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RETIREMENT PAY: A DIVORCE IN TIME SAVED MINE

In dissolution proceedings, the classification of retirement benefits as community or separate property presents an anomaly. Mechanically applied rules often supplant community property principles. The California courts have forsaken the traditional notion of community contribution through the expenditure of community efforts. In place of this, the courts rely on the date that the employee spouse becomes eligible to receive his pension. Until this date, the interest in the retirement benefits is characterized as neither separate nor community property. Rather, it is an expectancy—an unrecognized, unprotected property right.[1] Such a classification strips the nonemployee spouse of any interest in the retirement benefits. This interest potentially has substantial value, part of which results from the investment of the marital community's time and energy. In view of this the courts should recognize that the community is entitled to an apportioned share of the retirement benefits if and when they mature.

Matured vs Unmatured

"Retirement benefits," for the purpose of this note, means money received in either a lump sum or periodic payments under an employee retirement plan which provides for payments beyond return of the employee's contributions, if any, plus interest and which conditions the right to receive the payments upon the attainment of a certain age or the completion of a certain period of employment or both. In some, perhaps most, retirement plans the employee makes contributions from his wages to the retirement fund and has a right to withdraw those contributions upon termination of employment prior to retirement. Such withdrawable employee contributions are not included in the term "retirement benefits" as used in this note. If an employee is entitled to withdraw his accumulated contributions upon termination of employment before retirement, such contributions are, to the extent that they were made from wages earned during the marriage, part of the community estate. They are subject to division upon dissolution of marriage even though the employee spouse has no right to their

1. Hoeft v. Supreme Lodge of Knights of Honor, 113 Cal. 91, 96, 45 P. 185, 186 (1896).

immediate withdrawal.[2] The division usually is made by an offsetting allowance to the nonemployee spouse, leaving the right to receive the contributions entirely to the employee spouse.[3]

The application of the California community property system in apportioning retirement benefits in a dissolution proceeding depends primarily on whether the employee spouse's right to retirement benefits has matured by the time of dissolution.[4] If the right has matured, it is recognized as a community interest subject to division. The measure of this interest is the number of years in which employment and marriage coincided.[5] This measuring process has three possible applications. First, if the marriage existed during all years of participation in the retirement plan, the marital community's interest is equal to the full amount of the benefits which have matured.[6] Second, if the employee spouse was actively participating in the plan before marriage but became eligible to receive its benefits only after marriage, the community's interest is only a portion of the total benefits. This portion represents the benefits attributed to employment during marriage.[7] Finally, if the employee spouse brings a matured right into the marriage, the community

2. Phillipson v. Board of Administration, 3 Cal. 3d, 32, 41 n.8, 473 P.2d 765, 770 n.8, 89 Cal. Rptr. 61, 66 n.8 (1970); Williamson v. Williamson, 203 Cal. App. 2d 8, 11, 21 Cal. Rptr. 164, 167 (1962); Crossan v. Crossan, 35 Cal. App. 2d 39, 40, 94 P.2d 609, 610 (1939).

3. S. WALTZER, CALIFORNIA MARITAL TERMINATION SETTLEMENTS, § 9.53, (Cal. Cont. Educ. Bar 1971).

4. Waite v. Waite, 6 Cal. 3d 461, 469-70, 492 P.2d 13, 18, 99 Cal.Rptr. 325, 330 (1972); Phillipson v. Board of Administration, 3 Cal. 3d 32, 38, 473 P.2d 765, 769, 89 Cal. Rptr. 61, 65 (1970); Benson v. City of Los Angeles, 60 Cal. 2d 355, 359, 384 P.2d 649, 651, 33 Cal. Rptr. 257, 259 (1963).

Some of the confusion which surrounds the application of this rule is due to the courts' frequent synonymous use of the terms "vested" and "matured." It is suggested that a distinction between the two be maintained. A vested interest is not necessarily a matured right. Vested is better used to mean that the interest an employee has in a retirement plan is irrevocable. Matured conveys the idea that the employee's right to retirement benefits is capable of immediate enjoyment; due and payable as a result of having reached the limit of its time. Thus, an employee may have a vested interest in retirement benefits although his benefits have not matured. An example is the type of plan in which the employer is obligated to provide retirement benefits if his employee serves a minimum of ten years with the benefits becoming payable when the employee reaches age fifty-five. Here, the employee has a vested interest in the benefits after ten years of service, even if his employment is then terminated, but his right will not mature until his fifty-fifth birthday. *See generally* Pearson v. Los Angeles County, 49 Cal. 2d 523, 319 P.2d 265 (1957); Williamson v. Williamson, 203 Cal. App. 2d 8, 11-12, 21 Cal. Rptr. 164, 167 (1962); Houghton v. City of Long Beach, 164 Cal. App. 2d 298, 330 P.2d 918 (1958).

5. This is simply an application of the well established community law doctrine of apportionment. *See* Gettman v. City of Los Angeles, 87 Cal. App. 2d 862, 865, 197 P.2d 817, 819 (1948).

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

7. Gettman v. City of Los Angeles, 87 Cal. App. 2d 862, 197 P.2d 817 (1948).

has a claim to the increased value of the benefits attributable to any additional services rendered during marriage.[8]

In each of these instances, a matured right is divided. On the other hand, when the marriage is dissolved before a matured right accrues, the marital community is denied any interest in retirement benefits. Such a denial occurs regardless of the number of years which the community has devoted to accumulating these benefits. The courts simply characterize the employee spouse's right as an expectancy. This expectancy is not a property right in which the community may claim an interest.[9] Thus, the unmatured retirement benefits are neither valued nor divided upon dissolution.

The Legacy of French v. French

The court's characterization of unmatured retirement benefits as an expectancy and the consequent denial of any community interest in retirement pay is traceable to *French v. French*.[10] In that case Maxine French claimed a share of her seaman husband's retirement pay. At the time of the divorce seaman French had several years of Navy duty remaining before he could apply for retirement; he had made no contributions to any pension fund. Thus, he had no liquid retirement interest which could be added to the list of community assets. In the words of the court, "[a]t the present time, his right to retirement pay is an expectancy which is not subject to division as community property."[11]

French was cited as supporting authority for the decision in *Williamson v. Williamson*.[12] In that case the court of appeal denied Jeanne Williamson any interest in the funds contributed by her husband from his salary to his retirement plan during their marriage. Because the husband was not eligible to retire and because the terms of his retirement plan made no provision for the withdrawal of contributions, his interest was held to be an expectancy and not a property right in which the community could claim an interest.[13] In holding that this expectancy existing at the time of divorce was not community property, the court established the rule that:

> pensions become community property, subject to division in a divorce, when and to the extent that the party is certain to receive some payment or recovery of funds. To the extent that payment is, at the time of the divorce, subject to conditions which may or

8. *Cf.* Beam v. Beam, 10 Cal. App. 3d 973, 979, 89 Cal. Rptr. 280, 283-84 (1970); Ney v. Morgan, 212 Cal. App. 2d 891, 898-99, 28 Cal. Rptr. 442, 446 (1963).

9. Williamson v. Williamson, 203 Cal. App. 2d 8, 21 Cal. Rptr. 164 (1962).

10. 17 Cal. 2d 775, 112 P.2d 235 (1941).

11. *Id.* at 778, 112 P.2d at 237.

12. 203 Cal. App. 2d 8, 21 Cal. Rptr. 164 (1962).

13. *Id.* at 12, 21 Cal. Rptr. at 167.

> may not occur, the pension is an expectancy, not subject to division as community property.[14]

The California Supreme Court has acknowledged in dictum that the *Williamson* rule was a correct statement of the law.[15] This rule has been the source of inequities in the treatment of retirement pay in marital dissolutions. Trial courts have been precluded from recognizing the extent to which the retirement fund represents an expenditure of the community's time and effort. In this way the possibility of apportionment according to value has been eliminated. In short, the *Williamson* rule has denied the nonemployee spouse any share in what may be the community's only substantial asset—the right to unmatured retirement benefits.

The Narrowing of the Williamson Rule

In light of the inequities arising from the *Williamson* rule recent California decisions have narrowed its application through a two step process. First, the existence of conditions which affect the value of *matured* retirement benefits clearly has no effect on their classification as community property. Second, if the conditions precedent to the receipt of matured retirement benefits are entirely within the employee spouse's control, these benefits lose their expectant character and become divisible property rights.

In *Waite v. Waite*,[16] the appellant asserted that the pension payable under the Judge's Retirement Law should not be characterized as community property. Judge Waite had retired while still married. He sought to distinguish a judge's retirement pay from that of any other public employee.[17] This distinction was based on the fact that a judge's pension is subject to significantly different terms. A pension received under the Public Employee's Retirement System is paid in predetermined dollar amounts. In contrast to this system, a judge's monthly retirement pay may be increased to reflect raises accorded to active judges or decreased by his acceptance of a temporary judicial assignment.[18] For these reasons, Waite claimed that retired judges do not enjoy an unconditional and vested right to pension benefits. However, his effort to distinguish between the plans did not persuade the court. The retirement pay was classified as community property:

> The right [to the pension] flows from the services rendered by the

14. *Id.* at 11, 21 Cal. Rptr. at 167.

15. Phillipson v. Board of Administration, 3 Cal. 3d 32, 40, 473 P.2d 765, 770, 89 Cal. Rptr. 61, 66 (1970).

16. 6 Cal. 3d 461, 492 P.2d 13, 99 Cal. Rptr. 325 (1972).

17. *See* Phillipson v. Board of Administration, 3 Cal. 3d 32, 38, 473 P.2d 765, 768, 89 Cal. Rptr. 61, 64 (1970).

18. CAL. GOV'T CODE §68543.5 (West Supp. 1972), §75072 (West 1964).

> employee during marriage; the manner of the expression of the right does not distort it or alter its community characteristic.
>
> . . . Whether a pension plan provides for fixed or variable payments, and whether adjustments occur automatically or require legislation, the basic point remains that the pension serves as a remuneration for services rendered by the employee; if these services were discharged during the marriage, that remuneration must compose a community asset.[19]

In holding that the retirement pay was community property, *Waite* clearly demonstrated that conditions affecting the payment of matured rights have no bearing on the community nature of the pension when these rights matured during marriage.[20] This narrowing of the *Williamson* rule was applied by the court of appeals in *In re Karlin*.[21] In that case the retired spouse contended that his military retirement payments resulted from Congressional generosity. Because Congress may not appropriate new funds, these benefits were subject to conditions which might not occur. Thus, Karlin contended that his retirement payments constituted an expectancy which was not divisible as community property. The court disregarded his arguments. His retirement pay lost its expectant character the moment that he retired.[22] Since the right to receive this pay matured while the Karlins were married, the benefit of that right was a valuable property interest divisible as community property.[23]

The second step narrowing the application of the *Williamson* rule resulted from significant interpretation of *Williamson* itself. In *Bensing v. Bensing*,[24] an Air Force major on active duty for twenty-eight years argued that since he had not elected to retire prior to the time of dissolution, he had no vested right to retirement benefits. Therefore, his retirement pay remained an expectancy in which the community could claim no interest. The court found, however, that Major Bensing was eligible to retire after twenty years of service, which he had completed while married. Thus, the right to retirement benefits matured during the period of the marital community. Because of this, the community was entitled to share in the benefits to the extent they resulted from service during the years of marriage.[25] Significantly the court recognized that the right to receive retirement pay was sub-

19. 6 Cal. 3d at 471, 492 P.2d at 19-20, 99 Cal. Rptr. at 331-32.

20. *Id.* at 472, 492 P.2d at 20, 99 Cal.Rptr. at 332.

21. 24 Cal. App. 3d 25, 101 Cal. Rptr. 240 (1972).

22. See *id.* at 30, 101 Cal. Rptr. at 243.

23. The trial court awarded Mrs. Karlin a twenty-five percent interest in her husband's monthly retirement pay. This figure was calculated on the basis of a fifty percent community interest in the pension since the litigants had been married for eleven of Mr. Karlin's twenty-two years of active duty. *Id.* at 29, 101 Cal. Rptr. at 242.

24. 25 Cal. App. 3d 889, 102 Cal. Rptr. 255 (1972).

25. *Id.* at 891, 102 Cal. Rptr. at 256.

ject to a condition. That is, Major Bensing must apply for retirement. Even though this condition was not fulfilled, the court concluded that:

> the only condition to the payment of pension benefits is a condition entirely within Major Bensing's control and this is not the type of uncertainty which precludes division upon divorce.
>
> [T]o accept appellant's argument would mean that a spouse could be deprived of any share of matured pension rights by the decision of the employee to delay retirement until after the divorce proceedings were concluded. This would deprive respondent of her share of the community's most substantial asset.[26]

Though Major Bensing was receiving no retirement pay, the court devised a method to partition this presently nonexistent asset. It ordered a current distribution of the wife's interest in the retirement plan. By this order, the court of appeal modified the trial court's award. Mrs. Bensing had been awarded her share of the community's interest in the actuarial equivalent of Major Bensing's pension. This pension would be payable in monthly installments.[27] In modifying the trial court's award, the appellate court recognized that Mrs. Bensing was not entitled to a financial interest in the pension fund which was greater than that receivable by Major Bensing. Since the retirement payments would terminate on his death, the actuarial value might never be reached. Consequently, the award of a lump sum interest was stricken and the appellate court ordered monthly payments to Mrs. Bensing "continuing so long as both plaintiff and defendant live, but to terminate upon the death of either."[28]

Reconciling the Law with Justice

While recent decisions have narrowed the conditions to which the *Williamson* rule applies, the California courts' preoccupation with "vestedness" remains in derogation of community property doctrines. A more

26. *Id.* at 893, 102 Cal. Rptr. at 257.

27. *Id.* at 895, 102 Cal. Rptr. at 259.

28. *Id. But see Phillipson v. Board of Administration,* 3 Cal. 3d 32, 50, 473 P.2d 765, 777, 89 Cal. Rptr. 61, 73 (1970), where the court said: "But in this case the alternative, an award of the entire pension to the employee, leaves his spouse totally destitute. In that unfortunate situation, the injustice of awarding all benefits to the employee may leave no alternative but to permit the court to award a portion of the pension rights to the spouse." 3 Cal. 3d at 50, 473 P.2d at 777, 89 Cal. Rptr. at 73.

The *Bensing* decision was followed in Brown v. Brown, 27 Cal. App. 3d 188, 103 Cal. Rptr. 510 (1972). This case also involved a spouse on active military duty who was eligible to retire at the time of dissolution. Evaluation of the community interest, however, was remanded to the trial court since the Browns had been separated for several years when Leroy became eligible to retire. Since property acquired by either spouse under the circumstances of separation is the separate property of the acquiring spouse, the argument is available that since the right to the retirement benefits matured after separation, such benefits are the sole property of the employee spouse. *See* CAL. CIV. CODE § 5119 (West Supp. 1972).

substantial departure from the *Williamson* rule is needed. The court's reliance on the date that the pension rights mature is inconsistent with basic community property principles. If these basic principles were followed, the courts would seek to measure the direct contributions of community time and effort invested in the pension fund.[29]

The effect of this failure to apply basic community property principles is illustrated by the following hypothetical situation. Dick and Pat have been married for eighteen years, the length of Dick's service with his employer. Under his employment contract Dick will become entitled to generous employer-provided monthly retirement payments only after he has completed twenty years of service. Claiming irreconcilable differences, Dick petitions for dissolution. It is granted in the nineteenth year of marriage. By his unilateral decision to terminate his marriage immediately before his pension right matures, Dick has, under the present law, effectively denied Pat any interest in a very valuable asset. The law ignores the fact that Dick's interest in the retirement fund has been purchased almost entirely by personal efforts which are community assets.

A trial court faced with the facts of this extreme example probably would be tempted to go through some procedural stretching to achieve a just result. However, because most marital dissolutions are likely to occur well before the unmatured pension benefits of the employee spouse have significant value, the development of a fair and appropriate solution to the problem of determining and allocating the value of these benefits has received little judicial impetus. Yet as it relates to retirement pay, the *Williamson* rule of expectancies is applied whether the community has devoted thirty days or thirty years of energy and skill towards building up retirement benefits. As long as payment of the benefits is subject to conditions beyond the employee's control, the pension is not considered a proper subject for the courts' disposition. Merely because the right to retirement pay is unmatured at the time of dissolution the trial courts are required to reject the nonemployee spouse's claim to an apportioned share of that asset. This result is unfair and unnecessary.

Incorporating Unmatured Retirement Benefits into the Community Property System

To alleviate unfair results, the unmatured right to retirement benefits should be treated as a valid property interest. This treatment would preclude their classification as an expectancy incapable of readily calculable apportionment between the marital partners. However, the California courts understandably are reluctant to include in the community

29. See text accompanying notes 30-31, *infra*.

estate an interest which is subject to forfeiture, is contingent or is otherwise imperfect. Evaluating and distributing such an interest is beyond precise solution. Yet to dismiss these unmatured benefits as an improper subject for the courts' disposition ignores a fundamental concept of the community property system. This concept is that accumulations of value which result from the expenditure of time, energy or skill of a married person should inure to the benefit of the community[30] and each spouse should have a present, existing and equal interest in this wealth.[31]

This fundamental concept has been applied outside the area of retirement benefits. The courts have recognized a community interest in other assets of substantial, albeit only potential, value. These assets were developed, at least in part, by the expenditure of community owned time and effort.

For example, in *Waters v. Waters*,[32] the attorney husband objected to a judgment awarding his wife one half interest in property he expected to receive as a contingent fee from a client he represented in a case which was on appeal at the time of divorce. Since whether the husband would acquire any property could be ascertained only after the community terminated, he argued that the court had no jurisdiction to classify the contingency fee as community property. The court, however, found the disposition of this uncertain asset reasonable and proper. In making this finding, the court emphasized the fact that the attorney expended most of his time and skill in preparing the case during the period these assets belonged to the community:

> [A] very considerable part of the ultimate compensation, *if any*, to be received by defendant must be credited to the community, even though we assume the soundness of his argument to the effect that a portion of the fee which may be earned after the dissolution of the marriage will be his separate property.[33]

Thus, the court held that the expenditure of community assets created a contingent community property right. This right would be apportioned if and when the right becomes a certainty. If the right failed to mature, the Waters would receive nothing.[34] This logic and the conditional award are equally applicable to unmatured retirement benefits. A portion of the potential benefits are created by the expenditure of the employee spouse's time and energy. The right to receipt matures

30. *See* Beam v. Bank of America, 6 Cal. 3d 12, 17, 490 P.2d 257, 260, 98 Cal. Rptr. 137, 140 (1971); Somps v. Somps, 250 Cal. App. 2d 328, 332-33, 58 Cal. Rptr. 304, 307 (1967); H. VERRALL & A. SAMMIS, CASES AND MATERIALS ON CALIFORNIA COMMUNITY PROPERTY 5 (2d ed. 1971).

31. CAL. CIV. CODE § 5105 (West 1970).

32. 75 Cal. App. 2d 265, 170 P.2d 494 (1946).

33. *Id.* at 270, 170 P.2d at 498 (emphasis added).

34. *Id.* at 270, 170 P.2d at 497.

after dissolution. Therefore, the nonemployee spouse's interest would be payable only when the employee spouse's rights matured. If the retirement right never matures neither spouse will receive anything.

In addition to the *Waters* case, community interests have been recognized in life insurance benefits which became payable years after the community ended. An example of such recognition is *McBride v. McBride*.[35] Upon the death of Mr. McBride, his former wife claimed the benefits of a life insurance policy which had not been disposed of when the McBrides were divorced. She was awarded an interest in the proceeds. This award was supported by basic community property principles. When the premiums of an insurance policy have been paid with community funds, it is community property. Each spouse has a valid claim to its benefits.[36] When the policy is purchased partly with community and partly with separate funds, the proceeds are apportioned. This apportionment is based on the ratio of community contributions to separate property contributions.[37]

McBride can provide the foundation from which unmatured retirement benefits can be incorporated into the community property system. A life insurance policy is reasonably analogous to a retirement plan. The proceeds of that policy are similar to matured retirement benefits. The insurance proceeds are purchased by premium payments; the retirement benefits are purchased by expenditure of the employee's time, energy and skill. This leads to a new rule: the community has an interest in the benefits of the retirement plan to the extent that the value of these benefits is attributable to the community effort. The date that the benefits become payable is not the controlling factor. It simply conditions the time for enjoyment.

Such a new rule does not eliminate valuation problems. However, the fact that a dollar value cannot be assigned to the community interest in the retirement fund at the time of dissolution should not dissuade the court from including these benefits in the divisible community estate. *Scott v. Commissioner*,[38] a federal tax decision, dealt specifically with a property interest which was incapable of present evaluation. In that case, the deceased wife bequeathed her ownership in the insurance policy of her husband to her sons. The policy had been purchased with community funds. The husband survived the wife and continued to make premium payments. These payments were made

35. 11 Cal. App. 2d 521, 524-25, 54 P.2d 480, 481 (1936).

36. Sieroty v. Silver, 58 Cal. 2d 799, 803, 376 P.2d 563, 566, 26 Cal. Rptr. 635, 638 (1962); Tyre v. Aetna Life Ins. Co., 54 Cal. 2d 399, 402, 353 P.2d 725, 727, 6 Cal. Rptr. 13, 15 (1960).

37. Modern Woodmen of America v. Gray, 113 Cal. App. 729, 733, 299 P. 754, 755 (1936).

38. 374 F.2d 154 (9th Cir. 1967).

from his separate funds. The court said that the sons indeed had an ownership interest. However, the value of their mother's share could not be ascertained until the husband died:

> [B]ecause of the peculiar nature of an insurance policy, the wife's proportional interest can either grow or diminish. It grows as more premiums are paid from community funds; it diminishes as more premiums are paid from the husband's separate funds.[39]

These examples of contingency fee and life insurance cases can provide the impetus for overturning the *Williamson* rule. Outside the area of retirement pay courts have been interested in the extent to which community efforts are responsible for the development of an asset payable in the future. The fact that present evaluation, present distribution and even the guarantee of payment are precluded at the time of judgment has presented no insuperable problem. In the area of retirement benefits the California courts should also apply community property principles.

A Proposal

The California courts can return to basic community property principles in the division of retirement benefits in a way that is both manageable for them and fair to the spouses. This can be accomplished at the time of dissolution. The court simply must recognize that the nonemployee spouse has an apportionable ownership interest[40] in the retirement fund. This interest will mature *only* if and when the employee spouse becomes eligible to apply for retirement benefits. At that time, the community interest will be distributed. Such a conditional judgment removes from the employee spouse the risk of paying the community for retirement benefits which may never mature.[41] Notice of the court's order would be served on the employer who then could not make a discretionary disposition of the retirement benefits. At the

39. *Id.* at 160.

40. An award of an ownership interest avoids the argument that pension funds exist for the exclusive benefit of the employee and are therefore beyond the reach of creditors. "The recognition of an ownership claim [in the retirement fund] cannot be described as the levy of execution, garnishment, attachment or assignment of property." Phillipson v. Board of Administration, 3 Cal. 3d 32, 44, 473 P.2d 765, 772, 89 Cal. Rptr. 61, 68 (1970).

41. This risk would be created if the court awarded the nonemployee spouse community assets equal to one-half the actuarial value of the expected retirement benefits. A present award to the nonemployee spouse of community assets equal to one-half the actuarial value of the expected retirement benefits ignores the possibility that the employee spouse may never satisfy the conditions precedent to retirement. While the nonemployee spouse enjoys the equivalent of these benefits from the time of dissolution, the employee spouse must wait until his retirement, a fact which might not occur, to realize his share of the property division. *Cf.* Bensing v. Bensing, 25 Cal. App. 3d 889, 895, 102 Cal. Rptr. 255, 259 (1972).

time of retirement eligibility, the portion of the matured retirement benefits attributable to the period of employment during marriage could be calculated with reasonable accuracy in compliance with the decree.[42]

In some cases the courts will be able to determine a portion of the nonemployee spouse's interest at the time of dissolution. This is because the value of employee contributions made to the retirement fund during the existence of the marital community is readily determinable. Making such a determination does not impose any new burden on the courts. The current practice is to award the nonemployee spouse at the time of dissolution the equivalent of one-half of all withdrawable contributions made during the marriage.[43] Any additional interest accruing to the nonemployee spouse presumably would be based on employer contributions. This interest would be realized when the employee reaches retirement eligibility. A deduction necessarily would be made for the prior award to the nonemployee spouse of his or her share of the community contributions.

This proposed remedy is consistent with basic community property principles and their application in the contingency fee and life insurance cases. The right of each spouse to the retirement benefits would mature when the employee spouse becomes eligible to apply for retirement benefits. The choice among alternative methods of receiving retirement benefits—that is, periodic or lump sum payment—should remain in the employee as it would if he were still married. The nonemployee spouse's receipt of the matured benefits would be on the same basis as their receipt by the employee spouse. When the employee elected to retire, the employer would pay the former spouse a calculated share. These payments would be deducted from the employee's pension. In the event that employee spouse elected not to retire although eligible, the courts could fashion a decree forcing distribution to the nonemployee spouse of a proper share of the community interest as soon as the employee spouse's right to retirement benefits matures regardless of the choice not to retire.[44]

42. Admittedly, the calculation of the value of the community interest in a retirement plan would in most instances present serious practical problems for the trial judge. Because of the many variations in the factors which make up the ultimate size of an employee's pension check, it is suggested that this calculation be made by the employer or the administrators of the retirement plan. These are the experts with the knowledge of the mathematical basis and working order of the plan who possess the statistical data and variables which may concern the particular employee. It should not be a valid objection to this proposal that the evaluation of this interest is beyond mathematical precision. A reasonable approximation of the amount of the nonemployee spouse's interest should be held sufficient.

43. See text accompanying note 3, *supra*.

44. *See, e.g.*, Bensing v. Bensing, 25 Cal. App. 3d 889, 102 Cal. Rptr. 255 (1972).

Thus, once the courts recognize a community property interest in unmatured retirement benefits, the nonemployee spouse's interest can be protected. This would be accomplished by a conditional decree. Such a decree includes the degree of flexibility required to guarantee fairness to both spouses. This fairness continues from the time of dissolution until the retirement benefits mature.

Conclusion

As a result of recent decisions[45] the California community property system now recognizes the extent of the community effort involved in the accumulation of retirement benefits if the date of eligibility for retirement occurs prior to the dissolution of marriage, even though at the time of dissolution the fact of retirement remains uncertain. In light of these recent decisions, the courts can now further vindicate the rights of the nonemployee spouse by extending community property protection to unmatured retirement benefits. This extension would not be inconsistent with pronouncements by the supreme court:

> [W]e do not believe the Legislature has declared the employee's right to a pension so sacrosanct that it is incompatible with his spouse's ownership of her community share in it. Both employee and non-employee own community property rights in the pension fund that are of equal stature; such rights are equally subject to the power of the divorce court. Because the employee participates in the pension program he does not thereby strip his spouse of vested community property rights in that fund.[46]

This statement shows the court's recognition that retirement benefits are properly includable in the community property system. When such a recognition is coupled with the logic of the contingency fee and life insurance cases, the result is that unmatured benefits are community property subject to apportionment and distribution upon dissolution. Awarding the nonemployee spouse an apportioned ownership interest, contingent upon the employee spouse's acquisition of a matured right to retirement benefits, provides a fair and manageable solution. This solution finds support in the fundamental principles of the community property system.

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45. Brown v. Brown, 27 Cal. App. 3d 188, 103 Cal. Rptr. 510 (1972); Bensing v. Bensing, 25 Cal. App. 3d 889, 102 Cal. Rptr. 255 (1972).

46. Phillipson v. Board of Administration, 3 Cal. 3d 32, 50, 473 P.2d 765, 777, 89 Cal. Rptr. 61, 73 (1970).

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