PENSIONS AS MARITAL PROPERTY: VALUATION, ALLOCATION AND RELATED MYSTERIES

INTRODUCTION

Individuals are constantly seeking means by which to enhance their economic security. One cause of economic insecurity is the possible reduction of an individual’s earning power at an advanced age. In this country, this risk is met through one or more of the following means: personal savings (including individual insurance and annuities), private pensions, and government-sponsored programs. The dramatic growth of private plans since the 1940’s has focused considerable interest on this form of income maintenance.1

Pensions are complex. The esoterica comprised of numbers, predictions, estimates, discounts, needs and benefits is formidable.2 Regardless of how difficult the pension consideration may be, a failure to address it in a dissolution proceeding may expose the practitioner to liability.3

Although community property states addressed the issue of whether pension rights constitute a marital asset as early as 1941,4 equitable division jurisdictions have dealt with this issue only recently, and with little uniformity.5 The first and most significant

---

2. See H. WINKLEVOSS, PENSION MATHEMATICS (1977). For a thorough and comforting discussion of the pitfalls of attempting to formulate any general maxim concerning the treatment of pensions, see In re Marriage of Rogers, 45 Or. App. 885, —, 609 P.2d 877, 881 (1980), wherein the court declared:

   [I]t appears to us to be impractical if not impossible to formulate a categorical rule about the appropriate treatment of retirement accounts in dissolution of marriage cases. Because there are so many variables, individual cases will have to be largely decided on their facts. It follows that litigants who contest the appropriate treatment of a retirement account in these cases must develop a full record of all the relevant details. Id. at —, 609 P.2d at 881.

3. See, e.g., Smith v. Lewis, 13 Cal. 3d 349, —, 530 P.2d 589, 596-97, 118 Cal. Rptr. 621, 628-29 (1975) (affirming a $100,000 judgment against an attorney who neglected to assert a community property interest in the husband’s pension plan).

4. French v. French, 17 Cal. 2d 775, —, 112 P.2d 235, 236-37 (1941) (holding that nonvested pension rights are not property, but a mere expectancy, and thus not a community asset subject to division upon dissolution of marriage). This is not the law in California today. See In re Marriage of Brown, 15 Cal. 3d 838, 544 P.2d 561, 126 Cal. Rptr. 633 (1976), where nonvested pensions were recognized as community property. Id. at —, 544 P.2d at 562-63, 126 Cal. Rptr. at 634-35.

5. In California, a community property state, an oft-cited and well-reasoned opinion illustrates the evolution of the marital property interest in pensions. In re Marriage of Brown, 15 Cal. 3d 838, —, 544 P.2d 561, 562-70, 126 Cal. Rptr. 633, 634-42 (1976). Other instructive opinions from community property states include: Van
hurdle the courts have had to surmount is the issue of whether pension rights are in their entirety, in part, or not at all, an asset of the marital estate. For it is only after a court recognizes pension benefits as property that the various other complexities burgeon. The Nebraska Legislature made it unnecessary for the Nebraska Supreme Court to determine whether pension rights are property. In 1980, section 42-366(8) of the Nebraska Revised Statutes was amended to require the inclusion of “any pension plans, retirement plans, annuities, and other deferred compensation benefits owned by either party, whether vested or not vested” as part of the marital estate.

Since the passage of this statute, the pension property issue has been before the Nebraska Supreme Court three times. In Kullbom v. Kullbom, the court provided basic guidelines for valu-
ation and allocation of pensions upon dissolution of a marriage.\textsuperscript{10} The second time the court dealt with pension property was in the case of \textit{McBride v. McBride}.

There the court expanded upon the guidelines provided in \textit{Kullbom} and held that alimony was a proper method of allocating pension property.\textsuperscript{12} Lastly, in \textit{Pyke v. Pyke},\textsuperscript{13} the court decided that, under applicable law then in effect, military pensions were exempt from being included in the marital estate.\textsuperscript{14}

Proper methods for valuation and allocation of the pension property interest are a predominate focus of this article. Also discussed is whether alimony is an acceptable method for distributing marital property. In addition, collateral issues concerning disability benefits and assignment of pension rights are addressed. Finally, circumstances which influence an “if, as and when received”\textsuperscript{15} allocation award are analyzed.

\textbf{PENSION PLANS}

\textbf{PRIVATE- VS. GOVERNMENT-FUNDED PLANS}

The first private pension plan was established in 1875.\textsuperscript{16} One hundred years later, private pension plans provided for almost forty-four percent of all privately employed individuals.\textsuperscript{17} Pension fund assets stood at close to one hundred eighty billion dollars.\textsuperscript{18} These private pension funds, though heavily regulated by the federal government, are entirely within the reach of state domestic relations laws.\textsuperscript{19}

Public employees also reap the benefits of pension plans. The federal government supplies benefits through various programs. Civil service, social security, military retirement and railroad re-
tirement are only a few of the many federally-funded pensions. Such plans are subject to federal law; state law rarely will control when an attempt is made to assign a pensioner's rights under a federally-created plan. The practitioner must look to the controlling federal statute to determine whether the state court may divide the pension interest.

20. See, e.g., 45 U.S.C. § 231d(c)(3) of the Social Security Act which mandates: "The entitlement of a spouse of an individual to an annuity under section 231a(c) of this title shall end on the last day of each month preceding the month in which . . . the spouse and the individual are absolutely divorced. . . ." In Hisquierdo v. Hisquierdo, 439 U.S. 572 (1979), the Supreme Court ruled that railroad retirement benefits regulated under 45 U.S.C. § 231 could not be subject to state community property law upon dissolution of the marriage. Id. at 590.

The Uniformed Services Former Spouses' Protection Act, Pub. L. No. 97-252, 96 Stat. 730 (1982) provides comprehensive rules for the treatment of military retirement pay upon dissolution. Section 1002 of the act states that only disposable retired or retainer pay may be treated as property. Act of Sept. 8, 1982, Pub. L. No. 97-252, 1982 U.S. CODE CONG. & AD. News (96 Stat) 730 (to be codified at 10 U.S.C. § 1408). Essentially, "disposable retired or retainer pay" is defined as the total benefits to which a military person is entitled less all applicable federal, state or local taxes, fines, forfeitures and any deductions for survivor annuities. Id. at § 1408(a)(4). The former spouse cannot sell, assign, transfer or otherwise dispose of his or her interest in the military spouses' pension. Id. at § 1408(c)(2). Furthermore, it is explicitly stated that the pension interest is not devisable or descendible. Id. Finally, upon the death of either the former spouse or the military spouse, the pension interest concurrently ceases. Id. at § 1408(d)(4).

In order for a court to treat disposable retirement benefits as property, the spouse and former spouse must have been married at least ten years during which the military spouse was accumulating service creditable in determining the military spouse's eligibility for retirement benefits. Id. at § 1408(d)(2). However, nothing in the act prevents a court from awarding retirement pay for purposes of alimony or child support. Id. at § 1408(e)(6). But the court cannot award more than 50% of disposable retirement benefits. Id. at § 1408(e)(1). The act does not authorize a court to order a military spouse to voluntarily elect to provide a service annuity in favor of the former spouse. Id. at § 1408(b)(2). The act does not authorize a court to order a military spouse to elect a survivor annuity in favor of the former spouse. Id. at § 1408(f)(3).

Sections 1004 and 1005 of the act provide privileges to the former spouse if the parties were married at least 20 years while the military spouse was accumulating creditable service towards retirement benefits. Id. at § 1072(2)(F). Section 1004 of the act states that the former spouse may receive medical and dental care. Id. at § 1076(b). Section 1005 declares that the former spouse is entitled to commissary and post exchange privileges. Id. at § 1408. Note that section 1004 and 1005 entitlements terminate upon remarriage of the former spouse. Id. at § 1072(2)(F).


Notwithstanding any other law of the United States, or of any State, territory, or the District of Columbia, no annuity or supplemental annuity shall be assignable or be subject to any tax or to garnishment, attachment, or other legal process under any circumstances whatsoever, nor shall the payment thereof be anticipated . . .

Id.

22. Social security benefits, for example, are subject to state legal processes to enforce child support or alimony obligations. 42 U.S.C. § 659 (1976). Social security benefits, however, are not similarly available to enforce property settlements. The term "alimony", as used in § 659, "does not include any payment or transfer of prop-
The major difference between a defined benefit plan and a defined contribution plan is the method by which the plan is funded. The defined benefit plan is funded so as to provide for a definitely determinable benefit at some future date. Consequently, under a defined benefit plan, the ultimate benefits are fixed, while contributions are not. The defined contribution plan, on the other hand, is funded in such a manner that the contributions are made at a fixed rate, while the ultimate benefits are unknown.

Another significant area in which the two types of plans differ is that, under the defined contribution plan, individual account balances must be maintained for each participant. The defined benefit plan is not subject to this requirement. All contributions to the plan—whether made by the employee, the employer, or both—may be pooled into one common account for all participants. However, individuals participating in a defined benefit plan must be informed of their personal accrued benefits at least annually.

Civil service retirement benefits are available to a former spouse to the extent provided for in the terms of any court order or court-approved property settlement agreement incident to a decree of divorce, annulment or legal separation. Foreign service retirement legislation now provides that a former spouse is entitled to a pro-rata share of foreign service retirement benefits.
THE NATURE OF THE PENSION INTEREST

There are three periods of importance in the span of accruing pension benefits. Accrued pension benefits will either be nonvested, vested but not matured, or vested and matured. A nonvested benefit represents an accrual of benefits which the employee will forfeit if employment is terminated. A vested, but not matured, benefit is an accrued benefit which the employee has an irrevocable right to receive at some future date, regardless of whether the employee-employer relationship continues. A vested benefit is mature when the employee has a present unconditional right to receive the pension benefit.

METHODS OF DISTRIBUTING BENEFITS

A plan participant may select one of several payout options for the distribution of retirement benefits. Fundamentally, the choice is between receiving benefits in a lump sum or in periodic installments. If the latter method of distribution—the annuity—is selected, the participant must select from several annuity payout options.

Lump Sum

A plan participant may receive a distribution of the entire present value of the pension plan. Generally, the lump sum option is available only where certain, defined circumstances exist. For example, lump sum distribution typically may be triggered by: (a) the employee’s death; (b) termination of the employee-employer relationship; (c) the employee attaining age 59 1/2; or (d) disability, in the case of a self-employed individual.

Life Annuity

A single life annuity provides for periodic payments to the plan participant and, upon the participant’s death, the payments terminate. Because there are no benefits payable after the participant’s death, this annuity provides the largest installment pay-

30. E. Allen, supra note 1, at 54. Note that if the plan is contributory—that is, if the employee contributes his or her own earnings to the pension plan—the benefit accruing as a result of the employee contribution, by law, is never forfeited. Id. See 29 U.S.C. § 1053(a)(1) (1974).
32. Id.
34. D. McLanahan, supra note 28, at 89-90.
35. D. McGill, supra note 24, at 122.
ment per dollar of benefit available at the date of retirement.36

Life Annuity Certain and Continuous

The life annuity certain and continuous provides a specific number of payments, as elected by the plan participant.37 For example, the participant may elect to receive benefits in 60, 120, 180, or 240 guaranteed monthly installments. If the participant dies before receiving the number of payments elected, the fund remains liable for all unpaid benefits.38 If the participant lives long enough to receive the total number of payments elected, payments will continue until his or her death.39 Because this election may provide for benefits even if the participant dies, it is actuarily more expensive and, therefore, yields a smaller installment payment than the single life annuity.40

Joint and Survivor Annuity

A joint and survivor annuity provides payments for the life of the participant and, upon his or her death, to the participant's spouse for his or her life.41 Pension plans must provide for this method of payment unless the participant specifically elects to the contrary.42 Compared to the life annuity option, the installment payment amount per dollar of benefit available will be substantially smaller under the joint and survivor annuity option.43

Early Retirement Option

Normal retirement age is the age at which a plan participant may retire with full pension benefits.44 However, some plans allow

36. Id. The practitioner should note that this annuity option is especially significant in the event the non-pensioner spouse is awarded a proportion of the pensioner spouse's benefits "if, as and when" received. Namely, the life annuity option produces a greater payment per dollar of benefit available than any other annuity option. See notes 35-36 and accompanying text supra.


38. Id.

39. Id.

40. Id. at 91. Note also that as the period during which the payment of a monthly annuity is guaranteed becomes greater, there is a proportionately larger actuarial reduction in the dollar amount of the monthly benefit. This option is most attractive to the non-pensioner spouse where there is a direct assignment of benefits to him or her. That is, the non-pensioner spouse is guaranteed a specific number of payments, notwithstanding the intervening death of the pensioner spouse. See notes 216-21 and accompanying text infra.

41. D. McClanahan, supra note 28, at 92.

42. Id. at 92-93.

43. D. McGill, supra note 24, at 126-27.

44. Id. at 113-14. Typically, 65 is the normal retirement age. Id. at 115.
participants to elect retirement at an earlier time—customarily, at the age of fifty-five or upon the fulfillment of a minimum period of service. Early retirement can reduce retirement benefits as much as fifty-eight percent. The benefit is reduced for two reasons: first, full benefits will not have accrued by the employee's early retirement date; second, the pensioner electing early retirement will receive benefits over a longer period of time.

Disability Provisions

Some pension plans provide for payments in the event the plan participant becomes permanently unable to work due to injury or disease. Such plans treat disability payments either as early retirement benefits or as compensation. When the benefits received are compensation, the disabled individual will be eligible to receive regular retirement benefits at the normal retirement age.

FACTS AND HOLDING

As late as May of 1980, the Nebraska Supreme Court refused to recognize a marital property interest in pension plans. However, after section 42-366(8) was promulgated, the court was compelled to address the complex issues which emerge when the pension becomes a part of the marital estate. The difficulty inherent in dividing the pension is further compounded since the court has never formulated a definitive test for dividing marital property.

45. Id. at 116.
46. Id. at 116.
47. Id. at 118.
48. E. Allen, supra note 1, at 28.
50. D. McClanahan, supra note 28, at 93. This distinction is significant in that where disability payments are treated as present, as opposed to deferred compensation, there can be no marital property interest in the future benefits to be received. See notes 192-96 and accompanying text infra.
51. D. McGill, supra note 24, at 162.
52. Kullboom, 209 Neb. at 151, 306 N.W.2d at 847.
53. As late as May 28, 1980, this court followed the rule that a pension of one party to a marriage, unless its terms provide otherwise, is not a joint fund for the benefit of the other party and is not ordinarily subject to division as part of a property settlement, but may be considered as a source for the payment of alimony.
55. Nebraska has been flexible in the treatment of marital property division issues on appeal. There are maxims often repeated by the court, but none provide a
Kullbom v. Kullbom

In Kullbom, the parties were married in 1963, at which time the wife was a nurse and the husband was a dental student. By 1973, the husband was a practicing oral surgeon, and the couple had three children. In December, 1973, the marriage was dissolved.

The wife appealed, claiming that the trial court erred in failing to consider the marital property interest in the husband's pension plan. The supreme court, relying on section 42-366(8), agreed and held that the pension plan should have been included within the marital estate. The court recognized that both parties had contributed substantially to the acquisition of the marital estate, and it determined that each party was entitled to one-half of the property. In doing so, the court was, for the first time, confronted with a definitive explanation of the property division problem. Evidently, this is a necessary evil in an equitable division jurisdiction which, unlike its community property counterpart, is not required to divide the marital property equally. The court is guided by these four maxims:

In an action for dissolution of marriage, a court may divide property between the parties in accordance with the equities of the situation, irrespective of how legal title is held.


The second maxim instructs the court to consider:

- the circumstances of the parties, the duration of the marriage, contributions to the marriage by each party, including contributions to the care and education of the children, and interruption of personal careers or educational opportunities.


The third maxim provides:

- The rules for determining alimony or division of property in an action for dissolution of marriage provide no mathematical formula by which such awards can be precisely determined. They are to be determined by the facts in each case and the court will consider all pertinent facts in reaching an award that is just and equitable.


- Generally speaking, awards [in dissolution actions] ... vary from one-third to one-half of the value of property involved, depending upon the facts and circumstances of the particular case.

with the issues of pension property valuation and allocation.\textsuperscript{63}

The court advanced three methods by which the value of a pension plan can be determined: (1) consider the amount of the pensioner spouse's contribution to the fund plus interest, and award the non-pensioner spouse an appropriate share; (2) calculate the present value of the pensioner spouse's retirement benefits when they vest under the plan, and award the non-pensioner spouse an appropriate share; or (3) allocate a fixed percentage to the non-pensioner spouse of any future payments the pensioner spouse receives under the retirement plan.\textsuperscript{64} The court also adopted three methods by which the pension property interest could be divided: (1) order the pensioner spouse to pay the non-pensioner spouse a lump sum amount upon dissolution; (2) order the pensioner spouse to pay the non-pensioner spouse a fixed percentage of the pension benefits "as, if and when" paid to the pensioner spouse.\textsuperscript{65}

\textit{McBride v. McBride}

In \textit{McBride} the parties, during their twenty-eight years of marriage, accumulated assets consisting primarily of a house, two vehicles, cash in the bank, a coin collection, and the furniture and fixtures of the household.\textsuperscript{66} In addition, the husband had acquired a fully vested interest in a pension plan from which he could not receive any funds for ten years.\textsuperscript{67} The pension was not divided upon dissolution of the marriage;\textsuperscript{68} yet, the trial court appeared to divide all other marital assets nearly equally.\textsuperscript{69} The trial court also ordered the husband to pay the wife $300.00 per month for the rest of her life.\textsuperscript{70} The husband appealed, claiming that the court erred in awarding alimony for an indefinite period.\textsuperscript{71} The wife cross-appealed, urging that the trial court erred in failing to treat the husband's pension interest as a marital asset.\textsuperscript{72} The supreme court affirmed the lower court's decree, holding that the trial court had

\textsuperscript{63} See note 52 and accompanying text \textit{supra}.

\textsuperscript{64} 209 Neb. at 152-53, 306 N.W.2d at 848. The court made no mention as to what factors are of relevance in calculating the "present value" of the plan benefits. Neither did it make mention of the pertinent factors which should be considered in determining the "fixed percentage" for the non-pensioner spouse. See notes 86-89 and accompanying text \textit{infra}.

\textsuperscript{65} \textit{Id}.

\textsuperscript{66} \textit{McBride}, 211 Neb. at 461-62, 319 N.W.2d at 73.

\textsuperscript{67} \textit{Id}. at 462, 319 N.W.2d at 74.

\textsuperscript{68} \textit{Id}. at 460, 319 N.W.2d at 73.

\textsuperscript{69} \textit{Id}.

\textsuperscript{70} \textit{Id}.

\textsuperscript{71} \textit{Id}. at 461, 319 N.W.2d at 73.

\textsuperscript{72} \textit{Id}.
awarded the wife alimony \textit{in lieu of} her share in the pension.\textsuperscript{73} Further, the court approved of this action as falling within the methods set forth in \textit{Kullbom} for allocating pension property.\textsuperscript{74}

\textbf{Pyke v. Pyke}

In \textit{Pyke}, the parties were married twenty-six years, had two children, and had accumulated $91,000.00 in assets.\textsuperscript{75} The husband was a lieutenant colonel in the United States Air Force with twenty-six years of service, earning $39,000.00 per year.\textsuperscript{76} In two years from the date of dissolution, he would be eligible to receive almost $2,000.00 per month from his military retirement pension.\textsuperscript{77} The wife had been earning approximately $4,000.00 per year, but the trial court found that she was capable of earning $7,000.00 per year.\textsuperscript{78} Based on these facts, the trial court awarded the wife permanent alimony of $850.00 per month.\textsuperscript{79} The trial court specifically held that the husband's retirement pay was \textit{not} an asset to be divided, but could be considered as a fund available for the payment of alimony.\textsuperscript{80}

The sole issue on appeal was the amount of alimony awarded.\textsuperscript{81} The supreme court held that permanent alimony was reasonable under the circumstances. Moreover, the court recognized that the husband's military retirement benefit was not subject to division as a marital asset.\textsuperscript{82} In \textit{McCarty v. McCarty}, the United States Supreme Court held that military retirement benefits were not subject to California's community property laws and, therefore, were not a marital asset subject to division in a divorce proceeding.\textsuperscript{83} The Nebraska Supreme Court, without stating its reasons, discerned that this holding applied to common law juris-

\textsuperscript{73} Id. at 464, 319 N.W.2d at 74-75.
\textsuperscript{74} Id. at 465, 319 N.W.2d at 75. The court in \textit{Kullbom} expressly suggested three ways to allocate a pension property interest: 1) lump-sum allocation; 2) installments; or, 3) allocate as, if, and when paid to the pensioner. 209 Neb. at 152-53, 306 N.W.2d at 848. It is apparent that the court in \textit{McBride} found yet another method of pension property allocation—via the conduit of alimony.
\textsuperscript{75} \textit{Pyke}, 212 Neb. at 116, 321 N.W.2d at 909.
\textsuperscript{76} Id.
\textsuperscript{77} Id.
\textsuperscript{78} Id. at 117, 321 N.W.2d at 909.
\textsuperscript{79} Id. at 116-17, 321 N.W.2d at 906-09.
\textsuperscript{80} Id. at 120-21, 321 N.W.2d at 910 (emphasis added).
\textsuperscript{81} Id. at 116, 321 N.W.2d at 908.
\textsuperscript{82} Id. at 117, 321 N.W.2d at 909.
\textsuperscript{83} 453 U.S. 210, 223-25 (1981). The Court further concluded in \textit{McCarty} that the federal interest in military retirement benefits outweighed the state interest in community property laws and, therefore, could not be a community asset in a divorce proceeding. \textit{Id.} at 232-36. \textit{McCarty} was effectively overruled by Congress. \textit{See} note 20 \textit{supra}.
dictions as well.  

ANALYSIS

VALUATION OF THE PENSION INTEREST

In *Kullbom*, the court noted that there are at least three ways to determine the value of a pension. A trial court could consider the total amount of the employee's contribution to the fund plus accrued interest. Second, it could attempt to calculate the present value of the employee's retirement benefits under the particular plan. Finally, the trial court could determine a fixed percentage under the plan, payable to the non-pensioner spouse "as, if and when" it becomes payable to the pensioner spouse. The court's treatment of the valuation issue in *Kullbom* gave no indication of what should be taken into account to equitably determine the value of the respective parties' interests in the pension plan.

With respect to the first method, some plans are noncontributory and, therefore, employee contributions are nonexistent. The second method is quite acceptable, but the court gave no instructions as to what should be factored into the "present value" calculation. As for the third method, the court gave no indication of how the appropriate percentage should be determined. Indeed, the court in *Kullbom* addressed the valuation issue only incidentally.

As an initial consideration, the degree of difficulty in valuation depends upon whether the pensioner is covered under a defined

---

84. *Pyke*, 212 Neb. at 121, 321 N.W.2d at 911.
86. See e.g., E. ALLEN, J. MELONE & J. ROSENBOOM, PENSION PLANNING 58-61 (3rd ed. 1976). See also Minnis v. Minnis, 54 Or. App. 70, 634 P.2d 259 (1981). There the court severely criticized this particular method of valuation for the reason that it is egregious to assume a husband will retire immediately upon a final decree of divorce. *Id.* at —, 643 P.2d at 262.
88. See note 85 and accompanying text supra.
89. The court neither stated what should be factored into the present value calculation nor what an appropriate percentage would be in an "as, if and when paid" allocation. The court did, however, describe three methods of allocation definitively: (a) lump sum distribution, (b) installment distribution, or (c) "as, if and when paid" to the pensioner distribution. *Kullbom*, 209 Neb. at 152-53, 306 N.W.2d at 848.
contribution plan or a defined benefit plan. Defined contribution plans are easier to value due to the individual, present nature of the plan design. The individual account balance, as required by the Employee Retirement Income Security Act of 1974 (ERISA), is the best estimate of the value of the employee's interest. For employee contributions, no adjustments to the balance are necessary because ERISA mandates that employee contributions are 100 percent vested. However, employer contributions need not be 100 percent vested. In addition, some plans operate so that pensioners will receive no benefits unless they survive until retirement. If either of these elements are present in a plan, survival probability and vesting probability must be factored into the present value calculations. The actuary determines the survival probability by reference to mortality tables. Vesting probability is more difficult to obtain because vesting will depend on continued employment with the same employer. Continued employment probabilities may be obtained by analysis of the attrition rate in the company itself or in the industry at large, but these data may be difficult to obtain.

The defined benefit plan raises complex problems regarding the concept of present values. While defined contribution plans generally give no promise as to the benefit to be received at retirement, defined benefit plans must promise a benefit to be received from the date of retirement until the death of the pensioner.

92. Bonavich, supra note 6, at 28 & n.136.
94. See Bonavich, supra note 6, at 28-29 & nn. 137-140.
95. Id.
96. Id.
98. See Bonavich, supra note 6, at 29 & n.142.
99. Id.
100. Hardie & Reisman, Employee Benefit Plans and Divorce: Type of Plan, Date of Retirement, and Income Tax Consequences as Factors in Dispositions, 5 COMMUNITY PROP. J. 179, 180 (1978). The authors state:

The problem with the defined benefit plan is the determination of the value, at present, of the right to receive an unknown number of monthly checks, beginning in the future. That determination is made more complex when consideration must be given to the possibility that the employee may be fired before retirement, may change employers, or may die before retirement. Nevertheless, the defined benefit plan has a value at present and is capable of being valued just as any other asset in the marital estate.

Id. at 180-81.
101. D. McCLANAHAN, supra note 28, at 185-96, where the author points out:

It will help to clarify the function of actuarial assumptions by reviewing
Present value for a defined contribution plan is, for the most part, simply the present balance of the pensioner's individual account.\textsuperscript{102} Present value for a defined benefit plan is the value now of an amount only to become due at some future date—the date of retirement.\textsuperscript{103} Consequently, in addition to the vesting and sur-

the fundamental differences which underlie the two principle kinds of qualified pension plans recognized by ERISA: defined benefit plans, and defined contribution plans. The individual plan features, and the specific funding problems related thereto, that distinguish a defined benefit plan from a defined contribution plan are authentic, causative facts, upon which the theoretical and practical actuarial applications for each type of plans funding is based.

In one sense, it might be said that a defined benefit plan is an actuarial plan, and that a defined contribution plan is more an accounting plan. As an actuarial plan, a defined benefit plan requires the use of actuarial assumptions in its funding procedures. A defined contribution plan, on the contrary, does not need extensive actuarial assumptions for its funding operations.

The basic distinction between a defined benefit plan and a defined contribution plan can be understood when considered from the viewpoint of the employer's promises. In a defined benefit plan an employer promises to provide benefits at retirement, withdrawal, death, or disability, the exact amount of benefit being determined according to a formula that is defined in the plan, generally in terms of length of service and (as a rule) earnings history.

A defined contribution plan is generally an undertaking by the employer annually to contribute and credit to each participant's separate account a specified percentage of the employee's annual earnings. Whatever has been contributed to the employee's account over the years, together with investment earnings credited from year to year, will be payable upon retirement, death, disability, or subject to the vesting provisions of the plan upon withdrawal from the plan. The payments may be made in a single sum, in monthly or annual installments over a period of years, or by the purchase of an insured life annuity policy. The employer does not promise that the employee at retirement will receive any stated amount of lifetime pension. In addition, investment risks of the plan are borne by the employee.

\textit{Id.}

\textsuperscript{102} \textit{Id.} at 196.

With a defined contribution plan, the present interest, or present value, of an employee is always currently available for observation simply by making an inspection of the separate account balance that is maintained for each employee. An employee's account balance generally increases in value in tandem with any increase in value of the earned and credited retirement benefits. In defined contribution plans the pace of funding for the benefits is locked in step with the benefit accrual pace. There is usually little flexibility permitted in the rate of contribution, although some profit sharing plan formulas do allow for this. Thus, in making a valuation of a defined contribution plan, i.e., determining the present value of the plan benefits, the current value of the individual account of each member, as obtained from the plan administrator's records, will usually suffice for such purpose.

\textit{Id.}

\textsuperscript{103} \textit{Id.} at 197-98.

A difficulty in comprehending the concept of present value, as this term is used for defined benefit pension plan valuations, is that the member's present interest in plan benefits has its origin in the total amount of the future benefit that he/she will be entitled to at the date of retirement.
vival probabilities, an additional factor emerges. That is, a defined benefit plan requires a specific benefit at a future date.\(^\text{104}\) The amount of the promised benefit is generated by contributions to the plan and an actuarial assumption that the plan will realize some average rate of return on the investment of present contributions.\(^\text{105}\) This additional factor, the assumed rate of return, must be used to discount the future value of the accrued benefit to its present value.\(^\text{106}\) Once this sum is calculated, further discounts will be applied, as necessary, for the vesting and survival probabilities.\(^\text{107}\) Hence, the pensioner’s interest at the date of divorce is a present value of a future sum, payable at the date of retirement until his or her death.

Defined benefit plans could also be valued according to the mandates of ERISA. ERISA created the Pension Benefit Guaranty Corporation (PBGC) to insure the payment of benefits where a plan subject to ERISA is terminated.\(^\text{108}\) The PBGC has promulgated detailed regulations dictating the actuarial methods and assumptions to be used in calculating the present value of benefits under a defined benefit plan.\(^\text{109}\) These regulations do not take into

---

Present value is the value NOW of an amount due in the future, or due THEN. It is a lesser sum which the future benefit payments could now be exchanged for. By considering the total retirement benefit as being the amount which will fall due in the future, brings into perspective its present value nature as of any date prior to retirement. The present value is the amount which, after discounting for interest and various contingencies affecting the estimated number and amount of estimated future benefit payments, is sufficient to provide the expected future benefits. The amount earned at any point in time prior to the retirement date, therefore does have a value as of any valuation date of the plan of less than the total retirement amount value it will have at the retirement date.

\(^{104}\) See note 23 and accompanying text supra.

\(^{105}\) D. McClanahan, supra note 28, at 201.

\(^{106}\) Bonavich, supra note 6, at 29-30.

\(^{107}\) Id.


\(^{109}\) The formulas set forth in 29 C.F.R. §§ 2619.1-64 (1982) are “rigorous” and elaborate. Subpart c of 29 C.F.R. § 2619 contains valuation methods for immediate annuities, deferred annuities, early retirement benefits and death benefits. The appendices to 29 C.F.R. § 2619 illustrate the construction and use of mortality tables as well as a chart dictating the proper interest rate for reducing immediate and deferred annuities.

It should also be noted that all pension plans regulated under ERISA must file an “Annual Return Report,” I.R.S. Form 5500. If the plan has 100 or more participants, pension plan trustees must also file “schedule B” which contains specific “actuarial information,” including (1) present value (aggregate) of the vested benefits; (2) present value (aggregate) of non-vested accrued benefits; (3) information regarding the actuarial assumption used in computing the present value of accrual benefits. This schedule is available for public inspection and it has been described as “the best foundation for accurate valuation of a participants interest.” Bonavich, supra note 6, at 31 n.152.
account the probability of vesting. Therefore, in the case of nonvested benefits, the PBGC present value should be discounted again by the vesting probability element.¹¹⁰

Valuing a pension interest is, at best, a difficult task. As aptly pointed out by the California court in In re Marriage of Adams,¹¹¹ "[t]he computation and apportionment of a nonemployee spouse's interest in present or future retirement benefits on dissolution of marriage can often be abstruse. Almost each case dealing with a different kind of retirement plan is sui generis."¹¹²

The practitioner also should be especially aware of the need for a detailed record when trying to value the pension interest. In the absence of a good record, some very embarrassing consequences may result. For instance, in Kikkert v. Kikkert,¹¹³ a certified public accountant, using four separate discount rates—apparently arbitrarily chosen—computed four different values for the pension interest ranging from $22,000 to $35,000.¹¹⁴ On appeal, a New Jersey court was left with little choice but to remand the case for further proceedings on the valuation issue.¹¹⁵

Other problems may arise if the non-pensioner spouse fails to introduce sufficient evidence from which the court can calculate the present value of the pension plan. In In re Marriage of Evans,¹¹⁶ for example, the Illinois Supreme Court was presented with the issue of whether nonvested pension rights constitute marital property.¹¹⁷ It avoided the issue entirely, however, holding that the pension rights could not be divided because the record failed to establish their present value.¹¹⁸ Similar results obtained in Bennett v. Bennett,¹¹⁹ wherein the Utah Supreme Court concluded that no present value could be assigned to that portion of the nonvested pension rights.¹²⁰

The necessity of a complete and detailed record is aptly illus-

¹¹⁰ Id. at 31.
¹¹² Id. at —, 134 Cal. Rptr. at 300.
¹¹⁴ Id. at —, 427 A.2d at 79.
¹¹⁵ Id. at —, 427 A.2d at 79-80.
¹¹⁷ Id. at —, 426 N.E.2d at 858-59.
¹¹⁸ Id. at —, 426 N.E.2d at 859.
¹¹⁹ 607 P.2d 839 (Utah 1980).
¹²⁰ Id. at 840. In Bennett, the husband was a civilian employee of Hill Air Force Base. Id. Evidence of the value of his nonvested pension rights was limited to the testimony of a retirement officer in the Civilian Personnel Office at the base. Id. Notwithstanding the fact that the husband's rights under the pension plan would vest in only four years, the court gleaned from the retirement officer's testimony that "no reasonable interpretation can be placed on it other than one that concludes
trated by the particularly harsh result in *In re Marriage of Kis.*

There, the Montana Supreme Court upheld as a proper valuation method the trial court's determination that the pension rights had a present value of approximately $118,000.00, based on the cost of purchasing a life annuity to pay out $10,000.00 per year upon the husband's retirement four years later. Tacitly recognizing that the value assigned the husband's pension rights was not discounted for vesting and survival probabilities, the court nevertheless concluded:

> Value might be affected by the contingency of the retirement benefits failing to reach levels used by the court. ... The possibility that Louis Kis would not reach 55 years of age and the possibility that he would not serve 25 years could properly be considered in arriving at value. However, no evidence was offered by Louis Kis showing what, if any, effect such a contingency would have in diminishing the present value figure offered by Marge Kis.

One extraordinarily simple and convenient method of valuing a retirement plan interest was adopted by a New Jersey superior court in *DiPietro v. DiPietro.* Known as the "total offset method," it is based on the ERISA requirement of "actuarial equivalence." The simplicity of the total offset method perhaps is best illustrated when compared with standard actuarial procedures. In order to determine the present value of the plan as of the date of divorce, the actuary must discount the value of the promised retirement benefits twice. First, the actuary determines the present value of the benefits as of the date of retirement. This figure is then discounted a second time to determine the present

---

no present value can be assigned to that portion of [this husband's] retirement fund contributed by the U.S. government." *Id.*

Chief Justice Crockett dissented, urging that the court should consider "'all of the assets of every nature possessed by the parties whenever obtained and from whatever source derived and that this includes such pension fund or insurance'; and this should include anything that is realistic and substantial, even in expectancy." *Bennett,* 607 P.2d at 841 (Crockett, J., dissenting) (quoting *Englert v. Englert,* 576 P.2d 1274, 1276 (Utah 1978)).

122. *Id.* at —, 639 P.2d at 1153.
123. See notes 97-98 and accompanying text supra.
124. *Id.*
125. — Mont. at —, 639 P.2d at 1153-54.
127. *Id.* at —, 443 A.2d at 247-48.
128. *Id.* at —, 443 A.2d at 246-47. *See also* 29 U.S.C. § 1056 (1976) (mandating that a participant cannot increase or decrease the value of the plan by the exercise of one retirement option over another).
value of the promised benefits as of the date of divorce.\textsuperscript{130} The total offset method obviates the need for the second discount, as explained by an actuary who testified in DiPietro:

When discounting, this interest factor becomes a multiplier, but this approach does not take into account an equally competing factor, viz., the inflation factor. This latter factor becomes a divider. If we are to take into account inflation, then the interest factor is nullified because the rate of inflation, when speaking in terms of average tendencies and economic history, always closely equals the rate of interest. Therefore, since both factors are equal, they neutralize each other and the value will remain the same. There is, in effect, a "total offset."\textsuperscript{131}

In sum, courts have dealt with the pension valuation issue by employing a variety of methods and have achieved a variety of results. Analysis of the case law suggests that better results with regard to an equitable division of the pension interest obtain where the trial court has the benefit of expert testimony from an actuary or plan fiduciary.\textsuperscript{132} Thus, the practitioner should enlist the services of an actuary or the plan fiduciary in most any case where a pension interest is at stake. Moreover, with regard to valuation methods, three considerations are suggested. First, if the pension interest is both vested and matured, the total offset method of valuation appears most appropriate. It is easy to apply and conforms to the "actuarial equivalence" requirements of ERISA. Second, if the pension interest is either vested but not matured or nonvested, standard actuarial procedures should be employed to determine its present value. With regard to this con-

\textsuperscript{130} D. McClanahan, \textit{supra} note 28, at 197-98. The second discount is explained as a necessary procedure in any valuation of plan benefits prior to retirement:

By considering the total retirement benefit as being the amount which will fall due in the future, brings into perspective its present value nature as of any date prior to retirement. The present value is the amount which, after discounting for interest and various contingencies affecting the estimated number and amount of estimated future benefit payments, is sufficient to provide the expected future benefits. The amount earned at any point in time prior to the retirement date, therefore does have a value as of any valuation date of the plan of less than the total retirement value it will have at the retirement date.

\textit{Id.}

\textsuperscript{131} 183 N.J. Super. at —, 443 A.2d at 246-47.

\textsuperscript{132} \textit{See, e.g., In re Marriage of Evans, 85 Ill.2d 523, —, 426 N.E.2d 854, 856-57 (1981) (court took note of the lack of evidence supplied by a plan fiduciary); Kikkert v. Kikkert, 177 N.J. Super. 471, —, 427 A.2d 76, 79 (N.J. Super. Ct. App. Div. 1981) (a C.P.A., not an actuary, offered four separate present values for the same pension. All the values were arbitrarily determined). But see, e.g., Bennett v. Bennett, 607 P.2d 839, 940 (Utah 1980) (an actuary did give testimony but stated that nonvested pension rights had no value whatsoever).
sideration, a caveat is in order. Standard actuarial procedures should not be used in cases where, because of low vesting and survival probabilities, the type of plan involved, and related factors, the resulting valuation would be too speculative. The actuary or plan fiduciary would be in the best position to make such a determination. Third, if the value of the pension interest is determined by the actuary or plan fiduciary to be too speculative, two options seem appropriate. Valuation can be based on the pensioner's total contributions, with interest added. Alternatively, if the plan allows the pensioner a current right of withdrawal, the "cash value" of the pension interest may be used.

**Allocation of the Pension Interest**

After a value for the pension has been established, the court must then allocate the benefits. In *Kullbom*, the court suggested three ways to allocate pension benefits: (1) order an immediate lump sum distribution; (2) order the present value of the pension to be paid in installments; or, (3) order the pensioner spouse to pay to the non-pensioner spouse a fixed percentage of the pension benefits "as, if and when" paid to the pensioner.

---

133. *See* notes 94-99 and accompanying text *supra*.
134. *Id.*
   
   We need not attempt to develop precise valuations as to the theoretical interest of each of the parties to this retirement plan. It is a simple matter to conjure up hypothetical situations which may or may not develop, any one of which would result in a gross injustice to either party when this method of distributing an inchoate interest in any given pension plan is utilized.

*Id.*

136. D. McClaanahan, *supra* note 28, at 194. As the author points out:

   Some of the risks associated with pension plans, for which our actuary is trained better than anyone else to measure the financial effect, or force of their impact upon the funding process, are events pertaining to the physical condition or personal situation of employees, as well as economic phenomena, such as inflationary or deflationary forces.

*Id.*

139. *E.g.*, *In re Marriage of Hunt*, 78 Ill. App. 3d 653, 397 N.E.2d 511, 519 (Ill. App. Ct. 1979), stating that the trial court must first determine, if possible, the present value of the plan interest. The amount of pension to be included in the marital estate is determined by multiplying the present value of the pension by a fraction whose numerator is the duration of the marriage during which plan benefits were being accumulated and whose denominator is the entire period of time during which plan benefits were being accumulated by the pensioner spouse. After the foregoing determination has been made the trial court will then allocate the benefits in light of the circumstances of the case. *Id.*
spouse. In *McBride*, the court held that a permanent alimony award to the non-pensioner spouse was an acceptable method of allocating the pension property interest. The Nebraska Supreme Court thus has endorsed four methods by which the pension property interest can be divided.

Before analyzing each approved method of allocation, a brief discussion of the distribution of pensions in divorce cases is necessary. Property division in Nebraska is, in the main, a fact-sensitive determination. There are few guidelines which classify separate or marital property, as there are in other equitable division jurisdictions. The property division is wholly equitable. When deal-

---

141. *Id.* at 152-53, 306 N.W.2d at 848.
142. 211 Neb. 459, 319 N.W.2d 72 (1982).
143. *Id.* at 465, 319 N.W.2d at 74. "We are of the opinion that the trial court's method of considering [the husband's] pension fund by awarding alimony to [the wife] in the amount of $300 per month for her lifetime falls within the approved method set forth in *Kullbom v. Kullbom* . . ." *Id.* See note 64 and accompanying text *supra*.

Note that the facts in *McBride* are substantially similar to those in *Pyke v. Pyke*, 212 Neb. 114, 121, 321 N.W.2d 906, 911 (1982). Compare notes 66-74 and accompanying text *supra* with notes 75-84 and accompanying text *supra*. In *McBride*, the court stated that alimony was a proper method for dividing the pension property interest. 211 Neb. at 464-65, 319 N.W.2d at 75. However, in *Pyke* the pension interest was treated only as a factor to be considered in making the alimony award. 212 Neb. at 119-20, 321 N.W.2d at 910.

At the time *Pyke* was decided, military pensions could not be divided as a result of dissolution, pursuant to the Supreme Court decision in *McCarty v. McCarty*, 453 U.S. 210, 223-25 (1981). The Nebraska Supreme Court, recognizing that *McCarty* prevented inclusion of the pension in the marital estate, nevertheless concluded that the amount of the alimony award could be based on proceeds from the pension. 212 Neb. at 121, 321 N.W.2d at 911.

It appears that these cases illustrate an exercise in semantics rather than a recognition of a substantive distinction in alimony awards. See notes 171-79 and accompanying text *infra*.

144. E.g., *Malone v. Malone*, 163 Neb. 517, 520-21, 80 N.W.2d 294, 297 (1957), where the court stated:

In determining the question of alimony or division of property as between the parties, the court, in exercising its sound discretion, will consider the respective ages of the parties to the marriage; their earning ability; the duration of and the conduct of each during the marriage, their station in life, including the social standing, comforts, and luxuries of life which the wife would probably have enjoyed; the circumstances and necessities of each; their health and physical condition; and their financial circumstances as shown by the property they owned at the time of the divorce, its value at that time, its income-producing capacity, if any, whether accumulated or acquired before or after the marriage, the manner in which it was acquired, and the contributions each has made thereto and, from all the relevant facts and circumstances relating thereto, determine the rights of the parties and make an award that is equitable and just.

*Id.* at 520, 80 N.W.2d at 297 (quoting *Nickerson v. Nickerson*, 152 Neb. 799, 801-02, 42 N.W.2d 861, 862 (1950)).

145. See, e.g., *ILL. REV. STAT.* ch. 40 § 503 (Supp. 1982); *N.Y. DOM. REL. LAW* § 236 Part B (McKinney Supp. 1982); *VA. CODE* § 20-107.3 (Supp. 1982) (includes a specific provision for distributing pension benefits, limiting the award to no more than 50%
PENSIONS AS MARITAL PROPERTY

ing with the pension property interest, there is another important notion which must be recognized and treated—that of fairness. A pension interest is not tangible, and often it is not readily available for division purposes. Moreover, a pension interest is not a property interest which can be sold. Consequently, the allocation method utilized must not only be equitable, it must be fair to prevent undue hardship upon either party. While it may be meritorious to completely dissolve all attachments of the defunct marriage—at least with respect to property division—this may not be possible because of the undue burden which would be placed on one of the spouses.146

Lump Sum

The first method of allocation is lump sum distribution. Lump sum distribution is most effective when there are enough assets in the marital estate to offset the present value of the pension.147 The amount offset is awarded to the non-pensioner spouse immediately upon dissolution. An advantage of this type of distribution is that it effects a complete severance of each spouse's interest, and each takes immediate control of his or her share.148 The concern of

of the cash benefits to be received by the pensioner spouse). Id. at § 20-107.3(q). See also In re Marriage of Bodford, 94 Ill. App. 3d 91, 94, 418 N.E.2d 487, 488 (1981) (stating, in response to the separate property provisions of § 503, that the pension property interest is only recognized to the extent the pension was earned during the marriage, and not before).

The Nebraska Supreme Court recently has provided trial courts firmer guidelines for the treatment of property acquired by one spouse through gift or inheritance. In Van Newkirk v. Van Newkirk, 212 Neb. 730, 733, 325 N.W.2d 832, 834 (1982), the court explained:

While we have not heretofore said in exact words how property acquired by inheritance or gift during the marriage should be considered, an examination of our previous decisions discloses that when awarding property in a dissolution of marriage, property acquired by one of the parties through gift or inheritance ordinarily is set off to the individual receiving the inheritance or gift and is not considered part of the marital estate.

Id.

146. Shill v. Shill, 100 Idaho 433, —, 599 P.2d 1004, 1008 (1979). The court stated that, "it will often be true ... that the pension rights represent the largest portion of the assets owned by the community. An immediate award of equivalent property to the non-employee-spouse in exchange for the future contingent right to pension benefits will work a severe economic hardship on the employee-spouse"). Id.

147. Copeland v. Copeland, 91 N.M. 409, —, 575 P.2d 99, 104 (1978) (if the community has sufficient assets to offset the value of the pension a final disposition of the property can be effected at the date of divorce).

148. Cearley v. Cearley, 544 S.W.2d 661, 666 (Tex. 1976) ("The administration of justice will best be served if contingent interests in retirement benefits are settled at the time of the divorce . . ."). See also Ramsey v. Ramsey, 96 Idaho 672, —, 535 P.2d 53, 60 (1975). The "if, as and when received" is contrary to the philosophy that each spouse should have immediate control of his or her share of the property at the date of dissolution. A present value should be determined whenever possible).
the trial court in employing this method will be the burden placed on the pensioner spouse in making a potentially large cash outlay.\textsuperscript{149}

When marital assets are sufficient to offset the value of the pension and a lump sum award will not impose undue hardship on the pensioner spouse, this method of allocation is preferred.\textsuperscript{150} This is especially true where the pensioner spouse has retired or his or her retirement is imminent.\textsuperscript{151} Often, the marital estate will include realty of sufficient value to offset the pension property interest awarded,\textsuperscript{152} thus avoiding actual division of the pension. Even though the present value of the pension may constitute, for example, only ten percent of the total value of the realty, an offset of these two assets may result in a fair distribution.\textsuperscript{153} In the event a reasonably accurate valuation of the pension interest cannot be made\textsuperscript{154} a present division of the benefits should not be awarded.\textsuperscript{155} Neither should lump sum distribution be used where

\begin{itemize}
\item[149.] See note 150.
\item[150.] Johnson v. Johnson, 131 Ariz. 38, —, 638 P.2d 705, 708-09 (1981) (present cash value method is preferred if an accurate valuation can be determined and an immediate offsetting award will not impose undue hardship on the pensioner spouse); Holbrook v. Holbrook, 105 Wis. 2d 327, —, 309 N.W.2d 243, 249 (Wis. Ct. App. 1981) (if there are sufficient assets available at the time of divorce to divide the present value of the pension and this will not impose undue hardship on either spouse, the present cash value method is preferred); see also Philippson v. Board of Admin., 8 Cal. 3d 32, —, 473 P.2d 785, 777, 89 Cal. Rptr. 61, — (1970) (An award of property of equal value to the non-pensioner does not impair the objectives of a retirement plan. However, where there are not enough assets to offset the present value a court cannot divide the pension benefit immediately because this would leave the pensioner spouse without adequate subsistence).
\item[151.] Shill v. Shill, 100 Idaho 433, —, 599 P.2d 1004, 1010 (1979), where the court states:
\begin{quote}
In these cases a reasonably accurate calculation of the present value of the pension benefits may be made by reference to actuarial tables which would indicate the pensioners life expectancy and by discounting the sum that would be paid the pensioner during that period for the possibility the pension would not vest, reduced to the present value.
\end{quote}
\textit{Id.}
\item[152.] See Myung Sun Kim v. Soo Myung Kim, 618 P.2d 754, 757-58 (Hawaii Ct. App. 1980) (awarding the non-pensioner spouse $23,146.00 in light of the fact that the husband had an interest in an apartment building worth $94,000); \textit{In re Marriage of Coram}, 86 Ill. App. 3d 845, —, 408 N.E.2d 418, 421 (1980) (awarding the non-pensioner spouse the family residence, valued at $25,000.00, and the pensioner his pension rights, also valued at $25,000.00); \textit{In re Marriage of Uluhogan}, 86 Ill. App. 3d 654, —, 408 N.E.2d 107, 111 (1980) (awarding the non-pensioner spouse an additional $10,000.00 of the equity in the family residence to offset the pensioner spouse's pension rights).
\item[153.] Kaczmaczyk v. Kaczmaczyk, 593 S.W.2d 252, 253 (Mo. Ct. App. 1980) (noting that the non-pensioner took full responsibility for two children and her earning capacity was substantially less than that of the pensioner spouse).
\item[154.] See notes 120-24 and accompanying text supra.
\item[155.] Shill v. Shill, 100 Idaho 433, —, 599 P.2d 1004, 1010 (1979); Selchert v. Selchert, 90 Wis. 2d 1, —, 280 N.W.2d 293, 298 (1979) (awarding the non-pensioner
there is no appropriate asset for which an offset may be made.\textsuperscript{156} Nevertheless, it is of no consequence if the pensioner spouse has no present right to receive benefits—the pension interest still must be considered a marital asset.\textsuperscript{157}

\textit{Installment Payments}

The second method of allocation adopted by the Nebraska Supreme Court involves distributing the non-pensioner spouse's share by installment payments. Essentially the same considerations associated with the lump sum offset method are applicable.\textsuperscript{158} This method of distribution is particularly effective if the payments constitute a relatively small percentage of the pensioner spouse's net monthly income.\textsuperscript{159} In Nebraska, an apparently acceptable method of pension property allocation is alimony payments.\textsuperscript{160} Distribution of the non-pensioner spouse's share of the pension rights by installment payments might well obviate the need for support through alimony.\textsuperscript{161}

\textit{"If, As and When" Received}

The third method of allocation adopted by the Nebraska Supreme Court allows distribution to the non-pensioner spouse "if, as and when" benefits are received by the pensioner spouse. This method has three distinct advantages:\textsuperscript{162} (1) there is no need spouse 50 percent of the pension benefits, if, as and when received by the pensioner spouse).

\textsuperscript{156} In re Marriage of Vinson, 48 Or. App. 283, —, 616 P.2d 1180, 1182 (1980) (the court also noted that a lump sum award would not be fair in this case because of the possibility that the pension could increase in value).

\textsuperscript{157} Tigner v. Tigner, 90 Mich. App. 787, —, 282 N.W.2d 481, 483 (1979) (the court denied the pensioner's contention that his vested but not matured right was not part of the marital estate); NEB. REV. STAT. § 42-366(8) (Supp. 1982).

\textsuperscript{158} Green v. Green, 623 P.2d 890, 891 (Hawaii Ct. App. 1981) (court affirmed an award of $100.00 per month where the pensioner spouse earned between $2200.00 and $2600.00 per month). Cf. cases cited at notes 139-41.

\textsuperscript{159} 623 P.2d at 891.

\textsuperscript{160} See notes 73-74 and accompanying text \textit{supra}.

\textsuperscript{161} Malone v. Malone, 587 P.2d 1167, 1167-68 (Alaska 1978) (supreme court held that the trial court did not abuse its discretion in awarding divorced wife $350 per month as her share of the husband's pension in lieu of alimony. The court also encouraged the lower courts to provide for the financial needs of the spouses by a property division rather than an alimony award).

\textsuperscript{162} The method also has distinct disadvantages: a. It fails to disentangle the affairs of the parties. b. It requires the non-employee to monitor the fund, perhaps for many years, and creates problems for the fund administrator. c. It may leave the non-employee spouse in a plan no longer suited to his/her needs. This possibility is aggravated by any disparity between the ages and health of the parties and by any need of the non-employee spouse for immediate financial assistance.
to calculate the present value of the pension interest;\textsuperscript{163} (2) the pensioner spouse, upon retirement, will not be unduly burdened because he or she will have an asset—the pension benefits—from which to make the payments;\textsuperscript{164} and (3) the risk that the pensioner spouse may never receive pension benefits is equally allocated between the parties.\textsuperscript{165}

When the pension to be divided is nonvested, a present value is often too speculative because there is a high risk that the pensioner may never receive any benefits from the plan.\textsuperscript{166} In such a case, the "if, as and when" received method of distribution is clearly the most acceptable allocation formula.\textsuperscript{167} This method should also be used where the marital estate does not contain adequate assets to offset the value of the pension.\textsuperscript{168} Where the parties cannot agree on a present value or there is no evidence introduced to establish a value for the pension property interest, the court may have no choice but to use the "if, as and when"

d. If the employee spouse is terminated or dies, there may be no benefits remaining for the non-employee spouse.

e. The interest of the non-employee spouse is subject to whatever misfortunes may overtake the fund at a later time.


163. \textit{E.g.}, Weir v. Weir, 173 N.J. Super. 130, —, 413 A.2d 638, 641 (N.J. Super. Ct. Ch. Div. 1980) (if the risk that the pensioner spouse will not receive benefits is so large, an "if, as and when received" award is appropriate because no present value calculation is necessary).

164. \textit{E.g.}, Copeland v. Copeland, 91 N.M. 409, —, 575 P.2d 99, 104 (1978) (the appellate court suggested this method should be utilized when the pensioner spouse does not have sufficient assets presently available to finance a property distribution at the date of divorce).


166. \textit{See text accompanying notes 133-36 supra.}

167. This presumes, of course, that there are no employer contributions to the plan and the plan has no cash value from which the pensioner spouse has a present right to withdraw. See notes 137-38 and accompanying text supra. \textit{See In re Marriage of Brown}, 15 Cal. 3d 838, —, 544 P.2d 561, 567, 126 Cal. Rptr. 633, —, (1976) (any uncertainties involved can be resolved by this method); Shill v. Shill, 100 Idaho 433, —, 599 P.2d 1004, 1010 (1979) (parties hold the right to the benefit as tenants in common and later, when the pensioner begins receiving the benefits, the trial courts will divide the payments as received); Deering v. Deering, 292 Md. 115, —, 437 A.2d 883, 891 (the court stated that "a vital consideration" is whether the pensioner spouse's benefits will ever mature); \textit{In re Marriage of Vinson}, 48 Or. App. 283, —, 616 P.2d 1180, 1182 (1980) (unfair to award a lump sum if the pensioner spouse is young and the present value is highly speculative); \textit{Kearley v. Kearley}, 544 S.W.2d 661, 666 (Tex. 1976); \textit{Selchert v. Selchert}, 90 Wis. 2d 1, —, 280 N.W.2d 293, 298 (1979) (allocation of a proportion of the pension benefits to the non-pensioner spouse equally apportions the risk that the pensioner spouse may never receive benefits between the parties).

method. Similarly, this method is effective if the pensioner spouse chooses a lump sum payment at retirement instead of periodic benefit payments. It is advisable that the decree be fashioned to address this contingency.

**Alimony**

In *McBride*, the Nebraska Supreme Court expressly approved a fourth method of allocating the pension interest—via alimony. Before *McBride*, the court was in agreement with most other jurisdictions with regard to the disposition of pension benefits. Namely, the court would either divide the benefits currently or reserve jurisdiction. It appears that in most jurisdictions which

---

169. *In re Marriage of Pea*, 17 Wash. App. 728, —, 566 P.2d 212, 214 (1977). This is an especially important point for Nebraska practitioners, because § 42-366(8) requires the pension to be included in the marital estate. NEB. REV. STAT. § 42-366(8) (Supp. 1982).


171. *McBride*, 211 Neb. at 465, 319 N.W.2d at 75.

172. *See Kullbom*, 209 Neb. at 152-53, 306 N.W.2d at 849. In *Shill v. Shill*, 100 Idaho 433, 599 P.2d 1004 (1979), the court observed:

There are essentially only two ways to divide the retirement benefits upon divorce. One is to award the employee-spouse the pension and assign the non-employee-spouse assets of a value equal to the present value of the contingent benefits. In some divorce cases this might be accomplished by awarding the non-employee-spouse the family home, while awarding the employee-spouse the future rights to the entire pension. The other method of dividing the rights is to reserve jurisdiction until retirement and divide the actual monetary benefit when received. The advantage of the lump sum approach is that it effects a complete severance of the spouses' interests and gives each spouse immediate control of his or her share of the community property. ... However, it will often be true, as in the case at bar, that the pension rights represent the largest portion of the assets owned by the community. An immediate award of equivalent property to the non-employee-spouse in exchange for the future contingent right to pension benefits will work a severe economic hardship on the employee-spouse. ... The advantage of reserving jurisdiction over the pension rights and effecting a division of the actual monetary benefits if and when they accrue is that this approach allocates equally between the parties the risk that the rights may never vest and enables the court to better determine the actual proportion of the benefits that were derived from community property.


Given the state of our law, the trial court can at least shape its distribution of the pension funds to conform to the plan's essential purpose. The monies accumulated in a pension fund during the period of the marriage constitute compensation which both parties expect to have available upon retirement. Is it not appropriate for the court to calculate the interest in the fund . . . and provide for its distribution . . . at the time the funds become available? By doing so, we accomplish the purpose of the fund without requiring one spouse to pay out a portion of the monies not yet received.

*Id.* at —, 413 A.2d at 640-41. The court further pointed out:

[D]eferred distribution is . . . only [one] acceptable alternative . . .
consider pension rights a marital asset, pension benefits are divided currently, if at all feasible.\textsuperscript{173} In \textit{McBride}, this approach was implicitly rejected. Moreover, the court stated "that the trial court's method of considering [the husband's] pension fund by awarding alimony to [the wife] in the amount of $300 per month for her lifetime falls within the approved method set forth in \textit{Kullbom v. Kullbom}."\textsuperscript{174} The \textit{Kullbom} opinion did not indicate that a pension property interest could be divided by way of an alimony award.\textsuperscript{175}

The \textit{McBride} decision may prove to be fertile ground for confusion. The rationale underlying the opinion obfuscates the distinction between support payments and property division. Alimony is only a form of support or maintenance.\textsuperscript{176} As a result of \textit{McBride},

\begin{quote}
the trial court believes that the risks of total forfeiture of the pension rights are so remote it might be appropriate to fix a present value and distribute a portion thereof to the nonpensioner spouse. The requirements of the pension fund, the needs of the parties, the ability to pay or set off the payment against another asset, and other factors may dictate such an outcome. \textit{Id.} at — , 413 A.2d at 641. In a later case, Kikkert v. Kikkert, 177 N.J. Super. 471, 427 A.2d 76 (N.J. Super. Ct. Ch. Div. 1981), the court specifically recognized the merits of a complete division at the time of dissolution, stating that "[a]lthough fixing present value under such circumstances may be difficult and inexact, nevertheless immediate final resolution of the method of distribution is to be encouraged, preferably by voluntary agreement whenever possible." \textit{Id.} at — , 427 A.2d at 79.

\textsuperscript{173} \textit{See cases cited at note 148 supra.} The feasibility of a present division will, of course, always depend on the circumstances of the parties to a dissolution action. For example, reservation of jurisdiction is almost always appropriate where the pensioner spouse is in ill health. Regardless of the value of the marital estate, the risk is sufficiently high that the pensioner spouse will not receive the actuarially-computed present value of the pension benefits for a current severance to be prudent. Hardie & Reisman, \textit{Employee Benefit Plans and Divorce: Type of Plan, Date of Retirement, and Income Tax Consequences as Factors in Disposition}, 5 Community Prop. J. 179, 181 (1978). In \textit{In re Brown}, 15 Cal. 3d 838, 544 P.2d 561, 126 Cal. Rptr. 633 (1976), the court, after discussing the present division of the marital estate, observed: "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." \textit{Id.} at — , 544 P.2d at 567, 126 Cal. Rptr. at 639. \textit{See also Foster v. Foster}, 589 S.W.2d 223, 225 (Ky. Ct. App. 1979) (holding that there was no abuse of discretion in making the rights of the non-pensioner spouse prospective).

\textsuperscript{174} 211 Neb. at 465, 319 N.W.2d at 75.
\textsuperscript{175} 209 Neb. at 152-53, 306 N.W.2d at 848.
\textsuperscript{176} \textit{Neb. Rev. Stat.} § 42-360 (Supp. 1982). \textit{See also BLACK'S LAW DICTIONARY} 67 (5th ed. 1979), which, in relevant part, defines "alimony" as follows:

\begin{quote}
Comes from Latin "alimonia" meaning sustenance, and means, therefore, the sustenance or support of the wife by her divorced husband and stems from the common-law right of the wife to support by her husband. Allowances which husband or wife by court order pays other spouse for maintenance while they are separated, or after they are divorced (permanent alimony), or temporarily, pending a suit for divorce (pendent lite). Generally, it is restricted to money unless otherwise authorized by statute. But it may be an allowance out of the spouse's estate.
\end{quote}
however, the concept of alimony has been distorted because it has now also become a vehicle by which marital property can be divided. Moreover, the McBride decision seems to run afoul of section 42-365 and 42-366(8) of the Nebraska Revised Statutes.

177. 211 Neb. at 465, 319 N.W.2d at 75. See notes 73-74 and accompanying text supra.

178. In Kullbom the court suggested three ways to allocate the pension benefits: (1) allocate a lump sum distribution; (2) allocate the value in installments; or (3) allocate as, if and when paid. In McBride, the Nebraska Supreme Court evidently condoned an increased award of alimony as yet another way to allocate the pension benefits. In Pyke, the pension benefits were only a consideration in determining the alimony award.

The Pyke case is similar to the facts of McBride, yet contrary to its holding. Like McBride, the issue in Pyke principally concerned the trial court's award of alimony in conjunction with the funds available in the husband's pension fund. Ostensibly, this decree of alimony—based primarily on the benefit payments the husband was to receive—is very much like that of McBride. However, the pension in Pyke was a military pension. Before Pyke was decided, the United States Supreme Court, in McCarty v. McCarty, ruled that military pensions are not to be included in any marital estate for division of property purposes. See note 83 and accompanying text supra. The Nebraska Supreme Court in Pyke, recognizing that McCarty prevented it from dividing the property interest via alimony, as it did in McBride, stated:

[A] trial court, in determining what, if any, alimony should be awarded a spouse, may recognize that the spouse ordered to pay the alimony may have, by way of income for his own maintenance and support, a military pension or may have the proceeds of a military pension from which he may be able to make alimony payments, although the court cannot award an interest in the pension to the nonmilitary spouse.

212 Neb. at 121, 321 N.W.2d at 911. By the opinion in Pyke, it seems that not all pension plans have to be included in the marital estate. These pension plans which cannot constitute marital property need only be a factor in determining alimony payments; this is no different than the law prior to Neb. Rev. Stat. § 42-366(8) (Supp. 1990). For instance, see Witcig v. Witcig, 206 Neb. 307, 315-16, 292 N.W.2d 788, 793 (1980), where the court states: “We, therefore, reaffirm our position that pension interests may be considered on the question of alimony allowances, but not in the determination of the division of marital property.” Id.

The reasoning in McBride and the reasoning in Pyke are contradictory. Alimony is a form of support. “The purpose of alimony is to provide for the continued maintenance or support of one party by the other when the relative economic circumstances and the other criteria enumerated in this section make it appropriate.” Neb. Rev. Stat. § 42-365 (Supp. 1982).

Yet the McBride decision, without stating its reasons, unequivocably asserted that alimony is a form of marital property distribution. “We are of the opinion that the trial court's method of considering [the husband's] pension fund by awarding alimony to [the wife] in the amount of $300 per month for her lifetime falls within the accepted method set forth in Kullbom v. Kullbom.” McBride v. McBride 211 Neb. 459, 465, 319 N.W.2d 72, 75 (1982).

Alimony is terminable upon the death of either party or the marriage of the recipient. Neb. Rev. Stat. § 42-365 (1978). Alimony can be modified. Howard v. Howard, 196 Neb. 351, 357, 242 N.W.2d 884, 888 (1976). As a result of McBride, it now seems that pension property awards are terminable and modifiable.

Neb. Rev. Stat. § 42-365 and Neb. Rev. Stat. § 42-366(8) indicate that the McBride opinion may be in error. Section 42-366(8) mandates that “the court shall include as part of the marital estate, for purposes of the division of property at the time of dissolution . . . any pension plans . . . .” Id. (emphasis added). Certainly,
To avoid confusion, as well as potentially inequitable results, it is suggested that McBride be overruled.\textsuperscript{179}

\textbf{Collateral Issues}

Because of the complexity of many pension plan provisions, as well as Nebraska's relatively recent recognition of the pension interest as a marital asset, there are several issues which the supreme court undoubtedly will encounter in the future. This portion of the article will consider three of the more significant issues.

\textit{Circumstances Affecting "If, As and When Received" Allocations}

If the award of pension benefits is distributed via the "if, as and when" received method, the practitioner should be aware of two possible elections the pensioner spouse may make. These elections relate to early retirement and death benefit options.\textsuperscript{180}

Most plans provide for early, as well as normal, retirement ages.\textsuperscript{181} Suppose the non-pensioner spouse's portion is to be paid when the pensioner spouse retires. Suppose further that the pensioner spouse reaches the prescribed early retirement age and chooses not to retire. May the pensioner spouse avoid making the payments by opting to continue working until normal retirement age? The California Supreme Court, in \textit{In re Marriage of Gillmore},\textsuperscript{182} held that the pensioner spouse could not unilaterally make such a choice—a choice that potentially could cut off the

\textsuperscript{179} Id.

\textsuperscript{180} See notes 41-48 and accompanying text supra.

\textsuperscript{181} See notes 44-48 and accompanying text supra.

\textsuperscript{182} 29 Cal. 3d 418, 629 P.2d 1, 174 Cal. Rptr. 493 (1981).
PENSIONS AS MARITAL PROPERTY

1983]

rights of the non-pensioner spouse. The practitioner should take note that this problem can easily be avoided by providing the precise time the non-pensioner spouse's share is to be paid in either the dissolution decree or the property settlement agreement.

Another election which can influence the non-pensioner spouse's share under the "if, as and when" received allocation method involves death benefits. ERISA discourages plans which do not provide benefits to the surviving non-pensioner spouse upon the death of the pensioner spouse. Problems arise when the divorced pensioner remarries. If he or she elects the joint and survivor annuity in favor of the second spouse, the monthly benefit payments will be reduced. For the non-pensioner spouse who has been awarded a percentage of the benefits "if, as and when" received, his or her proportionate share will also be reduced. Court action may be necessary to force plan trustees not to honor the pensioner spouse's election in favor of the second spouse.

183. Id. at —, 629 P.2d at 4, 174 Cal. Rptr. at 496. The wife argued on appeal that the trial court abused its discretion by failing to order her husband to distribute his pension interest on the date he was eligible for early retirement. The supreme court agreed, stating that "one spouse cannot, by invoking a condition wholly within his control, defeat the community interest of the other spouse." Id. at —, 629 P.2d at 4, 174 Cal. Rptr. at 496. The court advanced the following rationale:

In so doing, he would subject [her] to the risk of losing the asset completely if [he] were to die while he was still employed. Although [he] has every right to choose to postpone the receipt of his pension and to run that risk, he should not be able to force [her] to do so as well.

Id. at —, 629 P.2d at 4, 174 Cal. Rptr. at 496. Moreover, the court further noted:

The right of the employee spouse is nonetheless limited by the fact that the nonemployee spouse owns an interest in the retirement benefits. . . . [T]he employee spouse has a right to agree to "a reasonable . . . nondetrimental modification of the pension system" . . . and . . . retains the right to elect "higher than ordinary retirement benefits." . . . If the right to choose among alternative retirement plans is exercised in a way which impairs the non-employee's interest in the benefits, the nonemployee spouse must be compensated.

Id. at —, 629 P.2d at 5-6, 174 Cal. Rptr. at 497-98.

184. This is not to suggest, however, the abandonment of the "if, as and when received" allocation method. Rather, for example, the decree might provide that the non-pensioner spouse is entitled to payment at the time the pensioner spouse reaches early retirement age. Of course, the court should take into consideration the circumstances of the parties in determining whether to allow such a provision.

See text accompanying notes 144-46 supra.


187. In re Marriage of Lionberger, 97 Cal. App. 3d 56, —, 158 Cal. Rptr. 535, 540-41 (1979). The court approved the trial judge's order precluding the plan trustee from honoring any election by the husband to receive a joint and survivor annuity. Id. Moreover, the court concluded that such an order did not contravene the provisions
is advisable to ask the court in the original dissolution proceeding to order the pensioner spouse to elect not to take the joint and survivor annuity or to revoke any such election he or she previously made.

The practitioner should be especially careful to make certain that any decree providing for distribution of the non-pensioner spouse's share by the "if, as and when" received method contains provisions for at least two contingencies. First, the decree should address the possibility that the pensioner spouse may lose his or her pension interest, either voluntarily or involuntarily. Second, the consequences of the non-pensioner spouse's death, either before or after the pensioner spouse's retirement, should be considered. That is, will any balance owed the non-pensioner spouse be payable to his or her estate?

of ERISA. Id. at —, 158 Cal. Rptr. at 543 (citing Treas. Reg. § 1.401(a)-11(c)(1)(B) (1977)).

Where the pensioner spouse involuntarily loses his or her pension benefits, the non-pensioner spouse likewise should lose his or her interest in the benefits. One of the principal features of the "if, as and when received" method of allocation is that it insures that both parties equally share the risk that the prospective benefits may never materialize. See note 165 and accompanying text supra. Similarly, it would be nothing short of anomalous to hold the pensioner spouse liable for benefits never received, when he or she lost the benefits involuntarily. See notes 162-64 and accompanying text supra.

For a variety of reasons, the pensioner spouse may voluntarily forfeit his or her pension rights. Forfeiture may occur, for example, as a result of the pensioner spouse changing jobs. Under such circumstances, should the non-pensioner spouse have a cause of action for nonpayment? Although no court order should have the effect of requiring an individual to continue working for a specific employer, the pensions remain liable for any wrongs in which they impair the non-pensioner spouse's interest in the pension. In re Marriage of Gillmore, 29 Cal. 3d 418, —, 629 P.2d 1, 6, 174 Cal. Rptr. 493, 498 (1981); See also In re Marriage of Brown, 15 Cal. 3d 838, —, 544 P.2d 561, 566, 126 Cal. Rptr. 633, 638 (1976).

This "terminable interest" rule states: "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 objects of her bounty." Waite v. Waite, 6 Cal. 3d 461, —, 492 P.2d 13, 21, 99 Cal. Rptr. 325, 333 (1972). This conclusion was based on the court's interpretation of California's Descent and Distribution Statute, wherein the court concluded:

[T]he statutory design for judges' pensions negates the spouse's contention that her legatees should inherit pension payments payable for the balance of the judge's life. Whatever community interest the wife may claim, it cannot transcend the legislation upon which the pension itself rests. The legislation grants to the wife, not an inheritable legacy, but a continuing economic protection for her lifetime. . . .

Id. at —, 492 P.2d at 22, 99 Cal. Rptr. at 334.

This rule has been criticized as an unwarranted deprivation of a property right. Ramsey v. Ramsey, 96 Idaho 672, 535 P.2d 53 (1975) (Bakes, J., dissenting):

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
Disability Benefits Considerations

Where an employee experiences a work-related injury and can no longer work at full capacity, many pension plans provide for the payment of disability benefits. Courts are not in agreement on whether these types of payments are marital assets. Courts which have concluded that disability payments constitute marital property focus on one of three notions: that the payment repre-
sent deferred compensation earned during the marriage;\textsuperscript{193} that an interpretation of an applicable statute requires the payment to be considered marital property;\textsuperscript{194} or, that the disability benefit accrued during the course of the marriage.\textsuperscript{195} Courts which have determined that such payments are not a marital asset emphasize that disability payments represent future earnings and, therefore, the benefits cannot be considered part of the present marital estate.\textsuperscript{196} While courts are in agreement that disability payments received while the marriage is intact are part of the marital estate,\textsuperscript{197} the problem emerges when courts must decide whether disability payments, to be received after dissolution, constitute marital property.

From a technical standpoint, disability payments are not deferred compensation; they are not earned during the course of the marriage to provide for retirement.\textsuperscript{198} Disability benefits, when re-

\textsuperscript{193} Guy v. Guy, 98 Idaho 205, —, 560 P.2d 876, 878-79 (1977) (court found an element of deferred compensation within the disability award and therefore the benefits constituted a marital asset); Busby v. Busby, 457 S.W.2d 551, 551-54 (Tex. 1970) (court held that if the serviceman could have elected retirement benefits but instead chose to receive disability pay, the benefits remained part of the marital estate); Copeland v. Copeland, 544 S.W.2d 183, 184 (Tex. Civ. App. 1976) (private employment disability pension based, in part, on length of service was considered community property).

\textsuperscript{194} Lukas v. Lukas, 83 Ill. App. 3d 606, —, 404 N.E.2d 545, 549-50 (1980) (holding that a workmans' compensation award is marital property because the award does not fit within the statutory definition of nonmarital property); Quiggins v. Quiggins, 637 S.W. 666, 668 (Ky. Ct. App. 1982) (holding for the same reasons as in Lukas that the workmens' compensation award is marital property).

\textsuperscript{195} In re Marriage of Thomas, 89 Ill. App. 3d 81, —, 411 N.E.2d 552, 552-53 (1980) (a workmens' compensation claims—since it arose during the course of marriage—is marital property); Kruger v. Kruger, 139 N.J. Super, 413, 354 A.2d 340, 344 (N.J. Super. Ct. App. Div. 1976) (to the extent that disability benefits were based upon service during the marriage, they were divisible); Hughes v. Hughes, 96 N.M. 719, —, 634 P.2d 1271, 1274-75 (1981) (Federal Civil Service Disability Benefits were earned during coveture and are therefore marital assets).

\textsuperscript{196} Flowers v. Flowers, 118 Ariz. 577, —, 578 P.2d 1006, 1011 (Ariz. App. Ct. 1978) (court held that while the marriage remains intact, disability payments become part of the marital estate, but after dissolution the spouse has no right to the future earnings of the other after divorce); Cook v. Cook, 102 Idaho 651, —, 637 P.2d 799, 802 (1981) (that part of the workmans' compensation award received during the marriage is a marital asset, but since this court interprets the purpose of a workmans' compensation award to reconcile the loss or impairment of earning power, once the marriage is terminated the ex-spouse cannot lay claim to any benefits received thereafter); In re Marriage of Huteson, 27 Wash. App. 359, —, 619 P.2d 991, 993-94 (1980) (because the disability pension contained no elements of deferred compensation, the benefits received could only be considered for purposes of alimony and support).

\textsuperscript{197} Even if the court determines disability payments to be entirely composed of future earning capacity, those payments already received are benefits procured for past earning capacity while the marriage remained a unit and consequently those benefits already received must become part of the marital estate.

\textsuperscript{198} Disability benefits will be disbursed from a pension plan when, because of
ceived, represent a remedy in recognition of the fact that the benefactor was unable to work at full capacity for a given period of time.\textsuperscript{199} No part of this payment received represents a distribution of wages earned for past labors, as in the case of deferred compensation benefits.\textsuperscript{200}

Moreover, simply because a person is receiving disability benefits does not mean that retirement benefits may not be available for division.\textsuperscript{201} Many plans provide for full vesting if an employee becomes totally and permanently disabled.\textsuperscript{202} Some plans provide that if a specified minimum period of service or participation in the plan has been completed, the disabled employee will be treated as if he or she elected early retirement, and the payments received will be in the form of deferred compensation, not disability benefits.\textsuperscript{203} Furthermore, partially disabled employees who are able to continue working until retirement may have the opportunity to elect either disability pay or retirement pay upon termination of employment.\textsuperscript{204}

The question of whether disability benefits are deferred compensation—and thus a marital asset subject to division upon dissolution—turns on the theory embraced by the court. How the Nebraska Supreme Court will choose to treat disability payments receivable after dissolution is difficult to discern.\textsuperscript{205} Trial courts in a job-related injury, the pensioner will not be able to work until normal retirement age. \textit{Mamorsky, supra} note 82, at 51.

\textsuperscript{199} Many pension plans adopt the social security definition of disability. \textit{Id.} This social security definition is: "[a]n inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or has lasted or can be expected to last for a continuous period for not less than 12 months. . ." 42 U.S.C. § 416(i)(1)(A) (1976).

\textsuperscript{200} But note that in some plans, the pensioner will not receive disability payments. The pensioner will be treated as if he or she retired and will receive early retirement benefits actuarily reduced due to the early commencement of the benefits. \textit{Mamorsky, supra} note 82 at 51. If this be the case the benefits are in fact deferred compensation and subject to division upon divorce.

\textsuperscript{201} Many plans which do not treat the benefit as early retirement compensation provide for the disability benefit to terminate upon reaching normal retirement age. Thereafter the accrued pension benefit will be payable. \textit{E. Allen, supra} note 1, at 53.

\textsuperscript{202} \textit{Id.}

\textsuperscript{203} See notes 50-51 \textit{supra}.

\textsuperscript{204} \textit{See In re Marriage of Stenquist, 21 Cal. 3d 779, 582 P.2d 96, 148 Cal. Rptr. 9 (1978)} (At the time of retirement, the pensioner had the option of receiving retirement benefits at 85\% of his pay or disability benefits at 75\% of his pay. The court held that disability payments are separate property only to the extent that they exceed the retirement pay option because it could not "permit the serviceman's election of a 'disability' pension to defeat the community interest in his right to a pension based on longevity.") \textit{Id.} at —, 582 P.2d at 98-100, 148 Cal. Rptr. at 11-13.

\textsuperscript{205} Nebraska has been flexible in the treatment of marital property issues on
Nebraska have been allowed wide discretion in dividing the marital estate, and there are few specific guidelines for determining what constitutes non-marital property. Given this flexibility in the case law and the lack of statutory authority, and in the light of the principles of equity, the court should refrain from promulgating any absolute rule as to whether disability payments are or are not marital property. The court has consistently relegated great discretion to trial courts in making property awards. To make no definitive rule would serve to extend this deference so that trial courts may continue to fashion awards solely by the guiding light of the equities in each unique dissolution event.

appeal. There are statements often repeated by the court, and none give a definitive answer to the property issue. Evidently this is a necessary end of an equitable division jurisdiction which has little statutory guidance concerning marital property. See note 55 supra. These statements tell the practitioner only that the property will be divided equitably. Hence, it will be difficult for a practitioner to advance any argument that disability payments are not a part of the marital estate. The Nebraska Supreme Court has steadfastly refused to admit that some particular type or form of property will be recognized as nonmarital. If the Nebraska Supreme Court does decide that disability benefits to be received after dissolution are nonmarital property, it will be new law.


207. For the most part decisions as to what is separate property is entirely a fact sensitive adjudication in light of equitable principles. Matlock v. Matlock, 205 Neb. 357, 359, 287 N.W.2d 690, 691 (1980) (property award is determined by consideration of the facts). Even property inherited or acquired by gift will not always be set aside to one spouse. Torrey v. Torrey, 206 Neb. 485, 489, 293 N.W.2d 402, 406 (1980) (the source of the property is only one of the factors to consider in the division of the property); Sullivan v. Sullivan, 192 Neb. 841, 843, 224 N.W.2d 542, 543 (1975).

208. NEB. REV. STAT. § 42-365 (Supp. 1982) demands only that the award of alimony and property be “reasonable.” NEB. REV. STAT. § 42-366(8) demands that when the parties fail to agree on a property settlement agreement that is otherwise conscionable, the court must distribute the property equitably. Id. at § 42-366(8). Nowhere does article 3 of § 42 of the Nebraska Code make provision for separate property of the spouse.

209. The proposition offered is not without judicial recognition. The Washington Appellate Court has declared the following rule concerning disability payments:

Some disabilities are the result of long term exposure to injury, disease or impairment while employed during marriage, and some, as here, flow from injury, disease or impairment which did not result from employment but which will prevent the employee from engaging in the particular employment thereafter. An inflexible rule that required a disability pension to be classified as separate property would ignore the fact that some “disability” pensions step into the place of a regular retirement pension and permit an earlier retirement and/or retirement with increased payments, others contain elements in the award attributable to an earned regular retirement pension along with elements which compensate for physical injury, and yet other awards are made for disability alone. We hold that to require a un-
Assignment of the Pension Interest

In the event that payments required by a decree of divorce become delinquent, the practitioner should be aware that it is feasible to have a portion of the pensioner spouse’s pension assigned to the non-pensioner spouse. The ability of a court to assign the beneficiary’s interest in the pension has been attacked on the ground that two provisions of ERISA prohibit assignment. The regulations expressly provide that pension benefits cannot be assigned or alienated, and that federal law supersedes any state law relating to pensions. Interpreting these provisions literally suggests that federal law preempts the field of pension regulation and, in addition, a former spouse does not have standing to sue because he or she is not a beneficiary under the pension plan.
Cases decided since 1978 have begun to carve out an "implied exception" to ERISA's strict preemption and anti-assignment clauses. A recent United States Supreme Court decision, *Hisquierdo v. Hisquierdo*, suggests that Congress has not preempted the field with respect to *private* pensions and, consequently, state regulation is not completely precluded. Further, any effect of ERISA is not great enough to justify avoidance of a support order. In addition, it can be argued that alienation furthers the congressional intent expressed in ERISA, because dependents and beneficiaries would thereby have access to the pension benefits.

A 1980 Revenue Ruling appeared to settle the person designated by a participant, or by the terms of an employee benefit plan, who is or may be entitled to a benefit thereunder. Obviously, a former non-pensioner spouse is not a participant or fiduciary. See also *Francis*, 458 F. Supp. at 86-87 and *Kerbow v. Kerbow*, 421 F. Supp. 1253, 1260 (N.D. Tex. 1976), where both courts construed ERISA's provisions regarding beneficiaries as precluding the former spouse from asserting a cause of action against a pension plan trust because the non-pensioner spouse was no longer a "beneficiary" under the plan.

215. The leading and well reasoned case of *Cartledge v. Miller*, 457 F. Supp. 1146, 1156 (S.D.N.Y. 1978), held that ERISA's anti-assignment or alienation sections were included only "to protect a person and those dependent upon him from the claim of creditors," not to insulate a breadwinner from the valid support claims of spouse and offspring." *Id.* The same court responded forcefully to the petitioner's argument that there were other ways of enforcing support rights:

To interpret ERISA so as to enjoin the attachment of the pension in this case is, practically, to foreclose any enforcement of the wife's support rights. 'Until and unless Congress has made it plain that it intended the absurd, unfair and unconscionable result contended for by the movant . . . the Court will not leave the field, and will permit the normal and routine enforcement machinery with respect to outstanding support orders to function.' *Id.* at 1157 (quoting *Cogollos v. Cogollos*, 93 Misc. 2d 406, 402 N.Y.S.2d 929, 930 (Sup. Ct. 1978).


217. *Id.* at 575-77. The Court denied a spouse's expectation of retirement benefits under the Railroad Retirement Act by interpreting provisions of 45 U.S.C. § 231 (1976). After analyzing § 231(m), the Court noted:

Different considerations might well apply where Congress has remained silent on the subject of benefits for spouses, particularly when the pension program is a private one which federal law merely regulates. . . . Our holding intimates no view concerning the application of community property principles to benefits payable under programs that possess these distinctive characteristics.

*Id.* at 590 n.24.


219. The purpose of the proscription on alienation and assignment is to protect an employee from his own financial improvidence in dealings with third parties. The provision is not intended to alter traditional support obli-
entire issue, concluding that a pension plan would not lose its qualification if the trustee complied with a court order requiring deductions for alimony or support payments.220

The Nebraska Supreme Court has not yet decided whether a pension can be assigned for purposes of allocating marital property. Consequently, if the non-pensioner spouse is awarded the pension on an “if, as and when” received basis, it is unclear whether that portion of the pension due him or her can be assigned by court order. This will be especially problematic if the pensioner spouse refuses to pay the non-pensioner “if, as and when” he or she receives the monthly pension benefit. However, the dissolution decree can provide for support payments in the exact amount of the property award in the event the property distri-

Our findings of an implied exception is not only in furtherance of Congress’s concern for the well-being of employees and their dependents as expressed in ERISA § 2(a), 29 U.S.C. § 1001(a) but is also consistent with the federal policy of enforcing support obligations and establishing paternity under the 1974 Social Services Amendments to the Social Security Act. ... [and citations]

American Tel. & Tel. Co. v. Merry, 592 F.2d 118, 124 (2d Cir. 1979).

220. Rev. Rul. 80-27, 1980-81 C.B. 85. This ruling first pointed out that “Section 401(a)(13) of the Code, as added by ERISA, ... provides that a trust shall not constitute a qualified trust unless the plan of which the trust is a part provides that benefits under the plan may not be assigned or alienated.” Id. at 86.

The ruling further took note of section 1.401(a)-13(b)(1) which states that “for the purposes of section 401(a)(13) of the Code, a trust will not be qualified unless the plan of which the trust is a part provides that benefits provided under the plan may not be anticipated, assigned (either at law or in equity), alienated or subject to attachment, garnishment, levy, execution, or other legal or equitable process.” Id.

It provided this exception to the general rule against alienation:

The rule against assignment or alienation of plan benefits was intended to assure that the accrued benefits of a plan participant are actually available for retirement purposes. (See H.R. Rep. 93-807, 93d Cong., 2d Sess. (1974), p. 68.) [1974-73 C.B. (Supplement) 236]. Therefore, the participant's benefits are not subject to attachment by general creditors. However, the rule was not intended to defeat the enforcement of the obligation of a plan participant to support the spouse or children of the participant through alimony or support payments. (See e.g., Cartledge v. Miller, 457 F. Supp. 1146 (S.D.N.Y. 1978); Cogollos v. Cogollos, 402 N.Y.S.2d 929 (Sup. Ct. 1978); and Wanamaker v. Wanamaker, 401 N.Y.S.2d 702 (Sup. Ct. 1978)).

Accordingly, a plan will not lose its qualification under section 401(a) of the Code merely because the trustee complies with a court order requiring deductions from the benefits of a participant in pay status for alimony or support payments.

Id.

The ruling also states that benefits not currently payable may not be attached because the participant has no present rights to them. Id. A simple solution to this preclusion is for the court to reserve jurisdiction until the working spouse begins to receive payments and assign the benefits at that time. Note that the ruling addressed itself solely to the issue of child support and alimony. It made no suggestion concerning garnishment for property division purposes.
bution is not made. Therefore, when the pension is assigned it will be assigned for support purposes, not for property distribution purposes.221

CONCLUSION

When the Nebraska Legislature decided that pensions were to be a part of the marital estate, many important issues concerning the property rights of spouses immediately emerged. Since the statute offered no guidance for the treatment of this newly defined marital property interest, the Nebraska Supreme Court was compelled to adopt its own policy. To date the court has adopted only the bare rudiments of a pension property division policy.

It is not surprising that the court did not develop a comprehensive set of guidelines. The pension property issue is relatively new and, as yet, remains untested by the practitioners of Nebraska. Furthermore, the court has always granted deference to the discretion of the trial court and apparently will continue to do so with regard to the division of pension interests. The practitioner is urged to consider with care the complex issues which will certainly arise in this area.

P. Joseph O'Neill—'84


Except for his expressions of frustration directed to the creativity of ingenious lawyers who developed this method of assuring compliance with the court order, [the pensioner] is unable to point to any statutory or policy consideration in support of his argument. Every family law case negotiated to settlement involves a give-and-take process. Why spousal support is waived in certain cases and not in others remains part of the personal decisional choice which each party must make in order to satisfactorily resolve his or her case. Moreover courts have recognized the close relationship between the amount of property division and the entitlement to spousal support.

Id.