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Domestic Relations-Husband's Vested Interest in Retirement Plan is Divisible as Marital Property

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influential role in the development of his children, especially male children, has been acknowledged and promoted by the courts.[40] The father's importance in the child's life, therefore, has not been relegated to an inconsequential position. Rather, the courts encourage custodial arrangements where the child will be with the father.

Recognizing that the judge must "[o]ften select the better of two poor" homes[41] for the child, the Missouri Court of Appeals has remained flexible and has attempted to achieve the "least detrimental solution"[42] for the child. The *Powers* decision is illustrative of the judicial attempt to reconcile the sometimes competing goals of stability of relationship and association with both parents. This balancing approach is a welcome and commendable effort to achieve the result most beneficial to the child.

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DOMESTIC RELATIONS—HUSBAND'S "VESTED" INTEREST IN RETIREMENT PLAN IS DIVISIBLE AS MARITAL PROPERTY

In Re Marriage of Powers[1]

The trial court rendered judgment on June 17, 1974, and both parties appealed various aspects of the court's decree. One issue on appeal was whether the husband's interest in a profit-sharing retirement plan was

mother was adulterous. *See* J. Lewis & G. Tockman, *The Status of Missouri Law in the Troubled Area of Child Custody*, 27 MO. L. REV. 406, 419-32 (1962). *See also* Annot., 23 A.L.R.3d 6 (1969). However, some courts have adopted a realistic approach and found that "all things never are exactly equal." Garbee v. Tyree, 400 S.W.2d 193, 199 (Spr. Mo. App. 1966) *cited with approval in* M—L— v. M—R—, 407 S.W.2d 600, 603 (Spr. Mo. App. 1966). *Accord*, Bolten v. Bolten, 507 S.W.2d 46 (Mo. App., D.K.C. 1974). The constitutionality of the presumption has been litigated in other jurisdictions. *E.g.*, State *ex rel.* Watts v. Watts, 350 N.Y.S.2d 285 (1973).

40. The court states in *Blair v. Blair*, 505 S.W.2d 444, 447 (Mo. App., D. Spr. 1974) that courts recognize "the fact that male children growing out of tender years need and will be benefited by the father's influence and guidance." *Accord*, Baer v. Baer, 51 S.W.2d 873, 879 (St. L. Mo. App. 1932).

41. H—B— v. R—B—, 449 S.W.2d 890, 893 (St. L. Mo. App. 1970).

42. J. GOLDSTEIN, A. FREUD, A. SOLNIT, *supra* note 13, at 553-54. For judicial implementation of this philosophy, *see* Johnson v. Johnson, 526 S.W.2d 33 (Mo. App., D. St. L. 1975). *Accord*, Flanders v. Flanders, 241 Iowa 159, 40 N.W.2d 468 (1950). In M—L— v. M—R—, 407 S.W.2d 600, 603 (Spr. Mo. App. 1968) the court said, "[P]erplexing problems of custody must be resolved not by applying academic rules or by mouthing pious platitudes but rather by determining, insofar as is humanly possible, what will best serve and promote the child's welfare." *Cited in* I— v. I—, 482 S.W.2d 523, 528 (Mo. App., D.K.C. 1972).

1. 527 S.W.2d 949 (Mo. App., D. St. L. 1975).

marital property under the new Missouri Dissolution of Marriage Act.[2] The husband claimed that his interest in the plan was not definite enough to constitute property, and therefore could not be subject to division.[3] In support of this contention, the husband noted that he was not entitled to immediate benefits from the funds until he retired or left the employment of the company. The St. Louis District of the Missouri Court of Appeals affirmed the trial court's holding that the husband's interest in the plan was marital property.[4]

Under the Missouri Dissolution of Marriage Act, the court is permitted to divide "marital property."[5] Prior to the enactment of the new law, the court lacked this authority, although an award of alimony in gross[6] served as a substitute for property division. The definition of marital property under the new act is similar to the concept of community property in community property jurisdictions—*i.e.*, property earned during the marriage by either spouse is considered the property of the marital community.[7] Several of the exceptions to marital property enumerated in the Missouri law correspond to items which would be considered property acquired by lucrative title under community property theory, and hence, excludable from the property of the marital community.[8] Under community property theory, an employee spouse's interest in a retirement plan may be considered property of the marital community.[9] By analogy, such an interest may be considered marital property under the Missouri law.

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2. §§ 452.300-.415, RSMo 1973 Supp.

3. 527 S.W.2d at 957. As authority for this position, the husband cited *Robbins v. Robbins*, 463 S.W.2d 876 (Mo. 1971).

4. 527 S.W.2d at 957.

5. Section 452.330(3), RSMo 1973 Supp., provides:

For purposes of sections 452.300 to 452.415 only, "marital property" means all property acquired by either spouse subsequent to the marriage except:

(1) Property acquired by gift, bequest, devise or descent;

(2) Property acquired in exchange for property acquired prior to the marriage or in exchange for property acquired by gift, bequest, devise, or descent;

(3) Property acquired by a spouse after a decree of legal separation;

(4) Property excluded by valid agreement of the parties; and

(5) The increase in value of property acquired prior to the marriage.

6. § 452.080, RSMo 1939. It was through such an award that the wife sought an interest in her husband's interest in a retirement plan in *Robbins*. 463 S.W.2d at 879.

7. W. DE FUNIAK & M. VAUGHN, PRINCIPLES OF COMMUNITY PROPERTY 24, 127-28 (2d ed. 1971).

8. "Property acquired by lucrative title is that acquired through gift, succession, inheritance, or the like. It has its basis in pure donation on the part of the donor." *Id.* at 128.

9. *Id.* at 147-48. The interest in the fund would be considered community property regardless of whether the employee spouse contributes anything directly to the plan. The benefit to him is still viewed as consideration paid for his services, and therefore earned by the marital community. *Id.* In some cases, however, a pension interest may be considered a gift to the employee, and, therefore, not community property. *See, e.g.*, Diagre v. Diagre, 228 La. 682, 83 So. 2d 900 (1955).

The *Powers* court failed to recognize the applicability of community property principles to the new act and did not look to cases in community property jurisdictions to support its holding. Instead, the court merely distinguished a Missouri case decided prior to the new act.

One spouse's interest in a retirement plan of the other is one of the more confusing items to be considered in a division of property. The courts' resolution of the problem is particularly important, because the right to participate in a pension plan is often the family's most valuable asset.[10] The major issues which confront a court dealing with a retirement plan are: (1) does the employee spouse's interest or right in the plan constitute "property"?; and (2) if the non-employee spouse is entitled to some portion of this "property", how should this interest be satisfied?

Although a court may recognize that an interest in a retirement plan has potential value,[11] it may be unwilling to divide such an interest unless it has achieved the status of property. The point at which the interest in a plan ceases to be a mere expectancy and becomes judicially recognizable as property is normally designated as "vesting."[12] Thus, if a court does not consider an employee's interest in the plan to be vested, it may not subject that interest to division as property.[13]

If only vested pension rights are subject to division, the crucial question is when such rights should be considered as vested. The strictest view holds that vesting coincides with the time at which payments under the plan actually begin, but this theory has been rejected by those jurisdictions which have confronted the vesting problem with respect to property division.[14] Instead, the courts have focused on the facts of each case, and have examined the conditions which the employee spouse must meet before he is entitled to benefits under the plan.

Most community property states hold that "vesting occurs upon the completion of the minimum service required by the [plan] for retirement."[15]

10. Blackburn, *Economic Aspects of Pension Plans*, 27 LAW & CONTEMP. PROB. 89 (1962).

11. Typically, an employee may acquire three rights under a pension plan: (1) Policy rights, i.e., in the corpus of the fund; (2) Income rights, i.e.,'rights to specific periodic payments; (3) Proceeds rights, i.e., rights to designate a death beneficiary. Note, 19 S.W.L.J. 370, 371-72 (1965).

12. Comment, *Community Property—Deferred Compensation: Disposition of Military Retired Pay Upon Dissolution of Marriage*, 50 WASH. L. REV. 505, 515 (1975); Hughes, *Community Property Aspects of Profit Sharing and Pension Plans in Texas—Recent Developments and Proposed Guidelines for the Future*, 44 TEXAS L. REV. 860, 871 (1966); Kent, *Pension Funds and Problems Under California Community Property Laws*, 2 STAN. L. REV. 447, 463 (1950).

13. Robbins v. Robbins, 463 S.W.2d 876 (Mo. 1971); Tucker v. Tucker, 121 N.J. Super. 539, 298 A.2d 91 (1972); Davis v. Davis, 495 S.W.2d 607 (Tex. 1973).

14. Comment, *supra* note 12, at 515. This view allows relative ease in resolving the question of vesting, but such ease is offset by its harsh disadvantage to the non-employee spouse.

15. *Id.* at 516. *E.g.*, Mora v. Mora, 429 S.W.2d 660 (Tex. Civ. App. 1968) (the court held that husband's interest in retirement fund was divisible property where he

The court in *Powers* employed similar reasoning, noting that the husband's interest in his employer's contributions to the plan were not subject to divestment, because he had participated in the plan for the required five years.[16] Where the employee spouse does not yet have a right to receive payment, either because he has not yet served the minimum required service period or because the plan provides for no such minimum period and the spouse has not yet retired, many courts have refused to consider the interest as vested.[17]

In *Robbins v. Robbins*,[18] a case decided under the old Missouri divorce law, the Missouri Supreme Court denied a wife's request that her husband's interest in a pension plan be valued among his assets for purposes of determining how much gross alimony she should receive. Because the husband's right to receive payment was subject to his remaining employed until he was eligible for retirement, the court considered the interest too speculative to be the object of an alimony award.[19] Because the husband did have a right to his own contributions to the retirement plan, the court considered his interest to be subject to inclusion in the valuation for alimony. If a case factually similar to *Robbins* arises under the Missouri Dissolution of Marriage Act, the husband's contributions to the plan should be designated as marital property.[20]

The potential inequity of a rule which holds that there is no vesting prior to eligibility for payment is that it deprives the non-employee spouse of the possibility to share in the deferred compensation for services which were rendered during the marriage.[21] Some courts have sought to ameliorate the harshness of this rule by allowing a division of the interest in a pension plan even though the employee spouse was not eligible to receive payments. The Texas Court of Appeals held the interest in a military pension to be divisible, even though the husband had not yet served the twenty years required for retirement, because his present enlistment term extended beyond the required period.[22] The Washington Court of Appeals granted division of

had served beyond the required twenty years in the Marine Corps to be eligible for retirement benefits, although he had not yet retired and the benefits were subject to forfeiture for dishonorable discharge or death). The husband's interest in the retirement plan is analogous to a vested remainder subject to divestment for a condition subsequent. *See* T. BERGIN & F. HASKELL, PREFACE TO ESTATES IN LAND AND FUTURE INTERESTS 74 (1966).

16. 527 S.W.2d at 957.

17. Cases cited note 13 *supra*.

18. 463 S.W.2d 876 (Mo. 1971).

19. *Id.* at 880.

20. Note, 24 HASTINGS L.J. 347 (1973). The husband's contributions are made from his earnings, which are undeniably marital property.

21. Comment, 50 WASH. L. REV., *supra* note 12, at 519. Note, 24 HASTINGS L.J. 347 (1973). For example, a wife who is married to a serviceman for eighteen years, and then gets divorced before her husband has served the required twenty year period, receives nothing for her eighteen years' participation in the marital community which acquired that interest in the pension fund.

22. Miser v. Miser, 475 S.W.2d 597 (Tex. Civ. App. 1972).

benefits under a retirement plan on the theory that, although the husband did not yet have a vested right to payment, he did have a vested right in the system which could not be altered to his detriment.[23] The Supreme Court of Washington has recently held that ". . . the proper rule is that the court must consider all the circumstances and evaluate the probability that the party who had a contingent right to a pension will eventually enjoy that pension."[24]

Arguably, vesting should not be a requirement for divisibility of an interest in a pension plan. It has been noted that the courts have recognized a community interest in other assets which are of potential value only, but which were developed by the expenditure of community time and effort.[25] In *Waters v. Waters*[26] the California Court of Appeals held that the wife had a half interest in a contingent fee which her husband, an attorney, expected to receive from a client whose case was on appeal at the time of the divorce. Although the appeal made the receipt of the fee uncertain, the court noted that the greater percentage of it had been earned while the marital community was in existence. The court fashioned its decree so that the wife would receive her portion only if the husband actually received the fee.[27]

The New Jersey Supreme Court, in applying a statute for division of property which is somewhat similar to Missouri's,[28] has apparently abandoned the requirement of vesting. In *Stern v. Stern*[29] the court noted that the New Jersey law makes no reference to vesting as a prerequisite for a division of property, but requires only that the property shall have been "acquired" during marriage.[30] However, focusing upon the term "acquired" does not really circumvent the issue of vesting. If the court does not consider an

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23. DeRevere v. DeRevere, 5 Wash. App. 741, 491 P.2d 249 (1971).

24. Wilder v. Wilder, 85 Wash. 2d 364, —, 534 P.2d 1355, 1358 (1975). Factors which the court should consider include: length of time remaining before eligibility matures, likelihood that employee spouse might reasonably decide to accept another job and abandon his pension rights, and marital community's investment in the pension system. *Id.* at 1358. Such a rule has an advantage in giving the court the discretion to make awards to spouses who would otherwise receive nothing for their membership in the marital community during a time when pension interests, albeit not rights, were accrued. However, it appears to be a difficult rule to apply, and the lack of judicial uniformity it could produce can be viewed as a counterbalancing inequity.

25. Note, 24 HASTINGS L.J. *supra* note 21 at 354.

26. 75 Cal. App. 2d 265, 170 P.2d 494 (1946).

27. *Id.* at 270, 170 P.2d at 498.

28. N.J.S. Ch. 34, § 2A-34-23 provides:

> In all actions where a judgment of divorce or divorce from bed and board is entered the court may make such award or awards to the parties, in addition to alimony and maintenance, to effectuate an equitable distribution of property, both real and personal, which was legally and beneficially acquired by them or either of them during the marriage.

29. 66 N.J. 340, 331 A.2d 257 (1975).

30. *Id.* at 348, 331 A.2d at 262. Blitt v. Blitt, 139 N.J. Super. 213, 353 A.2d 144 (1976); *accord*, Pelligrino v. Pelligrino, 134 N.J. Super. 512, 342 A.2d 226 (1975).

interest to be property unless it is vested, it may recognize that an interest has been "acquired," but nevertheless decide that the interest is not property.

In a recent case, *In re Marriage of Brown*,[31] the California Supreme Court rejected the requirement of vesting with respect to divisibility of pension rights upon divorce. *Brown* is particularly significant, for it overrules *French v. French*,[32] the seminal case for the doctrine that nonvested pension rights are not subject to division. In a thorough opinion the *Brown* court explored the nature of pension rights as a property interest and concluded that the *French* court erred in characterizing non-vested pension rights as mere expectancies.[33] The *Brown* court noted that pension rights certainly constitute a form of property, rather than mere expectancy, because they are derived from the terms of the employment contract and are therefore a chose in action.[34] The inequitous division of community assets produced by adherence to the *French* rule also influenced the *Brown* court's decision to reject the requirement for vesting.[35] There is also some indication that the California court felt that its position as enunciated in *French* warranted reevaluation because the pension rights of a spouse are now one of the most valuable assets possessed by a marital community.[36] The California Supreme Court's willingness to reevaluate and reject its long standing requirement of vesting may influence other jurisdictions to do likewise.

The Colorado Court of Appeals, applying a dissolution law identical to Missouri's,[37] has adopted an entirely new approach. In *In re Marriage of Ellis*,[38] a Colorado Court of Appeals held that the husband's interest in an army retirement plan did not constitute property, even though the husband was already drawing payments under the plan at the time of the dissolution.[39] The court decided that the interest should instead be considered in fixing the amount of maintenance and child support, and recognized as an "economic circumstance" of the husband in determining a just division of assets that were deemed to be marital property.[40]

31. 15 Cal. 3d 838, 544 P.2d 561, 126 Cal. Rptr. 633 (1975).

32. 17 Cal. 2d 775, 112 P.2d 235 (1941).

33. 15 Cal. 3d at 844, 544 P.2d at 564, 126 Cal. Rptr. at 636. The court explains that an expectancy is the interest of one who merely anticipates that he might receive a future beneficence, e.g., the interest of an heir apparent. As such, a holder of an expectancy has no enforceable right to his beneficence.

34. *Id.* at 845, 544 P.2d at 565, 126 Cal. Rptr. at 637.

35. *Id.* at 847, 544 P.2d at 566, 126 Cal. Rptr. at 638. In *Brown* the husband's pension rights had been built up by twenty-four years of community effort. The court could not condone permitting the husband to enjoy this asset as separate property merely because he needed two additional years to acquire a vested right.

36. *Id.*

37. COLO. REV. STAT., Ch. 46, Art. 1, § 14-10-113 (1972).

38. 538 P.2d 1347 (Colo. Appeals, 1975) *cert. granted*, Sept. 2, 1975.

39. *Id.* at 1350. The court found it important that the interest in Army retired pay has no cash surrender value, cannot be attached prior to payment, and cannot be assigned. *Id.* at 1349.

40. *Id.* at 1350. The court specifically rejects any analogy to community property law, because Colorado is not a community property state. *Id.* at 1349.

Having decided that an interest in a pension plan is divisible property, and that the non-employee spouse should receive a portion thereof, a court must still determine the manner in which this interest should be satisfied. The problem is two-fold, involving the issues of how to value the interest in the plan and how to fashion the decree dividing the interest. The court has two options: (1) award the entire pension to the employee spouse and award the non-employee spouse a lump sum or other marital property in lieu of participation in the pension; or (2) award the non-employee spouse a percentage division of the pension to be paid if, as, and when the pension becomes payable.[41]

If the lump sum method is used, the court must determine the value of the employee spouse's interest in the pension plan as of the date of the dissolution. One possibility is that the value of the interest is equal to the total of the employee's actual earnings that have gone into the fund.[42] Such a valuation would be much too low, because it ignores both the employer's contributions and the value of the employee's anticipated future benefits under the plan. As a second approach, a court may hear the testimony of actuaries concerning the present value of the interest in the plan based upon the payments the plan is to yield upon retirement.[43] Such actuarial testimony is certainly problematic,[44] and may fail to take into account such factors as the contingencies for receipt, dollar fluctuation, and the possibility of forfeiture. It has also been suggested that a plan's value should be considered to be what the employee spouse would be entitled to receive if his services were terminated on the date of the divorce decree.[45]

Once the value of the interest in the plan is determined, the court must then decide how to give each spouse his respective portion. Some rights under the plan may have been acquired prior to the marriage. Consequently, the value attributable to those pre-marriage years would not be subject to division.[46] For the rights acquired during the marriage, the court may award cash or other marital property to the non-employee spouse in

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Missouri attorneys should anxiously await the appellate ruling on this case, for if it is affirmed, it will provide some authority for claiming the "marital property" is *sui generis*, and not merely a species of community property.

41. DeRevere v. DeRevere, 5 Wash. App. 741, —, 491 P.2d 249, 253 (1971).

42. W. DEFUNIAK, *supra* note 7, at 529.

43. *In re* Marriage of Clark, 13 Wash. App. 805, 538 P.2d 145 (1975) (admitting evidence of actuarial value, although holding fairness, and not mathematical precision is the key to distribution of property); Parsons v. Parsons, 68 Wis. 2d 744, 229 N.W.2d 629 (1975); Schafer v. Schafer, 3 Wis. 2d 166, 87 N.W.2d 803 (1958).

44. Hughes, 44 TEXAS L. REV., *supra* note 12, at 879.

45. Kent, 2 STAN. L. REV., *supra* note 12, at 465.

46. W. DE FUNIAK, *supra* note 7, at 530; Comment, 50 WASH. L. REV., *supra* note 12, at 524. For example, if a wife has been married for ten of the fifteen years during which she has been employed by a company from which she is to receive retirement benefits, then the husband's claim would be to some portion of 2/3's of the value of the pension interest at the time of the divorce. *E.g.*, Mora v. Mora, 429 S.W.2d 660, 663 (Tex. Civ. App. 1968).

lieu of an interest in the retirement plan.[47] Such an award is potentially inequitable, because the employee's pension rights may be subject to forfeiture on a condition subsequent, while the non-employee spouse's award is not subject to such contingencies. In making a lump sum award a court should take care not to consider the pension interest twice, once as an asset for property division, and again as an income item to be considered in awarding alimony.[48] A lump sum award also presents problems if the employee spouse lacks sufficient cash to pay the non-employee spouse for his interest in the retirement plan and there is insufficient property to be awarded in lieu of this interest.[49]

To avoid some of the problems inherent in a lump sum award, the court may instead fashion its decree to award the non-employee spouse a proportionate share of the retirement payments if, as, and when they are received by the employee spouse.[50] The court would determine what portion of the retirement benefits were earned during the marriage, what portion, if any, the non-employee spouse should receive, and fashion its decree to give the non-employee spouse a proportionate share when the employee spouse actually begins receiving payments.[51]

The "if, as, and when" award has several advantages. Arguably, the judicial focus on the vesting concept in this area is merely a manifestation of the courts' fear of giving the non-employee spouse an outright award when there is a possibility that the employee spouse may never actually receive the benefits of the plan. With the "if, as, and when" decree, such fears are allayed, because the non-employee spouse will only receive the award if the employee spouse actually realizes benefits.[52] Under such a decree, a spouse who was married for eighteen years could be rewarded for participation in the marital community, even where the employee spouse was not yet eligible to receive retirement benefits at the time of the dissolution.[53] Such a decree would be particularly appropriate and effective if the employee had more than one spouse during the period in which the retirement benefits were being accrued.[54]

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47. Comment, 50 WASH. L. REV., *supra* note 12, at 534. *E.g.*, Crossan v. Crossan, 35 Cal. App. 2d 39, 94 P.2d 609 (1939); DeRevere v. DeRevere, 5 Wash. App. 741, 491 P.2d 249 (1971).

48. Kronforst v. Kronforst, 21 Wis. 2d 54, 123 N.W.2d 528, 534 (1963).

49. Comment, 50 WASH. L. REV., *supra* note 12, at 534.

50. Hughes, 44 TEXAS L. REV., *supra* note 12, at 880-881.

51. Miser v. Miser, 475 S.W.2d 597 (Tex. Civ. App. 1972) (wife to receive 85/240's of retirement payments if, as, and when husband receives them); Webster v. Webster, 442 S.W.2d 786 (Tex. Civ. App. 1969) (wife to receive 10/24's of retirement payments if, as, and when husband receives them); Mora v. Mora, 429 S.W.2d 660 (Tex. Civ. App. 1968) (wife to receive 88/308's of retirement payments if, as, and when husband receives them). *See also* Wilder v. Wilder, 85 Wash. 2d 364, 534 P.2d 1355 (1975); Davis v. Davis, 13 Wash. App. 812, 537 P.2d 1048 (1975).

52. Hughes, 44 TEXAS L. REV., *supra* note 12, at 881.

53. Note, 24 HASTINGS L.J. 347, 356 (1973).

54. *Id.* at 347.

Although it does have certain advantages, an "if, as, and when" award may be inappropriate in some circumstances. If the amount which the non-employee spouse would actually receive is small, such that equivalent marital property is available, the court should order the outright transfer of property. Such a decree would avoid enforceability problems and achieve finality when the actual receipt of retirement benefits will be many years hence.[55]

In light of the complexity of issues involved in determining the divisibility of pension interests, the treatment of the problem in *Powers* is overly simplistic. The court seized upon the term "vesting" as a shibboleth to solve the problem.[56] However, as has been noted earlier, vesting should not necessarily be the *sine qua non* for divisibility of an interest in pension plans.[57] The *Powers* court did not actually analyze the problem with respect to the new dissolution law, although it did allude to the law in its narrow holding.[58] Instead, *Robbins* was merely distinguished on the fact that the husband's interest in that case could be divested by contingencies.[59]

The court also failed to discuss the problem of valuing the interest in the pension plan. The sparse number of facts given in the case with respect to the plan fail to state what the interest in the plan was actually worth. The award approved was apparently one in which the non-employee spouse was awarded other marital property in lieu of a share in the payments under the plan.[60] The court did not discuss the merits of such an award, nor did it indicate whether an "if, as, and when" award is an acceptable form of award.

The new Missouri Dissolution of Marriage Act presents problems for those attorneys in Missouri who, through years of experience with the old divorce law, have developed perspectives which must now be changed to accommodate the theories of the new law. Focusing on *Robbins*, some attorneys might have assumed that interests in pension plans were not subject to division as property in a dissolution of marriage action. *Powers* does serve to alert these attorneys to the reality that such an interest may be considered marital property,[61] although the opinion does little to acquaint attorneys with the new philosophy employed to arrive at such a result.[62]

The *Powers* court could have taken the opportunity to reject the vesting requirement, although it may have wished to defer to the Missouri Supreme

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55. Comment, 50 WASH. L. REV., *supra* note 14, at 520.
56. 527 S.W.2d at 957.
57. *See* notes 25-27 and accompanying text *supra*.
58. 527 S.W.2d at 957.
59. *Id.*
60. *Id.*
61. Attorneys should heed such warning. The failure to consider pension rights in a divorce action has cost a California attorney a $100,000 judgment in a malpractice suit. Smith v. Lewis, 118 Cal. Rptr. 621, 530 P.2d 589 (1975).
62. The husband did not argue that the interest in the retirement plan should be excepted from marital property; but rather, he argued it was not property at all. 527 S.W.2d at 957.