Community Property - Civil Code Section 4800.8: The Inequitable Results From Its Application

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COMMUNITY PROPERTY—CIVIL CODE SECTION 4800.8: THE INEQUITABLE RESULTS FROM ITS APPLICATION

I. INTRODUCTION

The California Legislature recently enacted a series of statutes modifying California’s community property laws. One such statute is Civil Code section 4800.8 which provides:

The court shall make whatever orders are necessary or appropriate to assure that each party receives his or her full community property share in any retirement plan, whether public or private, including all survivor and death benefits, including, but not limited to, any of the following:

a) Order the division of any retirement benefits payable upon or after the death of either party in a manner consistent with section 4800.

b) Order a party to elect a survivor benefit annuity or other similar election for the benefit of the other party, as specified by the court, in any case in which a retirement plan provides for such an election. . . .

The effect of this new section is the abolishment of the terminable interest rule set forth in Benson v. City of Los Angeles and

2. Section 2 provides: “It is the intent of the Legislature to abolish the terminable interest rule set forth in Waite v. Waite and Benson v. City of Los Angeles, in order that retirement benefits shall be divided in accordance with Section 4800.” CAL. CIV. CODE § 4800.8 (West Supp. 1989) [citations omitted].
Waite v. Waite. Under the rule, an interest in a retirement plan originating from community funds or community labor constitutes community property, yet a nonparticipant spouse does not have an interest in benefits payable after the death of either spouse.

According to the terminable interest rule, the nonemployee spouse takes a community share in retirement benefits while the employee spouse is still living. However, the nonemployee spouse may not alienate or devise those benefits. The employee may designate a beneficiary, other than the nonemployee spouse, to receive the benefits upon the employee's death, or the benefits may go to a subsequent spouse who qualifies under the pension plan as the employee's "survivor" or "widow."

The main policy reasons of the terminable interest rule are that: 1) the employer is entitled to certainty concerning his obligations under the applicable retirement program; 2) the employer must not be required to do more than is specified by the contract with the employee spouse; and 3) the employer should not have to be frozen into contract obligations.

The effect of this new statute upon California community property law is significant. In eliminating the terminable interest rule, section 4800.8 provides that a former nonemployee spouse may receive his or her community property share in the retirement benefits of the employee spouse. Additionally, according to section 4800.8, the interest of the nonemployee spouse in the benefits extends to benefits payable after the death of either spouse. Yet, in abrogating the terminable interest rule, section 4800.8 adversely effects the employee spouse, the nonemployee spouse, and the employer.

First, section 4800.8 can disadvantage the employee spouse if the nonemployee spouse dies first. For example, if H (the employee spouse) marries W and W later dies, H can be deprived of a portion of his retirement benefits if W has previously bequeathed her interest
in the benefits to persons other than H.

Additionally, section 4800.8 may disadvantage the nonemployee spouse. A widowed nonemployee spouse may be deprived of a share in the benefits of the employee spouse. For example, suppose the employee spouse (H) has earned community property benefits during his first marriage and later remarries after divorce. In the event of H's death, the benefits do not necessarily go back to H so that the widow receives her share of the benefits. Instead, the first wife may collect her share in the benefits which will consequently deprive the widow of perhaps her only means of sustenance.

Third, an application of section 4800.8 may compel an employer to alter an existing contract in order to pay benefits to persons (e.g., the nonemployee spouses' devisees) who are not parties to the contract, who are wholly unrelated to the employee, and therefore of no concern to the employer.

This comment will assess section 4800.8's impact on community property in California. First, the comment will examine the terminable interest rule in three phases: its origin, development, and demise. Within this framework, the comment will next analyze section 4800.8's impact on community property law in California. Section III will assess the effects of section 4800.8 on the various parties involved and evaluate the underlying need for the statute. Finally, Section IV will propose an amendment to section 4800.8 which will mitigate the inequities created by the present statute.

II. HISTORY OF THE TERMINABLE INTEREST RULE

A. Origin of the Benson-Waite Doctrine

1. Packer v. Board of Retirement

Packer v. Board of Retirement illustrates the genesis of the terminable interest rule. After Packer, many courts developed the doctrine and expanded upon its application.

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11. See infra notes 17-47 and accompanying text.
12. See infra notes 48-74 and accompanying text.
13. See infra notes 75-117 and accompanying text.
14. See infra notes 118-23 and accompanying text.
15. See infra text accompanying notes 124-27.
In *Packer*, the widow (W) of a retired peace officer (H) brought an action to compel the Board of Retirement of the Los Angeles County Peace Officers' Retirement System and the members thereof to pay her a pension. During this time, the County Peace Officers Retirement Law was in effect. Enacted in 1931, it provided for a widow's pension if the officer had been disabled in the line of duty. In 1937, the law was amended to extend pension rights to the widow or children of any peace officer who died after retirement. In 1941, the law was further amended to provide that an officer might obtain a pension for his widow by exercising an option to take a lesser pension for himself during his life. Accord-

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22. Peace Officers Retirement Law, ch. 268, § 11, *Cal. Gen. Laws Ann.* act 5848, § 11 (Deering 1931) (amended by ch. 303, 1937). The 1937 amendment to section 11 of the act provided that, with certain limitations, the flat sum of $75.00 per month should be paid to the widow or children of a peace officer who "shall be killed or die, as a result of any injury received during the performance of his duty, or from sickness caused by the discharge of such duty, or after retirement, or while eligible to retirement on account of years of service...."

*Id.* (emphasis added). See also *Packer*, 35 Cal. 2d at 213, 217 P.2d at 661.

23. Peace Officers Retirement Law, ch. 268, § 11, *Cal. Gen. Laws Ann.* act 5848, § 11 (Deering 1931) (amended by ch. 745, 1941). The portion of section 11 pertaining to widows' pensions was amended to read in part:

Whenever any member shall be killed, or die, as a result of any injury received during the performance of his duty, or from sickness caused by the discharge of such duty, or after retirement for service connected disability, an annual pension shall be paid in equal monthly installments to his widow or child or children, in an amount equal to one half of such member's terminal salary....

*Id.* See also *Packer*, 35 Cal. 2d at 213 n.2, 217 P.2d at 661 n.2. Section 11.5, enacted in 1941, reads:

At any time before the first payment on account of any pension is made, or within 60 days after the effective date of this section, a member or beneficiary may elect to receive the actuarial equivalent at that time of his pension in a lesser pension payable throughout his life and that of his widow, if she survives him, in accordance with one or the other of the following options: Option 1: Upon his death, such lesser pension shall be continued throughout the life of and paid to his widow. Option 2: Upon his death, one half of such lesser pension shall be continued throughout the life of and paid to the widow.

ingly, all other provisions for a widow’s pension were eliminated except where the officer died as a result of a service-connected disability or was retired for such a cause. 24

H retired after serving the number of years required to entitle him to a pension. It was not claimed that H ever exercised the option which would have entitled W to a pension. W asserted that H’s service under the 1937 provision gave her, as third party beneficiary, a separate vested right to a widow’s pension which the 1941 amendment destroyed. 25 The court disagreed and stated that a widow’s interest, prior to her husband’s death, was to be considered merely a part of his pension benefits. 26 As such, the widow’s interest was subject to being entirely eliminated. 27 The court reasoned that to rule otherwise would remove a significant amount of flexibility necessary for the operation of pension systems. 28 According to the court, a contrary ruling “would mean that provisions benefitting third persons would be frozen into the law with respect to all employees then in service.” 29 Thus, these interests could not be removed despite the employee’s consent and his option to receive other pension benefits which might be of greater value to him than the one sought to be eliminated. 30

2. Benson v. City of Los Angeles

The case of Benson v. City of Los Angeles 31 further explains the origins of the terminable interest rule. In Benson, appellant Teresa Benson (W1) married August Benson (H) in 1920. Between 1916 and 1940, H was employed by the Los Angeles Fire Department. During the period of H’s employment, portions of his earnings were withheld in the amount of his contributions for pension benefits pursuant to provisions in the Los Angeles City Charter. In 1940, H retired from active service and was accordingly paid regular pension payments. In 1945, H commenced an action against W1 for divorce. In 1953, H married Olive (W2) and remained with her until his death in 1960. After H’s death, both wives filed claims with the city

26. Id. at 216, 217 P.2d at 663.
27. Id.
28. Id. at 217, 217 P.2d at 664.
29. Id.
30. Id.
for widow's pension benefits. W1 claimed she had a community property interest in the benefits. W2 also claimed an interest in the benefits based on the fact that she was a widow and the Charter provided for payments to the widows of police or fire department members.

The Supreme Court recognized that at the time of H and W1’s separation, both parties had a community property interest in the pension, but “no division of such interest was made.” However, the court denied W1 any recovery. According to the court, the “community possessed only such an interest . . . as [H’s] employment contract provided.” Thus, the pension was payable only to the widow, W2. The court stated:

This is not to say that upon a division of the community estate she [W1] could not have participated therein. Undoubtedly she had an interest which she could have asserted in the payments to August [H] during his lifetime, had she sought to do so. But after August’s death, the only right remaining was to enforce the city’s covenant to make payments to the “widow.”

Moreover, public policy pointed to such a result. According to the court, “[T]o vest interests not subject to control by the employee would impose such inflexibility upon public employment that the purpose of providing for retirement would be defeated. Such purpose is to induce competent persons to enter and remain in public service.”

3. Waite v. Waite

The terminable interest rule was further delineated in Waite v. Waite. In Waite, defendant Russell Waite (H) and plaintiff Jean

32. Benson, 60 Cal. 2d at 358, 384 P.2d at 650, 33 Cal. Rptr. at 258.
33. Id. at 359-60, 384 P.2d at 651, 33 Cal. Rptr. at 259.
34. Id. at 358-59, 384 P.2d at 650-51, 33 Cal. Rptr. at 258-59.
35. Id. at 358, 384 P.2d at 650, 33 Cal. Rptr. at 258.
36. Id. at 362, 384 P.2d at 653, 33 Cal. Rptr. at 261.
37. Id. at 360, 384 P.2d at 651, 33 Cal. Rptr. at 259.
38. Id. at 360, 384 P.2d at 652, 33 Cal. Rptr. at 260.
39. Id. at 361, 384 P.2d at 652, 33 Cal. Rptr. at 260. See also Allen v. City of Long Beach, 45 Cal. 2d 128, 131, 287 P.2d 765, 767 (1955) (the court supported the modification of an employee’s vested contractual pension rights prior to retirement for purposes of keeping the pension system flexible); Kern v. City of Long Beach, 29 Cal. 2d 848, 855, 179 P.2d 799, 803, (1947) (although city employee has a vested contractual right to a pension, the amount, terms, and conditions of the benefits may be altered).
40. 6 Cal. 3d 461, 492 P.2d 13, 99 Cal. Rptr. 325 (1972) (overruled by In re Marriage of Brown, 15 Cal. 3d 838, 851, 544 P.2d 561, 569, 126 Cal. Rptr. 633, 641 (1976)).
Waite (W) married in 1934, and separated in 1967. During the marriage, H served as a Superior Court Judge. Over the years, H contributed to the Judges' Retirement Fund, all of which was community property. H retired in 1966 without withdrawing his contributions or electing an optional settlement, and became entitled to a monthly pension. Upon separating in 1967, H and W divided the community property and excluded their respective pension rights.1 H then sued for divorce in Nevada in 1967. The Nevada court awarded H the contributions to the Judges' Retirement Fund, together with all rights and benefits accruing thereunder.2 W later filed a divorce action in California. The court ordered the payment to W, or her devisee or heirs, of one half of all benefits which may be payable under the Judges' Retirement Act by reason of H's services.3

H appealed, presenting the court with the issue of whether at the time of dissolution a judge's retirement benefits could be made payable to the judges spouse, or to “her devisee or heirs.”4 The court found that the statutory scheme for judges' pensions precluded W's contention that her legatees should inherit pension payments payable for the rest of the judge's life.5 As the court explained: “[T]he state has established here a pension plan in which pension benefits terminate with the death of the employee, or under optional programs, with the death of his surviving spouse. . . . The state contributes no benefits to the employee's estate, his heirs, or his legatees.”6 Crucial to the court's analysis was the state interest. The court noted:

The state's concern, then, lies in provision for the subsistence of the employee and his spouse, not in the extension of benefits to such persons or organizations the spouse may select as the objects of her bounty. Once the spouse dies, of course, her need for subsistence ends, and the state's interest in her sustenance reaches a coincident completion. When this termination occurs, the state's concern narrows to the sustenance of the retired employee; its pension payments must necessarily be directed to that sole objective.7

41. Id. at 465, 492 P.2d at 15, 99 Cal. Rptr. at 327.
42. Id. at 465, 492 P.2d at 15-16, 99 Cal. Rptr. at 327-28.
43. Id. at 466, 492 P.2d at 16, 99 Cal. Rptr. at 328.
44. Id.
45. Id. at 474, 492 P.2d at 22, 99 Cal. Rptr. at 334.
46. Id. at 473, 492 P.2d at 21, 99 Cal. Rptr. at 333.
47. Id.
B. Development of the Terminable Interest Rule

In 1972, the court in *Berry v. Board of Retirement of the County of Los Angeles Retirement Association*, citing *Waite*, held that the community interest of employee's former wife (W1) in employee's benefits died at the same time that employee's interest died. At the time of divorce from W1, employee (H) was not eligible to retire. H continued in active service for the county until his death, at which time he had a surviving widow (W2). The court decided that the only benefits remaining were those belonging to the surviving spouse (W2) since W1's community interest in the benefits died at the same time as did H's.

In *Bensing v. Bensing*, the court similarly reinforced the holding in *Waite*. In that case, the appellant (the employee) contended that pension benefits should be considered a mere expectancy not subject to division as community property since he had not retired but was just eligible for retirement. The court disagreed with the appellant's argument and held that pension benefits were community property subject to division in a divorce court. Yet, in dictum, the court stated that:

> The pension here terminates upon husband's death. Also, if the wife dies before monthly payments to her amount to the actuarial 'present value' of the pension, the payments to her cease and her share is payable to her husband. Her devisees and heirs are not entitled to the share of the pension she would have received if she lived.

Until this point, the court's application of the Benson-Waite

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49. Id. at 759, 100 Cal. Rptr. at 551.
50. Id. at 758-59, 100 Cal. Rptr. at 551. The court also defined community interest:
   > It is also our opinion, as spelled out in *Waite v. Waite* . . . that the 'community interest' which was divisible by the divorce court was either the funds on deposit at the time of divorce, or the retirement benefits payable to Eugene during his lifetime and after his retirement as those payments became due and payable, or an actuarial equivalent of the retirement benefits . . . based upon the actuarial expectancy of the lives of Elizabeth and Eugene at the time of retirement. The 'community interest' valuation could not be engrafted into any benefits ultimately payable to a surviving spouse.
   
   *Id.* (emphasis added).
53. Id.
54. Id. at 893, 102 Cal. Rptr. at 257.
doctrine had extended to public pension plans. In the case of *In re Marriage of Bruegl*, the court extended the Benson-Waite doctrine to private pensions.

In *Bruegl*, the parties, Evelyn and Herbert, married in 1945. A carpenter by profession, Herbert belonged to a union with a noncontributory pension fund. The couple separated in 1973. The main issue confronting the appellate court was Herbert’s argument that since he was not eligible for retirement, he could not receive any benefits until meeting the requirements specified in his pension plan. Thus, his interest in the pension was just an expectancy and not a community interest. The court rejected this argument and held that because the pension plan had vested it was community property subject to division between the spouses.

Additionally, however, Evelyn asked the court to consider part of the pension as a life insurance policy in order to avoid the rule that the wife’s vested rights in her husband’s pension plan are limited to amounts payable to him while he is living. In defining Evelyn’s interest in guaranteed payment as contingent, the court held that Evelyn had no community interest in the guaranteed payment feature of the plan insofar as it related to payments due after Her-

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56. *Id.* at 203-04, 120 Cal. Rptr. at 598. To support his argument, Herbert relied on Williamson v. Williamson, 203 Cal. App. 2d 8, 11, 21 Cal. Rptr. 164, 166 (1962) (overruled by *Brown*, 15 Cal. 3d at 851, 544 P.2d at 569, 126 Cal. Rptr. at 641. The court in *Williamson* established the principle that pension rights are not vested where the payments are subject to conditions which may or may not occur. In this context, the pension is a mere expectancy not subject to community property division. See also Kent, *Pension Funds and Problems Under California Community Property Laws*, 2 STAN. L. REV. 447, 463, 465 (1950) and *French v. French*, 17 Cal. 2d 775, 778, 112 P.2d 235, 236-37 (1941) (overruled by *Brown*, 15 Cal. 3d at 841, 544 P.2d at 562, 126 Cal. Rptr. at 634). In *French*, the court held that the appellant’s right to retirement pay was a mere expectancy because he had not completed the necessary requirements.

57. The court distinguished vested from unvested as follows: Herbert is over 45 years of age and has accumulated more than 10 years of pension credit. There is no way for his pension rights to be reduced or withdrawn. Herbert has an irrevocable interest in the fund; his rights have vested if Herbert were to quit his job tomorrow it could be considered a break, but would not cancel his pension rights. *Bruegl*, 47 Cal. App. at 203-04, 120 Cal. Rptr. at 598. See also *In re Marriage of Peterson*, 41 Cal. App. 3d 642, 649, 115 Cal. Rptr. 184, 189 (1974) (overruled by *Brown*, 15 Cal. 3d at 851, 544 P.2d at 569, 126 Cal. Rptr. at 635); *Brown*, 15 Cal. 3d at 842, 544 P.2d at 563, 126 Cal. Rptr. at 635 (defining the term “vested” as “a pension right which survives the discharge or voluntary termination of the employer”).


59. *Id.* See also *Peterson*, 41 Cal. App. 3d at 654, 115 Cal. Rptr. at 192.

60. The plan provided that upon the death of the employee after retirement, payments
bert's death. Thus, the court cut off Evelyn's interest in the plan upon Herbert's death in accordance with the Benson-Waite rationale.

The policy reasons behind the terminable interest rule were further brought to light by the court in *In re Marriage of Fithian.* In upholding the applicability of California community property law to federal military retirement pay (characterizing it as community property), the court commented on the need for widows to have a means of sustenance after their husbands' death. The court stated that it would not be "incongruous for Congress to supply a program to aid widows who no longer have husbands to provide sustenance, and omit to do so for ex-wives who can rely on state family law concepts of support, alimony, and community property as a source of income." Thus, in addition to concern for employers who should not have to be frozen into their contracts, and who should not have to continue payments to persons other than the employee's immediate family upon that employee's death, concern for the employee's widow emerged as an articulated policy goal underlying the terminable interest rule.

The cases of *In re Marriage of Lionberger* and *Allen v. Allen* further solidify the California court's adherence to the terminable interest rule. In *Lionberger*, husband and wife married in 1953 and separated in 1973. W filed a petition for dissolution of marriage, and in 1978, the court entered an interlocutory judgment of dissolution dividing all community property with the exception of H's retirement and pension benefits. The decree additionally provided that W's interest was alienable, inheritable, and assignable in the same manner as H's interest in the retirement or pension plan.
The court, however, following Waite, held that W did not have a right nor interest in any sums payable after H's death.\(^{69}\) Similar to the Lionberger court, the court in Allen terminated the interest of a nonemployee spouse in benefits payable after the employee spouse’s death.\(^{70}\)

In Allen, husband and wife were married for 36 years when W died. By then, H had retired from his job with Pan American World Airways and was receiving retirement income from Pan American. The retirement plan provided that all benefits received were nonassignable, inalienable, and nontransferable, and expressly declared its purposes to be: 1) to induce employees to enter and continue in employment with Pan American, and 2) to provide sufficient subsistence for retired employees and their dependents.\(^ {71}\) Yet, W died testate and made H her sole devisee and legatee. Thus, H believed that his status as W’s devisee and legatee would enable him to circumvent the inheritance taxes regarding the pension. By not listing the pension as a community asset, no inheritance taxes would be assessed on it pursuant to the Revenue and Taxation Code section 13551.\(^{72}\)

The court, however, disagreed with H and held that W had no power to bequeath her interest in the pension funds.\(^ {73}\) In so ruling, the court provided additional support for the terminable interest rule. In surveying the terminable interest rule, the court remarked:

Moreover, the result in Waite not only created little inequality; it was clearly powered by its own consideration of fairness. The court in Waite focused on the special purpose of the pension at issue there: “provision for the subsistence of the employee and his spouse.” . . . The court thus highlighted the unique place of such a pension in community property law; it is property that is meant to be shared by the spouses and only the spouses, and one whose purpose would be wholly defeated by allowing the deceased spouse to bequeath his or her share to third persons. . . . It seems perfectly appropriate to the function of pension benefits that they automatically pass to the surviving spouse.\(^ {74}\)

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69. *Id.* at 71, 158 Cal. Rptr. at 544.
70. *Allen*, 108 Cal. App. 3d at 621, 166 Cal. Rptr. at 657.
71. *Id.* at 616, 166 Cal. Rptr. at 654.
72. The Revenue and Taxation Code section 13551 allowed the taxation of the passage of a deceased spouse’s interest in community property to his or her surviving spouse. *Mr. Allen* did not list his pension as a community asset hoping to circumvent the taxation. *Id.* at 616-17, 166 Cal. Rptr. at 654.
73. *Id.* at 621, 166 Cal. Rptr. at 657.
74. *Id.* at 619, 166 Cal. Rptr. at 656.
C. The Development of Authority in Opposition to the Terminable Interest Rule

Despite its frequent application, the terminable interest rule often evoked criticism from the California courts. In *Cheney v. City and County of San Francisco*, Thomas Cheney and his wife entered into an agreement on their wedding day which provided that their individual earnings would remain separate property after marriage. Subsequently, Thomas filed for a divorce and after the interlocutory decree was entered, he died. Upon his death, a death benefit from the employees retirement fund became payable and resulted in being the subject of dispute between Thomas' mother (M) and Thomas' wife (W). M had been named as a beneficiary by Thomas pursuant to the retirement plan and contended that since she was the beneficiary, she should be entitled to the pension. However, W was the surviving widow and argued that she was entitled to the benefits because they were community property.

The court in *Cheney* awarded M the pension due to the fact that there was a valid contract in force between Thomas and W making the fund Thomas' separate property. Yet, the court stated that notwithstanding the contract's validity, the amount payable from the employees retirement system was community property. In this instance, the court's position was clearly contrary to the Benson-Waite approach to post-death benefits under a pension, which treats the pension as the employee's separate property.

In *Shaw v. Board of Administration* death benefits were also at issue. Petitioner (the nonemployee spouse) and Frank Shaw (the employee) were married in 1923. In 1944, Frank became a member of the State Employees Retirement System and according to the plan, Frank named Petitioner as beneficiary of any benefits to become due.

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75. 7 Cal. 2d 565, 61 P.2d 754 (1936). *Cheney* was harmonized with similar cases in Gettman v. City of Los Angeles Dept. of Water & Power, 87 Cal. App. 2d 862, 866, 197 P.2d 817, 819 (1948).
76. *Cheney*, 7 Cal. 2d at 567, 61 P.2d at 755.
77. Id. at 567-68, 61 P.2d at 755.
78. Id.
79. Id. at 569, 61 P.2d at 756.
80. Id. The court stated: "We are perforce committed to the view that the amount payable from the employees retirement system upon the husband's death represented earnings. As such it was community property unless the agreement executed by the husband and wife providing otherwise was still in force." Id.
upon his death. In 1948, Petitioner was granted an interlocutory decree of divorce from Shaw. The issue presented on appeal was whether or not Petitioner’s rights, as designated beneficiary of the death benefits, were abrogated by the divorce decree. On this point, the court held that Petitioner’s rights were not abrogated.

However, in dicta, the court’s opinion in Shaw was inconsistent with the terminable interest rule. It suggested that if Petitioner had not settled her community property claim at divorce, she might have been able to claim a share of death benefits had Frank named one, other than herself, as beneficiary. This reasoning contrasts with the rationale underlying the terminable interest rule which would render Petitioner’s interest in Shaw’s death benefits terminated upon his death. Thus, Petitioner could not have claimed an interest in the pension after Frank’s death.

In Gallaher v. State Teachers’ Retirement System, the court further eroded the rationale underlying the terminable interest rule. In Gallaher, Harold became a member of the teachers’ retirement system in 1950, and under the plan designated his wife Wilma (W1) as beneficiary. Harold and W1 lived in California until Harold moved to Reno, Nevada, informing W1 that he intended to obtain a divorce in Nevada. Thereafter, Harold was awarded a default divorce decree in the Nevada action, and then married Elsie (W2). In 1960, W1 commenced a California divorce action against Harold. The California decree held the Nevada decree void and provided for the division of the couple’s community property. After Harold died, the issue was whether W1 or W2 would partake in Harold’s benefits from the teachers retirement system. The court upheld W1’s claim as beneficiary over W2’s claim that Harold intended to switch W1’s status as beneficiary to W2. Thus, contrary to the terminable interest rule, W1’s interest in the benefits after Harold’s death did not terminate. Instead, W1 received the benefits and W2 was deprived of

83. Id. at 777, 241 P.2d at 639.
84. The court stated:
   The extent of the [divorce] decree in this respect . . . is that petitioner lost any claim to a community interest in the amount theretofore paid to the system. If petitioner lost all community interest in the amount theretofore paid to the system by Shaw, it means no more than that her right to demand a proportionate share of the death benefit, regardless of who might be the beneficiary, was lost.
   Id. at 775-76, 241 P.2d at 638.
86. Id. at 511-12, 47 Cal. Rptr. at 140-41.
87. Id. at 518, 47 Cal. Rptr. at 144-45. The court found no evidence from the record that Harold performed any affirmative act in furtherance of such intent.
what would have been her rightful interest in the benefits under the rule.

In the case of *In re Marriage of Peterson,*, the court openly disapproved of the terminable interest rule. In *Peterson*, Petitioner (W) and Respondent (H) married, then separated, with W filing for divorce. At the time of the interlocutory order, H was not yet eligible to retire under the United States Civil Service Retirement System. The relevant issue on appeal was whether or not W had an interest in the pension rights if H predeceased her. The court rejected her contention on the basis that prior California Supreme Court cases were binding and held to the contrary. Additionally, the court expressed dissatisfaction with the holding: "We do not believe the rule which we must follow is fair. Roy's pension rights constitute a bundle to which Elizabeth, as partner in the community during the years of marriage contributed her equal share. Why should she be deprived of her right to any single stick in the bundle?"

In 1983, the court further undercut the terminable interest rule in *Chirmside v. Board of Administration of the Public Employees' Retirement System*. In *Chirmside*, William and Irene Chirmside married in 1941. In 1946, William began working for the City Water Department and subsequently became a member of the Public Employees Retirement System (PERS). In 1975, William and Irene divorced, and on the final decree the pension was left unmentioned. In 1977, William retired and under the Retirement System opted to receive monthly payments and designated his sister as the beneficiary. William died in 1980, and the issue confronting the court was whether appellant's (Irene) community property interest

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89. *Id.* at 656, 115 Cal. Rptr. at 194. (The court stated: "We do not believe the rule which we must follow is fair.").
90. *Id.* at 644-46, 115 Cal. Rptr. at 186-87.
91. *Id.* at 656, 115 Cal. Rptr. at 194. The court stated: (W)e are bound to hold that Elizabeth's entitlement in this case is limited to Roy's pension rights while he is still living, and that she has no 'vested' interest in any amounts payable after his death, even though these amounts are part of the pension package purchased with community funds.
95. *Id.* at 207, 191 Cal. Rptr. at 605-06.
in her former husband's PERS account terminated with his death.95

The court in Chirmside held that appellant's interest in the pension did not terminate upon William's death.96 According to the court, the nonemployee's community property interest in the accumulated contributions could be harmonized with the employee's power to name a beneficiary by "limiting the employee's power to his community property interest in the remaining contributions."97 The court based its ruling on the decisions of In re Marriage of Brown98 and Henn v. Henn,99 and the difference between William's accumulated contributions and the type of pension or death benefits addressed in the Benson-Waite line of cases. William's contributions represented only withheld earnings during marriage and "[t]his money was unquestionably community property."100

Bowman v. Bowman101 marked the court's open retreat from the terminable interest rule's application. In Bowman, Rudy (H) and Celia (W1) married in 1949. H was employed by Pan American World Airways in 1956, until his death in 1981. In 1968, H and W1 separated and thereafter divorced. The interlocutory divorce judgment did not mention H's pension plans or life insurance.102 H then remarried W2, but that marriage also ended. H subsequently married W3.103 The subject of dispute involved W1 and W3's re-

95. Id. at 207-08, 191 Cal. Rptr. at 606.
96. Id. at 211, 191 Cal. Rptr. at 609.
97. Id. at 212, 191 Cal. Rptr. at 610. The court further explained that this result would eliminate possible unfairness that might otherwise occur. According to the court: "In this way, each statute is given effect, and the unfairness perceived by Justice Kaus in Peterson can be avoided." Id. See supra text accompanying note 92.
98. 15 Cal. 3d 838, 544 P.2d 561, 126 Cal. Rptr. 633 (1976). The court in Brown described "vested" as "defining a pension right which survives the discharge or voluntary termination of the employee." Id. at 842, 544 P.2d at 563, 126 Cal. Rptr. at 635.
99. 26 Cal. 3d 323, 605 P.2d 10, 161 Cal. Rptr. 502 (1980). The Henn court determined that a community asset left unmentioned in the pleadings as community property and left unadjudicated by the divorce decree is subject to future litigation. The court in Chirmside relied on both the Brown and Henn cases to support the argument that the terminable interest doctrine has become "legally extinct." Chirmside, 143 Cal. App. 3d at 211, 191 Cal. Rptr. at 608.
100. Id. at 211, 191 Cal. Rptr. at 609. The court stated that: "None of the cases in which the terminable interest doctrine has been applied involved only the accumulated contributions of the employee spouse." Id. at 209, 191 Cal. Rptr. at 607 (emphasis in original). Additionally, the court referred to California Civil Code section 687 which provides the definition of community property: "Community property is property acquired by husband and wife, or either, during marriage, when not acquired as the separate property of either." CAL. CIV. CODE § 687 (West 1989).
102. Id. at 151, 217 Cal. Rptr. at 175.
103. Id. at 151, 217 Cal. Rptr. at 175-76.
spective rights to the pension where H left everything to W3. W1 filed suit, asserting that she could claim a portion of the proceeds from the pension and life insurance because these benefits were not divided at the time of their divorce.104

The court agreed with W1 and held that respecting the pension plan, the terminable interest rule was inapplicable.105 The court reasoned that the pension benefits were community property and because they were not divided upon H and W1’s divorce, they still existed. Therefore, W1 had “a right to her day in court to determine the amount of her interest.”106

Bowman was most recently followed in In re Marriage of Allison.107 In Allison, husband and wife were married for twenty-seven years before separating. During the marriage, H was employed with Pacific Telephone. After the dissolution judgment, but before the property division, H retired. The Retirement Plan provided that H could select either a life annuity or a survivor annuity, and H chose a life annuity.108

The relevant issue confronting the appellate court was whether W had a community property interest in a survivor annuity. H argued that W had no interest because such rights were extinguished by the terminable interest rule.109 The court, agreeing with the court’s reasoning in Bowman, concluded that survivorship benefits of a private pension plan were a community asset and may be divided accordingly.110 Thus, apparently unconstrained by Benson and its progeny, the court stated: “We see no interest then that would be served by the application of the terminable interest rule to this

104. Id. at 151, 217 Cal. Rptr. at 176.
105. Id. at 156, 217 Cal. Rptr. at 179. The court stated:

Rudy was not a public employee and the plan is not a public plan. Unlike Benson and its progeny, the plan was not restrictive in its choice of beneficiaries. And Celia is not attempting to alienate or assign her interest prior to its maturity. She is simply seeking what is hers.

Id. Regarding the insurance policy, the court similarly held that Celia was entitled to her community interest in the life insurance proceeds. Id. at 160, 217 Cal. Rptr. at 182.
106. Id. at 156, 217 Cal. Rptr. at 179.
108. Id. at 852, 234 Cal. Rptr. at 672. Under the retirement plan, the life annuity would terminate on H’s death. Thereafter, H’s surviving spouse would receive payments from the survivor annuity. Id.
109. Id. at 854, 234 Cal. Rptr. at 674.
110. Id. at 854, 234 Cal. Rptr. at 675. The court cited Bowman: “We see no purpose to be served in extending this rationale to cut off the nonemployee spouse’s community property rights in private, i.e., nongovernmental pensions.” Bowman, 171 Cal. App. 3d at 155, 217 Cal. Rptr. at 178 (citing Culhane, Terminable Interest Doctrine, 14 Sw. U.L. Rev. 613, 643 (1984) (emphasis in original)).
case.\textsuperscript{111}

In 1987, the Legislature memorialized the death of the terminable interest rule with the promulgation of section 4800.8. \textit{In re Marriage of Taylor}\textsuperscript{112} is the first case to apply section 4800.8. In Taylor, husband and wife married in 1948 and separated in 1976. H began working as a Superior Court Judge in 1963 and held that position until he retired in 1984. H became eligible to retire in May 1983. In October of the same year, W brought suit seeking her proportionate share of benefits that H would have received had he retired when he was initially eligible.\textsuperscript{113} The pertinent issue on appeal was the validity of the terminable interest rule as it had been applied under the Judges' Retirement Act.\textsuperscript{114}

In applying section 4800.8, the court held that W was entitled to her share in H's judicial retirement benefits.\textsuperscript{115} Also, the court found that on remand the trial court should make whatever orders were necessary and appropriate to assure that each party received his or her full community property share in the retirement plan pursuant to section 4800.8.\textsuperscript{116} In so holding, the terminable interest rule was finally extinguished.\textsuperscript{117}

III. AN ANALYSIS OF SECTION 4800.8’S IMPACT ON COMMUNITY PROPERTY LAW IN CALIFORNIA

Section 4800.8 reflects the California Legislature’s response to the dissatisfaction generated from the effects of the terminable interest rule. However, the statute exceeds the actual need for which it was enacted, and consequently does not effectively mitigate the inequities resulting from the terminable interest rule’s application. The

\textsuperscript{111} Allison, 189 Cal. App. 3d at 855, 234 Cal. Rptr. at 674.
\textsuperscript{113} Id. at 437, 234 Cal. Rptr. at 487.
\textsuperscript{114} Id. at 437-38, 234 Cal. Rptr. at 486-87.
\textsuperscript{115} Id. at 443, 234 Cal. Rptr. at 491.
\textsuperscript{116} Id. The court additionally commented that: "[T]he law prior to the enactment of section 4800.8 can be viewed as unfair and as preserving an injustice." Id. at 442, 234 Cal. Rptr. at 491.
\textsuperscript{117} Section 4800.8 was later referred to in the case of \textit{In re Marriage of Higinbotham}, 203 Cal. App. 3d 322, 249 Cal. Rptr. 798 (1988). In Higinbotham, the relevant issue confronting the court was whether or not the wife was entitled to an order, authorized by section 4800.8, directing her husband's retirement plan to pay her a suitable share of any survivor or death benefits which became payable during her lifetime. Id. at 334, 249 Cal. Rptr. at 804. The court decided that section 4800.8 should apply. Id. at 335, 249 Cal. Rptr. at 805. In so ruling, the court retroactively applied section 4800.8. According to the court, the delay in formal entry of judgment in the case did not justify depriving the non-participant spouse of her rights under section 4800.8. Id. at 335, 249 Cal. Rptr. at 804.
following analysis will accordingly describe the adverse effects of the statute's application on some of the parties involved and the underly-
ing need for the statute.

A. The Effects of Section 4800.8 on the Various Parties Involved

In order to examine the effects of section 4800.8's application on the employee spouse, the nonemployee surviving spouse, the non-
employee former spouse, and the employer, it is instructive to illus-
trate the two situations which accurately reflect these effects. The first hypothetical represents a Benson situation, and the second hypo-
thetical shows a Waite situation. The difference between the two
situations is the following: In Benson, the employee spouse prede-
ceases both the nonemployee surviving spouse and the nonemployee
former spouse, so that the issue is whether the former nonemployee
spouse may claim an interest in the widow's pension. In Waite, how-
ever, it is the nonemployee spouse who dies first and the issue is
whether that spouse may bequeath her interest in the pension to de-
feat the claim of the surviving spouse to that interest:

Hypothetical I: H marries W1 in 1920. Between 1916 and 1940, H
is employed by the Fire Department. During this period, a
portion of his earnings are withheld in the amount of his contribu-
tions for pension benefits pursuant to the City Charter. In
1940, H retires and begins receiving regular pension payments.
In 1945, H divorces W1. In 1953, H marries W2. In 1960, H
dies and both W1 and W2 file claims with the city for pension
benefits.¹¹⁸

In this case, section 4800.8 would operate to permit W1 to re-
ceive her community share in the pension. Contrary to the result
mandated by an application of the terminable interest rule, W1's in-
terest in the pension is not extinguished upon H's death.¹¹⁹

This application of section 4800.8 yields both equitable and ine-
equitable results. In one sense, by not eliminating W1's interest in
the pension upon H's death, section 4800.8's application invokes an
equitable consequence because it enables W1 to claim what is right-
fully hers. What H earned while married to W1 is the marital prop-
erty of H and W1, not of H and W2. If W2 was able to claim W1's
community share in the pension, W1 would be deprived of what, in
essence, is her property.

On the other hand, section 4800.8's application may disadvan-

¹¹⁸. See supra text accompanying notes 31-34.
¹¹⁹. See supra text accompanying notes 115-17.
tage W2. First, given the situation where W1 receives other means of support (e.g., financial support from her new husband if she has remarried), W1 may not need the benefits as much as the surviving widow, W2, who no longer has a husband to provide support and clearly is in need of the benefits. In this way, W2 is deprived of a needed means of support, while W1 collects an additional source of income which she most likely does not need.

In spite of this effect, however, it is the author's contention that section 4800.8's application in a Benson context is justified. In all fairness, and in accordance with the basic community property principle that spouses are joint owners of marital property, W2 should not be able to claim an interest in benefits which are the community property of W1 and H. Furthermore, in reference to the possibility of W2 becoming disadvantaged by the application of section 4800.8, it is not likely that in this context W2 would be severely affected. In all likelihood, W2 will have other means of support (e.g., her community interest in the benefits) after the death of the employee spouse.

Nevertheless, as the following hypothetical illustrates, section 4800.8's application is not justified in a Waite situation:

Hypothetical II: H and W marry in 1934 and are divorced in 1967. During the marriage, H serves as Superior Court Judge and contributes to the Judge's Retirement Fund. In 1966, H retires without withdrawing his contributions or electing an optional settlement, and becomes entitled to a monthly pension. W dies testate in 1968, having designated her sister as the devisee of W's interest in the pension. Both H and W's devisee claim W's interest in the pension. Thus, W's devisee claim W's interest in the pension. Just as in the situation where the employee spouse predeceases the nonemployee spouse, section 4800.8's application in this case may also lead to inequities.

In this situation, an application of section 4800.8 upholds the sister's claim to W's interest in the pension. Contrary to the result compelled by an application of the terminable interest rule, W's interest in the pension is not extinguished upon her death. Thus, W may bequeath her interest in the pension. Just as in the situation where the employee spouse predeceases the nonemployee spouse, section 4800.8's application in this case may also lead to inequities.

First, as the surviving spouse, H may be adversely affected. Upon W's death, W's devisee would receive a portion of the pension and thus deprive H of part of his retirement pay. Furthermore, these benefits could be H's only means of sustenance when he retires.

120. See supra text accompanying note 64.
121. See supra text accompanying notes 40-43.
Therefore, it seems unjust to allow W’s heir to receive part of the benefits of H’s labor when H is in need of the benefits himself.

Moreover, if H has not yet retired, it appears even more unfair to permit W’s devisee to begin receiving H’s retirement pay when H is not yet eligible to receive the benefits. In this context, W’s devisee would receive H’s retirement pay while H receives nothing.\footnote{122}

Second, the employer may be adversely affected. Section 4800.8 may compel the employer to modify an existing contract in order to accommodate W’s right to transfer her interest in the benefits. The employer, consequently, may be forced to make payments to a person who is not a party to the contract, and therefore is of no concern to him. As the court stated in \textit{Waite}: 

\begin{quote}
The state’s concern, then, lies in provision for the subsistence of the employee and his spouse, not in the extension of benefits to such persons or organizations the spouse may select as the objects of her bounty.\footnote{128}
\end{quote}

\textbf{B. The Need for Section 4800.8}

By enacting section 4800.8, the California Legislature sought to eliminate both the \textit{Benson} and \textit{Waite} prongs of the terminable interest rule. However, as the following discussion demonstrates, the Legislature need not have abrogated both prongs of the rule. Specifically, the California Legislature should have eliminated only the \textit{Benson} part of the terminable interest rule.

In analyzing the various cases which illustrate the courts’ dissatisfaction with the terminable interest rule, a similar fact pattern emerges. Beginning with \textit{Cheney}, the cases generally reflect a \textit{Benson} situation (upon the death of the employee spouse, the former nonemployee spouse claims a community share of the employee spouse’s pension as against the claim of the widow to the entire pension)\footnote{124} as opposed to a \textit{Waite} situation (upon the death of the nonemployee spouse, the employee spouse claims the interest in the pension that the nonemployee spouse bequeathed to her heirs).\footnote{125} Therefore, the

\footnote{122} Furthermore, this result runs counter to the basic community property notion that spouses are joint owners of marital property. By allowing the deceased spouse to bequeath his or her share to third persons, section 4800.8 seemingly characterizes these benefits as the deceased spouses’ separate property. \textit{See supra} text accompanying note 74.


\footnote{125} \textit{See Waite}, 6 Cal. 3d at 473, 492 P.2d at 21, 99 Cal. Rptr. at 333. The cases of
real purpose of section 4800.8 is to resolve the inequitable results from the terminable interest rule's application in a Benson situation.126

Seen in this light, the application of section 4800.8 is unnecessary in a Waite situation. Unlike the holding in Benson, Waite's holding has not been criticized in many subsequent cases. Most likely, this is because the terminable interest rule's application in a Waite situation renders a fair result. It is more equitable to allow the employee spouse to receive his or her non-employee spouse's community share of the benefits upon the non-employee spouse's death rather than to allow the nonemployee spouse to bequeath the benefits to persons other than the employee spouse. The nonemployee spouse, in a sense, is not deprived of anything while he or she is living. The only restriction imposed on that spouse is his or her right to transfer the benefits. When weighed against the employee's right to benefits earned by his or her labor, the nonemployee spouse's right to transfer is significantly less compelling.

Thus, one infers that the need for section 4800.8 does not encompass its application in a Waite situation. Therefore, if an amendment were enacted which precluded section 4800.8's application in a Waite situation, the corresponding inequities produced by such application127 would be eliminated, and the need for the statute would still be fulfilled.

IV. AMENDMENT OF SECTION 4800.8

Because section 4800.8 is necessary only in a Benson situation, and would produce unjustified and inequitable results if applied in a Waite situation, the Legislature should enact an amendment to ensure section 4800.8's application in only a Benson situation. Wisconsin's Marital Property Act128 provides a guide as to possible lan-

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126. For example, where the former nonemployee spouse is deprived of her community share in her former spouse's retirement benefits. See supra text accompanying notes 35-36.
127. See supra text accompanying notes 121-23.
guage of the amendment.

The Act retains the *Waite* prong of the terminable interest rule.\(^1\) Section 5 of the Act states: "The marital property interest of the nonemployee spouse in a deferred employment benefit plan terminates at the death of the nonemployee spouse if he or she predeceases the employee spouse."\(^2\) According to the Act, then, the nonemployee spouse's heirs can have a survivorship interest in marital property only if the nonemployee spouse outlives the employment.\(^3\) When the nonemployee spouse predeceases the employee spouse, the marital property interest of the nonemployee spouse terminates. This is in conformity with the terminable interest rule.\(^4\) In partially retaining this rule, the Act precludes the possibility of the predeceased nonemployee spouse devising a portion of the surviving employee spouse's retirement.\(^5\)

Nevertheless, the Act still seems to abrogate the *Benson* part of the terminable interest rule.\(^6\) Consequently, given the situation where the employee spouse predeceases the nonemployee spouse, an application of the Act would permit the former nonemployee spouse to receive his or her community share of the employee spouse's benefits.

Thus, the incorporation of the Wisconsin's Marital Property Act into section 4800.8 as an amendment would produce the needed modification. The application of section 4800.8 would no longer result in the employee spouse being stripped of retirement benefits upon the death of the nonemployee spouse. Additionally, the statute would be applied only in situations where its application is truly necessary. In this way, the underlying need for the statute would not be compromised.

The Uniformed Services Former Spouses Protection Act (USFSPA)\(^7\) provides further guidance for an amendment to section 4800.8 that would retain the *Waite* prong of the terminable interest

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1. Act, effective January 1, 1986, is embodied in section 766.62).
2. Id.
3. Id.
rule. Under the USFSPA, a court may categorize military retired benefits as either separate property of the retired member or the property of the member and his ex-spouse. The Act additionally provides that an ex-spouse entitled to a portion of military retirement pay may not sell, assign, or transfer that interest. Furthermore, the interest may not be devised or inherited by that spouse's devisees or heirs. Thus, with the promulgation of the USFSPA, Congress recognized the need to retain the Waite prong of the terminable interest rule with respect to military pensions.

To recognize this same need, the California Legislature should amend section 4800.8 to read:

The Court shall make whatever orders are necessary or appropriate to assure that each party receives his or her full community property share in any retirement plan whether public or private, including all survivor benefits, including but not limited to either of the following:

a) Order the division of any retirement benefits payable upon or after the death of either party in a manner consistent with section 4800.8.

b) Order a party to elect a survivor benefit annuity or other similar election for the benefit of such other party, as specified by the court, in any case in which a retirement plan provides for such election.

c) In the event that the nonemployee spouse predeceases the employee spouse, the interest of the nonemployee spouse in a deferred employment plan shall terminate.

Furthermore, section 2 of the statute should be amended to read: “It is the intent of the Legislature to abolish the terminable interest rule set forth in Benson, in order that retirement benefits shall be divided in accordance with section 4800.”

This amendment, in effect, would eliminate the Benson inequity. A former nonemployee spouse may claim his or her community property share in the employee spouse’s benefits. Moreover, this amendment would preclude the predeceasing nonemployee spouse from devising a portion of the surviving spouse’s retirement benefits.

138. See supra text accompanying note 1 for comparison.
139. See supra note 2 for comparison.
V. Conclusion

Section 4800.8 changed community property law in California. In enacting the statute, the California Legislature abolished the terminable interest rule set forth in Benson and Waite. With section 4800.8’s application, a former nonemployee spouse may receive his or her community share in the retirement benefits of the employee spouse. Additionally, the interest of the nonemployee spouse extends to benefits payable after the death of either spouse. However, section 4800.8’s application can render inequitable results. These effects can be mitigated by an amendment to the statute. This amendment would restrict section 4800.8’s application to situations where its employment is absolutely necessary. If such an amendment were adopted, section 4800.8 could effectively fulfill the need for which it was enacted, while mitigating the inequities from its application.

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