#F-633 12/21/84

Memorandum 85-15

Subject: Study F-633 - Division of Pensions (Comments on Tentative Recommendation)

Background

The Commission has circulated for comment its tentative recommendation relating to division of employee pension benefit plans at dissolution of marriage. A copy of the tentative recommendation is attached to this memorandum. The tentative recommendation seeks to do three major things:

(1) Make clear that the court has discretion to make either an immediate disposition of the pension to the employee spouse with offsetting property to the nonemployee spouse or to reserve jurisdiction to divide the plan at a later time. Existing law may embody a preference for immediate disposition; the tentative recommendation would make the law neutral on this point and list illustrative factors the court may consider in exercising its discretion.

(2) Overrule In re Marriage of Gillmore, 29 Cal.3d 418, 629 P.2d 1, 174 Cal. Rptr. 493 (1981). The Gillmore case holds that when a plan is vested and mature, upon demand of the nonemployee spouse the court must order the employee spouse to pay the share of the nonemployee to the nonemployee as if the plan were in pay status, even if the plan is not yet in pay status and the employee has no intention to retire. The tentative recommendation gives the court discretion in such a situation whether to order the employee spouse to pay upon demand or the nonemployee spouse or to wait until the plan is in pay status.

(3) Authorize the court to order the pension plan to make payments directly to the nonemployee spouse in the reservation of jurisdiction situation. This is currently precluded by statutes governing public pension plans, but is expressly authorized by federal legislation enacted in 1984 for plans governed by ERISA.

This memorandum will first make some general observations about the comments received on the tentative recommendation, followed by an analysis of comments on the specific items summarized above.

General Comments

There was substantial interest in this tentative recommendation. There were many thoughtful and extensive comments submitted, and although many of the comments raised questions or concerns, most felt that improvements are needed in this area of the law.

Three of the commentators approved the recommendation in all of its aspects. See the letters of Demetrios Dimitriou and Justice Robert Kingsley, attached to Memorandum 85-4 (attorney's fees in family law proceedings); see also Exhibit 3 of this memorandum (Henry Angerbauer). Justice Kingsley states, "I thoroughly concur. It makes possible an intelligent solution of problems which cannot always property be dealt with under the present case law."

One commentator felt that the tentative recommendation would not be a particularly useful addition to the law. See Exhibit 5 (Daniel G. Gutierrez, M.A.A.A., E.A.). He notes that the tentative recommendation offers no meaningful guidance to court, lawyers, witnesses, or parties (particularly with respect to the manner of valuing a pension plan), and that it is too general and vague. The staff would have to agree that this comment is correct; the tentative recommendation only increases court discretion and does not offer any standards for exercise of the discretion.

The tentative recommendation does list a number of factors for the court to consider in the exercise of its discretion, however. Section 4800.4(b). Judge Leonard P. Edwards (Exhibit 11) suggests an additional factor; "The income of the parties including any child or spousal support either may be receiving or paying." He observes that the relationship of support and pension rights is often important to the court when it decided pension division questions. The staff would add this language.

There were also a number of technical comments addressed to the drafting of the proposal. See, e.g., Exhibits 1 (Murray Projector, F.S.A.--clarification of portions of preliminary part), 4 (Susan E. Howie--application to profit sharing and stock option plans), 5 (Daniel G. Gutierrez, M.A.A.A., E.A.-- consistency with ERISA procedure), 8 (Lois L. Blalock--consistency with ERISA procedure), and 9 (Barbara A. Di Franza--miscellaneous technical points). The staff will incorporate the necessary technical corrections, depending upon the Commission's policy decisions in this area.

Court Discretion For Immediate Disposition or Reservation of Jurisdiction

The concept that immediate disposition of the pension (by assigning the pension to the employee and awarding offsetting property to the nonemployee) should not be favored met with mixed reaction. In addition to the general letters of approval of the tentative recommendation, the San Mateo County family law judges particularly appreciated making clear that the court has discretion. "[I]t has always baffled me why some cases say the preferred method is the cash-out when the reservation of jurisdiction method clearly more equitably has both parties sharing the risks involved." (Exhibit 3).

On the other hand, Murray Projector, F.S.A. (Exhibit 1), believes there should be a preference in the law for immediate disposition, with the burden on the person arguing for reservation of jurisdiction to show that reservation is preferable in the particular case. Mr. Projector takes the position that reservation simply postpones the difficulties of division and increases the workload of the lawyers and the parties. He does not believe that reservation promotes equal sharing of risks, and includes a reprint of an article arguing this point.

The California Women Lawyers (Exhibit 7) favor present disposition because by limiting exercise of the court's discretion, the parties may come to settlement more easily, and because present disposition puts an end to litigation thereby unburdening both the courts and the parties. While the staff believes both these reasons to be good, we must not forget that there are other reasons that argue for reservation of jurisdiction. Besides the traditional arguments that reservation of jurisdiction eliminates many contingencies and thereby makes the evaluation of the pension more accurate and certain, and that it makes both parties share the risks (arguments that Mr. Projector seeks to refute, above), there is the argument that cash-out hurts the nonemployee spouse. "[M]any women have traded important interests in their spouses' pensions for the ability to stay in the home . . . The amounts involved, even in middle-class divorces, can be large. The margin for error, given assumptions about longevity, salaries, and inflation is great. In most cases, both spouses would be better served in the long run with an approach that preserves old-age security for each, and separates this issue from a search for current liquidity." Bruch, The Definition and Division of Marital Property in California: Towards Parity and Simplicity, 33 Hastings L.J. 769, 851-52 (1982).

One problem here is that if the employee husband is in poor health, the interests of husband and nonemployee wife are diametrically opposed. The husband does not wish to buy out his wife's interest in the pension because he will be impoverished in exchange for a future right he will never realize. The wife does not wish to defer jurisdiction because if the husband dies, her interest terminates under one branch of the terminable interest rule. The Commission has received repeated letters commenting on the need to repeal the terminable interest rule, including letters from the State Bar Family Law Section, but has chosen not to act in this area. The current tentative recommendation prompted two strong unsolicited observations about the need to repeal the terminable interest rule. See Exhibits 9 (Barbara A. Di Franza) and 12 (Robert M. Allen). Because of the pressure of the terminable interest rule on the present disposition/reserved jurisdiction decision, the staff believes the Commission cannot act effectively in this area unless both matters are addressed.

Overruling Gillmore

The reaction was also mixed to overruling Gillmore and allowing court discretion as to the time of payment under reservation of jurisdiction. In addition to the general letters approving the tentative recommendation without specific elaboration, several letters approved overruling Gillmore and suggested that the recommendation could go even further. Judge Leonard P. Edward (Exhibit 11) suggest that the court be given discretion to order payment when the employee is eligible for retirement, when the employee actually retires, or "at any other appropriate time." Robert M. Allen (Exhibit 12) suggests that we "eliminate the Court's discretion and require that the pension be vested, matured, and in a pay status, at least when applied to early retirement benefits (i.e. prior to normal retirement date)."

On the other hand, three letters support the Gillmore rule that division is required when the employee is eligible to retire, upon demand of the nonemployee spouse. Murray Projector, F.S.A. (Exhibit 1) believes this recommendation "is hard to justify, very, very hard," without further elaboration. The San Mateo County family law judges (Exhibit 3) observe that "Experience suggests that where benefits are not yet being paid (because employee spouse is working beyond eligible retirement age), the non-employee spouse wants the immediate pay-out

even though more might be paid by reserving until the benefits are in actual pay status." Of course, what the nonemployee spouse wants and what is fair to both spouses doesn't always coincide.

The California Women Lawyers (Exhibit 7) are strongly opposed to overruling Gillmore. They note that to the extent payment of the pension is deferred, the nonemployee spouse runs the risk that the pension will never achieve pay status. However, once the employee is eligible to retire, and the pension is vested and mature, further deferral would require the nonemployee to run an additional unnecessary risk. "We believe that the proposed legislation would violate the non-employee spouse's due process rights and would constitute a taking of property without fair compensation."

The staff can see both sides of the issue; it is a difficult problem to deal with. The Commission's tentative recommendation is not to force a resolution one way or the other, but simply to give the court discretion to make the fairest decision in light of the facts of the particular case. An alternative approach that would seem to satisfy both interests would be to order the pension split and each party could deal with his or her share a his or her own. This approach is discussed immediately below.

Ordering Pension Plan to Make Payments Directly to Nonemployee Spouse

The third major feature of the tentative recommendation was authority for the court to order pension payments directly to the nonemployee spouse who so elects, at the time the employee spouse is eligible for retirement. This approach would seem to be an ideal solution to many of the problems involved in dividing pension plans, and is in fact authorized by the recent ERISA amendments. However, we anticipated the pension plans would oppose this approach because of the added administrative burdens, but decided to circulate the proposal for comment anyway.

The results were somewhat surprising to the staff. In addition to the general letters of support for the whole approach of the tentative recommendation, a number of letters commented favorably on the direct payment alternative from some unexpected sources. Murray Projector (Exhibit 1), an actuary, and Lois L. Blalock (Exhibit 8), who represents collectively bargained private pension plans, both support the proposal. The staff believes the basis for this support is that because ERISA now authorizes this approach the courts will start to use it, and therefore

standard legislation will be helpful. This approach was also supported by judge Leonard P. Edwards (Exhibit 11), who states that attorneys, judges, and litigants need guidance in this area. "Non-employed parties will be greatly aided by this provision." We also received a letter from Don F. Keene (Exhibit 13) pointing out the impact of Gillmore on his personal situation and the advantages of a direct payment scheme by the pensions.

On the other hand, the State Teachers' Retirement System (Exhibit 6) gave us the expected response. They are concerned about the administrative costs of implementing this proposal, as well as with potential problems in computations and possible overpayments.

But the Public Employee's Retirement System (Exhibit 10) came up with what the staff believes is a very creative alternative. They propose that the employee's account in the plan be divided and actually allocated to the employee and the nonemployee spouse at the time the marriage is dissolved. Each will then have their dispute settled and can deal with their pension plan as their own, selecting their options and making their decisions without impinging on the other. PERS also notes that among the advantages of this proposal are that it eliminates problems with the terminable interest rule and simplifies survivor benefits problems. The PERS staff offers to work with us to develop acceptable legislation along these lines.

A suggestion along the same lines is also made by Barbara A. Di Franza (Exhibit 9)--the pension plan should be ordered to segregate the nonemployee's interest for accounting and/or management purposes. She points out this would simplify tracing the nonemployee's interest and would allow the nonemployee to select his or her own investment alternatives without being bound by the employee spouse's decisions, in a defined contribution plan.

The staff believes this approach is very promising, particularly from a political perspective if sponsored by PERS and accepted by plans governed by ERISA. We believe it merits further work; however, the work involved would be substantial in order to develop a sound and functional scheme.

Conclusion

This is an important area of the law in which there are substantial problems and there is substantial interest in improvement. The proposals

of the Commission generally to liberalize court discretion in making decisions in the pension plan area are quite modest, but none of them received a consensus in support. The staff believes that some of the problems could be worked out if we were to deal with the terminable interest rule together with the other pension plan matters.

The staff is most optimistic about the approach suggested by PERS, which may turn out to be both practically and politically feasible. However, it is a substantial undertaking and would require a substantial amount of staff, if not Commission, time to develop. Given the Commission's determination to devote full time to redrafting the Probate Code, we do not see how we can also do the work required on this matter at the same time.

Seeing no general agreement on the basic approach of the tentative recommendation, and no time to attempt to develop a general agreement, perhaps further work in this area should be deferred. The staff is reluctant to defer this because it is an important problem now and interest in it is mobilized now; people are looking to the Commission for guidance. But given the lack of consensus, the lack of time, and the Commission's priorities, we see no alternative.

Respectfully submitted,

Nathaniel Sterling
Asst. Executive Secretary

EXHIBIT 1

MURRAY PROJECTOR, F.S.A.
Consulting Actuary
776 Scripps Drive
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October 16, 1984

California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94306
Att'n: Nathaniel Sterling,
Assistant Executive Secretary

Re: Division of Pension

Dear Mr. Sterling:

Thanks for your letter of October 5 asking that I comment on the Commission's September 1984 "Tentative Recommendation relating to Division of Employee Pension Benefit Plans" (copy enclosed).

Comment Number	Page	Line(s)	Recommendation Text and My Comment
1	1	10	"until retirement." I suggest that this phrase be replaced with "until retirement or eligibility to retire."
2	2	1-2	"Neither of these approaches to division of pensions is free of practical or theoretical problems." This statement is true, but the question is which approach has greater practical or theoretical problems? The reservation of jurisdiction approach postpones and/or repeats the practical or theoretical problems faced at the original hearing. Reservation of jurisdiction may make it easier for the original court, but this easement is attained by transferring the original difficulties to the court that takes over after the period of reservation. This is a generalization, of course, subject to exceptions. But it still should be recognized that reservation does not reduce the total workload of the courts, and that it does increase the total workload of attorneys and spouses

Comment Number	Page	Line(s)	Recommendation Text and My Comment
3	2	9-10	"To the extent there is a bias in existing law for present disposition, the bias should be negated." I suggest that "bias should be replaced with "preference" in both instances.
4	2	10-12	"The court should be free to exercise its discretion to select the manner of disposition most suited for the particular case." This discretion is not in conflict with continuing the preference for present disposition. The court should be free to exercise its discretion to go against the preferred present disposition approach, if it believes that there are special circumstances warranting the alternate disposition by reserved jurisdiction. But the burden of proof should belong to the party arguing for reserved jurisdiction.
5	2	13-15	"Where the court reserves jurisdiction to divide the pension, existing law requires division at the time the pension is vested and matured, even if the plan is not yet in pay status."(underlining added) The wording of this statement is not precisely correct. The usual interpretation of Gillmore is that it permits the nonemployee spouse to receive payment before the employee retires, on request, but that the nonemployee spouse may choose to wait until the employee spouse retires before asking for payment. (See "Treatment of Retirement Benefits," page 299, by Commissioners Herbert S. Ross and Richard E. Denner, from the syllabus for the 1983 Los Angeles Superior Court Family Law Symposium.)

Comment Number	Page	Line(s)	Recommendation Text and My Comment
6	2	16-19	"In many cases this requirement will defeat the purposes of reservation of jurisdiction--to impose an equal sharing of risks on the employee and nonemployee spouses and to simplify the calculation of the community's interest in the pension plan." (underlining added)

This is the most troublesome statement of all, subject to the three criticisms.

1. It seems to assume that reservation of jurisdiction requires a later award to the nonemployee spouse only in the form of monthly payments, and does not allow for an award in a single sum as done in a present disposition of a nonmatured pension. The usual practice is, after the period of reservation has expired, to then argue disposition by single payment (assuming sufficient assets) versus disposition by monthly payments.

2. "To simplify the calculation" may be the intention of reservation of jurisdiction, but it doesn't work out that way. The simplest calculation is usually by present disposition. (See immediately preceding paragraph and Comment #2.)

3. Reservation of jurisdiction does not impose an equal sharing of risks, it only appears to do so. But the belief that it does do so is pervasive, and needs to be identified and corrected. Much of the difficulty with the Tentative Recommendation arises from this belief which is accepted too often as a statement of fact rather than as an assertion of belief.

Please read the enclosed copy of "A Fair Value is a Fair Value." The article addresses the cause of the misunderstanding about the equal sharing of risks, which is a misunderstanding of what actuarial present values mean. Since present dispositions of defined benefit pension interests are founded on actuarial present values, a correct understanding of their meaning is a necessary condition for proper family law revision.

Comment Number	Page	Line(s)	Recommendation Text and My Comment
7	2	19-22	"Where the court reserves jurisdiction, the court should have discretion as to the timing of the division, including the discretion to defer division until the plan is actually in pay status, . . . (underlining added) As I read the underlined portion, the intention of the recommendation is to overthrow the (unanimous) Gillmore decision which now gives the nonemployee spouse the right to ask for payment or disposition when the employee is eligible to retire, without being compelled to wait until the employee actually retires. If my reading is correct, then this recommendation is hard to justify, very, very hard.
8	2	23-29	"In addition, . . . employee spouse." We agree. But maybe the federal Retirement Equity Act of 1984 (REA), makes California legislation unnecessary.

Yours sincerely,

Murray Projector

MURRAY PROJECTOR
MP:ef

Encl: noted

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A FAIR VALUE IS A FAIR VALUE

Murray Projector, F.S.A.

The disposition of a defined benefit pension in a marriage dissolution is a vexatious issue. The courts must generally choose between assigning the pension interest to the employee spouse, with offsetting community assets awarded to the non-employee spouse, or reserving jurisdiction and then ordering suitable payment in kind to each spouse when pension benefits become payable.

If there are insufficient other assets available for offsetting the defined benefit pension asset, then the choice is easy. But if there are sufficient other community assets, and the attorneys plead contrary dispositions, then the choice becomes more difficult.

The actuarial present value of the retirement benefit is usually available for determining the amount of other assets to be awarded the non-employee spouse in exchange for the employee spouse retaining all retirement rights. The question facing the court is then easy to state: Is it fairer to pay now or later? Is it fairer to buy-out now based on a single value in advance of realized contingencies, or to let said realized contingencies determine actual payments to each spouse?

Opposing counsel spend much time arguing the two alternatives. The court is allowed discretion in each case, as circumstances and judgment dictate. Much has been written about the advantages and disadvantages of each alternative.

Despite the extensive discussion of this question, it is apparent that the courts and attorneys do not always understand the nature of an actuarial present value appraisal or future pension payments. The pervasive lack of understanding is to be expected, because explanation has not been readily available.

It is not the *calculation* of the present value that is now of concern. It is the *meaning* of the value so calculated that needs exposure. It is difficult for courts and attorneys to arrive at the best solutions when there is disagreement on the meaning of the present value.

There is frequently an instinctive or "gut" feeling that reserved jurisdiction is "inherently" fairer, that the actuarial present value is a product of imagination unrelated to reality. These views are symptomatic of a need to explain what an actuarial present value is, and what it is not.

We will concentrate on that meaning, rather than on the mechanics of present value calculations. It is hoped that said values will then receive a more even-handed reception than is presently the case. The uneven current treatment is evident, with an appreciable number of exceptions, despite Supreme Court sanction of the use of actuarial present values.

I. Heads or Tails

Suppose the community owns a ticket to a special coin tossing to be held next week. One coin will be tossed. If it comes up heads, the ticket bearer receives $1,000. If it comes up tails, there is a zero payout. And suppose further that there is need to appraise this ticket as of now, in advance of next week's coin tossing.

Most people would agree on $500 as a fair price for the ticket. This price seems reasonable, even if the supposition is carried to hundreds of tickets for hundreds of coin tossings in hundreds of locations.

The next step is to suppose a review of actual outcomes one month later, after all these heads or tails happenings have taken place, and then to compare the fair price of $500 per ticket with actual events. How does the fair price of $500 compare with the effect of each toss on each ticket holder? In some cases the fair price is $500 more than the amount realized; in some cases it's $500 less.

In no case does the accepted appraised price prove equal to the actual value determined by subsequent events. Thus we have a fair price which is always "wrong," when rightness and wrongness are determined by future events.

At this point, some of those who originally agreed with the $500 appraisal become uneasy. A fair price that is always contradicted by future events is hard for many to accept. For others, this apparent conflict presents no difficulty. The latter group makes and maintains the distinction between a *fair value* and *predicted outcome*. The $500 is a fair price; it *is not* a prediction of future events.

The apparent paradox is not really a paradox. The alleged deficiency of a fair price that never matches future events is actually a defect in the choice of a criterion for fairness. When reviewing the fairness of the $500 ticket valuation, the subsequent outcome of head or tail is irrelevant. (What *is* relevant, of course, is that heads will come up about half the time when a large number of coins has been tossed.)

The analogy with actuarial present values of defined benefit pension plans is obvious. A fair value for an employee spouse's pension benefits is neither a prediction of value, nor of how long the employee will live. It is a fair value now, based upon known probabilities of future events. If present values are calculated properly, then future realized values will exceed fair values about half the time, and fall short the other half.

From the viewpoint of spouses, the relationship between later realizations and actuarial present values should be dissociated from what is equitable now. Later events, such as length of life, are chance events unrelated to need or merit. To measure the community interest at trial by the outcome of fortuitous events, as is done by reserving jurisdiction, is again using the wrong criterion for a fair value.

The present value approach determines the value of a community asset at time of trial. It is the value now of a ticket to a coin tossing, and the rightness of that value will not be better determined by waiting for events to unfold.

II. Death and Taxes

Estate tax regulations provide for charitable gifts which have the effect of reducing the decedent's estate tax. In some cases, the decedent has assigned a life estate interest to an individual, with a charity as remainderman. How large is the charitable gift in such a situation?

Tables are provided to determine the amount of the charitable gift for a remainder interest. Suppose, for example, a 60-year-old widow with a life estate in a $100,000 portfolio.

The prescribed tables show a 0.62226 life estate factor and a 0.36774 remainder interest. (These are actuarial present value factors for each $1.00 of assigned assets.) For $100,000 the remainder value (charitable deduction) is $100,000 times 0.36774, which is $36,774.

This $36,774 is the prescribed charitable deduction for the estate without consideration of the widow's *actual* longevity. Should she die soon after the decedent, then the $36,774 deduction was, in retrospect, "unfairly low"; the "right" deduction "should" have been closer to $100,000. If she lives to 110, then the $36,774 was, with the use of hindsight, "unfairly high"; and the "right" deduction "should" have been lower.

In principle, the regulations could have provided for keeping the estate open, and determining the fair tax when the life estate interest is terminated by the death of the widow. It is fortunate, however, that the estate tax regulations do not allow the reserved jurisdiction option, which would lead to unnecessary expense, delay, and litigation.

One could list many reasons why the immediate buy-out procedure is prescribed for charitable remainder tax situations, and in other tax situations involving life annuities or life estates. Whatever the reasons, it is worth noting that the prescribed use of actuarial present values is accepted by practitioners as being fair. There is no concern that values determined by later events do not match those resulting from the earlier required factors.

There is an understanding that the present value is the proper value, and that the fairness of the published remainder factors cannot be judged by later events.

III. More Than Tossing a Coin

It is obviously true that in arriving at an actuarial present value for a pension income, more is involved than merely calculating the probability of a coin coming up heads or tails. There are more contingencies to consider, and judgment is needed for quantifying these contingencies. The resulting present value is, nevertheless, similar in concept to the $500 ticket appraisal and the $36,774 charitable deduction.

Understanding actuarial present values leads to the following conclusions:

1. An actuarial present value is a fair value, without being a prediction of future realized value.

2. Dividing retirement payments as received means replacing fair actuarial present values with those determined by fortuitous and chance events, and which are only partially related to need, merit and fairness.

3. Assuming sufficient other assets, the courts should state their preference for immediate buy-out, which would then permit counsel to concentrate on issues more appropriate for adversary procedures.

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TENTATIVE RECOMMENDATION

relating to

DIVISION OF EMPLOYEE PENSION BENEFIT PLANS

Under existing law there are two basic approaches to division of a community property interest in the pension plan of an employee at dissolution of marriage: the present disposition approach and the reservation of jurisdiction approach.[1] In the present disposition approach, a current valuation is made of the retirement benefits of the parties; these benefits are awarded to the employee spouse covered by the benefits, and the nonemployee spouse is awarded other community property assets of equivalent value. In the reservation of jurisdiction approach, the court reserves jurisdiction over the parties and pension plan until retirement, at which time the parties or the court decide how the retirement benefits are to be divided.

These two methods of handling retirement assets are recongized in the case law and have been given judicial approval.[2] A trial court has broad discretion to select either method. In Phillipson v. Board of Administration,[3] the present disposition was declared the preferred method, but later cases such as Marriage of Skaden[4] appear to negate any preference. As a result, some judges prefer the present disposition system while others prefer reservation of jurisdiction. Some practitioners believe that present disposition still appears to be favored by existing law.[5]

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1. See Hardie & Sutcliffe, Reserving Jurisdiction: A Potential Trap, California Lawyer 33 (July/August 1982).

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

3. 3 Cal.3d 32, 89 Cal. Rptr. 61 (1970).

4. 19 Cal.3d 679, 139 Cal. Rptr. 566 (1977).

5. See letter to California Law Revision Commission from Family Law Section, State Bar of California, dated February 22, 1984 (copy on file in Commission office).

Neither of these approaches to division of pensions is free of practical or theoretical problems.[6] The approach that may be preferable under the circumstances of one case may not be preferable under the circumstances of another. Factors such as the age of the parties and time until retirement, whether there are other substantial amounts of community property that may offset the value of the pension plan, and the tax consequences of the different dispositions may dictate the appropriate manner of division in each case.

To the extent there is a bias in existing law for present disposition, the bias should be negated. The court should be free to exercise its discretion to select the manner of disposition most suited for the particular case.

Where the court reserves jurisdiction to divide the pension, existing law requires division at the time the pension is vested and matured, even if the plan is not yet in pay status.[7] In many cases this requirement will defeat the purposes of reservation of jurisdiction--to impose an equal sharing of risks on the employee and nonemployee spouses and to simplify the calculation of the community's interest in the pension plan. Where the court reserves jurisdiction, the court should have discretion as to the timing of the division, including the discretion to defer division until the plan is actually in pay status, so that it can devise the most appropriate resolution of each case.

In addition, the court should have authority to require a properly joined plan to make payments directly to the nonemployee spouse after the pension is vested and mature, based on the amount that would be payable if the employee spouse had actually retired at that time. This will enable the nonemployee spouse to exercise full control of his or her interest without impairing the income or otherwise affecting the rights of the employee spouse.

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6. See Sterling, Division of Pensions: Reserved Jurisdiction Approach Preferred, 11 Community Property Journal 17 (1984).

7. In re Marriage of Gillmore, 29 Cal.3d 418, 629 P.2d 1, 174 Cal. Rptr. 493 (1981).

EXHIBIT 2

HENRY ANGERBAUER, CPA
4401 WILLOW GLEN CT.
CONCORD, CA 94521

10/20/84

Law Revision Commission:

I agree with your tentative Recommendation relating to the Division of Employee Pension Benefit Plans and that you implement your proposal by sending it to the Legislature. Best Personal Regards to all of you there at the Commission and I hope the Legislature has cut your budget to severely to handicap your operation. I really enjoy receiving these blue books when they become available and your other materials.

Sincerely

Henry Angerbauer

Thomas M. Jenkins
Judge

In Chambers
Hall of Justice
Redwood City, California 94063
364-5600

October 25, 1984

California Law Review Commission
4000 Middlefield Road, Suite D-2
Palo Alto, California 94303

Gentlemen:

I have recently received your tentative recommendations relating to litigation expenses in family law proceedings and division of employee pension benefit plans. Discussion with those handling such matters at our court results in an affirmative recommendation. The feeling is that both of these proposals are worthy of support.

Particularly appreciated was the pension proposal with the comment that "it has always baffled me why some cases say the preferred method is the cash-out when the reservation of jurisdiction method clearly more equitably has both parties sharing the risks involved". It was suggested, however, that the comment on page 2 might be looked at when it says "in many cases this requirement will defeat the purposes of reservation of jurisdiction ..." Experience suggests that where benefits are not yet being paid (because employee-spouse is working beyond eligible retirement age), the non-employee spouse wants the immediate pay-out even though more might be paid by reserving until the benefits are in actual pay status.

I hope the foregoing is helpful.

Sincerely,

THOMAS M. JENKINS

TMJ:df

EXHIBIT 4

BURRISS & RICE
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW
OLD MILL OFFICE CENTER
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MOUNTAIN VIEW, CALIFORNIA 94040
(415) 948-7127

November 13, 1984

CALIFORNIA LAW REVISION COMMISSION
4000 Middlefield Road, Suite D-2
Palo Alto, California 94303

Re: Tentative Recommendation
Division of Employee Pension Benefit Plans

Gentlemen:

I have reviewed your Tentative Recommendation with regard to employee pension benefit plans and have one comment.

The recommendation refers only to an employee benefit pension plan. It is silent on profit sharing plans, and stock and savings plans which in many instances are administered very much like pension plans in that the employee's rights to payments are predicated on years of employment, termination of service, actual retirement, or death.

The recommended addition to §4800.4 of the Civil Code does not address these additional situations, and I believe it should.

Very truly yours,

Susan E. Howie

SUSAN E. HOWIE
Attorney at Law

SEH:kt

EXHIBIT 5

PIHL, GUTIERREZ, GARRETSON & ROBERTS, INC.
Actuaries & Consultants
170 State Street, Suite 260A
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(415) 941-4292

November 21, 1984

California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303

Dear Commission:

I have read and reviewed the tentative recommendation relating to the division of employee pension benefit plans dated September, 1984, and would like to provide the following comments.

My first general impression is that the measure to be added to the California Civil Code, as tentatively proposed, is general and vague enough so as not to provide any real meaningful guidance to the practitioner nor to the judges that are required to render decisions with respect to the division of such employee pension benefits. It does not appear to me that this recommended measure is providing any additional guidance nor is it allowing for anything different from that which is already being done.

Specifically, I would also like to make the following comments. Section 4800.4(a)(1) stipulates to the award of the interest to one party on such conditions as it deems proper to effect a substantially equal division of the property. Ignoring the relative advantages and disadvantages of present division versus reservation of jurisdiction this comment seems to radically oversimplify the attempt to affect a substantially equal division. As a practicing consulting actuary I can attest to the fact that expert actuaries and economists cannot agree, with the guidance currently given, on what the proper value should be to "affect a substantially equal division of the property". If such experts cannot agree on a value then it is difficult to understand how practicing lawyers and judges can possibly arrive at such a value. This could be the reason why some practitioners lead toward reservation of jurisdiction.

Section 4800.4(a)(2) deals with the reservation of jurisdiction to divide the interest either when the plan is vested and mature or at the time payments or refunds are actually made pursuant to the plan. This section again oversimplifies the problem with respect to dividing the interest "... when the plan is vested and mature ..." in that there is no guidance given as to the manner and amount that payments, at that, should be. Again, experts in the field can disagree as to the amount of payments that should be provided at that time and thus it becomes difficult for practitioners and judges to render appropriate and proper decisions.

Section 4800.4(a)(3) discusses the concept of ordering a plan to make payments directly when the plan is vested and mature based on the amount that would be payable if the employee actually retired when the payment is first made. This is consistent with the concept of the recently passed Retirement Equity Act of 1984. There is a significant difference here, however, in that the language in the proposed measure indicating "... the amount that would be payable if the employee actually retired when payment is first made." could generate payments payable to the "alternate payee", as referred to in the Retirement Equity Act, that are greater than those allowed by such Act. The Act specifically states that if payments are made to an alternate payee prior to the time that the employee actually retires then the amount of such payments will be based upon the actuarial equivalent of the benefits accrued to date, not the amount of benefit that would be payable had the employee actually retired at that time. The difference is that if the employee were to retire then the plan may provide for subsidies in the benefit due to early retirement and the Retirement Equity Act specifically states that such subsidies shall not be provided to an alternate payee unless and until the employee spouse actually does retire and begin to receive such subsidies.

It is quite possible that the specific guidance that I, as a practicing consulting actuary would like to see is not something that should be provided in a proposed measure such as this, but instead should come through specific court cases and on this issue I obviously defer to you. To briefly summarize, however, I do not feel that the proposed measures give any significant guidance, as may be your intention, and that there may be significant conflicts between the proposed measure and current federal law.

Respectfully submitted,

PIHL, GUTIERREZ, GARRETSON
& ROBERTS, INC.

Daniel G. Gutierrez, M.A.A.A., E.A.

DGC:sae

P.S. Please find enclosed an article and two drafts of two additional articles on subjects related to these issues.

STATE OF CALIFORNIA GEORGE DEUKMEJIAN, Governor

STATE TEACHERS' RETIREMENT SYSTEM
P.O. Box 15275-C (916) 386-3766
Sacramento,CA 95851

Memorandum 85-15 EXHIBIT 6 Study F-633

November 21, 1984

California Law Review Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303

Subsection (a)(3) of section 4800.4 of the proposed amendment to the Civil Code is not acceptable to the System. This subsection essentially states that the System would have to pay a non-member spouse's community property share before the member actually retires.

This would be contrary to the STRS law (Education Code §22000, et seq.). We have no statutory authority to pay a benefit to anyone before the member applies for and actually begins to receive a benefit.

To do otherwise would create unworkable situations, such as where we would be required to begin payment when the member reaches age 55 (earliest retirement age) to a non-member spouse. First of all, the allowance is drastically reduced at age 55 (30% less than at age 60). This would not be to the benefit of either party. Secondly, suppose the System began payment to only the non-member spouse and the member died before he/she actually retired. We would be required by law to consider the member as having died as an active member, qualifying his survivors for benefits. Therefore, we would be required to pay double benefits for an unknown length of time if he remarried and/or had minor children.

Our plan, like other pension plans, is based upon the concept that benefits are payable only when the member applies for said benefits. The holding in re Marriage of Gillmore, 174 Cal.Rptr.493 (1981) should be left alone.

If the tenative recommendation is put into law other questions would arise, such as: 1) since the service retirement allowance is based upon the member's age at retirement, what age would we use to determine the benefit if the court requires STRS to pay before the member retires? 2) What age would we use when the member actually retires? 3) Would the member's age and final compensation upon which the allowance is based be frozen at the time the spouse demands the community property share of the allowance?

From an actuarial point of view, the System would be required to maintain much additional data because the cost of the plan is determined using demographics on members. Therefore, we would have to maintain additional data on:

1) dates of all marriages and dissolutions

2) segregated service for each such period because of multiple marriages and dissolutions.

3) mortality data on spouses which would not be available because there is no reason for the System to be notified of the death of a spouse who is not receiving payments.

From an administrative point of view, there would be extra costs to the System for the maintenance of the additional data, additional calculations and collections of overpayments.

In summary, we think your tentative recommendation is not a good idea and would create numerous problems in the administration of the plan. Please keep me advised as to actions you take regarding this matter.

Sincerely,

Ronald E. Mealor
Staff Counsel

REM:sgp

California Women Lawyers

From the office of: Cynthia Podren
1950 Addison Street
Berkeley, CA 94704

AFFILIATES: Women Lawyers of Alameda County, Black Women Lawyers Association of Southern California, Women's Section, Contra Costa County Bar, Fresno County Women Lawyers, Inland Counties Women at Law, Kern County Women Lawyers, Long Beach Women Lawyers, Women Lawyers Association of Los Angeles, Marin County Women Lawyers, Monterey County Women Lawyers, Napa County Women Lawyers, Orange County Women Lawyers, Women Lawyers of Placer County, Queen's Bench, Women Lawyers of Sacramento, Lawyers' Club of San Diego, San Fernando Valley Women Lawyers' Association, San Francisco Women Lawyers' Alliance, Women Lawyers of San Joaquin County, Women Lawyers of San Luis Obispo County, San Mateo County Women Lawyers, Santa Clara County Bar Association Committee on Women Lawyers, South Bay Women Lawyers, Tulare County Women Lawyers, Women Lawyers of Ventura County

November 27, 1984

California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303

In re: Tentative recommendation relating to division of employee pension benefit plans, Study No. F-663

Ladies and Gentlemen:

I have had the opportunity to read your proposed legislation on the issue of deferred division of employee pension benefit plans.

While we have no objection to consigning more questions for the court's consideration in the exercise of its discretion, we feel as a practical matter that more may be said for the current policy, or bias as you put it, in existing law for present disposition. Our support is grounded in several policies. By limiting the court's exercise of discretion, the parties may come to settlement more easily. Second, a present disposition serves the policy of a quick resolution of pending litigation, which has a result of not only unburdening the courts but of unburdening the parties.

Our strongest opposition, however, is based on the language in the proposed statute which would give the court discretion to defer payment of a retirement plan until even after the plan is mature and employee could be receiving payments. Any spouse who claims a community share of a pension must run the risk, along with the employee spouse, that the pension will never be placed in pay status. To the extent that the payment of the pension to the non-employee spouse may be deferred beyond the time when the pension is mature, however, the proposed legislation asks the non-employee spouse to run a risk that he or she should not be asked to bear. We believe that the proposed legislation would violate the non-employee spouse's due process rights and would constitute a taking of property without fair compensation.

We note parenthetically that giving the court the authority to require a properly joined plan to make payments directly to the non-employee spouse after the pension is vested and mature may run into preemption problems, considering the scope alloted to the ERISA legislation by the courts.

We appreciate your solicitation of our views on this legislation and again would like to register with you at this time our opposition to the enactment of proposed § 4800.4 of the Civil Code.

Very truly yours,

CYNTHIA PODREN
Vice-Chair, Family Law
Legislation Committee

CP:kc
cc: Theresa Boschert

EXHIBT 8

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WRITER'S DIRECT DIAL NUMBER
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WASHINGTON, D.C.
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WASHINGTON, D.C. 20036
TELEPHONE (202) 887-0300

SAN JOSE
333 WEST SANTA CLARA STREET
SAN JOSE, CALIFORNIA 95113
TELEPHONE (408) 947-4000

November 27, 1984

Comments on Tentative Recommendation Relating to Division of Employee Pension Benefit Plans

Mr. Nathaniel Sterling
Assistant Executive Secretary
California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, California 94306

Dear Mr. Sterling:

In response to the request for comments on the Commission's Tentative Recommendation relating to the division of interest in employee pension benefit plans, we note the following.

The Retirement Equity Act of 1984 (P.L. 98-397) amended the Employee Retirement Income Security Act of 1974 ("ERISA")(29 U.S.C. §1001, et seq.) and the Internal Revenue Code of 1954 (the "Code")(26 U.S.C.) to provide that pension plans, pursuant to a qualified domestic relations order as defined under ERISA and the Code, may pay directly to a nonemployee spouse his or her community property interest in an employee's benefits when the employee first becomes eligible to receive benefits, regardless of whether the employee actually retires at that time (29 U.S.C. §1056(d)(3)(E); 26 U.S.C. §414(p)(4)(A)). In light of this, we propose Civil Code section 4800.4 and its Comment be revised as follows (underlining reflects changes):

"4800.4 (a) Except upon written agreement of the parties, or on oral stipulation of the parties in open court, in a division of the interest of the community in an employee pension benefit plan of a party upon dissolution of marriage or legal separation, the court in its discretion may do any of the following:

(1) Award the interest to one party on such conditions as it deems proper to effect a substantially equal division of the property.

(2) Reserve jurisdiction to divide the interest either when the employee's benefits under the plan are vested and mature or at the time payments or refunds are actually made under the plan.

(3) In the case of a plan that is not governed by the Employee Retirement Income Security Act of 1974 (P.L. 93-406), as amended, order the plan, if it has been joined as a party to the proceeding, to make payments of a party's interest directly to the party when the employee's benefits under the plan are vested and mature, based on the amount that would be payable if the employee actually retired when payment is first made.

(4) In the case of a plan that is governed by the Employee Retirement Income Security Act of 1974 (P.L. 93-406), as amended, order the plan, if it has been joined as a party to the proceeding, to make payments of a party's interest directly to the party at such time, in such manner and in such amounts as may be permissible under the Employee Retirement Income Security Act of 1974 (P.L. 93-406), as amended.

(b) In the exercise of its discretion pursuant to this section, the court shall consider all matters relevant to the time and manner of the division, including but not limited to the following:

(1) The age of the parties.

(2) The degree of control of the parties over the plan.

(3) The nature and extent of other property of the community.

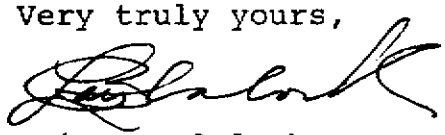
(4) The tax consequences of the division.

Comment. Section 4800.4 makes clear that the court may select either the immediate division or the reservation of jurisdiction approach to division of the parties' community property interest in an employee benefit pension plan, depending on the circumstances of the particular case. This is consistent with existing case law. The court's discretion is subject to an agreement of the parties as to the manner of division.

The authority of the court in Section 4800.4 to order a plan to make payments of a party's interest directly to the party at the time the employee is first eligible to receive benefits overrules In re Marriage to Gillmore 29 Cal.3d 418, 629 P.2d 1, 174 Cal. Rptr. 493 (1981) to the extent that case requires the employee (rather than the plan) to make payment directly to a party of the party's interest prior to retirement of the employee. Once the extent of a party's interest in an employee pension benefit plan governed by the Employee Retirement Income Security Act of 1974 (P.L. 93-406), as amended, has been determined pursuant to existing community property law, if the court in its discretion determines that the party's interest is to be satisfied directly from the plan, then the court is authorized to enter any order that would be a qualified domestic relations order under Section 206(d) of the Employee Retirement Income Security Act of 1974, as amended (29 U.S.C. §1056(d)) and Section 414(p) of the Internal Revenue Code of 1954, as amended, (26 U.S.C. §414(p)).

If you have questions, please feel free to contact me or Mr. Charles A. Storke ([415] 983-1371).

Very truly yours,



Lois L. Blalock

EXHIBIT 9

WESTPHAL, ELLNER, DIFRANZA & PORTMAN
ATTORNEYS AT LAW
1666 THE ALAMEDA
SAN JOSE, CALIFORNIA 95126

BARBARA A. DIFRANZA
KENNETH E. ELLNER
MARK PORTMAN
RONALD E. WESTPHAL

(408) 297-1600

November 29, 1984

California Law Revision Commission
4000 Middlefield Rd., Suite D-2
Palo Alto, CA 94303

Re: Tentative recommendation relating to division of employee pension benefit plans, F-663 dated 9-27-84

Ladies and Gentlemen:

Judge Leonard Edwards was kind enough to forward a copy of the proposed California Civil Code Section 4800.4 for my comments. Judge Edwards knows that I have had a longstanding interest in employee benefits in the context of dissolution of marriage.

I have tried to make my comments in the order of the proposed section:

- - -

4800.4. (a): Suggest you change "open court" to include a reference to a stipulation which might be recorded by a shorthand reporter in a deposition. Also, the word "division" would better be changed to "disposition or adjudication". The word "any" might better read "one or more".

Discussion: Oftentimes a deposition serves at a time when the parties get together for settlement and would be a shame to prevent them from entering into oral stipulations on the record. The correct term for what a court does with a pension plan or other community property is "disposition" -- "division" is one of the alternatives. Finally, the court may pursue one of the alternatives first and then one of the other alternatives later and therefore should be allowed under this statute to choose more than one of these items.

- - -

4800.4. (a) (1): I would suggest adding a sentence as follows: "When the court awards the interest to one party based upon that party's obligation to make payments to the other party, which payments are unsecured by other property, then the court shall provide that the obligee of such payments remains as owner

of such pension until all such payments have been made, this for the purpose of securing such payments."

Discussion: Consider the situation where the largest asset is a pension plan. Because there are no offsetting assets, employee spouse buys nonemployee spouse's interests in the plan via a note payable over several years. Employee spouse then goes bankrupt. His pension plan is exempt but his obligation to his nonemployee spouse is not.

- - -

4800.4. (a) (2): The word "divide" should be "dispose of". The sentence then should be revised as to the last clause after the word "or" . I would suggest changing that last clause to "or at the time payments or refunds could be reasonably requested by the employee and made pursuant to the plan".

In addition, there should be added a sentence such as "In the meantime, the court may make any orders with regard to notification, prohibition of payments and changes in status of beneficiaries, and other matters as may protect and preserve the interest of any of the parties pending complete disposition".

Discussion: I believe the intent here is to protect the employee spouse from the inequities created by the line of cases which provide that the pension must be paid out although the employee continues to work. Most of this problem will be taken care of by the Retirement Equity Act of 1984 which is going to allow an exception to ERISA for payments in this situation even though the employee continues to work. The nonemployee spouse can then roll her interest over to an IRA. It would be a shame to open up a situation whereby a court would, perhaps in haste when other issues were more pressing, loosely order that nonemployee spouse would receive her pension interest when "payments or refunds are actually made pursuant to the plan." Although the court is supposed to consider "the degree of control of the parties over the plan" under (b) (2), the rapidly drafted order may still allow the employee to delay payment in an unreasonable fashion.

The protective orders are necessary in order to preserve the asset pending the payout.

- - -

4800.4. (a) (3): Suggest that after the third reference to party that the words "and his or her successors" be added.

Discussion: More about that below.

- - -

4800.4. (a) (4)[or added to (3)]: Pending payments to be made out of plan, order that the joined plan segregate the nonemployee's interest for accounting and/or management purposes.

Discussion: All letter rulings on the subject have allowed the segregation of the account of the nonemployee in defined contribution type plans. Where the parties know what the wife's interest is in dollars today (the easiest date to calculate it), it would be much better to segregate that amount so that complicated tracing would not have to be done in the future to separate the nonemployee spouse's interest from employee spouse's later contributions and interest. Moreover, to the extent possible, the nonemployee should be allowed to select her own investment alternatives and not continue to be bound by the employee's selection of stocks vs. bonds etc.

4800.4. (b) (4): "Division" should be changed to "disposition".

- - -

4800.4. (b) (5): Would suggest adding "If no benefits are payable to the non-employee's heirs or successors after the nonemployees death compensation to the employee for such loss."

Discussion: If the court wants to give the wife a life interest in her own property, conferring the "remainder" on husband, then the nonemployee should be compensated with other property. [See the discussion of the terminable interest rule on pages 43-44 of the materials from the Santa Clara County Bar Association's deferred compensation seminar, prepared by the undersigned and Donald Parkyn, enclosed.]

- - -

Related legislative reform: I would propose that the court consider awarding to the non-employee spouse not only the right to have her heirs and successors receive her portion of the pension after her death but the right to receive her portion of the pension after the employees death. It is possible that REA has already amended ERISA to allow this for most pensions. [See "Payments in any form" p. 27 of Prentice Hall discussion enclosed.] Moreover, this reform could be easily done with respect to public pensions in this state. Enclosed is "proposed legislation re public pensions; protection of non-employee spouses receipt of pension". This was prepared back in early 1982 for OWL (Older Womens League). The need for such legislation persists to the present day.

- - -

Thank you for your anticipated consideration. Please call upon me if I can be of any further help in this regard.

Sincerely yours,

Barbara A. Di Franza

BARBARA A. DI FRANZA

/BDF

STATE OF CALIFORNIA

PUBLIC EMPLOYEES' RETIREMENT SYSTEM
1416 NINTH STREET, P.O. BOX 1953
SACRAMENTO, CA 95809
Telephone (916) 445-6867

Memorandum 85-15 Study F-633

EXHIBIT 10

November 30, 1984

California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303

Re: Tentative Recommendation Relating to
Division of Employee Pension Benefit Plans

Thank you for permitting us to review your tentative recommendation relating to division of employee pension benefit plans dated September 1984. We are particularly interested in paragraph (3) of your proposed Civil Code section 4800.4.

Many of the problems and risks associated with reserving jurisdiction to divide the community interest in a retirement plan would be solved or would not exist if the employee's account in the plan were divided and actually allocated to the employee and the ex-spouse when the marriage is dissolved. The employee and the ex-spouse will have the dispute settled and their rights determined finally. Each can deal with his or her interest in the plan separate from the other, and separate from the other's interest in the plan. Though some administrative burden may be placed on the plan by completely splitting the employee's interest in the plan, the plan will benefit by not being involved in future disputes when time comes for payment.

We suggest that at dissolution of marriage the plan split the employee's account according to the parties' respective interests as determined by the court or the parties. The ex-spouse could either take a refund of contributions (if it is a contributory plan) or take an allowance when the account is vested and matured (when the employee reaches, or would have reached, minimum retirement age). The life allowance payable to the ex-spouse would be based on the life of the ex-spouse rather than the life of the employee (the calculation would be based on actuarial equivalents).

The plan would treat the employee and the ex-spouse separately. The ex-spouse would be entitled to a refund of contributions or a monthly allowance for his or her life, and would not be dependent upon the employee's actions for timing of receipt or the amount of the benefit. The employee and the employee's survivors and beneficiaries would receive, free of any claim by the ex-spouse, all the benefits he or she is entitled to, based on his or her share of that which accrued during the marriage and all that accrued after the dissolution of marriage.

Some of the problems solved by dividing the rights completely, upon dissolution of marriage, are:

1. Termination of payments to the ex-spouse on the earlier death of the employee;

2. Entitlement to the ex-spouse's share upon the earlier death of the ex-spouse;

3. The ex-spouse being dependent upon the action of the employee to determine when payments begin;

4. The ex-spouse being dependent upon the action of the employee to determine the amount and form of the payment (optional election, refund); and

5. Survivor benefits being subject to community property claims of the ex-spouse.

Division of community property rights in a retirement plan are difficult and complex because of the many, and often alternative, benefits payable upon different fact situations. The Public Employees' Retirement System would like a solution which divides the interest in the plan fairly, and which provides certainty as to payment of benefits. Then the employee and the ex-spouse can plan their lives without further litigation with, or dependence upon, the other.

I and other staff at the Public Employees' Retirement System would be glad to discuss with you and your staff the problems we face dividing community property interests in retirement and death benefits, and suggested solutions.

Sincerely,

ROLAND K. BOWNS
Manager, Legal Office

RKB:cl

cc: Kenneth G. Thomason
Sandra C. Lund
Gerald Ross Adams

EXHIBIT 11

Superior Court of the State of California
COUNTY OF SANTA CLARA
191 NO. FIRST STREET
SAN JOSE, CALIFORNIA 95113
(408) 299-1121

CHAMBERS OF
LEONARD P. EDWARDS
JUDGE

December 4, 1984

Nathanial Sterling, Esq.
California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, California 94303

RE: Tentative Recommendation relating to
Division of Employee Pension Benefit Plan

Dear Mr. Sterling:

I am writing to you concerning your tentative recommendation concerning Division of Employee Pension Benefit Plans. I am a Superior Court Judge in Santa Clara County and over the past three years have been assigned to our Family Court Division.

I applaud your efforts. Attorneys, judges, and litigants need some guidance in this important area. I support 4800.4(a)(3) which would permit the court to order a plan to make direct payments to a party of that party's interest when the plan is vested and mature based on the amount that would be payable if the employee actually retired when payment is first made. Non-employed parties will be greatly aided by this provision.

I suggest some changes be made to give the court broader discretion in the division of these plans. To 4800.4(a)(2) I would add the words "or at any other appropriate time." There may be other times at which future division of pension rights could be divided such as the sale of a major asset. This language would give the court the discretion to designate such an appropriate time.

I suggest adding another factor to those listed in 4800.4(b). "(5) The income of the parties including any child or spousal support either may be receiving or paying." The relationship of support and pension rights is often important to the court when it decides pension division questions.

Finally, I want to note that there are more choices to the court in pension division decisions than the common notions of immediate division and reservation of jurisdication. Immediate division is usually thought of as a lump sum approach. However,

as Mr. Dan Guiterrez has pointed out in his article, "Shattuck: A New Look - A Second Opinion" (enclosed). The immediate division might include period payments even of an unvested and unmature plan. When this legislation is addressed, I hope that the language selected will not exclude this possibility.

Thank you for your consideration of my comments.

Yours very truly,

Leonard P. Edwards

LPE:hmr

Enclosure

EXHIBIT 12

LAW OFFICE OF
McNAMEE, ALLEN & JOHNSON
ATTORNEYS AT LAW
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1625 THE ALAMEDA
SAN JOSE, CALIFORNIA 95126-2224
TELEPHONE (408) 295-1666

December 17, 1984

California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303

Re: Tentative Recommendation relating to
Division of Employee Pension Benefit Plan

To whom it may concern:

I have read your proposed C.C. § 4800.4 and comment. I do not like the Gillmore case to the extent that it allows the non-employee spouse to begin collecting his or her 50% community property share at an early retirement age if the employee spouse does not elect to retire early. I do not particularly oppose the Gillmore thinking as applied to an employee who elects to work beyond normal retirement age. The distinction is that early retirement is contemplated by all to be abnormal or unexpected (ie. that is why they label it "early" retirement) while normal retirement is normal or expected. [In fact, I question whether it might be better to overrule Gillmore/Steinquist altogether so that the non-employee spouse would not share in the employee spouse's pension until the employer spouse actually retires].

Your proposed legislation does not go far enough. It does not totally overrule Gillmore, as suggested in your comment; rather, it gives the court discretion in subsection (2) to reserve jurisdiction until the plan is "vested and mature" (ie. early retirement date whether or not employee spouse is retired) or at the time payments are actually made (ie. overrules Gillmore if elected by Court). I suggest that you eliminate the Court's discretion and require that the pension be vested, matured, and in a pay status, at least when applied to early retirement benefits (ie. prior to normal retirement date).

There is one other related matter that I believe that the proposed legislation should address. If a pension plan is community property, and I agree that it is, then that the non-employee spouse's ownership interest should not be divested by

his or her death prior to the employee spouse's death. It seems to me that the non-employee spouse's interest should pass to his his or her heirs by descent or inheritance and they should be able to continue to receive the non-employee spouse's interest until the employee spouse's later death. This would overrule Waite v. Waite (1972) 6 Cal 3d 461, 99 Cal Rptr 325.

Thank you for your anticipated consideration.

Very truly yours,

Robert M Allen

Robert M. Allen

RMA:bec

EXHIBIT 13
December 26, 1984

Hon. Newton Russell
California State Senator
401 North Brand Boulevard
Glendale, CA 91203

Dear Senator Russell:

Enclosed you will find tentative recommendations by the California Law Revision Committee relating to division of employee pension benefit plans. I, and others in my situation, as I will describe below, strongly urge your full support of these recommendations. On page 4 of the attachment, you will find reference to the Gillmore Case which set the stage for requiring employee spouses such as myself to personally pay retirement benefits to an ex-nonemployee spouse upon demand when that retirement is vested and matured.

In this case, although I am eligible to retire, I do not plan to do so for seven years, during which time my retirement will increase to the point where retirement becomes a financial reality. In the interim, I am required to pay with personal funds retirement payments to my exspouse. Properly and morally, these retirement payments should be paid by the retirement system in accordance with my exspouse's community interests in the fund. The practical result of the Gillmore Case with the present "protected" position of the retirement system under current law literally results in a blackmail situation requiring that I make personal payments to satisfy her retirement interests or take an early retirement myself at considerable loss of final retirement income.

We have, in the present law and in the Gillmore Case, a very inequitable, unfair, and immoral basis for distribution of retirement funds. Your support and influence are required to rectify the problem. You can expect opposition, of course, from the Los Angeles County retirement system (and others) since it has already indicated its intent to oppose this law revision; however, I hope you do appreciate the fact that its opposition is one predicated on grounds that force me personally and others in my circumstance to subsidize the retirement system's obligations.

Sincerely,

Don F. Keene
7314 Verdugo Crestline Drive
Tujunga, CA 91042

DFK:cas

Enc.

cc: Hon. Marian La Follette
California State Assemblywoman

Mr. Nathanial Sterling
Assistant Executive Secretary
California Law Revision Commission

633
#F-~~663~~

9/27/84

STATE OF CALIFORNIA

C A L I F O R N I A L A W

R E V I S I O N C O M M I S S I O N

TENTATIVE RECOMMENDATION

relating to

DIVISION OF EMPLOYEE PENSION BENEFIT PLANS

September 1984

Important Note: This tentative recommendation is being distributed so that interested persons will be advised of the Commission's tentative conclusions and can make their views known to the Commission. Any comments sent to the Commission will be considered when the Commission determines what recommendation, if any, it will make to the California Legislature. It is just as important to advise the Commission that you approve the tentative recommendation as it is to advise the Commission that you object to the tentative recommendation or that you believe that it needs to be revised. COMMENTS ON THIS TENTATIVE RECOMMENDATION SHOULD BE SENT TO THE COMMISSION NOT LATER THAN NOVEMBER 30, 1984.

The Commission often substantially revises tentative recommendations as a result of the comments it receives. Hence, this tentative recommendation is not necessarily the recommendation the Commission will submit to the Legislature.

CALIFORNIA LAW REVISION COMMISSION
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303

#F-663 9/27/84

TENTATIVE RECOMMENDATION

relating to

DIVISION OF EMPLOYEE PENSION BENEFIT PLANS

Under existing law there are two basic approaches to division of a community property interest in the pension plan of an employee at dissolution of marriage: the present disposition approach and the reservation of jurisdiction approach.[1] In the present disposition approach, a current valuation is made of the retirement benefits of the parties; these benefits are awarded to the employee spouse covered by the benefits, and the nonemployee spouse is awarded other community property assets of equivalent value. In the reservation of jurisdiction approach, the court reserves jurisdiction over the parties and pension plan until retirement, at which time the parties or the court decide how the retirement benefits are to be divided.

These two methods of handling retirement assets are recongized in the case law and have been given judicial approval.[2] A trial court has broad discretion to select either method. In Phillipson v. Board of Administration,[3] the present disposition was declared the preferred method, but later cases such as Marriage of Skaden[4] appear to negate any preference. As a result, some judges prefer the present disposition system while others prefer reservation of jurisdiction. Some practitioners believe that present disposition still appears to be favored by existing law.[5]

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1. See Hardie & Sutcliffe, Reserving Jurisdiction: A Potential Trap, California Lawyer 33 (July/August 1982).

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

3. 3 Cal.3d 32, 89 Cal. Rptr. 61 (1970).

4. 19 Cal.3d 679, 139 Cal. Rptr. 566 (1977).

5. See letter to California Law Revision Commission from Family Law Section, State Bar of California, dated February 22, 1984 (copy on file in Commission office).

Neither of these approaches to division of pensions is free of practical or theoretical problems.[6] The approach that may be preferable under the circumstances of one case may not be preferable under the circumstances of another. Factors such as the age of the parties and time until retirement, whether there are other substantial amounts of community property that may offset the value of the pension plan, and the tax consequences of the different dispositions may dictate the appropriate manner of division in each case.

To the extent there is a bias in existing law for present disposition, the bias should be negated. The court should be free to exercise its discretion to select the manner of disposition most suited for the particular case.

Where the court reserves jurisdiction to divide the pension, existing law requires division at the time the pension is vested and matured, even if the plan is not yet in pay status.[7] In many cases this requirement will defeat the purposes of reservation of jurisdiction---to impose an equal sharing of risks on the employee and nonemployee spouses and to simplify the calculation of the community's interest in the pension plan. Where the court reserves jurisdiction, the court should have discretion as to the timing of the division, including the discretion to defer division until the plan is actually in pay status, so that it can devise the most appropriate resolution of each case.

In addition, the court should have authority to require a properly joined plan to make payments directly to the nonemployee spouse after the pension is vested and mature, based on the amount that would be payable if the employee spouse had actually retired at that time. This will enable the nonemployee spouse to exercise full control of his or her interest without impairing the income or otherwise affecting the rights of the employee spouse.

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6. See Sterling, Division of Pensions: Reserved Jurisdiction Approach Preferred, 11 Community Property Journal 17 (1984).

7. In re Marriage of Gillmore, 29 Cal.3d 418, 629 P.2d 1, 174 Cal. Rptr. 493 (1981).

The Commission's recommendations would be effectuated by enactment of the following measure:

An act to add Section 4800.4 to the Civil Code, relating to marital property.

The people of the State of California do enact as follows:

406/200

Civil Code § 4800.4 (added). Division of employee pension benefit plan

SECTION 1. Section 4800.4 is added to the Civil Code, to read:

4800.4. (a) Except upon written agreement of the parties, or on oral stiputation of the parties in open court, in a division of the interest of the community in an employee pension benefit plan of a party upon dissolution of marriage or legal separation, the court in its discretion may do any of the following:

(1) Award the interest to one party on such conditions as it deems proper to effect a substantially equal division of the property.

(2) Reserve jurisdiction to divide the interest either when the plan is vested and mature or at the time payments or refunds are actually made pursuant to the plan.

(3) Order a plan that has been joined as a party to the proceeding to make payments of a party's interest directly to the party when the plan is vested and mature, based on the amount that would be payable if the employee actually retired when payment is first made.

(b) In the exercise of its discretion pursuant to this section the court shall consider all matters relevant to the time and manner of the division, including but not limited to the following:

(1) The age of the parties.

(2) The degree of control of the parties over the plan.

(3) The nature and extent of other property of the community.

(4) The tax consequences of the division.

Comment. Section 4800.4 makes clear that the court may select either the immediate division or the reservation of jurisdiction approach to division of an employee benefit pension plan, depending on the circum-

stances of the particular case. This is consistent with existing case law. The court's discretion is subject to an agreement of the parties as to the manner of division.

The authority of the court in Section 4800.4 to order the plan divided when payments are actually made under the plan overrules In re Marriage of Gillmore, 29 Cal.3d 418, 629 P.2d 1, 174 Cal. Rptr. 493 (1981) (interest of community in plan must be divided upon demand of nonemployee spouse when plan is vested and matured, whether or not plan is in pay status). In addition, Section 4800.4 grants the court authority to order payments directly by the plan to the nonemployee spouse, based on the amount that would be payable if the employee spouse retired at that time.

The term "employee pension benefit plan" is defined in Section 4363.3. For provisions on joinder of a plan, see Sections 4363.1 and 4363.2. On enforceability of an order against the plan, see Section 4351.