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PENSIONS AS PROPERTY SUBJECT TO EQUITABLE DIVISION UPON DIVORCE IN OKLAHOMA

I. INTRODUCTION

A major topic of discussion in legal and business circles today¹ is the status, upon divorce, of a pension due a working spouse on retirement—whether such a pension constitutes jointly acquired property subject to equitable division upon divorce. Part of the “new property”² of marriage, the pension is conceivably the most valuable asset of a marriage in today’s “debt-happy society.”³ A majority of the states, by statute, permit their courts to make an equitable division of certain property upon divorce.⁴ While most state courts have not ruled directly on the question, several have held that “benefits payable from a retirement plan, at least to the extent that they are vested at the time of the divorce, are property subject to division by a divorce court.”⁵ The trend toward considering a pension as part of the marital estate is seen most clearly in the community property states.⁶ California, in 1976, overruled thirty-five years of precedent⁷ when its supreme court declared that pension rights, to the extent that they are derived from employment during marriage, comprise a community asset subject to division upon divorce.⁸

1. See BUSINESS WEEK, November 7, 1977, at 104-08.

2. C. FOOTE, R. LEVY, & F. SANDER, CASES AND MATERIALS ON FAMILY LAW 816 (2d ed. 1976) [hereinafter cited as FOOTE].

3. BUSINESS WEEK, November 7, 1977, at 104. E.g., *In re Marriage of Brown*, 15 Cal. 3d 838, 848, 544 P.2d 561, 566, 126 Cal. Rptr. 633, 638 (1976) in which the court stated, “As the date of vesting and retirement approaches, the value of the pension right grows until it often represents the most important asset of the marital community.”

4. FOOTE, *supra* note 2, at 815.

5. Dickinson, *The Divorce Situation: Role of Retirement Plans*, 10 REAL PROP., PROB. & TR. J. 644 (1975). E.g., *In re Marriage of Pope*, 544 P.2d 639 (Colo. Ct. App. 1975).

6. Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas and Washington. Basically, in these states each party to the marriage has a legal claim to half of all property acquired during marriage. See FOOTE, *supra* note 2, at 749-62. See also notes 39-45 *infra* and accompanying text.

7. Overruled was *French v. French*, 17 Cal. 2d 775, 112 P.2d 235 (1941). The decision in *French* characterized nonvested pension rights not as property but as a mere expectancy and thus not a community asset.

8. *In re Marriage of Brown*, 15 Cal. 3d 838, 544 P.2d 561, 126 Cal. Rptr. 633 (1976). Subsequent to *French v. French*, 17 Cal. 2d 775, 112 P.2d 235 (1941) and prior to *Brown*, the court had

The concern of this comment is the status of the working spouse's pension upon divorce in Oklahoma. The statutory authorization for property division upon divorce will be summarized, along with the judicial construction of the statutes.⁹ There will be a brief comparison of the community property, common law property, and Oklahoma property systems to determine if the differences among them merit distinction in the treatment of pensions upon divorce.¹⁰ More importantly, the Oklahoma Supreme Court has addressed the issue, and the discussion of those cases will form one of the major areas of concentration.¹¹ This comment will then examine cases from other jurisdictions to see how those courts have handled the problem.¹² The conclusion will present the arguments for and against treating the pension due the working spouse as jointly acquired property subject to an equitable division upon divorce in Oklahoma.¹³ It should be noted that much of the discussion will be couched in terms of the wife as the nonworking spouse and the husband as the recipient of the pension plan. This is the configuration of the parties with which the courts have most frequently been presented. The principles discussed are, of course, applicable whichever roles the spouses assume.

II. STATUTORY AUTHORIZATION AND CONSTRUCTION

Title 12, sections 1275 and 1278 of the Oklahoma Statutes¹⁴ authorize the trial court to restore to each party, upon divorce, the property individually owned prior to marriage and to confirm in each party the property he or she acquired after marriage in his or her own right. It is from such separate property that alimony, if any, will be paid. Under these statutes property acquired by the parties jointly during marriage is subject to a just, fair, and reasonable division between them.¹⁵ Such jointly acquired property is divided no matter which party holds the title, and the court is instructed to have due regard to

held that a vested pension was community property. Thus, in *Smith v. Lewis*, 13 Cal. 3d 349, 530 P.2d 589, 118 Cal. Rptr. 621 (1975), the court ruled that an attorney could be sued for malpractice because he did not assert in a divorce action his client's community interest in the vested retirement benefits due her husband.

9. See notes 14-38 *infra* and accompanying text.

10. See notes 39-76 *infra* and accompanying text.

11. See notes 77-103 *infra* and accompanying text.

12. See notes 104-131 *infra* and accompanying text.

13. See notes 132-141 *infra* and accompanying text.

14. OKLA. STAT. tit. 12, § 1275 (1971) and OKLA. STAT. tit. 12, § 1278 (Supp. 1978). Note that section 1275 allows the court to make this equitable division of jointly acquired property even when the court refuses to grant the parties a divorce.

15. OKLA. STAT. tit. 12, § 1278 (Supp. 1978).

the time and manner of acquisition of the property in making the division.¹⁶ Property jointly acquired has been defined as property "accumulated by the joint industry of the husband and wife during the marriage."¹⁷ It includes the enhanced value of separate property brought to the marriage if such enhancement is the result of "joint efforts, skill or funds of both working together"¹⁸ as well as property obtained by combining separately acquired funds.¹⁹ The term has been construed to refer to "all property accumulated during marriage except property acquired by one spouse as a gift or inheritance."²⁰

In defining jointly acquired property, the Oklahoma Supreme Court has not had the opportunity to discuss the level of interest which rises to the status of "property" and thus comes under the statutory mandate.²¹ Property subject to division is typically the residence of the parties, furniture, automobiles, savings and bank accounts, life insurance policies, and stocks and bonds.²² Included without discussion in this inventory have been the proceeds from an insurance claim for fire losses to a family business²³ and a severed mineral interest in a tract of land.²⁴ The court has, also without discussion, excluded from the in-

16. "[T]he particular proviso respecting division of jointly acquired property when granting divorce is not permissive, but defines a mandatory duty placed upon the trial court." *Collins v. Oklahoma Tax Comm.*, 446 P.2d 290, 295 (Okla. 1968). See generally Comment, *Domestic Relations: Relevant Factors in the Division of Jointly Acquired Property*, 23 OKLA. L. REV. 288 (1970).

17. *Tobin v. Tobin*, 89 Okla. 12, 213 P. 884 (1923). It is property acquired during married life "as the result of industry, economy and business ability . . ." *Collins v. Oklahoma Tax Comm.*, 446 P.2d 290, 295 (Okla. 1968).

18. *Collins v. Oklahoma Tax Comm.*, 446 P.2d 290, 295 (Okla. 1968).

19. *Johnston v. Johnston*, 440 P.2d 694, 697 (Okla. 1968).

20. *Symposium on the Law of Domestic Relations in Oklahoma—Alimony and the Division of Jointly Acquired Property*, 14 OKLA. L. REV. 422, 427 (1961). See also *Heirs of Payne v. Seay*, 478 P.2d 889 (Okla. 1970) in which the court said, "Separate property is defined . . . as that acquired [after marriage] by gift, devise or descent, or by exchange of the spouse's individual property." *Id.* at 896.

21. See *In re Marriage of Ellis*, 538 P.2d 1347 (Colo. App. 1975) for an opinion which refused to recognize that military retired pay is "property" since it "is not a fixed or tangible asset. At no time has it any cash surrender, loan, redemption, or lump sum value. . . . [It] cannot be attached or garnished. . . . The right to the pension . . . cannot be assigned, sold, transferred, conveyed, or pledged." *Id.* at 1349. See also *French v. French*, 17 Cal. 2d 775, 112 P.2d 235 (1941) in which a pension was considered to be a mere expectancy.

22. See *Attleberry v. Attleberry*, 554 P.2d 1370 (Okla. 1976).

23. See *Kiddie v. Kiddie*, 563 P.2d 139 (Okla. 1977).

24. See *Coker v. Coker*, 460 P.2d 424 (Okla. 1969). Whereas several courts which have addressed the issue of whether a pension is jointly acquired property placed emphasis on the status of a pension as a property interest, the Oklahoma Supreme Court's decisions did not consider that point. See notes 77-103 *infra* and accompanying text for a discussion of this point and of other interests which the court has, with discussion, included or excluded from the inventory of jointly acquired property.

ventory of jointly acquired property the value of a growing wheat crop.²⁵

The court has recognized that there may not be "participation . . . in the business world"²⁶ on the part of both parties to the marriage. Thus, the industry required of the nonworking spouse has been defined as "performance of . . . customary duties during coverture"²⁷ and "participation . . . [in] domestic activities."²⁸ If such industry has contributed to the accumulation of property during the marriage, the nonworking spouse is entitled to certain rights in that property.

A spouse's rights in jointly acquired property become important upon divorce.²⁹ At that time the spouse is entitled to a share of such property; the spouse "has a vested interest therein which is not forfeited even though [he or] she may be at fault."³⁰ It is not required by the statutes, which mandate only a fair and just division, that each partner receive an equal share of the jointly acquired property, and, indeed, the court has emphasized this point.³¹ In making the division, the trial court will look to the facts and circumstances of each case. The court will consider the parties' respective conduct and efforts which contributed to the acquisition of the property, without regard for the needs of the parties or their personal conduct except as such conduct relates to the creation of the estate.³²

25. See *Maxfield v. Maxfield*, 258 P.2d 915 (Okla. 1953).

26. *Durfee v. Durfee*, 465 P.2d 161 (Okla. 1970): "[A] wife's entitlement to such a division [of jointly acquired property] does not necessarily derive from any participation by her in the business world, as distinguished from domestic activities." *Id.* at 165.

27. *Catron v. First Nat'l Bank & Tr. Co.*, 434 P.2d 263 (Okla. 1967): "[T]he performance of a wife's customary duties during coverture is sufficient to entitle her to the benefits provided by [Okla. Stat. tit. 12, § 1278]." *Id.* at 276.

28. *Durfee v. Durfee*, 465 P.2d 161, 165 (Okla. 1970).

29. See note 58 *infra* and accompanying text for a discussion of the contingent nature of a spouse's rights in jointly acquired property in Oklahoma. See also *Jones v. Farris*, 180 Okla. 341, 69 P.2d 344 (1937).

30. *Collins v. Oklahoma Tax Comm.*, 446 P.2d 290, 295 (Okla. 1968).

31. "[T]he 'equitable division' referred to in 12 O.S. 1961, § 1275 [*sic*], does not necessarily mean an 'equal division.'" *Durfee v. Durfee*, 465 P.2d at 165. *E.g.*, *Tobin v. Tobin*, 89 Okla. 12, 213 P. 884 (1923): "There may be circumstances surrounding the accumulation of the property under which, when the unfortunate hour of the divorce is reached, it would be grossly inequitable to divide the property equally between the parties. For this reason, the language of the statute uses the words 'fair and equitable division.'" *Id.* at 17, 213 P. at 889.

32. *Hill v. Hill*, 197 Okla. 697, 699, 174 P.2d 232, 234 (1946). See also *Greer v. Greer*, 194 Okla. 181, 183, 148 P.2d 156, 158 (1944). In *Dresser v. Dresser*, 164 Okla. 94, 22 P.2d 1012 (1933) a divorce was granted to the wife due to the husband's fault. The court, in its syllabus, pointed out several relevant considerations in making a property division: whose efforts principally resulted in the accumulation of the jointly acquired property; duration of married life; whether the marriage was one of convenience or one of love and affection; whether the wife was somewhat at fault and provoked ill treatment; the respective financial worth of the parties; and their respective conduct as to frugality or wastefulness during the married life.

It is necessary to distinguish this division of jointly acquired property from an award of alimony. While a property division is mandated by the statute,³³ the granting of alimony is discretionary.³⁴ "[I]n divorce proceedings, alimony and division of property jointly acquired are separate and distinct questions, and are governed by separate and distinct statutory provisions."³⁵ Confusion sometimes arises due to the fact that the statutes allow division of jointly acquired property either "in kind" or by an award of the entire property to one spouse who then pays the other spouse a "sum as may be just and proper to effect a fair and just division thereof."³⁶ The trial courts have added to this confusion by language such as "judgment for alimony 'as property division and in settlement of all her property right. . . .'"³⁷ Since the Oklahoma Supreme Court has held that the pension being paid to a retired spouse may be considered only as earnings in determining alimony for support,³⁸ it is important to remember the distinction between alimony and a division of jointly acquired property.

33. *Collins v. Oklahoma Tax Comm.*, 446 P.2d 290 (Okla. 1968).

34. See OKLA. STAT. tit. 12, § 1275 (1971) and OKLA. STAT. tit. 12, § 1278 (Supp. 1978). See also *Reed v. Reed*, 456 P.2d 529 (Okla. 1969).

35. *Kunc v. Kunc*, 86 Okla. 297, 299, 97 P.2d 771, 774 (1940). See notes 77-83 *infra* and accompanying text. The distinction is also important for purposes of title 12, section 1289 of the Oklahoma Statutes which allows termination of alimony payments upon the death of the recipient but provides that payments arising from a division of jointly acquired property are irrevocable and shall continue until completed. OKLA. STAT. tit. 12, § 1289 (Supp. 1978). The U.S. Internal Revenue Service also treats the two payments differently. See I.R.C. §§62(13), 71(d), 215.

36. The sum paid to the other spouse has been misconstrued as alimony. See *Bowring v. Bowring*, 196 Okla. 520, 166 P.2d 415 (1946).

37. *Colvert v. Colvert*, 568 P.2d 623, 625 (Okla. 1977). In this case the wife received a divorce because of the fault of her husband, a soon-to-be graduated medical student. She was awarded "an alimony judgment, as property division, of \$35,000, payable in monthly installments." 568 P.2d at 624. The husband appealed since the value of their jointly acquired property did not remotely approach that amount. He claimed his wife had been given a property interest in his soon-to-be received medical degree. The court denied that this was the case and said that the trial judge had considered the husband's future earning capacity in setting the amount of the judgment. Since the Oklahoma Supreme Court has said that the only relevant consideration in making a division of jointly acquired property is the conduct and efforts of the parties which contributed toward the accumulation of that property, see text accompanying note 32 *supra*, its upholding of the trial court's award in this case is strange. It may be explained by looking to the language of OKLA. STAT. tit. 12, § 1289 (Supp. 1978) and by pointing out that an award to the wife of alimony, while discretionary, is paid out of the husband's separate property. A court can consider the future earnings of the husband in setting an alimony award, see *Whayman v. Whayman*, 207 Okla. 371, 249 P.2d 1004 (1952), and, by authority of title 12, section 1289, can earmark the award as being for support or for property division, as it wishes. Apparently the trial court looked to the future earnings of the husband, as evidenced by his medical degree, and considered them the husband's separate property. Out of this the wife was awarded alimony which was designated as a property settlement. It is no wonder the husband was confused. This consideration of the husband's future earnings plays a role in the court's analysis of the status of a pension on divorce. See notes 77-103 *infra* and accompanying text.

38. *Baker v. Baker*, 546 P.2d 1325 (Okla. 1976). See notes 77-83 *infra* and accompanying text.

III. COMPARISON OF THE COMMUNITY PROPERTY, COMMON LAW PROPERTY, AND OKLAHOMA PROPERTY SYSTEMS

A. *The Community Property System*

The community property system originated in Europe and was brought to America by the Spanish colonists. This system has long recognized "that both men and women share equally in the labor and struggles of daily life. Accordingly, it was thought appropriate that men and women should also share equally in the fruits of their common efforts, and a notion of community of goods between husband and wife developed."³⁹

The first step in discussing the community property concept is to identify community property, as distinguished from separate property. It is only community property in which each spouse has half ownership. "Property acquired by the earnings of either husband or wife during marriage, income from community property, and property acquired by the sale of community property"⁴⁰ is community property. The only requirement for sharing in this community property is that there be a marriage.⁴¹ It is then presumed that the husband and wife have worked side by side in acquiring property during the marriage.⁴²

39. FOOTE, *supra* note 2, at 755. The community property system, a creature of statute, varies widely in America from state to state. For a brief treatment of community property concepts, see J. CRIBBET, *PRINCIPLES OF THE LAW OF PROPERTY* 91-93 (2d ed. 1975) [hereinafter cited as CRIBBET]. For a complete treatment, see W. DE FUNIAK & M. VAUGHN, *PRINCIPLES OF COMMUNITY PROPERTY* (2d ed. 1971) [hereinafter cited as DE FUNIAK].

40. CRIBBET, *supra* note 39, at 92. "On the other hand, property owned by either spouse before marriage, acquired by gift, inheritance, or devise after marriage, and income from such property is considered to be separate and subject to control by the spouse concerned." *Id.* DE FUNIAK, *supra* note 39, at 126-29, points out that courts tend, without adequate analysis, to hold that any property acquired during marriage is community property, as long as it was not acquired by gift, bequest, devise or inheritance. This overlooks the distinction, always present in community property law, between property acquired by onerous title and property acquired by lucrative title. Property acquired by onerous title is that "property acquired by husband and wife during the marriage through their labor or industry or other valuable consideration out of community property (i.e. payment of money, rendition of services, or payment of charges). Property acquired by onerous title is always community property. Property acquired by lucrative title is exemplified by a gift, an inheritance and a devise and has its basis in pure donation (versus remuneration) on the part of the donor. Whether it is community property depends on whether the donor intends the property to be for the benefit of both spouses. It was because of this distinction that some early cases held that the military retirement pension was not community property as it was purely a gift to the soldier from the federal government and thus acquired by lucrative title. See *Johnson v. Johnson*, 23 S.W. 1022 (Tex. Ct. App. 1893).

41. DE FUNIAK, *supra* note 39, at 93. See *id.*, at 276-83, for a discussion of the management of community property.

42. This presumption that property possessed or acquired during the marriage or in possession of the spouses at the time of the dissolution of the marriage is community property is, of course, rebuttable. DE FUNIAK, *supra* note 39, at 117-18. The presumption is also the starting point for an analysis of the status of income derived during the marriage from separate property

At the moment of acquisition, each spouse has ownership rights in half of the property.⁴³

Just as marriage creates community property, dissolution of the marriage destroys it. This dissolution may result from death or divorce, and upon such dissolution each spouse is theoretically, and, indeed in several states, is absolutely entitled to his or her separate estate plus half of the community property.⁴⁴ This is not true, however, under the statutes of several community property states. These states allow their courts "to take into consideration the respective situations of the spouses, as well as the situation of the children, and also [allow] the courts to consider the respective innocence and guilt of the spouses in deciding how to divide the community property."⁴⁵

The community property system has wrestled with the problem of the type of interest which rises to the level of "property." Indeed, the characterization by the California Supreme Court of the right to retirement pay in the future as a "mere expectancy" has only recently been abandoned in favor of calling such right a "contingent interest in property."⁴⁶ The importance of this distinction is that the former is not a community asset subject to division upon dissolution of marriage, while the latter is. The court's analysis in *In re Marriage of Brown*⁴⁷ is instructive, not only on the general problem of what interests constitute "property," but also on the status of pensions upon divorce under community property law.

Brown involved a pension plan contributed to only by the employer under which the husband-employee, were he to be prematurely discharged, would forfeit all rights in the fund.⁴⁸ Thus his rights had

and of assets purchased during the marriage in part with separate property and in part with community property. See FOOTE, *supra* note 2, at 759.

43. "In simpler words, the rights of each spouse in the community property are vested." Lilly, *Oklahoma's Troublesome Coverture Property Concept*, 11 TULSA L.J. 1, 3 (1975) [hereinafter cited as Lilly]. See also DE FUNIAK, *supra* note 39, at 142:

It is important to notice that the wife's ownership and possession in half of these earnings and gains [through labor and industry of the spouses] during marriage passed to her automatically *ipso jure* without the necessity of delivery. And her ownership and possession in half of these earnings and gains . . . related, just as the husband's ownership did, to the very inception of the right to such earnings and gains.

44. FOOTE, *supra* note 2, at 759. See also DE FUNIAK, *supra* note 39, at 515.

45. DE FUNIAK, *supra* note 39, at 514.

46. *In re Marriage of Brown*, 15 Cal. 3d 838, 544 P.2d 561, 126 Cal. Rptr. 633 (1976). See also DE FUNIAK, *supra* note 39, at 129-97, for a complete discussion of the status of various interests under community property law.

47. 15 Cal. 3d 838, 544 P.2d 561, 126 Cal. Rptr. 633 (1976).

48. If he accumulated the required points, his rights in the fund would not be forfeited even if he were discharged. 15 Cal. 3d at 843, 544 P.2d at 563, 126 Cal. Rptr. at 635. The details of the pension plans involved (i.e. whether contributed to only by the employee, only by the employer, or

not vested. These rights were comparable to those of a husband in an earlier case of which the court had said: "To the extent that payment is, at the time of the divorce, subject to conditions [i.e. continued employment] which may or may not occur, the pension is an expectancy, not subject to division as community property."⁴⁹ The court in *Brown*, however, relied on prior pension case law to reaffirm that an employee has an enforceable right to a pension from the moment he enters his employment contract, provided that he fulfills the required conditions.⁵⁰ Because a pension is a form of deferred compensation for services rendered, the employee's right to his pension is based on his employment contract. A contract right is not an expectancy but a chose in action, a form of property.⁵¹ The fact that the payment of the pension is contingent upon the employee's fulfilling certain conditions merely makes the pension a contingent future interest, long recognized as property, and thus a community asset.⁵²

B. *The Oklahoma Property System*

Oklahoma is now considered to be a common law property state. However, the state was briefly involved with the community property system⁵³ and today retains the coverture property concept, a feature

by both; whether subject to forfeiture by death or discharge; whether refundable or nonrefundable on voluntary termination of employment) assume great importance in the opinions of most courts. See notes 104-131 *infra* and accompanying text. Confusion can occur because each court has its own definitions of key terms. The California Supreme Court used "expectancy" to describe the interest of a person who merely foresees that he might receive a future beneficence but who has no enforceable right to the beneficence. "Vested" was used to refer to a pension right which survives the discharge or voluntary termination of the employee.

As so defined, a vested pension right must be distinguished from a 'matured' or unconditional right to immediate payment. Depending upon the provisions of the retirement program, an employee's right may vest after a term of service even though it does not mature until he reaches retirement age and elects to retire. Such vested but immature rights are frequently subject to the condition, among others, that the employee survive until retirement.

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

49. 15 Cal. 3d at 845, 544 P.2d at 564, 126 Cal. Rptr. at 636.

50. The conditions are usually length of employment and survival until retirement. If the employer is a public entity, the contract's enforceability is based on the constitutional prohibition against impairment of contracts. A contract can be enforced against a private employer under the traditional contract principles of offer, acceptance and consideration or on the basis of promissory estoppel. 15 Cal. 3d at 847, 544 P.2d at 566, 126 Cal. Rptr. at 638.

51. 15 Cal. 3d at 846, 544 P.2d at 565, 126 Cal. Rptr. at 637.

52. Again reliance was placed on prior case law which had found other contingent future interests, such as an attorney's contingent fee in a case on appeal, to be community assets. 15 Cal. 3d at 848, 544 P.2d at 566, 126 Cal. Rptr. at 638.

53. In 1939 the Oklahoma legislature allowed married couples to elect voluntarily to come under the community property system. In 1945 the system was made mandatory in the state and remained so until repealed in 1949.

born out of that system. Coverture property is that discussed above—jointly acquired property subject to just and reasonable division upon divorce.⁵⁴ The Oklahoma Supreme Court has declared that property acquired during coverture is “an estate in the manner of community property.”⁵⁵

The Oklahoma property system recognizes, by its coverture property concept, that joint industry goes into the acquisition of property during marriage. The Oklahoma Supreme Court defined the wife's interest in this coverture property when it said: “The nature of the wife's interest is similar in conception to community property of community property states, and is regarded as held by a species of common ownership.”⁵⁶ This court also set out the distinction between Oklahoma and the community property states that the wife, during the marriage, lacks “actual investiture of title, a right to make present disposition of property, [and] a descendible interest.”⁵⁷ In Oklahoma, the right to assert an interest in jointly acquired property is available to the wife only on specific occasions. It is said that her rights are contingent; they do not vest until divorce, separation, inability to support, or death occur.⁵⁸ Thus the same court which could say that a “wife has a vested interest in jointly acquired property of the marital community”⁵⁹ also had to acknowledge that the wife had no right to a division of jointly acquired property prior to divorce. Until then, her interest in the property is merely contingent.⁶⁰

C. *The Common Law Property System*

In contrast to the community property approach of half to the husband and half to the wife is the common law property concept. The common law property system developed in England and was brought to America by the English colonists. This system was based on the idea that “the husband and wife [were] one and the husband [was] the one.”⁶¹ Although it has no modern significance, the estate *jure uxoris* was the embodiment of the concept of the unity of husband and wife.

54. See notes 15-20 *supra* and accompanying text. Coverture property is also subject to division upon separation or death. See *Sanditen v. Sanditen*, 496 P.2d 365, 367 (Okla. 1972).

55. *Black v. Haynes*, 45 Okla. 363, 145 P. 362 (1914).

56. *Collins v. Oklahoma Tax Comm.*, 446 P.2d 290, 295 (Okla. 1968).

57. *Id.* at 297.

58. *Lilly*, *supra* note 43, at 5. See also *Collins v. Oklahoma Tax Comm.*, 446 P.2d 290, 296 (Okla. 1968).

59. *Collins v. Oklahoma Tax Comm.*, 446 P.2d 290, 297 (Okla. 1968).

60. *Id.* at 296.

61. CRIBBET, *supra* note 39, at 86.

This estate gave the husband the right, for the duration of the marriage, to any real property owned by the wife.⁶² The husband's rights in his wife's real property included power to manage it, to sell or to mortgage his interest in it, and to make it liable for his debts.⁶³ The wife could not alienate the property without her husband's permission.⁶⁴ The husband was also entitled to "[w]hatever movables the wife [had] at the date of the marriage . . . and he [was] entitled to take possession and make his own any movables to which [the wife became] entitled during the marriage."⁶⁵

The right to dower was the wife's protection of her interest in her husband's property. Upon the death of the husband or upon divorce for any reason except the fault of the wife, dower gave the wife a life estate in one-third of the real property owned by the husband at any time during the marriage. This interest attached immediately upon acquisition of the property. Even if subsequently conveyed to a third person, the dower interest was unaffected unless the wife either joined in the conveyance or the parties were divorced due to the fault of the wife.⁶⁶ Thus at common law the wife was entitled, upon divorce, to the restoration of her separate property and, unless divorced through her own fault, to a life estate in one-third of her husband's real property.

With the passage of the Married Woman's Property Acts,⁶⁷ the legal unity of husband and wife was severed. Today, however, the common law jurisdictions for the most part still do not recognize the "defacto community of property which prevails in most marriages."⁶⁸ During the marriage each spouse has a legal claim only to that property he or she separately owns, except for assets held in some form of joint ownership. In most states, upon divorce, there is no attempt to divide rationally the jointly acquired property.⁶⁹ In some states neither the statutes nor the courts differentiate clearly between property divisions

62. *Id.* at 86. Note that if "issue were born of the marriage, the estate *jure uxoris* merged into [the husband's] estate by curtesy." *Id.* This gave the husband a life estate in all real property owned by his wife.

63. *Id.*

64. DE FUNIAK, *supra* note 39, at 5.

65. *Id.* at 4.

66. CRIBBET, *supra* note 39, at 87-88.

67. These acts typically provided that property brought into the marriage by the wife as well as property acquired by the wife during the marriage was to be regarded as the wife's separate estate, subject to her control and power of disposition. FOOTE, *supra* note 2, at 756. *E.g.*, CONN. GEN. STAT. ANN. § 46-9 (West 1978).

68. FOOTE, *supra* note 2, at 756.

69. *Id.*

and alimony for support.⁷⁰

At common law a wife's dower interest attached only to "lands and tenements whereof [her husband] was seised at any time during the coverture."⁷¹ Obviously, such an inheritable interest in real property is of sufficient status to be termed "property" and to be subject to division upon divorce. Examples of the analysis modern courts in common law jurisdictions use to decide whether a certain interest rises to the status of "property" will be discussed later.⁷²

As has been noted, there are distinctions among the property systems in the community property states, in the common law property states, and in Oklahoma. These distinctions, though major in some areas, should not call for differing answers to the question of whether a pension due the working spouse is jointly acquired property. However, because of their recognition of the husband and wife as a community, the community property states are probably more willing to recognize the joint effort attributable to the acquisition of a pension.⁷³ This applies, however, only after their courts have analyzed the right to a pension and found it to be property. Because of a philosophy of the unity of husband and wife, with the husband's being the unit, common law property states were more likely to consider a pension as either the personal property of the spouse who earned it⁷⁴ or as future income in setting the amount of alimony payable to the wife.⁷⁵ However, this situation is changing. Common law property states have been faced increasingly with the issue of pensions as a marital asset.⁷⁶ The resolution often turns on whether the right to a pension is recognized as property.

IV. THE OKLAHOMA SUPREME COURT FACES THE ISSUE

In 1975 in *Baker v. Baker*,⁷⁷ the Oklahoma Supreme Court was

70. *Id.* at 815. The Uniform Marriage and Divorce Act § 307 Alternative A (1973 amendment) is identified by its drafters as a new concept in Anglo-American law. It is based on the principle that "all property of the spouses, however acquired, should be regarded as assets of the married couple, available for distribution among them, upon consideration of . . . various factors enumerated . . ." Alternative B, drafted at the behest of the community property states, retains the distinction between separate and community property and provides for the distribution of only community property.

71. CRIBBET, *supra* note 39, at 87.

72. See notes 104-131 *infra* and accompanying text.

73. *E.g.*, *In re Marriage of Brown*, 15 Cal. 3d 838, 848, 544 P.2d 561, 566, 126 Cal. Rptr. 633, 638 (1976).

74. *E.g.*, *Howard v. Howard*, 196 Neb. 351, 242 N.W.2d 884 (1976).

75. *E.g.*, *In re Marriage of Ellis*, 538 P.2d 1347 (Colo. Ct. App. 1975).

76. *E.g.*, *Hutchins v. Hutchins*, 71 Mich. App. 361, 248 N.W.2d 272 (1976).

77. 546 P.2d 1325 (Okla. 1976).

faced directly with the issue of whether a trial court had erred in treating a military service pension as jointly acquired property subject to division upon divorce. The court reversed the trial court and held that pension benefits could be considered only as earnings in determining the amount of alimony for support, not as marital property subject to division.⁷⁸

Baker involved a pension⁷⁹ which was already being paid to the husband at the rate of \$812.85 per month. Finding this pension to be jointly acquired property, the trial judge awarded the wife the sum of \$24,000, payable in installments, as a division of this property.⁸⁰ The husband contended on appeal that "retirement pay is not property acquired by the parties during coverture."⁸¹

The court agreed, stating that "if the retirement fund is divided at the time of the divorce as jointly acquired property [it] would in effect destroy the husband's future livelihood and means of complying with an alimony or support award."⁸² The court allowed the pension to be considered as earnings out of which alimony for support could be paid.⁸³

In making its decision the court cited an earlier case, *Holeman v. Holeman*.⁸⁴ That case involved a pension plan to which the husband, twenty-nine months away from his retirement date, was still contributing at the time of the divorce. There was no evidence introduced of the husband's rights in the pension plan: whether he would lose all future benefits if he resigned or was dismissed prior to retirement; whether, in such case, he would be reimbursed for either his contributions or for his employer's contributions, if any; and whether he had a right of withdrawal of any of the accumulated funds prior to retirement.⁸⁵ The trial court awarded the wife \$16,000 alimony, payable in

78. *Id.* at 1326.

79. Apparently most of this military pension had been earned during the marriage of the parties. They had been married over seventeen years, and the husband was a second lieutenant at the time of the marriage. He retired prior to the divorce action. *Id.*

80. The trial court also awarded the wife property totaling \$27,625 in value (versus \$6,050 to the husband) and alimony for support of \$18,000. *Id.*

81. *Id.*

82. *Id.*

83. The supreme court, taking the pension into consideration, modified the wife's award for alimony for support from \$18,000 to \$24,000, payments of which would terminate on death or remarriage. *Id.* at 1327.

84. 459 P.2d 611 (Okla. 1969).

85. This is the type of evidence which has been very important to other courts considering the issue. See notes 104-131 *infra* and accompanying text. Evidence was introduced that showed that the value of the retirement fund ten years prior to trial was \$2,375. The trial court did find that the husband would receive \$260 per month upon retirement. The wife's contention that the fund

installments of \$200 per month prior to the husband's retirement and in installments of \$90 per month thereafter.

On appeal the husband contended that the property division which gave the wife their entire 135 acre farm was inequitable. His wife pointed out that the "the decree [gave the husband] his retirement fund, which is also jointly acquired property."⁸⁶ The court noted that the husband had been allowed to keep his retirement fund but reminded the wife that out of it he had to pay \$90 per month alimony. The court said, "It would be unfair to divide the retirement fund and then make a provision for payment of the majority of the alimony award out of his monthly retirement income."⁸⁷

An interesting aspect of this case is that it fails to state that a retirement fund is not jointly acquired property. In fact, the court seems to agree that it is by using such language as "[w]ith the exception of the retirement fund the only asset the parties have acquired . . . is the 135 acre farm."⁸⁸ The approach of both the *Baker* and *Holeman* courts is that it is not fair to divide the retirement fund and then to make the husband pay alimony for support out of his portion. Since alimony for support is discretionary,⁸⁹ it is not clear that the same result would have been reached had there been no award for alimony to the wife.

Prior to *Baker* and *Holeman*, the court, in *Whayman v. Whayman*,⁹⁰ examined an appeal from a judgment in which the husband's retirement fund had played a part. The pension plan involved was one to which the husband had been contributing through payroll deductions for many years. Upon his mandatory retirement in five years, he would have been entitled to payments totalling approximately \$15,000.⁹¹ The trial court awarded the wife alimony of \$10,200, payable at the rate of \$125 per month for five years and \$75 per month thereafter. Obviously the trial judge considered the retirement payments as future income and set the alimony payments to decrease accordingly; the supreme court upheld him. The issue of whether the retirement fund was jointly acquired property was neither raised by the parties nor addressed by the court.

Although not dealing specifically with the pension due the work-

was worth \$37,752 at the time of trial was found to be unsupported by the evidence. 459 P.2d at 613.

86. *Id.*

87. *Id.* at 614.

88. *Id.*

89. See OKLA. STAT. tit. 12, § 1278 (Supp. 1978).

90. 207 Okla. 371, 249 P.2d 1004 (1952).

91. 207 Okla. at 372, 249 P.2d at 1006.

ing spouse, *Roberts v. Roberts*⁹² concerns an analogous situation. In that case, the husband had been contributing ten percent of his salary per month, an amount matched by his employer, to "the Provident Fund. . . . He may not withdraw this unless he leaves his present employer or retires."⁹³ The trial judge had awarded this fund, in all important respects identical to a pension fund, wholly to the husband.⁹⁴ There was no award of alimony to the wife. In listing the assets acquired by the spouses during their marriage, the supreme court included the \$30,000 value of the Provident Fund and found that the wife had been awarded only "ten to twenty percent of an accumulation of property of some \$45,000 to \$50,000 in value."⁹⁵ Finding this to be contrary to section 1278,⁹⁶ which requires a just and reasonable division of jointly acquired property, the court set the property division aside.⁹⁷

The court was then faced with the problem of dividing the Provident Fund, the money in which could not be withdrawn unless the husband left his present employment or retired.⁹⁸ Recognizing that the husband could not be required to do this, the court instead awarded the wife "an allowance [of \$12,100] payable monthly as alimony in lieu of a division of this fund."⁹⁹

To summarize, the Oklahoma Supreme Court has ruled that a pension presently being paid to a husband is not jointly acquired property subject to division upon divorce.¹⁰⁰ It has ruled that a pension plan could be considered in determining alimony, either as present earnings¹⁰¹ or as future income.¹⁰² However, in a closely analogous

92. 357 P.2d 980 (Okla. 1960).

93. *Id.* at 981. "In addition, his employer maintains a separate retirement program for all employees, including [Mr. Roberts]." *Id.* This separate retirement program apparently played no part in either the decision of the trial court or of the supreme court.

94. It is difficult to tell from the reported decision whether the trial court awarded the fund to the husband as a part of his portion of the jointly acquired property or whether the judge considered it the husband's separate property and restored it to him. If it was considered jointly acquired property, the wife received as her share of property \$5,033 to \$9,833 out of a total of \$46,000 to \$52,000. If it was considered separate property, the wife received \$5,033 to \$9,833 out of a total of \$16,030 to \$22,000. 357 P.2d at 982. Even though either award is arguably inequitable in a divorce granted to both parties, the former award is even more so and leads to the conclusion that the trial judge considered the Provident Fund to be the husband's separate property.

95. *Id.* at 982-83.

96. OKLA. STAT. tit. 12, § 1278 (Supp. 1978).

97. 357 P.2d at 982-83.

98. One of the major problems in considering a pension as jointly acquired property is how to make a division of it upon divorce. See note 141 *infra* and accompanying text.

99. 357 P.2d at 983.

100. *Baker v. Baker*, 546 P.2d 1325 (Okla. 1976).

101. *Id.*

situation, the court found a nonpension fund to which both the husband and his employer contributed and to which the husband would be entitled upon leaving employment or retiring, to be jointly acquired property. Unable to make division in kind, the court, looking to the instructions of section 1278, gave the fund to the husband and required him to pay to his wife "such sum as may be just and proper to effect a fair and just division thereof."¹⁰³ The supreme court has not, like the California Supreme Court in *Brown*, discussed the level of interest a working spouse has in the pension due him—whether it is merely an expectancy or whether it rises to a contingent future interest. The court's decisions seem to turn entirely on what it identifies as the equities involved. If there is an alimony award to the wife, the pension paid to or due the husband has not been considered as jointly acquired property because the husband must have it to meet his alimony obligations. In *Roberts*, there was no alimony award to the wife, and the Provident Fund was considered jointly acquired property. Note that the court has yet to face directly the issue of whether, in the absence of an alimony award, a pension not being paid but due to the working spouse is jointly acquired property subject to division upon divorce.

V. COURTS OF OTHER JURISDICTIONS FACE THE ISSUE

In contrast to the Oklahoma courts, the courts of other common law jurisdictions, in considering pension plans as a marital asset, use an analysis much like that of the California Supreme Court in *Brown*. The courts look at the features of the pension plan and decide whether such features tend to make the working spouse's interest in the plan property.¹⁰⁴

In 1976, the Colorado Supreme Court held that the military retirement pay being received by the husband was not property under the applicable statute. "Our reason is that it does not have any of the following elements: cash surrender value; loan value; redemption value; lump sum value; and value realizable after death."¹⁰⁵ In making this

102. *Holeman v. Holeman*, 459 P.2d 611 (Okla. 1969). See also *Whayman v. Whayman*, 207 Okla. 371, 249 P.2d 1004 (1952).

103. OKLA. STAT. tit. 12, § 1278 (Supp. 1978).

104. The term "vested" plays a large role in the decisions of many of the courts. Each court has its own definition of the term. For the most part, in discussing the cases, the use of the term will be avoided here. The Employee Retirement Income Security Act of 1974 uses the term "vested benefit" to mean that portion of the employee's total benefits (which he will receive upon retirement) which is nonforfeitable except on death. 29 U.S.C. § 1002(25) (1976).

105. *Ellis v. Ellis*, 552 P.2d 506, 507 (Colo. 1976). The court was construing COLO. REV. STAT. § 14-10-113 (Supp.1976) which requires that the court shall divide "the marital property."

decision the court upheld the intermediate appellate court and relied on that court's reasoning.

In that intermediate proceeding,¹⁰⁶ the appellate court considered a divorce where the husband was then drawing his retirement pay from the military. The trial court had allowed this pay to be considered in setting the award of maintenance and support. The wife argued that the retirement pay was marital property, a division of which she was entitled to. On appeal the court noted several aspects of the military pension program: the program was noncontributory on the part of the soldier; his right to the pay was contingent on his living until retirement age; and the amount of retirement pay—wholly within the control of Congress—was subject to change.¹⁰⁷ Looking primarily to the factors on which the supreme court was later to rely,¹⁰⁸ the court found that “the husband’s army retirement pension and the future retired pay to be received thereunder do not constitute ‘property’ and are, therefore, not subject to division as such.”¹⁰⁹

Later in the same year, however, in *In re Marriage of Pope*,¹¹⁰ the Colorado Court of Appeals was faced with the problem of the status, upon divorce, of the contributions of the working spouse on deposit with the Colorado Public Employees Retirement Association.¹¹¹ This pension fund was made up of contributions from state employees. In the event of termination of employment before retirement, the full amount of the employee’s contributions was refunded. If the employee died prior to retirement, the accumulated deductions were paid in a lump sum to his heirs. In contrast to the situation in *Ellis*, there

The statute defines marital property—basically the definition of community property—and provides a presumption that all property acquired subsequent to marriage is marital property.

106. *In re Marriage of Ellis*, 538 P.2d 1347 (Colo. Ct. App. 1975). This decision was cited and relied on by the Arkansas Supreme Court in *Fenney v. Fenney*, 259 Ark. 858, 537 S.W.2d 367 (1976). The applicable statute in Arkansas granted to the wife upon divorce one-third of her husband’s personal property. The court held that the right to receive retirement pay from the armed forces was not “personal property” within the meaning of the statute because such right to payment, not yet due and payable, could not be assigned, sold, transferred, conveyed or pledged. *Id.*

107. 538 P.2d at 1349. The court also pointed out that the retirement pay had no cash surrender value and no loan, redemption, or lump sum value; it could not be attached or garnished; and the right to the pay not yet due and payable could not be assigned, sold, transferred, conveyed or pledged. *Id.*

108. See text accompanying note 105 *supra*.

109. 538 P.2d at 1350. Having no cash surrender value, the pension was treated as property which might later be acquired by the husband. Previous case law had settled that after-acquired property was not subject to a property division. *Id.*

110. *In re Marriage of Pope*, 544 P.2d 639 (Colo. Ct. App. 1975).

111. The husband was appealing the trial court’s decision that such contributions constituted marital property.

was a cash surrender value which the court could consider—the amount of the employee's accumulated contributions.¹¹² All these factors were sufficient to distinguish *Pope* from *Ellis*, and the court held the interest of the husband in the pension due him to be property. Unable to divide the husband's interest in the pension fund in kind, the court considered the amount of the fund in determining the amount of other marital property to be retained by each spouse.¹¹³ The court also adopted one of the principal policy arguments for treating a pension as jointly owned property subject to division upon divorce. "The husband's interest in these funds was created out of deductions from his salary which otherwise would have been available to the parties during their marriage."¹¹⁴

The Missouri Supreme Court has also split on this issue.¹¹⁵ In *Robbins v. Robbins*¹¹⁶ the wife appealed from a ruling that she was not entitled to have the present value of the pension to which her husband would be entitled upon retirement considered in determining her award of alimony. Her contention was that she should receive gross alimony based on the net assets of the parties, and she claimed half of the present value of her husband's future pension benefits. The husband, a policeman, had contributed a portion of his salary to a retirement fund to which the employer also contributed. If the husband resigned prior to retirement, he would receive a refund of only his contributions. No provision was made for his dependents except on his disability or death. "[T]he right to a pension or to a return of contributions [was] not subject to levy, attachment or execution and [was] not assignable."¹¹⁷ Considering all this, the court held that "a valuation of defendant's rights as the present value of his possible future pension benefits would be purely speculative"¹¹⁸ and affirmed the trial court's refusal to consider the interest a present asset of the husband. The

112. 544 P.2d at 640.

113. *Id.* at 641. This is analogous to the direction of the Oklahoma statute which allows marital property to be set aside to one spouse who reimburses the other spouse for his or her interest in the property. OKLA. STAT. tit. 12, § 1278 (Supp. 1978).

114. 544 P.2d at 640.

115. In *Jaeger v. Jaeger*, 547 S.W.2d 207 (Mo. App. 1977), the court remanded a divorce action to give the parties an opportunity to present evidence concerning the nature of the pension plan involved and the husband's rights in it. Such evidence was then to be considered in the light of *In re Marriage of Powers*, 527 S.W.2d 949 (Mo. App. 1975) (husband's interest in pension fund considered to be marital property) and *Robbins v. Robbins*, 463 S.W.2d 876 (Mo. 1971) (husband's interest in pension plan considered too contingent to be considered in making an award of maintenance to the wife).

116. 463 S.W.2d 876 (Mo. 1971).

117. *Id.* at 879.

118. *Id.*

wife argued that because her husband's rights in the pension fund were vested she was entitled to a share upon divorce. The court agreed that the husband had a right to his future benefits which could be taken from him only if he did not comply with the requirements of the plan. But the court held that he had never had any right to the present value of the future pension.¹¹⁹

In *In re Marriage of Powers*¹²⁰ the husband relied on *Robbins* in arguing that his interest in his company's profit sharing plan was improperly included as marital property subject to division upon divorce. He contended that his interest in the plan was not definite enough to be property. The court distinguished *Robbins* by pointing out that Mr. Powers could not use the funds in the account until he terminated his employment or retired; however, he would receive both his contributions and his employer's contributions if he did resign prior to retirement.¹²¹ This served to make his interest a present asset—and thus marital property subject to division—whereas Mr. Robbins, who would receive only his own contributions upon resignation, had no present asset.

Of the common law jurisdictions, New Jersey has been one of the most progressive in examining the "new property" of marriage and giving it the status of property subject to division upon divorce.¹²² Its courts have analyzed husbands' interests in several pension plans and have come to different conclusions.¹²³

119. *Id.* at 881.

120. 527 S.W.2d 949 (Mo. Ct. App. 1975). In this case the court was construing MO. ANN. STAT. § 452.330 (Vernon 1977) which calls for division of the marital property upon divorce on the basis of certain specified considerations. The statute is very similar to the Colorado statute involved in *Ellis and Pope*. See COLO. REV. STAT. § 14-10-113 (1976). See also note 105 *supra*.

121. *Powers v. Powers*, 527 S.W.2d 949, 957 (Mo. Ct. App. 1975).

122. See *Callahan v. Callahan*, 142 N.J. Super. 325, 361 A.2d 561 (1976) in which the court held that the value of stock options to which a husband was entitled was property subject to an equitable division upon divorce. The applicable statute is N.J. STAT. ANN. § 2A:34-23 (West Supp. 1977) which calls for the court "to effectuate an equitable distribution of the property, both real and personal, which was legally and beneficially acquired by [the parties] or either of them during the marriage." *Id.*

123. See *White v. White*, 136 N.J. Super. 512, 347 A.2d 360 (1975). But see *Pellegrino v. Pellegrino*, 134 N.J. Super. 512, 342 A.2d 226 (1975). Another court which has made this analysis in a number of cases is the Wisconsin Supreme Court in construing WIS. STAT. ANN. § 247.26 (West Supp. 1977) which allows the trial court to divide either party's estate, real or personal, between the parties. In *Pinkowski v. Pinkowski*, 67 Wis. 2d 176, 226 N.W.2d 518 (1975) (pension fund should be included among assets for division between the parties), the court reviewed its past decisions on the subject of the status of pensions upon divorce. The Michigan Court of Appeals took the opportunity in *Hutchins v. Hutchins*, 71 Mich. App. 361, —, 248 N.W.2d 272, 273 (1976) "to resolve this question which has been plaguing the trial courts"—whether the trial judge should consider the retirement pension of the husband as an award in the division of property. In answering the question in the affirmative, the court reviewed case law from Washington, Texas, Colorado, Wisconsin, and New Jersey.

In *Pellegrino v. Pellegrino*¹²⁴ the wife contended that her husband's contributions to his retirement plan were subject to an equitable distribution upon divorce. Under the plan his contributions would be repaid to him or paid to his chosen beneficiary should he resign or die before retirement. The husband's interest was thus characterized as "a present fixed right to future enjoyment"¹²⁵ of his contributions, and as such his contributions were subject to division upon divorce.

Pellegrino was distinguished in *White v. White*,¹²⁶ where the husband had an interest in a pension plan contributed to only by his employer. He had no right of withdrawal of the contributions until he became totally and permanently disabled, resigned (after reaching a certain age and working a required number of years), or retired. The court refused to characterize this interest, stating that, whatever present right the husband had in the plan, it was neither property acquired during marriage nor subject to equitable division upon divorce.¹²⁷

The issue in *Kruger v. Kruger*¹²⁸ involved the same question the Oklahoma Supreme Court faced in *Baker*:¹²⁹ the status upon divorce of military retirement pay already being received by the husband. Reaching the opposite conclusion from that of the Oklahoma court, this court looked to precedent from the community property states to characterize military retirement pay, not as a gratuity, but as consideration earned by the employee.¹³⁰ As such it was property subject to division, and to effect the division the husband was ordered to pay the

124. 134 N.J. Super. 512, 342 A.2d 226 (1975).

125. 134 N.J. Super. at —, 342 A.2d at 227-28. The *Pellegrino* decision was explained in *Blitt v. Blitt*, 139 N.J. Super. 213, 353 A.2d 144 (1976). There the court said that the source of the contributions—whether from employee, employer or both—was not the deciding factor. What was important was that the contributions were payable to the employee should he resign or die prior to retirement. In *Blitt* the contributions would be repaid even if the employee were dismissed.

126. 136 N.J. Super. 552, 347 A.2d 360 (1975).

127. 136 N.J. Super. at —, 347 A.2d at 361.

128. 139 N.J. Super. 413, 354 A.2d 340 (1976).

129. 546 P.2d 1325 (Okla. 1976). See notes 77-83 *supra* and accompanying text. The dissenting judge in *Kruger* raises some good arguments for those who support the view of the Oklahoma Supreme Court. This issue was also faced in *In re Marriage of Ellis*, 538 P.2d 1347 (Colo. Ct. App. 1975). See notes 105-108 *supra* and accompanying text. The Nebraska Supreme Court in *Howard v. Howard*, 196 Neb. 351, —, 242 N.W.2d 884, 888 (1976) decided the same issue in accord with the Oklahoma court. Its decision cited no authority and merely declared:

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. . . . There are situations where retirement income must be considered in providing for the care and maintenance of the divorced wife. In those situations, it is considered as a source for the payment of alimony, not as a part of a property settlement.

130. 139 N.J. Super. at —, 354 A.2d at 344.

wife a specified amount from each retirement payment he received. It should be noted that the wife received no award of alimony as did the wife in *Baker*.

From this discussion it can be seen that the status of the pension due the working spouse is dependent in most common law jurisdictions on the type of interest the spouse has in the plan. Courts engage in a case by case analysis of the plans, the most important aspect of which seems to be the provision specifying what the employee-spouse would receive should he or she terminate employment or die prior to retirement. Some common law jurisdictions differ in their respective treatments of a future pension due the employee and of a pension presently being paid to the retired employee.¹³¹

VI. POLICY ARGUMENTS

There are several arguments which can be made for considering the pension due the working spouse as jointly acquired property subject to division upon divorce. One of these arguments characterizes the pension fund, made up of contributions in the form of payroll deductions or contributions by the employer which otherwise would have been payable as salary, as deferred compensation. As a Michigan court stated, this compensation "would have been available to the parties during their marriage to be invested in stocks, bonds, savings account, annuity and/or other investments."¹³² This deferred compensation could have been used during the marriage, not only to augment the marital estate but also to raise the parties' standard of living.¹³³

In some cases the husband and wife have an understanding, perhaps unspoken, that the pension due the working spouse will be used for both of them.¹³⁴ In such cases, in the event that no alimony is

131. Indeed, the New Jersey court said that its decision in *Pellegrino v. Pellegrino*, 134 N.J. Super. 512, 342 A.2d 226 (1975) (funds contributed by husband to pension plan subject to equitable distribution upon divorce) did not involve the same issue as was faced in *Kruger v. Kruger*, 139 N.J. Super. 413, 354 A.2d 340 (1976) (husband's military retirement pay constituted assets subject to equitable distribution). Even though the decisions were the same as to the status of the pensions involved, *Pellegrino* was not dispositive of the result in *Kruger*. 139 N.J. Super. at —, 354 A.2d at 343. See also notes 128-130 *supra* and accompanying text. See *Hutchins v. Hutchins*, 71 Mich. App. 361, 248 N.W.2d 272 (1976) (retired husband's pension payments subject to equitable distribution upon divorce).

132. *Hutchins v. Hutchins*, 71 Mich. App. 361, —, 248 N.W.2d 272, 277 (1976). All these are more usual forms of jointly acquired property subject to division upon divorce.

133. See *Scherzer v. Scherzer*, 136 N.J. Super. 397, —, 346 A.2d 434, 437 (1975).

134. See *Robbins v. Robbins*, 463 S.W.2d 876, 878 (Mo. 1971) in which the wife testified "that, since her employers had no pension plan, it was the understanding of both that [the husband's] pension would be used for their mutual security and retirement."

awarded, to allow the working spouse to retain his or her pension interest, without an off-setting payment to the other spouse, is inequitable. This is especially true where there is little other jointly acquired property to be divided.

In Oklahoma an award of alimony for support is discretionary with the trial judge.¹³⁵ If a pension may be considered only in determining this award and there is no award of alimony for support, the spouse with the pension may end up with a secure future while the other spouse gets nothing.¹³⁶

In the case where there is an award of alimony for support, the pension does enter into the judge's consideration; however, it must be remembered that certain contingencies, such as remarriage, terminate the support payments.¹³⁷ On the other hand, a spouse who remarries would normally continue to receive a share of pension benefits divided as jointly acquired property since payments pertaining to a division of property are irrevocable.¹³⁸

Collins v. Oklahoma Tax Commission raises another aspect of the alimony-joint property division issue. "If property has been acquired by joint effort during marriage the wife has a vested interest therein which is not forfeited even though she may be at fault."¹³⁹ It is unlikely that alimony would be awarded to a wife at fault. If her husband's pension plan is not considered jointly acquired property, she will forfeit her share of the plan, no matter how much effort and industry she contributed to the marriage.

There are several disadvantages to the nonworking spouse to having a pension due the working spouse included in a property division rather than considered as income in determining alimony for support. If the payments are treated as income, the entire pension account is available for alimony purposes; if the pension is divided as property, only the amount accumulated in the account during the marriage is subject to division. Moreover, alimony payments are enforceable by

135. OKLA. STAT. tit. 12, § 1278 (Supp. 1978).

136. See *In re Marriage of Brown*, 15 Cal. 3d, 838, 849, 544 P.2d 561, 567, 126 Cal. Rptr. 633, 639 (1976) in which the court answered the husband who insisted that an award of alimony would compensate his wife for not receiving a share of his pension benefits. "Alimony, however, lies within the discretion of the trial court; the spouse 'should not be dependent on the discretion of the court . . . to provide her with the equivalent of what should be hers as a matter of absolute right.'"

137. See OKLA. STAT. tit. 12, § 1289 (Supp. 1978).

138. *Id.*

139. 446 P.2d 290, 295 (Okla. 1968).

contempt proceedings and will not be discharged by bankruptcy.¹⁴⁰

Courts are understandably reluctant to characterize pensions as property subject to an equitable division.¹⁴¹ If they do, they must determine how the pension is to be divided. Most courts whose decisions were examined in this article did not direct an actual apportionment of the specific pension fund. Instead, the value of the fund was taken into account in determining the total assets available for equitable division. The employee-spouse then retained the entire fund but made an offsetting payment to the other spouse. Other courts, since the present value of a pension to be received in the future is sometimes difficult to ascertain, will order the retired employee-spouse to pay the other a portion of each pension payment as it is received.

VII. CONCLUSION

It remains to be seen what the Oklahoma Supreme Court will do when directly faced with the issue of whether the pension due the working spouse is jointly acquired property subject to just and reasonable division upon divorce. The opinion of the California Supreme Court in *In re Marriage of Brown* could be persuasive, due to the affinity between the concepts of community property and coverture property. Too, the court may be influenced by other common law jurisdictions, and their case by case analyses of the pension interest involved. As alimony is awarded less often and the pension interest is increasingly included in the assets of married couples, it is obvious that the Oklahoma Supreme Court should rethink its position that a pension can only be considered as income in determining alimony for support.

Dianne Smith

140. See *Neugebauer v. Neugebauer*, 548 P.2d 1032 (Okla. 1976). See also FOOTE, *supra* note 2, at 817.

141. See Dickinson, *The Divorce Situation: Role of Retirement Plans*, 10 REAL PROP., PROB. & TR. J. 644 (1975).