

*You see things; and you say, "Why?"
But I dream things that never were; and I say, "Why not?"*
George Bernard Shaw

The parties in this case needed to utilize a retirement plan that was fully the husband's separate property in order to save husband from some adverse effects of poor judgment in which he removed wife's survivor status from a community pension plan. What to do? Ask! The pension plan agreed with DiFranza's letter set forth below and the parties were able to conclude a felicitous settlement.

Dear Plan Administrator:

The purpose of this letter is to establish the jurisdiction of a California court to dispose of employee benefit plans which, without agreement of the parties, would not constitute community property. There are a number of bases to support what the parties wish to do. Here are some of them presented in a somewhat informal fashion:

1. Jurisdiction Conferred by Stipulation.
 - a. *In re Marriage of Saslow* (1985) 40 Cal. 3d 848, 865-866 upheld the court's jurisdiction to adjudicate separate property disputes raised by the parties in their pleadings.
 - b. *Spahn v. Spahn* (1945) 70 CA2d 791, 796-797 held that the trial court is fully empowered to decide property issues submitted by the parties in their pleadings.

2. The Property Has Been Transmuted to Community Property

Joe Employee has transmuted his property interest in his UCRP benefits into community property in writing in two Stipulations which were executed with the approval of his attorney. You have received one of the Stipulations. The parties can transmute property for their mutual benefit as they have done in these Stipulations. See Family Code Sections 850, 852. These Stipulations allow Joe Employee to divide *all* of his property interests in two retirement plans, his UCRP plan and his military plan, in a manner acceptable to him to avoid extensive litigation relating to these plans.

California law allows and encourages parties to use California community property law to divide all of their property in an equitable fashion for their mutual

benefit. Joe Employee and his former wife have done so in these Stipulations. You indicate that UCRP has allowed an out-of-state litigant to divide benefits earned outside of the marital years because that state's law permitted such a division. For the reasons set forth herein, California law allows the same. In addition, it seems unfair to provide out-of-California litigants with greater rights than two California citizens who desire to settle their marital litigation in an amicable way.

2. Court Has Jurisdiction to Remedy Wrongs by Use of What Otherwise Would Be the Employee Spouse's Separate Property

FACTS: H, in violation of TRO, threw \$5,100 of W's separate property ("s/p") jewelry into sea. Trial ct. ordered H to reimburse W from his share of community property ("c/p") (which would otherwise have been his s/p). H appealed, arguing court lacked jurisdiction and that W's remedy was to sue for tort of conversion. Court of Appeal affirmed in favor of W. Court distinguished prior cases holding that court in dissolution action lacks jurisdiction over other spouse's s/p and that it could not award damages for conversion by calling remedy one of "reimbursement" from other spouse's share of c/p.

Court then noted that it was in everyone's best interests to resolve issue at that point rather than require further litigation:

"It is not in either spouse's interest to expend time and money to pursue this type of claim in a separate civil action, nor should the taxpayers be required to provide such a forum when the dispute can be easily, fairly and completely resolved within the dissolution action. [Citations.] In any event, dissolution proceedings, despite our highly detailed statutory scheme, still retain some vestige of equity and the trial court properly relied upon equitable principles. [Husband's] wilful destruction of [wife's] jewelry certainly constitutes 'unclean hands' and precludes his seeking judicial relief. He may not complain when his conduct was so egregious." (Id. at pp. 1275-1276.) *In re Marriage of Hebbing* (1989) 207 Cal.App.3d 1260, 255 Cal.Rptr. 488

The settlement between these two parties results after a claim by Wife that Husband wrongfully acted in such a way as to deny her her community property interest in retirement payments received by him and survivor benefits with respect to retirement earned during the marriage.

3. Jurisdiction is Sustained Under Family Code Section 2610.

Here is the code section. Remarks in brackets and underlining for emphasis is added by me.

Family Code Section 2610

(a) Except as provided in subdivision (b), the court shall make whatever *[this encourages the court to innovate to accomplish the objective]* orders are necessary or appropriate to ensure that each party receives the party's full community property share in any retirement plan, whether public or private, including all survivor and death benefits, including, but not limited to, any of the following:

(1) Order the disposition of any retirement benefits *[not just "any community property retirement benefits"]* payable upon or after the death of either party in a manner consistent with Section 2550.

(2) Order a party to elect a survivor benefit annuity or other similar election for the benefit of the other party, as specified by the court, in any case in which a retirement plan provides for such an election, provided that no court shall order a retirement plan to provide increased benefits determined on the basis of actuarial value. *[The desired order would not increase the value of benefits paid by the plan.]*

(3) Upon the agreement of the nonemployee spouse, order the division of accumulated community property contributions and service credit as provided in the following or similar enactments: [Omitted various California State Plan special division sections]

(4) Order a retirement plan to make payments directly to a nonmember party of his or her community property interest in retirement benefits. *[Our two Stipulation and Orders transmute separate property to community property. See Family Code § 850 and 852; See Gunn below.]*

Family Code Section 2610, *continued*

(b) A court shall not make any order that requires a retirement plan to do either of the following:

(1) Make payments in any manner that will result in an increase in the amount of benefits provided by the plan.

(2) Make the payment of benefits to any party at any time before the member retires, except as provided in paragraph (3) of subdivision (a), unless the plan so provides.

[Note that there is no bar to making an order for division of benefits not technically earned during the marriage.]

4. Community Property Rights From First Marriage May Extend into Second Marriage.

FACTS: In 1971, H divorced W. Pursuant to terms of marital settlement agreement, he was awarded his United Airlines (UAL) retirement fund, then valued at \$50,670, subject to an obligation to name his 4 children as beneficiaries. H remarried and then died 6 years later. His pension fund had increased to \$84,465. After UAL refused to pay any of funds to W#2, she brought action for declaratory relief. W#2 was aware that H had named his sons as beneficiaries, but he told W#2 he was going to change as they had reached majority. W#2 agreed sons had right to \$50,670, but she claimed balance. Trial ct. found W#2 had no right to share in H's pension benefits, and she appealed.

HELD: Affirmed. The rule relied upon by W#2, namely that if H designates someone other than W as the beneficiary of life insurance policies paid with c/p funds-W can set aside one-half-has no application here. This was a premarital obligation of H's for which c/p of H and W#2 was liable. *Gunn v. United Airlines, Inc.* (1982) 138 Cal.App.3d 765, 188 Cal.Rptr. 302

The *Gunn* case illustrates that employee benefit plans may be divided although the source of same post-dates the marriage.

5. The Plan's Integrity is Maintained.

The order is, as required by 12.07 of your plan document, issued in accordance with state domestic relations law and it is "not inconsistent with the Plan."

6. The Stipulation and Orders Divide the Assets of an Entire Career Rather Than Just One Plan.

Courts routinely take pension assets which have been enriched by post-separation efforts and give the former spouse a share of that enrichment, including the very portion that has been augmented by post-separation tenure. *In re Marriage of Lehman* (1998) 18 Cal. 4th 169; 955 P.2d 451; 74 Cal. Rptr. 2d 825. The trend is toward looking at the entire career and giving each spouse a prorata share, considering that the experience and knowledge gained in the early years of a person's career contributes to the later results.

* * *

I look forward to hearing from you and/or plan counsel that the intent of the parties may be implemented by domestic relations order under the UCRP. Inasmuch as Joe Employee is contemplating retirement in the very near future, time is of the essence. Your courtesy in expediting our request for review has been and will continue to be much appreciated.

Sincerely yours,

Barbara A. DiFranza