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PENSION RIGHTS AS MARITAL PROPERTY: A FLEXIBLE APPROACH

*Kuchta v. Kuchta*¹

The statutory procedures that Missouri courts follow in the disposition of marital property on marriage dissolution are found in Missouri Revised Statutes section 452.330.² Enacted as part of the Missouri Dissolution of Marriage Act³ in 1973, section 452.330 broadly defines the term "marital property" and lists several factors to be considered in arriving at a just division of such property.⁴ Until recently, however, the extent to which a spouse's pension rights could be treated as marital property within the meaning of section 452.330 remained unclear. Following protracted appellate review, the Missouri Supreme Court concluded in *Kuchta v. Kuchta*⁵ that trial courts may, unrestricted by fixed rules, treat pension rights as marital property subject to equitable division on marriage dissolution.

Arlene and Eustis Kuchta had been married for more than nineteen years when a decree of dissolution was entered in 1978.⁶ The Circuit Court

1. 636 S.W.2d 663 (Mo. En Banc 1982).

2. (Cum. Supp. 1982).

3. 1973 Mo. Laws 470 (codified at MO. REV. STAT. §§ 452.300-415 (1978)).

4. Patterned after Section 307 of the Uniform Marriage and Divorce Act, the Missouri statute provides:

"[*M*arital 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.

MO. REV. STAT. § 452.330.2 (Cum. Supp. 1982). *See also* UNIF. MARRIAGE & DIVORCE ACT § 307 (1970), 9A U.L.A. 142 (1979). MO. REV. STAT. § 452.330.1 (Cum. Supp. 1982) directs Missouri courts to consider "all relevant factors" including:

- (1) The contribution of each spouse to the acquisition of the marital property, including the contribution of a spouse as homemaker;
- (2) The value of the property set apart to each spouse;
- (3) The economic circumstances of each spouse at the time the division of property is to become effective . . . ; and
- (4) The conduct of the parties during the marriage.

5. 636 S.W.2d 663, 666 (Mo. En Banc 1982).

6. *Id.* at 663.

of Platte County divided the marital property of the parties. The decree of dissolution set off to Eustis various assets, including the value of a TWA retirement plan.⁷ At the date of dissolution, Eustis had been employed with TWA for twenty-two years. Arlene, a homemaker, had not participated in any retirement plan.

The Missouri Court of Appeals for the Western District, finding that the retirement plan was divisible as marital property, modified the decree of dissolution to provide Arlene with a fractional share of retirement benefits paid out of the plan.⁸ Upon application of both parties, the cause was then transferred to the Missouri Supreme Court. In a four-to-three decision affirming the decree and judgment of the circuit court, the supreme court found that nonmatured pension rights did not constitute marital property under Missouri law.⁹ On rehearing,¹⁰ the supreme court again affirmed the decree and judgment of the circuit court but conceded that Missouri courts could properly consider prospective pension benefits as divisible marital property.¹¹

On rehearing, the Missouri Supreme Court recognized the increasingly important role of pension rights in the economic security of employees and noted that an employee-spouse's pension rights may often be the most valuable asset of the marital community.¹² The court characterized pension rights as a form of deferred compensation that frequently accrues during a

7. *Id.* at 664.

8. *Kuchta v. Kuchta*, No. WD 30691, slip op. at 8 (Mo. App., W.D. July 8, 1980).

9. *Kuchta v. Kuchta*, No. 62439, slip op. at 6 (Mo. En Banc Sept. 8, 1981). Relying on its decision in *Robbins v. Robbins*, 463 S.W.2d 876 (Mo. 1971), the court determined that an employee-spouse could receive pension benefits within the meaning of the marital property definition only "when the final contingency—that he be alive to receive the payment—is fulfilled." *Kuchta, supra*, at 6. In *Robbins*, which arose prior to the enactment of § 452.330, the court had found that potential pension benefits, in the absence of a right to the present value of such benefits, were too speculative to warrant consideration in awarding alimony. 463 S.W.2d at 881.

10. The supreme court sustained appellant Arlene Kuchta's motion for rehearing, withdrew its initial opinion, and heard further arguments. 636 S.W.2d at 663. The motion for rehearing was supported by briefs of amici curiae Client Counsel of Northeast Missouri, NOW Legal Defense and Education Fund, National Center on Women and Family Law, and Women Lawyers' Association of Greater St. Louis.

11. 636 S.W.2d at 665. Although the circuit court awarded the entire interest in the TWA retirement plan to Eustis Kuchta, the supreme court on rehearing determined that the circuit court did properly consider the potential pension benefits as marital property and further concluded that, in view of the relevant factors listed in § 452.330 as applied to the instant case, the court could not "with any degree of certainty declare that the result reached was not equitable and just." *Id.* at 666-67. See note 4 *supra*. The supreme court directed that its holding in *Robbins* no longer be followed. 636 S.W.2d at 665. See note 9 *supra*.

12. 636 S.W.2d at 664.

marriage and results from the joint efforts of both spouses.¹³ Similar characterizations have led an expanding number of jurisdictions to recognize the divisibility of pension rights as marital or community property.¹⁴

13. *Id.* at 665.

14. *See* *Malone v. Malone*, 587 P.2d 1167, 1168 (Alaska 1978) (per curiam); *Van Loan v. Van Loan*, 116 Ariz. 272, 274, 569 P.2d 214, 216 (1977); *In re Marriage of Brown*, 15 Cal. 3d 838, 842, 544 P.2d 561, 562-63, 126 Cal. Rptr. 633, 634-35 (1976); *Robert C.S. v. Barbara J.S.*, 434 A.2d 383, 387 (Del. 1981); *Linson v. Linson*, 1 Hawaii App. 272, —, 618 P.2d 748, 750 (1980); *Shill v. Shill*, 100 Idaho 433, —, 599 P.2d 1004, 1007 (1979); *In re Marriage of Hunt*, 78 Ill. App. 3d 653, 658-59, 397 N.E.2d 511, 516 (1979); *In re Marriage of Schissel*, 292 N.W.2d 421, 424 (Iowa 1980); *Foster v. Foster*, 589 S.W.2d 223, 224 (Ky. Ct. App. 1979); *Sims v. Sims*, 358 So. 2d 919, 921 (La. 1978); *Ohm v. Ohm*, 49 Md. App. 392, —, 431 A.2d 1371, 1375 (1981); *Miller v. Miller*, 83 Mich. App. 672, 675, 269 N.W.2d 264, 265 (1978); *Jensen v. Jensen*, 276 N.W.2d 68, 69 (Minn. 1979); *In re Marriage of Miller*, — Mont. —, —, 609 P.2d 1185, 1187 (1980); *Kullbom v. Kullbom*, 209 Neb. 145, 150-51, 306 N.W.2d 844, 847-48 (1981); *Kikkert v. Kikkert*, 177 N.J. Super. 471, 475, 427 A.2d 76, 78 (1981); *Copeland v. Copeland*, 91 N.M. 409, 412, 575 P.2d 99, 102 (1978); *Majauskas v. Majauskas*, 110 Misc. 2d 323, —, 441 N.Y.S.2d 900, 901 (N.Y. Sup. Ct. 1981); *Keig v. Keig*, 270 N.W.2d 558, 560 (N.D. 1978); *Hansen v. Hansen*, 273 N.W.2d 749, 753 (S.D. 1979); *Cearley v. Cearley*, 544 S.W.2d 661, 666 (Tex. 1976); *In re Marriage of Jacobs*, 20 Wash. App. 272, 273-74, 579 P.2d 1023, 1024-25 (1978); *Bloomer v. Bloomer*, 84 Wis. 2d 124, 129 n.3, 267 N.W.2d 235, 238 n.3 (1978). *But see* *Paulsen v. Paulsen*, 269 Ark. 523, 526, 601 S.W.2d 873, 875 (1980); *Ellis v. Ellis*, 191 Colo. 317, 319, 552 P.2d 506, 507 (1976); *Thompson v. Thompson*, 42 C.L.J. 33, — (Conn. 1981); *Sadler v. Sadler*, — Ind. App. —, —, 428 N.E.2d 1305, 1308 (1981); *Baker v. Baker*, 120 N.H. 645, 648, 421 A.2d 998, 1000 (1980); *Cherry v. Cherry*, 66 Ohio St. 2d 348, —, 421 N.E.2d 1293, 1298 (1981); *Baker v. Baker*, 546 P.2d 1325, 1326 (Okla. 1975); *In re Marriage of Anderson*, 27 Or. App. 193, 196, 555 P.2d 816, 817 (1976); *Carter v. Carter*, — S.C. —, —, 286 S.E.2d 139, 140 (1982); *Bennet v. Bennet*, 607 P.2d 839, 840 (Utah 1980). Arizona, Arkansas, Colorado, Delaware, Illinois, Kentucky, Montana, and New Jersey have, like Missouri, adopted marital property provisions similar to UNIF. MARRIAGE & DIVORCE ACT § 307 (1970), 9A U.L.A. 142 (1979). *See* ARK. STAT. ANN. § 34-1214 (Cum. Supp. 1981); COLO. REV. STAT. § 14-10-113 (Cum. Supp. 1981); DEL. CODE ANN. tit. 13, § 1513 (1981); ILL. ANN. STAT. ch. 40, § 503 (Smith-Hurd 1980); KY. REV. STAT. § 403.190 (Cum. Supp. 1980); MONT. CODE ANN. § 40-4-202 (1981); N.J. STAT. ANN. § 2A: 34-23 (West Cum. Supp. 1981-1982). *See also* note 4 *supra*. Arizona, California, Idaho, Louisiana, New Mexico, Texas, and Washington are community property jurisdictions. In the leading case of *In re Marriage of Brown*, 15 Cal. 3d 838, 544 P.2d 561, 126 Cal. Rptr. 633 (1976), the California Supreme Court characterized pension rights as a contractual right to deferred compensation for services rendered. *Id.* at 845, 544 P.2d at 565, 126 Cal. Rptr. at 637. As a contractual right, or chose in action, the California court concluded that pension rights constitute a divisible contingent interest in property rather than a mere expectancy. *Id.*

Most of the courts that have prohibited the division of prospective pension benefits have, nevertheless, required consideration of such pension rights in dividing other marital assets or in awarding maintenance. *See* *Paulsen v. Paulsen*, 269 Ark.

Prior to *Kuchta*, intermediate appellate courts in Missouri had generally recognized the divisibility of vested pension rights under section 452.330.¹⁵ As the varied appellate opinions in *Kuchta* indicate, however, the issue of pension rights as marital property was far from settled.¹⁶ In its resolution of the issue, the supreme court examined three periods of employment during which a marriage dissolution could occur: Stage I, Stage II, and Stage III.¹⁷ The court described Stage I as the period of employment during which retirement benefits are "nonvested" and "nonmatured,"¹⁸ Stage II as the period during which benefits are "vested" but "nonmatured,"¹⁹ and Stage III as the period during which benefits are "vested" and "matured."²⁰ The retirement benefits at issue in *Kuchta* fell within Stage II.²¹ The supreme court, after briefly addressing the proper treatment of

523, 526, 601 S.W.2d 873, 875 (1980); *In re* Marriage of Ellis, 36 Colo. App. 234, —, 538 P.2d 1347, 1350 (1975); *Thompson v. Thompson*, 42 C.L.J. 33, — (Conn. 1981); *Sadler v. Sadler*, — Ind. App. —, —, 428 N.E.2d 1305, 1308 (1981); *Baker v. Baker*, 120 N.H. 645, 648, 421 A.2d 998, 1001 (1980); *Baker v. Baker*, 546 P.2d 1325, 1326 (Okla. 1975); *In re* Marriage of Anderson, 27 Or. App. 193, 196, 555 P.2d 816, 817 (1976).

15. See *Massey v. Massey*, 594 S.W.2d 296, 298 (Mo. App., W.D. 1979); *McLaughlin v. McLaughlin*, 585 S.W.2d 567, 569 (Mo. App., E.D. 1979); *Daffin v. Daffin*, 567 S.W.2d 672, 679 (Mo. App., K.C. 1978); *Nilges v. Nilges*, 564 S.W.2d 262, 263 (Mo. App., St. L. 1978); *Anspach v. Anspach*, 557 S.W.2d 3, 6 (Mo. App., St. L. 1977); *Ledbetter v. Ledbetter*, 547 S.W.2d 214, 215 (Mo. App., St. L. 1977); *Jaeger v. Jaeger*, 547 S.W.2d 207, 212 (Mo. App., St. L. 1977); *In re* Marriage of Powers, 527 S.W.2d 949, 957 (Mo. App., St. L. 1975). See also *Domestic Relations—Husband's "Vested" Interest in Retirement Plan is Divisible as Marital Property*, 42 MO. L. REV. 143 (1977). But see *In re* Marriage of Faulkner, 582 S.W.2d 292, 296 (Mo. App., E.D. 1979) (retirement plan not marital property because plan provisions for disposition of benefits "too speculative and not conducive to computation").

Although the term is often treated differently according to the context, pension rights are deemed "vested" when a pension plan participant is entitled to receive plan benefits irrespective of whether employment is terminated prior to retirement. See D. MCGILL, *FUNDAMENTALS OF PRIVATE PENSIONS* 130 (1975). See also notes 18-20 and accompanying text *infra*.

16. The Missouri Supreme Court had, prior to *Kuchta*, declined to review the issue of pension rights as marital property. *In re* Marriage of Brethauer, 566 S.W.2d 462, 465 (Mo. En Banc 1978).

17. 636 S.W.2d at 665.

18. If employment is terminated during this period, the employee-spouse has no right to receive any benefits, presently or in the future, except the amount of employee contributions to the retirement plan plus interest. *Id.*

19. If employment is terminated during this period, the employee-spouse has a right to receive certain benefits beyond the amount of employee contributions, but only upon reaching a designated retirement age. *Id.*

20. If employment is terminated during this period, the employee-spouse has a present right to receive certain benefits beyond employee contributions. *Id.*

21. *Kuchta v. Kuchta*, No. WD 30691, slip op. at 5-6 (Mo. App., W.D. July 8, 1980). A report entitled "Your 1978 Personal Statement of Benefits," furnished by

retirement benefits falling within Stages I and III,²² found that retirement benefits falling within Stage II often present "speculative and perhaps insoluble questions" that require the application of a flexible approach to accommodate the particular vesting and maturing provisions of the retirement plan at issue.²³ The court, emphasizing that the recognition of pension rights as marital property does not require the actual division of such rights in every case, authorized trial courts in Missouri to exercise broad discretion in designing "some plan" when the division of pension rights is necessary to protect the rights and interests of the parties to a marriage dissolution.²⁴

The authority of trial courts to divide pension rights pursuant to state marriage dissolution laws is limited by federal preemption with respect to certain pensions created by federal law. In *Hisquierdo v. Hisquierdo*,²⁵ the United States Supreme Court determined that an anti-attachment provision of the Railroad Retirement Act of 1974²⁶ precludes the division of benefits received under that Act.²⁷ In *McCarty v. McCarty*,²⁸ the Supreme Court found that federal law precluded a state court from dividing military nondisability retirement pay pursuant to state marriage dissolution laws.²⁹ Although federal preemption remains a barrier to any division of pension rights created by the Railroad Retirement Act, Congress recently responded to the *McCarty* decision by enacting legislation that expressly permits the division of disposable military retirement pay as marital or community property, with specific conditions and limitations.³⁰ To the ex-

TWA to Eustis Kuchta, was introduced at trial as Petitioner's Exhibit Number 3. The report indicated the benefits payable under the retirement plan were 100% vested.

22. In dicta, and without further elaboration, the court suggested: "Even a casual reading of the somewhat artificially designed 'time-periods' makes it apparent that a trial court, if it deemed proper in the first instance, could act with a relative degree of certainty during Stage I or Stage III, with more lingering doubts in the latter." 636 S.W.2d at 665.

23. 636 S.W.2d at 665.

24. *Id.* at 665-66. Although refusing to set fixed rules with respect to the division of pension rights, the *Kuchta* court did note the efforts of other courts, including the method of division proposed by the intermediate appellate court in the instant case. See note 61 and accompanying text *infra*.

25. 439 U.S. 572 (1979).

26. 45 U.S.C. §§ 231-231t (1976).

27. 439 U.S. at 590. The anti-attachment provision is found in 45 U.S.C. § 231m (1976). In addition, *id.* § 231d(c)(3) specifically cuts off a spouse's right to receive a retirement annuity following a divorce from an employee covered by the Act.

28. 453 U.S. 210 (1981).

29. *Id.* at 232.

30. See Department of Defense Authorization Act, Pub. L. No. 97-252, § 1002, 96 Stat. 730 (1982) (to be codified at 10 U.S.C. § 1408). *Id.* § 1001 provides that Title X of the Act may be cited as the "Uniformed Services Former Spouses' Protec-

tent of the specified conditions and limitations, federal preemption continues to restrict the application of state marriage dissolution laws to military pensions. As noted by the *Kuchta* court on rehearing,³¹ a 1978 amendment to the federal civil service retirement laws expressly permits the division of federal civil service retirement benefits upon marriage dissolution.³² Unlike the recent military pension legislation, the federal civil service retirement laws as amended impose essentially no restriction on the divisibility of federal civil service retirement benefits pursuant to state law.

Although most private pension plans are subject to federal regulation under the Employee Retirement Income Security Act of 1974 (ERISA),³³ the threat of federal preemption with respect to the division of pension rights as marital or community property appears limited to those pension rights that originate directly from federal pension legislation. Some state courts have noted ERISA's restriction on the assignment and alienation of plan benefits covered by the Act but have proceeded to determine the divisibility of pension rights under their own marriage dissolution laws.³⁴ The United States Supreme Court has dismissed appeals from two California decisions holding that ERISA does not preclude the treatment of pension rights as community property.³⁵ Thus, although the mandate of the *Kuchta* court is limited by federal preemption with respect to certain pension rights originating directly from federal retirement statutes, Missouri trial courts may otherwise exercise unfettered discretion in the treatment of pension rights as marital property, at least where such rights are vested but

tion Act." President Reagan signed the Defense Authorization Act into law on September 8, 1982.

31. 636 S.W.2d at 665.

32. See 5 U.S.C. § 8345(j) (Supp. V 1981), which provides in part that benefits shall be paid (in whole or in part) by the Office to another person if and to the extent expressly provided for in the terms of any court decree of divorce, annulment, or legal separation, or the terms of any court order or court-approved property settlement agreement incident to any court decree of divorce, annulment, or legal separation.

33. 29 U.S.C. §§ 1001-1381 (1976). See generally Bonavich, *Allocation of Private Pension Benefits as Property in Illinois Divorce Proceedings*, 29 DE PAUL L. REV. 1 (1979).

34. See, e.g., *In re Marriage of Hunt*, 78 Ill. App. 3d 653, 665-66, 397 N.E.2d 511, 519 (1979); *Ohm v. Ohm*, 49 Md. App. 392, 401, 431 A.2d 1371, 1377 (1981). ERISA's restriction on the assignment and alienation of retirement benefits is found in 29 U.S.C. § 1056(d)(1) (1976).

35. See *In re Marriage of Campa*, 89 Cal. App. 3d 113, 152 Cal. Rptr. 362 (1979), *appeal dismissed*, 444 U.S. 1028 (1980); *Johns v. Retirement Fund Trust*, 85 Cal. App. 3d 511, 149 Cal. Rptr. 551 (1978), *appeal dismissed and cert. denied*, 444 U.S. 1028 (1980). Such dismissals of federal appeals are generally viewed as decisions on the merits, indicating that no substantial federal question exists. *Hicks v. Miranda*, 422 U.S. 332, 344-45 (1975). See also *Stone v. Stone*, 632 F.2d 740, 743 (9th Cir. 1980) (concluding that federal courts have concurrent jurisdiction with state courts in suits by spouses seeking to enforce marital interests in ERISA-regulated pension plans), *cert. denied*, 453 U.S. 922 (1981).

unmatured.³⁶

The treatment of unmatured pension rights as marital or community property has received considerable attention.³⁷ Once it is determined that pension rights are subject to division as marital or community property under state law, attention necessarily focuses on the valuation of such interests and their allocation between the parties to a marriage dissolution. Valuation of the marital portion of pension rights necessarily involves a determination of what pension interests have accrued during the marital relationship. The accrual of pension interests is dependent on the nature and provisions of the retirement plan in which the employee-spouse participates.³⁸

As noted by the Missouri Supreme Court in *Kuchta*, the nature and provisions of pension plans vary considerably.³⁹ Pension rights, or the right to retirement benefits, may be provided to employees through numerous vehicles, including traditional pension plans, profit sharing plans, money purchase pension plans, employee stock ownership plans, Keogh plans, and simplified employee pension plans.⁴⁰ ERISA introduced two general categories for retirement plans: defined benefit plans and defined contribution plans.⁴¹ In a defined benefit plan, accrued benefits are determined on the basis of a benefit formula that expresses the accrued benefits in terms of the benefits that a participant can expect to receive upon retirement.⁴² The accrued benefit in a defined benefit plan is generally dependent on years of

36. See note 19 and accompanying text *supra*.

37. See generally Bonavich, *supra* note 33; DiFranza & Parkyn, *Dividing Pensions on Marital Dissolution*, 55 CAL. ST. B.J. 464 (1980); Fleck & Schiller, *Developments in Marital Property Law*, 68 ILL. B.J. 698, 706-09 (1980); Foster & Freed, *Spousal Rights in Retirement and Pension Benefits*, 16 J. FAM. L. 187 (1977); Hardie, *Pay Now or Later: Alternatives in the Disposition of Retirement Benefits on Divorce*, 53 CAL. ST. B.J. 106 (1978); Krauskopf, *Marital Property at Marriage Dissolution*, 43 MO. L. REV. 157 (1978); Krauskopf, *A Theory for "Just" Division of Marital Property in Missouri*, 41 MO. L. REV. 165 (1976); Leonard, *Older Women and Pensions: Catch 22*, 10 GOLDEN GATE L. REV. 1191, 1203-07 (1980); Pattiz, *In a Divorce or Dissolution Who Gets the Pension Rights: Domestic Relations Law and Retirement Plans*, 5 PEPPERDINE L. REV. 191 (1978); Comment, *Retirement Pay: A Divorce in Time Saved Mine*, 24 HASTINGS L.J. 347 (1973); Comment, *Pensions as Property Subject to Equitable Division upon Divorce in Oklahoma*, 14 TULSA L.J. 168 (1978); *Pensions: After Mey v. Mey, When are They Property Subject to Equitable Distribution upon Divorce in New Jersey?*, 12 RUTGERS L.J. 261 (1980); Annot., 94 A.L.R.3d 176 (1979).

38. See *Massey v. Massey*, 594 S.W.2d 296, 298 (Mo. App., W.D. 1979).

39. 636 S.W.2d at 665.

40. See Brown, *Pension and Profit Sharing Plans Distinguished*, in INTRODUCTION TO QUALIFIED PENSION AND PROFIT SHARING PLANS 11-66 (Practising Law Institute, Tax Law and Est. Planning Series 1982).

41. *Id.* See 29 U.S.C. § 1002 (34), (35) (1976).

42. See Brinster, *Funding Plan Benefits*, in INTRODUCTION TO QUALIFIED PENSION AND PROFIT SHARING PLANS 250 (Practising Law Institute, Tax Law and Est. Planning Series 1982).

service, age, and compensation.⁴³ In a defined contribution plan, accrued benefits are equal to the participant's individual account balance, which may consist of both employer and employee contributions.⁴⁴ Defined contribution plans pay participants the contributions accumulated in the participant's individual account plus interest earned thereon and forfeitures from other participants.⁴⁵ The nature of the retirement plan in which an employee-spouse participates must be considered when attempting to value the pension rights that have accrued during a marriage.

Valuation of pension rights is also dependent on the particular provisions of the retirement plan at issue in a marriage dissolution. Provisions relating to participation, contributions, vesting, distribution of benefits, cost of living adjustments, plan earnings, and forfeitures are all relevant in valuing prospective retirement benefits attributable to a marriage.⁴⁶ Although consideration of such plan provisions and other variables will not result in a precise valuation of prospective retirement benefits, it will aid in approximating what interest is available for treatment as marital property in Missouri. Precise valuation is not essential in equitable distribution jurisdictions such as Missouri where, unlike community property states, equal division of marital assets is not required.⁴⁷ As a Washington court noted in *In re Marriage of Clark*,⁴⁸ "The key to an equitable distribution of property is not mathematical preciseness, but fairness."⁴⁹

Several methods of allocation are available for use by trial courts in the equitable division and distribution of marital estates containing prospective retirement benefits. In *Kuchta*, the court emphasized that the division of pension rights between spouses is not mandatory, that the most desired result is a "full and final division of marital property without contingencies."⁵⁰ Rather than divide prospective retirement benefits, a trial court may simply consider pension rights as part of the marital estate and award to the non-employee-spouse an offsetting amount of other marital property. Nondivision of pension rights has been advocated where the present value of the pension rights is not too speculative and there is sufficient other marital property to make an offsetting award.⁵¹ Where a lump sum award to the nonemployee-spouse at the time of dissolution is appropriate, the trial court

43. *Id.*

44. *Id.*

45. B. STONE, MOD. LEGAL FORMS § 6661.2 (Cum. Supp. 1981).

46. See Pattiz, *supra* note 37, at 220-27.

47. See Fleck & Schiller, *supra* note 37, at 707; Krauskopf, *Marital Property at Marriage Dissolution*, 43 MO. L. REV. 157, 176 (1978).

48. 13 Wash. App. 805, 538 P.2d 145 (1975).

49. *Id.* at 810.

50. 636 S.W.2d at 666.

51. See *In re Marriage of Hunt*, 78 Ill. App. 3d 653, 663, 397 N.E.2d 511, 519 (1979); *Kikkert v. Kikkert*, 177 N.J. Super. 471, 477-78, 427 A.2d 76, 79 (1981); *Copeland v. Copeland*, 91 N.M. 409, 414, 575 P.2d 99, 104 (1978). In *Kikkert*, the court noted that continued sharing of financial interests by divorced spouses is "too

could first project the future growth of the pension rights that accrued during the marriage, reduce the future value of the pension rights by the value of taxes to be paid upon distribution of the benefits,⁵² and, finally, discount the net amount to present value at the time of dissolution.⁵³ A trial court might also consider evidence of the cost of an annuity in establishing the present value of future retirement benefits.⁵⁴ In lieu of dividing prospective retirement benefits, an equitable division of the marital estate could also include a cash settlement payable in installments with interest.⁵⁵

In *Kuchta*, the court indicated that where the contingent nature of pension rights prohibits a full and final division of the marital estate, trial courts are empowered to design "some plan" to protect the rights and interests of the parties, including the power to order a delayed percentage division.⁵⁶ In an effort to apportion the risk of contingent pension rights, numerous jurisdictions have sanctioned such a "wait-and-see" approach, under which the trial court orders a division of the potential retirement benefits if and when paid.⁵⁷ Some courts have indicated that where such a method of allocation is utilized, the employee-spouse retains the power to determine, within the limits of the retirement plan, when and in what form

susceptible to continued strife and hostility." 177 N.J. Super. at 478, 427 A.2d at 79. See also *Bonavich, supra* note 37, at 46.

52. *Corliss v. Corliss*, — Wis. 2d —, —, 320 N.W.2d 219, 221 (Ct. App. 1982).

53. *Bloomer v. Bloomer*, 84 Wis. 2d 124, 133, 267 N.W.2d 235, 240 (1978). In *Jensen v. Jensen*, 276 N.W.2d 68, 69 (Minn. 1979), the Minnesota Supreme Court upheld a trial court's consideration of expert testimony relating to an accepted formula for valuing an annuity pension by discounting for future interest and mortality.

54. See *Kis v. Kis*, — Mont. —, —, 639 P.2d 1151, 1153 (1982). The court in *Kis* also suggested that the employee-spouse might introduce evidence of the effect any contingencies would have in diminishing the present value figure. *Id.* at —, 639 P.2d at 1154.

55. See *Hansen v. Hansen*, 273 N.W.2d 749, 753 (S.D. 1979). See also *DeRevere v. DeRevere*, 5 Wash. App. 741, 746, 491 P.2d 249, 253 (1971). In *Malone v. Malone*, 587 P.2d 1167, 1168 (Alaska 1978), the court awarded to the nonemployee-spouse, as a share of retirement benefits, a monthly sum payable during the lives of the parties.

56. 636 S.W.2d at 666.

57. See *In re Marriage of Brown*, 15 Cal. 3d 838, 848, 544 P.2d 561, 567, 126 Cal. Rptr. 633, 639 (1976); *Robert C.S. v. Barbara J.S.*, 434 A.2d 383, 387 (Del. 1981); *Shill v. Shill*, 100 Idaho 433, —, 599 P.2d 1004, 1010 (1979); *In re Marriage of Hunt*, 78 Ill. App. 3d 653, 662-63, 397 N.E.2d 511, 519 (1979); *Foster v. Foster*, 589 S.W.2d 223, 225 (Ky. Ct. App. 1979); *Sims v. Sims*, 358 So. 2d 919, 921 (La. 1978); *Ohm v. Ohm*, 49 Md. App. 392, —, 431 A.2d 1371, 1377-81 (1981); *Kikkert v. Kikkert*, 177 N.J. Super. 471, 477-78, 427 A.2d 76, 79-80 (1981); *Copeland v. Copeland*, 91 N.M. 409, 414, 575 P.2d 99, 104 (1978); *Cearley v. Cearley*, 544 S.W.2d 661, 666 (Tex. 1976); *DeRevere v. DeRevere*, 5 Wash. App. 741, 746, 491 P.2d 249, 253 (1971).

payments will be made from the plan.⁵⁸ Pension plan participants often have the power to elect between an annuity and a lump sum distribution⁵⁹ and may have the option to alter benefits by electing an early or late retirement.

The division of pension rights if and when paid avoids the difficulty of determining the present value of prospective retirement benefits⁶⁰ but does require the trial court to determine an appropriate formula for setting the percentage. In *Kuchta*, the intermediate appellate court concluded that the trial court must retain jurisdiction to fix the percentage when payments under the retirement plan commence and to modify the percentage at any time thereafter, as necessary.⁶¹ The supreme court, however, indicated that the percentage should be resolved and fixed at the time of dissolution.⁶² The most practical approach would appear to require only that a formula for determining the percentage be settled at the time of dissolution, with the

58. See *In re Marriage of Brown*, 15 Cal. 3d 838, 849, 544 P.2d 561, 568, 126 Cal. Rptr. 633, 640 (1976); *Farver v. Department of Retirement Systems*, 97 Wash. 2d 344, —, 644 P.2d 1149, 1151 (1982). In *Farver*, the court also found that the percentage interest awarded to the nonemployee-spouse was inheritable. 97 Wash. 2d at —, 644 P.2d at 1153. In *Wilder v. Wilder*, 85 Wash. 2d 364, —, 534 P.2d 1355, 1359 (1975), the trial court had excused the husband from the duty to make payments from his retirement benefits to his former spouse if, through no fault of his own, the benefits failed to mature. The court did, however, require the husband to pay a certain amount per month from his salary if he chose not to retire when eligible. 85 Wash. 2d at —, 534 P.2d at 1359.

59. I. GOODMAN, RETIREMENT DISTRIBUTIONS ¶ 1 (CCH Pension Plan Guide No. 390, Sept. 17, 1982).

60. *Cearley v. Cearley*, 544 S.W.2d 661, 666 (Tex. 1976). In *Kuchta*, counsel for Arlene Kuchta noted that expert evidence on valuation may not be available to parties of modest means. Appellant's Brief on Rehearing at 7.

61. *Kuchta v. Kuchta*, No. WD 30691, slip op. at 9 (Mo. App., W.D. July 8, 1980). Pointing to several contingencies in the ultimate payout of benefits under the retirement plan, the court concluded that it would be improper to require Eustis Kuchta to pay to Arlene her share of the pension rights in cash or even as a "fixed and definite liability, for the retirement benefits bird is yet in the bush." *Id.* at 7. The court also noted that the equation for fixing the percentage division could be expressed as: the number of years of the marriage as the numerator, with the number of years of employment as the denominator (this fraction representing the rights that accrued during the marriage), multiplied by a fraction representing the share of the nonemployee-spouse (the court suggested a fraction of 1/2). However, the court concluded that the use of such a simple years-in-marriage to years-out-of-marriage ratio would be improper where later year contributions to the retirement plan, outside of the marriage, might account for a larger portion of the pension benefits. *Id.* at 8-9.

62. 636 S.W.2d at 666. The court suggested that the respective shares should not be contingent on future events "requiring further resort to the courts." *Id.*

numbers being inserted when the employee-spouse retires.⁶³ To effectuate the delayed percentage division, the decree of dissolution might also order that payments to the nonemployee-spouse be made directly from the administrator or trustee of the retirement plan.⁶⁴

While trial courts in Missouri may, following *Kuchta*, exercise broad discretion in the treatment of vested but nonmatured pension rights as marital property, the extent to which Missouri courts might treat nonvested rights as marital property remains unclear.⁶⁵ The courts of numerous other jurisdictions have concluded that nonvested as well as vested pension rights are subject to division as marital or community property.⁶⁶ The *Kuchta* court's conclusion that "the threatened presence of contingencies which may create differing degrees of 'risk of forfeiture'" does not alter the treatment of pension rights created by the joint efforts of both spouses⁶⁷ would support the treatment of nonvested rights as marital property. Contributions to a retirement plan, even though nonvested, may be made by an employer on behalf of an employee-spouse during the course of the latter's marriage. In addition, years of service with the employer prior to the vesting of employer contributions count toward the period of employment required for vested status. Although the nonvested status of pension rights should be a relevant consideration in the valuation and method of allocation of such rights,⁶⁸ nonvested status by itself should not preclude any and

63. See DiFranza & Parkyn, *supra* note 37, at 467. See also *Sims v. Sims*, 358 So. 2d 919, 921 (La. 1978).

64. See 1 PENS. PLAN GUIDE (CCH) ¶ 2533, at 4293 (1979). In *Kuchta*, the intermediate appellate court suggested that the decree of dissolution should order the employee-spouse to make no alienation of the pension rights, including the election of a joint and survivor annuity with a subsequent spouse, without providing for the protection of the former spouse's rights. *Kuchta v. Kuchta*, No. WD 30691, slip op. at 9 (Mo. App., W.D. July 8, 1980). It has also been suggested that counsel for the nonemployee-spouse should join the pension plan as a party to the dissolution proceeding. See DiFranza & Parkyn, *supra* note 37, at 467.

65. See note 22 and accompanying text *supra*.

66. See *Van Loan v. Van Loan*, 116 Ariz. 272, 274, 569 P.2d 214, 216 (1977); *In re Marriage of Brown*, 15 Cal. 3d 838, 842, 544 P.2d 561, 562-63, 126 Cal. Rptr. 633, 634-35 (1976); *Robert C.S. v. Barbara J.S.*, 434 A.2d 383, 387 (Del. 1981); *Linson v. Linson*, 1 Hawaii App. 272, —, 618 P.2d 748, 750 (1980); *Shill v. Shill*, 100 Idaho 433, —, 599 P.2d 1004, 1007 (1979); *In re Marriage of Hunt*, 78 Ill. App. 3d 653, 658-59, 397 N.E.2d 511, 516 (1979); *Ohm v. Ohm*, 49 Md. App. 392, —, 431 A.2d 1371, 1375 (1981); *Kikkert v. Kikkert*, 177 N.J. Super. 471, 475, 427 A.2d 76, 78 (1981); *Cearley v. Cearley*, 544 S.W.2d 661, 666 (Tex. 1976); *Bloomer v. Bloomer*, 84 Wis. 2d 124, 129 n.3, 267 N.W.2d 235, 238 n.3 (1978).

67. 636 S.W.2d at 665.

68. The *Kuchta* court's intimations as to the certainty with which a trial court could dispose of nonvested rights could be read as referring merely to valuation and allocation, but such a reading would be inconsistent with the court's reference to the speculative and insoluble questions arising with respect to vested pension rights. See notes 22 & 23 and accompanying text *supra*.

all treatment of nonvested pension rights as marital property.⁶⁹ Any risk that contributions will fail to vest could be equitably allocated between the spouses by the utilization of a delayed percentage division.⁷⁰

The express recognition that vested pension rights, at least, may be treated as marital property in Missouri undoubtedly furthers the policies and goals of the Missouri Dissolution of Marriage Act.⁷¹ During marriage, the accrual of pension rights attributable to the employment of either spouse creates mutual expectations of retirement security. Even where both spouses are employed and each participates in a retirement plan, the unlikelihood that the respective pension rights will be of equal value necessitates the treatment of such rights as marital property when equitably dividing and distributing the marital estate. The *Kuchta* court's grant of authority to employ a flexible approach in the treatment of vested but unmatured pension rights as marital property should enable Missouri trial courts to more adequately safeguard spousal rights and expectations arising from the marital endeavor.

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69. On rehearing, the *Kuchta* court began its analysis of the pension rights issue with the following observation:

On reflection, it becomes apparent that whether or not present or prospective pension rights are to be classified as marital property is no longer of primary concern, but rather the manner by which the trial court can treat the same in seeking to reach a fair and equitable division thereof if necessary to comply with § 452.330.

636 S.W.2d at 664.

70. See *In re Marriage of Hunt*, 78 Ill. App. 3d at —, 397 N.E.2d at 519.

71. In *Corder v. Corder*, 546 S.W.2d 798, 804 (Mo. App., K.C. 1977), the court observed:

As opposed to the old order, the Dissolution of Marriage Act views the acquisition of "marital property" as a partnership endeavor, and it enunciates a standard for dividing such property which is flexible enough to weigh and balance the respective contributions of the spouses and to accommodate consideration of manifest justness and fairness.