Post-Retirement Medical Benefits: A Not-So-Certain Property Right

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The issue of post-retirement medical benefits as separate property sparked great interest when it was first introduced in an article published in 1994.[1] That interest may have subsided somewhat because of the difficulty of finding experts who can value these perquisites, coupled with the high cost involved. These considerations must be weighed against a relatively small extra value, which is found in post-retirement medical benefits and then added to the basic benefit.

This article will show that an earlier conclusion that these benefits are marital property may have been premature. Before establishing a marital entitlement, it must initially be established that the participant has or could have a property right to the benefits in the first place.[2] This cannot be done without first examining what the plan provides and the federal case law that determines when participants have contractual rights under the plan. This process may require outside legal assistance because of the complex issues that must be examined.

Property and marital rights are determined by the same principles of state law. Yet, when they differ, the distinction between them is largely cosmetic, because marital law cannot create property rights that the participant did not possess in the first

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1 *See* William Horbatt & Alan Grosman, *Division of Retiree Health Benefits on Divorce: The New Equitable Distribution Frontier,* 28 FAM. L.Q. 4 (1994).

2 *See* Brown v. Brown, 15 Cal.3d 838, 544 P.2d 561, 126 Cal.Rptr. 633, 94 A.L.R.3d 164 (Cal., 1976); Diffenderfer v. Diffenderfer, 491 So.2d 265, 11 Fla. L.Weekly 280 (Fla., 1986); In re Marriage of Hunt, 78 Ill.App.3d 653, 397 N.E.2d 511, 34 Ill.Dec. 55 (Ill.App. 1 Dist., 1979); Majauskas v. Majauskas, 61 N.Y.2d 481, 463 N.E.2d 15, 474 N.Y.S.2d 699, 6 Employee Benefits Cas. 1053 (N.Y., 1984).

instance. Therefore, it cannot create such entitlements for the non-participant spouse. Accordingly, the difference between these two issues is largely a problem of apportioning the participant's rights. This leads to many complicated problems of measurement.

Marital property rights must address what occurred before the marriage, as well as what might occur after it. For example, property acquired before the marriage is clearly non-marital; however, even an unvested marital benefit does not confer to a participant entitlement if employment is terminated.[3] If, on the other hand, reemployment occurs, the earlier benefit can be reinstated and divided as marital property when it vests. Court rulings, which determined that unvested benefits conferred a property right, appeared more expansive than earlier rulings that determined otherwise.[4] They really were not. The differences arising between them have to do with when each is measured.

Another important distinction must be understood. When a family law court uses a definition of marital property that appears to be more expansive than the participant's property rights, the court has redistributed such alleged marital property rights between the parties based only upon its equitable powers. This award is nothing more than a fiction. No family law court can create property, it can only award it.

Currently few or no family law decisions identify possible equity issues requiring division of post-retirement benefits. Therefore, the remainder of the article will focus attention on what conditions are necessary for the participant to have an enforceable claim to post-retirement medical benefits, and what might be the limits of that claim.

I. Unvested Pension Benefits

Many family court rulings before ERISA found that retirement benefits did not vest a property right because they were gratuitous in nature.[5] ERISA changed the premise upon which

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[3] 26 U.S.C.A. § 411 (a)(6)(D)(iii) (West Supp. 1998).

[4] *See Brown*, 544 P.2d 561; *Diffenderfer*, 491 So.2d 265; In re Marriage of Hunt, 397 N.E.2d 511; *Majauskas*, 463 N.E.2d 15.

[5] *See* French v. French, 17 Cal.2d 775, 112 P.2d 235, 134 A.L.R. 366 (Cal., 1941); White v. White, 136 N.J.Super. 552, 347 A.2d 360 (N.J.Super.A.D., 1975); Lumpkins v. Lumpkins, 519 S.W.2d 491 (Tex.Civ.App. –Austin, 1975).

those rulings were based by providing that the employer must adopt one of the strict earnings definitions found under the Act and one of the minimum vesting schedules that established rights to those benefits.[6] ERISA also provided participants with many remedies for enforcement. The IRS could levy taxes and penalties against the employer and the plan participant who were not in compliance.[7] The Department of Labor could sue on behalf of plan participants and in some cases the employer.[8] It could give that employer steep fines.[9] The participant had specific authority to file an action in state or federal court for benefit disputes and could be awarded benefits for his or her trouble.[10] These cumulative rights, resulted in a strong congressional message that promised benefits are a participant's "contractual" right and that the employer-sponsors would be forced to honor them.

The family law decisions after ERISA determined that vested benefits were marital property and that unvested benefits were not since they were too speculative.[11] In the late 1970's, family law rulings began to change the theory supporting the conclusion that unvested benefits could not be divided as marital property.[12] These rulings reasoned that unvested benefits would likely vest in the future and had an actuarial calculable present value that could be discounted for that contingency. Now, nearly all states have determined that both vested and non-vested benefits provide marital property rights.[13] Arguments that certain benefits were speculative did not prevent division of them con-

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6 *See* 29 U.S.C.A. §§ 1053(a), 1054 (West Supp. 1998).

7 *See* 26 U.S.C.A. §§ 4971, 4975 (West Supp. 1998).

8 *See* 29 U.S.C.A, § 1132(a) (West Supp. 1998).

9 *See id.* at § 1132(l).

10 *See id* .at § 1132(a).

11 *See* Summers v. Summers, 491 So.2d 1270, 11 Fla. L. Weekly 1676 (Fla.App. 2 Dist., 1986); Whitcig v. Whitcig, 206 Neb. 307, 292 N.W.2d 788 (Neb., 1980); White v. White, 136 N.J.Super. 552, 347 A.2d 360 (N.J.Super.A.D., 1975); *Lumpkins*, 519 S.W.2d at 491.

12 *See French*, 112 P.2d at 236; *White*, 347 A.2d at 361; *Lumpkins*, 519 S.W.2d at 493.

13 Van Loan v. Van Loan, 116 Ariz. 272, 569 P.2d 214 (Ariz., 1977); *Brown*, 544 P.2d 561; DeLoach v. DeLoach, 590 So.2d 956, 16 Fla. L. Weekly D2939 (Fla.App. 1 Dist., 1991); In re Marriage of Hunt, 397 N.E. 2d 511*;* Cearley v. Cearley, 544 S.W.2d 661, 664 (Tex., 1976).

tingent upon their availability.[14] This allowed division of nearly all benefits from all plan types, including non-qualified plans.

The division of employee benefits rights evolved from two simple requirements: a participant's "contractual" right to that benefit can be established and the benefit could vest in the future with some reasonable likelihood.[15] If post-retirement medical benefits are paid after the marriage terminates and there are no "contractual" rights to them, then earlier rulings that benefits are mere gratuities may still apply.[16]

II. Social Security Benefits - Not a Property Right

In 1960, the Supreme Court in *Flemming v. Nestor*[17] determined that social security benefits did not vest a *property* right. This position was revisited and reaffirmed by the Court in *Hisquierdo v. Hisquierdo.*[18]

The Flemming Court, considering the property rights of a deported alien, reached its conclusion by classifying social security benefits as entitlements from a social and not pension program. As such, they could be terminated or reduced at the will of Congress. That ruling was validated when Congress changed the date for eligibility for unreduced benefits from age 65, to age 65, 66 or 67, depending upon the participant's date of birth.[19]

Since the *Flemming* Court held that social security benefits did not vest a *property* right, it would follow that they could not be divided as a *marital property* right. Nevertheless, fearing state courts might yet expand their definition of marital property

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14 *See* Whitfield v. Whitfield, N.J.Super. 36, 56 USLW 2423, 9 Employee Benefits Cas. 1675, 535 A.2d 986, 987 (N.J. Super.A.D., 1987).

15 *See Brown*, 544 P.2d at 565, 566; *Diffenderfer*, 491 So.2d at 266; In re Marriage of Hunt, 397 N.E.2d at 516, 517; *Majauskas*, 463 N.E.2d at 20.

16 The distinction that pension benefits were more than an expectancy was based upon the theory that such benefits were deferred compensation for services rendered during the marriage, and if wrongfully denied, the employee could enforce that right in court. *Brown*, 544 P.2d at 564; *Diffenderfer*, 491 So.2d at 266; In re Marriage of Hunt, 397 N.E.2d at 518; *Majauskas*, 463 N.E.2d at 20.

17 363 U.S. 603, 80 S.Ct. 1367, 4 L.Ed.2d 1435 (U.S.Dist.Col., 1960).

18 439 U.S. 572, 99 S.Ct. 802, 59 L.Ed.2d 1, 1 Employee Benefits Cas. 1421 (U.S.Cal., 1979).

19 42 U.S.C.A. § 416(l)(1) (West Supp. 1998).

rights (which they since have), Congress amended the Social Security law in 1977 to prevent a state ordered division under its marital property laws. At the same time, it added a provision to make possible awards of alimony or child support based upon need.[20] Additionally, Congress prevented a property division by a state court by adding a definition of alimony that completely excluded any possible lump-sum award of alimony or offset as to other marital property.[21] The *Flemming* Court showed that a benefit failed to confer a property right if it could be terminated at the will of the sponsor. Under early marital law, a deferred benefit fails to confer a marital property right if, at the time of divorce, it is little more than a mere expectancy.[22] Later decisions showed that if the benefit could vest in the future, it was more than a mere expectancy, and could be divided as marital property when it became payable. Therefore, three separate issues must be addressed before concluding whether a benefit is marital property. First, does the plan provide an enforceable contractual right to the benefit? Second, is it possible for that benefit to vest? Third, if the plan does not provide an enforceable contractual right to the benefit or it is impossible for the benefit to vest, is it possible to divide the benefit when it becomes payable?

The distinction between the first two questions is that the plan may not offer a contractual right to the benefit on its face, but the sponsor still may be liable for certain actions it took.[23] Alternatively, the participants may have a right to infer rights to benefits based upon representations made during collective bargaining sessions.[24] Some of these distinctions have already been established by labor case law.

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20 42 U.S.C. § 659 (West Supp. 1998).

21 *See id.* at § 659(i)(3).

22 *See French*, 112 P.2d at 236; *Summers*, 491 So.2d at 1271; *Whitcig*, 292 N.W.2d at 793; *Lumpkins*, 519 S.W.2d at 493.

23 *See* Wise v. El Paso Natural Gas Co., 986 F.2d 929, 61 USLW 2604, 16 Employee Benefits Cas. 1789 (5th Cir.(Tex.), 1993), *cert. denied,* 510 U.S. 870 (1993). *See also* In re Unisys Corp. Retiree Medical Ben. ERISA Litigation, 57 F.3d 1255, 64 USLW 2026, 19 Employee Benefits Cas. 1556, Pens. Plan Guide (CCH) p 23911P (3rd Cir.(Pa.), 1995), *cert. denied,* 116 S.Ct. 1316 (1996).

24 *See* Northeast Dept. ILGWV Health & Welfare Fund v. Teamsters Local Union No. 229 WELFARE FUND, 6 Employee Benefits Cas. 1874, 764 F.2d 147,163 (3rd Cir.(Pa.), 1985).

Under the vast majority of plans, post-retirement medical benefits are offered as a gratuity and not a promise.[25] Such perquisites are clearly not guaranteed and can be withdrawn at any time (even to persons receiving them), if the plan documents clearly provide for this contingency.[26] When the plan is silent as to whether the benefits are promised, or is unclear as to the promise, the employer may have an obligation to provide some benefit even if the document showed that the employer had a different intent.[27]

Other times, these benefits were negotiated during labor management discussions or arbitration in lieu of other entitlements that may have a contractual right of value. Under such circumstances, the benefits likely will be deemed contractual, although the plan provides otherwise.[28] Employers that offered these benefits as an inducement to early retirement will also likely have to pay them to the participants who elect this option. Accordingly, to reach a property right determination, one may be required to interpret specific plan language and predict how existing case law might apply to the specific set of facts.[29] Such an analysis may require the outside assistance of an ERISA attorney.

III. An Argument That Advocates a Property Right

The argument, which advocates that post-retirement medical benefits are always marital property, is based upon a theory. The

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25 *See* In re White Farm Equip. Co. 788 F.2d 1186 (6th Cir. 1986); Anderson v. Alpha Portland Industries, Inc. 836 F.2d 1512, 1516, 108 Lab.Cas. P 10,271, 9 Employee Benefits Cas. 1569 (8th Cir.(Mo.), 1988), *cert. denied,* 489 U.S. 1051 (1988).

26 *See* Anderson v. John Morrell & Co., 830 F.2d 872, 109 Lab.Cas. P 55,932, 8 Employee Benefits Cas. 2657 (8th Cir.(S.D.), 1987); Williams v. Wright, 783 F. Supp. 1392 (S.D.Ga., 1992).

27 *See* Bidlack v. Wheelabrator Corp. 993 F.2d 603, 61 USLW 2726, 143 L.R.R.M. (BNA) 2322, 125 Lab.Cas. P 10,692, 16 Employee Benefits Cas. 2217 (7th Cir.(Ind.), 1993), *cert. denied,* 510 U.S. 909 (1993).

28 However, the benefits will be deemed contractual only for the duration of the contract. *See* Senn v. United Dominion Industries, Inc., 951 F.2d 806, 60 USLW 2464, 139 L.R.R.M. (BNA) 2246, 120 Lab.Cas. P 11,117, 14 Employee Benefits Cas. 2238 (7th Cir.(Wis.), 1992) *cert. denied,* 509 U.S. 903 (1993).

29 See *Anderson*, 830 F.2d at 875,876; *Williams*, 783 F. Supp. at 1396.

theory states that since the benefits have a significant value, which is shown as a liability on the employer's financial statement, it therefore must have a corresponding asset. According to the theory, post-retirement medical benefits must exist as a marital asset because they are to be used for the exclusive benefit of the plan participants.

The logic upon which this argument is built is faulty. The argument assumes that if all the participants have a collective ownership interest in an asset, then any one participant has a pro rata share interest in that asset. This assumption is necessary in order to reach the conclusion that the medical benefits are property because welfare plans do not contain a benefit-earnings definition like retirement plans.[30] The advocates claiming that post-retirement medical benefits are marital property took a giant leap in order to reach that conclusion. They assumed that the collective existence of a trust asset establishes an individual employee's right to receive a portion of it. Under ERISA, property rights to benefits are determined by the amount of benefit that vests, not by what corresponding liability the employer shows on its financial statement.[31] Therefore, the only issue determining property rights is what benefit vests, and little else.

An employer *must* maintain a liability ledger for both vested and unvested benefits under the requirements of ERISA and generally accepted accounting principles.[32] Unvested benefit liabilities can be funded with trust assets. The trust then owns the assets. Employees have rights to vested benefits, and these benefits may be paid from trust assets, but only when they become payable under the terms of the trust.[33]

The employer can use the non-committed assets for some other purpose. If that were to occur, certain participants would benefit from those assets. Which participants would benefit, and by how much, would depend upon actions the employer may or may not take in the future.[34] Therefore, *no* relationship exists

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30 *See* 29 U.S.C. § 1051(1) (West Supp. 1998).

31 *See* 26 U.S.C. § § 40 1(a)(2), 411(a) (West Supp. 1998).

32 *See id.* § 6058(a). *See also* Statement of Financial Accounting Standards "SFAS" 87 and 112.

33 *See* 26 U. S.C. § 411(a) (West Supp. 1998).

34 *See Anderson*, 836 F.2d at 1516, 1517.

between the liability on an employer's financial statement and the ownership rights of participants.[35]

Advocates then argue cost of living adjustment benefits, like post-retirement medical benefits, are speculative benefits because the sponsor may withdraw them before they are paid. They argue that speculative benefits are marital property, citing *Whitfield v. Whitfield*[36] *as* support. *Whitfield* held that speculative benefits might be divided if they vest.

Again, the advocates took a major leap in logic in order to reach their conclusion. The vast majority of post-retirement medical plans provide benefits that will never vest. Such benefits may even be withdrawn during retirement.[37] ERISA provides that welfare benefits (which include post-retirement medical benefits) need not ever vest,[38] whereas pension benefits must be able to vest.[39] The advocates overlooked this critical distinction.

IV. Rulings on Disability Income

Unquestionably, disability income is very valuable and represents property. Yet, many courts have applied a strict standard for determining that disability income is a marital property interest. This same standard may apply to post-retirement medical benefits.

If the retirement benefit was marital property to begin with, the participant cannot change the status of the property by an election to receive it as disability income instead of retirement income.[40] True disability income, merely reimbursing personal injury or illness, is separate and non-marital property.[41] There-

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35 *See* 26 U.S.C. § 401(a)(2), as restricted by 26 U.S.C. § 411(a) (West Supp. 1998).

36 535 A.2d at 986.

37 *Williams*, 783 F. Supp. at 1397.

38 *See* 29 U.S.C. § 1051(1) (West Supp. 1998).

39 See 29 U.S.C. § 1053 (West Supp. 1998).

40 Weisfeld v. Weisfeld, 545 So.2d 1341, 58 USLW 2043, 14 Fla. L. Weekly 287 (Fla., 1989); Gnerlich v. Gnerlich, 538 N.E.2d 285 (Ind.App. 4 Dist., 1989); Dolan v. Dolan, 78 N.Y.2d 463, 583 N.E.2d 908, 577 N.Y.S.2d 195, 14 Employee Benefits Cas. 2114 (N.Y., 1991); Ciliberti v. Ciliberti, 374 Pa.Super. 228, 542 A.2d 580 (Pa. Super., 1988).

41 *See Weisfeld*, 545 So.2d at 1345; Brant v. Brant, 26, 508 (L.a.App. 2 Cir. 1/25/95), 649 So.2d 111 (La.App. 2 Cir., 1995); *Gnerlich*, 538 N.E.2d at 287; *Dolan*, 583 N.E.2d at 909; *Ciliberti*, 542 A.2d at 582.

fore, one must determine what portion of the benefit the participant would have received as retirement benefits in order to determine any residual that may be because of the disability elections. This residual portion is separate and non-marital property.[42]

Since personal injury or long-term illness includes lost wages, post-dissolution benefits that replace these are separate non-marital property.[43] Analyzed from this perspective, post-retirement medical benefits have value only to the extent that the retired employee becomes ill. In effect, the plan only reimburses the loss the illness causes. Accordingly, post-retirement medical benefits are separate and non-marital property under the same principles of court rulings that determined true disability income is separate and non-marital property.

V. Rulings on Workers' Compensation

Workers' compensation rulings may hold the key to whether post-retirement medical benefits should be divided as marital property or excluded as non-marital personal property. Rulings on this issue have been divided into four categories.[44] The trend of most state rulings is to adopt the "analytical approach" for the determinative process.[45] Some courts have determined that reimbursements for permanent loss of limb or body function are never property.[46] A third group of rulings adopts the timing rule, sometimes referred to as the "bright line" approach.[47] The re-

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42 *See Dolan*, 583 N.E.2d 908; *Ciliberti*, 542 A.2d at 582.

43 *See* In Re Elfmont, 39 Cal.Rptr.2d 596 (Cal.App., 1995); In Re Marriage of Smith, 817 P.2d 641, 643 (Colo.App., 1991); *Weisfeld*, 545 So.2d at 1346; *Dolan*, 583 N.E.2d at 909; *Ciliberti*, 542 A.2d at 582.

44 Annotation, *Division and Separation. Workers' Compensation Benefits as Marital Property Subject to Distribution,* 30 A.L.R. 5th 139 (1995).

45 *See Weisfeld*, 545 So.2d at 1345; Van de Loo v. Van de Loo, 346 N.W.2d 173 (Minn.App., 1984); Johnson v. Johnson, 317 N.C. 437, 346 S.E.2d 430, 55 USLW 2127 (N.C., 1986); Hartzell v. Hartzell, 90 Ohio App.2d 385, 629 N.E.2d 491 (Ohio App. 2 Dist., 1993).

46 *See Weisfeld*, 545 So.2d at 1345, Amato v. Amato, 180 N.J.Super. 210, 434 A.2d 639, 643 (N.J.Super.A.D., 1981).

47 *See* Liles v. Liles, 289 Ark. 159, 711 S.W.2d 447 (Ark., 1986); In re Marriage of Fjeldheim, 676 P.2d 1234 (Colo.App., 1983); *Weisfeld*, 545 So.2d at 1344; Maricle v. Maricle, 221 Neb. 552, 378 N.W.2d 855 (Neb., 1985).

mainder of the rulings adopts the "unitary" approach.[48] The collective logic employed by all of these rulings excludes any possible classification of post-retirement medical benefits as marital property, except for retired participants receiving them on the valuation cut-off date.

The "analytical" approach looks at the nature of the loss before determining the marital property status of the reimbursement. Any portion of the reimbursement designed to compensate for lost wages during the marriage or lost medical expenses paid with marital funds is marital property under this theory. Accordingly, the remaining portion of reimbursement is non-marital and separate property.[49]

If a loss of limb or body function is responsible for some reimbursement, the second group of rulings would decrease the amount of marital property by excluding that portion from the total reimbursement.[50] The courts that adopted the timing method for awards are basing such awards on the "bright line" theory. If the workers' compensation awards were not made during the marriage, it was not earned as marital property because it was not acquired during the marriage.[51] Under the "unitary" method, no portion of the benefit is marital property because the injured spouse exchanged a pre-marital asset, the healthy body, for another asset, the workers' compensation benefit.[52]

Since the "unitary" method yields no marital property, the largest marital benefit that could be obtained for post-retirement medical benefits is the greater of the "analytical" award and the "bright line" award. The greater award will be the "bright line" award because the marital property value of the post-retirement medical benefits is zero under the "analytical" approach. Ac-

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48 *See Weisfeld*, 545 So.2d at 1346; Izatt v. Izatt, 627 P.2d 49 (Utah, 1981).

49 In re Marriage of Cupp, 152 Ariz. 161, 730 P.2d 870, 55 USLW 2423 (Ariz.App. Div. 1, 1986); Clayton v. Clayton, 297 Ark. 342, 760 S.W.2d 875 (Ark., 1988); In re Marriage of Robinson, 54 Cal.App.3d 682, 126 Cal. Rptr. 779 (Cal.App. 2 Dist., 1976); Lentini v.Lentini, 236 N.J.Super. 233, 565 A.2d 701 (N.J.Super.A.D., 1989).

50 *Supra* note 44, at 150.

51 In re Marriage of Drone, 217 Ill.App.3d 758, 577 N.E.2d 926, 160 Ill.Dec. 601 (III. App. 5 Dist., 1991); Johnson v. Johnson, 638 S.W.2d 703 (Ky., 1982).

52 Gloria B.S. v. Richard G.S., 458 A.2d 707 (Del.Fam.Ct., 1982); Richards v. Richards, 59 N.M. 308, 283 P.2d 881 (N.M., 1955).

cordingly, the "bright line" theory is the only theory that can be used to support a marital property finding for post-retirement medical benefits. The only circumstance upon which post-retirement medical benefits can be classified as marital property is when the participant is retired and receiving the benefits on the valuation cut-off date.[53]

To show that the marital value of the post-retirement medical benefit is zero under the "analytical" approach, the workers' compensation benefit must be compared to the post-retirement medical benefit. This comparison must be done for purposes of determining the similarities and differences of both benefits. A common thread between the two is that each reimburses a loss triggered by an injury sustained or illness. The most significant difference between them is when workers' compensation reimburses marital wages or out-of-pocket expenses; the marital property value is enriched by that reimbursement, whereas in post-retirement medical reimbursements, no such enrichment occurs.

Post-retirement medical benefits generally are payments made to a third party provider for the services it rendered to the participant. When an employer pays the cost of health insurance during the marriage, the marital property value of the premium payments are reflected in an already higher marital asset value. The higher value can be differentiated from what would have been achieved during the marriage if the marital funds were used to pay the premiums. Accordingly, the only property left for consideration is reimbursement for future illness or future injury, and either is considered non-marital under the "analytical" ap-

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53 The reason post-retirement medical benefits can only be classified as marital benefits in such a narrow arena is due to the result that there are no earnings definitions under welfare plans. Nothing ever vests under welfare plans except the amount of benefit that has already been paid. Under the structure of workers' compensation benefits, the problem is very different because a benefit must be paid after entitlement based upon a worker's injury or illness has been established. This would also apply to covered claims of health plans during the pendency of the contract. The federal case law has shown that the employer's plan describing the post-retirement medical benefits do not constitute a promise to provide future benefits.

proach. Therefore, the property value of the post-retirement medical benefit is zero under the "analytical" method.[54]

VI. Actuarial Valuation Considerations

If the participant's "contractual" rights to the property can be established, or a theory can be found to support the post-marital retirement benefit as marital property, and there are no non-marital property issues that first must be addressed, the actuary then must decide how to value the benefits. This may not be as easy as what has been previously advocated by William Horbatt and Alan Grosman.[55] A number of issues must be addressed before an appropriate valuation method can be determined. First, is the use of a collective property reserve that the pension trust maintains valid for marital valuation measurement when the benefits may be terminated for any one participant by a voluntary action of the employer?[56] The answer should be no. There is *no* basis that can be used to relate a theoretical reserve to a marital definition of earnings. A benefit based upon the funded portion of the reserve can be terminated with respect to an individual by merely changing the terms of the plan. Second, if the retired group had bad claims experience, does that make the marital benefit worth more, or the claimants a bad claims risk? This answer should also be no. Third, under family law, is it equitable to value a benefit that would penalize a participant in poor health? The answer is obviously no. In view of all of these issues, the authors reject the valuation methodology advocated by Horbatt and Grosman.

The value of the benefit should be determined as the present value of the future premium payments that would be required from a large insurer providing similar benefits. Actuarial adjustments may be necessary because it may be impossible to find an insurer providing identical benefits. This is not going to be an

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54 There can be a small portion of benefit equal to pending but unpaid claim reimbursements in the small percentage of plans structured to reimburse the participant directly.

55 *See* Horbatt & Grosman, *supra* note 1, at 355.

56 This can be easily done in a welfare plan by changing the plan to a completely different welfare plan. The new benefits of the changed welfare plan may not even cover the particular participant for whom a present value of the prior benefit was sought.

easy task, and non-actuaries should not undertake it. The ability to compare benefits is a highly specialized skill for which only actuaries and insurance underwriters have any training. The present value should reflect the increased mortality suffered by individuals with certain illnesses or injuries based upon the most recent tables available.[57] The health status of the individual should be factored into the present value calculation and *not* into the valuation of the amount of annual premium.

VII. Problems of Dividing Post-Retirement Medical Benefits

No matter how carefully one addresses the legal issues governing a marital property division, many family law courts will continue to change and expand what is considered marital property (based upon equitable circumstances).[58] Post-retirement medical benefits pose many practical problems in dividing them. Courts need to be aware of those problems before issuing future equity-based rulings.

In family law, property rights may be divided in two ways: under the immediate offset method and under the deferred distribution method. As previously shown, post-retirement medical benefits are frequently little more than a mere expectancy, because the employer can withdraw them at any time before they vest in the employee.[59] In these circumstances, it would be unjust

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57 *See* Edward A. Lew & Jerzy Jajewski, *Medical Risks: Trends in Mortality by Age and Time Elapsed,* Praeger, The Assoc. of Life Insurance Medical Directors of America and the Society of Actuaries (I 990), for appropriate tables.

58 For examples of expanding the definition of marital property, *see* Ferguson v. Ferguson, 928 P.2d 597 (Alaska, 1996)(individual fishing quota created a property interest which, if marital is subject to division); Weineg v. Weineg, 674 N.E.2d 991 (Ind.App., 1996)(an agreement amongst family members to play the lottery created a partnership, the proceeds of which are considered marital property); Elkus v. Elkus, 169 A.D.2d 134, 572 N.Y.S.2d 901, 60 USLW 2139 (N.Y.A.D. 1 Dept., 1991)(Opera singer's celebrity status constituted marital property).

59 *See Anderson*, 836 F.2d at 1516,1517; *Anderson*, 830 F.2d at 876; In re White Farm Equip. Co., 788 F.2d at 1397; *Williams*, 783 F. Supp. at 1397.

to award any immediate offset due to the very high risk that the benefits never will be paid.[60]

Moreover, other substantial problems appear in dividing these benefits when they are paid. Foremost, should a participant be penalized when he or she is now suffering from poor health? Dividing a benefit when it is paid will do just that. Second, benefits are seldom, if ever, paid to the participant. The actual benefit often is a reimbursement to a third party provider for services it rendered to the participant. Therefore, any possible value provided by these benefits cannot be divided when they are paid. Additionally, payment is not triggered by anything predictable. Accordingly, the benefit must be divided as a present value at the time of dissolution. The attorney representing the participant will require the other party to prove that the participant first has a contractual right to the benefit and that such right is enforceable in the future.

If the post-retirement medical benefit can be shown to be marital property, one additional problem must be solved before it can be divided as property under the immediate offset method. A lack of any earnings definition in the plan could pose problems if the participant has not retired or if the parties were not married during the entire length of plan participation.[61] This would require apportioning the present value between marital and nonmarital interests. This may not be possible.

When family law issues related to marital efforts made earnings under defined benefit plans less than clear, many courts ruled in favor of dividing the benefits between marital and nonmarital portions by use of a time rule.[62] Use of the time rule would be inappropriate for dividing welfare plan property interests for two reasons. First, the size of the benefit is not normally

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60 As the cost for providing medical benefits continues to escalate, the current trend that most companies will either reduce or eliminate insurance benefits will continue. These will eventually carryover into the welfare plans that provide post-retirement medical benefits, resulting in a widespread reduction or termination of such plans.

61 *See* 750 ILL. COMP. STAT. § 5/503 (West 1998); FLA. STAT. ANN. § 61.075 (West 1997); CAL. FAM. CODE § 760 (West 1997).

62 *See* In re Marriage of Adams, 134 Cal.Rptr. 298 (Cal.App., 1976); DeLoach v. DeLoach, 590 So.2d 956 (Fla.App., 1991); In re Marriage of Hunt, 397 N.E.2d at 518; *Majauskas*, 463 N.E.2d at 20, 21; Bulicek v. Bulicek, 59 Wash.App. 630, 800 P.2d 394 (Wash.App. Div. 1, I 990).

affected by the amount of service. Secondly, in order to receive the benefit, the participant must work until the earliest date that he or she may retire and receive such benefits. Use of the time rule was justified for dividing defined benefit retirement plan property between martial and non-marital portions, because the benefit that the participant receives at retirement was built upon a foundation of efforts.[63] However, use of the time rule in a welfare plan is contraindicated because each year's benefit is unrelated to the prior year's benefit.[64] Therefore, the lack of any earnings definition in the plan will present a trial court with a logistical nightmare if it attempts to separate out the marital and non-marital portions.

VIII. Conclusion

Post-retirement medical benefits can be very valuable entitlements and, upon thorough analysis, may be distributed as a marital asset. Determining the property status of the benefits, however, can be a difficult and expensive task. It may require extra fees in interviewing the client and others for additional background information. This will also require researching new *federal case law* that may apply to the client's circumstances.

If, during this process, it can be established that the participant may have a property right to the benefit, a theory to support a marital property classification may still need to be found. There appears to be only one theory to currently support that finding, and this would appear to limit the post-retirement medical benefit classification as marital property to participants retired and already receiving benefits on the valuation cut-off date. Most state courts do not recognize this theory as valid. Accordingly, only a small portion of plans providing post-retirement medical benefits will need those benefits present-valued for marital estate purposes. However, a lack of an earnings definition under the welfare plan could pose a logistical nightmare for di-

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63 *See* In re Marriage of Adams, 134 Cal. Rptr. at 302; In re Marriage of Hunt, 909 P.2d 525 (Colo., 1995); Jerry L.C. v. Lucille H.C., 448 A.2d 223 (Del.Supr., 1982); In re Marriage of Wisniewski, 286 Ill.App.3d 236, 675 N.E.2d 1362, 221 Ill.Dec 632 (Ill.App. 4 Dist., 1997); Gemma v. Gemma, 105 Nev. 458, 778 P.2d 429 (Nev., 1989); *Majauskas*, 463 N.E.2d at 20; Rothbart v. Rothbart, 141 N.H. 71, 677 A.2d 151 (N.H., 1996); *Bulicek*, 800 P.2d at 399.

64 *See* 29 U.S.C.A. § 1051(l) (West Supp. 1998).

viding the benefit between marital and non-marital portions when the parties were not married during the entire period of plan participation (unless the "bright line" theory is also used for such purposes). This problem will have to be resolved before division. Finally, the benefit must be offset with other marital property since there are problems of dividing it through the deferred distribution method. This will require the hiring of an actuary.

The foregoing should provide family law attorneys ample incentive to retain dissolution actuaries to value defined benefit pension plan property.[65] Dissolution actuaries are also pension actuaries and are accustomed to working with defined benefit plans and all of its ancillary benefits. A post-retirement medical benefit is just one of them. A dissolution actuary can also assist the family law attorney in recognizing when certain benefits can likely survive all of the tests for a marital property classification. In this way, the ERISA attorney is used as an expert witness to assist in that assessment only when there is a significant probability of the presence of extra marital benefits. If the actuary has already been consulted to value the pension benefit, the expense of the determinative process for extra benefits not likely to survive the required marital classification tests can be kept to a minimum. In this way, the dissolution actuary who has a solid background in retirement plans is in the best position of alerting the attorney to other benefits that exist. This actuary will also provide some idea if the potential value of the extra benefits justifies the potential expense for finding them.

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[65] A dissolution actuary is a pension actuary who specializes in divorce.