

Gillmore Excerpts

'The employee spouse cannot by election defeat the nonemployee spouse's interest in the community property by relying on a condition solely within the employee spouse's control. [Citations.] . . . A proper order for a trial court to make in these circumstances is that the nonemployee spouse is the one who has the choice as to when his or her share of the pension shall begin.' [Citing *In re Marriage of Luciano* (1980) 104 Cal.App.3d 956, at p. 960.] [page 425]

Earl's claim that he is being forced to retire misses the point. He is free to continue working. However, if he does so, he must reimburse Vera for the share of the community property that she loses as a result of that decision. His claim that the court lacks jurisdiction to order him to make payments to Vera because it lacks jurisdiction over his separate property also lacks merit. Earl alone will make the decision to use separate property to reimburse Vera, when and if he decides not to retire. His situation is not unlike that faced by a couple ordered to divide a house that they own as community property. If one of the spouses chooses to keep the house, he or she is free to use separate property to purchase the other's interest. Here, Earl must divide his retirement benefits with Vera. If he does not wish to retire, he must pay her an amount equivalent to her interest. [Footnote #7]

Frequently, parties are able to arrive at a reasonable settlement of these issues. (In re Marriage of Skaden, supra, 19 Cal.3d at pp. 688-689.) For example, the nonemployee spouse may choose to wait, preferring to receive the retirement benefits when the employee spouse actually retires. The nonemployee may thereby ensure some protection for the future and may be able to share in the increased value of the pension plan. (See *In re Marriage of Adams*, supra, 64 Cal.App.3d at p. 186.) #9 However, if the nonemployee spouse chooses to receive immediate payments, as Vera does, he or she has a right to do so. Any inequities caused by the immediate distribution of retirement benefits can be resolved through adjustments in spousal support. [page 428]

Footnote #7 One commentator argues that when an employee who is eligible to retire chooses to continue working, part of his or her salary is actually attributable to community effort. "From an economist's perspective, the employee spouse's compensation for continued employment is not the full amount of his paycheck. Rather, his compensation is only that amount above the pension benefits that he will not receive while he continues working. For example, in the matured pension situation, if the employee can receive retirement pay in the amount of X dollars without working, then his actual compensation for services rendered is not the amount of his paycheck, Y dollars, but Y minus X dollars. This is nothing more than a reapplication of the 'benefits foregone' formula of *Stenquist* [21 C.3d 779]. [Fn. omitted.] Therefore, rather than penalizing the spouse for not retiring, the contrary is true-the community is being penalized because it is forced to subsidize the employee spouse's salary, which becomes his separate property." (Note, *In re Marriage of Stenquist: Tracing the Community Interest in Pension Rights Altered by Spousal Election*, supra, 67 Cal.L.Rev. 856, 879.) Since this court does not find any taking of separate property, it is not necessary to discuss Earl's constitutional claim. [p.427]

Footnote #9 The nonemployee spouse, of course, cannot have it both ways. The decision to ask for distribution of the retirement benefits before the employee spouse actually retires "constitutes an irrevocable election to give up increased payments in the future which might accrue due to increased age, longer service and a higher salary." (*In re Marriage of Luciano*, supra, 104 Cal.App.3d at p. 961, citation omitted.) Thus, if Vera chooses to receive her share of the retirement benefits immediately, she will forfeit her right to share in the increased value of those benefits in the future.

Excerpts are from *In re Marriage of Gillmore* (1981) 29 Cal.3d 418, 174 Cal.Rptr. 493 by Barbara A. DiFranza, ddf@difranza.com.