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Community Property - New Mexico Changes the Method of Allocating Future Pension Benefits between Divorcing Spouses: Ruggles v. Ruggles

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COMMUNITY PROPERTY—New Mexico Changes the Method of Allocating Future Pension Benefits Between Divorcing Spouses: *Ruggles v. Ruggles*

I. INTRODUCTION

Upon divorce, courts in community property jurisdictions[1] must determine a community's interest in a pension, as well as when and how the non-working spouse should receive his or her part of the pension.[2] The New Mexico Supreme Court addressed this issue in *Ruggles v. Ruggles*[3] and held that such pension benefits should be divided upon divorce and that the non-working spouse should receive his or her share of the assets upon divorce if the pension is mature.[4] In doing so, the court adopted a preference for the "lump sum" method of distribution of pension benefits.[5] While the *Ruggles* court expressed a strong preference for full lump sum distribution of the pension assets at the time of divorce, the court also recognized that the "lump sum" method will not work in every case, and trial courts need flexibility when determining the method of distributing assets.[6] Accordingly, the *Ruggles* court expressed a preference, not a mandate, for the "lump sum" method.[7] Because future pension assets may be distributed using liquid assets from the community estate,[8] the decision will have a tremendous impact on the division of tangible property in many divorce cases. This Note examines the history of the division of pensions upon divorce in New Mexico, relevant case law from other states, the rationale of the *Ruggles* court in choosing the "lump sum" method of distribution, and implications of the decision.

II. STATEMENT OF THE CASE

Joseph and Nancy Ruggles decided to divorce. Joseph was an employee of Sandia National Laboratories in Albuquerque,[9] and his wife was

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1. There are nine community property states: Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, Washington and Wisconsin. *See generally* W. deFuniak & M. Vaughn, Principles of Community Property 55-91 (2d. ed. 1971).

2. There are two primary methods currently used in community property jurisdictions to divide future pension benefits: the "lump sum" method, which attempts to compensate the non-working spouse for the working spouse's future pension benefits and the "pay as it comes" method, which pays the non-working spouse his or her benefits only when the working spouse actually receives his or her share. *Id.* at 114-200.

3. 116 N.M. 52, 860 P.2d 182 (1993).

4. *Id.* at 67, 860 P.2d at 197.

5. *Id.* at 67-68, 860 P.2d at 197-98. The "lump sum" method means that the pensioner will "buy out" the non-working spouses's interest in the pension at the time of divorce. The court's holding deals only with benefits which are both vested and matured. "Vested" benefits are those which are owned by the employee, although he or she may not yet be eligible to receive them. The benefits "mature" when the employee is eligible to receive them. *See* Davidson et al., Financial Accounting 484-485 (5th ed. 1988).

6. *Ruggles*, 116 N.M. at 67, 860 P.2d at 197.

7. *Id.* at 67-68, 860 P.2d at 197-98.

8. *Id.* at 66, 860 P.2d at 196.

9. *Id.* at 55, 860 P.2d at 185.

employed by Albuquerque Public Schools.[10] Prior to trial, the couple had signed a marital settlement agreement (MSA) which outlined their property rights.[11] The MSA specified that Nancy's community property share of her husband's retirement benefits was equal to 48% of the pension annuity as of the date her husband was eligible to retire.[12] At the time of the trial, Joseph's interest in his pension plan was fully vested and matured.[13] It is unclear whether the MSA stated when Nancy was to receive her share of the benefits.[14]

The trial court ruled that Nancy should start receiving benefits when Joseph was eligible to retire.[15] The court of appeals reversed that decision, holding that Nancy should receive her benefits when Joseph began receiving his pension payments.[16] The New Mexico Supreme Court reversed the decision of the court of appeals, stating that marital assets should be divided upon divorce and paid in a lump sum if the pension is mature.[17] The specific instructions from the *Ruggles* court to the trial court on remand, however, were to enforce the MSA if the trial court could determine the intent of the parties in drafting the contract.[18] If the trial court could not determine the intent of the parties in drafting the MSA, then the original trial court decision would be reinstated, which would award Nancy Ruggles a pro-rated share of the pension on an installment basis, as if Joseph had retired when he was eligible to retire.[19] The *Ruggles* court acknowledged that this is not the "lump sum" method, but found that the MSA agreement dividing the tangible assets would take precedence over any court-imposed distribution scheme.[20] The holding states that this method of paying by installments is itself preferable to the old "pay as it comes" method. The *Ruggles* court expressed a preference for "lump sum" distribution of community assets at divorce, but the final result in *Ruggles* will not be a "lump sum" distribution and might be considered to be a third alternative.[21]

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10. *Id.* at 56, 860 P.2d at 186.
11. *Id.* at 55-56, 860 P.2d at 185-86.
12. *Id.* at 55, 860 P.2d at 185.
13. *Id.*
14. Both the trial court and the court of appeals held that the MSA was unambiguous in granting Nancy benefits, but each reached a different conclusion as to when the payout to Nancy should begin. *Id.* at 56, 860 P.2d at 186.
15. *Id.*
16. *Id.* This decision exemplifies the "pay as it comes" method. *See* DEFUNIAK & VAUGHN, *supra* notes 1-2.
17. *Id.* at 52, 860 P.2d at 182. This approach exemplifies the "lump sum" method.
18. *Id.* at 66, 860 P.2d at 196.
19. *Id.*
20. *Id.* Due to the existing MSA agreement in *Ruggles*, there would have been no assets for the court to divide, making a lump sum award impractical.
21. *See id.* Mick v. Mick, a case consolidated with *Ruggles*, is less complicated and not really of any importance for the purpose of analysis, because the court's rationale in *Mick* is similar to that of *Ruggles*. *Ruggles*, 116 N.M. 52, 57, 860 P.2d 182, 187 (1993). In a divorce action, Norman Mick sued for immediate disbursement of his community share in his wife's federal retirement benefits. *Id.* Both the trial court and the appeals court ruled against him. *Id.* The New Mexico Supreme Court overturned the appellate court decision and remanded the case to the trial court with instructions to apply the "lump sum" method of distribution. *Id.* The only aspect of *Mick*

III. CONTEXTUAL BACKGROUND

A. Introduction—Defining Methods of Distribution

The two primary methods of distributing community pension assets upon divorce are the "lump sum" and the "pay as it comes" method.[22] Courts in jurisdictions that use the "lump sum" method try to derive a present value for the future stream of retirement payments.[23] In jurisdictions that utilize the "pay as it comes" method, the court reserves jurisdiction over the case until the working spouse actually retires and begins receiving benefits.[24] At that time, the benefits are divided on a monthly, weekly, or yearly basis between the former spouses.[25]

B. Cases From Other Jurisdictions

1. The Majority View: The Lump Sum Method

A majority of community property jurisdictions have adopted the "lump sum" method[26] for dividing future pension benefits in divorce actions.[27] The California Supreme Court addressed the issue in *Gillmore v. Gillmore*,[28] a leading case involving a dispute over pension assets between divorcing spouses. The California court ruled that one spouse should not be able "to defeat the community interest of the other spouse" by

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which differs from *Ruggles* in a legally significant way is the fact that Hazel Mick was a federal employee. Because the pension in *Mick* was not a private pension, the retirement benefits are not subject to the broad anti-assignment provisions of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1001 (1988), or the Retirement Equity Act of 1984 (REA), 29 U.S.C. § 1055 (1988). *Ruggles*, at 57 n.5, 860 P.2d at 187 n.5. ERISA governs private pension plans and restricts the assignment of benefits to parties other than the beneficiary. 29 U.S.C. § 1001(b). The REA provides states with a method of awarding divorcing spouses part interest in the pension plan through a qualified domestic relations order (QDRO), 29 U.S.C. § 1056(d) (1988). A QDRO was necessary in *Ruggles*, but not in *Mick*. A detailed discussion of the federal laws governing pensions is beyond the scope of this Note. However, there are a host of federal laws governing disbursements of retirement benefits that may trump state laws under the supremacy clause of the United States Constitution. *See* U.S. CONST. art. VI. *See also* Hisquierdo v. Hisquierdo, 439 U.S. 572 (1979). The New Mexico held in Luxton v. Luxton, 98 N.M. 276, 648 P.2d 315 (1982), that a husband's U.S. Civil Service medical retirement benefits were community property since 5 U.S.C.S. § 8345(j)(1) (Supp. IV 1980) provides for payments to persons other than the civil service employee under terms of a divorce decree. Thus, although federal retirement plans are not subject to ERISA, they are often subject to a host of other laws governing their disbursement. These regulations may take precedence over state law.

22. *Ruggles*, 116 N.M. at 60, 860 P.2d at 190. *See also* DEFUNIAK & VAUGHN, *supra* note 1.

23. *Ruggles*, 116 N.M. at 58-63, 860 P.2d at 188-93. Courts must estimate the size and number of payments and then discount the cash flow by an appropriate discount rate. *Id.*

24. *Id.*

25. *Id.*

26. *See infra* note 50 for further explanation of lump sum calculations.

27. *Ruggles*, 116 N.M. at 60-61, 860 P.2d at 190-91. Idaho decides each case individually. *See* Shill v. Shill, 599 P.2d 1004 (Idaho 1979). Washington tries to decide each case using the method that will produce the most equitable result without a particular preference. *See* Edwards v. Edwards, 444 P.2d 703 (Wash. 1975).

28. 629 P.2d 1 (Cal. 1981).

delaying his or her retirement.[29] The rationale of the California court is the primary criticism of the "pay as it comes" method: that the working spouse can control when the non-working spouse receives his or her share of the pension plan by delaying retirement.[30]

The Nevada Supreme Court adopted the lump sum method in *Gemma v. Gemma*.[31] In *Gemma*, a police officer appealed a verdict awarding his ex-wife a lump sum payment based on his unvested retirement benefits.[32] In upholding the trial court ruling, the Nevada court focused on the amount of control one spouse has over the other's community property assets, observing that the wife "may elect to receive pension benefits at the time they become due and payable, this being defined in the divorce decree as the time when [the husband] is first eligible to retire . . . ."[33]

Arizona also applied the lump sum method of distribution in *Koelsh v. Koelsh*.[34] The *Koelsh* court reversed a verdict from the appeals court that divided pension assets between divorcing spouses on a "pay as it comes" basis.[35] The state supreme court criticized the appeals court decision: "[i]n ruling that the non-employee spouse's interest in the retirement benefits cannot be satisfied until the employee spouse decides to retire, the courts are awarding the latter unilateral control over the property of the former."[36] The *Koelsh* court also found that it was unfair for the non-working spouse to be forced to become an unwilling investor in the pension assets.[37] Arizona adopted a somewhat novel approach, stating that the "pay as it comes" method was actually unfair to the working spouse as well as the non-working spouse because under a "straight line" method of calculation, the non-working spouse would share any excess value the pension plan accrued due to the working spouse's promotions and pay raises after the divorce.[38]

2. The Minority View: Pay As It Comes Method

Texas and Louisiana remain the only two community property states to prefer the "pay as it comes" method. The Texas Supreme Court held in *Cearley v. Cearley*[39] that a spouse's community property interest in a pension plan must be valued and apportioned only when the retiring spouse begins receiving the benefits.[40] *Cearley* involved a dispute between

29. *Id.* at 4 (quoting *In re* Stenquist, 582 P.2d 96, 100 (Cal. 1978)). The logic of *Gillmore* was central to the New Mexico Supreme Court's decision in *Copeland*, 91 N.M. 409, 575 P.2d 99 (1978), and was a key argument in the case presented by Nancy Ruggles in *Ruggles*, 116 N.M. at 56, 860 P.2d at 186.

30. *See Gillmore*, 629 P.2d at 4.

31. 778 P.2d 429 (Nev. 1989).

32. *Id.* at 429-30.

33. *Id.* at 432.

34. 713 P.2d 1234 (Ariz. 1986).

35. *Id.* at 1244.

36. *Id.* at 1239.

37. *Id.* at 1240.

38. *Id.*

39. 544 S.W.2d 661 (Tex. 1976).

40. *Id.* at 666.

an Air Force man and his wife over his military pension.[41] The *Cearley* court ruled that such future benefits were only a contingency, and the non-working spouse could receive her share of the pension only "if and when" the working spouse received his share.[42] Similarly, the Louisiana Supreme Court ruled in *Sims v. Sims*[43] that while a non-working wife's ownership in her husband's pension plan should be recognized at the time of divorce, the non-working spouse should receive no payment until the benefits are paid to the working spouse or the working spouse dies.[44] In the wake of *Ruggles*, New Mexico is now in line with most of the other community property jurisdictions.[45]

B. *New Mexico Cases*

1. *Copeland*: The Pre-*Schweitzer* Era

In *LeClert v. LeClert*,[46] New Mexico first recognized that retirement benefits earned during coverture are community property subject to division.[47] Nine years later, in 1978, the New Mexico Supreme Court expressed a preference for immediate distributions of pension assets between divorcing spouses in *Copeland v. Copeland*.[48] In *Copeland*, the court established the "lump sum" method as the proper method of dividing pensions in divorce actions.[49] This decision urged trial courts to determine a present value for future pension benefits[50] and then make

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41. *Id.* at 661.
42. *Id.* at 662.
43. 358 So.2d 919 (La. 1981).
44. *Id.* at 923. The *Sims* court failed to address, however, whether a non-working spouse had a remedy if the working spouse remained on the job for the sole purpose of depriving the non-working spouse of community assets. *Id.*
45. *Ruggles*, 116 N.M. 52, 860 P.2d 182.
46. 80 N.M. 235, 453 P.2d 755 (1969).
47. *LeClert*, 80 N.M. at 235, 453 P.2d at 755. The history of the *LeClert* decision is a lengthy one involving the clash between the state's interest in a fair division of property and federal laws governing the disbursement of military pensions. *See* Espinda v. Espinda, 96 N.M. 712, 634 P.2d 1264 (1981) (overruling *LeClert*). The New Mexico decision to overrule *LeClert* was based on a U.S. Supreme Court case, McCarty v. McCarty, 453 U.S. 210 (1981), which precludes states from dividing military retirement pay. Congress then passed the Uniform Services Former Spouses' Protection Act, 10 U.S.C. § 1408 (1988), which reversed *McCarty*, and New Mexico then reinstated *LeClert* in Walentowski v. Walentowski, 100 N.M. 484, 672 P.2d 657 (1983).
48. 91 N.M. 409, 575 P.2d 99 (1978).
49. *Id.* at 414, 575 P.2d at 104.
50. The mathematics involved in calculating the present value of a future stream of cash payments are complex. The formula for a discrete number of payments, or one in which the beneficiary's benefits terminate at death is:

$$\Pi = {}_{t=1}\Sigma^{3}\, Rt\ (1+i)^{-t}$$

Π, the upper case Greek letter pi, signifies present. When $t=t_1$, the rate of the flow is $R(t_1)$ dollars per year. In a continuous cash flow, or in the case in which the beneficiary's benefits are inheritable, the formula derives its answer from the definite integral:

$$\Pi = {}_{0}\int^{3} R(t)e\ dt^{-it}$$

However, an esoteric knowledge of mathematics is unnecessary. Present values can be rapidly calculated using an inexpensive financial calculator, or a table of present value factors that can be multiplied against the cash payment. For a complete discussion of net present value equations, see ROSS ET AL., CORPORATE FINANCE 74-101 (2d ed. 1990).

a lump sum payment to the non-working spouse from liquid community assets equal to his or her share of the pension benefit.[51] The *Copeland* decision, however, also recognized that the "lump sum" method might not work in every case, and that the "pay as it comes" method might be the only practical one in cases where there are insufficient liquid assets to make a lump sum or in cases where a lump value cannot be determined with accuracy.[52]

The New Mexico Supreme Court continued to refine and modify *Copeland* with subsequent cases giving the trial courts even more latitude in determining how to divide pension benefits. For example, in *Ridgeway v. Ridgeway*,[53] the court recognized that it was impossible to determine the future value of some profit sharing plans, and that lump sum payments from such plans should be valued at their present undiscounted net worth.[54]

The *Copeland* decision did not address the distinction between vested and unvested pension plans, because the court was confronted with benefits which were fully vested.[55] Five years later, in *Hertz v. Hertz*,[56] the court ruled that even pension benefits which are not fully vested could be valued and divided at the time of divorce providing the employee or employer contributed to the plan during coverture.[57]

2. *Schweitzer*: New Mexico Adopts the "Pay as it Comes" Method

The *Schweitzer v. Burch*[58] court rejected the *Copeland* doctrine and expressed a rigid preference for the "pay as it comes" method.[59] Ironically, the primary holding of *Schweitzer* does not address the issue of the "lump sum" versus the "pay as it comes" methods,[60] but the court used the opportunity in *Schweitzer* to address the issue of when a non-working spouse is legally entitled to payments from the working spouse's pension plan.[61] The holding in *Schweitzer* stated, "[w]e now modify *Copeland*

51. *See Copeland*, 91 N.M. at 414, 575 P.2d at 104.
52. *Id.*
53. 94 N.M. 345, 610 P.2d 749 (1980).
54. *Id.* at 347, 610 P.2d at 751. The New Mexico Supreme Court has never dealt with the issue of non-defined pension plans. These are essentially plans in which the employer invests the pension money in securities but makes no predictions or promises as to what the benefits will be worth at the time of retirement. *See* DAVIDSON, *supra* note 5. However, it would seem that the logic of *Ridgeway* regarding profit sharing would also apply to the non-defined plans; therefore, the community property value at the time of divorce would amount to the market value of the securities in the employee's share of the non-defined plan. Few employers currently have non-defined pension plans, because federal regulations like ERISA have made them costly to the employer. *Id.*
55. *Copeland*, 91 N.M. at 412, 575 P.2d at 102.
56. 99 N.M. 320, 657 P.2d 1169 (1983).
57. *Id.*
58. 103 N.M. 612, 711 P.2d 889 (1985).
59. *Id.* at 615, 711 P.2d at 892.
60. *Id.* at 612, 711 P.2d at 889. *Schweitzer* primarily addresses the issue of whether pension benefits that were awarded by the courts to a non-working spouse on a "pay as it comes" basis can be transferred through bequest. The New Mexico Supreme Court held that only payments resulting from direct community contributions to the pension plan can be transferred to the relatives of a deceased spouse. *Id.* Payments beyond those directly linked to the community's contributions terminate at death. *Id.*
61. *Id.* at 615, 711 P.2d at 892.

prospectively to hold that upon the dissolution of marriage, unless both parties agree otherwise, the trial court must divide community property retirement benefits on a 'pay as it comes' basis."[62] This doctrine remained the law of New Mexico until 1993 when *Ruggles* was decided.

The *Schweitzer* court was troubled by the fact that under the "lump sum" method the working spouse bore the entire risk that the pension would never be realized or received.[63] If the working spouse should die prematurely or for some other reason be unable to obtain the vested and matured pension benefits, as might occur if the plan itself went bankrupt, he or she would not receive an equal portion of the pension asset under *Copeland*.[64] The *Schweitzer* court stated that "the inequality would be compounded if the employee spouse died first, having received only a portion of his or her divided share but having paid the ex-spouse the present value of all of his or her estimated lifetime share under the lump sum decree."[65] The court had also grown weary of the ambiguities inherent in the "lump sum" method and the resulting litigation.[66] These ambiguities typically included choosing an appropriate interest rate to discount the future stream of cash flows, and estimating the life span of the working spouse.[67]

IV. RATIONALE OF THE RUGGLES COURT

Ruggles reversed *Schweitzer*, returning New Mexico to the "lump sum" method of distribution for pension assets upon divorce. The *Ruggles* decision affirmed the underlying philosophy of community property as expressed in *Copeland*: "[T]he fundamental principle that property attributable to community earnings must be divided equally when the community is dissolved."[68] Another tenet of New Mexico's community property law, as expressed in *Hertz v. Hertz*, is "the desirability of granting each spouse complete and immediate control over his or her share of the community property in order to ease the transition of the parties after dissolution."[69] The *Ruggles* court sought to provide both spouses with control of their prospective shares of the working spouse's pension plan.[70]

The *Ruggles* court rejected the rationale of *Schweitzer*, stating that while the working spouse may bear the risk of early death and the resulting pension forfeiture under the lump sum method, the non-working spouse is in greater need of immediate liquid assets, because he or she

62. *Id.* at 615, 711 P.2d 892.
63. *See supra* note 23 and accompanying text.
64. *Schweitzer*, 103 N.M. at 615, 711 P.2d at 892.
65. *Id.*
66. *See id.*; *see also infra* note 79.
67. *Id.*
68. *Ruggles*, 116 N.M. at 58, 860 P.2d at 188 (quoting *Copeland*, 91 N.M. at 411, 575 P.2d at 101).
69. Hertz v. Hertz, 99 N.M. 320, 330, 657 P.2d 1169, 1179 (1983) (quoting Cunningham v. Cunningham, 96 N.M. 529, 531, 632 P.2d 1167, 1169).
70. *Ruggles*, 116 N.M. at 52, 860 P.2d at 182.

may not have a job.[71] In addressing *Schweitzer*, the *Ruggles* court noted that it is impossible to develop a system where both parties in a divorce share the risk associated with community pension plans:

> [W]e think it impossible to devise a system that, in all cases, will result in both spouses bearing the risk of forfeiture equally. Although this is the professed goal of the reserved jurisdiction or "pay as it comes in" method, its achievement of that goal is illusory.[72]

The *Ruggles* court found that the "pay as it comes" method did not foster a better sharing of the risk, because "the court has the prospect of relitigating the parties' precise shares of the pension payments when the employee decides to retire. This is not an equal sharing of the risk."[73]

The *Ruggles* court also addressed the problem of the complex equations that are necessary to discount a future stream of cash flows to a net present value to determine a lump sum and found that such equations are not too complicated to be workable.[74] Although the *Ruggles* court admitted that pension plans are "different from other assets whose current values may be more easily fixed,"[75] the court concluded that such contingencies can be accounted for using accepted actuarial and statistical techniques.[76] The court also pointed out that the "pay as it comes" method is fraught with its own ambiguities, including the difficulty in calculating the precise value added to the pension during coverture when determining the share of the pension payments owed to the non-working spouse.[77]

In *Ruggles*, the court found that the lack of control over one's community share after divorce is a particularly odious aspect of the "pay as it comes" method, because it contravenes the notion of an equal and fair division of the community assets.[78] Echoing the rationale from the *Gillmore* decision in California, the *Ruggles* court stated "[e]ven when the husband has not yet retired, he has the ability to frustrate his wife's

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71. *Id.* at 64, 860 P.2d at 194.
72. *Id.*
73. *Id.*
74. *Id.*
75. *Id.*
76. *Id.* at 65, 860 P.2d at 195. Insurance actuarial tables are fairly uniform and can be used to accurately estimate the average life span of a person given certain identifiable risk factors. However, in the net present value equation, the one variable which must be set arbitrarily is the discount rate. This can have a significant impact on the value of the pension plan to the non-working spouse. In the case of Nancy Ruggles, her husband's future stream of cash flows from the Sandia pension was estimated to be $1570.71 per month. The marital settlement agreement stipulated that Nancy should receive 48% of that, or $753.94 per month. Assuming that Joseph would live 20 years beyond his earliest retirement date, the following calculations illustrate the difference in Nancy's lump sum payment given a 5% and a 10% discount rate:

NPV OF AN ORDINARY ANNUITY AT 5% = $114,240.99
NPV OF AN ORDINARY ANNUITY AT 10% = $78,126.75

For a complete discussion of net present value equations see ROSS ET AL., CORPORATE FINANCE 74-101 (2d ed. 1990).
77. *Ruggles*, 116 N.M. at 65, 860 P.2d 195.
78. *Id.*

receipt of her as yet unpaid portion of the retirement benefits."[79] The New Mexico court borrowed another argument from *Gillmore*, stating that the immediacy with which a person receives a particular asset is a factor of the asset's value.[80]

At trial, an expert witness summarized the problem when he observed that under the "pay as it comes" method, every day Joseph Ruggles remained on the job after his earliest retirement date decreased the value of his wife's community share in the pension plan.[81] Accordingly, the court sought to give Nancy Ruggles control over her community assets, even though a full lump sum distribution was not practical in that case.[82] In awarding Nancy Ruggles a pro-rated share of payments equal to her share of the pension, the court may have created a compromise between "lump sum" and "pay as it comes," but the holding reiterated the court's preference for full "lump sum" distribution in cases where there are sufficient community assets.[83]

V. ANALYSIS

The doctrine of community property as it applies to timing and distribution of pension plans creates a dilemma between awarding both spouses equal risk or equal control over the pension assets of the community. The two goals are mutually exclusive. The desire to spread the risk is expressed in *Schweitzer*, which prevented one spouse from bearing all the risk that pension assets would never actually be received; whereas the desire to share control is expressed in *Ruggles*, which prevents one spouse from having sole control over the timing of pension asset distribution.[84]

The logic of *Schweitzer* remains sound, despite an eloquent criticism in *Ruggles*. Nevertheless, the *Schweitzer* holding is a cold-hearted syllogism made without regard to the end result, which often creates hardship for the non-working spouse. While it is true that under the "lump sum" method the working spouse bears the risk of early death and therefore forfeiture of the pension, the fact that the working spouse has died prevents him or her from suffering any hardship over the loss of the pension. A more valid criticism of the "lump sum" method, which was not addressed in either *Schweitzer* or *Ruggles*, is that under a "lump sum" method of distribution, the court is transforming the unrealized pension (an asset which frequently is not devisable) into liquid assets

79. *Id.* at 66, 860 P.2d at 196.

80. *Id.* (citing Gillmore v. Gillmore, 629 P.2d 1, 4 (Cal. 1981)).

81. *Ruggles*, 116 N.M. 56, 860 P.2d 186. A malicious ex-spouse could prevent his wife or her husband from receiving any of the benefits from the pension plan by remaining on the job until death. Many plans do offer a survivor benefit, but the employee usually has the power to designate a beneficiary or an option to not have a survivor benefit. *See* OLDHAM, DIVORCE, SEPARATION AND DISTRIBUTION OF PROPERTY § 7.10 (1987).

82. *Ruggles*, 116 N.M. at 62, 860 P.2d at 192.

83. *Id.* at 66, 860 P.2d at 196.

84. Schweitzer v. Burch, 103 N.M. 612, 615, 711 P.2d 889, 892 (1985).

which the non-working spouse can transfer to someone else upon his or her death. The non-working spouse can also transfer his or her share of the entire pension asset *inter vivos*. The working spouse must wait for the payments to arrive and is left with assets which terminate on death or decrease in value when a survivor benefit option is chosen.[85]

Despite this consideration, the *Ruggles* court chose the more compassionate method of distribution in awarding the non-working spouse control over his or her community assets. The court apparently found the effects of *Schweitzer* to be too harsh on non-working spouses who could be left penniless and jobless after a divorce, especially if the community's assets were based primarily in the working spouse's pension plan. In theory, if the interest rate is properly determined, the "lump sum method" should be fair to both spouses as the working spouse is compensated for the loss of immediate liquid assets by the larger, undiscounted pension benefits received when he or she retires.

VI. IMPLICATIONS

It is unclear how trial courts are to implement the *Ruggles* decision, because the *Ruggles* court expresses a preference for one method of distribution, enforces another and allows the trial courts flexibility to choose among several others.[86] On an abstract level, the court embraces the "lump sum" method as the method of choice,[87] but the remand instructions in *Ruggles* suggest that the assets should be paid in installments as if Joseph had retired when he was eligible to retire.[88] This is not an application of the "lump sum" method, but it obviously remains an acceptable method of distribution in New Mexico. This is especially true if there are insufficient tangible assets in the community to make a "lump sum" payment. Furthermore, the *Ruggles* court allows trial courts an option to use the "pay as it comes" method, if that method is the only practical one under the circumstances.[89] By reinstating the trial court decision,[90] the *Ruggles* court is expressing confidence in the ability of the trial courts to make the proper decisions given the new flexibility of the *Ruggles* holding. The "lump sum" method is now preferred in New Mexico, but trial courts have wide latitude in dividing assets if a lump sum distribution is not practical.

Now that the "lump sum" method is once again the preference in New Mexico, vagaries of calculating a present value for future pension

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85. ERISA requires "qualified" pension plans to have a survivorship benefit option. "Qualified plans" are those that meet Internal Revenue Service requirements for tax advantaged status. Such status allows the employee to postpone paying taxes on the benefits until they are actually received. However, choosing the survivor benefits option usually decreases the monthly pension payments, because there is a significant chance that the payments will continue for a longer period of time. *See* OLDHAM, *supra* note 81, § 7.10 (1987).

86. *Ruggles*, 116 N.M. at 66, 860 P.2d at 196.

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

benefits will probably remain the focus of litigation, and most parties to such litigation will be forced to hire expert witnesses. In particular, the proper discount rate to be used in the lump sum calculation will be a source of dispute. Attorneys for the non-working spouse will argue for a low discount rate, thus increasing the lump sum payment,[91] but such a strategy may backfire if the lump sum exceeds the community's liquid assets. The courts can then award a "lump sum" in installments, as was the case in *Ruggles*, but this method involves yet another interest rate calculation and largely nullifies the benefits of an immediate distribution of property. In such cases, the trial court may be forced to revert to the "pay as it comes" method. The *Ruggles* court recognized this possibility: "[i]f there are no other assets, or insufficient assets, or unsuitable assets, with which to satisfy (or secure) a lump sum distribution, the court may be forced to award the nonemployee spouse's share 'as it comes in.'"[92] Thus, divorce attorneys would be well advised to choose their discount rates prudently.

One could infer from the *Ruggles* decision that the cases which followed and expanded *Copeland* are once again valid law in New Mexico, but the issue remains open to debate. In particular, it is unclear whether courts will enforce the landmark decision in *Ridgeway* regarding the valuation of profit sharing plans at their current net worth.[93] Furthermore, it is unclear whether the *Hertz v. Hertz* decision[94] allowing distribution of unvested and unmatured plans will be enforced since *Ruggles* concerned only vested and matured assets.[95]

VII. CONCLUSION

Ruggles represents a return to the *Copeland* decision with most of the problems inherent with the "old lump sum" method. In this sense, the *Ruggles* decision amounts to little more than a choice between the lesser of two evils. However, the *Ruggles* decision allows trial courts wide latitude in distributing assets if a lump sum distribution is not practical. The instructions to the *Ruggles* trial court on remand also suggest a third alternative, which would allow the working spouse to pay the lump sum in installments.

Attorneys who practiced in New Mexico during the post-*Schweitzer* era are faced with a new set of vagaries and ambiguities. These variables will become weapons in the hands of those who are skilled in mathematics and the language of finance. Those practitioners will manipulate the

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91. *See supra* note 54 and accompanying text.
92. *Ruggles*, 116 N.M. at 67, 860 P.2d at 197.
93. *See supra* note 45 and accompanying text.
94. 99 N.M. 320, 657 P.2d 1169 (1983).
95. *Ruggles*, 116 N.M. at 54, 860 P.2d at 184. In addition to keeping a watchful eye on the New Mexico Supreme Court's treatment of *Copeland* and its progeny, a careful practitioner should keep abreast of all changes in federal laws governing pension plans because the U.S. Supreme Court has held that such federal laws can preclude states from applying their own law. Hisquierdo v. Hisquierdo, 99 U.S. 802 (1979); *see supra* note 21.

variables to their advantage, but for many attorneys and judges, *Ruggles* will remain a troublesome enigma solely within the domain of the expert witness.

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