are non-forfeitable.

### PART III

#### ANALYSIS AND COMPARISON OF PLANS

##### 1. *PURPOSES*

- A. *Pension Plans, all types*  
Replacement of income, payable generally as an annuity at time of retirement.
- B. *Profit Sharing Plans*  
When profits exist, to allow employees to share in gains of the employer and to provide a fund to ease employees' financial burden upon retirement.
- C. *Stock Bonus Plans*  
To provide employees with a closer identity with employer by giving employees stock of the employer. This type of plan must distribute only stock of the employer.
- D. *Employee Stock Ownership Plans (ESOP)*  
Similar to a Stock Bonus Plan, but also allows borrowing to acquire employer stock. Generally, employer's motives may also include a) providing a source of corporate financing; b) providing a market for closely held stock; and/or c) having a vehicle which will facilitate transfer of control to key management or owner's relatives at the time of withdrawal by the largest share holders.
- E. *HR-10 or Keogh Plans*  
These plans may be of pension or profit sharing format. Their purpose is to provide benefits for the self-employed individual and all common law employees of such individual.
- F. *Individual Retirement Accounts (IRA)*  
To allow individuals who are not active participants in *any* other retirement program to put away funds for retirement and have contributions tax deductible.

G. Tax Sheltered Annuities

To allow employees of § 501(c)(3) organizations (generally schools, hospitals and charities) to put away funds for their retirement and have contributions tax deductible.

All tax qualified retirement plans must have as their main motive the providing of benefits to employees of employer. All funding must be for the exclusive benefit of participants and their beneficiaries (and to pay reasonable expenses of administration). The plan must *specifically* prohibit diversion of the funds for any other purpose and must clearly prohibit any use which would constitute a reversion of funds to employer (with some exceptions).

2. DEFINITIONS

A. *Accrued Benefits:*

Defined Benefit Pension Plans v. Defined Contribution Plans: Accrued benefits for individual account plans (defined contribution plans) are the balances in the accounts. For defined benefit plans, accrued benefits are expressed as a part of the final projected benefit at normal retirement, which part has been "earned" to date.

B. *Compensation:*

Target Benefit and Defined Benefit Pension Plans: For most plans, compensation is the actual remuneration for the current Plan Year. For Target Benefit and Defined Benefit Pension Plans, compensation is generally defined as an average of compensation over a period of years. This variation is used in order to "smooth out" any sharp swings in compensation which may occur from year to year.

C. *Employees:*

i. HR-10 or Keogh Plans:

Added categories of employees: *Owner-Employees*: persons owning more than 10% of profits or capital; *Partner-Employees*: partners owning 10% or less of capital and profits; *Self-Employed*: all owners of a capital or profit interest.

ii. Subchapter S. Plans:

Added category of employees: *Stockholder-Employee*: individuals owning more than 5% of the stock of employer.

D. *Retirement Dates:*

HR-10 or Keogh Plans and IRA:

Normally pay-out may not occur until a participant has reached 59 1/2 and must begin when a participant has reached 70 1/2. These restrictions in Keogh Plans need only apply to owner-employees, but are sometimes applied to all participants in the plan.

These are a substantial number of variations in definitions and there are a number of terms which are defined in one plan or another. The above list is not exhaustive by any means, but

does indicate the key variations in definitions which will distinguish one plan from another.

### 3. *ADMINISTRATION*

#### A. Defined Benefit Pension Plans

- i. Must make reports and pay premiums to the Pension Benefit Guarantee Corporation (PBGC) to "insure" participants against loss of promised benefits.
- ii. Must file actuarial reports (signed by ENROLLED ACTUARY) with IRS and perhaps with DOL.
- iii. Generally, the plan assets are kept in an unsegregated fund and individual allocation of assets to participants is not made. No allocations of gains and losses is made to participants: investment results are reflected in contributions made or to be made by employer.

#### B. Pension Plans, all types

Minimum Funding Accounts are kept to be sure required employer funding is made.

Plans (regardless of type) must generally be maintained with a trust. As an alternative, a plan may be fully insured; in which case a trust is not required, although it still may be utilized (in which case the trustee would hold the insurance contracts).

### 4. *ELIGIBILITY*

#### A. HR-10 or Keogh Plans:

Maximum service to participate is three years (and all accrued benefits are 100% vested immediately).

#### B. IRA:

May not be an active participant in any other qualified retirement plan at any time during individual's tax year (generally, calendar year).

#### C. Tax Sheltered Annuity (TSA):

Must be an employee in a § 501(c)(3) organization. For certain educational institutions, minimum age may be set at 30, instead of 25, for all retirement plans maintained by the employer.

### 5. *FUNDING*

#### A. Allowable (Maximum) Funding

##### i. Defined Benefit Plans

Funding sufficient to fund for a benefit not exceeding 100% of compensation (over three highest consecutive years) or \$75,000 (this figure is adjusted annually to reflect cost of living; for 1978 it is

- \$90,150), whichever is less (there are adjustments made to the above limits for differing situations).
- ii. **Defined Contribution Plans (including Target Benefit Pension Plans):**  
Annual Additions (basically employer funding and forfeitures, plus some larger employee contributions) for each participant may not exceed 25% of compensation or \$25,000 (the figure is adjusted annually to reflect cost of living; for 1978 it is \$30,050) whichever is less.
  - iii. **Tax Sheltered Annuity:**  
Generally, 20% of aggregate covered compensation, not exceeding 100% of current year eligible earnings; but also limited as set forth in IRC § 415(c)(4).
  - iv. **HR-10 or Keogh:**  
For owner-employees, 15% of earned income or \$7500, whichever is less (exceptions: when the regulations are issued, HR-10 Defined Benefit Pension Plans *may* allow larger funding).
  - v. **IRA:**  
15% of earned income or \$1500, whichever is less.  
15%/\$1750 for spouses IRA.
  - vi. **Employee Contributions:**
    - a. For most plans, mandatory contributions may not be onerous, which has been interpreted to mean not more than 6%.
    - b. For most plans, voluntary contributions are allowed equal to not more than 10% of total covered compensation during all years of plan participation; subject, however, to the restriction that part of such contributions (whether mandatory or voluntary) will be counted against the Annual Additions limitation in (ii) above.
    - c. For HR-10 or Keogh Plans, voluntary employee contributions for owner-employees may only be made if there is at least one other plan participant not an owner-employee who could have made a voluntary contribution, and are further limited to 10% of earned income or \$2500, whichever is less.

Generally, over-funding may disqualify a plan for tax benefits, but for HR-10 Plans and IRA, any over-funding will lead to a 6% excise tax (per year) on the excess funding until it is paid back or otherwise reduced to zero.

Any plan investing in employer securities will generally prohibit investment of employee contributions (including rollovers)

in such securities (this is to avoid certain securities law problems). For ESOP's and Stock Bonus Plans, it is common to prohibit all employee contributions because of the above problem.

**B. Minimum Funding**

**i. Pension Plans:**

All current year costs plus a ratable portion of past service liability (generally, amortized over 30 or 40 years). For Target Benefit or Money Purchase Pension Plans, current cost is the required employer contribution set forth in the plan.

**ii. HR-10 or Keogh Profit Sharing Plan:**

For qualification such plans must give a definite formula for contributions (10% of profits, etc.).

**C. Deductible Funding**

**i. Employee contributions are *not* deductible.**

**ii. Defined Benefit Pension Plan:**

The current year's cost plus past service liability and interest amortized over 10 years or minimum funding, if larger.

**iii. Target Benefit and Money Purchase Pension Plans:**

So long as the plan's contribution formula does not exceed maximum funding limits above, the formula contribution is deductible.

**iv. Combined Pension Plan with a Stock Bonus or Profit Sharing Plan, including ESOP:**

25% of covered compensation.

**v. Stock Bonus or Profit Sharing Plans:**

15% of covered compensation for current year contribution; up to 25% of covered compensation for current year plus prior year's missed contributions.

**vi. HR-10 or Keogh Plans:**

For each self-employed individual (whether or not an owner-employee) 15% of earned income or \$7500, whichever is less; for all common law employees deductions are the same as the type of plan as noted above as if it were maintained by a corporate employer.



- vii. Subchapter S Plan:  
For stockholder-employee, 15% of compensation or \$7500, whichever is less; normal limits apply for all other employees.
- viii. IRA:  
An above-the-line deduction is available to each individual having earned income (i.e. both spouses if working may each establish an IRA) equal to 15% of earned income up to \$1500 (or \$1750 spouses IRA). All contributions must be made in cash.
- ix. TSA:  
Generally, 20% of earnings, cumulative for all years in eligible employment, subject to the limitations on maximum funding of IRC § 415.

Generally, funding for each year may be made up to the time for filing a tax return, except for an IRA which must be funded (in cash) by February 14 of the following year. This allowed delayed funding applies for minimum and deductible funding. Maximum funding is determined for each Limitation Year which will be the calendar year (*Rev. Rul. 75-481*) unless the plan sponsor affirmatively elects otherwise. Normally the plan will fix the Limitation Year as the Plan Year.

## 6. ACCRUED BENEFITS AND ALLOCATIONS

- A. Individual Account Plans (Defined Contribution Plans):  
Generally, all funding must be allocated to participant's individual accounts and no substantial assets may remain unallocated. Accrued benefits for each participant will be the individual account balance.
- B. Defined Benefit Plans:  
Accrued benefits must be determined by one of three formulas (3%, ratable, or 133 1/3%, see IRC § 411) and the accrued benefit for each participant is generally expressed as a percentage of final projected benefits in the form of an annual annuity payable at normal retirement. No individual accounts are maintained. The current value of accrued benefits for participants is the "actuarial equivalent" at the present time of the earned portion of final retirement benefits and must be calculated using the actuarial assumptions (investment return, turnover, mortality, etc.) used for the plan.
- C. Profit Sharing, Stock Bonus, and ESOP's:  
Forfeitures will be allocated amongst remaining participants based either on current covered compensation or upon prior individual account balances.

D. Pension Plans:

Forfeitures reduce employer funding and may *not* be used to increase employee benefits.

E. Subchapter S Profit Sharing Plans:

Forfeiture may not be allocated to stockholder employees.

7. *VESTING*

A. HR-10 or Keogh Plans:

If there is an owner-employee, all accrued benefits are immediately fully vested.

B. IRA, TSA:

All accrued benefits are 100% vested at all times.

C. Employee and Rollover Contributions:

100% vested at all times.

Except as noted above, retirement plans will have a vesting schedule which will provide vesting based on years of service. The minimum vesting is set forth in IRC § 411. In addition, the maximum required vesting for plan qualification (generally) will be a four to eleven year graded vesting schedule, which is discussed in the Conference Committee Report from Congress, issued when ERISA was passed.

8. *ALLOWABLE INVESTMENTS:*

A. Stock Bonus and ESOP's:

These plans must primarily invest in employer securities and for the stock bonus plan may only distribute employer stock to participants.

B. Eligible Individual Account Plans (see ERISA § 407(d)(3)):

May invest more than 10% of plan assets in qualified employer real estate and securities. Other plans may not do so.

C. TSA, IRA and HR-10 or Keogh Plans:

Generally, no loans to participants may be made and no pledge of plan interests to secure a loan may be made.

Defined Contribution Plan investment returns (or losses) go directly to the participants. There is no "guarantee" of investment performance.

Defined Benefit Plan investments are used to build the fund

to pay benefits and the employer in effect “guarantees” the investment results and is obligated to fund for any deficiency. Contrariwise, any superior returns will *reduce* required employer funding.

## 9. ***BENEFITS***

### A. Pension Plans:

Generally, payable only at retirement or other severance from employment.

### B. Profit Sharing, Stock Bonus and ESOP's:

Benefits may be paid at retirement or may be paid on account of hardship, or even on account of the passage of time (at least two years for employer contributions). Benefits will be paid to participants at the times and for those occasions as the plan will state.

### C. Stock Bonus Plans (including ESOP's, at least in part):

Benefits must be paid in employer stock (not marketable securities).

### D. Defined Benefit Pension Plan:

Benefits (within limits) are guaranteed by the PBGC and the employer's net worth (up to 30%) is collateral for this guarantee.

### E. IRA, HR-10 or Keogh Plans:

Benefits are normally payable after age 59 1/2 and before age 70 1/2.

If there is a life contingency pay-out, it must generally be in the form of a Qualified Joint and Survivor Annuity. However, Profit Sharing, Stock Bonus and ESOP's will normally avoid this problem by providing for lump sum pay-out only. A pension plan (according to the IRS) will provide a life contingency pay-out.

## 10. ***TERMINATION AND AMENDMENT***

### A. Defined Benefit Plan:

- i. Any termination or other change in status is reportable to PBGC and will have to be subject to PBGC rules (and approval).
- ii. If the plan is terminated within 10 years of establishment, the 25 highest paid employees may have a reduction of benefits in order to prevent discrimination. See Regulations § 1.401-4(c). The same rules will apply to Target Benefit Pension Plans.

Amendments may not be made (generally) which will reduce accrued benefits or vested benefits. In addition, no amendment may allow a reversion of funds to the employer.

A termination may be *ordered* by the PBGC if a covered defined benefit pension plan is "in trouble" or might be. In addition, ERISA § 4062(e) provides for a 20% plus if plan participants are terminated. Defined benefit plans have many more restrictions because of PBGC regulation.

Any plan which is substantially curtailed or terminated (in whole or in part) must provide for full vesting for all affected participants. This is required plan language.

