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I. INTRODUCTION

In response to the wave of state and federal domestic relations legislation over the past decade,[1] the New Mexico Court of Appeals and the United States Supreme Court this past year refined the application of these laws in several controversial cases. For example, the court of appeals decided whether gross or net retirement pay was divisible under the Federal Uniformed Services Former Spouses' Protection Act.[2] Similarly, the United States Supreme Court decided whether the Parental Kidnaping Prevention Act provides a federal cause of action to resolve conflicting custody orders from two states.[3] In addition to decisions like these affecting legislation, New Mexico appellate courts focused on significant issues regarding community property this year.[4] This survey will discuss these and other developments in New Mexico family law from April 1, 1987, through February 1, 1988. The article will review selected cases dealing with pensions, alimony, community property determinations, and custody jurisdiction.[5]

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1. *See, e.g.*, New Mexico Child Custody Jurisdiction Act, N.M. STAT. ANN. §§ 40-10-1 to -24 (Repl. Pamp. 1986), and the Uniform Parentage Act, N.M. STAT. ANN. §§ 40-11-1 to -23 (Repl. Pamp. 1986). Federal legislation has included the Parental Kidnaping Prevention Act of 1980, 28 U.S.C. § 1738A; the Retirement Equity Act of 1984, 26 U.S.C. § 2 (Supp. III, 1985); the Federal Uniformed Services Former Spouses' Protection Act, 10 U.S.C. § 1072 (1982); the Domestic Relations Tax Reform Act of 1984, 26 U.S.C. § 2 (Supp. III, 1985); and the Child Support Enforcement Amendments of 1984, Pub. L. No. 98-378, 98 Stat. 1305.

2. White v. White, 105 N.M. 600, 734 P.2d 1283 (Ct. App. 1987). *See infra* notes 79-95 and accompanying text.

3. Thompson v. Thompson, 108 S.Ct. 513 (1988). *See infra*, notes 189-227 and accompanying text.

4. *See infra* notes 136-88 and accompanying text.

5. Three cases regarding child support and custody were also decided during the survey year: Alfieri v. Alfieri, 105 N.M. 373, 733 P.2d 4 (Ct. App. 1987); Wolcott v. Wolcott, 105 N.M. 608, 735 P.2d 326 (Ct. App. 1987), *cert. denied*, 105 N.M. 618, 735 P.2d 535 (1987), and Meier v. Davignon, 105 N.M. 567, 734 P.2d 807 (Ct. App. 1987). These cases are analyzed thoroughly in: Montoya, *Domestic Relations*, 18 N.M.L. REV. 371 (1988).

II. PENSION PLANS

Pension plans[6] designed to provide security for an individual's mature years have experienced rapid growth in the United States.[7] Many people participate in these retirement plans, which often comprise the largest asset to be divided in a divorce.[8] Due to their importance, pensions have occupied a major place in appellate court domestic relations decisions for the past decade.[9] Domestic relations lawyers must be familiar with the court decisions regarding various types of plans[10] as well as evaluation

6. The term "pension plan" is a term of art which means any plan, fund or program maintained by an employer or employee organization, or both, to the extent that it provides retirement income to employees or defers employee income until termination of employment or later. 29 U.S.C.A. § 1002(2)(A) (West 1985).

7. Hardie, *Pay Now or Later: Alternatives in the Disposition of Retirement Benefits on Divorce*, 53 CAL. ST. B.J. 106 (1978).

8. *Id.* In the past, retirement plans often provided that vesting of the employee's rights could be postponed until retirement. An employee could thus be fired two years before retirement, for example, and receive none of the accumulated pension benefits. B. GOLDBERG, VALUATION OF DIVORCE ASSETS § 9.2 at 230 (1984). Congress passed the Employee Retirement Income Security Act (ERISA) of 1974 to eliminate this inequity. The Act provides that in private pension plans, a certain percentage of the benefit earned or contribution made by a pension participant must vest in accordance with certain minimum standards, thus guaranteeing an employee's entitlement to receive benefits even though the employee is not yet eligible for retirement. 29 U.S.C. § 1001-1461 (West 1985).

The original version of ERISA included a spendthrift provision which protected a participant's benefits from creditors. Thus, under the original version, retirement benefits could not be assigned or alienated. The original version, however, did not consider the financial effect of divorce. Rumore, *Pension Benefits in Alabama Divorce Cases After the Retirement Equity Act of 1984*, 37 ALA. L. REV. 639, 641-42 (1986). State courts, nevertheless, in some cases permitted payments from pension benefits for property settlements or alimony. *Id.* at 642. In the Retirement Equity Act ("REA") of 1984, Congress addressed the spendthrift rules to ERISA plans as applied in domestic relations cases. The REA provides that spendthrift rules apply unless a domestic relations court issues a "qualified domestic relations order" ("QDRO"). 29 U.S.C.A. § 1056(d)(3)(A) (West 1985); I.R.C. § 401(a)(13)(B) (West Supp. 1986). A "QDRO" is a domestic relations order that creates the right of an alternate payee to a participant's benefits and which meets specific requirements as to its contents. 29 U.S.C.A. § 1056(d)(3)(B)-(d)(3)(D) (West 1985); I.R.C. § 414(p)(1)(A) (West Supp. 1986).

9. For a discussion of appellate decisions regarding pensions in New Mexico up to 1983, see generally Neerken, *New Mexico Community Property Law and the Division of Retirement Plan Benefits Pursuant to the Dissolution of Marriage*, 13 N.M.L. REV. 641 (1983). Recent New Mexico law on pensions is discussed in: Shapiro, *Family Law*, 17 N.M.L. REV. 291, 302-07 (1987); Montoya, *Domestic Relations*, 18 N.M.L. REV. 371, 398-400 (1988).

10. ERISA defines two basic types of pensions: defined contribution plans and defined benefit plans. 29 U.S.C.A. § 1002(34)-(35) (West 1985). When an employer makes a specific annual contribution to the employee's account, but does not promise any particular retirement income, the plan is known as a defined contribution plan. 29 U.S.C.A. § 1002(34). Benefits under this type of plan include the cumulative value of the annual contributions made to the employee's account, together with profits made if the employee chooses to have the money invested. Valuation of this type of plan for divorce purposes is obtained from the latest account statement furnished by the plan administrator. GOLDBERG, *supra* note 8, at 232.

A plan which is funded by employer contributions to provide systematic, definitely determinable benefits is known as a defined benefit plan. *Id.* Benefits depend on the employee's salary and length of service. In comparison, benefits of a defined contribution plan depend on the amount of employer and employee contributions, together with the profits earned by each. *Id.* at 231.

methods, to effectively design property settlements for court approval.[11]

A. "Lump sum" vs. "Pay As It Comes In" Methods of Payment

Generally speaking, courts divide retirement benefits either by what is known as the "lump sum" method or by the "pay as it comes in" method.[12] The lump sum method is also known as the "present value" method because, although the employee spouse receives the entire pension, the non-employee spouse receives a property award equivalent to the present value of the non-employee's share of the pension.[13] The lump sum method has the advantage of providing a clean break and finality to the parties.[14] One disadvantage of the lump sum method is that there are several methods for computing present value, so courts must equitably choose between a wide range of asserted values for any given pension.[15]

The lump sum method may prove inequitable if the employee spouse pays the non-employee spouse the present value of the estimated lifetime share of the pension but then dies sooner than expected, receiving none or only a portion of his or her share.[16] In such a case, the employee spouse bears the risk of paying the non-employee spouse for a right which the employee spouse may never fully exercise.[17] The lump sum method may also prove inequitable to a non-employee spouse, who may never share in a future increase in retirement benefits which were built on a foundation of community effort.[18]

In the 1985 case of *Schweitzer v. Burch*, the New Mexico Supreme Court acknowledged the possible inequities of the lump sum method.[19] The court therefore adopted the "pay as it comes in" or "reserved jurisdiction" method of retirement division.[20] Under this method, the court reserves jurisdiction to award the pension until it matures, and the non-employee spouse receives his or her share of the pension as it is paid.

11. GOLDBERG, *supra* note 8, at § 9.1. A well-known California case, in which a wife sued her divorce attorney for malpractice because he failed to secure her interest in her husband's military retirement benefits, demonstrates the importance of pension benefits. The California Supreme Court affirmed a $100,000 judgment for malpractice. Smith v. Lewis, 13 Cal. 3d 349, ___, ___, 118 Cal. Rptr. 621, 623-24, 629, 530 P.2d 589, 591-92, 597 (1975).

12. Copeland v. Copeland, 91 N.M. 409, 414, 575 P.2d 99, 104 (1978). For a thorough discussion of how the New Mexico Supreme Court has divided various types of retirement plans, see Neerken, *supra* note 9. For an analysis of recent cases, see Shapiro, *supra* note 9, at 302-07.

13. Broadhead v. Broadhead, 13 FAM. L. REP. (BNA) 1420 (1987).

14. *Id.*

15. GOLDBERG, *supra* note 8, at 228, 251. *But see* Troyan, *Pension Evaluation and Equitable Distribution*, 10 FAM. L. REP. (BNA) 3001, 3009 (1983).

16. Schweitzer v. Burch, 103 N.M. 612, 711 P.2d 889 (1985).

17. *Id.*

18. GOLDBERG, *supra* note 8, at 252.

19. 103 N.M. at 613, 711 P.2d at 890.

20. *Id.*

The risks that a future right might never arise, as well as the possibility that benefits may increase, is thus shared equally by both parties.[21]

B. Determining Present Value—Mattox v. Mattox[22]

Though the "pay as it comes in" method is preferred, the *Schweitzer* court also held that the parties may agree to use the lump sum method.[23] The parties may thus choose to make a clean break regarding the pension at divorce in order to compromise different positions as to its value, or in order to accommodate the fact that the pension is so small and so far in the future that "pay as it comes in" treatment is unwise. During the survey year the New Mexico Court of Appeals gave some idea of the type of lump sum agreement it might approve. For example, the court provided guidelines for determining the present value of a pension in a divorce which occurred before *Schweitzer* became effective, and also for determining the value of a pension which increased in value based on future employee service. In *Mattox v. Mattox*,[24] a former husband raised the issue of whether the trial court had properly valued his pension, employee stock option ("ESOP"),[25] and employee savings plans.[26] Husband's benefits in his defined benefit pension plan[27] had vested, but would not mature for almost two more years from the time of the divorce.[28]

1. Valuation Date

In determining the value of unmatured pension benefits, the trial court must determine their present value.[29] In *Mattox*, the trial court used the calculations of wife's expert in determining present value.[30] Wife's expert

21. *Id.* For a critical discussion of the *Schweitzer* decision, see P. Carter and J. Myers, *Division and Distribution of the Community Interest in Defined Benefit Pensions: Schweitzer Reconsidered*, 18 N.M.L. REV. 95 (1988).

22. 105 N.M. 479, 734 P.2d 259 (Ct. App. 1987).

23. *Schweitzer*, 103 N.M. at 615, 711 P.2d at 892. Presumably the parties can agree by means of a settlement or they can agree to give the court the option to decide the value of a lump sum and to award a setoff in other property.

24. 105 N.M. 479, 734 P.2d 259 (Ct. App. 1987).

25. Employee stock option plans ("ESOP's") are defined contribution plans in which a bank loans money to secure the plan, with the employer guaranteeing the loan. The ESOP uses the funds loaned to buy stock from the employer, who then gets the benefit of making a tax-deductible payment to the ESOP for its annual loan repayment. GOLDBERG, *supra* note 8, at 234.

26. An employee savings plan is a defined benefit plan in which the employee contributes, and the employer usually matches a portion of the employee contribution. *Id.* at 233. The employee may be permitted to borrow a portion of vested profits. Schurenberg, *Firm Footing for Your Retirement*, 14 MONEY 104 (1988).

27. A defined benefit plan provides systematic pension payments based on the employee's salary and length of service. GOLDBERG *supra* note 8, at 232. For a comparison of defined benefit and defined contribution plans, *see supra*, note 10.

28. *Mattox*, 105 N.M. at 481, 734 P.2d at 261.

29. *Id.* at 482, 734 P.2d at 262.

30. *Id.*

computed present value by determining the value of husband's interest at the future retirement date, and then discounting the amount back to the trial date; however, the findings submitted to the appellate court did not specify that this was the date used.[31] On appeal, husband did not dispute the method of present value calculation but contended that the future retirement value should not have been discounted back to the trial date, but rather back to the earlier date of a letter opinion issued by the trial judge.[32] The *Mattox* court held that the letter opinion of the trial judge would only be considered if necessary to clarify ambiguity.[33] The appeals court insisted that since the trial court findings did not specify the valuation date used, there could be no ambiguity, and there was no need to consult the letter opinion for clarification.[34] The appellate decision was in spite of the fact that value was a pivotal issue in this appeal. The *Mattox* decision clearly demonstrates the deference the appellate court will show to trial court decisions. Practitioners would do well, therefore, to make certain that the record on appeal clearly specifies the basis for the trial court decision.

2. Future Employment Years—A Factor in Computing Value but Not in Computing Contribution

In determining wife's contribution to the *Mattox* pension, both wife's and husband's experts considered husband's earnings only during the marriage; they did not consider any earnings between the date of trial and the maturity date of the pension.[35] However, in determining value the experts added marital years, together with the anticipated remaining years until the pension's maturity.[36] On appeal, husband contended that

31. *Id.* at 481-82, 734 P.2d at 261-62. Defined benefit plans are more difficult to evaluate than defined contribution plans. This is because all that the expert knows is the value of the future retirement benefits earned to date, and these benefits are based on the assumption that the employee will remain on the job until retirement. GOLDBERG, *supra* note 8, at 232. Since the employee may be fired, may change jobs, or may die, these benefits are highly speculative; to properly evaluate these benefits requires the use of a highly-trained actuary or accountant. *Id.* at 233.

Current developments in the stock market make the value of defined contribution plans even more difficult to calculate. Most defined contribution plans allow employees to divide their accounts among two to four investments. Schurenberg, *supra* note 26. The impact of employee's choices became painfully apparent during the stock market crash of "Black October," 1987, when equity funds in pension plans fell around 32%. *Id.* Non-retiring employees were penalized by the fact that many plans award retiring employees the value of their accounts as of the end of the previous month rather than on the day they retire. Thus, after the crash, many employees retired in October in order to redeem their stock fund holdings at the much higher September 30th prices. Non-retiring employees found their retirement funds were depleted by the depressed stock value as well as the early retirement of many of their co-workers. *Id.* at 103-04.

32. *Mattox*, 105 N.M. at 482, 734 P.2d at 262.

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

in addition to not using future earnings in computing contribution, the community was also not entitled to use future employment years in computing value.[37] Husband argued that the pension should be valued as if it had been cashed in at the time of divorce and was subject to early retirement penalties.[38]

The *Mattox* court held that husband was confusing the two issues of contribution and valuation, and rejected his argument for two reasons.[39] First, husband in actuality would receive the entire pension, as he had testified he did not intend to retire early and take the early retirement penalty.[40] Second, valuing the pension at the lower, "early retirement penalty" rate would severely penalize the non-employee spouse.[41] Community effort had contributed 92% of the pension's value.[42] Accordingly, the court refused to undervalue the pension based on the unsupported assumption that husband would retire early.[43]

3. Maturity Date vs. Projected Retirement Date

The trial court in *Mattox* valued the pension at its maturity, when husband would have worked 25 years and would be 53 years old, a "normal" retirement date at his workplace.[44] Husband maintained that the value of the pension should be based on the fact that he would likely retire at 65.[45] This projection would sharply reduce the pension benefits, because wife would be entitled to fewer payment years.[46] The court of appeals did not condone this approach and chose instead to affirm the trial court's use of the earliest full maturity date for establishing the pension's value rather than husband's anticipated date.[47] The court preferred the maturity date because it could be easily ascertained from the plan, as opposed to husband's retirement date, which was purely speculative.[48]

4. Consideration of Tax Consequences of Retirement Payments

Husband also maintained the trial court erred in not considering the tax consequences of the ESOP, the pension plan and the savings plan in

37. *Id.*
38. *Id.*
39. *Id.* at 482-83, 734 P.2d at 262-63.
40. *Id.*
41. *Id.* at 482, 734 P.2d at 262.
42. *Id.* at 483, 734 P.2d at 263.
43. *Id.*
44. *Id.*
45. *Id.*
46. *Id.*
47. *Id.* at 483-84, 734 P.2d at 263-64.
48. *Id.*

determining their values.[49] With regard to the ESOP and the pension plan, the *Mattox* court held that, because the tax consequences were speculative, the trial court did not err in not considering them.[50] In other words, since husband's tax rate would change after retirement, and the trial court could not predict what husband's future taxes would be, it was not necessary to consider these unknown tax consequences in determining value.[51]

Wife, however, had also been awarded the Bell Systems Savings Plan or "BSSP." Husband maintained that there would be tax consequences and penalties for immediately liquidating the savings plan in order to give it to wife.[52] The trial court had not specified whether husband should liquidate the BSSP immediately and suffer the penalties, or pay wife in installments as the amounts became withdrawable without penalty.[53] Depending on the alternative the trial court chose, the tax consequences and penalties in this case could be immediate and specific.[54] The court of appeals, therefore, remanded the transfer of the BSSP to the trial court for clarification on how to distribute the BSSP or its equivalent amount.[55]

The *Mattox* decision provides practical guidelines for parties needing to agree on valuation for property settlements or for parties who stipulate to let the trial court decide a present value. From *Mattox*, we learn that the value of an unmatured pension is based on marital years together with anticipated remaining years until the pension's maturity. We also learn that the "normal" retirement date listed in the plan is used in computing value, not a hypothetical retirement date set by husband. Finally, *Mattox* gives us examples of speculative tax consequences which a trial court need not consider, contrasted with immediate and specific tax consequences, which a trial court should consider.

C. Dividing Increases in Value—Lewis v. Lewis[56]

Community property in New Mexico is divided according to its value on the date of divorce.[57] In a unified divorce, in which the property division judgment is simultaneous with the divorce decree, the property is simply valued as of the date of the decree.[58] However, at times the

49. *Id.* at 484-85, 734 P.2d at 264-65.
50. *Id.*
51. *Id.*
52. *Id.* at 485, 734 P.2d at 265.
53. *Id.*
54. *Id.* at 486, 734 P.2d at 266.
55. *Id.*
56. 106 N.M. 105, 739 P.2d 974 (Ct. App. 1987).
57. Hurley v. Hurley, 94 N.M. 641, 615 P.2d 256 (1980), *rev'd on other grounds*, Ellsworth v. Ellsworth, 97 N.M. 133, 637 P.2d 564 (1981); Madrid v. Madrid, 101 N.M. 504, 505, 684 P.2d 1169, 1170 (Ct. App. 1984).
58. *Hurley*, 94 N.M. at 643, 615 P.2d at 258.

court will provide for a bifurcated divorce, first entering a partial decree of divorce, and then months or even years later, entering a judgment dealing with the property and debt division or support issues.[59] When the property increases in value during this time interval, courts must determine whether to divide the increase between the relevant dates. In *Lewis v. Lewis,* the court of appeals divided an increase in value of pension and profit sharing plans which had occurred during the period between the divorce decree and property judgment.[60]

1. From Divorce Decree to Property Division Judgment—Parties Each Get One-Half of Earnings and Increases in Value

The trial court in *Lewis* issued a bifurcated divorce decree on May 18, 1983, and a property division, debt division and alimony judgment on October 30, 1984.[61] The property judgment awarded to wife one-half the earnings and increases in value of the plans from the date of divorce until the judgment.[62] The trial court later amended its judgment and awarded all post-divorce earnings and increases in the plans to husband.[63]

On appeal, husband argued that the judgment should be upheld because, even if he were not entitled to the post-divorce increases as a matter of law, all assets should be valued on the same date—the date of the divorce decree.[64] The court of appeals reasoned that for husband's argument to succeed, the court must conclude that a single valuation date must be used in order to divide property equally.[65] However, no New Mexico authority provides for such a rule.[66] Rather, though the trial court must determine the extent of community property in order to divide it equally, the court is not required to divide the property with mathematical certainty.[67] The appellate court accordingly reinstated the trial court's original judgment and awarded wife one-half of the increases and earnings from the plans from the date of the divorce decree to that of the property division judgment.[68]

2. From Property Division Judgment to Appeal—Parties Get Shares Awarded in Judgment

59. Lewis v. Lewis, 106 N.M. 105, 739 P.2d 974 (Ct. App. 1987).
60. *Id.*
61. *Id.* at 108, 739 P.2d at 975.
62. *Id.* at 109, 739 P.2d at 976.
63. *Id.*
64. *Id.* at 110, 739 P.2d at 977.
65. *Id.*
66. *Id.*
67. *Id.*
68. *Id.* at 111, 739 P.2d at 978.

In addition to the issue of the pension and profit sharing plans' increase in value between the divorce date and the property judgment date, the court also had to consider the plans' increase in value from the judgment date until the date of appeal.[69] The appellate court distinguished this increase from the increase before judgment.[70] Though wife maintained she should also receive one-half of this increase, the appellate court held that the judgment fixed each party's percentage of ownership.[71] Since the judgment apportioned 29% of the pension to the wife and 71% to the husband, the judgment set wife's share at 29% of increases and earnings from the date of the property division judgment until the date she received her share.[72]

D. Military Retirement Benefits as Community Property

The status of military retirement income as community property has evolved rapidly in recent years. In 1981, the United States Supreme Court held in *McCarty v. McCarty*[73] that federal law precluded states from dividing military benefits pursuant to state laws.[74] The publicity and outrage that followed the *McCarty* decision[75] led to the 1982 Federal Uniformed Services Former Spouses' Protection Act ("FUSFSPA").[76] The Act permits state courts to classify military retirement allowances as divisible marital property according to a specific state law.[77] In accordance with FUSFSPA, in 1983 the New Mexico Supreme Court ruled in accordance with its decisions before *McCarty*,[78] that military retirement benefits were community property.

During the survey year, the New Mexico Court of Appeals decided an issue of first impression regarding whether the non-employee's share of military retirement should be based on the employee's gross pay or net "disposable" pay. In *White v. White*,[79] husband argued that the court could declare a community property interest only in military pay defined

69. *Id.*
70. *Id.*
71. *Id.*
72. *Id.*
73. McCarty v. McCarty, 453 U.S. 210 (1981).
74. *Id.* at 220-36.
75. Members of EXPOSE (Ex-Partners of Servicemen for Equality) picketed military facilities to protest the "throw-away military wife system," and lobbied for federal legislation to guarantee wives a share of military retirement. L. WEITZMAN, THE DIVORCE REVOLUTION 116-18 (1985).
76. 10 U.S.C. § 1408 (1982)..
77. *Id.*
78. Walentowski v. Walentowski, 100 N.M. 484, 672 P.2d 657 (1983). The New Mexico Supreme Court held that FUSFSPA would apply retroactively to the date of the *McCarty* decision. *Id.* at 487, 672 P.2d at 660.
79. 105 N.M. 600, 734 P.2d 1283 (Ct. App. 1987).

as "disposable" under the FUSFSPA.[80] "Disposable" retirement pay is gross pay less statutorily specified deductions which are under the direct or indirect control of the retiree.[81] Husband's deductions in *White* included federal tax, life insurance, disability retirement and a survivor's benefit plan.[82]

1. Non-Employee's Share Based on Net Disposable Pay or Gross Pay?

Wife contended that basing her community property share of husband's retirement on net disposable benefits made her pay two sets of federal taxes.[83] First, she paid a tax because husband was permitted to subtract his withholding tax from her share.[84] Second, she paid tax individually on the amount she received.[85] The court of appeals agreed with wife and held that basing the division on disposable benefits resulted in unfair and disparate treatment of the non-military spouse.[86] The court cited with approval a California decision[87] regarding the inequity which results when a non-employee spouse's share is based on deductions controlled by the employee:

> [ex-spouses] are subject to receiving different sums if, for example, their respective spouses are in different tax brackets, or if one understates his dependents, or if one commits torts against the government or incurs other indebtednesses to it for which the ex-spouse bears no liability. We can conceive of no legitimate governmental interest . . . which would rationally support such disparate treatment.[88]

The court of appeals therefore held that it would be unfair and illogical to base wife's share of retirement benefits on disposable pay.[89]

2. Division of Military Pay a State Law Question

Husband in *White* argued that FUSFSPA limits the division of military

80. *Id.* at 603, 734 P.2d at 1286; 10 U.S.C. § 1408(c)(1) (1982).

81. 10 U.S.C. § 1408(a)(4) (1982). This is with the exception of withholding tax liability. Disposable pay can thus vary widely among retirees with the same gross pay.

82. *White*, 105 N.M. at 602, 734 P.2d at 1285.

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.* at 604, 734 P.2d at 1287.

87. Casas v. Thompson, 42 Cal.3d 131, 228 Cal. Rptr. 33, 720 P.2d 921 (1986) *(en banc), cert. denied*, 479 U.S. 1012 (1986). California has been the leading state in developing a body of law regarding retirement plans and, as a result, the majority of jurisdictions apply California law concerning pension rights. GOLDBERG, *supra* note 8, at 236.

88. *Casas*, 42 Cal.3d at 143-44, 228 Cal. Rptr. 40-41, 720 P.2d 928-29.

89. *White*, 105 N.M. at 603, 734 P.2d at 1286.

pay, and thus New Mexico trial courts can declare a community property interest only in what FUSFSPA defines as "disposable" retirement pay.[90] The court of appeals, however, again agreed with the California Supreme Court's decision that how retirement pay is divided on divorce is a state law question, which FUSFSPA was not intended to affect.[91] Rather, Congress intended the "disposable pay" requirement to establish a scheme for permitting the ex-spouse to "garnish" retirement pay.[92] The "disposable pay" distinction only applies to limit the amount that can be garnished, not to limit states in their division of military pay on divorce.[93] Thus FUSFSPA would not preclude a trial court from holding that gross military pay should be divided on divorce.[94] However, although the *White* court held that gross pay should be divided in the instant case, this was not to be an inflexible rule. Rather, courts should treat the matter equitably and, under other fact situations, might choose to authorize appropriate deductions before division.[95] The *White* decision epitomizes the careful balancing courts must perform when dealing with conflicting equities between the parties, a task that is made more difficult due to the interweaving of federal and state law affecting pension plans.

III. ALIMONY

The court of appeals decided two critical cases regarding alimony during the survey year. One dealt with the denial of alimony to the ex-wife of a physician, and the other dealt with a lump sum alimony award that was deemed nonmodifiable, and inheritable, since wife died during the appeal.

The parties in *Lewis v. Lewis* had been married for 38 years.[96] They had married when husband was in medical school, when wife was 23 and husband was 22. There were three children, born two, four, and six years after the marriage, and wife did not work outside the home until 1973.[97] In 1973, the parties moved to New Mexico, and wife helped establish husband's medical practice, working first as his secretary and later as his bookkeeper.[98] The parties separated in 1981, and wife worked at temporary jobs after the separation, earning minimum wage at one job

90. *Id.*
91. *Id.*
92. *Id.*
93. *Id.*
94. *Id.*
95. *Id.* at 604, 734 P.2d at 1287. For example, the court stated that if there were an IRS tax lien against the community prior to divorce and sums were withheld from the retiree's benefits to pay for this, these sums would be fairly deducted before dividing the benefits. *Id.*
96. 106 N.M. 105, 739 P.2d 974 (Ct. App. 1987).
97. *Id.* at 114, 739 P.2d at 981.
98. *Id.*

and $5 an hour at another.[99] In the year of the divorce, husband paid himself a salary, pension contributions and personal expenses of $88,296.[100] The parties had assets in excess of $800,000.[101] Wife requested $2,060 per month, after taxes, for living expenses, as alimony at the time of the divorce.[102]

The trial court in *Lewis* denied alimony, finding that wife only required $1,300 per month, after taxes, to maintain herself and that she had enough property to provide that sum.[103] The court held that the earnings wife would receive from her money market account, as well as from investing her share of the pension, "would be just sufficient to allow [wife] to maintain herself on a conservative level."[104]

The court of appeals, although it stated that it might have made a different determination of need for a 62-year-old woman who had been married most of her adult life to a professional, did not find an abuse of discretion in the $1,300 award for living expenses.[105] On the other hand, the appellate court held that there was not substantial evidence to support the trial court's finding that income from wife's assets would provide her with $1,300 per month after taxes.[106] Rather, the record showed that wife would receive only $1,000 monthly before taxes.[107]

A. Possible Presumption of Potential Income

Did the trial court perhaps intend that wife earn the remaining funds by rehabilitating herself into the job market and gaining full-time employment? The court of appeals found the record unclear on this point but stated that the trial court should not have assumed an income potential for wife to be added to her income from property.[108] Cases which properly denied alimony because the wife had income potential involved women who were younger, who had more job skills, and who had had shorter marriages than the wife in *Lewis*. The court therefore held that "wife, a 62-year-old spouse whose marriage is dissolved after almost four decades, whose marital role was primarily that of a homemaker, and whose spouse is well able to afford alimony, has no obligation to 'rehabilitate' herself."[109] The court of appeals then remanded the case to the trial court

99. *Id.*
100. *Id.*
101. *Id.* at 108, 739 P.2d at 975.
102. *Id.* at 114, 739 P.2d at 981.
103. *Id.* at 114-15, 739 P.2d at 981-82.
104. *Id.* at 115, 739 P.2d at 982.
105. *Id.*
106. *Id.*
107. *Id.*
108. *Id.*
109. *Id.* at 116, 739 P.2d at 983.

to reconsider whether the wife's potential income had been a factor in the denial of alimony.[110]

B. Lump Sum vs. Periodic Alimony

In deciding whether to award alimony, courts consider many factors, such as the spouse's needs, the spouse's age and health, means available for the spouse's support, the payor spouse's earning capacity, the duration of the marriage, and the amount of property owned by each party.[111] As in *Lewis,* the parties in *Michaluk v. Burke* were in their 60's and husband disputed the trial court's award of alimony to wife.[112] Husband in *Michaluk* conceded that wife was entitled to alimony but disputed the $35,000 amount and the fact that it was a lump sum award.[113] Before the court heard the appeal, wife died.[114] After wife's death, husband contended that her right to receive lump sum alimony abated and that her children, who were to inherit her property, should not have been substituted as parties to the appeal.[115]

At the time of the divorce in *Michaluk*, husband and wife had been married for 17 years; wife was 65, and husband was 68 years old.[116] The trial court found that wife was in ill health, unemployable, and had $10,000 in assets.[117] Husband had $110,000 in assets, including a four-plex worth $100,000, which was his separate property.[118] Based on these facts, the trial court found that wife was entitled to alimony and awarded her a lump sum out of husband's separate property, rather than a periodic amount.[119]

Husband in *Michaluk* asked the appellate court to hold that periodic alimony should be the rule, with lump sum alimony reserved only for compelling circumstances.[120] The court of appeals disagreed because the New Mexico statute does not provide for a preference of one type of alimony over another and because husband had previously failed to pay alimony to a former wife.[121] Husband also argued that his separate property should not be used to pay alimony.[122] The court again pointed to the

110. *Id.*
111. Michelson v. Michelson, 86 N.M. 107, 110, 520 P.2d 263, 266 (1974).
112. 105 N.M. 670, 673-74, 735 P.2d 1176, 1179-80 (Ct. App. 1987).
113. *Id.* at 673, 735 P.2d at 1179.
114. *Id.* at 672, 735 P.2d at 1178.
115. *Id.* at 672, 677, 735 P.2d at 1178, 1183.
116. *Id.* at 673-74, 735 P.2d at 1179-80.
117. *Id.* at 673, 735 P.2d at 1179.
118. *Id.*
119. *Id.*
120. *Id.*
121. *Id.*; N.M. STAT. ANN. §40-4-7(B)(1) (Repl. Pamp. 1986).
122. *Michaluk,* 105 N.M. at 673, 735 P.2d at 1179.

relevant statute, which allows one spouse's separate property to be awarded to the other as alimony; the court also cited cases which provide that alimony may be awarded from either community property or separate property.[123]

Finally, husband in *Michaluk* cited the fact that the lump sum alimony award would require him to sell his only asset, a four-plex which provided rental income, a major source of his livelihood.[124] The court of appeals again cited the evidence that husband had failed to make monthly payments to his first wife, and that because of the acrimonious relationship between the parties, it was unlikely that he would make alimony payments to his second wife without compulsion by the court.[125] The parties could ill afford additional litigation costs, and wife had stated her desire to leave the state, which would make enforcing periodic alimony more difficult.[126] Based on these facts, the appellate court upheld the trial court's award of lump sum alimony as within its discretion.[127]

C. *Whether Lump Sum Alimony Award Abates After Wife's Death*

Husband in *Michaluk* argued that, since the judgment was stayed pending appeal, the stay prevented the vesting of wife's right to payment of the alimony, so that the alimony could not be inherited by wife's children.[128] Husband cited *Corliss v. Corliss* "for the principle that the right to future installments of alimony becomes vested only upon becoming due."[129] The court of appeals distinguished *Corliss*, however, as applying only to future payments of periodic alimony, whereas *Michaluk* involved lump sum alimony which vested at the time of entry of judgment.[130] The court construed the statute providing for alteration or amendment of an alimony award as not being applicable to lump sum alimony or alimony in gross.[131] The court reasoned that, like accrued periodic alimony, lump sum alimony is nonmodifiable.[132] Once an installment of periodic alimony becomes due or accrued, the right to payment becomes a fixed property right.[133] Likewise, once lump sum alimony has been awarded, it cannot

123. *Id.* at 674, 735 P.2d at 1180 (citing N.M. STAT. ANN. §§ 40-4-7(B)(1), -12 (Repl. Pamp. 1986); Ridgway v. Ridgway, 94 N.M. 345, 610 P.2d 749 (1980); Harper v. Harper, 54 N.M. 194, 217 P.2d 857 (1950)).

124. *Michaluk*, 105 N.M. at 674, 735 P.2d at 1180.

125. *Id.*

126. *Id.*

127. *Id.* at 673, 735 P.2d at 1179.

128. *Id.* at 675, 735 P.2d at 1181.

129. *Id.* (citing Corliss v. Corliss, 89 N.M. 235, 549 P.2d 1070 (1976)).

130. *Michaluk*, 105 N.M. at 675, 735 P.2d at 1181.

131. *Id.*

132. *Id.*

133. *Id.*

be modified.[134] Therefore, the appellate court held that wife's estate was entitled to the lump sum alimony award, and husband had to pay it.[135]

IV. COMMUNITY PROPERTY DETERMINATIONS

A. Statute of Limitations

A majority of jurisdictions hold that the statute of limitations and the equitable defense of laches should be tolled during the marital relationship. Courts reason that, if these defenses ran between husband and wife, spouses would, in effect, be "forced" to sue each other to avoid these defenses to claims that arise in divorce.[136] Courts believe, therefore, that they should toll the statute of limitations and laches during the marital relationship in order to promote domestic harmony.[137]

In *Dolezal v. Blevins,* the issue was whether in a cause of action for nonpayment of debt based on a divorce decree, the statute of limitations was tolled during the time the parties were remarried.[138] The parties in *Dolezal* were divorced on July 16, 1973, and the decree provided that husband would pay $50,000 to evenly distribute the property of the parties.[139] Husband paid wife $5,000, but then the parties remarried on November 1, 1973, and no further payments were made.[140] In 1981, the parties divorced for the second time.[141] In 1984, wife sued for payment of the $45,000 balance, together with interest.[142] During a hearing, husband asserted the claim was barred by the statute of limitations, and the trial court dismissed wife's complaint with prejudice.[143]

On appeal, wife maintained that the trial court erred in failing to find that the statute of limitations is tolled as to payments between a husband and wife during the marriage.[144] Husband, on the other hand, argued that the rationale behind the tolling rule had been nullified when the New Mexico Supreme Court abrogated interspousal immunity for intentional

134. *Id.* at 676, 735 P.2d at 1182.
135. *Id.* at 675, 735 P.2d at 1181.
136. Dolezal v. Blevins, 105 N.M. 562, 563, 734 P.2d 802, 803 (Ct. App. 1987).
137. *Id.* For example, in a Nevada case, wife entered into a postnuptial agreement that limited husband's responsibility to support her, in order to save her marriage. Cord v. Neuhoff, 94 Nev. 21, 573 P.2d 1170 (1978). The Nevada Supreme Court held that the agreement was null and void, since the material part which limited husband's responsibility of support was illegal. *Id.* at ___, 573 P.2d at 1172. The court also held that wife's action challenging the agreement was not barred by laches. *Id.*
138. 105 N.M. 562, 734 P.2d 802 (Ct. App. 1987).
139. *Id.*
140. *Id.*
141. *Id.*
142. *Id.*
143. *Id.*
144. *Id.* at 562-63, 734 P.2d at 802-03.

and negligent torts.[145] The appellate court disagreed with husband, holding that the fact that suits for negligent and intentional torts are allowed between husband and wife does not negate the policy behind tolling the statute of limitations during the marital relationship.[146] Therefore, wife's cause of action was tolled during the remarriage of the parties, so the court of appeals remanded the matter for trial on the merits.[147]

B. Personal Injury Settlement

During the survey year, the court of appeals decided two difficult cases concerning whether property was to be characterized as community or separate property. One involved wife's tort recovery for toxic shock syndrome, and the other involved the parol evidence rule when property is deeded to one spouse.

The central issue in *Russell v. Russell*[148] was whether husband was entitled to a community share of wife's recovery for medical expenses she incurred as a result of contracting toxic shock syndrome.[149] The findings of fact in the *Russell* divorce provided that wife had a cause of action due to an illness that required hospitalization and substantial medical care.[150] The findings specified that the community was entitled to the portion of wife's claim that was attributable to past medical expenses, loss of service to the community and loss of earnings to the community.[151] Damages for wife's physical injury as well as pain and suffering, however, were to be wife's separate property.[152]

The problem arose because some time later the tort case was settled, and the settlement figure did not specify what amount, if any, was included for medical expenses.[153] Wife had testified that she did not know how the settlement figure was determined, and under the terms of the settlement she could not reveal the total amount.[154] However, wife stated that her medical expenses were approximately $80,000, and that the settlement was in excess of that amount.[155]

The trial court held a hearing to determine what amount husband should recover from the wife's settlement of her toxic shock syndrome claim. When wife admitted that her total medical expenses for the severe illness

145. *Id.* at 563, 734 P.2d at 803.
146. *Id.*
147. *Id.*
148. 106 N.M. 133, 740 P.2d 127 (Ct. App. 1987).
149. *Id.*
150. *Id.* at 134, 740 P.2d at 128.
151. *Id.* at 135, 740 P.2d at 129.
152. *Id.*
153. *Id.*
154. *Id.*
155. *Id.*

had been approximately $80,000, husband requested a finding that he was entitled to $40,000, or half of the settlement for medical expenses.[156] Wife, however, contended that most of her expenses had been covered by insurance, so husband was only entitled to half of the unreimbursed medical expenses which the couple's joint tax return showed to be $1,421.16.[157]

If the settlement amount included medical expenses, wife received a windfall because she was reimbursed for expenses that the insurance had previously paid.[158] On the other hand, if the settlement figure used the medical costs merely as an indication of the severity of the illness, and the settlement was entirely for pain and suffering, then husband would not be entitled to a share of the settlement.[159] The trial court found that, since the only evidence introduced as to medical expenses of the community was the tax return showing unreimbursed expenses of $1,429, husband was entitled to recover half of this amount, or $714.[160] The appellate court found that the trial court misunderstood the decree when it only awarded husband half of the unreimbursed medicals.[161] The decree had clearly stated that any portion of the settlement "directly attributable to medical expenses" should be divided equally as community property.[162] The decree was in accordance with established New Mexico personal injury law that an award for pain and suffering is separate property, but an award for medical expenses or loss of earnings belongs to the community.[163]

The appellate court reasoned that recovery for medical expenses is a community asset since it represents reimbursement for community debts.[164] In addition, the recovery of medical expenses in this case was also a community asset because the insurance which provided for the payment of medical expenses was purchased with community funds.[165] The fact that the parties were covered by insurance should not operate to penalize the community.[166] Accordingly, if there was a double recovery for medical expenses, husband and wife should share it equally.[167] The court of appeals

156. *Id.*
157. *Id.*
158. *Id.*
159. *Id.* This was because paragraph 14 of the findings of the trial court provided that wife would retain as her separate property any damages for physical injury and pain and suffering. *Id.* at 135, 740 P.2d at 129.
160. *Id.*
161. *Id.*
162. *Id.*
163. *Id.*
164. *Id.*
165. *Id.*
166. *Id.* at 137, 740 P.2d at 131.
167. *Id.*

therefore remanded the case for rehearing on the amount of the settlement that was attributable to medical expenses.[168] The trial court was also to determine if the insurance companies had sought reimbursement for medical expenses and, if so, to deduct these amounts from the portion of the settlement to be divided.[169]

C. Land Deeded to One Spouse

The parol evidence rule seeks to preserve the integrity of contracts by refusing to allow the parties to alter the contract by oral or parol declarations. Thus, the rule provides that unambiguous terms of a contract cannot be modified by parol evidence.[170] A recent New Mexico case refined the application of the parol evidence rule with regard to community property.

The dispute in *Sanchez v. Sanchez* involved two ranches that were deeded to wife alone by wife's parents during the time the parties were married.[171] In spite of the terms of the deed, the trial court held the ranches were community property, based on two items of evidence introduced at trial.[172] First, husband worked for fifteen years without wages, managing his father-in-law's ranch.[173] This labor provided part of the consideration for the transfer of one of the ranches to the community, even though the deeds were in wife's name only.[174] Second, husband and wife together relinquished their interest in another ranch in exchange for these two ranches.[175] Husband argued that the exchange was for the benefit of the community, not wife alone.[176]

Wife contended that since the deeds were in her name only, the prop-

168. *Id.* On remand, the trial court made the following judgment, in part:

1) The New Mexico Court of Appeals in its opinion in cause numbered 9130 directed that "any part of wife's settlement intended to reimburse the community for medical expenses is community property' and that the portion of wife's settlement 'directly attributable to medical expenses' was community property.
2) No portion of the product liability suit settlement is directly attributable to medical expenses.
3) No portion of the product liability suit settlement was intended as reimbursement for medical expenses.
4) No portion of the product liability suit settlement is community property.

Russell v. Russell, No. DR-81-04350 (2nd Jud.D.C. Feb. 5, 1988).

169. Russell, 106 N.M. at 137, 740 P.2d at 131. Although the record on appeal did not state whether the insurance companies had sought reimbursement from wife, the record from the trial on remand shows the insurance companies who paid the medical expenses had not requested subrogation, or intervened in wife's suit against Proctor and Gamble. Russell v. Russell, No. DR-81-04350 (Court's Findings of Fact and Conclusions of Law, Finding No. 14) (2nd Jud.D.C. Jan. 26, 1988).

170. BLACK'S LAW DICTIONARY 1006 (5th ed. 1979).

171. 106 N.M. 648, 748 P.2d 21 (Ct. App.), *cert. denied*, 106 N.M. 627, 747 P.2d 933 (1987).

172. *Id.* at 649, 748 P.2d at 22.

173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.*

erties were gifts to her and therefore separate property.[177] Wife relied upon the statutory provision which states: "All property of the wife owned by her before marriage and that acquired afterwards by gift, bequest, devise or descent, with the rents, issues and profits thereof is her separate property."[178] The court of appeals held, however, that the fact that the deeds only stated wife's name raised a rebuttable presumption that the ranches were wife's separate property.[179] That presumption may be overcome by a preponderance of evidence introduced at trial, and in this case the trial court found such a preponderance of evidence.[180]

On appeal, wife argued that admission of husband's testimony as to the ranch grantor's intent was in violation of the rule prohibiting parol evidence that adds to or varies unambiguous written terms in deeds.[181] Ordinarily, parol evidence is admissible to show that consideration for a contract differs from what is shown on the contract itself,[182] but wife argued that the evidence in this case altered the deeds rather than showing consideration.[183] The appellate court disagreed. Since the deeds spoke in terms of "consideration paid" but did not specify the nature of the consideration, husband's testimony on the nature of the consideration was admissible.[184] The *Sanchez* court also cited the general rule that parol evidence is admissible to show that real property granted to one spouse is community property because the intent of the grantor is a fundamental issue.[185] Therefore, since the issue was whether the grantor intended the property to be community or separate, parol evidence was properly admitted to show the true consideration and intent behind the deeds.[186] The evidence revealed the grantor's lack of intent to make a gift to wife, and instead proved the intent that wife hold the property as trustee for the community.[187] The court of appeals thus affirmed the trial court's ruling.[188]

V. CUSTODY JURISDICTION

Prior to passage of the federal Parental Kidnaping Prevention Act ("PKPA") of 1980,[189] the confusion surrounding interstate custody disputes encouraged a non-custodial parent to kidnap the couple's children

177. *Id.*
178. *Id.* (citing N.M. STAT. ANN. § 57-3-4 (1953 & Repl. Pamp. 1962, Vol. 8) currently codified as amended at § 40-3-8 (Repl. Pamp. 1986)).
179. *Sanchez*, 106 N.M. at 650, 748 P.2d at 23.
180. *Id.* at 649, 748 P.2d at 22.
181. *Id.* at 650, 748 P.2d at 23.
182. *Id.* (citing Morstad v. Atchison, T. & S.F. Ry., 23 N.M. 663, 170 P. 886 (1918)).
183. *Sanchez*, 106 N.M. at 650, 748 P.2d at 23.
184. *Id.*
185. *Id.* at 651, 748 P.2d at 24.
186. *Id.*
187. *Id.*
188. *Id.*
189. 28 U.S.C. § 1738A.

and shop for a forum which would be willing to enter a different custody order.[190] Even in cases that did not involve parental kidnaping, a parent who moved to another state would often seek a new custody order from the new state.[191] This type of "forum shopping" was possible because child custody orders are subject to modification to conform with changes in circumstances.[192] The result was often conflicting custody orders from two states, neither willing to concede the exclusive custody jurisdiction of the other.[193] Congress passed the PKPA to alleviate this problem; its purpose is to prevent a second state from modifying the initial state's custody order, except in carefully prescribed circumstances.[194] The PKPA provides for a presumption of continuing, exclusive jurisdiction in the initial state, and thus discourages parents from seeking custody modification from a second state.[195]

The PKPA gives the criteria for state courts to use when determining the one court with custody jurisdiction.[196]State courts may still enter conflicting custody decrees, however, because of differing interpretations of the Act. In such situations, the question has arisen as to whether federal courts may act as referees in deciding which state has jurisdiction.[197] The PKPA does not contain an express provision for a federal court remedy, but may a cause of action be implied from the PKPA? The standard for an implied cause of action under a federal statute is an issue clouded with contradiction.[198] However, in *Thompson v. Thompson*, a unanimous United

190. Meade v. Meade, 812 F.2d 1473, 1475 (4th Cir. 1987).

191. *Id.*

192. *Id.*

193. Shapiro, *Family Law*, 17 N.M.L. REV. 291, 294 (1987); Montoya, *Domestic Relations*, 18 N.M.L. REV. 371, 373-81 (1988).

194. 28 U.S.C. § 1738A and note.

195. *Id.; see also* Montoya, *supra* note 193 at 376-77.

196. In order for a state court's custody decree to be consistent with the Act, the state must have jurisdiction under its own local law and one of the five conditions listed in 28 U.S.C. § 1738A(c)(2) must be satisfied. These conditions authorize the state court to enter a custody decree if the child's home is or recently has been in the state, if the child has no home state and it would be in the child's best interest for the state to assume jurisdiction, or if the child is present in the state and has been abandoned or abused. *Id.*

197. Thompson v. Thompson, 108 S.Ct. 513 (1988).

198. The Supreme Court set out four factors for determining whether an implied cause of action can be inferred from a statute when Congress has not explicitly done so: 1) Is plaintiff a member of a class Congress intended to protect? 2) Is there any evidence of legislative intent either to create or deny a remedy on behalf of an individual? 3) Would implication of a private remedy be supplemental to the purpose of Congress, or would it interfere? and 4) Is the area involved in the legislation traditionally one of state concern? Cort v. Ash, 422 U.S. 66, 78 (1975). Justice Rehnquist later discounted the first three *Cort* factors, stating that they merely amount to finding legislative intent to create a federal remedy. Touche Ross & Co. v. Redington, 442 U.S. 560, 575-76 (1979). However, the factors are still used by the Court, as can be seen from the brief discussion in Thompson v. Thompson, 108 S.Ct. 513 (1988). *See also* Texas Industries, Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 639-40 (1981).

States Supreme Court[199] recently decided that the PKPA does not provide for an implied private cause of action in federal courts.[200]

Two conflicting custody decrees were involved in *Thompson v. Thompson;* one granted custody to wife, and the other granted custody to husband.[201] Originally, a California decree granted joint custody to both parties.[202] Wife wanted to move to Louisiana and asked the California court to modify the decree and grant her sole custody of her son.[203] The court granted sole custody to wife on a temporary basis, pending a California investigator's report upon which the court would make its final decision.[204] Wife then moved to Louisiana and a few months later petitioned the Louisiana court for an order enforcing the California decree, and granting her sole custody.[205] The Louisiana court assumed jurisdiction and granted the request.[206] Two months later, after consideration of the investigator's report, the California court granted sole custody to husband.[207] Husband did not try to enforce the California decree in Louisiana but instead sued in California Federal District Court for an order declaring the Louisiana decree invalid.[208]

In an opinion written by Justice Marshall, the Supreme Court found that the PKPA did not provide for a private cause of action in federal court, based on its reading of the Act itself, and on the legislative history of the PKPA.[209] The *Thompson* Court found that Congress, in enacting the PKPA, was seeking to remedy the inapplicability of full faith and credit requirements to state custody determinations.[210] Statements made by sponsors and supporters of the Act show that its purpose was to provide for nationwide enforcement of custody orders.[211] Thus the PKPA is titled: "Full faith and credit given to child custody determinations."[212] The Court therefore construed the PKPA as furnishing a rule of decision for courts to use in adjudicating custody disputes and not as creating an entirely new cause of action.[213]

199. Although the Court was unanimous, Justices Scalia and O'Connor did not join in the section of the judgment which discussed implied private rights of action.
200. Thompson, 108 S.Ct. 513 (1988).
201. *Id.* at 515.
202. *Id.*
203. *Id.*
204. *Id.*
205. *Id.*
206. *Id.*
207. *Id.*
208. *Id.*
209. *Id.* at 513-14.
210. *Id.* at 517.
211. *Id.*
212. *Id.* at 518.
213. *Id.* at 520.

When deciding whether a cause of action should be implied from a statute, the Court is faced with the possibility that Congress did not even consider the need for such a cause of action. The *Thompson* Court found that the legislative history of the PKPA shows that the proposal to extend federal court jurisdiction to include state custody orders was considered and rejected by Congress.[214] An exchange between Congressman Conyers and Congressman Fish shows that the disadvantages of the proposal were discussed:

> Mr. Conyers: Do you see any possible merit in leaving the enforcement at the State level, rather than introducing the Federal judiciary?
>
> Mr. Fish: Well, I really think that it is easier on the parent that has custody of the child to go to the nearest Federal district court . . .
>
> Mr. Conyers: Of course you know that the Federal courts have no experience in these kinds of matters, and they would be moving into this other area. I am just thinking of the fact that they have on the average a 21-month docket, you would now be imposing custody matters which it seems might be handled in the courts that normally handle that. . . .[215]

The Supreme Court found that the above discussion between congressmen indicated Congress was aware of the possibility of involving federal courts in child custody disputes and rejected this approach.[216]

Husband argued that the legislative history did not negate the possibility of an implied cause of action.[217] The cause of action proposed by Congressman Fish and rejected by Congress would have permitted federal courts to enforce custody orders initially, before a second state had created a conflict by refusing to do so.[218] Instead, husband argued that the Court should infer a cause of action which would only involve cases of an actual conflict between two state decrees.[219] Rather than forcing federal courts to decide domestic relations disputes, this would only require them to analyze which of two states should retain exclusive jurisdiction under a federal statute, a task for which federal courts are well-qualified.[220]

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214. *Id.* at 518.

215. *Id.* at 519.

216. *Id.* The Court also pointed to a letter from then Assistant Attorney General Patricia Wald to the Chairman of the House Judiciary Committee, which was often referred to during the debate on the PKPA. *Id.* The letter indicated that the Justice Department felt that federal enforcement of state custody decrees would entangle the federal judiciary in domestic relations disputes, with which the federal courts have little experience, and which have traditionally been the province of the states. *Id.*

217. *Id.*

218. *Id.*

219. *Id.*

220. *Id.* at 520, n.4.

The Supreme Court disagreed; it found that making a jurisdictional decision under the PKPA would involve domestic relations determinations.[221] Since the Act provides that jurisdiction can turn on the child's best interest or on proof that the child has been abandoned or abused, in reality a complex domestic relations dispute is involved.[222] Therefore, based on the context and history of the PKPA, the Supreme Court held that the PKPA was meant to extend the requirements of the Full Faith and Credit Clause to custody determinations and was not intended to imply a private cause of action in federal court.[223]

Husband argued that failure to imply a private cause of action in federal court would make the PKPA ineffectual.[224] The Court, however, refused to presume that states would be unable or unwilling to enforce the PKPA.[225] "State courts," wrote Justice Marshall, "faithfully administer the Full Faith and Credit Clause every day; now that Congress has extended full faith and credit requirements to child custody orders, we can think of no reason why the courts' administration of federal law in custody disputes will be any less vigilant."[226] Husband was therefore required to seek enforcement in the Louisiana courts of the California decree granting him custody.[227]

VI. CONCLUSION

The *Thompson* decision makes it clear that state courts will now be primarily responsible for interpreting the provisions of the PKPA regarding continuing custody jurisdiction and for the PKPA's effectiveness interstate.[228] *Thompson's* approach to state law power in this area parallels the New Mexico Court of Appeals' holding in *White*,[229] where the responsibility was placed on state courts to determine substantive property rights in divorce cases even where federal military pay was involved. The appellate court in *White* held that the federal FUSFSPA "disposable pay" requirement applies only to the procedural garnishment of retirement pay, whereas the actual division of retirement pay is a state law property question which FUSFSPA does not affect.[230]

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221. *Id.*
222. *Id.*
223. *Id.* at 520.
224. *Id.*
225. *Id.*
226. *Id.* Justice Marshall did leave the way open for the Supreme Court to decide "truly intractable jurisdictional deadlocks," as it has in the past. *Id.* at 519.
227. *Id.*
228. *Id.* For a criticism of the New Mexico Supreme Court's interpretation of "home state" jurisdiction under the PKPA, see Montoya, *Domestic Relations*, 18 N.M.L. REV. 371, 375-77 (1988).
229. *See supra*, notes 78-94 and accompanying text.
230. *See supra*, notes 91-94 and accompanying text.

These decisions and others like the valuing and dividing of pensions,[231] demonstrate the courts' attempts to balance and harmonize the conflicts between parties' property rights, equitable considerations, and statutory law. The desire to do equity is even more apparent in the cases dealing with lump sum vs. periodic alimony[232] and the presumption of income potential for an elderly homemaker wife.[233]

The appellate courts also focused this year on several subtle issues regarding the characterization of property, such as whether parol evidence may be used to prove the community nature of property when it is unambiguously deeded to one party,[234] or what portion of a tort recovery for personal injury is community property.[235] The courts' decisions this survey year have provided valuable guidance, and practitioners of family law may look forward to future work of similar value.

231. *See supra*, notes 23-55 and accompanying text.
232. *See supra*, notes 111-35 and accompanying text.
233. *See supra*, notes 96-110 and accompanying text.
234. *See supra*, notes 170-88 and accompanying text.
235. *See supra*, notes 148-69 and accompanying text.