Distribution of Pension Benefits in Marital Dissolutions: Determining the Time of Valuation of the Community Interest

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DISTRIBUTION OF PENSION BENEFITS IN MARITAL DISSOLUTIONS: DETERMINING THE TIME OF VALUATION OF THE COMMUNITY INTEREST

I. INTRODUCTION

California Civil Code section 4800 requires that all community property be divided equally between the spouses in a marital dissolution. Community property is defined in general terms by section 4800 as being all property acquired by either spouse during marriage.

The computation and apportionment of each spouse's respective interest in a retirement fund in compliance with the equal division requirement of section 4800 can be an amorphous task. For example, pension benefits are often composed of the separate property interest of the employee spouse as well as the community interest. To complicate matters, few retirement plans are similar in composition, and their values are often subject to complexities and differences of expert opinion. As a consequence, the courts use various methods of apportionment to ascertain a spouse's interest in retirement benefits in an attempt to distribute the funds equitably.

California courts have traditionally employed the "time rule" method of apportionment, which requires the courts to set a value for the pension as of the date of trial. More recently, in In re Mar...
riage of Behrens, however, the court valued the community interest in a retirement plan at the time of separation. Because pensions increase in value as time passes, the community interest in a plan is greater if the plan is valued at the time of trial. The Behrens method of placing valuation at the time of separation is thus inconsistent with the cases which adhere to the "time rule." This dichotomy has generated confusion as to which method of apportionment is appropriate in valuing pension rights upon the dissolution of marriage. It is unclear whether the Behrens method should be recognized as a genuine alternative to the "time rule."

The problem is not one of computing a nonemployee spouse's interest in present or future benefits, but is rather a lack of guidance from the courts as to which allocation rules should govern the division of retirement benefits. This comment will analyze legislative and judicial treatment of the apportionment of retirement benefits in marital dissolutions to show that Behrens is consistent with precedent. Additionally, this comment will outline problems with the "time rule" method of apportionment and will assert that no one method of allocation should be used to the exclusion of others because of the great variation in pension plans. The comment will also focus on the primary objective of the legislature and the courts to accomplish an equitable distribution of community assets. Finally, this comment will set forth guidelines to accomplish this purpose, and will specifically define when valuation of a community interest in a retirement plan should take place.

II. THE NATURE AND DISTRIBUTION OF PENSIONS

In order to comprehend the problems inherent in the apportionment of pensions, it is essential to acquire a basic understanding of retirement plans and their distribution in marital dissolutions. For the purpose of this comment, retirement plans include those established by an employer to provide deferred benefits for employees after retirement or upon the termination of service.
A. Types of Retirement Plans

Generally, pension plans can be characterized as either defined benefit plans or defined contribution plans. Defined benefit plans are the most common and promise a definite amount of compensation at the retirement date. The amount of contribution required to fund the benefit plan, however, varies with age, sex, salary, actuarial assumptions, and plan experience. The benefits awarded under this plan are not dependent upon the amount placed into the plan by either the employer or the employee. The employee's present interest in the plan is derived from the amount of monthly benefits promised at retirement, rather than from the plan's present value. Consequently, the present valuation of an interest in such a plan is so complicated that it requires the services of an actuary.

The value of defined contribution plans, on the other hand, is based entirely on the amount put into the plan by the employee or by the employer on behalf of the employee. The annual contribution in a defined contribution plan is known, whereas the amount of the final benefit is not, since it depends upon the number of annual contributions made. Consequently, at any point in time, a participant's accrued benefit in such a plan is generally the balance of that individual's account, and thus is readily identifiable.

Except for the very broad categories of defined benefit and defined contribution mentioned above, retirement plans are not uniform and each plan contains different elements which substantially affect its valuation. Thus, as an appellate court has noted, almost

9. Defined benefits plans primarily include those based on a percentage of earnings.
12. Projector, supra note 4, at 231.
13. The value additionally includes accumulations acquired through investment. Types of defined contribution plans include money purchase pensions, profit sharing plans, employee stock ownership trusts, savings plans, thrift plans and target benefit plans. Ross, Projector & Jacoby, supra note 10, at 10.
15. Elements differing in each plan and substantially affecting their valuation include (1) the terms of vesting which determine the benefits to the employee who quits or is fired before retirement; (2) the benefits at retirement; (3) the loss of retirement benefits if disability benefits are obtained; (4) the availability or lack of availability of options providing continuing benefits to the unemployed spouse in the event of death; (5) the rights of the employee spouse to elect retirement payments; (6) early retirement; (7) late retirement; (8) death benefits instead of retirement benefits; and (9) any other possible combination of these various factors. Clemens & Jaffe, supra, note 11, at 318.
every case dealing with a different kind of pension is *sui generis.*

B. **Methods of Distribution in Marital Dissolutions**

Understanding the process of valuing a pension plan is necessary in order to distribute its funds in a marital dissolution proceeding. California courts dispose of retirement benefits in marital dissolution proceedings in one of three ways: (1) all retirement benefits may be awarded to the employee spouse and other equalizing assets awarded to the nonemployee spouse, (2) the benefits may be divided in kind by applying a percentage formula to each benefit when received, or (3) the court can reserve jurisdiction to establish the method of division at a later time. In the first two situations, a present valuation of the community interest is required, and methods of apportionment such as the "time rule" come into play.

It is preferable when dividing community interests in a retirement plan to award the pension rights to the employee spouse and to equalize this division of property by awarding other community property of equal value to the nonemployee spouse. Yet, despite this "preferred" method of division, California courts retain the discretion to divide the community assets in any manner which they deem the most compatible with the "equal division" provisions of California community property law and the most equitable under the circumstances.

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16. *In re Marriage of Adams,* 64 Cal. App. 3d at 184, 134 Cal. Rptr. at 300 (court dealt with complicated issues of apportionment in determining the community property and the separate property portions of the husband's retirement benefits).


18. See *In re Marriage of Marx,* 97 Cal. App. 3d 552, 159 Cal. Rptr. 215 (1979) (award of all pension benefits to husband justified on a showing of strong economic need for wife and children to keep the family home).

19. See *In re Marriage of Fithian,* 10 Cal. 3d 592, 517 P.2d 449, 111 Cal. Rptr. 369 (1974) (71% of husband's retirement pay found to be community property and husband directed to pay 35% of his post-dissolution retirement benefits to wife as he received them).


21. The mechanics of computing the present value of future retirement benefits are extremely complicated. The court must first find the value of the benefits calculated as a lump sum as of the date the employee will retire under his or her particular pension. This sum is then reduced to a present value by discounting the lump sum for interest, mortality and vesting. Due to the complexity of ascertaining the present value of pensions, the services of actuaries are employed. For a thorough treatment of the process of computing the present value of future pension benefits, see Projector, *Valuation of Retirement Benefits in Marriage Dissolutions,* 50 L.A. B. Bull. 229 (1975).


III. LEGISLATIVE AND JUDICIAL TREATMENT

A. Statutory Basis

California community property law requires that all community assets be divided equally upon the dissolution of marriage. An employee's salary earned during marriage is regarded as community property. Similarly, to the extent that retirement benefits are earned during marriage, they constitute community property.

Prior to 1976, it was necessary to distinguish between vested and nonvested retirement benefits when distributing such funds upon the dissolution of marriage. Nonvested benefits were considered to be mere expectancies and were not considered to be property; thus, only vested benefits were considered a community asset subject to division at the termination of marriage. In the 1976 case of In re Marriage of Brown, however, the California Supreme Court determined that the characterization of retirement benefits as either vested or nonvested did not necessarily reflect the community's contribution toward the benefits, and thus often resulted in the inequitable division of property upon dissolution of marriage. The court held that nonvested pension benefits are contingent property interests, not mere expectancies, and that such benefits are community assets to

24. CAL. CIV. CODE § 4800 (West 1983). California Civil Code § 4800 provides in relevant part that the court shall divide assets either (a) in its interlocutory judgment decreeing the dissolution of the marriage or in its judgment decreeing the legal separation of the parties, or (b) at a later time, if the division of property is in issue. It expressly reserves jurisdiction to make such a property division and to divide the community property and the quasi-community property equally.

25. CAL. CIV. CODE § 5110 (West Supp. 1983). California Civil Code § 5110 provides, in pertinent part, "all real property situated in this state and all personal property wherever situated acquired during the marriage by a married person while domiciled in this state . . . is community property."


27. French v. French, 17 Cal. 2d 775, 778, 112 P.2d 235, 236 (1941). "Vested" refers to a pension right which is not subject to a condition of forfeiture if the employment relationship terminates before retirement. "Nonvested" refers to a pension right which is subject to such a condition of forfeiture.

28. Id.


30. Id. at 841-42, 544 P.2d at 562-63, 126 Cal. Rptr. at 634-35.
the extent that they are acquired during marriage. Consequently, when a marriage is dissolved all retirement benefits earned and accumulated during marriage, whether or not vested, are now required by California Civil Code section 4800 to be equally divided between the spouses.

Theoretically, the division of retirement benefits upon dissolution should be an easy task—each spouse should receive a fifty percent share of the total amount of the fund. Yet, if the spouses were not married to each other throughout the entire period of employment, the nonemployee spouse has not contributed to the retirement plan for the period of employment occurring either prior to the marriage or subsequent to separation. Thus, the employee spouse may have a separate property interest in part of the retirement plan. In such a situation, apportionment between separate and community interests is necessary. California Civil Code section 5118 establishes that spouses no longer accumulate community property once they have separated and are living apart. Earnings and accumulations acquired by each spouse after separation, then, become the separate property of each. Consequently, unless a post-separation increase in a pension fund is attributable to previous contributions made during marriage, California Civil Code section 5118 would require that such an increase be deemed the separate property of the employee spouse.

California Civil Code section 4800 gives the courts flexibility to allocate such post-separation increases in compliance with its “equal division” requirement. The original language of section 4800 stated that community assets should be valued at the time of trial. A 1976 amendment to that provision, however, provides that for good cause valuation may be placed at a date after separation and prior to trial. The courts have repeatedly pointed out that the intent of this

31. Id. at 842, 544 P.2d at 562-63, 126 Cal. Rptr. at 634-35.
32. Id.
33. CAL. CIV. CODE § 5118 (West 1983), supra note 2.
34. Id.
35. Id.
38. CAL. CIV. CODE § 4800 (a) (West 1983). The text of California Civil Code § 4800, subsection (a), provides that:
the court shall value the assets and liabilities as near as practicable to the time of trial, except that, upon 30 days' notice by the moving party to the other party, the court for good cause shown may value all or any portion of the assets and liabilities at a date after separation and prior to trial to accomplish an equal
amendment is to remedy inequities which might result, for example, when the efforts of one spouse alone cause a substantial post-separation increase in the value of the community estate, and when valuation at the time of trial would thus deprive a spouse of his or her separate property. Consequently, whenever the earnings of an individual spouse increase the value of a community asset, the courts must determine what portion constitutes the separate interest.

The time of valuation of a retirement fund becomes significant in situations where a lapse of time has taken place between separation and the time of trial. If valuation takes place at the time of trial, any post-separation increases to the plan will be considered community assets, regardless of the fact that they may be attributable to the efforts of one spouse living separate and apart from the other. Valuation at the time of separation, however, will appropriately attribute such increases to the employee spouse.

B. The “Time Rule” Method of Apportionment

In California, the courts have most frequently employed the “time rule” method of apportionment to make the allocation between community and separate portions of pension benefits. This method of apportionment, which places valuation at the time of trial, is based on the principle that the nonemployee spouse’s share of the retirement fund is directly proportionate to the amount of time that the employee spouse contributes to the fund during the existence of the community. Applying this concept, the “time rule” computes the community interest as a fraction of the total benefits. The numerator represents the time period in the pension plan during marriage, and the denominator represents the total number of years in the plan. For example, an employee who receives $600 per month

\[
\text{community interest} = \frac{x \times (\text{length of service during marriage} + \text{total time in plan})}{1005}
\]

division of the community property and the quasi-community property of the parties in an equitable manner.

Id.

43. Adams, 64 Cal. App. 3d at 182, 134 Cal. Rptr. at 302.
44. The “time rule” is perhaps more easily visualized when expressed as:

\[
\frac{1}{2} x \times (\text{length of service during marriage} + \text{total time in plan}) = \text{community interest.}
\]
on retirement must divide those benefits in the following manner: if the employee spouse has participated in the plan for twenty years, and the length of the time between the date of marriage and the date of dissolution is fifteen years, the nonemployee spouse is entitled to a monthly payment of $225 or 600/2 x 15/20.

While the "time rule" is not the exclusive method used in California to allocate community and separate portions of retirement benefits,\textsuperscript{45} the courts have suggested that it is the most appropriate. In \textit{In re Marriage of Judd},\textsuperscript{46} the court explained why this method of division promotes the "equal division" requirement of California Civil Code section 4800:

Where the total number of years served by an employee-spouse is a substantial factor in computing the amount of retirement benefits to be received by that spouse, the community is entitled to have its share based upon the length of service performed on behalf of the community in proportion to the total length of service necessary to earn those benefits. The relation between years of community service to total years provides a fair gauge of that portion of retirement benefits attributable to community effort.\textsuperscript{47}

The "time rule" complies with section 4800 in that it places valuation at the time of trial as recommended by that statute.\textsuperscript{48} Consequently, courts have repeatedly employed the "time rule" in the belief that it will accomplish an equitable distribution of benefits.\textsuperscript{49}

\textbf{IV. Behrens Not Inconsistent With Precedent}

In \textit{In re Marriage of Behrens},\textsuperscript{50} however, the court held that the community interest in a profit sharing plan\textsuperscript{51} was to be valued at the time of separation.\textsuperscript{52} The court attributed a post-separation increase to amounts intended and received as a form of compensation.

\begin{itemize}
\item \textsuperscript{45} Adams, 64 Cal. App. 3d at 187 n.8, 134 Cal. Rptr. at 302 n.8.
\item \textsuperscript{46} 68 Cal. App. 3d 515, 137 Cal. Rptr. 318 (1977).
\item \textsuperscript{47} \textit{Id}. at 522-23, 137 Cal. Rptr. at 321.
\item \textsuperscript{48} \textit{CAL. CIV. CODE} § 4800 (West 1983).
\item \textsuperscript{49} See cases cited \textit{supra} note 42.
\item \textsuperscript{50} 137 Cal. App. 3d 562, 187 Cal. Rptr. 200 (1982). In Behrens, the trial court valued the husband's retirement benefits at $69,000, found the entire plan to be community property, awarded the plan to the husband, and awarded the wife $69,000 in offsetting community property. \textit{Id}. at 577, 187 Cal. Rptr. at 209.
\item \textsuperscript{51} A profit sharing plan is an "incentive" type of retirement plan where the employer's contributions to the fund are derived from the annual profits earned by the company. The allocation formula is generally related to compensation, but service and other factors may be given consideration.
\item \textsuperscript{52} \textit{Behrens}, 137 Cal. App. 3d at 577, 187 Cal. Rptr. at 209.
\end{itemize}
subsequent to separation. Since earnings of an employee spouse received after separation are his or her separate property, the nonemployee spouse's interest in the benefits was held to constitute one-half of the community interest in the plan at separation, together with any post-separation increases specifically attributable to the assets already in the plan as of separation. As pensions only increase in value as time passes, the community interest in a plan is less if valued on the date of separation. This makes a significant difference when the earnings are substantial and the time lapse from separation to trial is considerable.

While the method of apportionment employed in Behrens may be inconsistent with the "time rule" as used in previous cases, neither section 4800 nor the courts have ever required that the "time rule" be followed to the exclusion of other apportionment methods. In the case In re Marriage of Adams, for instance, the court remarked in a footnote:

We are not saying that the "time rule" is the only rule. . . . [W]e can envision an increase in benefits after separation that might be caused solely by the employee spouse's earnings. In such a case it would be an abuse of discretion to give a portion of the increase to the community.

However, in In re Marriage of Marsden, another court held that retirement benefits should not be valued at the time of separation, but rather at the time of trial. The Marsden court's unqualified statement implies that pension benefits are never to be valued at separation. Explaining its decision, the court said that when the pension benefits are to be divided according to their present value, as opposed to their value at a later date, the appropriate date of valuation is the date of trial. The court thus equated "present" with "time of trial." This interpretation contradicts both the legislative intent behind section 4800—which specifically allows for valuation

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53. Id.
54. Id. (citing CAL. CIV. CODE § 5118).
55. Behrens, 137 Cal. App. 3d at 577, 187 Cal. Rptr. at 209.
57. 64 Cal. App. 3d 181, 134 Cal. Rptr. 298 (1976).
58. Id. at 187 n.8, 134 Cal. Rptr. at 302 n.8.
60. Id. at 448, 181 Cal. Rptr. at 922.
61. See supra notes 17-21 and accompanying text.
62. Id.
to take place at a time other than at trial—and prior assertions by the courts that they have the discretion to employ whatever method they deem "reasonable" in dividing retirement benefits. Consequently, even though the Marsden court found valuation at the time of trial to be the most appropriate for the particular facts before them, their statement that this should be done as a general rule was erroneous.

The courts have clearly retained the discretion to use any "reasonable" method in allocating pension rights. In In re Marriage of Freiberg, the court applied the "time rule," but added that trial courts exercise judicial discretion in deciding which method should be used to distribute the community interest in pension plans. Such a determination will not be disturbed unless an abuse of discretion is evident. "The criterion governing judicial action is reasonableness under the circumstances," the court stated, and the methods used are determined from the facts in each case. Thus, the Behrens court was free to select the method of apportionment most equitable in that particular case.

Further evidence that Behrens is not incompatible with California case law is found in the specific language of section 4800. That section does not require that valuation take place at the time of trial, only that it be done "as near as [is reasonably] practicable" to that time. This phrasing evidences the legislature's awareness of situations in which both the nature and the value of the community property should not be fixed at the precise time of trial. Furthermore, section 4800 provides that the courts may "for good cause shown . . . value all or any portion of the assets and liabilities at a date after separation and prior to trial to accomplish an equal division of the community property and the quasi-community property of the parties in an equitable manner."

The court in Behrens found the post-separation increase to be

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63. CAL. CIV. CODE § 4800(a) (West 1983).
64. See infra notes 66-68 and accompanying text. In Marsden, the court appears also to have erroneously equated "marital property" with "retirement benefits." Marital property connotes a community interest in an asset. A retirement plan, however, can be comprised of separate as well as community property.
65. The court in Marsden did not discuss the particulars of the pension at issue in that case. However, it can be assumed that the court determined that valuing the plan at the time of trial, rather than at separation, would accomplish a more equitable distribution.
67. Id. at 312, 127 Cal. Rptr. at 798.
68. Id.
69. CAL. CIV. CODE § 4800 (a) (West 1983).
70. Id.
separate property and concluded that awarding that increase to the community interest by valuing the assets at the time of trial would be inequitable. 71 The court's decision to place valuation at a time other than at trial was consequently within the bounds of both its discretion and section 4800.

V. PROBLEMS WITH THE "TIME RULE"

The question then arises as to which method of apportionment the courts should employ in each situation. The "time rule" method of allocation does not consider that the majority of pension plans accrue at a disproportionate rate throughout a career. 72 Therefore, the "time rule" does not always accurately reflect the relative spousal contribution to any post-separation increases to the retirement plan. Under the "time rule," for instance, where the employee spouse works for twelve years during marriage for a company which requires twenty years of employment for retirement, the community interest in the retirement fund will be 12/20 of the total plan. When, however, contributions are based on a percentage of present income, and that income has been steadily increasing over the years, the community interest will actually be less than 12/20, because less than 12/20 of the total dollar contributions will have been made during the marriage. If such a plan is valued at the time of trial, the community portion of the pension benefits will reflect part of the increase in value attributable to the higher salary the employee spouse received after separation. In such a situation, the employee spouse is treated as though he has earned the same amount of pension benefits each month of his employment, when in fact, his salary was higher in the later months. Consequently, the later and higher salary was responsible for a greater percentage of the pension benefits. 73 When pension rights accrue at a disproportionate rate an application of the "time rule" results in an inequitable distribution of the funds. Unless an increase to a retirement fund occurring after

71. Behrens, 137 Cal. App. 3d at 577, 187 Cal. Rptr. at 209. As the court said in Behrens regarding the pension benefits in that case, "[w]e are not dealing here with an indivisible appreciating asset which is to be valued, as a general rule, at the time of trial rather than at date of separation." Behrens, 137 Cal. App. 3d at 577, 187 Cal. Rptr. at 209.

72. Pension benefits are generally calculated as a percentage of an employee's salary. Thus, assuming that an employee's compensation increases as his employment responsibilities increase, it follows that the percentage of pension benefits earned during the later years of employment are normally greater than those earned during the earlier years of employment. Thus, pension benefits normally do not accrue at a fixed rate throughout an employee's career.

separation can be traced to earlier contributions made during marriage, California Civil Code section 5118 requires that post-separation increases to the pension fund be deemed the separate property of the employee spouse.\(^7\)

However, the courts have rejected formulas which give greater weight to time periods worked after separation, even when salary and pension contributions have significantly increased.\(^7\) In *In re Marriage of Anderson*, for example, the court stated that the first few years of service during marriage must be given just as much weight in computing total service as the last few years after separation.\(^7\) The justification for this determination was given in *Judd*,\(^7\) where the court stated:

> [A]n employee's contributions in the early years of employment during marriage, even though based on a smaller salary, may actually be worth more than contributions during the post-separation years, due to the longer period of accumulated interest and investment income prior to the commencement of benefit payments.\(^7\)

This rationale is based on the theory that the services rendered by the nonemployee spouse to the community during the early, low-paid years of the employee spouse's employment provide the foundation for the post-separation escalation of pension benefits and thereby justify the nonemployee spouse's right to share equally in the increased benefits.\(^7\) Nonetheless, there will be cases in which the employee spouse will continue to work after separation and the increased retirement benefits will not be the result of a foundation provided by the prior community contributions. In such instances, the courts should select a more equitable method of distribution which will attribute those post-separation increases to the employee spouse. Departure from the "time rule" method of placing valuation at the time of trial can be justified on the basis that California Civil Code section 511B\(^8\) as being more equitable, and thereby constituting "good cause" within the purview of California Civil Code section 4800.

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74. *See supra* note 2.
75. *Freiberg*, 57 Cal. App. 3d at 311, 127 Cal. Rptr. at 797; *Anderson*, 64 Cal. App. 3d at 39, 134 Cal. Rptr. at 253; *Judd*, 68 Cal. App. 3d at 523, 137 Cal. Rptr. at 322.
76. 64 Cal. App. 3d 36, 39, 134 Cal. Rptr. 252, 253 (1976).
78. *Id.* at 523, 137 Cal. Rptr. at 322.
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subsection (a). 81

VI. ANALYSIS: GUIDELINES FOR THE COURTS TO FOLLOW IN DETERMINING TIME OF VALUATION

The courts have not set forth factors which determine when valuation is to take place at the time of trial and when it is to take place at separation. Some general guidelines based on precedent and equity, however, can be set forth for the courts to follow.

A. POST-SEPARATION INCREASES RESULTING FROM PERSONAL AND NON-PERSONAL FACTORS

In deciding when to value the community interest in certain kinds of assets, courts have made a distinction between post-separation increases due to personal factors—those resulting solely from the efforts of the employee spouse—and nonpersonal factors—those attributable to elements not under the employee spouse’s control. For instance, the courts have disallowed valuation of corporate stock at the time of separation when post-separation increases have been the result of market forces, and not the result of the employee spouse’s own labors. 82

In In re Marriage of Aufmuth, 83 the court valued the community interest in a professional corporation at the time of trial, rejecting the employee spouse’s argument that valuation should take place at the date of separation. 84 The court in Aufmuth acknowledged that if the post-separation earnings of a spouse increase the value of the community asset, the courts must ascertain what portion is separate property. 85 Although the court observed that the word “earnings” is broader in scope than “wages” and “salaries,” it held that “in contrast, the earnings of a corporation are not, generally speaking, the earnings of the individual stockholder or stockholders, but are ‘profits’ of the corporation . . . .” 86 An employee who is also a stockholder, the court went on to explain, takes his earnings in salary, bonuses and other forms of benefits. 87 The court then placed

82. Aufmuth, 89 Cal. App. 3d 446, 152 Cal. Rptr. 668; Imperato, 45 Cal. App. 3d 432, 119 Cal. Rptr. 590.
84. Id. at 464, 152 Cal. Rptr. at 679-80.
85. Id.
86. Id. (quoting Imperato, 45 Cal. App. 3d at 438, 119 Cal. Rptr. at 594).
valuation at the time of trial and applied the post-separation increases at issue to the community interest. The court thus made the distinction between post-separation increases generated by a corporate entity and those generated by the individual labors of the employee spouse. A similar distinction was made in *In re Marriage of Priddis* where the court divided stocks in a marital dissolution proceeding. In that case, the court recognized that the purpose of section 4800, subsection (a), in allowing valuation to be placed at a time other than at trial, is to remedy inequities which might result when post-separation increases in the value of the community estate are the result of the efforts of one spouse alone. On the other hand, the court stated that "when an asset increases in value from nonpersonal factors such as inflation or market fluctuations, generally it is fair that both parties share in that increased value."

Although *Aufmuth* and *Priddis* involved the division of community assets other than pension funds, the distinction those cases draw between personal factors and nonpersonal factors is applicable to the apportionment of pension benefits. Although what constitutes a post-separation increase to a pension due to a personal factor and what constitutes one due to a nonpersonal factor has not yet been addressed by the courts, there are criteria by which increases to pension plans can be characterized as resulting from personal or nonpersonal factors.

1. **Increases Due To Merit Raises**

Pension benefits increase in value for a variety of reasons. Commonly, increases are based on the employee’s compensation. Benefits in a pension are frequently based on an employee’s initial compensation with allowances for increases in that compensation during the period of employment. As compensation generally increases with employment responsibilities, so do contributions to the pension.

Promotions which increase compensation are clearly the product of the employee spouse’s own skills, energy and labor, since they reward individual merit. Thus, where the court finds that a post-

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88. *Id.* at 465, 152 Cal. Rptr. at 680.
89. 132 Cal. App. 3d 349, 183 Cal. Rptr. 37 (1982).
90. *Id.* at 355, 183 Cal. Rptr. at 39, (quoting *In re Marriage of Barnert*, 85 Cal. App. 3d 413, 423, 149 Cal. Rptr. 616, 622 (1978)).
92. California Civil Code § 4800(a), provides that valuation may be made at a time other than trial when post-separation increases in the value of the community estate are the result of the effort of one spouse alone. CAL. CIV. CODE § 4800 (a) (West 1983).
separation increase is due to a merit raise, it should value the benefits at the date of separation in order to attribute that increase to the employee spouse. To do so allows the employee spouse to enjoy the fruits of his own labors after separation, and thereby accomplishes an equitable distribution of the benefits in compliance with section 5118.

2. Increases Due To Longevity Raises

Alternatively, benefits can be based upon the total number of years the employee has been in the service of the company. It is not uncommon, for example, to find a pension which provides for a fixed percentage of benefits computed on the basis of the employee’s compensation for each year of past and future service.

Longevity raises are received for prior years of service. Thus, a longevity raise which occurs after separation can be said to be the product of the previous community contribution. For example, a couple has been married for ten years, during which the husband has participated in a pension plan. The couple then separates and the husband receives a salary increase in recognition of his prior ten years of service, an increase reflected in his pension. To allow the husband to be awarded the post-separation increase in the plan as his separate property would ignore the fact that the community, rather than the husband, actually made the contributions to the plan during those ten years. The greater the lapse of time between separation and trial, however, the less likely a longevity raise can be said to be the result of prior community contributions. If the spouses are separated for eight years before dissolution, and the employee spouse receives longevity raises every two years, it is difficult to reason that a longevity raise received for the eight years of service after separation is the product of the previous community contribution.

Thus, where the court finds that a post-separation increase to a pension is the result of a longevity raise, and that the time between separation and trial is not proportionately long, the court should value the pension benefits at the time of trial and attribute the increase to the community interest. To place valuation at the date of separation, in such a situation, would be inequitable, as the employee spouse would be allowed to enjoy benefits which are not solely the product of her own time and energy.

3. Increases Due to Cost-of-Living Raises

Post-separation increases to pensions can also be the result of
cost-of-living raises. Some pensions are specifically designed to cope with inflationary pressures. A "cost-of-living pension," for example, provides a retirement income that varies from month to month in relation to a cost-of-living index. More commonly, pension benefits are calculated as a percentage of an employee's salary and a cost-of-living increase to that salary will result in an increase to the retirement fund. Such increases are not merit raises, but rather the result of the "reevaluation of money." A post-separation increase to a pension which is a consequence of a cost-of-living raise, then, is not due to the skills and labors of the employee spouse, and is no more within his control than increases resulting from inflation and market fluctuations. In such a situation, the nonemployee spouse should also share in the increase, and the court should value the retirement benefits at the time of trial in order to attribute the entire post-separation increase to the community interest.

4. Increases Due To Forfeitures From Accounts of Terminated Employees

A pension may obtain an additional element of value when other employees leave the plan early. The ultimate benefits received by the employee spouse could be greater than contributions made during marriage if the pension reflects an additional component of contributions made on behalf of other employees and subsequently forfeited by them. Post-separation increases to a pension which are the result of such forfeitures by other employees should not be deemed the separate property of the employee spouse. In such instances, the pension benefits have appreciated on their own without regard to the individual labors of the employee spouse. In order to properly characterize such increases as community property, the court should value the assets of the pension at the time of trial.

5. Increases Due To Returns From Investments

A pension plan is generally administered by a trustee, usually the employer company, which places the plan's funds in various types of investments. A plan's value is increased through returns on

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95. Clemens & Jaffe, supra note 11, at 319.
96. Typical investments held by retirement plans include government and corporate
those investments. Thus, similar to sections three and four above, when the value of community assets has increased subsequent to separation due to such nonpersonal factors as inflation and other market fluctuations, the fairest equal division of those assets is one which allows both spouses to share equally in the gain. This rationale should be extended to post-separation increases due to returns on investments, which are closely related to market fluctuations, and are therefore nonpersonal. Furthermore, such post-separation increases are essentially the product of the previous community interest, with which the original investment was made, and not the earnings of the employee spouse subsequent to separation. Consequently, where the court finds that a post-separation increase to a pension is the result of returns from investments of the community interest in the plan, the value of the plan should be placed at the time of trial in order to attribute that increase to the community.

6. Summary

When a post-separation increase to a retirement fund is due to a personal factor such as individual effort resulting in a merit raise, valuation should be placed at separation in order to award that increase to the employee spouse. When, however, a post-separation increase is the result of such nonpersonal elements as longevity raises, cost-of-living raises, and investment returns, valuation should be placed at the time of trial so that the nonemployee spouse may share in the gain. Valuing pensions in this manner is consistent with the expectations of the individual spouses. The employee spouse expects that the fruits of his or her labor subsequent to separation are his or her own, and the nonemployee spouse assumes that he or she is entitled to share in the benefits earned by his or her investment in the community.

B. Application of the “Direct Tracing” Method

Quite often, post-separation increases are the result of a combination of both personal and nonpersonal factors. It is not unusual to find a post-separation increase resulting from a merit raise as well as from interest accumulated through investment. A problem then arises as to whether such post-separation increases are to be charac-

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terized as separate property or as community property. The "time rule" method of valuing the assets at the time of trial would automatically attribute the entire post-separation increase to the community, and thus deny the employee spouse that portion of the increase which is the result of his or her own efforts. Valuation at the time of separation, however, would produce the opposite and equally inequitable result. This problem is similar to the difficulty of apportioning "commingled" assets. Generally speaking, "commingling" refers to the investment or use of separate and community assets which have been mixed in a savings account, or used to purchase property or pay community expenses.100

A rebuttable presumption exists that all property acquired during marriage is community property.101 This presumption applies to assets which consist of commingled assets or are derived from a commingled source.102 Thus, if separate and community assets have been commingled so that it is impossible to determine and identify each source, the commingled whole will be presumed to be community property.103 The presumption can be rebutted, however, by tracing the separate property to its source.104 Consequently, if the source of specific property can be identified, that property will be accorded separate property status.105

The "direct tracing" method is one means the courts recognize to rebut the commingling presumption and to ascertain that an item is separate property.106 This method simply involves identifying the source of the property in question with such evidence as bank records and receipts.107 As long as the total amount of commingled separate property may be "directly traced," it does not lose its character when commingled with community property.108 Although cases in which the "direct tracing" method has been applied have been

100. Clemens & Jaffe, supra note 11, at 286.
102. Id.
106. In re Marriage of Mix, 14 Cal. 3d 604, 612, 536 P.2d 478, 484, 122 Cal. Rptr. 79, 84 (1975). At present, the courts recognize two methods of rebutting the presumption of community property. One is the "direct tracing" method, and the other is the "family living expense" method. The latter method is used in situations where a purchase has been made out of the commingled fund, and thus is inapplicable to the allocation of pension benefits. See generally Clemens & Jaffe, supra note 11, at 286.
107. Mix, 14 Cal. 3d at 612, 536 P. 2d at 485, 122 Cal. Rptr. at 85.
108. Id.
limited to situations involving savings accounts, checking accounts, and the like, the courts should extend its application to the division of retirement plans where post-separation increases have resulted from personal as well as nonpersonal factors. When it can be shown, through actuarial expertise or otherwise, that the assets which have accumulated since separation can be traced to their source, the community interest should be valued at separation and accorded that portion of the increase established to be part of the community. The employee spouse would then be entitled to those increments of the increase whose sources were directly traced to personal factors. When, however, a post-separation increase results from both personal and nonpersonal factors which are so entwined that their respective sources are unidentifiable, the presumption that all assets acquired during marriage are community property should prevail and the entire post-separation increase should be attributed to the community. Placing valuation at the time of trial would accomplish this result.

This approach would make apportionment of separate and community interests in pension funds more consistent with that used for other types of community assets. In addition, distribution would be more equitable because both the community and the employee spouse would be assured of keeping those increments of post-separation increases which could be directly traced to their respective efforts.

VII. CONCLUSION

In apportioning pension benefits in marital dissolutions, the questions arises as to whether the traditional “time rule” method of placing valuation at the time of trial should be applied, or whether the Behrens method of valuing such assets at separation should be employed, remains unresolved. Until the courts address this issue, confusion will continue, and lawyers and actuaries will attempt to convince the courts to employ one method over the other.

Because pension plans vary greatly in composition, and because numerous elements affect their valuation, no one method of apportionment can accomplish an equitable distribution in all situations. Consequently, the courts should not follow one method of apportionment to the exclusion of all others, but should select that method which will achieve the most equitable distribution possible in each

109. See id. (wife had commingled her community property earnings as an attorney with her separate property income from pre-marriage investments).
instance, in compliance with California community property law. Yet, some guidelines must be established to provide a basis for selecting which method of apportionment to employ. In order to achieve minimal uniformity, courts should distinguish between post-separation pension increases due to personal factors and those due to nonpersonal factors. When a post-separation increase results solely from the efforts of the employee spouse, valuation should be placed at separation in order to award the increase to that spouse as his or her separate property. Conversely, when the pension has appreciated on its own since separation, valuation should be placed at the time of trial to attribute that increase to the community. If a post-separation increase results from both personal and nonpersonal factors, the courts should apply the "direct tracing" method to identify the various sources of the increase.

Valuing the community interest in pension benefits in this manner will accomplish an equitable distribution in compliance with California Civil Code section 4800.\textsuperscript{110} The employee spouse will keep those earnings made after separation, as required by California Civil Code section 5118,\textsuperscript{111} and the nonemployee spouse will still share in those contributions made by the community during marriage, as mandated by California Civil Code section 5110.\textsuperscript{112}

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\textsuperscript{110} See supra note 24 and accompanying text.
\textsuperscript{111} See supra note 2 and accompanying text.
\textsuperscript{112} See supra note 25 and accompanying text.