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In Re Marriage of Brown: Every Family Lawyer Knows What It's Done--Do You Know What It Can Do?

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Notes

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INTRODUCTION

In re Marriage of Brown[1] marks a departure from long settled case law regarding the division of "expectant"[2] pension benefits upon dissolution of a marriage[3] and perhaps heralds a new and controversial advance in the treatment of nonvested pension plans. Paradoxically neither the decision nor its treatment of the valuation of nonvested pension benefits was unexpected.[4] In applying fundamental community property rationale[5] to the

1. 15 Cal. 3d 838, 544 P.2d 561, 126 Cal. Rptr. 633 (1976).

2. *Id.* at 844, 544 P.2d at 564, 126 Cal. Rptr. at 636. Brown dispenses with the term "expectancy" and instead uses the term "nonvested."

3. Brown specifically overrules French v. French, 17 Cal. 2d 775, 112 P.2d 235 (1941).

4. *See* In re Marriage of Peterson, 41 Cal. App. 3d 642, 115 Cal. Rptr. 184 (1974); In re Marriage of Wilson, 10 Cal. 3d 851, 519 P.2d 165, 112 Cal. Rptr. 405 (1974).

5. That expenditures of community assets, i.e., time, labor, and skills, result in acquisitions of community property to the extent and in the proportion to the community expenditures.

field of pension benefits and overruling 35 years of precedent[6] in the process, *Brown* created a new community property asset.[7] In reaching its holding[8] the Court resorted to a rationale[9] the logical extension of which may lead to a startling proposition: that at the outset of employment, the nonemployee spouse may have an enforceable interest in the employment contract of the employee spouse.[10]

FACTS

Upon separation of the spouses, the employee spouse was two years short of acquiring a "vested" interest in the pension plan notwithstanding the expenditure of 24 years of labor during marriage. In accordance with traditional case law and section 5118 of the California Civil Code,[11] the trial court held that these pension benefits constituted mere expectancies and therefore were not entitled to recognition as a divisible community asset upon dissolution of the marriage.[12]

HISTORY

In the past, treatment of retirement plans[13] was less than uniform.[14] Behind the rather confused treatment of these plans lay ostensibly different policies: (1) the protection of the nonemployee spouse's right to share in community acquisitions, and (2) the recognition of an employer's need to promote and maintain

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6. French v. French, 17 Cal. 2d 775, 112 P.2d 235 (1941). The case was viewed as holding that nonvested pension rights are mere expectancies and therefore not subject to division in a dissolution proceeding.

7. In re Marriage of Brown, 15 Cal. 3d 838, 844, 544 P.2d 561, 564, 126 Cal.Rptr. 633, 636 (1976).

8. "Pension rights, whether or not vested, represent a property interest; to the extent that such rights derive from employment during coverture, they comprise a community asset subject to division in a dissolution proceeding." In re Marriage of Brown, 15 Cal. 3d 838, 842, 544 P.2d 561, 562-63, 126 Cal. Rptr. 633, 634-35 (1976).

9. The *Brown* Court essentially treats a contract right as being synonomous with a property right.

10. Just what "interest" may be enforced is a question that *Brown* leaves unresolved.

11. CAL. CIV. CODE § 5118 (West 1976). "The earnings and accumulations of a spouse . . . while living separate and apart from the other spouse, are the separate property of the spouse."

12. In re Marriage of Brown, 15 Cal. 3d 838, 843, 544 P.2d 561, 563, 126 Cal. Rptr. 633, 635 (1976).

13. For the purposes of this Note, retirement plans and pension plans are synonomous.

14. *See* Lemly v. United States, 75 F. Supp. 248 (ct. cl. 1948); French v. French, 17 Cal. 2d 775, 112 P.2d 235 (1941); Crossan v. Crossan, 35 Cal. App. 2d 39, 94 P.2d 609 (1939); Cheney v. City & Cty. of S.F., 7 Cal. 2d 565, 61 P.2d 754 (1936); Dryden v. Board of Pension Commissioners, 6 Cal. 2d 575, 59 P.2d 104 (1936); Lynch v. United States 292 U.S. 571 (1933).

stability in his employment relationships.[15] Although acknowledging that community expenditures would ordinarily result in community acquisitions, case law held to the contrary, stating that public policy, i.e. maintaining stable employee relationships, would be hampered if pension rights were to vest in someone other than the employee.[16]

To reconcile community property concepts with public policies regarding employes pensions, earlier decisions drew elaborate distinctions between types of plans, categorizing them, for example, according to whether they were contributory or noncontributory in nature. This distinction affected particularly the time and the extent to which the employee's rights would vest. In plans of the contributory type the employee generally had a nonforfeitable interest to the extent of his contributions, irrespective of the length of his service or the reason his employment terminated.[17] Earlier case law, however, gave considerably less protection to pension plans involving contributions made by the employer.[18] Since the employee spouse never had control over retained payments, deductions or employer contributions, the employee was said not to have a vested property right in the contributions.[19]

In the important 1941 case of *French v. French*[20] the nonemployee spouse argued that "retirement" pay was community property because it was compensation for services rendered during the marriage. The California Supreme Court agreed but

15. *See* Lemly v. United States, 75 F. Supp. 248 (ct. cl. 1948); French v. French, 17 Cal. 2d 775, 112 P.2d 235 (1941); Crossan v. Crossan, 35 Cal. App. 2d 39, 94 P.2d 609 (1939); Cheney v. City & Cty. of S.F., 7 Cal. 2d 565, 61 P.2d 754 (1936); Dryden v. Board of Pension Commissioners, 6 Cal. 2d 575, 59 P.2d 104 (1936); Lynch v. United States 292 U.S. 571 (1933).

16. Benson v. City of Los Angeles, 60 Cal. 2d 355, 361-62, 384 P.2d 689, 692, 33 Cal. Rptr. 257, 260 (1963). Today, however, public policy compels a contrary result. Invariably the fund is the community's only substantial asset, and it is therefore more equitable to divide it equally rather than leaving the nonemployee spouse destitute.

17. Kent, *Pension Funds and Problems Under California Community Property Laws*, 2 STAN. L. REV. 447, 448 (1950).

18. *Id.* at 448. Broader provisions for vesting were customarily available in plans of the contributory type than in those where the employer bore the entire cost.

19. Hoeft v. Supreme Lodge Knights of Honor, 113 Cal. 91, 96, 45 P. 185, 190 (1896). The Hoeft Court found that the employee spouse had a mere expectancy at most.

20. 17 Cal. 2d 775, 112 P.2d 235 (1941).

noted that "At the present time his right to retirement pay is an expectancy which is not subject to division as community property."[21] Subsequent cases,[22] however, tended to rely upon the *French* dictum and erroneously construed the case as holding that such an expectancy, existing at the time of dissolution, is never subject to division.[23] These cases emphasized the date on which the employee spouse became eligible to receive his or her pension notwithstanding the expenditure of community time, labor and skill prior to such date.[24] As a consequence, nonvested pension rights could not be classified as either community or separate property because, at best, they were mere expectancies; the rights to such benefits were unrecognized, unprotected and inconsequential interests.[25] *French* and the cases following

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21. *Id.* at 778, 112 P.2d at 236. The Court's discussion of retirement pay was actually dicta; the holding was limited to retainer pay. *See* Note: *Community Property: Division of Expectancies as Community Property at Time of Divorce*, 30 CALIF. L. REV. 469 (1942). The French Court relied on a federal statute which drew distinctions between retainer and retirement pay. Because a statutory amendment, 10 U.S.C. Armed Forces (1970), eliminated the distinction, French should have been overruled prior to *Brown*. *See* In re Marriage of Mercier, 48 Cal. App. 3d 775, 121 Cal. Rptr. 886 (1975).

22. Note: *Community Property: Division of Expectancies as Community Property at Time of Divorce*, 30 CALIF. L. REV. 469 (1942); Phillipson v. Board of Administration, 3 Cal. 3d 32, 41 n.8, 473 P.2d 765, 770 n.8, 89 Cal. Rptr. 61, 66 n.8 (1970); Williamson v. Williamson, 203 Cal. App. 2d 8, 11, 21 Cal. Rptr. 164, 167 (1962). Williamson v. Williamson extended the scope of *French*. In Williamson the employee spouse was ineligible to retire and the retirement plan made no provision for withdrawal of accumulated contributions. Following *French*, the Court held that a mere expectancy does not constitute property to which a community interest attaches:

> . . . pensions become community property, subject to division in a divorce, when and to the extent that the party is certain to receive some payment or recovery of funds. To the extent that payment is, at the time of divorce, subject to conditions which may or may not occur, the pension is an expectancy, not subject to division as community property.

With an increasingly rigid application of community property principles, Williamson emphasized the absence of conditions precedent to the receipt of the money. *See* also Waite v. Waite, 6 Cal. 3d 461, 469-70, 492 P.2d 13, 18-19, 99 Cal. Rptr. 324, 329-30 (1972); Phillipson v. Board of Administration, 3 Cal. 3d 32, 38, 473 P.2d 765, 768, 89 Cal. Rptr. 61, 64 (1970). If an employee remains employed:

> . . . the nature and value of his retirement pension is contingent both upon his survival until retirement. . . . Thus, the retirement benefits of a present employee are classed as an expectancy, and neither those rights nor their actuarial equivalent is divided or awarded as community property. . . . Phillipson v. Board of Administration, 3 Cal. 3d 32, 41 n.8, 473 P.2d 765, 768 n.8, 89 Cal. Rptr. 61, 64 n.8 (1970).

23. Note: *Community Property: Division of Expectancies as Community Property at Time of Divorce*, 30 CALIF. L. REV. 469 (1942). Phillipson v. Board of Administration, 3 Cal. 3d 32, 473 P.2d 765, 89 Cal. Rptr. 61 (1970). Williamson v. Williamson, 203 Cal. App. 2d 8, 21 Cal. Rptr. 164 (1962).

24. It is only on the date of retirement that a property interest in retirement benefits arises under *French*.

25. Hoeft v. Supreme Lodge Knights of Honor, 113 Cal. 91, 96, 45 P. 185, 190 (1896).

French thus ignored the clear community character of the contributions and focused exclusively on the time set for receipt of benefits.

This mechanical approach lead to harsh results in many cases. Adherence to the expectancy view rendered fundamental community property laws essentially inapplicable to pension and retirement plans; unfulfilled contingencies or the speculative value of an inchoate interest often resulted in a forfeiture of the community's interest in the benefits if the marriage dissolved prior to maturation of the plan.

Judicial dissatisfaction with this approach became apparent[26] as the courts increasingly expanded the nonemployee spouse's rights in the pension. The interchangeable use of "vested" and "matured" to refer to the right to receive pension payments, for example, disappeared in *In re Marriage of Fithian*:

> The right to retirement benefits 'vests' when an employee acquires an irrevocable interest in a fund created by his own contributions and/or the contributions of his employer. The 'vesting' of the retirement benefits must be distinguished from the 'maturing' of those benefits, which occurs only after the conditions precedent to the payment of benefits have taken place or are within the control of the employee.[27]

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26. *See* In re Marriage of Wilson, 10 Cal. 3d 851, 519 P.2d 165, 112 Cal. Rptr. 405 (1974); In re Marriage of Peterson, 41 Cal. App. 3d 642, 115 Cal. Rptr. 184 (1974). The view that pension rights of the presently employed are an expectancy has been implicitly rejected by subsequent cases. Smith v. Lewis, 13 Cal. 3d 349, 355 n.4, 530 P.2d 589, 593 n.4, 118 Cal. Rptr. 621, 625 n.4 (1975); In re Marriage of Bruegl, 47 Cal. App. 3d 201, 205 n.4, 120 Cal. Rptr. 597, 599 n.4 (1975): The ". . . fact that retirement and the receipt of pension benefits were in the future was not a contingency affecting the vesting of the right."

27. 10 Cal.3d 592, 596 n.2, 517 P.2d 449, 451 n.2, 111 Cal. Rptr. 369, 372 n.2 (1974). The cases spoke predominantly in terms of "vestedness," but normally attached different meanings to the term. *See* Williamson v. Williamson, 203 Cal. App. 2d 8, 21 Cal. Rptr. 164 (1962). *See* Phillipson v. Board of Administration, 3 Cal. 3d 32, 473 P.2d 765, 89 Cal. Rptr. 61 (1970). Pre-1974 case law made no distinction between "vested" and "matured," ordinarily employing each interchangeably to denote the fulfillment of all conditions precedent to payment of the benefits.

Where the marriage was dissolved before the conditions precedent were met, courts denied the community any interest in retirement benefits although they were purchased with community assets. It was therefore easy to emphasize contingencies, thereby rendering community property principles inoperable. Cases referred to such conditions as: death, Dryden v. Board of Administration, 6 Cal. 2d 575, 581, 59 P.2d 104, 107 (1936); survivorship, Phillipson v. Board of Administration, 3 Cal. 3d 32, 41 n.8, 473 P.2d 765, 770 n.8, 89 Cal. Rptr. 61, 66 n.8 (1970); the necessity of applying for benefits, Benson v. City of Los Angeles, 60 Cal.2d 355, 361-62, 384 P.2d 689, 652, 33 Cal. Rptr. 257, 260 (1963); termination of

The definitions thus given to "matured" and "vested" necessarily provided increased protection to community interests by recognizing that property interests arise earlier than at the moment of pension payments.[28]

Judicial dissatisfaction peaked in *In re Marriage of Wilson*.[29] There, the appellate court ordered a division of an "expectant" pension benefit in a dissolution proceeding. The California Supreme Court observed that this may have been a correct reading of the law, but it reversed the decision on procedural grounds.[30] Although a subsequent appellate decision criticized *French* and suggested that a reconsideration of that case was in order, the court, nonetheless, failed to advance it.[31]

The *Brown* court squarely met the *French* decision[32] stating flatly that ". . . the *French* court's characterization of nonvested pension rights as expectancies errs."[33] In explaining its rationale, the court stated that the right to a pension benefit is a contractual

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employment, Phillipson v. Board of Administration, 3 Cal.3d 32, 41 n.8, 473 P.2d 765, n.8, 89 Cal. Rptr. 61 n.8 (1970).

28. In re Marriage of Fithian, 10 Cal. 3d 592, 596 n.2, 517 P.2d 449, 451 n.2, 111 Cal. Rptr. 369, 371 n.2 (1974).

29. 10 Cal. 3d 851, 519 P.2d 165, 112 Cal. Rptr. 405 (1974).

30. *Id.* at 853. The wife in Wilson acquiesced in the *French* rationale at the trial level and failed to cross-appeal from that portion of the judgment. Therefore, the issue was not properly before the court.

31. In re Marriage of Peterson, 41 Cal. App. 3d 642, 651-52, 115 Cal. Rptr. 184, 190-91 (1974).

32. The *French* Court incorrectly focused upon the date when benefits became payable. *Brown* represents a recognition that the proper inquiry in pension fund classification is whether the nonemployee spouse has an apportionable right of ownership in a retirement fund to the extent it is a product of community expenditures notwithstanding its contingent, inchoate or forfeitable nature. The date benefits become payable or vest is no longer controlling, but merely refers to the time of enjoyment.

It is sufficient, therefore, if pension rights have accrued during marriage. The presence of conditions regulating the payment of a matured right is irrelevant to the community nature of the pension because the right to the pension flows from the services rendered by the employee during marriage:

> Whether a pension plan provides for fixed or variable payments, and whether adjustments occur automatically or require legislation, the basic point remains that the pension serves as remuneration for services rendered by the employee; if these services were discharged during the marriage, that remuneration must compose a community asset. Waite v. Waite, 6 Cal. 3d 461, 471, 492 P.2d 13, 20, 99 Cal. Rptr. 325, 332 (1972).

"It is established law that pension rights of a spouse resulting from his employment during marriage are community property," In re Marriage of Ward, 50 Cal. App. 3d 150, 153, 123 Cal. Rptr. 234, 236 (1975); Benson v. City of Los Angeles, 60 Cal. 2d 355, 359, 384 P.2d 649, 651, 33 Cal. Rptr. 257, 259 (1963), "It necessarily follows that pension rights which are earned during the course of a marriage are the community property of the employee and his wife. . . ." In re Marriage of Ward, 50 Cal. App. 3d 150, 153, 123 Cal. Rptr. 234, 236 (1975).

33. In re Marriage of Brown, 15 Cal. 3d 838, 844, 544 P.2d 561, 564, 126 Cal. Rptr. 633, 636 (1976).

one derived from the terms of the employment. It explained that a contractual right is not an expectancy but is rather a chose in action, a property right.[34] Therefore, the ". . . *employee* acquires a property right to pension benefits when he enters upon the performance of his employment contract."[35] (Emphasis added.) Without evidencing any consideration of the question, the Brown court assigned the contract right to the employee spouse.

THE CONTRACTUAL PROPERTY RIGHT

Brown's impact on community property law is already apparent. The Court has introduced its own ill-defined contract principle into the field of community property law. *Brown* asserts that ". . . a nonvested pension right is nonetheless a contractual right, and thus a property right."[36] To whom this contract right belong remains unsettled. Paradoxically *Brown* uses contract rights "belonging" to the employee spouse to create a community property asset for the nonemployee spouse.[37] Inasmuch as a contract right constitutes a property right,[38] it is arguable that the nonemployee spouse acquires an enforceable community interest therein at the outset of employment.[39]

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34. *Id.* at 845, 544 P.2d at 565, 126 Cal. Rptr. at 637.
35. *Id.*
36. *Id.* at 846, 544 P.2d at 566, 126 Cal. Rptr. at 638.
37. *Id.* at 845, 544 P.2d at 656, 126 Cal. Rptr. at 637. Given the broad proposition that nonvested pension rights are property rights based on a contractual right, and in view of the judicial progression expanding the nonemployee spouse's rights from matured, to vested, to nonvested rights, is it within this progression to recognize the nonemployee spouse's rights upon execution of the contract of employment with respect to all matters relating to the disposition of the pension plan? The courts formerly held to one extreme, i.e., that only when pension benefits were payable did a community property right arise in the nonemployee spouse. The courts have since expanded the community property rights of the nonemployee spouse as described above. Since Brown recognizes a community property right in nonvested pension plans, there is but one logical step remaining: recognition of a community property right in the contract of employment itself.
38. *Id.* Although a contract right is always a property right, In re Marriage of Brown, 15 Cal. 3d 838, 544 P.2d 561, 564, 126 Cal. Rptr. 633, 636 (1976), the converse is not true; a property right is not always a contract right. Nevertheless, the Court in Brown appears to treat a contract right as being synonomous with a property right in the *employee* spouse. According to fundamental community property law, if the property right exists in the employee spouse, and it is obtained during marriage, the nonemployee spouse is said to have a community interest therein, CAL. CIV. CODE § 5110 (West 1976).
39. CAL. CIV. CODE § 5110 (West 1976).

Once it is acknowledged that pension rights are treated as compensation for services rendered, it is difficult to justify summarily depriving ths nonemployee spouse of his or her community interest in the contract right at any time during the marriage. If *Brown* and its progeny fail to recognize the continuing community property right of the nonemployee spouse in the contract of employment, then the unilateral termination of employment by the employee spouse prior to dissolution would divest the nonemployee spouse of that interest. Unless the courts recognize and enforce this continuing interest of the nonemployee spouse, these acquisitions during marriage would *not* constitute community property in apparent contradiction of section 5110 of the California Civil Code. As a consequence, *Brown* would paradoxically preserve the fundamental error of *French* while purporting to overrule it. If the employee spouse leaves employment prior to dissolution, the courts following the *Brown* rationale should recognize the clear community character of the prior contractual right and prevent a forfeiture of the "consideration for services rendered in the past" which is otherwise worked upon the nonemployee spouse. *Brown* cannot be said to stand for such a proposition.

Suppose, for example, that the employee spouse has worked for 15 years but resigns before his pension rights have vested and at a time when dissolution is not contemplated. The employee spouse's unilateral decision would deprive the nonemployee spouse of his or her "community" interest in 15 years of accumulated consideration in the nonvested pension plan. Equal management and control was never exercised over the asset, contrary to the requirement of California Civil Code section 5125,[41] and it is arguable that the nonemployee spouse has been deprived of "property" without due process of law.

This possibility raises the spectre of the employee spouse having to obtain the consent of the nonemployee spouse before terminating any employment or at least of having to compensate the nonemployee spouse for the appropriate value of the community interest in the non-vested plan that would be forfeited. The latter view would not substantially impair either the employee spouse's right to terminate his employment or his right to *choose* his place of work. Rather, once the employee spouse commenced work (receiving part of the consideration through a

40. *Id.*

41. CAL. CIV. CODE § 5125 (West 1976): ". . . either spouse has the management and control of the community personal property . . . as the spouse has of the separate estate of the spouse."

pension plan) the employee spouse could not unilaterally dispose of the "accumulated community asset," i.e. the nonvested pension plan. The fact that there would be an equal forfeiture as between the spouses is of little consolation; the nonemployee spouse has unilaterally been deprived of a significant property interest.

CONCLUSION

At a minimum, a new and substantial community property asset has been judicially created. At present, its creation will benefit the wife more often than not. Though the advantage may be lost as more women enter the labor market, the Court's holding in *Brown* seems consistent with the legislative and judicial policy of equalizing the treatment between the sexes.[42]

In essence, *Brown* recognizes the injustice of rendering community property principles inapplicable to pension benefits on the basis of inartfully drawn historical distinctions and therefore holds that community property principles were never correctly applied to pension plans in California. By viewing retirement benefits in this manner the court has, perhaps unwittingly, advanced the proposition that the nonemployee spouse has an enforceable interest in the pension plan from the outset of employment. But the fact that retirement pay may be increased, diminished or forfeited does not change the original community nature of retirement benefits which are determined at the outset of employment. Because the court based its holding on the rationale that the right to pension benefits is a contract right and therefore a property right, it may well be that the nonemployee spouse's rights in a nonvested pension are more extensive than the Court imagined.[43]

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42. *See* California Family Law Act of 1970.

43. In a brief comment, the Court in Brown notes that it does not "conceive" that its decision will in any way impair the employee spouse's traditional right to choose or terminate his place of employment, In re Marriage of Brown, 15 Cal. 3d 838, 849, 544 P.2d 561, 568, 126 Cal. Rptr. 633, 640 (1976). This Note posits a "conceivable" situation and suggests the essence of Brown is contrary to a passing remark.