

STATE OF CALIFORNIA
CALIFORNIA LAW
REVISION COMMISSION

TENTATIVE RECOMMENDATION

relating to

DIVISION OF EMPLOYEE PENSION BENEFIT PLANS

September 1984

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

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

CALIFORNIA LAW REVISION COMMISSION
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TENTATIVE RECOMMENDATION

relating to

DIVISION OF EMPLOYEE PENSION BENEFIT PLANS

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

These two methods of handling retirement assets are recognized in the case law and have been given judicial approval.² A trial court has broad discretion to select either method. In Phillipson v. Board of Administration,³ the present disposition was declared the preferred method, but later cases such as Marriage of Skaden⁴ appear to negate any preference. As a result, some judges prefer the present disposition system while others prefer reservation of jurisdiction. Some practitioners believe that present disposition still appears to be favored by existing law.⁵

1. See Hardie & Sutcliffe, Reserving Jurisdiction: A Potential Trap, California Lawyer 33 (July/August 1982).
2. In re Marriage of Brown, 15 Cal.3d 838, 544 P.2d 561, 126 Cal. Rptr. 633 (1976).
3. 3 Cal.3d 32, 89 Cal. Rptr. 61 (1970).
4. 19 Cal.3d 679, 139 Cal. Rptr. 566 (1977).
5. See letter to California Law Revision Commission from Family Law Section, State Bar of California, dated February 22, 1984 (copy on file in Commission office).

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

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

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

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

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

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

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

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

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

406/200

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

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

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

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

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

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

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

(1) The age of the parties.

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

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

(4) The tax consequences of the division.

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

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

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

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