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Community Property - Profit Sharing Plans - Approval of Undiscounted Current Actual Value and Distribution by Promissory Note Secured by Lien on Separate Property

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NOTES

COMMUNITY PROPERTY–PROFIT SHARING PLANS–APPROVAL OF UNDISCOUNTED CURRENT ACTUAL VALUE AND DISTRIBUTION BY PROMISSORY NOTE SECURED BY LIEN ON SEPARATE PROPERTY. *Ridgway v. Ridgway,* 94 N.M. 345, 610 P.2d 749 (1980).

INTRODUCTION

The judicial practice of dividing spousal pension and retirement benefits upon divorce is founded in the basic concept that marriage is a 50-50 partnership. This concept requires an equitable distribution of all "partnership" assets upon divorce.[1] The average American family spends most of its income on necessities and niceties with little left over for investment and savings in anticipation of retirement. Consequently, many types of public and private retirement plans,[2] including profit-sharing plans, have come into being to secure adequate funds for future needs and to help mitigate financial hardship during retirement.[3] Accordingly, the courts now recognize that an interest in an employee retirement plan may constitute a major asset.[4] In *Ridgway v. Ridgway,*[5] the pension concerned was a profit sharing plan. This Note will discuss the methods[6] used by the trial court, and approved by the New Mexico Supreme Court, for valuing and dividing the plan benefits upon divorce.

STATEMENT OF THE CASE

The petitioner, Linda Ridgway, filed an action in the District Court, Eddy County, for dissolution of marriage, division of commu-

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1. The services of a wife as homemaker, mother and career-builder for her husband are no longer regarded as strictly labor of love. The homemaker's claim is that but for her services the family breadwinner would not have been free to concentrate on his career and to earn his salary and acquire fringe benefits. Hence, the husband's efforts were only part of the total partnership commitment which produced the assets, including pension benefits. *See* Foster and Freed, *Spousal Rights in Retirement and Pension Benefits,* 16 J. Fam. L. 187 (1977-78).

2. For a listing and analysis of the principal types of retirement plans, *see* Pattiz, *In a Divorce or Dissolution Who Gets the Pension Rights: Domestic Relations Law and Retirement Plans,* 5 Pepperdine L. Rev. 191, 271 (1978).

3. *See* Bonavich, *Allocation of Private Pension Benefits as Property in Illinois Divorce Proceedings,* 29 DePaul L. Rev. 1, 2 (1979).

4. *See* Thiede, *The Community Property Interest of the Non-Employee Spouse in Private Employee Retirement Benefits,* 9 U.S.F.L. Rev. 635 (1975).

5. 94 N.M. 345, 610 P.2d 749 (1980).

6. Neither the use of current actual value nor the installment method of division of pension benefits pursuant to a promissory note had previously been recognized as an available alternative for New Mexico trial courts and so they were new methods in that sense.

nity property, and child custody and support.[7] Linda and Lance Ridgway had been married for slightly over six years. During that time, they acquired, among other community property, a vested but unmatured interest in a private profit-sharing plan with Southwestern Engineering and Machining Corporation (hereinafter referred to as SEMCO), Lance's employer.[8]

The trial court determined that the interest in the profit-sharing plan was community property and had a total current cash value of $23,425.74.[9] The wife's share was held to be $11,712.87. The court did not discount her interest because her husband had the immediate right to such monies upon his termination of employment with SEMCO for any reason and his estate had the immediate right upon his death.[10] Because neither the community nor the husband had sufficient cash or equivalent assets to effect immediate payment, he was ordered by the trial court to execute a promissory note for the wife's share of community assets[11] payable to her over approximately three years.[12] The note was secured by a lien on his separate property.[13]

On appeal, the New Mexico Supreme Court affirmed the trial court's use of undiscounted current actual value of plan benefits where present value is not ascertainable.[14] It also approved of the promissory note installment payment procedure used for dividing the benefits.

OVERVIEW OF PENSION AND RETIREMENT BENEFITS AS COMMUNITY PROPERTY

The decision in *Ridgway* is the most recent step in the development of the judicial treatment in New Mexico of pension plans upon divorce. The trend toward including spousal pension plans in community property is best illustrated by the California cases.[15] Prior to 1976, the California courts had held that nonvested pension rights

7. Record, vol. 1, at 1-3, Ridgway v. Ridgway, 94 N.M. 345, 610 P.2d 749 (1980).
8. Record, vol. 1, at 51, 52.
9. *Id.* at 52.
10. *Id.*
11. The wife's interest in other community property was added to her interest in the profit-sharing plan for a balance of $14,203.64 payable under the note. *Id.* at 52-54. An option to reduce the note to $10,000.00 after making a cash down payment was available to respondent. Record, vol. 1, at 64-66.
12. Installments were to be paid at the rate of $250.00 per month until paid in full and bearing no interest until default. Record, vol. 1, at 54, 55.
13. Record, vol. 1, at 55.
14. Ridgway v. Ridgway, 94 N.M. 345, 610 P.2d 749 (1980).
15. The two California cases referred to *infra* have been the most commonly cited cases in this area of the law.

were not property interests, but were mere expectancies, and thus not community assets.[16] For example, in *French v. French,*[17] decided in 1941, a nonvested right in a Navy retirement plan was held to be an expectancy, not a property interest, and thus not subject to division as community property. In more recent decisions, however, the California courts have recognized that pension rights, whether vested or nonvested, do constitute property interests.[18] Hence, to the extent that interests in pensions plans derive from employment during coverture, they are divisible community assets.

Thirty-five years after *French,* in the leading case of *In re Marriage of Brown,*[19] the California Supreme Court overruled *French,* concluding that *French* and its progeny had erred in characterizing nonvested pension rights as expectancies and had thus wrongly denied the trial courts the authority to divide such interests as community property.[20] The *Brown* court ruled that the trial court, when dividing nonvested pension rights as community property, may award each spouse an appropriate portion of each pension payment as it is paid, if it concludes that the uncertainties affecting vesting or maturation of the pension make it unwise to attempt to divide the present value of the rights.[21]

In New Mexico, the question of the disposition of retirement or pension benefits in divorce proceedings was first addressed in *LeClert v. LeClert.*[22] In that case, the New Mexico Supreme Court held that retirement benefits, which had vested on account of the length of the husband's service in the Navy, constituted community property to the extent that the benefits were acquired during coverture.[23] In *Otto v. Otto,*[24] the supreme court ruled that the character of retirement pay is determined by the law of the state where it is earned. Thus, if retirement pay is earned in a community property state during coverture, it is community property.[25]

The question of "maturing" of benefits was not at issue before the

16. French v. French, 17 Cal. 2d 755, 112 P.2d 235 (1941).

17. 17 Cal. 2d 755, 112 P.2d 235 (1941).

18. *In re* Marriage of Brown, 15 Cal. 3d 838, 544 P.2d 561, 126 Cal. Rptr. 633 (1976); *In re* Marriage of Carl, 67 Cal. App. 3d 542, 136 Cal. Rptr. 703 (1977); *In re* Marriage of Roesch, 81 Cal. App. 3d 367, 146 Cal. Rptr. 255 (1978).

19. 15 Cal. 3d 838, 544 P.2d 561, 126 Cal. Rptr. 633 (1976).

20. This change in characterization from an expectancy to a form of property came about because a close analysis of pensions showed them to be part of the consideration earned by the employee, to which the employee had a contractual right or a choice in action which translates as a form of property. *Id.*

21. *Id.*

22. 80 N.M. 235, 453 P.2d 755 (1969).

23. *Id.*

24. 80 N.M. 331, 455 P.2d 642 (1969).

25. *Id.*

New Mexico Supreme Court until it decided *Copeland v. Copeland*,[26] The supreme court held in that case that a vested but unmatured pension plan should be divided so as to entitle the non-employee spouse to a share of the community interest in the portion of the plan that was earned during coverture.[27] In *Copeland*, the trial court adopted a flexible approach whereby the trial court's choice of either an immediate division of the pension assets or a "pay as it comes in" system would depend upon whether there were sufficient community assets to cover the immediate division of the pension.[28]

ANALYSIS OF THE DECISION

The two main issues addressed by the New Mexico Supreme Court in *Ridgway* were the division of the community property and the valuation of the profit-sharing plan.[29] Several of the problems encompassed by these issues were not reconciled by the court.

Division of Community Property

Several alternative methods are available for dividing pension benefits. Of the five methods mentioned below, only two were available to the court in *Ridgway*. Ideally, an immediate division upon divorce would be effected by a lump-sum payment to the non-employee spouse of actual plan benefits, when plans are vested and matured.[30] When actual benefits cannot be reached an immediate division is still possible, either by using community or separate property of the employee spouse as an offset[31] or by allowing the employee spouse to borrow half of the actual plan benefits, satisfy the other spouse's interest with the funds, and relinquish his future right to receive the borrowed benefits from the plan.[32] When an immediate division is

26. 91 N.M. 409, 575 P.2d 99 (1978).

27. The court reserved decision on whether unvested retirement benefits properly should be considered community property, because it was confronted only with benefits which were vested. *Id.* at 412, 575 P.2d at 102.

28. 91 N.M. at 414, 575 P.2d at 104.

29. Child custody was also dealt with by the Supreme Court, but it is of no significance to this Note.

30. Immediate allocation of assets offers advantages of terminating the litigation and thereby avoiding problems associated with continued economic entanglement of former spouses and continued judicial supervision. For a detailed presentation of the pros and cons of immediate versus "wait and see" allocations *see* Bonavich, *Allocation of Private Pension Benefits as Property in Illinois Divorce Proceedings, supra* note 3, at 31-33.

31. The New Mexico Supreme Court clearly indicated its preference for an immediate division of unmatured benefits when sufficient assets exist. Copeland v. Copeland, 91 N.M. at 414, 575 P.2d at 104.

32. This method was utilized in Hines v. Sands, 312 S.W. 2d 275 (Tex. Civ. App. 1958). In *Hines*, the trustees of an employee profit-sharing trust paid the ex-wife half of the employee's share of nonforfeitable trust benefits and in return the employee surrendered his

not possible, as in *Ridgway,* the trial court has two alternatives–the promissory note method or the "pay as it comes in" system. Where a present or current actual value is ascertainable, yet sufficient assets for an immediate division cannot be obtained, an installment or delayed payment method may be used by ordering a promissory note in favor of the non-employee spouse.[33] The second alternative where sufficient assets for immediate division are not available, or the only alternative when neither present nor current actual value is ascertainable, is the "pay as it comes in" system.[34]

The court in *Ridgway* first considered the husband's argument that the trial court's method of dividing community property was an invasion of his separate property rights and tantamount to an award of alimony.[35] In comparing alimony and community property division, the supreme court noted that an alimony award is discretionary with the trial court and can be granted, even if it is not specifically requested, in an effort to divide community property equitably.[36] The court determined, however, that in the instant case the distribution to the wife was of her share of community property, and was not alimony.[37]

The husband contended that the trial court invaded his separate property by ordering him to execute a promissory note in favor of his wife and secure it with a lien on his residence, which was separate property.[38] The husband had to make the note payments out of his future earnings because otherwise he did not have enough community

benefits. In *Ridgway,* the respondent's ability to obtain loans from the plan was limited by ERISA because of his position as a trustee. Record, vol. 3, at 28-30, Ridgway v. Ridgway, 94 N.M. 345, 610 P.2d 749 (1980).

33. Ridgway v. Ridgway, 94 N.M. at 346, 610 P.2d at 750. The trial court apparently adopted the promissory note method at the suggestion of counsel for the petitioner. Record, vol. 3, at 15-16, 24-27.

34. *In re* Marriage of Brown, 15 Cal. 3d at 848, 544 P.2d at 567, 126 Cal. Rptr. at 639; Copeland v. Copeland, 91 N.M. at 414, 575 P.2d at 104. For a recent study indicating that the courts have become increasingly prone to favor a "when, as and if" division in situations where a pension is too difficult to value or where sufficient assets for an offsetting exchange do not exist, *see* Pattiz, *In a Divorce or Dissolution Who Gets the Pension Rights: Domestic Relations Law and Retirement Plans, supra* note 2, at 250-51.

35. 94 N.M. at 346, 610 P.2d at 750.

36. *Id.* Even though alimony was not specifically requested in the pleadings, where the wife's prayer for relief asked for equitable division of community property then an alimony award to her was proper in the amount that community property awarded the husband exceeded that awarded the wife. *See* Worland v. Worland, 89 N.M. 291, 551 P.2d 981 (1976). The statutory authority for allowance from a spouse's separate property as alimony is set forth in N.M. Stat. Ann. § 40-4-12 (1978).

37. Once the basis has been established for finding that the award would be proper if it had been alimony, the basis is without purpose when it is then characterized as community property.

38. Record, vol. 1, at 51-55 and Brief-in-Chief for Appellant at 4, Ridgway v. Ridgway, 94 N.M. at 345, 610 P.2d 749 (1980).

or separate property to pay her.[39] Clearly, his future earnings constitute separate property.[40] Regarding the lien imposed by the trial court on his separate property, the husband argued that the trial court had exceeded its legal authority. Although previously the invasion of a spouse's separate property was allowed only when statutorily authorized for alimony or child support,[41] the supreme court warranted a new usage of the trial court's inherent power by allowing it to impose a lien on one spouse's separate property to secure a debt owed to the other spouse.[42]

While the supreme court stated that imposition of a lien in no way changed the status of the husband's separate property,[43] it overlooked a "value" argument that the lien affects salability of the property and its value as security. Insofar as the lien does not vest title in the wife and it is consistent with the passing of fee, it does not change the property status. Nevertheless, it is an incumbrance on the property which diminishes its value. The effect of this incumbrance is the same as if the court had transferred to the wife a portion of the husband's separate property equal in value to the diminution caused by the lien. As a practical matter, if the trial court had not imposed the lien, the wife could herself have obtained a lien on all real estate owned by the husband by following the statutorily prescribed procedure for a money judgment creditor.[44] In sum, the supreme court authorized imposition of a lien on the husband's separate property, but it ignored the argument that the husband's separate property was invaded without statutory authority both by requiring him to make payments to the wife out of his future earnings and by decreasing the value of his separate property.[45]

The above-mentioned disparities in *Ridgway* may to some extent be balanced by the trial court's concern for adequately protecting the wife's interest.[46] Because of the fact that the profit-sharing plan in question was established and to be administered by a corporation consisting of the appellant, his mother, his stepfather, and several other stockholders,[47] it was suggested that the stock might be dissipated so as to erode the wife's share.[48] Also, because the plan was

39. Brief-in-Chief for Appellant at 6.
40. N.M. Stat. Ann. § 40-3-8(A)(1) (1978).
41. N.M. Stat. Ann. § § 40-4-12 to -20 (1978).
42. 94 N.M. at 346, 610 P.2d at 750.
43. *Id.*
44. N.M. Stat. Ann. § 39-1-6 (1978).
45. 94 N.M. at 346, 610 P.2d at 750.
46. Record, vol. 3, at 11.
47. Record, vol. 2, at 71.
48. Record, vol. 3, at 24.

subject to the Employment Retirement Income Security Act of 1974,[49] the court was reluctant to subject plan benefits in the trust to attachment or other legal or equitable process so as to directly secure the wife's interest in the benefits.[50]

Had the "pay as it comes in" method been utilized in *Ridgway*, the problems involved in invading the husband's separate property would have been avoided. The former spouses would have received their respective shares in the plan benefits at the same time—when and if the plan administrators distributed the benefits. However, the problem of how to enforce a delayed payment method of division would still be present. A lien could be imposed on the husband's separate property, just as under the promissory note method.[51] A constructive trust with the husband acting as trustee might have been established to receive any benefits of the plan as they were paid.[52] Additionally, the court could have required the husband to put up a bond to cover the wife's share. Another enforcement tool available was a periodic accounting required of the employee spouse and possibly the employer as well, if permissible under ERISA.[53]

Valuation of Profit-sharing Plan

At least three basic methods exist for valuing pension and profit-sharing plans. A determination may be made of either present value,[54] current actual value[55] or a certain portion of the plan's future value

49. 29 U.S.C. §§ 1001-1461 (1976 & Supp. III 1979) [hereinafter referred to as ERISA].

50. *See* Treas. Reg. § 1.401(a)-13(b) (1978). A recent treatment of ERISA limitations on court enforcement of spousal pension division is contained in Bonavich, *Allocation of Private Pension Benefits as Property in Illinois Divorce Proceedings, supra* note 3, at 33-45. *See also* Pattiz, *In a Divorce or Dissolution Who Gets the Pension Rights: Domestic Relations Law and Retirement Plans, supra* note 2, at 253-54.

51. *See* text accompanying note 42 *supra*. The trial court originally intended to use the plan benefits (when, as, and if paid) as collateral security for the indebtedness in *Ridgway*, but decided against doing so apparently due to the ERISA limitations on the plan. Record, vol. 3, at 22-27 & 30, Ridgway v. Ridgway, 94 N.M. 345, 610 P.2d 749 (1980).

52. The tax consequences of such a trust were examined in Bell, *Tax Planning in Divorce*, 20 S.W.L.J. 726, 736 (1966).

53. *See* Pattiz, *In a Divorce or Dissolution Who Gets the Pension Rights: Domestic Relations Law and Retirement Plans, supra* note 2, at 252-54.

54. As the supreme court in *Ridgway* interpreted the *Copeland* approach to valuation, trial courts must apply the present value method where a state retirement plan is part of the community property and that value is ascertainable by substantial evidence. Ridgway v. Ridgway, 94 N.M. at 347, 610 P.2d at 751. It is noted that ERISA has its own methods for computing the present value of plan benefits under the Pension Benefit Guaranty Corporation (PBGC) which promulgated regulations describing the methods. 29 C.F.R. §§ 2610.1-2610.10 & appendices (1980).

55. *Id.*

under the "pay as it comes in" system.[56] In discounting to reach the present value, relevant contingencies and other factors of the particular plan should be considered. Included among those factors are discounting for interest,[57] discounting for mortality,[58] and vesting,[59] tax consequences,[60] optional pay-outs,[61] the possibility of early retirement,[62] and other features affecting value and capable of calculation which may present themselves in a particular pension or profit-sharing plan. Some of these factors, such as tax consequences and optional pay-out on termination of employment, may be relevant in discounting current actual value as well.[63]

In considering the valuation of the profit-sharing plan, the supreme court ruled that the trial court's application of the undiscounted current actual value was correct despite the trial court's loose usage of the term "present value" when applying the former measure.[64] The rule set out in *Copeland v. Copeland*[65] that a determination of present value should be made when valuing unmatured pension benefits was decidedly not inflexible. The supreme court in *Ridgway* said that there is no certainty to future benefits derived from a profit-sharing plan because those benefits are contingent upon the success or failure of the business.[66] In *Ridgway,* present value could not be determined because the evidence failed to show an ascertainable future benefit. In contrast, in *Copeland,* a state retirement plan clearly producing an ascertainable value of future benefits mandated application of the

56. For a recent case applying this method to vested but unmatured benefits *see* Rogers v. Rogers, 45 Or. App. 885, 609 P.2d 877 (1980). The opinion contains a meritorious discussion of the various approaches to disposition of retirement monies.

57. For a discussion of this factor, pointing out that it requires a subjective judgment in the choice of an annual interest rate, *see* Projector, *Valuation of Retirement Benefits in Marriage Dissolutions,* 50 L.A. B. J. 229, at 231-33 (1975).

58. 50 L.A. B. J., *supra* note 57, at 233-35.

59. 50 L.A. B. J., *supra* note 57, at 235-37.

60. *See* Wetzel v. Wetzel, 35 Wis. 2d 103, 150 N.W.2d 482 (1967); Troutenko v. Troutenko, 503 S.W.2d 686 (Tex. Ct. Civ. App. 1974); Kruger v. Kruger, 139 N.J. Super. 413, 354 A.2d 340 (1976). *See also* note 69 *infra.*

61. *See* Pattiz, *In a Divorce or Dissolution Who Gets the Pension Rights: Domestic Relations Law and Retirement Plans, supra* note 2, at 245.

62. *Id.*

63. While the supreme court approved of the use of undiscounted current actual value under the particular facts in *Ridgway,* it did not rule that it would be improper to discount the current actual value. Ridgway v. Ridgway, 94 N.M. at 347, 610 P.2d at 751.

64. In a footnote to the opinion the supreme court noted a dictionary definition of "present value" which refers to the amount required which if invested at a certain interest rate would produce a desired yield. 94 N.M. at 346, 610 P.2d at 750 n. 1. Reducing a future payment to its present value is also referred to as discounting, the procedure for which is described in relation to retirement plans in Projector, *Valuation of Retirement Benefits in Marriage Dissolutions, supra* note 57.

65. 91 N.M. 409, 575 P.2d 99 (1978).

66. Ridgway v. Ridgway, 94 N.M. at 347, 610 P.2d at 751.

present value method.[67] Thus, the supreme court in *Ridgway* concluded that the present value method must be applied where that value is ascertainable by substantial evidence. If not, then the current actual value method may be applied.[68]

The tax consideration in *Ridgway* is that, as the husband earns the money he uses to pay on the note, it will be taxed as ordinary income. Furthermore, any benefits eventually received by him under the profit-sharing plan will also be taxed upon receipt,[69] thereby subjecting him to double taxation. On the other hand, unlike in an alimony situation,[70] the wife may end up not being taxed at all on monies received pursuant to a division of community property.[71]

The husband argued vigorously that the trial court reached an inequitable result by using the undiscounted current actual value method and requiring payment pursuant to a promissory note.[72] Since the wife's half of the plan benefits were allocated to her by way of promissory note payments, she would receive a right to the present use of cash, whereas the value of the husband's interest was contingent[73] and in future use. The husband's interest in the plan benefits was contingent upon the success or failure of the business.

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67. Copeland v. Copeland, 91 N.M. 409, 575 P.2d 99 (1978).

68. Ridway v. Ridgway, 94 N.M. at 347, 610 P.2d at 751.

69. I.R.C. § 402(a). Deferred compensation benefits are taxable as ordinary income or at capital-gains rates depending on such conditions as whether the benefits are received over a period of time or in a lump-sum and whether paid on account of the employee's death or separation from employment. *See* Hughes, *Community Property Aspects of Profit-Sharing and Pension Plans in Texas–Recent Development and Proposed Guidelines for the Future,* 44 Tex. L. Rev. 860 (1966).

70. I.R.C. § 71(a)(1) provides for inclusion of alimony and separate maintenance payments in the wife's gross income.

71. When a husband satisfies his wife's vested interest in his profit-sharing plan out of his other assets this would constitute a division of a community property asset that is generally not taxable. However it is more likely that the transfer of interest will be treated as an assignment of her right to receive future taxable income or as a termination of "her employment" and will give rise to ordinary tax treatment in the first instance and capital-gains treatment under the latter. For a discussion of these and other similar tax consequences *see* Hughes, *Community Property Aspects of Profit-Sharing and Pension Plans in Texas–Recent Developments and Proposed Guidelines for the Future, supra* note 69, at 881-84.

72. Brief-in-Chief of Appellant at 13-15 and Reply Brief of Appellant at 5, 6, Ridgway v. Ridgway, 94 N.M. 345, 610 P.2d 749 (1980).

73. While the New Mexico Supreme Court stated that there is no certainty to benefits in a profit-sharing plan as they are contingent upon the success or failure of the business operation, it also recognized that here the benefits were vested but unmatured. Ridgway v. Ridgway, 94 N.M. at 347, 610 P.2d at 751. In other words, while the benefits were nonforfeitable, the employee did not have an unconditional right to them. He could reach them only upon termination of his employment with SEMCO, retirement at age 65, or upon death. *See* note 10 *supra* and Reply Brief for Appellant at 3. The trial court agreed with the opinion of petitioner's counsel that the plan was supported by SEMCO stock so that in the event the stock became worthless nothing would be left to distribute as benefits to anyone. Record, vol. 3, at 23.

The profit-sharing plan was supported by SEMCO stock and small amounts of cash,[74] so that if the business collapsed and the stock became worthless there might be nothing left to distribute. The husband had only future use value because he did not have an unconditional right to receive the benefits, but instead he could receive benefits presently only if he went so far as to terminate his employment with SEMCO.[75] If SEMCO stock became worthless after he had fully paid off the wife's interest from his future earnings then he would receive nothing from the plan either for his share of the community interest or as reimbursement for the wife's share which he paid. While it is true that there is no requirement that each spouse receive exactly the same dollar value from a plan,[76] it seems that a better method of valuation or division might have been used to limit or avoid this inequality.[77]

Had the trial court in *Ridgway* chosen to use the "pay as it comes in" method, it still could have used undiscounted current actual value to firmly establish the value of the wife's interest; the tax problem, however, could have been avoided by distribution of net after-tax benefits to both spouses.[78] By using this method the court also would have avoided the inequity of giving the wife a present use in cash while the husband retained future use value, because each spouse would receive equal cash benefits at the same time.

CONCLUSION

In *Ridgway,* the New Mexico Supreme Court expanded the concept of community property to include profit-sharing plans.[79] It approved the use of undiscounted current actual value of the plan where present value cannot be ascertained. It also endorsed the use of a promissory note in favor of the wife and secured by a lien on the

74. Record, vol. 2, at 90.

75. To assume that because of the husband's option to receive the benefits upon termination of employment he has a present use value would be to assume that he was going to quit his job immediately. He would be penalized for not quitting immediately by not receiving equal treatment unless he did so. Brief for Appellant, at 9-10.

76. Sparks v. Sparks, 84 N.M. 267, 502 P.2d 292 (1972). A disparity in dollar value might not be acceptable if the method of division was not the best suited under the circumstances.

77. *See* text at note 80 *infra.*

78. In *Ridgway,* the trial court stated that tax consequences were not considered because at the time of the hearing on the merits no evidence regarding tax consequences was submitted. Record, vol. 3, at 22.

79. The broad proposition that retirement pay is a form of employee compensation, which if earned during coverture became community property, was held in LeClert v. LeClert, 80 N.M. 235, 236, 453 P.2d 755, 756 (1969). It was not extended specifically to profit-sharing plans until *Ridgway.* 94 N.M. at 347, 610 P.2d at 751.

husband's separate property where neither the community nor the employee spouse had sufficient assets for an immediate division. The court could have reached a more equitable result, however, either by discounting the current actual value for taxes and other relevant and calculable factors prior to execution of the promissory note or by distributing the undiscounted current actual value on a "pay as it comes in" system.[80]

Future treatment of pension and profit sharing plans will require continued development of a flexible approach to valuation and division of plan benefits because of the broad range of plans in existence. Adaptability is especially important in valuation due to the numerous contingencies which may be involved, some of which are so remote and incalculable as to preclude present or current valuation altogether.[81] To reach just and equitable results, the courts must be aware of available alternatives and must carefully consider selection of the method of allocation best suited to the particular facts of each case.

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80. *See* note 63 *supra.*

81. *See* Projector, *Valuation of Retirement Benefits in Marriage Dissolutions, supra* note 57, at 237.