Conclusion

By holding that counsel need not (and generally should not) be present during psychiatric interviews, Edwards subordinated the interviewee's rights to the requirements of psychiatry. The justification given was that alternative safeguards were available and that admitting counsel would imperil the validity of the examination. Yet there was no discussion of what the interviewee's rights are, no discussion of how the alternative safeguards could protect them, and very little discussion (apart from conclusory statements) of why counsel's presence would be incompatible with a valid examination. As a result, the Edwards court was overly hasty in deferring to what it perceived to be the needs of psychiatry.

Arne Wagner

II

COMMUNITY PROPERTY

DIVIDING THE COMMUNITY PROPERTY INTEREST
IN NONVESTED PENSION RIGHTS

In re Marriage of Brown.1 The California Supreme Court overruled French v. French,2 and held that nonvested pension rights3 constitute community property. Under French, only "vested" pensions were considered property subject to division between the spouses on divorce.4 The inequity of the French rule had been the subject of much criticism by commentators.5 With Brown, California joins two her over a long period of time, whereas defendant's psychiatrist had been brought in solely for purposes of litigation.

2. 17 Cal. 2d 775, 112 P.2d 235 (1941).
3. Brown defines "vested" to mean a pension which is not subject to forfeiture if the employee voluntarily leaves his job prior to retirement age; a "matured" pension is one in which the employee has an immediate right to payment because he is eligible to retire. 15 Cal. 3d at 842, 544 P.2d at 563, 126 Cal. Rptr. at 635.
4. 17 Cal. 2d at 777, 112 P.2d at 236.
of the eight other community property states in dividing nonvested pension rights on divorce.\(^6\)

Throughout his 23 years of marriage, Robert Brown had been employed by General Telephone Company.\(^7\) When the parties separated, Robert was only 3 years away from optional retirement,\(^8\) but earlier termination of his employment would forfeit his right to any pension. Since Robert's pension had not vested, the trial court applied the French rule and found that Robert's pension was an "expectancy" incapable of division as community property. Consequently, his wife received no interest in the future pension benefits even though Robert soon could elect to retire and collect $311 per month, a sum which would amount to $37,000 in 10 years.\(^9\) Justice Tobriner, speaking for the court, rejected the expectancy label and held that the employee's right to pension benefits, whether or not vested, constitutes a community property interest.\(^10\) The court remanded the case and directed the trial court either to value the pension and divide it between the parties, or if valuation was too uncertain, to retain jurisdiction over the pension for later division between the parties when benefits were paid.\(^11\) The court accorded limited retroactivity to its cause the division of pension rights as community property was made to depend solely on whether the date of divorce was before or after the date of vesting; yet the date of divorce could be controlled by the employee spouse. A divorce before the date of vesting would secure the entire pension for the employee spouse, while a divorce after vesting would require the employee spouse to share his benefits with the other spouse.

6. See Le Clert v. Le Clert, 80 N.M. 235, 453 P.2d 755 (1969) (court ordered division of anticipated retirement pay; retirement was "imminent" at the time of trial and the employee spouse apparently had retired by the time of appellate review); Wilder v. Wilder, 85 Wash. 364, 534 P.2d 1355 (1975) (court awarded division of retirement benefits still contingent on the completion of an additional period of employment). In Wilder, the court approved DeRevere v. DeRevere, 5 Wash. App. 741, 491 P.2d 249 (1971), the first community property case in which nonvested pension rights were divided at the time of divorce although several years remained for the pension to vest. The court in DeRevere stated that the employee had a vested interest in the pension system, a theory which formed the basis for Justice Tobriner's analysis. Texas also may divide nonvested pension rights, although the issue has not been squarely faced by Texas courts. In Miser v. Miser, 475 S.W.2d 597 (Tex. Civ. App. 1971), the court ordered a division of the husband's anticipated retirement pay when he had 11/2 years to serve before retirement eligibility because he had "bound himself to serve for more than enough time to receive the retirement benefits" by reenlisting. \(^{Id.}\) at 600-01.

7. 15 Cal. 3d at 843, 544 P.2d at 563, 126 Cal. Rptr. at 635.

8. At the time of separation, Robert had earned 72 of the 78 points required for retirement eligibility. If Robert was discharged or otherwise terminated his employment prior to accumulating 78 points, he would forfeit his right to any retirement benefits. Once he had accumulated 78 points, he could retire at a lower pension or continue to work until age 63 and retire at an increased monthly pension. \(^{Id.}\) at 842-43, 544 P.2d at 563, 126 Cal. Rptr. at 635.

9. \(^{Id.}\) If Robert deferred his retirement until age 63, his benefits would amount to $58,000 if he lived to age 73.

10. \(^{Id.}\) at 845, 544 P.2d at 565, 126 Cal. Rptr. at 637.

11. \(^{Id.}\) at 848, 852, 544 P.2d at 567, 570, 126 Cal. Rptr. at 639, 642.
holding; it would apply only to cases in which there had been no adjudication of the marital property rights or in which their adjudication was still subject to appellate review at the time of the decision.\(^\text{12}\)

I. Property v. Expectancy

In concluding that nonvested pension rights are divisible on divorce, the Brown court incorporated into community property law a concept of pension rights previously articulated in contract law. In disputes arising from employment contracts, the California courts long had recognized that the employer's promise to pay a pension became irrevocable well before the employee had completed the period of service required for pension eligibility.\(^\text{13}\) Consequently, the employee had contractual rights against an employer who purported to revoke the offered pension. Until Brown, however, divorce courts did not accord the community any interest in these contractual rights. Instead, courts relying on French held that the employee's rights were too uncertain to divide until the employee had worked the number of years required for the pension to "vest."\(^\text{14}\) Under this view, the interest of the employee was a mere "expectancy," not property capable of division on divorce.\(^\text{16}\) This left the employee in an enviable position; his rights in the pension were secure, but he did not have to share his benefits if he obtained a timely divorce.

The Brown court held that when the contractual right to a pension arises during marriage, property exists that should be divided upon

\(^{12}\) Id. at 851, 544 P.2d at 569, 126 Cal. Rptr. at 641. Brown also would apply retroactively to those cases in which the trial court had expressly reserved jurisdiction to divide pension rights. Id.

\(^{13}\) The courts have refused to permit public employers to withdraw or significantly to alter promised pensions, holding that such actions constitute impairment of contracts in violation of article I, section 9 of the California Constitution, since a contractual right in the pension system arises when the employee has performed some services for the employer. See Allen v. City of Long Beach, 45 Cal. 2d 128, 287 P.2d 765 (1955); Kern v. City of Long Beach, 29 Cal. 2d 848, 179 P.2d 799 (1947); Dryden v. Board of Pension Comm'rs, 6 Cal. 2d 575, 59 P.2d 104 (1936).


\(^{15}\) French v. French, 17 Cal. 2d at 775, 112 P.2d at 235.
divorce.\textsuperscript{16} The contractual analysis underlying the opinion in \textit{Brown} raises two questions: (1) whether the court must, on divorce, divide contract rights other than rights to pension payments; and (2) whether there is a community property interest in compensation to which the employee had no contractual right at the time of divorce, but which later would be paid for services performed during marriage.

Since \textit{Brown}, one court of appeal has addressed the issue of whether a contract right that was not a pension was community property. In \textit{In re Marriage of Skaden},\textsuperscript{17} the court refused to find a community property interest in the termination provisions of an employment contract. The contract provided that the husband, an insurance salesman, would receive for 1 year after his termination a portion of the renewal premiums paid by his former customers if he refrained from competing with his employer. The court rejected the wife's argument that \textit{Brown} required a valuation and division of this interest. Instead, the court found that at the time of divorce the husband's contractual right to termination payments was an expectancy since the right to payment depended on the husband's actions after the divorce.\textsuperscript{18}

The \textit{Skaden} court's reluctance to find that contract rights are a form of community property seems questionable after \textit{Brown};\textsuperscript{19} nothing in \textit{Brown} purports to limit its holding to rights arising from pension contracts. Skaden's employer could not unilaterally have altered the contract's termination provisions, and Skaden's right to enforce those provisions was no less a right arising from an employment contract

\begin{itemize}
  \item \textsuperscript{16} 15 Cal. 3d at 845, 544 P.2d at 565, 126 Cal. Rptr. at 637: [The employee's right to such benefits is a contractual right . . . . Since a contractual right is not an expectancy but a chose in action, a form of property . . . an employee acquires a property right to pension benefits when he enters upon the performance of his employment contract.
  \item \textsuperscript{17} 132 Cal. Rptr. 524 (3d Dist.) (opinion vacated), \textit{hearing granted}, 61 Cal. App. 3d 682 (1976).
  \item \textsuperscript{18} In \textit{In re Marriage of Fonstein}, 17 Cal. 3d 738, 746, 552 P.2d 1169, 1173, 131 Cal. Rptr. 873, 877 (1976), the court stated that the husband's right to withdrawal payments upon his voluntary withdrawal from a law partnership was a valuable community property right. However, since the wife was not claiming an interest in the withdrawal right per se, but only using the value of this right to determine the worth of the husband's interest in his partnership, the court's characterization of this type of termination payment as community property is dictum.
  \item \textsuperscript{19} Arguably, \textit{Skaden} is also a retreat from pre-\textit{Brown} law. \textit{See Waters v. Waters}, 75 Cal. App. 2d 265, 170 P.2d 494 (4th Dist. 1946), where the court granted the wife an interest in a contingent legal fee; the husband had performed most of the services during their marriage, but the result of an appeal and thus his right to the fee was unknown at the time of divorce. \textit{But see Lakenan v. Lakenan}, 256 Cal. App. 2d 615, 64 Cal. Rptr. 166 (2d Dist. 1967), where the court held that since the husband had no legal right at the time of divorce to assert a claim for his services as executor of his father's estate, there was no community property interest in his future executor's fee.
\end{itemize}
than Robert Brown’s right to collect his promised pension. Nor was the anticompetition condition attached to the termination provision more onerous than similar conditions imposed on pension recipients.

Neither should Brown be read to exclude from the property of the community certain interests which technically are not contractual rights. In some circumstances, a spouse should be awarded an interest in deferred compensation to which there is no contractual right at the time of divorce. Federal pensions, for example, have frequently been treated as gratuities rather than contract rights since they are subject to revocation by congressional act. Although there may not be an enforceable contractual right to such benefits either before or after payments begin, courts in community property states have long been dividing federal pensions; Brown should not be read as repudiating this practice. The logic of the opinion suggests rather that even interests in noncontractual bonuses intended as additional compensation for work performed during an entire year should be divided when the spouses separate. Brown rests ultimately on considerations more basic than the formal classification of contractual rights as a form of property. Justice Tobriner minimized the significance of the contractual right label and stressed that the rights of the nonemployee spouse arise from the fundamental principle of community property law that both spouses participate in the community and both are entitled to share in its rewards.

20. See, e.g., Lynch v. United States, 292 U.S. 571, 577 (1934) (dictum) ("[P]ensions . . . are gratuities . . . and the grant of them creates no vested right. The benefits conferred . . . may be redistributed or withdrawn at any time in the discretion of Congress."); Stouper v. Jones, 284 F.2d 240, 243-44 (D.C. Cir. 1960) (an employee has "no right under the Retirement Act based on contractual annuity principles" and the government is entitled to modify or revoke any benefits previously offered). But see Berkey v. United States, 361 F.2d 983 (D.C. Cir. 1966) (veteran's retirement pay distinguishable from a gratuitous pension); Steinberg v. United States, 163 F. Supp. 590 (Ct. Cl. 1958) (employee's right to the pension arises on retirement).

21. In Stouper v. Jones, 284 F.2d 240 (D.C. Cir. 1960), the employee had been required to retire because of a disability. A subsequent change in the Retirement Act made those with her disability no longer eligible for benefits. Her attempt to claim continued benefits failed.


23. But see In re Marriage of Hisquierdo, 63 Cal. App. 3d 231, 133 Cal. Rptr. 684 (2d Dist. 1976), in which the court refused to divide the husband's interest in his nonvested pension arising under the federal Railroad Retirement Act. The court did not apply Brown because it did not find federal government pension rights to be contractual since the provisions could be altered by subsequent legislation.
[W]e submit that whatever abstract terminology we impose, the joint effort that composes the community and the respective contributions of the spouses . . . are the meaningful criteria. The wife's contribution to the community is not one whit less if we declare the husband's pension rights not a contingent asset but a mere "expectancy." He concluded that pension rights constitute a contingent interest which is a property interest of the community.

This reasoning invites courts to examine the purpose for which the anticipated payments will be received after divorce and to determine whether the contingent interest, if received, relates back to the joint effort of the community. To the extent that payments constitute compensation for services rendered during marriage, the payments should be treated as community property and divided on divorce.

II. Dividing the Pension Rights

In holding that pension rights must be divided between the spouses on divorce, the court recognized that pensions have become an increasingly significant component of employee compensation and that as the date of retirement approaches, the pension may surpass in value all other community property assets.

Several methods of valuation and division are available to split this important asset between the spouses. The court explicitly rejected one: awarding additional spousal support to the nonemployee spouse to offset any inequity resulting from the award of the entire pension to the employee spouse. Justice Tobriner refused to entrust the nonemployee spouse's interest to the discretion of the trial court for an unpredictable award of spousal support in lieu of an exact share of what was his as a matter of "absolute right." The task of ascertaining and dividing the pension will not be an easy one since precision is demanded by Civil Code section 4800, which requires divorce courts to divide the community property "equally."

a. Lump-Sum Settlement

Lump-sum settlement—the award of the pension to the employee spouse and property of equal value to the other spouse—has two advantages over dividing the pension between the parties as payments are

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24. 15 Cal. 3d at 851-52, 544 P.2d at 569-70, 126 Cal. Rptr. at 640-41.
25. Id. at 852, 544 P.2d at 570, 126 Cal. Rptr. at 641.
26. Id. at 848, 544 P.2d at 567, 126 Cal. Rptr. at 639.
27. Id. (quoting In re Marriage of Peterson, 41 Cal. App. 3d 642, 651, 115 Cal. Rptr. 184, 191 (2d Dist. 1974)).
received. One advantage is the finality of the arrangement. The severance of the community is complete, obviating the need for a later hearing to prorate the pension and for continuing court orders to force the pensioner to pay the nonemployee spouse's share. A second advantage is the placing of control of the pension in the employee spouse. The employee must decide whether to remain at his job until his pension vests, and he must select among various options for receiving pension benefits. As sole owner of the pension rights, the employee spouse may decide these questions without regard to the possibly conflicting interests of his ex-spouse.

Despite these advantages, an award of all the pension rights to one spouse will not always be the preferable method of settlement. If there is not other community property of equivalent value, one lump-sum payment may not be possible. Even where there is sufficient other community property, the award of the pension to one spouse may be inequitable if the employee is stripped of all property but his rights to a future pension while the other spouse receives assets which may be immediately used and enjoyed. Finally, if the pension rights cannot be valued with sufficient accuracy to satisfy the equal division requirement of section 4800, a lump-sum settlement should not be ordered.

The trial court can readily evaluate whether there is sufficient other community property to order a lump-sum settlement of the pension rights. More troublesome will be the task of valuing the pension rights with sufficient accuracy to meet the statutory equal divi-
sion requirements. The difficulty is compounded by the great variety of retirement plans, each with its own set of options, conditions, and payment methods. Commentators and the courts have suggested a variety of methods for valuing the pension at the time of divorce, all of which involve some combination of the following factors: the expected amount of retirement benefits, the life expectancy of the employee at the age of retirement, the risk that the employee will die or be discharged before retirement age, and the risk that the employee will forfeit the pension by voluntary termination of employment before the pension vests. Valuing the last factor—the risk of forfeiture by voluntary termination of employment—will be only new task imposed on the courts by Brown. This factor is particularly difficult to quantify since the risk is entirely within the control of the employee.

32. Most retirement plans can be divided into two main types: defined contribution plans and defined benefit plans. See Projector, Valuation of Retirement Benefits in Marriage Dissolutions, 50 L.A.B. Bull. 229, 230-31 (1975) [hereinafter cited as Projector]. Defined contribution plans are plans in which an account is kept for each employee and a specified amount is contributed periodically to the account, either by the employer, the employee, or both. At retirement age, the balance in the account is paid out in a lump sum or used to purchase an annuity of whatever amount the account can buy. A defined benefit plan is a plan in which no account is kept for the employee, but at retirement age the employer provides the employee with a defined package of benefits.


35. Another factor for consideration—the tax liability incurred by receipt of pension payments—has been specifically rejected by the supreme court. See In re Marriage of Fonstein, 17 Cal. 3d 738, 552 P.2d 1169, 131 Cal. Rptr. 873 (1976); In re Marriage of Wilson, 10 Cal. 3d 851, 519 P.2d 165, 112 Cal. Rptr. 405 (1974).

Once the pension is valued, the court must apportion it between separate and community property if the parties were not married throughout the full term of employment.

36. The risk of never getting the pension has been before the courts in vested pension cases, but the risk in those cases was the risk of involuntary termination of employment—the risk of death or discharge before retirement age. A proper valuation of the pension should include discounting for these risks as well.
Prior to valuing this risk, the court must determine who should bear it. If only the employee spouse is to bear the risk, the probability of the pension not vesting can be ignored—the nonemployee spouse will receive other property equal to the full value of the pension. If both parties are to bear the risk, the value of the pension will be discounted by an appropriate factor and the nonemployee spouse will receive property equal only to the value of the discounted pension. A court might place the entire risk of nonvesting on the employee who takes sole ownership of the pension on the theory that the decision to change employment and forfeit the pension is solely within the employee's control. Such a policy, however, would severely penalize a decision to change jobs. The employee spouse would lose his pension after having already "purchased" the nonemployee spouse's interest in the pension with other community property; had the spouses remained married, they would have shared the loss of the pension.

Instead, the Brown court approved the alternative approach of dividing the risk of nonvesting between the spouses; it directed trial courts to "take into account the possibility that...termination of employment may destroy [pension] rights before they mature." Consequently, if the court directs a lump-sum settlement of the parties' interests in the pension, the value of the pension must be discounted by the risk that the pension never will be paid. Discount factors to apply are not readily available. Although employment turnover tables can be used as the basis for calculating an appropriate discount factor, such tables are not available for all occupations and age groups, and where available, they are not always reliable. Even if reliable employee turnover tables were available, they might not be appropriate in the divorce context since a change in home life may significantly affect employment decisions.

Because of the lack of accurate discount factors, one commentator has suggested a simple rule of thumb to determine the risk of voluntary termination of employment: calculate the number of years worked as a percentage of the number of years of work required for vesting; then discount the value of the pension to that percent. Although this method is easy to apply and may reflect general patterns of employment mobility, it is perhaps too arbitrary to satisfy the equal division requirement of section 4800; it fails to consider variables such as the effect of the employee's age on his propensity to change employment.

37. 15 Cal. 3d at 848, 544 P.2d at 567, 126 Cal. Rptr. at 639.
38. Projector, supra note 32, at 236.
39. Id. For example, if H worked 2 years of the 20 years required for vesting, a pension valued at $10,000 should be discounted to 10 percent of its value—$1,000.
Even if the probability of pension forfeiture could be quantified to produce acceptable discount factors, the use of such statistics to value the pension must be questioned. Statistical methods will insure only that over the great number of divorces, nonemployee spouses in aggregate will obtain property equivalent to the aggregate value of the employee spouses' pension rights. In each particular case, however, the pension either will vest and be worth more than its discounted value or it will not vest and be worth nothing. Thus, in each case there will have been no "equal division" of the community property.

The Washington Supreme Court has suggested an individualized approach to determining the risk of nonvesting, but this approach is as riddled with difficulties as statistical methods. If the court knows that there is a high probability that the employee spouse will leave his job before his pension vests, what should it do? If the court assigns no value to the pension, the nonemployee spouse will receive nothing even if the employee remains on the job and the pension vests. As long as section 4800 requires that community property be divided equally between the spouses, an imprecise method of valuation will be unsatisfactory. Consequently, when the parties dispute the value of the pension, the court can best meet the statutory standard by retaining jurisdiction and dividing the benefits between the spouses as payments are made.

b. Apportioning Each Pension Payment

The Brown decision grants trial courts the discretion to retain jurisdiction over the pension and to award an appropriate portion to each spouse as it is paid when a satisfactory value cannot be

40. It may be argued that statistical factors, such as life expectancies, are used routinely to assess the value of other contingent assets such as interests in remainders and life insurance policies. There is no serious objection to the use of statistical methods to value such assets, even though the discounted value overvalues the asset that never is realized and undervalues the asset that eventually is enjoyed. The considerations behind the use of actuarial methods to value these contingent assets, however, do not apply to pensions simply because pension rights cannot be sold, assigned, or cashed in. A life insurance policy has a cash value that can be realized by its owner long before the death of the insured; a remainder interest can be sold on the market to realize its worth. Since a pension cannot be placed on the market to raise cash equivalent to the pension's discounted value, the risk of the pension never being received cannot be shared by anyone but the owner.

41. The Washington Supreme Court suggested consideration of the following factors to determine the probability of the pension vesting: length of time remaining before eligibility for benefits, other options open to the employee, the likelihood that the employee would pursue another career or abandon his pension rights, the amount of the community's investment in the pension plan and whether the community's interest should be considered a permissibly forfeitable asset under the employee's control. Wilder v. Wilder, 85 Wash. 2d 364, 369, 534 P.2d 1355, 1358 (1975).
determined. The division of payments actually received will ensure the fairness contemplated by section 4800.

1. Freedom of Contract. One of the most perplexing problems raised by permitting both spouses to retain an interest in the pension is the freedom of the employee spouse to forfeit the pension without answering to the other spouse. The employee spouse has some control over whether the pension will vest because he has the power to decide whether to remain at his job. While the parties remain married the employee still has the final voice in his own employment decisions, but those decisions can be moderated by the influence of the other spouse. Once the parties separate, however, there is no assurance that the decision of the employee spouse will not be injurious to the other. For example, if the employee spouse receives a better job offer, he may gladly leave his job and forfeit his pension, a decision from which both will benefit if they are married. If this occurs after the divorce, the nonemployee spouse will not benefit from the decision, but will lose his share of the forfeited pension.

The court avoided the question of whether the employee spouse has a duty to maintain the pension by stating that the law regarding the spouse's duty would not change, and noting that in prior cases the employee spouse had been permitted the freedom to terminate his employment. But these cases all involved vested pensions; whenever the employee elected to leave his job, by definition he retained his pension rights. Thus, the employee's duty to maintain a nonvested pension had not been considered by pre-Brown cases. Dicta in earlier cases might be read to reject the freedom of contract suggested by Justice Tobriner. One court stated that "[t]he husband may not, by devices within his control, defeat the wife's right to what is community property." This case and others, however, considered only the employee spouse's freedom to choose among alternative modes of receiving pension benefits once the pension had vested. When this

42. 15 Cal. 3d at 848, 544 P.2d at 567, 126 Cal. Rptr. at 639. Presumably, a pro rata division also would be permitted when there is insufficient other community property to award to the nonemployee spouse. Alternatively, the court could value the pension rights and order the employee spouse to pay the other spouse in installments.

43. The spouses retain joint ownership as tenants in common of property not divided at divorce. W. DE Funiak & M. Vaughn, Principles of Community Property 520 (2d ed. 1971).

44. 15 Cal. 3d at 849-50, 544 P.2d at 568, 126 Cal. Rptr. at 640.

45. See note 3 supra.


exercise of control is in issue, both parties as co-owners can be said to have an equal interest in the form and amount of pension benefits and so the employee spouse's freedom of contract may be justifiably restrained. But when the issue is whether the employee must remain at his job after it becomes unsatisfactory, solely to realize the other spouse's interest in the pension, the employee's strong interest in satisfactory employment, or no employment, must prevail. Consequently, dicta from vested pension cases should not be used to curtail the employee spouse's employment decisions.

Where a court orders that pension payments be divided as they are received, it effectively requires that the parties share equally the risk of nonreceipt. The risk so allocated should be considered to include the risk that the pension might be forfeited by a reasonable decision of the employee. Reasonable decisions should encompass all the situations in which an employee is likely to leave a job: better job offer, new sources of income, educational opportunities, and renunciation or change of employment for spiritual or psychological fulfillment.

The risk of forfeiture that the spouses share, however, should not be interpreted to encompass the risk that the employee spouse will forfeit his pension solely to spite the other spouse. The risk allocated between the parties should be limited to the risk of a reasonable, good faith forfeiture of the pension rights. Where the predominant intent of the employee spouse in terminating employment is to injure the interests of the other spouse, the courts should provide a remedy. The principles of both cotenancy and community property law require some measure of good faith in dealings by one co-owner which affect the interest of the other. The Civil Code imposes a duty of good faith on the manager and controller of community property, and restrictions are placed on cotenants in their dealings with jointly owned property. Whatever the legal theory utilized, bad faith forfeiture of pension rights should be discouraged by permitting the injured spouse a cause of action for damages against the forfeiter.

48. The court would not, of course, literally require that the employee remain at his job; but the court's decree could make it economically impossible for the employee to do otherwise.

49. A similar analysis was implied by the Washington Supreme Court when it first considered the divisibility of nonvested pensions. Wilder v. Wilder, 85 Wash. 2d 364, 369, 534 P.2d 1355, 1385 (1975).

50. The problem will not frequently arise since the injury that the employee inflicts on himself should generally suffice to prevent capricious forfeitures.

51. CAL. CIV. CODE § 5125(e) (West Supp. 1976). No cases have interpreted this section to date.

In some circumstances it may be necessary to apply principles of tracing in order to prevent inequitable results when the employee reasonably decides to leave his employment. When an employee's accumulated experience and special skills have made him highly marketable, he may receive offers from prospective employers that include comparable pension benefits to compensate him for the loss of benefits that would occur if he left his current employment. To the extent that the employee has used his spouse's interest in the pension as leverage to obtain the comparable pension benefits in the new position, the court should give the nonemployee spouse an interest in the substituted pension. If the employee does not obtain comparable pension benefits or additional compensation in lieu of pension benefits, tracing will have no application because the employee will have received nothing in return for his forfeiture of the jointly owned pension and both spouses must share the loss.

2. Deferred Retirement. A problem related to the issue of the employee spouse's freedom of contract, but not unique to nonvested pension cases, is the employee's right to defer retirement. Many retirement plans offer the employee the option of retiring early for lower monthly benefits or deferring retirement and receiving increased benefits. If the employee elects to retire early, both spouses will receive a share of the early pension benefits. If the employee elects to postpone retirement, his salary after divorce will continue to be his separate property while the other spouse will receive no payments. Faced with employees who elected to defer retirement, courts have ordered the employee to make payments to the other spouse starting from the first day on which he could have retired even though he did not retire at

53. Tracing is widely used in the context of divorce or probate proceedings to determine the separate or community character of property to be distributed. See, e.g., In re Marriage of Mix, 14 Cal. 3d 604, 536 P.2d 479, 122 Cal. Rptr. 79 (1975); In re Estate of Reizian, 36 Cal. 2d 746, 227 P.2d 249 (1951); Huber v. Huber, 27 Cal. 2d 784, 167 P.2d 708 (1946).

54. A recent court of appeals case lends some support to this recommendation. In In re Marriage of Cavnar, 62 Cal. App. 3d 660, 133 Cal. Rptr. 267 (4th Dist. 1976), the husband converted retirement benefits which he was receiving into disability pay. A year later the couple separated and under other community property principles, the disability pay became the husband's separate property. The wife argued that since retirement pay would have been community property, the husband's act of converting the pay to disability pay should not deprive her of her interest. The court agreed and ordered a division of that part of the husband's payments which were attributable to his retirement.


56. Robert Brown had this option. See note 8 supra.
that time. These courts have valued the pension by determining what the employee would have received if he had retired on that date.

This result does not conform to the principle of risk-sharing encompassed by the pro rata division of pension rights, or to the freedom of contract urged by Brown. If the employee spouse must begin paying the other spouse before all risks of divestment have been eliminated, such as divestment because of death, discharge for cause, or other forfeiture provisions in the retirement plan, the risk has not been shared by both spouses. Further, the employee spouse has been penalized by not retiring. Until he eventually receives pension benefits, the employee must pay the other spouse with his separate property earnings. Moreover, since the preretirement "pension" benefits for the nonemployee spouse will begin before the employee retires, these payments may exceed the total benefits the employee actually receives. To avoid this result, when the pro rata method of dividing the pension is used, the nonemployee spouse should receive a share of the pension only when payments actually begin.

If the nonemployee spouse is destitute, the court may be reluctant to permit the employee spouse to continue to earn a separate property salary after retirement age while the other spouse receives nothing. In this situation, however, the court can simply order a lump-sum settlement of the pension rights on the date of vesting or the date of maturation. A reliable valuation of the pension can be made at this time since there is no risk of voluntary forfeiture once the pension has vested, and the risk of divestment because of early death may be calculated by accepted actuarial tables. The court can order the employee spouse to pay the other the appropriate share of the discounted pension, and if the employee does not have enough property to make a full settlement, the court can order the settlement paid in installments. If the court so divides the pension, the nonemployee spouse need not wait beyond the time of retirement eligibility for payments, and the employee spouse need not pay out more than the other's appropriate share.

Conclusion

Because there is no reliable means of predicting whether an employee will voluntarily leave his job, it is difficult to value a pension before it has vested. This suggests that where the value of the pension is disputed, the courts should retain jurisdiction and later order

58. Since the court retains jurisdiction over the pension when a pro rata division is used, it can adjudicate the rights of the parties in the pension at this date or any other.
a division of the pension when payments begin. This result is dictated by the equal division requirement of section 4800 and by the need to treat the parties fairly.

The longer the period remaining until retirement eligibility at the time of divorce, the higher the value the parties are likely to place on a final adjudication of their relationship. The employee spouse will want to maximize his freedom from the interests of the other spouse; the nonemployee spouse will be unwilling to track the employee spouse down at the age of retirement to demand payments. Correspondingly, the longer the period remaining before retirement eligibility, the lower will be the value of the pension. It is likely, then, that the pension will not be worth so much that a dispute over its value will override the parties' interest in a final division of their property. Consequently, the parties can be expected to stipulate to the value of the pension and any departure of the stipulated value from the pension's true value will reflect the price one party is willing to pay to be totally free from the other. If the court refuses, as it should, to value the pension for a lump-sum settlement when the parties cannot agree on its value, the parties will be encouraged to settle out of court when they place a high value on the finality of the divorce decree.

When the divorce occurs only a short time before the employee spouse reaches retirement age, however, the value of the pension is likely to be high in relation to other community property, and the parties are likely to be far less tolerant of errors in valuing the pension. At the same time, the likelihood of employment and residential mobility is diminished so that the burden on the parties to share the pension rights will be minimal. The risk of forfeiture of the pension that the nonemployee spouse will have to bear will be relatively slight while the restrictions placed on the employee spouse by the other's interest in the pension benefits will be relatively less burdensome. Consequently, a policy by the courts to refuse to order a lump-sum settlement will not work a significant hardship in such a situation. The parties, of course, always have the option of settling on the value of the pension out of court. These considerations suggest that the courts should adopt only the pro rata method of dividing pension rights and leave the uncertainties of valuing nonvested pensions outside the courtroom doors.

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