

Certainly, a rule under which the fruits of an entire career were divided by the time rule would be more or less a fair rule--if it were consistently followed. However, the time rule as applied to the entire career is not followed in California. If it were, then the wife of a minor league baseball player could come back for the bug bucks once the baseball player got into the big leagues and started hitting home runs and getting huge headlines. Certainly, one could argue that the major leagues would never have been reached but for the time spent in the minors. If the correct rule is to divide compensation evenly over the entire career, let's throw in all the compensation from all the paychecks, the health and other benefits too.

### Brown Has No Time Rule<sup>2</sup>

The time rule has been approved as applying only to those cases where the benefits themselves are accumulated as measured by time of service. The *Brown* trial court never got to the point of discussing how to allocate the benefits so that the allocation method was not in controversy. The time rule was not discussed. Footnote 4 tells us that the defined contribution plan was only mentioned at oral argument!

Brown did remind us of the general principal which should guide all these discussions:

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.

A defined contribution plan is simply a bank or investment account where a certain part of money which is earned during the community period is taken by the employer and--instead of being put in the employee's paycheck--such dollars are placed in an investment account in the employee's name. That part of the account which is on deposit at the date of separation accumulates value through the passage of time by the process of "passive appreciation" --much like the community residence.

A defined benefit plan however accumulates value by heaping up credited service. In contrast to the defined contribution account which can be valued on a "what-you-now-see-is-what-you-get" basis, the ongoing value of each year of a typical defined benefit plan can be determined by reference to numerous variables: making assumptions about how long the employee will work, looking at mortality tables, and making assumptions about the future salary increases of the employee, an actuary analyzes the plan formula (typically one set benefit factor x each year of service x final average compensation) and come out with a value. In most of these plans, we know that if there were 10 marital years out of a 30 year career, that those marital years represent 1/3 of the benefit. That is because if we

---

<sup>1</sup> © Barbara A. DiFranza, [bdf@difranza.com](mailto:bdf@difranza.com). Permission is given to copy providing attribution is given to the author.

<sup>2</sup> In accord, *In re Marriage of Gray* (2007) 155 Cal.App.4th 504, 66 Cal.Rptr.3d 87.

pretend that those years never existed, there will only be 2/3 of the benefit left.

The *Brown* case never actually came out with a formula about the time rule and certainly could not have "extended it" to defined contribution plans. Mentioning time is not the same as resolving a controversy about allocation in favor of the time rule. Also, the *Judd* case in no way extends the time rule to a stock plan.

In the first part of the opinion (Mr. Judd appealed), it was revealed that the trial court had imposed the vesting rule on Mrs. Judd as to the *defined benefit* plan:

In determining the community interest to be 60 percent of the entire annuity plan, the trial court apparently looked only at the percentage of the plan which was "vested" at the time of trial. #1 The court thus followed a theory which, for purposes of this opinion, we shall call the "vesting rule."

So the court straightened that out and then it noted that in that particular plan, the time rule would be a good way to divide the benefits:

The reason why California courts have accepted this manner of division as properly implementive of the "equal division" requirement of Civil Code section 4800 is apparent: **Where the total number of years served by an employee-spouse is a substantial factor in computing the amount of retirement benefits to be received by that spouse, the community is entitled to have its share based upon the length of service performed** on behalf of the community in proportion to the total length of service necessary to earn those benefits. The relation between years of community service to total years of service provides a fair gauge of that portion of retirement benefits attributable to community effort.

The stock plan (a defined contribution plan) was part of a counter appeal by Ms. Judd which was discussed at the end of the case. Ms. Judd did not complain about the allocation method used by the trial court but about the fact that her claim to the stock in the account on the date of separation plus split of stock thereafter (which was set forth as the thing she was being denied) had been improperly barred because the court imposed the old French rule *re vesting*. When the court said "re-divide according to the principles herein", it was obvious that it meant that the court should ignore the vesting.

The issue is discussed in *In re Marriage of Poppe* (1979) 97 Cal.App.3d 1, 158 Cal.Rptr. 500:

However, we agree that the apportionment made by the trial court was erroneous because the basis upon which the apportionment was made, years of service during the marriage before separation compared to "qualifying" years in service, **bears no substantial rational relationship to the amount of the pension.** (òp. 8)

Former wife asserts that the "time rule" is the normal basis for apportioning retirement benefits earned in part during coverture and was appropriately employed by the court in the case at bench. Although the "time rule" is not the only acceptable method for apportioning retirement benefits between the community and separate estates (see *In re Marriage of Adams*, 64 Cal.App.3d 181, 186, +[]+. 6, 187, +[]+. 8),

it is apparently the method most frequently employed. (See, e.g., In re Marriage of Judd, 68 Cal.App.3d 515, 522; In re Marriage Of Adams, supra, 64 Cal.App.3d at pp. 181, 184 et seq; In re Marriage of Anderson, 64 Cal.App.3d 36, 39-40; In re Marriage of Freiberg, 57 Cal.App.3d 304, 310.) [BDF note: Brown's not cited because Brown is not a time-rule case!!!]

However, apportionment on the basis of the "time rule" is appropriate **only where the amount of the retirement benefits is substantially related to the number of years of service**. The rule and its rationale were aptly stated in In re Marriage Of Judd, supra, 68 Cal.App.3d at pages 522-523:

"The most effective method of accomplishing the above result would be to determine the community interest to be that fraction of retirement assets, the numerator of which represents the length of service during the marriage but before the separation, and the denominator of which represents the total length of service by the employee-spouse. Such disposition would comport with what we have termed the 'time rule.' [Citation.] [||] . . .

The reason why California courts have accepted this manner of division as properly implementive of the 'equal division' requirement of Civil Code section 4800 is apparent: Where the total number of years served by an employee-spouse is a substantial factor in computing the amount of retirement benefits to be received by that spouse, the community is entitled to have its share based upon the length of service performed on behalf of the community in proportion to the total length of service necessary to earn those benefits. The relation between years of community service to total years of service provides a fair gauge of that portion of retirement benefits attributable to community effort." ([Emphasis] added.) Thus it is that in each and all of the cited cases the amount to be received in retirement benefits depended upon or was substantially ò related to the number of years of service rendered. (See In re Marriage of Judd, supra, 68 Cal.App.3d at pp. 519, 522-523; In re Marriage of Adams, supra, 64 Cal.App.3d at p. 186; In re Marriage of Anderson, supra, 64 Cal.App.3d at p. 39; In re Marriage of Freiberg, supra, 57 Cal.App.3d at p. 308.)

In the case at bench the amount of former husband's pension is not substantially related to the number of years he served in the Naval Reserve. The only relationship between the number of years of service and the pension is that to be eligible for the pension former husband must have served a minimum number of "qualifying" years, years in which he earned 50 or more points. That condition having been satisfied, all points earned, whether in a "qualifying" year or not, counted in fixing the amount of his pension. The number of points that can be earned in a year may be as high as 364 or as low as 1, depending on the nature and frequency of the service rendered, not the number of years served. Thus the amount of the pension is not a function of the number of years of service; **the number of years of service during the marriage is not a fair gauge of the community contribution**; and the court's apportionment of the pension on the basis of the number of "qualifying" years served as compared to the number of years of service during the marriage must be said to be unreasonable, arbitrary and an abuse of discretion.

The argument that without the reserve service during the marriage no pension at all would be received is correct, but it is of no significant help in resolving the problem. There would likewise be no pension but for former husband's service before the marriage and after the separation of the parties. To the extent service during the marriage contributed to former husband's rank and thus increased his base pay, former wife has no cause for complaint. The pension is based on the increased base pay, and she thus receives the benefit of the increased base pay. Indeed, she receives the benefit also of any increase in base pay resulting from former husband's reserve service after separation of the parties.

If *Poppe* doesn't do it, look at the case of *In re Marriage of Henkle* (1987) 189 Cal.App.3d 97, 234 Cal.Rptr. 351 which held that years during which no benefits were earned could not be considered in the time rule formula.

Finally, there is only one case that has directly addressed the issue of how an account balance plan or defined contribution plan is to be allocated; and that is *In re Marriage of Behrens* (1982) 137 Cal.App.3d 562, 187 Cal.Rptr. 200:

"We are not dealing here with an indivisible appreciating asset which is to be valued, as a general rule, at [the] time of trial rather than at date of separation. [Citation.] The value of Husband's profit-sharing account can readily be divided, for purposes of characterization, into preseparation and postseparation increments. Patently, the corporation's contributions to Husband's account were intended and received as a form of compensation; postseparation contributions would, by the orthodox rule, be Husband's separate property. [former Civ. Code §5118.] Hence only the value of the account at date of separation, together with any increase in value directly attributable to assets then in the account, were subject to division as community property." (Id. at p. 577.)