NEW MEXICO LAW REVIEW

Volume 13
Issue 3 *Summer 1983*

Summer 1983

New Mexico Community Property Law and the Division of Retirement Plan Benefits Pursuant to the Dissolution of Marriage

Julie Neerken

NEW MEXICO COMMUNITY PROPERTY LAW AND THE DIVISION OF RETIREMENT PLAN BENEFITS PURSUANT TO THE DISSOLUTION OF MARRIAGE

JULIE NEERKEN*

I. INTRODUCTION

This article surveys law relating to the division of retirement plan benefits in New Mexico upon dissolution of marriage. Because retirement plan benefits form part of an increasing portion of the assets involved in division of property pursuant to a dissolution, the issues discussed are of growing significance to most practitioners. The first portion of this article briefly delineates the paths courts have taken in characterizing retirement plan benefits as community property. The second section explains the various categories of interests in retirement plans and describes the courts' treatment of such plans as divisible property. The third section discusses the division of authority with respect to apportionment of disability benefits, and the fourth section discusses government retirement plans. The fifth portion analyzes valuation issues. The final parts of the article review the purposes of the Employee Retirement Income Security Act of 1974[1] and the problems of preemption and anti-alienation raised by that Act. The text will cite decisions from other community property states where New Mexico courts have not ruled upon an issue.

II. RETIREMENT PLAN BENEFITS

A. Definition of Community Property

In New Mexico, N.M. Stat. Ann. § 40-3-8(B) defines community property as "property acquired by either or both spouses during marriage which is not separate property."[2] Generally, community property does

*Associate, Poole, Tinnin & Martin, P.C.

1. 29 U.S.C. §§ 1001 to 1381 (1976 & Supp. V 1981) [hereinafter cited as "ERISA" or "the Act"]. Hereinafter, for reader convenience, when a specific section or sections of the Act are referred to in a footnote, both the U.S.C. cite and the ERISA section cite will be given. ERISA cites refer to Public Law and Statutes at Large section numbers. ERISA is at Pub. L. No. 93-406, 88 Stat. 829 (1974).

2. N.M. Stat. Ann. § 40-3-8(B)(1978). Section 40-3-8 reads in full:

A. "Separate property" means:

(1) property acquired by either spouse before marriage or after entry of a decree of dissolution of marriage;

(2) property acquired after entry of a decree entered pursuant to Section 40-4-3 NMSA 1978 unless the decree provides otherwise;

(3) property designated as separate property by a judgment or decree of any court having jurisdiction;

(4) property acquired by either spouse by gift, bequest, devise or descent;

(5) property designated as separate property by a written agreement between the spouses; and

(6) Each spouse's undivided interest in property owned in whole or in part by

not include gratuities because the community receives gift property through lucrative and not through onerous means.[3] At one time, some courts held that retirement plan benefits were "mere gratuities," and not divisible as community property.[4] Most courts now hold that retirement plan benefits are compensation for past services.[5] The basis for this holding is that salary is not personal to the individual, but is income to the community for the efforts of the community.[6] This is the correct result because the nonemployee spouse should have as much expectancy in this type of compensation as in current cash compensation.

In classifying retirement plan benefits as community property, courts have held that it is irrelevant whether the vested benefits are attributable to employee or employer contributions, or whether the benefits are in pay status.[7] Where a pension plan is not a qualified retirement plan,[8] but is a nonqualified excess benefit or other deferred compensation plan[9] as to which the employee-spouse may have no contractual rights, courts should reach a comparable result. For example, if the pension is actually a part of an employment contract for all of the vice-presidents of a given bank, and is in effect based upon their earnings, success, and tenure, the

---

the spouses as cotenants in joint tenancy or as cotenants in tenancy in common.

B. "Community property" means property acquired by either or both spouses during marriage which is not separate property.

C. "Property" includes the rents, issues and profits thereof.

D. The right to hold property as joint tenants or as tenants in common and the legal incidents of so holding, including but not limited to the incident of the right of survivorship of joint tenancy, are not altered by the Community Property Act of 1973 [40-3-6 to 40-3-17 NMSA 1978], except as provided in Sections 40-3-10, 40-3-11 and 40-3-13 NMSA 1978.

3. W. DeFuniak & M. Vaughn, Principles of Community Property § 69 (2d ed. 1971) [hereinafter cited as DeFuniak & Vaughn].

4. *See, e.g.*, Daigre v. Daigre, 228 La. 682, 83 S.2d 900 (1955) (holding that a pension was a mere gratuity and not subject to division as community property upon separation).

5. *See, e.g.*, T.L. James & Co. v. Montgomery, 332 So.2d 834 (La. 1976) (holding that retirement plan benefits are deferred compensation earned during the existence of the community). *See also* cases cited *infra* in notes 7, 10, 18, 20, 22, 31, 33, 35, 36, 38, 40, 42, 62, 73 & 79.

6. *See, e.g.*, cases cited *infra* in notes 7, 9, 20, 22, 36, 37, 40, 44, 62, 79 & 97.

7. *See, e.g., In re* Fithian, 10 Cal. 3d 592, 517, P.2d 449, 111 Cal. Rptr. 369, *cert. denied*, 419 U.S. 825 (1974), *overruled on other grounds*, 15 Cal. 3d 838, 544 P.2d 561, 126 Cal. Rptr. 633 (1976). *Fithian* held that the source of contributions to a plan was irrelevant to the characterization of plan benefits as community property. In pay status signifies retirement plan benefits which are currently being paid to a participant or beneficiary.

8. Qualified plans are those plans that qualify for tax-exempt status under I.R.C. §§ 401(a) and 501(a). All references and citations to sections of the Internal Revenue Code in this article are to sections of the Internal Revenue Code of 1954, as amended to the date of publication, unless otherwise indicated. All references and citations to Treasury regulations are to Treasury regulations under the Internal Revenue Code of 1954, as amended to the date of publication, unless otherwise indicated.

9. Employers maintain nonqualified excess benefit plans and unfunded "top-hat" plans to benefit the most highly compensated employees. Many of these plans are exempt from most or all of the provisions of ERISA, 29 U.S.C. §§ 1001 to 1381 (1976 & Supp. V 1981), including the vesting requirements. 29 U.S.C. §§ 1002(36), 1051(2), 1081(a)(3) & (8), 1101(a)(1) (1976); ERISA §§ 3(36), 201(2), 301(a)(3), (8), and 401(a)(1).

compensation plan should be considered community property to the extent that the earnings were part of the community. A court may wish to discount the value of the pension to the extent that it believes that the employee-spouse's rights are contingent.[10]

Once there is either a legal separation[11] or a dissolution of marriage,[12] the earnings and accumulations of each of the parties are no longer community property.[13] Therefore in New Mexico, the community begins when the marriage begins, and ends on the date of legal separation or dissolution. In determining what portion of a participant's interest in a retirement plan is subject to division as community property, the court must first ascertain the portion of the benefits that were earned during coverture. Under the traditional Spanish community property system, one-half of whatever was acquired, earned, gained, or purchased by the husband and wife during the marriage belonged to each party.[14] Retirement plan benefits may be characterized as separate property if one spouse earned them while the marital domicile was in a separate property state, prior to the existence of the community, or after the termination of the community. In such a situation, the benefits are not subject to division under the New Mexico statute.[15] In addition, New Mexico courts have the discretion to utilize plan benefits for the payment of alimony.[16]

10. *See, e.g.*, Grost v. Grost, 561 S.W.2d 223 (Tex. Civ. App. 1978), in which the court divided as community property the benefits earned in an unfunded plan during coverture. A discount because of the contingent nature of the property would be appropriate if a court concluded that there was a substantial possibility that the benefits would never in fact be paid.

11. N.M. Stat. Ann. § 40-4-3 (1978) states: "Whenever the husband and wife have permanently separated and no longer live or cohabit together as husband and wife, either may institute proceedings in the district court for a division of property, disposition of children or alimony, without asking for or obtaining in the proceedings, a dissolution of marriage."

12. N.M. Stat. Ann. § 40-4-1 (1978) lists incompatibility, cruel and inhumane treatment, adultery, and abandonment as grounds for dissolution of marriage.

13. 1943-44 Op. N.M. Att'y Gen. 245.

14. De Funiak & Vaughn, *supra* note 3, at § 66. In Otto v. Otto, 80 N.M. 331, 455 P.2d 642 (1969), the New Mexico Supreme Court directed the trial court to determine upon remand when the parties lived in community property jurisdictions, and to divide the retirement plan benefits accordingly.

15. N.M. Stat. Ann. § 40-3-8(A) (1978). A New Mexico court may divide the property if the property was acquired during domicile in a noncommunity property state, and the property could be divided under the law of that state. Hughes v. Hughes, 91 N.M. 339, 573 P.2d 1194 (1978), involved the divorce of a couple who had spent the first 11 years of their marriage in Iowa, a noncommunity property state. The couple used savings from the husband's wages during this period for the downpayment on a ranch and apartments in New Mexico. The New Mexico Supreme Court followed what it characterized as the general rule that property brought in from a noncommunity property state will retain its separate property nature when traceable into New Mexico property. *Id.* at 343, 573 P.2d at 1198. The court stated that under conflict of law rules, Iowa law would determine the character of the property brought in from Iowa. Iowa law granted the wife an inchoate equitable right in her husband's separate property. The court therefore held that the wife was entitled to a portion of the "separate property," as that term was defined in Iowa. *Id.* at 346–47, 573 P.2d at 1201–1202.

16. N.M. Stat. Ann. § 40-4-12 (1978) permits the court to make an allowance to one spouse from the other spouse's separate property.

B. Classification of Particular Types of Interests

Retirement plans may be divided into two large categories: defined contribution plans and defined benefit plans. Generally speaking, a defined contribution plan is a retirement plan which defines a participant's interest as the amount in his account when the account becomes distributable. The benefit right is defined in terms of the contributions and earnings. In contrast, a defined benefit plan defines the participant's benefits in terms of a certain amount which he may anticipate receiving at retirement. Participants may have different types of benefits. In pay status or matured benefits are benefits which are currently being paid to a participant. Vested but unmatured benefits are benefits which the participant cannot lose by termination of employment, but which are not currently being paid to the participant. Unvested and the unvested portion of partially vested benefits are benefits which a participant will forfeit if he terminates employment.

In New Mexico, a court may divide in pay status benefits distributed under a governmental plan as community property. For example, in *Otto v. Otto,*[17] the New Mexico Supreme Court divided in pay status benefits from a Navy retirement plan as community property. In *LeClert v. LeClert,*[18] the supreme court held that vested benefits to a naval officer constituted community property, notwithstanding the fact that the benefits were not in pay status.[19] Similarly, in *Copeland v. Copeland,*[20] the husband had worked twenty-four and one-fourth years of the twenty-five years required as a prerequisite to actual retirement under a public employee retirement plan. The New Mexico Supreme Court held that the vested but unmatured benefits were divisible. The court noted that:

> This trend toward considering unmatured pension benefits as community property subject to division upon dissolution of the community is based upon sound reasoning and equitable considerations. Permitting the husband to keep his full benefits simply because he still had nine months to work before he was eligible to retire would work a great injustice.[21]

Other courts have agreed with the New Mexico courts on the issue of whether benefits not yet in pay status should be considered community property in appropriate situations.

17. 80 N.M. 321, 455 P.2d 642 (1969).

18. 80 N.M. 235, 453 P.2d 755 (1969).

19. *LeClert* was decided prior to the effective date of the major law concerning private retirement plans, ERISA, 29 U.S.C. §§ 1001 to 1381 (1974 & Supp. V 1981). ERISA profoundly affects the division of benefits under most private retirement plans; therefore, it was not incumbent upon the *LeClert* court to consider the anti-alienation issues discussed *infra* in notes 106–147 and accompanying text.

20. 91 N.M. 409, 575 P.2d 99 (1978).

21. *Id.* at 412, 575 P.2d at 102.

In re Brown[22] was a ground-breaking decision which decreed that vested and nonvested benefits should be treated alike when courts applied community property laws. In *Brown,* the California Supreme Court reversed a long line of authority,[23] and held that unvested benefits under a qualified retirement plan were not a mere expectancy but were actual property.[24] The following hypothetical illustrates why the *Brown* result is equitable. Assume that a qualified retirement plan contains ten-year cliff vesting,[25] as permitted by the Internal Revenue Code.[26] Under this method of vesting, an employee who has at least ten years of service with the employer has a nonforfeitable right to his entire accrued benefit derived from employer contributions.[27] Prior to the crediting of ten years of service, the employee has no vested interest in employer contributions. Assume also that an employee covered by this plan has earned nine and one-half years of service at the time of the dissolution of a marriage. It is probable that this employee will earn the additional one-half year of service, at which time his entire interest under the plan would be fully vested. It would be unfair to characterize the employee's interest in the plan as so contingent that it should not be divided as community property. Because plan benefits can be one of the major assets of the community,[28] ignoring such an asset because it is contingent produces a dramatic understatement of the value of the community's assets.

There are no cases in New Mexico which carefully consider the question of whether nonvested benefits under a qualified plan are subject to division as community property. In *Copeland v. Copeland,*[29] which dealt with fully vested but unmatured public employee retirement benefits in a contributory plan, the New Mexico Supreme Court noted with apparent approval that *Brown* and similar cases divided unvested as well as vested benefits under qualified retirement plans.[30]

Recently, in *Hertz v. Hertz,*[31] the New Mexico Supreme Court held that the district court erred in its valuation of the community property

22. 15 Cal. 3d 838, 544 P.2d 561, 126 Cal. Rptr. 633 (1976).

23. *Id.* at 844, 544 P.2d at 564, 126 Cal. Rptr. at 636.

24. *Id.* at 841, 544 P.2d at 562, 126 Cal. Rptr. at 634.

25. *See* I.R.C. §411(a)(2)(A).

26. 26 U.S.C. §§1 to 8023 (1976).

27. Employee contributions are always fully vested and may not be forfeited by reason of death unless payments under an annuity or a similar form of benefits have already commenced. I.R.C. §411 (a)(1); Treas. Reg. 1.411(b)(1)(ii). Employer contributions may be forfeited by reason of death. Treas. Reg. 1.411(b)(1).

28. *See* Employee Benefit Research Institute, *Retirement Income Opportunities in an Aging America: Income Levels and Adequacy* Table C-1, at 104 (1982).

29. 91 N.M. 409, 575 P.2d 99 (1978). For further discussion of *Copeland,* see *infra* text accompanying note 80.

30. 91 N.M. at 411, 575 P.2d at 101.

31. ___ N.M. ___, 657 P.2d 1169 (1983).

interest in a qualified retirement plan. One ground of error was that the district court valued the husband's interest in the plan at full face value, although the husband was only seventy-five percent vested in the plan. The court held that: "The correct valuation in the plan is one-half of husband's (75%) *vested interest* of the percentage owned (3.1518%) of the reasonable value of the plan ($91,880.40) on the date of the divorce. . . ."[32] In considering the value of the interest in the retirement plan, the supreme court only cited its decision in *Ridgway v. Ridgway*.[33] *Ridgway* involved the division of a fully vested account[34] and therefore did not present the issue of the valuation of unvested benefits. The *Hertz* court never discussed the problem of valuing unvested benefits, appears never to have considered discounting the value of the unvested benefits, and cited neither *Brown* nor the *Copeland* dicta approving *Brown*. It is hoped that when a New Mexico court carefully weighs the equities of dividing unvested benefits under a qualified retirement plan, New Mexico will join the states which hold that a community property division of such benefits is appropriate.

III. DISABILITY BENEFITS

A separate issue from the division of retirement benefits payable on account of age is the community property division of disability retirement benefits from retirement plans. A conflict in the treatment of disability benefits has emerged among the states which has substantial implications for the divisibility of disability benefits as community property. Much of the reason for this split in authority is no doubt due to the diverse nature of disability benefits. Some disability pensions step into the place of regular retirement pensions and simply permit an early retirement on the basis of disability. Other disability benefits contain elements of an earned regular retirement pension along with elements which compensate for physical injury. Yet other benefits (more similar to pure insurance), which cease for a terminated employee regardless of the length of his employment, are paid for disability alone.[35]

The New Mexico Supreme Court has considered the division of disability benefits only under governmental retirement plans. In *Luxton v. Luxton*,[36] the New Mexico Supreme Court held that United States Civil Service medical retirement benefits were subject to division as community

32. *Id.* at ___, 657 P.2d at 1178 (emphasis added).

33. 94 N.M. 345, 610 P.2d 749 (1980).

34. *Id.* at 347, 610 P.2d at 751.

35. *In re* Kittleson, 21 Wash. App. 344, 350, 585 P.2d 167, 173 (1978).

36. 98 N.M. 276, 648 P.2d 315 (1982). In Stroshine v. Stroshine, 98 N.M. 742, 652 P.2d 1193 (1982), the New Mexico Supreme Court held that the husband's Veterans Administration disability benefits were community property.

property. The *Luxton* court, which decided the case after the United States Supreme Court decided *McCarty v. McCarty,*[37] stated that Congress intended such retirement benefits to be subject to state property law. The court also noted that the legislative history of the pertinent sections of the statute establishing the retirement system supported the conclusion that such benefits were community assets. In *Hughes v. Hughes,*[38] an earlier case which the supreme court also decided after *McCarty,* the court found "no indication that Congress intended that the federal [civil service disability] benefits involved in this case be treated as separate property."[39] The court therefore applied case law dealing with non-federal disability benefits. Citing an Idaho case,[40] the *Hughes* court found that the husband became entitled to disability pay during coverture by virtue of his contributions to the retirement and disability fund, and applied a presumption that the asset was community property.[41]

In *In re Kittleson,*[42] the Washington Court of Appeals held that under certain circumstances, there should be community property division of disability payments from non-governmental retirement plans. In *Kittleson,* the court reviewed the authority from California which supported the proposition that because disability payments are compensation for personal anguish and lost earning capacity and are comparable to damages for personal injury, such payments are therefore the recipient spouse's separate property.[43] The Washington court noted that in the *Kittleson* case, the husband had an election between taking either his regular retirement benefits or taking the disability award.[44] The court held that trial courts should determine on a case-by-case basis whether disability pay should be considered community property. The court stated that an inflexible

37. 453 U.S. 210 (1981). For a discussion of *McCarty v. McCarty,* see *infra* text accompanying notes 48–59.

38. 96 N.M. 719, 634 P.2d 1271 (1981).

39. *Id.* at 722, 634 P.2d at 1274.

40. Guy v. Guy, 98 Idaho 205, 560 P.2d 876 (1977). In *Guy,* the Idaho Supreme Court held that disability benefits payable under an employee group insurance policy were consideration for past employment; therefore, future benefit payments were community property.

41. 96 N.M. at 722, 634 P.2d at 1274.

42. 21 Wash. App. 344, 585 P.2d 167 (1978). In Arizona, courts consider disability payments to be community property. *See, e.g.,* Flowers v. Flowers, 118 Ariz. 577, 578 P.2d 1006 (Ct. App. 1978).

43. 21 Wash. App. at ___, 585 P.2d at 171–72. Traditionally, California courts considered disability benefits to be payment for personal injury. Therefore, such benefits were not community property. *See In re* Jones, 13 Cal. 3d 457, 531 P.2d 420, 119 Cal. Rptr. 108 (1975), *overruled on other grounds,* 15 Cal. 3d 838, 544 P.2d 561, 126 Cal. Rptr. 633 (1976). Recently, the California Supreme Court has shown signs of modifying its stand on disability retirement payments. In *In re* Stenquist, 21 Cal. 3d 779, 582 P.2d 96, 148 Cal. Rptr. 9 (1978), and *In re* Cavnar, 62 Cal. App. 3d 660, 133 Cal. Rptr. 267 (1976), the courts held that when a court considers disability pay which is in lieu of retirement pay, it is proper to consider the pay to be community property to the extent that the disability pay actually is in lieu of retirement pay.

44. 21 Wash. App. at ___, 585 P.2d at 172.

rule that required a disability pension to be classified as separate property would ignore important distinctions among the various forms of disability payments.[45]

It is probable that when the New Mexico courts are faced with the issue of divisibility of disability payments from qualified retirement plans, they will find that such disability payments are community property. The New Mexico courts will undoubtedly rely on *Hughes v. Hughes* and cases, such as *In re Kittleson,* from other jurisdictions.

IV. GOVERNMENT PLANS

The provisions of Title I of ERISA,[46] which include reporting and disclosure requirements, participation and vesting requirements, fiduciary responsibility rules, and administrative and enforcement procedures, do not apply to governmental plans[47] as that term is defined in ERISA § 3(32). Section 3(32) defines a governmental plan as a plan established or maintained by the government of the United States, by the government of any state or political subdivision thereof, or by any agency or instrumentality of the foregoing for its employees. Because governmental plans are not covered by ERISA, the questions of the permissibility of dividing benefits under such plans, and the preemption of state property law by federal law in the case of federal government plans, will now be discussed.

A. Military and Railroad Retirement Pay

In *McCarty v. McCarty,*[48] the United States Supreme Court held that federal law precluded a California court from dividing, pursuant to state community property law, the federally created right to military retired pay. The basis for this holding was that there was a conflict between the federal military retirement scheme and the community property right asserted by the wife. The Supreme Court stated that the military retirement system conferred no entitlement to retired pay upon the wife and did not embody even a limited community property concept.[49]

Justice Blackmun, writing for the Court, found that the language,

45. *Id.* at ___, 585 P.2d at 173.

46. ERISA Title I contains Subtitle A, 29 U.S.C. §§ 1001 to 1003 (1976 & Supp. V 1981), which has general provisions such as statements concerning policy and coverage, and Subtitle B, 29 U.S.C. §§ 1021 to 1144 (1976 & Supp. V 1981) which has regulatory provisions dealing with reporting and disclosure, participation and vesting, funding, fiduciary responsibility, and administration and enforcement.

47. 29 U.S.C. § 1003(b)(1)(1976); ERISA § 4(b)(1).

48. 453 U.S. 210 (1981). See Comment, *McCartyism in New Mexico: McCarty v. McCarty and the Uniformed Services Former Spouses' Protection Act, post* at 663, for further discussion of *McCarty* [hereinafter cited as Comment].

49. 453 U.S. at 224.

structure, and history of the statute providing for retirement pay indicated that retirement pay is the personal entitlement of the retiree. The Court felt that the application of community property principles to military retirement pay would threaten "grave harm to clear and substantial federal interests."[50] Any division of the retirement pay as community property would reduce the amount that Congress had determined was necessary for retired service personnel. This reduction could potentially frustrate the congressional objective of providing for the retired service member and interfere with congressional goals of having the military retirement system serve as an inducement for enlistment and reenlistment.[51] The Supreme Court stated that the injunction against attachment of military retirement pay was not to be circumvented by an offsetting award of other property.[52]

Justice Blackmun relied strongly on *Hisquierdo v. Hisquierdo*,[53] a California case concerning the division of retirement benefits. In *Hisquierdo*, the United States Supreme Court held that federally-created railroad retirement benefits were not subject to division under state community property laws. The *Hisquierdo* Court also stated that "[o]n the rare occasion when state family law has come into conflict with a federal statute, this Court has limited review under the Supremacy Clause to a determination whether Congress has 'positively required by direct enactment' that state law be preempted."[54] Although *Hisquierdo* reaffirmed the principle that family law is the province of the states, both the *Hisquierdo* and the *McCarty* Courts found a federal preemption of the state property law.[55]

The result in *McCarty* was both harsh and unnecessary and the holding has in effect been legislatively overruled.[56] The legislation allows state courts to divide military retirement pay as part of a property settlement in a marital dissolution if the couple was married for at least ten years during which time one spouse was in military service. Regardless of the duration of the marriage, military retirement pay can be the source of alimony or child support payments. The statute requires that the court order affecting military retirement pay be a final decree served personally

50. *Id.* at 232.
51. *Id.* at 234–35.
52. *Id.* at 228 n. 22.
53. 439 U.S. 572 (1979).
54. *Id.* at 581.
55. It is the author's opinion that the *McCarty* court did not convincingly find a direct preemption of state property law, nor did it convincingly set forth a strong federal interest opposed to the division of property pursuant to community property concepts. Further discussion of this issue is beyond the scope of this article.
56. Uniformed Services Former Spouses Protection Act, Pub. L. No. 97-252, §§ 1001 to 1006, 96 Stat. 730 (1982) (to be codified in scattered sections of 10 U.S.C.) (effective Feb. 1, 1983). See Comment, *supra* note 48, for further discussion of this legislation.

or by certified or registered mail upon the secretary of the appropriate branch of the armed services.

One by-product of *McCarty* is that courts, in considering retirement plans not covered by the new legislation, will now have to treat preemption issues[57] more exhaustively. Until *McCarty,* courts deciding cases involving governmental plans used reasoning very similar to the reasoning used when considering qualified retirement plans. After *McCarty,* the quest for legislative intent will often be the primary concern. Additionally, although *McCarty* did not pertain to plans covered by ERISA, the case raises some question as to whether the United States Supreme Court is becoming less deferential to state property law and less solicitious of the rights of non-employee spouses in retirement plans. The New Mexico Supreme Court has indicated that it will read the *McCarty* case narrowly. In *Stroshine v. Stroshine,*[58] the supreme court stated that:

> In *McCarty,* the United States Supreme Court specifically restricted its holding only to military nondisability retirement pay. . . . Accordingly, absent any clear expression to the contrary, there is no federal preemption of state domestic relations law with respect to disability retirement pay. . . . *McCarty* remains yet the exception, and not the rule. . . .[59]

B. New Mexico State Pensions

Section 4(b) of ERISA exempts state government retirement plans from its coverage. The State of New Mexico has established a retirement plan for its employees.[60] In *Copeland v. Copeland,*[61] the New Mexico Supreme Court held that benefits payable under the New Mexico Public Employees Retirement Act should be divided as community property. The court made no reference to the legislative history or intent and relied heavily on case law from other jurisdictions.[62]

57. It is currently unclear when the division of private retirement plan benefits upon dissolution of a marriage violates federal law. *See infra* text accompanying notes 106–117. The *McCarty* decision arguably bolsters the position that ERISA's anti-alienation statute forbids such a division.

58. 98 N.M. 742, 652 P.2d 1193 (1982). *See supra* note 36.

59. 98 N.M. at 743, 652 P.2d at 1194.

60. *See* Public Employees Retirement Act, N.M. Stat. Ann. § 10-11-1 to -38 (Repl. Pamp. 1980 & Cum. Supp. 1982).

61. 91 N.M. 409, 575 P.2d 99 (1978).

62. *Id.* at 411, 575 P.2d at 101. The court relied on cases considering qualified retirement plans and military pension plans. *In re* Brown, 15 Cal. 3d 838, 544 P.2d 561, 126 Cal. Rptr. 633 (1976), was the first major case holding that unvested retirement plan benefits may be subject to division as community property. See *supra* text accompanying notes 22–24 for further discussion of *Brown.* In Wilder v. Wilder, 85 Wash. 2d 364, 534 P.2d 1355 (1975), the husband would have been eligible to receive military pension benefits only if he reenlisted, as he indicated he would. The Washington Supreme Court affirmed the trial court's decision and awarded the wife a portion of the pension. In Cearley v. Cearley, 544 S.W.2d 661 (Tex. 1976), the Texas Supreme Court held that the military pension was a contingent interest in property and a community asset.

V. VALUATION ISSUES

When a court divides retirement plan benefits pursuant to the division of community property, one of the most important and complex issues can be valuing the benefits. Valuation issues may be fairly straightforward when the benefits under a plan are in pay status. A court only has to calculate the amount of the benefit which is community property, and divide the benefit accordingly. When benefits are not in pay status, and particularly when benefits are unvested or partially vested, valuation may be difficult.

Before valuing the benefits, a court must first value the plan itself. In *Hertz v. Hertz*,[63] the New Mexico Supreme Court determined the value of the profit sharing plan of the husband's law firm. The trial court had divided contributions which had been authorized by the employer's board of directors but which had not yet been included in the valuation of the plan's assets on the date of divorce. The plan was valued on June 30th of each year and the date of the divorce was December 31, 1979.[64] The New Mexico Supreme Court summarized the plan provisions concerning the date on which contributions would be considered as having been made. The court then stated that trial courts "may use an undiscounted current actual value at the date of divorce, if the present value of the plan cannot be ascertained by substantial evidence."[65] The supreme court held that it was "an abuse [of the trial court's] discretion to value the plan six months after the community was dissolved. The correct approach in this case is to value the community interest in the profit sharing plan as of the date of the divorce."[66] It is commendable to utilize a flexible approach toward valuation of a plan's assets, so that increases or decreases in the value of a participant's share of the plan's assets will be properly reflected in the division of property. In many instances, however, a court should use caution in valuing authorized but unpaid contributions to profit sharing plans because a variety of events (including the absence of profit at year's end), could affect the amount of the actual contribution. Because of the dates involved in the *Hertz* case,[67] presumably the contribution had been made. If the contribution had not been made, the court would have considered this factor in its valuation of the benefits.

Copeland v. Copeland[68] is the seminal New Mexico case dealing with valuation of benefits. In *Copeland*, the husband, whose retirement benefits were at issue, was fully vested in his benefits. In addition, if he elected

63. ___ N.M. ___, 657 P.2d 1169 (1983).
64. *Id.* at ___, 657 P.2d at 1177.
65. *Id.*
66. *Id.*
67. The date of divorce was December 31, 1979, but the opinion was not issued until early 1983.
68. 91 N.M. 409, 575 P.2d 99 (1978).

to retire in nine months, his benefits would become fully mature at that time.[69] The husband could have withdrawn his contributions, however, thereby forfeiting all employer-provided benefits. The husband's death would have also resulted in a forfeiture of the employer-derived portion of the retirement benefits. Testimony indicated that if the husband retired in nine months he could expect approximately $200,000.00 in benefits.[70] The trial court, troubled by the contingencies surrounding the employer-derived portion of plan benefits, had included only $15,000.00 (the amount of employee contributions), as community property. The New Mexico Supreme Court reversed, holding that the value of the entire retirement benefit was subject to division.[71]

The *Copeland* court devoted much of its discussion to a careful consideration of the valuation problems raised by the facts before it, and the problems likely to occur in other common fact patterns. The court first recognized that the actuarial value of pensions generally exceeds the accumulated employee contributions.[72] The court then described two general approaches toward dealing with the contingencies involved in plan benefits. One approach is to derive a value for the benefits at the time of dissolution by determining life expectancy and discounting for present value by use of actuarial tables. The court noted that in *In re Brown,*[73] the California trial court was instructed to take account of the possibility of death or termination of employment.[74] Under the second approach, a court can award either a specified amount or a certain percentage of the benefits to the nonparticipant spouse if, when, and as the benefits are paid.[75] This method leaves the risks of the contingencies apportioned between the two spouses, but involves more complex court administration.

The *Copeland* court instructed the trial court to make a division of assets which included the present value of the unmatured benefits "or divide the pension on a pay as it comes in system."[76] The *Copeland* court noted that if the community has sufficient other assets to offset the value of the pension, an immediate division incorporating such an offset would make a final disposition possible.[77] If the pension is the principal asset of the community, and the participant spouse cannot deliver property

69. *Id.* at 410, 575 P.2d at 100.
70. *Id.* at 412, 575 P.2d at 102.
71. *Id.* at 414, 575 P.2d at 104.
72. *Id.* at 413, 575 P.2d at 103.
73. 15 Cal. 3d 838, 544 P.2d 561, 126 Cal. Rptr. 633 (1976). *See supra* notes 22–24 and accompanying text for further discussion of *Brown*.
74. 91 N.M. at 413, 575 P.2d at 103.
75. *Id.* at 414, 575 P.2d at 104.
76. *Id.*
77. *Id.*

worth the nonparticipant spouse's interest in the plan, then the trial court could proceed on the "pay as it comes in" system.[78]

In *Ridgway v. Ridgway,*[79] the appellant challenged the trial court's valuation of his interest in a noncontributory profit sharing plan. The New Mexico Supreme Court interpreted the trial court's decree as an award of the undiscounted current actual value of the participant's vested but unmatured benefits in the plan as of the date of divorce. The supreme court held that this was a proper award. The *Ridgway* court stated that in *Copeland v. Copeland,*[80] it had not established an inflexible rule that trial courts could apply only the present value method of valuation.[81] The present value, the court explained, is the amount which must be invested at present to produce a given amount at a set time in the future. This method of valuation is most appropriate when the plan is a defined benefit plan. Under *Copeland,* the trial court must apply the present value method where the evidence of that value is sufficient. The current actual value may be applied if the present value cannot be ascertained.

The *Ridgway* court stated that the evidence was not sufficient to apply the present value method of valuation. The court felt that there was no certainty under the profit sharing plan as to what benefits would be available upon retirement because the benefits were "contingent upon the success or failure of the business operation."[82] The latter phrase indicates that counsel may not have given the court an adequate briefing on the operation of the profit sharing plan because it does not appear that the success of the business in future years would not have an effect on the property earned during coverture unless the plan involved employee stock ownership. The court nonetheless reached a fair result by affirming the division of the current amount in the participant's account. Because the appellant contested only the method of valuation, it is not clear how the trial court addressed the problem of current versus deferred distribution.

In summary, where there are vested and in pay status benefits, the valuation problems are minimal. The benefits payable each month should be divided by a fraction, the numerator of which represents the number of years of coverture during which the participant earned the benefits under the plan, and the denominator of which reflects the number of years of service during which plan benefits were accrued. The result will reflect the portion of the benefits which is community property, and the court should divide the benefits accordingly. Where there are vested benefits which are not in pay status, courts must evaluate relevant contingencies,

78. *Id.*
79. 94 N.M. 345, 610 P.2d 749 (1980).
80. 91 N.M. 409, 575 P.2d 99 (1978).
81. 94 N.M. at 347, 610 P.2d at 751.
82. *Id.*

such as the amount of the death benefit, if any, the health of the participant, and similar facts. Where there are unvested or partially vested benefits, the court can value the benefits presently or can retain jurisdiction. Valuing benefits presently can be speculative, but retaining jurisdiction is judicially inefficient and forces the parties to continue to deal with each other.[83]

VI. ERISA

ERISA[84] regulates most private retirement plans. ERISA preempts inconsistent state law[85] and plans covered by ERISA must prohibit the assignment and alienation of benefits.[86] Most state courts have held, however, that benefits under retirement plans subject to ERISA may constitute property which state courts may divide. Because the prohibition against alienation and the scope of preemption are unclear, there is not only confusion, but also the sentiment that many state court decrees raise legal issues which cannot be resolved.[87]

Congress enacted ERISA to protect the continued well-being and security of employees and their dependants.[88] Both the Internal Revenue Service and the Department of Labor have jurisdiction over portions of ERISA.[89] ERISA covers employee benefit plans established by any employer engaged in commerce or in any industry or activity affecting commerce, or established by any employee organization or organizations representing employees engaged in commerce or in any industry or activity affecting commerce.[90] ERISA does not apply to government plans, church plans which have made no election to be covered, plans maintained solely to comply with workmen's compensation or unemployment compensation or disability insurance laws, plans maintained out of the United States primarily for the benefit of aliens, or excess benefit plans which are not funded.[91] Additionally, the Department of Labor by regulation may exempt certain kinds of plans from portions of ERISA.[92] An ERISA reorganization plan[93] delegated authority to the Department of Labor with respect to the interpretation of provisions relating to preemption and alienation of plan benefits.[94]

83. For examples of the types of extended litigation which can develop, see Kilberg & Heron, *Dissolution of Marriage and Support Payments: ERISA & the Non-employee Spouse's Interest in Plan Benefits*, Pension and Profit Sharing (P-H) ¶ 1079 (1978).

84. 29 U.S.C. §§ 1001 to 1381 (1974 & Supp. V 1981.)

85. *See infra* text accompanying notes 97–104.

86. *See infra* text accompanying notes 106–147.

87. *See infra* text accompanying note 114.

88. 29 U.S.C. § 1001 (Supp. V 1981), ERISA § 4.

89. Reorganization Plan No. 4 of 1978, 43 Fed. Reg. 47,713 (Oct. 17, 1978) (executive order).

90. 29 U.S.C. § 1003(a) (1976), ERISA § 4(a).

91. 29 U.S.C. § 1003(a) & (b) (1976), ERISA § 4(a) & (b).

92. *See, e.g.*, 29 U.S.C. § 1002(2)(B) (Supp. V 1981), ERISA § 3(2)(B).

93. *See supra* note 89.

94. *See infra* text accompanying notes 106–113.

A. Preemption

Section 514(a) of ERISA contains a broad preemption of state laws. That section reads as follows:

> Except as provided in Subsection (b) of this section, the provisions of this title and Title IV shall supercede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in §4(a) and not exempt under §4(b). This Section shall take effect on January 1, 1975.[95]

The Department of Labor, which has primary authority with respect to preemption,[96] has not yet developed regulations under ERISA §514. Most courts have held that section 514(a) does not preempt state property law.[97] The California dissolution of marriage statute specifically identifies retirement plan benefits as divisible property.[98]

In *Stone v. Stone*,[99] Judge Renfrew, a federal district court judge, articulately set forth the rationale for this position. Judge Renfrew stated that ERISA §514(a) was not designed to preempt every state law with even the most tangential relation to ERISA.[100] The opinion acknowledged the presumption that federal law does not supersede the historic police powers of the state unless that was the clear manifest purpose of Congress. The court found that this presumption controlled in the question of preemption of community property law under ERISA §514(a).[101] The court found no clear evidence of congressional intent to preempt state community property laws insofar as they relate to employee benefit plans. The *Stone* court reasoned that preemption would deprive nonemployee spouses of a share in marital assets which these spouses indirectly helped to acquire, and would leave such spouses without effective remedy against their participant spouses.[102]

The *Stone* analysis is correct because both domestic relations law and property law are areas of strong state concern, and United States Supreme Court cases have established the preferred position of state regulation in these areas.[103] States should be the principal source of substantive do-

95. 29 U.S.C. §1144(a) (1976), ERISA §514(a).

96. T.D. 7534, 1978-1 C.B. 119.

97. *See* Stone v. Stone, 450 F. Supp. 919 (N.D. Cal. 1978), *aff'd*, 632 F.2d 740 (9th Cir. 1980), *cert. denied*, 453 U.S. 922 (1981). *See also* Central States Pension Fund v. Parr, 480 F. Supp. 924 (E.D. Mich. 1979); Senco of Florida, Inc. v. Clark, 473 F. Supp. 902 (M.D. Fla. 1979); Carpenters Pension Trust v. Kronschnabel, 460 F. Supp. 978 (C.D. Cal. 1978).

98. *See, e.g.*, Cal. Civ. Code §4363.1 (West Supp. 1983). There is no comparable New Mexico provision.

99. 450 F. Supp. 919 (N.D. Cal. 1978), *aff'd*, 632 F.2d 740 (9th Cir. 1980), *cert. denied*, 453 U.S. 922 (1981).

100. 450 F. Supp. at 932.

101. *Id.*

102. *Id.* at 932–33.

103. *In re* Burrus, 136 U.S. 586 (1890); United States v. Yazell, 382 U.S. 341 (1966).

mestic relations law, and courts should find preemption only when necessary to accomplish the important federal interest underlying ERISA, the promotion of guaranteed retirement income. In *Francis v. United Technologies Corp.*,[104] for example, a California federal district court did not properly weigh federal law and state interests. The *Francis* court specifically disagreed with Judge Renfrew's "analysis of Congressional intent in regard to the preemptive effect of ERISA,"[105] and found that ERISA preempted state property law. The nonemployee spouse was therefore not able to obtain a decree granting her any interest in the retirement plan in which her ex-spouse was a participant. Such interference with state law does not serve the purposes underlying ERISA.

B. Anti-Alienation

1. The Anti-Alienation Provisions.

Both the tax and labor provisions of ERISA[106] contain an anti-alienation rule. The Internal Revenue Service has the primary authority to interpret the anti-alienation provisions of ERISA.[107] I.R.C. §401(a)(13) requires all qualified plans, that is, plans which qualify for tax-exempt status under I.R.C. §401, to provide that benefits under the plan may not be assigned or alienated.[108]

In Treasury Regulation §1.401(a)-13, the Internal Revenue Service interpreted the provisions of I.R.C. §401(a)(13). The regulation defines assignment or alienation to include any direct or indirect arrangement (whether revocable or irrevocable), whereby a party acquires from a participant or beneficiary a right or interest enforceable against the plan, or to all or any part of a plan benefit payment which is, or may become, payable to the participant or beneficiary.[109] The treasury regulation lists specific arrangements not considered assignments or alienations. These exceptions do not include division of plan benefits pursuant to dissolution of marriage.[110] Regulations dealing with the division of benefits incidental

104. 458 F. Supp. 84 (N.D. Cal. 1978).

105. *Id.* at 86.

106. ERISA contains four titles. Title II contains modifications to the Internal Revenue Code, and all citations to that title are referred to in I.R.C. citation form for convenience. For example, I.R.C. §401(a)(13) is ERISA §1021(c). Title I of ERISA contains various provisions, some of which are similar to Internal Revenue Code provisions; these provisions are under the jurisidiction of the Department of Labor and are referred to as the labor provisions. Title III treats jurisdiction, administration, and enforcement matters, and Title IV deals with insurance of certain pension benefits by a federal agency, the Pension Benefit Guaranty Corporation.

107. *See supra* note 89.

108. I.R.C. §401(a)(13) reads as follows: "A trust shall not constitute a qualified trust under this section unless the plan of which such trust is a part provides that the benefits provided under the plan may not be assigned or alienated. . . ."

109. Treas. Reg. §1.401(a)–13(c).

110. Treas. Reg. §1.401(a)–13(c)(2).

to a dissolution of marriage would have substantial weight and would provide guidance to practitioners.

The labor provision, ERISA § 206(d)(1), also requires retirement plans to prohibit assignment or alienation.[111] There are no regulations under ERISA § 206.

The legislative history indicates that the purpose of ERISA's anti-alienation provisions was to prevent creditors from attaching retirement plan benefits.[112] Courts have found congressional intent to ensure, through the anti-alienation rules, that the benefits were available for the financial support of the participant and his family after retirement.[113] The legislative history is silent on the division of retirement plan benefits as community property and whether or not that is an alienation within the scope of section 401(a)(13) of the Internal Revenue Code and ERISA § 206(d).

2. Sanctions.

It is possible for a court to order immediate distribution of assets divided pursuant to divorce in a manner which the Internal Revenue Service finds unacceptable.[114] The results of violation of the anti-alienation and distribution clauses could include disqualification of a plan. The fiduciary who complies with such a court order may also be violating ERISA § 404, which requires adherence to the terms of a plan. Violation of new I.R.C. § 72(p)(1)(B)[115] results in treatment of the amount alienated or assigned as current taxable income to the assigning or pledging participant. The latter sanction seems more in line with the nature of the violation; disqualification of the entire plan has adverse tax consequences to the employer and all of the participants in the plan.[116]

Courts should impose sanctions for impermissible distributions only upon the participant in cases where the employer or plan administrator

111. ERISA § 206(d)(1) reads as follows: "Each pension plan shall provide that the benefits provided under the plan may not be assigned or alienated." 29 U.S.C. § 1056(d)(1) (1976).

112. H. Rep. No. 807, 93rd Cong., 2nd Sess. (1974), *reprinted in* U.S. Code Cong. & Ad. News 4670, 4734.

113. *See, e.g.*, Stone v. Stone, 450 F. Supp. 919 (N.D. Cal. 1978), *aff'd*, 632 F.2d 740 (9th Cir. 1980), *cert. denied*, 453 U.S. 922 (1981), and cases cited *infra* in notes 125, 133 & 140.

114. *See, e.g.*, Private Ltr. Rul. 8010051 (Dec. 12, 1979), *reprinted in* I.R.S. Letter Rulings (CCH) No. 159 (Mar. 15, 1980).

115. The Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97-248, 96 Stat. 325 (1982), added I.R.C. § 72(p)(1)(B), which states:

> ASSIGNMENTS OR PLEDGES.—If during any taxable year a participant or beneficiary assigns (or agrees to assign) or pledges (or agrees to pledge) any portion of his interest in a qualified employer plan, such portion shall be treated as having been received by such individual as a loan from such plan.

The Tax Equity and Fiscal Responsibility Act repealed § 72(m)(4) which was a provision analogous to § 72(p)(1)(B) but which was applicable only to partnership plans.

116. It is not clear at this time which sanction the Internal Revenue Service will impose for violations of the anti-alienation and distribution clauses.

has acted properly. Obeying a court order to distribute assets pursuant to a divorce decree is an example of acting properly. The anti-alienation sections of ERISA should be interpreted only to provide an outside limit on how state courts may treat retirement benefits from qualified plans in marriage dissolution proceedings.[117] The anti-alienation rules should pose a restraint on state domestic relations proceedings only when consistency with the purposes or provisions of the federal law concerning retirement plans is at stake.

C. *The Department of Labor and Internal Revenue Services' Position With Respect to Preemption and Anti-Alienation*

There is a line of cases[118] which find an exception to the assignment and alienation prohibitions of ERISA for actions for family support obligations. The cases have relied on the assumption that the purpose of the anti-alienation rules is to ensure that benefits are available for the participant and the participant's beneficiaries. Similarly, there is authority implying an exception to ERISA §514(a) so that that section does not preempt state property law classifying plan benefits as property subject to division upon dissolution of marriage.[119]

Some commentators have reacted with apparent approval or little comment to the courts' positions with respect to the anti-alienation provisions of ERISA.[120] One commentary[121] strongly criticized these judicial holdings on the grounds that the preemption rulings with respect to the issue of state property law are not consistent with the otherwise broad preemption of state laws by ERISA, and that only Congress should establish such an exception to preemption.[122]

The Department of Labor wrote an amicus brief[123] considering this issue during the Ninth Circuit's consideration of *Stone v. Stone*.[124] In its brief, the Department argued that while ERISA §514 preempts com-

117. This article does not discuss the formulation of court orders dealing with plan assets in the context of a dissolution of marriage. In general, courts should not order plans to make payments which would result in payment in a form not provided for in the plan, or of an amount greater than otherwise payable from the plan.

118. *See supra* cases cited in note 97.

119. *See, e.g.*, Pension and Profit Sharing (P-H) ¶8975 (1983).

120. *See* Kroll, *Divorce Under ERISA*, 37 N.Y.U. Inst. Fed. Tax'n §3.01–3.05 (ERISA Supp. 1979); Solomon, *Beyond Preemption: Accommodation of the Nonemployee Spouses' Interest under ERISA*, 31 Hastings L.J. 1021 (1980) [hereinafter cited as Solomon]; Stripling, *Transfer of Pension Benefits Incident to Divorce*, 54 J. of Tax'n 216–22 (1981).

121. *See* Hutchinson & Ifshin, *Federal Preemption of State Law under the Employee Retirement Income Security Act of 1974*, 46 U. Chi. L. Rev. 23 (1978). Mr. Hutchison was Administrator of the Pension and Welfare Program in the Department of Labor.

122. *Id.* at 65.

123. *Reprinted in full in* 37 N.Y.U. Inst. Fed. Tax'n §3.07 (ERISA Supp. 1979).

124. 632 F.2d 740 (9th Cir. 1980), *cert. denied*, 453 U.S. 922 (1981).

munity property law as to employee benefit plans, there is an implied exception to the anti-alienation rules for the enforcement of state court orders relating to benefits in pay status in community property divisions.

In *Stone*, the Ninth Circuit Court of Appeals held that the United States Supreme Court's summary dismissal of the appeal in *Carpenters Pension Trust Fund v. Campa*[125] resolved the preemption and anti-alienation issues. In *Campa*, the Supreme Court dismissed, for want of a substantial federal question, a case in which the appellant trust fund contended that ERISA §514 preempted California community property law, and therefore, that the trial court's division of the husband's retirement benefits was in violation of I.R.C. §401(a)(13) and beyond the power of the trial court. In its decision,[126] the California Court of Appeals had held that community property law not only did not frustrate the congressional intent underlying ERISA of assuring genuine pension rights, but was consistent with the objective of assuring that the members of a participant's family receive the pension which they anticipated.[127] The court noted that "domestic relations is a field peculiarly suited to state regulation and control, and peculiarly unsuited to control by federal courts."[128] Because the nonemployee spouse's rights in the retirement plan were those of an owner, not a creditor, the anti-alienation rules were not contravened. The California court found further support for this proposition in the fact that Congress explicitly and selectively preempted community property law in certain sections of ERISA.[129] The court also held that the preemption test set forth in *Hisquierdo v. Hisquierdo*[130] did not affect its reasoning because in that case, the United States Supreme Court had expressly distinguished ERISA and specifically stated that its decision did not reach that statute.[131]

The Department of Labor demonstrated its position regarding preemption not only by its amicus brief in *Stone v. Stone*,[132] which involved a community property state, but also in its amicus curiae brief in *American Telephone and Telegraph Co. v. Merry*,[133] which involved a marriage dissolution in a non-community property state. In addition, 80 Dept. of

125. 444 U.S. 1028 (1980).

126. *In re* Campa, 89 Cal. App. 3d 113, 152 Cal. Rptr. 362 (1979).

127. *Id.* at 119, 152 Cal. Rptr. at 368.

128. *Id.*

129. *Id.* at 120, 152 Cal. Rptr. at 369.

130. 439 U.S. 572 (1979).

131. 89 Cal. App. 3d at 124, 152 Cal. Rptr. at 373.

132. 632 F.2d 740 (9th Cir. 1980), *cert. denied*, 453 U.S. 922 (1981).

133. 592 F.2d 118 (2d Cir. 1979). In *Merry*, the Second Circuit affirmed enforcement of a Connecticut court order garnishing an interest in the A.T.&T. pension plan for arrearages in alimony and child support orders. The court found an implied exception to both the anti-alienation and preemption rules of ERISA where enforcement of state family support orders is concerned. *See* Solomon, *supra* note 120, at 1021 nn.1 & 23. Ms. Solomon states that the Tax Division of the Justice Department filed amicus curiae briefs for both the Secretaries of Labor and the Treasury in *Merry*. Ms. Solomon wrote the amicus curiae brief in *Stone* for Equal Rights Advocates.

Labor Op. Letter 39A states that there is an implied exception to the anti-alienation rules without referring to the preemption issue, and refers to the Department of Labor's amicus brief filed in *Stone*.

The Internal Revenue Service concurs that certain types of divisions of retirement plan benefits do not contravene the anti-alienation rule. The Internal Revenue Service's position is shown by its concurrence in the Department of Labor's amicus briefs in *Stone*[134] and *Merry*.[135] Further, in a revenue ruling,[136] the Internal Revenue Service stated that there would be no disqualification if a pension plan complied with a court order regarding distribution of in pay status benefits to meet a participant's alimony or support obligations. Although this revenue ruling did not apply to community property law, the rationale should be the same, and the same results should be permitted in a division of property in a community property jurisdiction.[137]

In addition, the Internal Revenue Service has issued private letter rulings with respect to the division of retirement plan benefits as community property pursuant to the dissolution of a marriage. Although private letter rulings have no precedential value and, under I.R.C. § 6110(j)(3), cannot be cited as precedent, such rulings do represent the Internal Revenue Service's position. Private Letter Ruling 8027041[138] stated that in pay status benefits were divisible as community property but Private Letter Ruling 8304089[139] stated that payment to a nonemployee spouse of vested benefits which were not currently in pay status would disqualify the plan. Under the Internal Revenue Code, individual retirement accounts may be divided pursuant to divorce decrees.[140] In Private Letter Ruling 8007024,[141] the Internal Revenue Service permitted the rollover from a corporate plan to an individual retirement plan of plan benefits pursuant to a division of community property.[142]

The Ninth Circuit once noted[143] that a summary dismissal by the United States Supreme Court of an appeal from a state court for want of a

134. 37 N.Y.U. Inst. Fed. Tax'n § 3 (ERISA Supp. 1979).

135. *See* Solomon, *supra* note 120, at 1021 n.1.

136. Rev. Rul. 80-27, 1980-1 C.B. 85–86.

137. A revenue ruling has substantial precedential value. See Rev. Proc. 72-1, 1972-1 C.B. 694, which states that revenue rulings "are published to provide precedents to be used in the disposition of other cases, and may be cited and relied upon for that purpose."

138. Private Ltr. Rul. 8027041 (Apr. 9, 1980), *reprinted in* I.R.S. Letter Rulings (CCH) No. 176 (July 16, 1980).

139. Private Ltr. Rul. 8304089 (undated), *reprinted in* I.R.S. Letter Rulings (CCH) No. 309 (Feb. 2, 1983).

140. I.R.C. § 408(d)(6) and Treas. Reg. § 1.408-4(g).

141. Private Ltr. Rul. 8007024 (Nov. 21, 1979), *reprinted in* I.R.S. Letter Rulings (CCH) No. 156 (Feb. 28, 1980).

142. A rollover is a direct or indirect tax-free transfer of plan assets to another plan or individual retirement account that complies with the rules set forth in the Internal Revenue Code.

143. Carpenters Pension Trust v. Kronschnabel, 632 F.2d 740 (9th Cir. 1980), *cert. denied*, 453 U.S. 922 (1981).

substantial federal question operates as a decision on the merits.[144] The Supreme Court's refusal to grant certiorari in *Stone v. Stone*[145] and the Ninth Circuit's reasoning might suggest that the Supreme Court is at present satisfied with the result of *Carpenters Pension Trust Fund v. Campa*,[146] that the Court considers the debate over preemption[147] ended, and that courts applying community property law may divide the retirement benefits in a qualified pension plan notwithstanding the language of ERISA §§514(a) and 206(d)(1), and I.R.C. §401(a)(13) and the regulations thereunder. The one sentence statement in *Campa*[148] that there was no federal question is not an adequate manner of resolving such an important dispute.[149] The United States Supreme Court should, in the absence of further Congressional action,[150] permit full briefing of the question and should issue a decision which would give guidance to courts, the Internal Revenue Service, and the Department of Labor.

VII. CONCLUSION

New Mexico courts have for the most part dealt well with the problem of dividing retirement plan benefits pursuant to a dissolution of marriage whether or not ERISA covered the retirement plans. There are indications that when the New Mexico courts are confronted with the divisibility of disability benefits from qualified retirement plans, the New Mexico courts will fairly assess the extent to which such benefits should be characterized as community property.

There is a need, however, for a more careful analysis by the New Mexico Supreme Court of the problems and equities in dividing unvested benefits under qualified retirement plans. The traditional strong deference for family law and state property law fully justify the lower courts' findings that there is no preemption of state community property law by ERISA because there is no strong federal interest or clear legislative intent sufficient to justify such preemption. Further, any finding of preemption would throw the entire area of domestic relations law and retirement plans into confusion, and would result in the filing of a huge number of petitions requesting courts either to reconsider awards or to clarify the state of the law.

144. 632 F.2d at 747.

145. 632 F.2d 740 (9th Cir. 1980), *cert. denied*, 453 U.S. 922 (1981).

146. 444 U.S. 1028 (1980).

147. *See* R. Stern & E. Gressman, Supreme Court Practice 324 (5th ed. 1978).

148. 444 U.S. 1028 (1980).

149. Solomon, *supra* note 120, at 1027.

150. Senator Robert Dole recently introduced a bill, S. 19, 98th Cong., 1st Sess. (1983), entitled the Retirement Equity Act of 1983. S. 19 would clarify that accrued retirement benefits may be subject to division pursuant to the dissolution of a marriage. The bill would also affirm the Internal Revenue Service's position that no retirement plan can be required to distribute plan assets not yet in pay status. *See supra* text accompanying note 136.

Nonetheless, there is considerable confusion as to the reach of the preemption and anti-alienation provisions. If Congress does not act, the United States Supreme Court and the administrative agencies charged with enforcing the provisions of ERISA should clarify the meaning of the preemption and anti-alienation sections of ERISA. Any legislative, judicial, or administrative rulings on these points should preserve flexibility for state courts and, within reasonable limits, defer to state property law. It seems that Congress, the Internal Revenue Service, and the Department of Labor unwisely have left much unclear with respect to the payment of benefits not in pay status and the division of benefits as community property.