

1996

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Recommended Citation

Joan M. Krauskopf and Sharon Burgess Seiling, *Pilot Study on Marital Power as an Influence in Division of Pension Benefits at Divorce of Long Term Marriages, A*, 1996 J. Disp. Resol. (1996)

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A Pilot Study on Marital Power as an Influence in Division of Pension Benefits at Divorce of Long Term Marriages*

Joan M. Krauskopf and Sharon Burgess Seiling**

I. INTRODUCTION

Property division at divorce ordinarily is accomplished through negotiation of the parties and their attorneys in the "shadow of the law."¹ Nearly all state laws include provisions causing retirement benefits earned during the marriage within the marital property to be shared by the spouses when a marriage ends.² Many anecdotal accounts indicate that pension benefits in the husband's name are often not shared as the law envisions.³ Research data establishes that older divorced women tend to be impoverished later in life when they can no longer work if they do not receive private retirement benefits during a divorce.⁴ No data indicate(s) clearly either the extent to which women of long-term marriages fail to receive the share of pension benefits to which they are entitled or, if they do not, why. The authors hypothesize that women are receiving less pension benefits than they are entitled to during a divorce because the power imbalance in negotiation favors the husband more often than the wife.

The Hewlett Foundation on Dispute Resolution funded a small pilot project designed by the authors to explore whether the hypothesis might be true and to determine a methodology for more extensive research. This article explains the

* The researchers explain a dearth of information about division of pension benefits at divorce during a time that recognition grows of the economic plight of older divorced women with no pension benefits. This article reviews the complexity of dividing pension benefits and the literature on marital power. In addition, the researchers describe a pilot study in which they establish both the feasibility of a larger study and the likelihood that the imbalance of power between long term spouses results in the wife receiving less of the pension benefits than legislators intended.

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1. Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979).

2. Grace Blumberg, *Intangible Assets: Recognition and Valuation* § 23.08, in VALUATION AND DISTRIBUTION OF MARITAL PROPERTY (J. McCahey ed. 1994).

3. Letter from Vickie Gottlich, Staff Attorney, National Senior Citizens Law Center to Joan Krauskopf, Professor of Law, The Ohio State University College of Law (May 26, 1993).

4. William Crown et al., *The Economic Status of Divorced Older Women*, Policy Center on Aging, Heller School, Brandeis University (1993).

applicable law, aspects of power in negotiation, the research methodology, and the tentative findings from the project.

II. THE LAW OF PENSIONS IN PROPERTY DIVISION AT DIVORCE

A. State and Federal Laws

The "no-fault" divorce reform movement which began in California in 1970 shifted the focus of divorce from fault grounds to economic considerations, particularly property division, as all states eventually adopted some version of equitable distribution.⁵ The theory underlying equitable distribution is that marital partners each contribute to the total marriage endeavor.⁶ Therefore, the assets of that partnership should be equitably distributed between them.⁷ In numerous states, a common starting point for division of property after a long marriage is equality. In several others, there is a presumption that the property should be divided equally.⁸ In fact, the Ohio legislature reformed its law to mandate equal division unless the court finds that equality is inequitable.⁹ On its face, the effect should be an equal sharing of the marital assets after divorce of the parties in a long term marriage.¹⁰

Concurrently with the divorce reform movement in the states, pressures to make pension benefits more secure for the well-being of workers and their families resulted in the Federal Employees Retirement Income Security Act of 1974 ("ERISA").¹¹ ERISA's requirements made most employees' contractual rights to pension benefits more secure.¹²

During the 1980's, courts or legislatures in all states classed contractual rights to future pension benefits as property rights.¹³ In most states the pension rights, to the extent earned during the marriage, had to be equitably distributed by the

5. I. Ellman, *Principles of the Law of Family Dissolution: Analysis and Recommendations*, Tentative Draft No. 2, 2 (The American Law Institute, Mar. 14, 1996).

6. *Id.*

7. Barbara Rowe & Alice Morrow, *The Economic Consequences of Divorce in Oregon After Ten or More Years of Marriage*, 24 WILLAMETTE L. REV. 463, 472 (Spring 1988).

8. Ellman, *supra* note 5, at 3.

9. OHIO REV. CODE § 3105.71(C)(1) (1991).

10. *Id.*

11. Federal Employees Retirement Income Security Act of 1974, Pub. L. No. 93-406, 88 Stat. 829 (codified as amended at 29 U.S.C. §§ 1001-1461 (1974)).

12. Dale Vlasek, *Chapter 30—Private Retirement Benefits*, OHIO-DOMESTIC REL. LAW 764, 764 (1987); Camilla E. Watson, *Broken Promises Revisited: The Window of Vulnerability For Surviving Spouses Under E.R.I.S.A.*, 96 IOWA L. REV. 431, 436 (1991).

13. AMERICAN ASSOCIATION OF RETIRED PERSONS, WOMEN'S INITIATIVE, WOMEN, PENSIONS, & DIVORCE: SMALL REFORMS THAT COULD MAKE A BIG DIFFERENCE 30 (1993) [hereinafter A.A.R.P.]. Alabama was the last to join the parade. *Ex parte Vaughn*, 634 So. 2d 533 (Ala. 1993).

court. The Ohio legislation in 1991 removed any doubts by twice specifying that retirement benefits were property subject to division.¹⁴

Largely in response to concerns that homemaker spouses were not adequately sharing in pension benefits attributed to employee spouses' earnings records, Congress passed the Retirement Equity Act of 1984 ("REA").¹⁵ The REA enables state courts to distribute pension benefits between spouses during a divorce as authorized by state law, even though those benefits are otherwise controlled by federal law.

B. Complexity of Pension Benefits and Court Power

To appreciate whether settlements or court orders properly include the value of pension benefits requires a rudimentary understanding of this type of property and the court's power to divide it. The researchers believe that complexity of valuation and division itself increases the probability that pension benefits may be divided less than equitably. Retirement benefits which a state court may divide at divorce include both the cash value of those established by the worker individually (such as IRAs, SRAs, or Keogh plans) and those provided as deferred wages by either a private company or a governmental agency employer.¹⁶ The wide range of plans and benefits and methods of dividing them are exceedingly complex in detail. In the study reviewed in this article, the researchers were particularly interested in disposition of wage-earner pension benefits. However, the scope of the study quickly expanded to include all types of retirement benefits and other property because other property or retirement savings may have been traded for a share of the wage-earner pension benefits during a divorce.

The two most likely benefits provided under a pension plan are the employee's right to periodic payments after retirement (an employee annuity) and a deceased employee's survivor's rights to survivor payments (usually a survivor's annuity).¹⁷

1. Employee Annuity

Two common wage earner plans for retirement annuities are defined contribution and defined benefit plans. Under a defined contribution plan the employer makes periodic contributions to accounts in the names of individual

14. OHIO REV. CODE § 3105.18(C)(1)(d) (1974); OHIO REV. CODE § 3105.171(A)(3)(a)(i) (1974).

15. Retirement Equity Act of 1984, Pub. L. No. 98-397, 98 Stat. 1426; S. REP. NO. 575, 98th Cong., 2d Sess. Preamble 1984; H.R. REP. NO. 655, 98th Cong. 2d Sess. 12 (1984); *Testimony of the NOW Legal Defense and Education Fund, 1983: Hearings on S. 19 Before the Senate Finance Committee, 98th Cong., 2nd Sess. (1983)* (statement of Judith Avner).

16. State courts have no power to divide federal Social Security retirement benefits. LAWRENCE GOLDEN, *EQUITABLE DISTRIBUTION OF PROPERTY* 166 (1983); *Hoyt v. Hoyt*, 559 N.E.2d 1292, 1295 (1990).

17. Vlasek, *supra* note 12, at 766; MARVIN SNYDER, *VALUE OF PENSIONS IN DIVORCE* 17 (2d ed. 1992).

employees.¹⁸ At any one time, the value of an employee's pension rights is the accumulated dollars in the account.¹⁹ This value is easily divided at divorce. Withdrawal or assignment could be made from the account, or the employee spouse may pay other money in a lump sum or an increased share of other property as the non-employee spouse's share.²⁰

In contrast, a defined benefit plan does not have individual accounts while an employee works, but only promises a benefit to be determined at the time of retirement.²¹ A defined benefit plan uses a formula which multiplies the number of years worked and the amount of earnings by a pre-selected factor to determine the annuity amount an employee will be entitled to at retirement. At the time of divorce, courts may divide the employee rights to this future pension annuity by determining a present value of the accrued rights and ordering a portion of it paid to the non-employee spouse.²² Unfortunately, at any one time the present value of those future benefits can be determined only by projecting the total amount expected to be collected and discounting that amount for the chance of death and an appropriate interest rate.²³ Although many courts consider all present value evidence speculative, most courts require expert evidence to value retirement benefits, such as actuaries or pension plan evaluators.²⁴ The payment to effectuate the sharing of this value could be a cash lump sum, other property, or cash installment payments over time.²⁵ Because the employee who must pay out this share at divorce may die before collecting the actual pension, some courts hesitate to use a lump sum pay-out at the time of divorce.²⁶

Beyond an immediate division, courts may reserve jurisdiction to divide defined benefits if and when they are actually paid to the retired employee spouse. This division is implemented by ordering the employee to pay a portion to the ex-spouse as each benefit is collected during retirement. The advantage of this method is that the risk of not collecting due to the employee's early death is shared by both ex-spouses.²⁷ However, many courts are reluctant to use this method because of increased costs, difficulties of tracking and collecting from the ex-spouse, and the desire to free both ex-spouses from contact with one another after divorce.²⁸

18. SNYDER, *supra* note 17, at 9.

19. *Id.* at 7.

20. *Id.* at 10-11.

21. *Id.* at Chapter 4.

22. *Id.* at Chapter 17.

23. Vlasek, *supra* note 12, at 766.

24. Hoyt, 59 N.E.2d at 1295.

25. *Id.*

26. Joan Krauskopf, *Pension Benefits, Valuating and Dividing at Marriage Dissolution*, 40 J. MO. BAR 81 (1984); Hoyt, 59 N.E. 2d at 1298.

27. SNYDER, *supra* note 17, at 84.

28. Krauskopf, *supra* note 26; Hoyt, 59 N.E.2d at 1299.

The third method of distribution was authorized by the REA.²⁹ Courts may divide the pension benefits by a Qualified Domestic Relations Order ("QDRO") which assigns a portion of benefits described in the order to an alternate payee.³⁰ The REA specifically permits state domestic relations courts to order the pension plan administrator to pay a portion of pension benefits, either in lump sum or periodically in the future, to the "alternate payee" (usually the ex-spouse of the employee).³¹ The REA requires pension plan administrators to determine whether the court order is qualified and, if so, to pay the assigned benefits directly to the alternate payee.³² If the order meets the technical requirements of the REA, this method nearly eliminates enforcement difficulties.

2. Survivor's Benefits

The REA of 1984 also requires pension plans to provide a joint and survivor annuity so that employees' spouses may continue to receive benefits after the death of employee spouses.³³ Unless the spouses specifically waive this right, all wage earner pension plans should provide a joint and survivor annuity so long as the spouses remain married.³⁴

The REA authorizes QDROs at the time of divorce which assign survivor benefits to an ex-spouse.³⁵ While courts have the power to enter orders for these survivor benefits at the time of divorce, if no benefits are ordered, they are lost.³⁶ In other words, even though survivor's rights exist under the pension plan during marriage, there will be none after divorce unless the court specifically orders them.

The QDRO could assure some retirement benefit payments to the survivor by assigning both pre-retirement survivor benefits and post-retirement survivor benefits of a joint and survivor pension annuity.³⁷ If an employee spouse dies while continuing to work, the pre-retirement survivor benefits will be payable at the time the employee would have been eligible to retire. If post-retirement annuity benefits are being shared through a QDRO assignment to the ex-spouse as an alternate payee, the post-retirement survivor benefits would, in effect, continue them at the death of the retiree.³⁸

29. Retirement Equity Act, *supra* note 15.

30. SNYDER, *supra* note 17, at Chapter 3.

31. 26 U.S.C. § 414(p)(4)(A)(ii) (1984).

32. SNYDER, *supra* note 17, at 16.

33. 29 U.S.C. § 1055(a)(1) (1988).

34. 29 U.S.C. § 1055(c)(2) (1994).

35. 29 U.S.C. § 1055(d)(2) (1994).

36. *Retirement Plans*, 12 FAM. ADV. 44, 46 (Winter 1990); Alan H. Kandel, *Handling Retirement Plan Benefits When a Couple Divorces*, 18 ESTATE PLANNING 268 (Sept/Oct. 1991).

37. *Retirement plans*, *supra* note 36, at 46; Kandel, *supra* note 36, at 268.

38. Vlasek, *supra* note 12, at 776.

3. Actual Outcomes and Effects of the Law

Marital status and work histories play a large role in the financial well-being of older men and women.³⁹ Divorce has resulted in dramatic declines in the economic status of women and their children in the short term, and there is much discussion about its role in the rising poverty rate among children.⁴⁰ Little attention, however, has been paid to the effects of divorce on older women in long-term marriages whose children are grown. While younger women have opportunities to participate in the workforce, building their own retirement program, or to remarry and benefit from another husband's pension at retirement age, women who divorce at a later age have fewer opportunities.⁴¹ Therefore, the impact of divorce on women in their late forties, fifties, and sixties can be devastating not only in the short run, but for the remainder of their lives.⁴²

Crown, Mutschler, Schulz and Loew, in a comprehensive analysis of economic well-being,⁴³ found that older divorced and separated women have very modest asset holdings and the highest poverty rates among older women. In their review of secondary data, receipt of pension income (other than social security) was found to be a significant determinant of the financial well-being of older divorced women.⁴⁴

There are indications that the federal and state laws authorizing and encouraging division of pension benefits at divorce are not functioning as intended. The Clearinghouse of the Pension Rights Center ("Center") maintains a file of reported complaints about failure to divide pensions appropriately from all over the country.⁴⁵ However, the Center reports:

Not enough hard data on matters such as the actual dollar amount divorced wives typically receive are yet available. Many problems that women may be facing in the state courts remain unknown because these proceedings are not generally documented in a way that is accessible by

39. KAREN C. HOLDEN, ECONOMIC STATUS OF OLDER WOMEN: A SUMMARY OF SELECTED RESEARCH ISSUES, HEALTH AND ECONOMIC STATUS OF OLDER WOMEN 92-129 (A. Regula Herog et al. eds., 1989).

40. Gay C. Kitson & Leslie A. Morgan, *The Multiple Consequences of Divorce: A Decade Review*, 52 J. OF MARRIAGE AND THE FAM. 913 (1990); RICHARD PETERSON, WOMEN, WORK, AND DIVORCE (1989); LENORE WEITZMAN, THE DIVORCE REVOLUTION: THE UNEXPECTED SOCIAL AND ECONOMIC CONSEQUENCES FOR WOMEN AND CHILDREN IN AMERICA XII (1985).

41. DIANE PASK, THE EFFECT OF FAMILY BREAKDOWN ON RETIREMENT PLANNING, IN AN AGING WORLD: DILEMMAS AND CHALLENGES FOR LAW AND SOCIAL POLICY, 855, 858 (1989).

42. Joan Pennington, *The Economic Implications of Divorce for Older Women*, 23 CLEARINGHOUSE REV. 488, 489 (1989); See e.g., Lisa Wenger, *Divorced Dependent Spouses' Plight—Lost Security: An Overview of the Problem and Current Remedies*, 10 BIFOCAL 1 (Winter 1989/90).

43. Crown et al., *supra* note 4.

44. *Id.* at 30.

45. A.A.R.P., *supra* note 13, at xi, 10-12.

researchers. The future impact of several major changes made in the federal pension laws over the last decade is still unknown.⁴⁶

The staff attorney in charge of pension issues for the National Senior Citizens Law Center responded to the researchers' inquiry:

To my knowledge, there has been no research on the extent to which pensions and other retirement benefits are divided between divorcing parties. . . . [A] study such as you propose, which reviews actual court cases and samples divorcing parties, judges, and attorneys would not only further the research in this area, it would greatly enhance the work I do.⁴⁷

The authors' searches discovered only very limited empirical data on pension distribution in the three studies described below. The studies did not review pension distribution in detail; they had a small number of cases which included pensions and involved cases filed before the REA was in effect. However, the findings are consistent with the anecdotal accounts.

The oldest of these studies is an Oregon study of divorce settlements in which one hundred and sixteen interviews revealed that in seventy-nine cases involving pensions, the couple determined values of the property in two-thirds of the cases.⁴⁸ Most of the parties had no idea what the values of the pensions were. Two-thirds of the cases went to trial with no value determined, and in only three court orders did wives share in the husband's pension benefits.⁴⁹ The second study is a review of all economic issues reflected in selected court decrees in New York.⁵⁰ Although there were very few court records listing pensions, women appeared to have shared only ten percent of pensions.

The third study investigated occurrences of dividing the property by apportioning the assets as intact pieces in such a way as to balance the value between the parties. The researcher found pattern of the distribution of property by gender, regardless of the dispute resolution forum or income level.⁵¹ Women consistently received household goods and jewelry, while their spouses got pensions and other retirement plans, family businesses, securities, land, and recreational vehicles. Divorcing couples' homes, vehicles, cash and bank accounts were divided roughly equally with no gender-related pattern. Although wives reported receiving fifty-two percent of property on average, the authors believe the effect of this pattern is clear: the wives were getting assets which had little

46. *Id.* at 34.

47. Gottlich letter, *supra* note 3.

48. Rowe & Morrow, *supra* note 7, at 471.

49. *Id.* at 474.

50. Marsha Garrison, *Good Intentions Gone Awry: The Impact of New York's Equitable Distribution Law on Divorce Outcomes*, 57 BROOK. L. REV. 621, 626 (1991).

51. Jessica Pearson, *The Equity of Mediated Divorce Agreements*, 9 MEDIATION Q. 179, 187 (1991).

potential for growth in value. Men were receiving assets, including pensions, which produced income or would likely grow in value.

Divorce is becoming an increasingly important avenue for transfer of property. In fact, "more wealth in our society is transferred through divorce today than through the traditional paths of inheritance via trusts and estate routes of yesteryears."⁵² Because the right to a pension benefit earned by a wage earner spouse during a long-term marriage is often the most valuable asset of the marriage, how those rights are identified, valued, and distributed between the parties may substantially affect the future economic well-being of the former spouses.

Since pensions and other retirement benefits have only recently become well recognized as marital property available for distribution at divorce, patterns of practice may be changing. Greater awareness of the importance of retirement benefits to long-term financial well-being on the part of divorcing spouses may increase the frequency of attorneys and judges considering retirement benefits an important asset in a divorce. Understanding the patterns of distribution of these assets and their impact on the divorcing parties is important to assessing the future financial well-being of older divorced women. The extent of actual sharing also is directly relevant to evaluating the effectiveness of state and federal statutes and whether Congress should mandate automatic distribution. On February 24, 1995 Representative Barbara Kennelly introduced the Pension Reform Act of 1995 ("PRA"), which called for automatic equal sharing of the marital portion of pensions subject to ERISA if the divorce court did not provide otherwise.⁵³

Even though a greater awareness of retirement benefits as property exists, the dynamics between the spouses in settling their economic affairs may affect the ability to adequately consider and share complex property interests, including pension benefits. Therefore, power emanating from negotiation resources should be a critical factor affecting implementation of the equitable distribution laws and the economic condition of persons divorced after a long-term marriage.

III. THE DIVORCE SETTLEMENT PROCESS AND CONCEPTS OF POWERS

The legal issues involved in an equitable distribution of property concern: (1) identification of property subject to division; (2) valuation of the divisible property; and (3) the determination of equitable or fair distribution of the property. Parties negotiate these issues in the "shadow of the law."⁵⁴ In other words, legal rules and perceptions of those rules by judges who allocate marital funds, by attorneys who advise and advocate for the parties, and by the parties themselves,

52. Joseph Ducanto, *A Modern Divorce Tale: Splitting the Blanket in the 90's*, 130 TR. AND EST. 57 (1991).

53. H.R. DOC. NO. 1048, 104th Cong., 1st Sess. (1995).

54. Mnookin & Kornhauser, *supra* note 1.

influence the outcome of negotiation. However, the legal shadow does not fall on parties equally able to negotiate.

A. Power Resources

Divorcing parties negotiate distribution of pension benefits within a marital relationship and legal environment in which the parties have varying degrees of power. Power is the ability of a person to influence another as the person wishes.⁵⁵ One's negotiating power is derived from his or her possession of tangible and intangible resources that affect that person's ability to influence the negotiation.⁵⁶ Therefore, the outcome of negotiation is largely dependent on the resources available to each divorcing party which influence the process, i.e., each person's respective power.⁵⁷

The study of power in divorce settlement differs from most other family power studies in that divorce is the culmination of the family relationships as they have existed, but the decisions affect the parties' future lives.⁵⁸ Unlike many other negotiation venues and legal processes, divorce involves parties who know each other well, who may have been in an intimate relationship for many years, and who have established set ways of relating to one another. In fact, divorce mediators find that couples' patterns of relating to each other are so well established that one spouse can control both the process and the outcome of communication.⁵⁹ Therefore, although the parties are involved intensely in the present struggle and vitally interested in the future, they also are very much anchored in the past.⁶⁰ Their past together may create or reinforce the different degrees of power between them.

1. Effect of Social Values and Alternatives

Value norms or the societal structural contexts in which people operate also affect their perception of power. An individual's power within a marital, family or group relationship is influenced by the societal expectations associated with his/her positions in the social system.⁶¹ Both powerful and powerless persons

55. BERTRAM H. RAVEN ET AL., *The Bases of Conjugal Power*, in POWER IN FAMILIES 217 (Ronald Cromwell & David Olson eds., 1975); JOHN HAYNES, *Power Balancing*, in DIVORCE MEDIATION: THEORY AND PRACTICE 277 (J. Fohlberg & A. Milne eds., 1988).

56. *Id.*

57. *Supra* note 55.

58. Sharon J. Price & Patrick C. McKenry, *Chapter Seven—Economics of Divorce*, DIVORCE 107, 108 (1988).

59. HAYNES, *supra* note 55, at 277, 290.

60. Jeffrey Z. Rubin, *Some Wise and Mistaken Assumptions About Conflict and Negotiation*, 46 J. OF SOC. ISSUES 195 (1989); HAYNES, *supra* note 55, at 282.

61. Penelope E. Bryan, *Killing Us Softly: Divorce Mediation and the Politics of Power*, 40 BUFF. L. REV. 441, 447 (1992); JEAN LIPMAN-BLUMEN, GENDER ROLES AND POWER 14 (1984); Gerald W. McDonald, *Family Power: The Assessment of a Decade of Theory and Research, 1970-1979*, 42 J. OF

take this system for granted,⁶² to the point that it may be invisible to the people involved.⁶³

Social status, or the societal importance placed on positions and roles, makes income, occupation, and education part of a person's social power base.⁶⁴ For example, the role of a family's provider brings with it legitimized authority over a variety of family decisions.⁶⁵

Furthermore, income, occupation and education are positively related to one's alternatives to the marital relationship.⁶⁶ Because of societal gender role ideologies favoring women as homemakers and men as providers, income, occupation and education are gender related.⁶⁷ Typically, the male invests more of his time in employment activities to carry out the provider role as his main family role.⁶⁸ Many women invest significant time and effort in family and homemaking activities, while limiting other education and career options.⁶⁹ As the years pass, those investments provide the husband with more alternatives outside the marriage, and the wife with fewer. Since alternatives outside the marriage are resources that increase power within the relationship, the differing marital roles increase his power and reduce her power over time. Thus, normative social values have a gender effect.⁷⁰

2. Effect of Specific Characteristics

Socially created power alone is not enough to determine any individual's power in a particular situation.⁷¹ Group characteristics and those of individual persons involved have more ability to affect outcome.⁷² Power is the property of particular individuals within specific relationships, and even though it has roots in a structural or social context shared by many others, it is not easily transferred

MARRIAGE AND THE FAM. 111, 116 (1980); MAXIMILIANE E. SZINOVACZ, HANDBOOK OF MARRIAGE AND THE FAMILY 651, 661 (Marvin B. Sussman & Suzanne K. Steinmetz eds., 1987).

62. LIPMAN-BLUMEN, *supra* note 61, at 14.

63. Aafke Komter, *Hidden Power in Marriage*, 3 GENDER AND SOC'Y 187, 192 (1989); S. LUKES, A RADICAL VIEW 24 (1974).

64. JOHN R.P. FRENCH & BERTRAM RAVEN, STUDIES IN SOCIAL POWER, 160 (Cartwright & Dorwin eds., 1959); SZINOVACZ, *supra* note 61, at 661-62.

65. FRENCH & RAVEN, *supra* note 64, at 150, 159-60; SZINOVACZ, *supra* note 61, at 661.

66. JOHN SCANZONI, A HISTORICAL PERSPECTIVE ON HUSBAND-WIFE BARGAINING POWER AND MARITAL DISSOLUTION 30 (Levinger & Moles eds., 1979).

67. Bryan, *supra* note 61, at 449.

68. ROBERT S. WEISS, STAYING THE COURSE: THE EMOTIONAL AND SOCIAL LIVES OF MEN WHO DO WELL AT WORK (1990).

69. VICTOR FUCHS, WOMEN'S QUEST FOR ECONOMIC EQUALITY 58-74 (1988); Elizabeth Landes, *Economics of Alimony*, 7 J. OF LEGAL STUD. 35, 40 (1978).

70. Bryan, *supra* note 61, at 447; LIPMAN-BLUMEN, *supra* note 61, at 14.

71. SZINOVACZ, *supra* note 61, at 665.

72. *Id.*

to other relationships.⁷³ Individual and specific group characteristics bring specificity to power exertions, and are power resources.⁷⁴

Scholars describe power resources as tangible or intangible.⁷⁵ Tangible resources are ones that can be objectively measured.⁷⁶ Money is the most obvious. Among married couples, men equate money (or the ability to earn money) with power, even in the home.⁷⁷ Income contributed to the marriage by the parties and wealth accumulated prior to or during the marriage are sources of power.⁷⁸ Education and occupation are tangible resources, which not only contribute to social status on their own but also affect earning capacity.⁷⁹ These resources convey power outside of marriage and provide alternatives to marriage for those possessing them.⁸⁰

Examples of intangible resources of power include: level of commitment or dependence by one person on another, personality and attractiveness, gender, age, self-concept, cognitive and persuasive ability, knowledge and expertise, dominance, power to coerce or reward, and emotional state.⁸¹

B. *Effect of attorney representation*

The factor of legal representation further complicates the issue of power in negotiation between divorcing spouses. The attorney in the divorce process is the negotiating agent and advisor for the divorcing spouse. Because divorcing parties generally have little knowledge of the legal system, especially concerning technical matters such as dividing pension benefits, representation by an attorney is an important way to enhance a party's power in achieving a desired outcome.⁸² This is particularly true for women because of their less powerful position, and their greater likelihood of giving in to coercive threats.⁸³

Studies of child support before and after the implementation of specific guidelines have found that attorney representation and judicial variation were

73. JOHN HAYNES, *supra* note 55, at 278; McDonald, *supra* note 61, at 113; R.E. CROMWELL ET AL., *Family Power: A Multi-trait-Multimethod Analysis*, in POWER FAMILIES 151 (R. Cromwell & D. Olson eds., 1975); SZINOVACZ, *supra* note 61, at 653.

74. McDonald, *supra* note 61, at 113-14.

75. Bryan, *supra* note 61, at 447.

76. *Id.*

77. PHILIP BLUMSTEIN & PEPPER SCHWARTZ, *AMERICAN COUPLES: MONEY, WORK AND SEX* 53 (1983).

78. *Id.*

79. Bryan, *supra* note 61, at 447.

80. SCANZONI, *supra* note 66, at 30.

81. Bryan, *supra* note 61, at 457; FRENCH & RAVEN, *supra* note 64, at 160; McDonald, *supra* note 61, at 113; Constantina Safilios-Rothschild, *The Study of Family Power Structure: A Review 1960-1969*, 31 J. OF MARRIAGE AND THE FAM. 539, 552 (1960); SZINOVACZ, *supra* note 61, at 665.

82. Austin Saratand & William F.L. Felstiner, *Law Strategy in the Divorce Lawyer's Office*, 20 LAW AND STRATEGY REV. 99 (1986).

83. Bryan, *supra* note 61, at 462; Barbara J. Lonsdorf, *Coercion: A Factor Affecting Women's Inferior Financial Outcome in Divorce*, 3 AM. J. FAM. L. 282 (1989).

related to variability in support awarded.⁸⁴ In looking at child support awards after the implementation of the guidelines, one study found that attorneys' experiences were positively related to the custodial mothers' award of child support.⁸⁵ Another study of child support awards before and after the Ohio guidelines went into effect found that attorney representation for the wife and for both parties increased the probability of an award of child support to the custodial mother over the probability of award in cases in which only the husband had representation.⁸⁶ Studies in Florida, Colorado, and Ohio also have shown variability by judges in awards of child support for cases which were similar in income and number of children.⁸⁷

Divorcing parties typically enter into the legal process with little understanding of it.⁸⁸ Thus, for them the rules and the process must be interpreted by their attorney. In fact, much of the conversation between attorney and divorcing client is educational, with the pattern remaining consistent regardless of experience, type of practice or specialization of the attorney.⁸⁹ The educational conversation occurs often at a level similar to that of lawyers interacting with each other, so the client does not receive much clarification or translation.⁹⁰ Additionally, "law talk" occurs frequently because of the inquiry of the client rather than a voluntary offer from the attorney.⁹¹ Krauskopf and Seiling conclude that such findings indicate that even when divorcing parties have legal representation, they must exert power to require the attorney to play a more meaningful role in educating them and in advocating strongly to further their best interests.

Unfortunately, parties of lesser power may not have the ability to hire or to continue to pay the attorney who could best represent them. For a variety of reasons, including the possibility of not being paid, Krauskopf and Seiling speculate that attorneys for persons with less power going into the negotiating process may not intervene in such a way as to balance the power, particularly

84. Walter L. Ellis, *The Effects of Background Characteristics of Attorneys and Judges on decision Making in Domestic Relations Court: An Analysis of Child Support Awards*, 16 J. OF DIVORCE AND REMARRIAGE 107-19 (1991); Kathryn Stafford et al., *The Effects of Child Support Guidelines: An Analysis of the Evidence in Court Records*, 11 LIFESTYLES: FAMILY AND ECONOMIC ISSUES 361-81 (1990); Kenneth R. White & Thomas R. Stone, *A Study of Alimony and Child Support Rulings With Some Recommendations*, 10 FAM. LAW Q. 75-91 (1976); Lucy Yee, *What Really Happens in Child Support Cases: An Empirical Study of Establishment and Enforcement of Child Support Orders in the Denver District Court*, 21 DENV. U. L. REV. 65 (1979).

85. Ellis, *supra* note 84, at 112.

86. Stafford et al., *supra* note 84. Representation was not significant for the amount of child support awarded. Income was not available from the court records, so the researchers could not consider it. *Id.*

87. White & Stone, *supra* note 84; Yee, *supra* note 84; Ellis, *supra* note 84.

88. Austin Sarat & William Felstiner, *Lawyers and Legal Consciousness: Law Talk in the Divorce Lawyer's Office*, 20 LAW & SOC'Y REV. 1603, 1672 (1989).

89. *Id.* at 1670.

90. *Id.* at 1672.

91. *Id.* at 1670.

concerning complex issues such as pension benefits. Complaints to the Pension Rights Center regarding failure to divide pensions appropriately indicate that attorneys have not mastered the complexity of the basic law they should know and, thus, fail to obtain benefits for their clients.⁹² Results from the New York and Oregon studies, discussed earlier, also raise doubts about whether pensions were considered fully by attorneys and judges.⁹³

The sparse information about division of pension benefits is consistent with sociological studies showing that attorneys in divorce matters tend to push clients to settle quickly and delegate decision-making to them.⁹⁴ Without attorney advocacy to change the power relations between the parties, employed spouses (husbands) are likely to exert greater power than their wives over economic matters.⁹⁵

IV. AUTHORS' HYPOTHESES PRIOR TO DATA COLLECTION

Previous research and data have not indicated what ramifications power has on property division as a result of negotiation. No empirical research is reported on this specific topic. However, one could predict that by virtue of social status, the spouse employed for the longer time and in the higher status occupation would have more power during the divorce negotiation process. This would seem likely unless that power were ameliorated by greater intangible power resources exerted by the other. The other's power could stem from greater resources, such as information in financial matters, dominance, self-esteem, or representation by an attorney.

The hypothesis was that husbands would more often than not retain most of the value of their pensions and that wives would not receive commensurate value for the distributional share to which state and federal laws entitle them because of power factors favoring husbands. In other words, the authors believed that human behavior transforms the law into outcomes divergent from those policy makers sought when creating the law.

A. *The Pilot Research Project*

The law of Ohio requires inclusion of retirement benefits earned during the marriage in marital property, presumptively mandates an equal division of marital property, and authorizes indefinite spousal support for a spouse of a long term marriage whose earning capacity has been adversely affected by service to the

92. A.A.R.P., *supra* note 13, at 10-12.

93. Garrison, *supra* note 50; Rowe & Morrow, *supra* note 7.

94. Sarat & Felstiner, *supra* note 88, at 1680.

95. Lonsdorf, *supra* note 83, at 283.

marriage.⁹⁶ The pilot study, explored in this article, was designed to gather preliminary data on the pattern of marital property division for couples in long-term marriages and the incidence of inclusion of pension/retirement benefits in property division. Furthermore, the research sought to explore the role of marital power as a determinant of divorce property division.

To establish a data base, law students recorded basic data about every dissolution and divorce⁹⁷ filed in Franklin County, Ohio, during the year 1992. They recorded as complete information as possible about the economic awards for all marriages of twenty years or more in which no minor children were residing in a parental home. Over 6,300 court files were read and recorded, 5,240 of which were divorce cases that were completed and available. Of those, approximately ten percent involved marriages of over twenty years, and of those, just over half (5.7 percent) had no minor children at home.

Since negotiation determines how the legal rights and responsibilities will be translated into action, it was important to interview one or both divorced parties to determine what exchanges or trade-offs had been made for pension benefits and what role marital power played in the settlement outcome. As the court records were collected, students searched the phone directory for current addresses and phone numbers of the parties. The parties who could be found were called to confirm that they were the persons being sought. A brief description of the study was given over the phone, and the callers asked whether the parties would be willing to receive a letter about the study. A week or ten days after they received the letter they were contacted again about participating in the study. Twenty-five divorced parties, including both husband and wife from two cases (for a total of twenty-three cases involved), agreed to participate in the study. After getting the designated number for the pilot study, no more contacts for interviews were made. Graduate students, conducted the interviews under the supervision of Professor Seiling, using a qualitative interview protocol. At the time of the interview, the subjects also completed a scale in written form, Hoskin's Perceived Dominance-Accommodation Scale.⁹⁸ Information about their (and their former spouse's) age, income, and occupation was also requested in written form.

The interviewees ranged in age at divorce from forty-one to seventy-two, with an average age of fifty-two years. The parties had been married an average of twenty-nine years, with the length of marriage ranging from twenty to forty-nine years. There were nine males and sixteen females in the sample. Our sample included men and women with varied incomes and asset portfolios. Pre-divorce household incomes ranged from \$25,000 to \$375,000. There were a variety of

96. OHIO REV. CODE §§ 3105.17.1(C)(1), 3105.18(C)(1) (1991); *Kunkle v. Kunkle*, 554 N.E.2d 83 (1990).

97. In Ohio, a dissolution is granted when both parties seek to end the marriage and agree on all aspects of economic settlement, but a divorce which requires establishing grounds for divorce must be used when the parties have not agreed on all the economic terms.

98. Carol N. Hoskins, *Measuring Perceived Dominance-Accommodation: Development of a Scale*, 58 PSYCHOL. REP. 627-42 (1986).

patterns in property division, income sharing, use of attorneys, knowledge of and competence in financial and legal matters, and marital power.

Because pension benefits may be included in a trade of assets when the property settlement is being developed, it was important to analyze the fairness of overall property division. The researchers independently assessed the extent to which (1) the property was equally divided; (2) the property division included retirement benefits; and (3) the disparity in the parties' earning capacities was lessened by a combination of the property division and spousal support. The property division for each case was judged by each investigator using a sliding scale point system representing good, fair and poor. Eleven cases were judged good, five cases judged fair and seven cases judged poor, based on the three factors described above and using relative equality as the primary criterion. Of the twenty-three cases, just under half were classified as a good property division.

An important part of the study was to determine whether the power relationship between the parties that existed during the marriage influenced the bargaining during the divorce process and, thus, the resulting property division. One aspect of marital power was measured through use of Hoskin's Perceived Dominance-Accommodation Scale. The interviewees completed the scale, recalling the interaction with their spouses during their marriage. The scale covers a variety of spheres of the marital relationship, including work, relations with friends and relatives, money, sex, affection, shared values and use of leisure time.⁹⁹ Because the scale measures a person's perception of dominating or accommodating behavior with their marital partner, there may be inconsistencies between perception and actual experience of dominance.¹⁰⁰ Furthermore, the recall of marital relations after divorce is somewhat problematic. It is, however, hoped that the relative length of the marriage compared to the time elapsed since divorce will provide for an adequate recall of the relationship between the partners.

Possible scores on the Perceived Dominance-Accommodation Scale ranged from thirty to 150, with a midpoint of ninety. Scores at the high and low ends are indicative of power imbalance, with scores at the midpoint reflecting more equal power. Accommodating partners scored high, and dominating partners had low scores. The twenty-five respondents' scores on the dominance scale were ranked from one to twenty-five, the highest having a score of one and the lowest, twenty-five. The cases had been sorted into good, fair and poor groups with regard to the equality of their overall division of property (see discussion above). The Perceived Dominance-Accommodation scores of respondents from the cases which had been classified in the good group had a mean rank of 11.5, those from cases classified fair had a mean rank of 9.1, and those from cases classified poor had a

99. *Id.*

100. *Id.*

mean rank of 18. The Kruskal-Wallis 1-Way ANOVA¹⁰¹ was performed on the three groups.

B. Results

1. Marital Power

The Kruskal-Wallis test showed that the groups of cases judged to be different on the basis of equality in property division, also scored differently on the dominance scale, significant at the .05 level. Examination of the scores of the groups indicates strongly that power between the husband and wife in negotiation accounts for the differences. The mean ranks of respondents' dominance scores ranged from closest to the middle for the GOOD property division group to furthest from the middle for the POOR property division group. It is apparent that the group with the most equal power balance was also the group that was determined to be most equitable in division of property. Although the results from a sample of twenty-five interviewees cannot be conclusive, this is valuable evidence that a relationship exists between marital power and equality of the final property division between spouses at divorce.

2. Legal Counsel

An important question arises about the role of the legal system in divorce negotiation -- can the marital power relationship be moderated through use of legal procedures and/or hiring an attorney to represent one's interests in the divorce process? The resources that an attorney can bring to the party include knowledge of the law, legal procedures, and judicial preferences; knowledge of financial matters including pension plans and their division options; and assertiveness in making the case for the client.¹⁰² These resources may be especially helpful to one who has been in an accommodating role relative to the opposing party in a bargaining situation or to one who may be distraught or in shock as a result of the divorce proceedings.

In seventy-two percent of cases rated good in property division both divorcing parties had attorneys, compared to sixty percent for those rated fair, and twenty-nine percent for those with a poor rating. This distribution of legal representation among the three groups indicates that attorneys may moderate marital power in the divorce settlement process. With a larger sample, one could statistically test whether attorney representation intervenes to temper a power imbalance and to achieve a more equal settlement.

101. ANOVA is an abbreviation for analysis of variance. The Kruskal-Wallis test is used for comparing differences among independent samples from populations which have the same distribution. MARJIA J. NORUSIS/ SPSS, INC., SPSS FOR WINDOWS BASE SYSTEM USER'S GUIDE, RELEASE 6.0 289 (1993).

102. Sarat & Felstiner, *supra* note 82, at 99; LONSDORF, *supra* note 83, at 282.

Of the twenty-three cases, thirteen had attorney representation for both parties, six had only representation for the wife, three had only representation for the husband, and one case had no attorney. Two cases involved use of an attorney by one party for advice prior to or during the preparation of the case without retaining the attorney for preparing documents or presenting the case. In one case, the divorcing husband was a practicing attorney. His wife hired another attorney, early in the process, to inform her of "her rights" and to investigate "facts about their assets." The wife, however, relied on her attorney husband to guide her "in what he thought was the right direction."

There were very mixed feelings on the part of the respondents about the usefulness of attorneys, how well the parties felt they were served, the respect and caring accorded them, and the cost of legal counsel. The cases considered good in terms of fairness of property division had varied attorney input. In four cases, the couples themselves worked out most of the settlement before taking it to an attorney. The respondent felt that he or she received good advice from the attorney on financial matters in three cases. The women in two cases were very knowledgeable about financial matters and had a major role in setting the terms of their property divisions. In one case, the judge spelled out what would be an acceptable property division.

Those situations that received a fair score in property settlement were also mixed. One case involved the respondent's wife setting the terms regarding finances, with the respondent not using an attorney. In another case, the respondent did not follow her attorney's advice to ask for more property. And finally, in a third case, the respondent did not feel that she was adequately represented by her attorney.

Six cases resulted in a poor property division. The cases included: one having no attorney; one in which the husband was an attorney and the wife accepted his terms; one in which the wife set the terms and her attorney merely carried out her instructions; two in which the couple reached agreement before going to an attorney; and one in which the respondent did not feel that he had adequate representation, with the attorney telling him what the judge would "give his wife."

3. Type of Marital Dissolution

A part of the power structure within which parties bargain is the divorce law of the state and the judicial preferences expressed by individual judges.¹⁰³ In Ohio, the law permits two distinct ways to dissolve a marriage: divorce and dissolution. Under dissolution, the parties agree between themselves and present their decision to a judge, who accepts it if she believes they have made the decision without coercion.¹⁰⁴ The divorce procedure contains the possibility of

103. Sarat & Felstiner, *supra* note 82, at 102.

104. OHIO REV. CODE §§ 3105.64-.65 (1991).

one party contesting the divorce, providing a legally sanctioned bargaining tool for the parties to use.¹⁰⁵

In the study, divorce was the procedure used by sixty-four percent of cases rated good, forty percent of cases rated fair, and fourteen percent of cases rated poor. Krauskopf and Seiling concluded when divorcing parties' power is unequal, their use of dissolution reinforces the imbalance between them and may have the result of very unequal distribution of marital property. This inequality is reflected in the predominant use of dissolution by parties who had a poor property settlement and their greater power imbalance measured by mean rank on the *Perceived Dominance-Accommodation Scale*.

The authors' research also showed there was an interaction between procedure used and use of legal counsel. Eleven cases of the twenty-three involved dissolution, and twelve cases used the divorce procedure. In all but one of the divorce cases, both parties had legal counsel. In two cases, the couples tried to work out a settlement prior to engaging attorneys; one on their own using dissolution and one through mediation. In both cases, a settlement could not be reached through those means. Therefore, the couples hired attorneys and went through the divorce proceedings.

Preliminary results indicate that the power imbalance between parties who had unequal property division may not be entirely offset by use of the divorce procedure or by hiring an attorney. There appears to be evidence of a relationship between marital power and division of property that is not completely ameliorated by use of legal power resources. Further research is needed to establish the interaction between marital power in force prior to and during the divorce process and the role of the attorney in representing the parties. Can legal counsel overcome, at least to some extent, the imbalance of marital power within which the parties go into the negotiation process? Does the use of the divorce procedure protect the less powerful party during the divorce settlement negotiations?

4. Complexity of Property: Pension/Retirement Benefits

Of the twenty-three cases, twenty had retirement benefits. Three of those did not consider them in divorce negotiations, and seventeen included them in the marital property to be divided. Of the seventeen with retirement benefits, ten scored good on property division. In two cases, the pension was not shared because the pension earner refused to have it considered (according to the respondents) -- one case involved the wife, and the other, the husband.

Retirement benefits were held by both parties in seven cases, by husbands only in ten cases, and by wives only in three cases. The remaining three cases had no current pension benefits for either party. Husbands retired and were drawing retirement benefits in five cases.

Among those cases with the husband only having retirement benefits, the wife was awarded none of the value in three cases, sixty percent in two cases, fifty

105. OHIO REV. CODE § 3105.01 (1991).

percent in two cases and twenty-five percent in one case. The husband received none of the wife's retirement benefits in all three cases in which the wife was the only pension holder. For those cases in which both parties had retirement benefits, the wife was awarded none of the husband's benefits in three cases (in two cases all of the benefits were awarded to the husband and specific other assets were awarded to the wife in trade), in two cases was awarded one of multiple pensions or retirement account, and in two cases was awarded fifty percent of the pension benefits. One case involved the husband sharing his pension, but the amount and proportion were unknown.

Five of the twenty-three cases involved the retirement of the husband prior to the divorce, and in one of these cases the wife was retiring at the time of divorce. An additional case involved the retirement of the husband simultaneously to the divorce. In two of the six cases involving a husband who had retired prior to or at divorce, both parties had retirement benefits, and for the remaining four, the husband alone had retirement benefits. Of all the cases involving a husband who had retired prior to or at divorce, only one-third of the awards included shared retirement benefits. This compares to more than half (fifty-seven percent) of those in which the husband had not retired who shared retirement benefits with the spouse.

One question to be pursued is whether there is a pattern of differential sharing of pension benefits between groups of spouses who have retired and those who have not. The law makes no distinction between division of the retirement benefits before and after retirement of the pension holder. It is unclear whether the pension holders, their spouses, the attorneys, and the judges view the circumstances differently, and thus view the property division differently.

5. Discussion

Findings from interviews of the sample of twenty-five divorcing parties lend support to the assertion that "power relations within marriage, and the way that couples negotiated while still married, will affect the way in which they deal with the issues which arise on separation."¹⁰⁶ Gwynn Davis, Stephen Gretney and Jean Collins followed divorcing couples and their solicitors through the divorce process in England, and although they did not use the Perceived Dominance-Accommodation Scale to assess power, they came to the conclusion that marital power is an important factor in divorce negotiations.¹⁰⁷ Results of the authors' pilot study support Davis, Gretney and Collins contention by finding a statistical relationship between marital power, measured through dominance/accommodation, and equality of property settlement. More study in this area is needed to inform the policy debate regarding pension distribution at divorce and to provide attorneys and financial counselors with a better understanding of the complexity of the issues that parties bring to divorce proceedings. A larger sample would provide

106. GWYNN DAVIS ET AL., *SIMPLE QUARRELS* 46 (1994).

107. *Id.*

a broader base upon which to measure the relationship between marital power and divorce settlements.

The role of the attorney in moderating a marital power imbalance to achieve a balanced settlement is unclear. Divorcing parties and the legal system are likely to have different approaches to the resolution of the dispute. The parties may find it difficult to "see the logic or justice which their legal advisor assures them is there."¹⁰⁸ Furthermore, divorcing parties often speak a different language and operate in a different culture.¹⁰⁹ Divorcing parties, who have had no experience with legal action and who have not been assertive in their interactions with others, may be afraid to hire an attorney or be unable to get the best advice or advocacy from one. Some divorcing parties in the study felt that they did not receive adequate legal representation, others were not prepared to take the advice given. Other parties in the study believed they had very good legal counsel.

6. Pensions/Retirement Benefits

A survey of the court record data indicates that the cases in the authors' study were divided almost equally into three groups: those with no pension benefits, those which had pension coverage for one of the parties (a large majority of whom are the husbands), and those which had pension coverage for both parties. For those parties with pension/retirement benefits, there are indications that divorcing parties, attorneys, and judges *are considering* pension benefits in the division of marital property. Even in those cases in which the benefits were not part of the divorce settlement, the interviewees were aware that retirement benefits are part of marital property. Some of the parties, however, were not successful in sharing the benefits even though they wanted them to be shared.

The fairness of the sharing appears to be of greater concern to the parties than the mere sharing of retirement benefits. Among the cases from the court records in which both parties have pension/retirement benefits, over eighty percent of the parties were awarded his/her own benefits. In most of those cases, there was no valuing of the benefit -- it may have appeared to the parties that the easiest way for equal division of the pension/retirement benefits to occur was for each party to keep his/her own earned benefits. No equality of value should be implicit in this form of division as the small evidence available from those which were valued indicates most pensions earned by the husbands were much greater in value than those earned by wives. The complexity of the methods of sharing and the additional time and expertise needed to complete the paperwork necessary for approval of a QDRO work against those with less knowledge, assertiveness, and ability to pay for legal services. Divorcing parties may not be getting adequate advice on valuation of the pension assets for immediate division and on methods of future sharing by QDRO. Thus, patterns of sharing appear ad hoc or random.

108. DAVIS ET AL., *supra* note 106, at 72.

109. *Id.* See also JOHN M. CONLEY & WILLIAM M. BARR, RULES VERSUS RELATIONSHIPS: THE ETHNOGRAPHY OF LEGAL DISCOURSE 60 (1990).

With a larger sample, the researchers could compare advice or knowledge of financial and legal issues with method and extent of pension sharing to answer the questions of whether the more complex and difficult-to-divide property is taken by the more powerful party.

During the authors' study, interview data revealed an avenue to explore regarding possibly divergent sharing patterns between those whose pensions are being paid out post-retirement and those for whom the pension is an accumulating asset to be collected at a later date. Although the law does not distinguish between pre- and post-retirement pension benefits, the parties themselves may view them differently, i.e., an asset versus an income stream. The present reality of receiving payments versus the future uncertainty may also make the two situations appear very different. There is a need for further research into the details of the division of pension/retirement benefits at divorce with regard to the retirement status of the pension holder.

V. CONCLUSION

Evidence from the authors' study indicates that divorcing parties, attorneys and judges generally consider pension/retirement benefits in divorce decisions. There are also indications that equitable division of complex property such as pension benefits may not always occur. Patterns of sharing appear ad hoc or random. This pilot study demonstrated a statistical relationship between long-term spouses' marital power, measured through dominance/accommodation, and the fairness of their divorce settlement. Preliminary indications are that use of legal counsel and specific legal procedures may ameliorate the power imbalance between divorcing parties. More exploration of marital power as it relates to attorney variables, parties' satisfaction with the settlement, and the actual settlement itself is needed to understand more fully its impact on the ultimate outcomes. In particular, this pilot study indicates that attorneys play a coaching role rather than a direct negotiator role in many divorce settlement processes. The possibility that attorney as advisor and coach can change power imbalance needs thorough study both for its impact on direct party negotiations and on mediated settlements.

