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DIVISION AND DISTRIBUTION OF THE COMMUNITY INTEREST IN DEFINED BENEFIT PENSIONS: *SCHWEITZER RECONSIDERED**

PHOEBE CARTER** and JOHN MYERS***

I. INTRODUCTION

Since the New Mexico Supreme Court designated pension benefits as community property subject to division on dissolution of marriage,¹ New Mexico courts have been grappling with the problem of how to divide and distribute these benefits equitably.² These efforts, however, have been unsuccessful for two reasons. First, the courts have divided pension benefits without providing a comprehensive definition of the community interest in a pension. Second, the courts have distributed these benefits without a clear analysis of the alternative distribution methods.³ In *Schweitzer v. Burch*,⁴ the New Mexico Supreme Court addressed both the division and distribution issues, but failed to resolve the two problems.

Retirement benefits earned in a community property state during coverture are community property subject to division upon dissolution of marriage.⁵ New Mexico statutes define community property as "property acquired by either or both spouses during marriage which is not separate property."⁶ Separate property is defined as "property acquired by either

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1. *LeClert v. LeClert*, 80 N.M. 235, 453 P.2d 755 (1969).

2. As used here, "divide" means to determine what part of a pension is the community property of both spouses and what part is the separate property of the employee spouse. "Distribute" means to convey one-half of the community interest to the non-employee spouse. The terminology clearly distinguishes two separate activities. The court has not maintained the distinction and sometimes has used the term division to encompass both activities or to mean distribution. See *Schweitzer v. Burch*, 103 N.M. 612, 711 P.2d 889 (1985), for an example of the use of the term division to mean distribution.

3. The options often are categorized as the "offset" method, which generally occurs at the time of divorce, and the "deferred" method, which generally begins at the time of retirement. In the offset method, the non-employee spouse receives non-pension assets to offset his or her share of the community interest in the pension and the employee spouse retains the entire pension. Troyan, *Pension Evaluation and Equitable Distribution*, 10 FAM. L. REP. (BNA) 3001, 3006 (1983). In the deferred method, each party receives a share of the retirement benefits. *Id.* at 3008. See *infra* text accompanying notes 115-25 for a discussion of these options.

4. 103 N.M. 612, 711 P.2d 889.

5. *Otto v. Otto*, 80 N.M. 331, 455 P.2d 642 (1969). *Accord* *Hughes v. Hughes*, 96 N.M. 719, 722, 634 P.2d 1271, 1274 (1981); *LeClert*, 80 N.M. at 237, 453 P.2d at 757.

6. N.M. STAT. ANN. § 40-3-8(B)(Repl. Pamp. 1986).

spouse before marriage or after entry of a decree of dissolution of marriage."⁷ Upon divorce, New Mexico trial courts must divide equally the community property of the spouses.⁸ The New Mexico Supreme Court regards retirement benefits as a method of employee "compensation for services rendered in the past."⁹ Since 1969, the supreme court has held the following types of retirement benefits to be community property subject to division upon dissolution of marriage: military retirement pay,¹⁰ public employee retirement benefits,¹¹ profit sharing plan benefits,¹² federal civil service disability benefits,¹³ federal civil service medical retirement benefits,¹⁴ and military disability retirement pay.¹⁵

Some general parameters have emerged to guide the division of pension benefits.¹⁶ The problem with the general parameters is that they do not sufficiently interpret the concept of community property in terms of the specific provisions of the pension plan which, in turn, establish the value of the pension. Thus, the definition of the community interest in pension benefits is incomplete. Section II of this Article describes the types of pension plans and the principal provisions of defined benefit plans.

The first decision to deal specifically with the division of pension benefits in terms of a pension plan provision appeared in *Schweitzer*.¹⁷ In determining the inheritability of the community interest of the non-employee spouse, the court held that if the non-employee spouse dies, the interest of the decedent's estate in the pension is limited to a value equal to one-half of the contributions made by the employee spouse to the pension plan.¹⁸ Therefore, the inheritable community interest in a pension is defined in terms of the amount of employee contributions. Section III of this Article demonstrates not only that *Schweitzer* provides a poor definition of the community interest in a pension in the context of inheritability, but also that the *Schweitzer* definition should not be used in the context of dividing pension benefits at divorce.

Schweitzer also addressed the issue of distributing the community inter-

7. N.M. STAT. ANN. § 40-3-8(A)(1)(Repl. Pamph. 1986). Other classes of separate property such as gifts, bequests, and devises are set out in § 40-3-8, but they are not at issue here.

8. *Otto*, 80 N.M. at 332, 455 P.2d at 643.

9. *LeClert*, 80 N.M. at 236, 453 P.2d at 756.

10. *LeClert*, 80 N.M. 235, 453 P.2d 755; *Otto*, 80 N.M. 331, 455 P.2d 642.

11. *Copeland v. Copeland*, 91 N.M. 409, 575 P.2d 99 (1978).

12. *Ridgway v. Ridgway*, 94 N.M. 345, 610 P.2d 749 (1980); *Hertz v. Hertz*, 99 N.M. 320, 657 P.2d 1169 (1983).

13. *Hughes*, 96 N.M. 719, 634 P.2d 1271.

14. *Luxton v. Luxton*, 98 N.M. 276, 648 P.2d 315 (1982).

15. *Stroshine v. Stroshine*, 98 N.M. 742, 652 P.2d 1193 (1982).

16. The general parameters are that the community interest is limited to those retirement benefits earned during coverture in community property states. *Otto*, 80 N.M. at 331, 455 P.2d at 642.

17. 103 N.M. 612, 711 P.2d 889.

18. *Id.* at 615, 711 P.2d at 892.

est.¹⁹ The New Mexico Supreme Court held that "upon dissolution of marriage, unless both parties agree otherwise, the trial court must divide community property retirement benefits on a 'pay as it comes in' basis."²⁰ The court's reasoning in support of this decision reflects a misunderstanding of the related, but distinct, issues of the uncertainty regarding future events and the risk to the parties associated with that uncertainty in the distribution of pension benefits.²¹ Thus, the choice of the "pay as it comes in" distribution method is arbitrary. Section IV of this Article shows that *Schweitzer* unnecessarily limits the discretion of the trial courts to consider the effects of each distribution method on the parties in a particular divorce.

The issues of division and distribution of pension benefits have become increasingly important in divorce actions because pension benefits comprise a growing proportion of marital assets.²² This Article evaluates both the factors which distinguish the community interest from the separate interest of the employee spouse for purposes of division and the factors which determine the nature of uncertainty and the allocation of risk associated with distribution. Section V analyzes the *Schweitzer* decision and its rationale in light of these factors.

II. ACQUISITION OF PENSION BENEFITS

A. Types of Pension Plans

There are two basic types of pension plans: defined benefit plans and defined contribution plans.²³ In defined benefit plans, a formula determines the amount of the periodic retirement benefits.²⁴ The formula incorporates factors which relate to the employment record of the employee. On the other hand, defined contribution plans operate essentially as sav-

19. *Id.*

20. *Id.*

21. See *infra* text accompanying notes 147-83.

22. L. WEITZMAN, *THE DIVORCE REVOLUTION* (1985). In her research of divorcing couples in California in the wake of no-fault divorce, Lenore Weitzman found the nature of accumulated property to be changing. Rather than real or personal property, couples during marriage had acquired "career assets," such as pensions. *Id.* at 110. Ms. Weitzman defined career assets as "tangible and intangible assets that are acquired as a part of either spouse's career or career potential." *Id.* Career assets include pensions, the good will value of a business or profession, a professional education and license, and insurance benefits. *Id.* at 113-21, 121-24, 124-35, and 135-39. Ms. Weitzman contends that career assets should be considered property and divided upon divorce because the assets were accumulated during marriage, at least in part, and because all marital property cannot be divided without including those assets. *Id.* at 110.

23. BUREAU OF LABOR STATISTICS, U.S. DEPT. OF LABOR, BULL. NO. 2262, *EMPLOYEE BENEFITS IN MEDIUM AND LARGE FIRMS*, 1985 at 49, 72 (1986) [hereinafter cited as BLS].

24. *Id.* at 49.

ings plans.²⁵ The employer and sometimes the employee contribute to the employee's retirement account. The amount available for retirement depends on the amount contributed over the years and the amount of accumulated interest.²⁶

The two types of plans operate in fundamentally different ways. Under defined benefit plans, the employer is obligated to pay benefits based on the formula related to the work history of the employee.²⁷ Under defined contribution plans, benefits depend on the amount invested in the name of the employee and the yield on the investment.²⁸ The employer has no obligation to ensure a predetermined level of retirement pay.²⁹

Pension plans are categorized also as contributory plans or non-contributory plans.³⁰ Under contributory plans, both the employee and employer contribute to the pension fund. Under non-contributory plans, only the employer contributes to the pension fund.³¹ In defined benefit plans, the retirement benefit is not dependent on the amount of employee contributions.³² Alternatively, in defined contribution plans, any employee contributions and accumulated interest on them make up part of the fund available at retirement.³³ The rest of the fund is comprised of employer contributions and associated interest.³⁴

Because defined contribution plans are essentially savings plans, their value at any time, including at divorce, is determined easily. The value of such plans is the amount of accumulated contributions plus interest as of the valuation date.³⁵ It follows that the value of the community interest in defined contribution plans is the amount of contributions made during coverture in community property states plus accumulated interest on these contributions. In contrast, interpreting the community interest in a defined benefit pension in terms relevant to the provisions of a specific plan is

25. *Id.* at 72-74. Typical defined contribution plans include salary reduction plans (401(k) plans), savings plans, employee stock ownership plans (ESOPs), and profit sharing plans. *Id.* at 73-74.

26. *Id.* at 72.

27. *Id.* at 49.

28. *Id.* at 72.

29. *Id.*

30. *Id.* at 55.

31. *Id.* at 55, 73-74. About 90 percent of participants in defined benefit plans of medium and large firms make no contributions. *Id.* at 55. Of defined contribution plans, salary reduction (401(k)) and savings plans are contributory by definition; ESOPs are non-contributory by law; profit sharing plans are non-contributory by definition. *Id.* at 73-74.

32. *Id.* at 49.

33. *Id.* at 72.

34. *Id.*

35. COMMERCE CLEARING HOUSE, RETIREMENT BENEFITS AND DIVORCE, § 702 (1984) [hereinafter cited as CCH]; *Johnson v. Johnson*, 131 Ariz. 38, 43, 638 P.2d 705, 710 (1981). For stock plans, the value at any time is the market value of the stock.

more difficult. This Article, therefore, concentrates on defined benefit plans.³⁶

B. Provisions Affecting the Amount of the Periodic Payment

The value of a defined benefit pension is comprised of two elements. One element is the amount of the periodic payment, which is determined by the pension plan formula. The other element is the number of payments, which is determined by the dates at which payments may begin and end as well as the frequency of payments.³⁷ Provisions affecting the amount of the periodic payment are discussed first. Section II.C addresses provisions affecting the number of payments.

1. Service Years and Income

In most cases, the basic formula in a defined benefit plan specifies the amount of the periodic retirement benefit as a function of three factors:³⁸ the number of years the employee has been a participant in the pension plan;³⁹ the employee's average income over a specified period;⁴⁰ and a percentage rate. Stated as a formula, these three factors appear as follows:

$$\text{Annual Benefit} = \text{Service Years} \times \text{Average Income} \times \text{Rate.}$$

For example, an employee with twenty years of plan participation, an average income of \$30,000 for the specified period, and a plan rate of 2 percent would receive a pension of \$12,000 per year, or \$1,000 per month.

It is worth noting that only information on income, service years, and the plan rate is required to determine the amount of the periodic benefit.⁴¹

36. Another reason for concentrating on defined benefit plans is that they are the predominant type of pension plan. About 80 percent of the employees of medium and large firms are participants in defined benefit plans, while 53 percent are participants in defined contribution plans. BLS, *supra* note 23, at 49, 72. In addition, many government pensions are defined benefit plans, including federal civil service, military, and New Mexico state and local government (PERA) and education (ERA).

37. The distinction between provisions affecting the amount of the payment and those affecting the number of payments is the authors' and is important to the discussion of uncertainty and risk. See *infra* text accompanying notes 147-83.

38. BLS, *supra* note 23, at 49.

39. Often, but not always, the number of service years is the same as the period of employment. 26 U.S.C. § 410(a)(1) (1982).

40. Commonly, this factor is the average of the five greatest earning years. Earnings-based formulas apply to 70 percent of covered employees. The other common formula specifies a dollar amount per year of service and applies to 29 percent of covered employees. BLS, *supra* note 23, at 49.

41. Some pensions provide for automatic cost-of-living adjustments to the periodic benefit based on the change in an index, such as the Consumer Price Index. *Id.* at 54. Other pensions make *ad hoc* cost-of-living adjustments to benefits. *Id.* at 53. For pensions with cost-of-living adjustments, the benefit formula determines the payment at retirement. Subsequent payments are based on the initial payment and any adjustments made to reflect changes in the cost of living. *Id.* at 54.

In addition, the amount of employee contributions to the pension plan is irrelevant to the determination of the periodic benefit.⁴²

2. Vesting

The vesting provision also affects the amount of the periodic payment. Vesting is the degree to which an employee's rights to his or her retirement benefits are non-forfeitable.⁴³ Vested benefits are not contingent on an employee's future service.⁴⁴ There are two general types of vesting provisions: cliff vesting and graduated vesting.⁴⁵ Under cliff vesting, an employee is not vested at all until a specified number of service years has been completed.⁴⁶ Under graduated vesting, an employee achieves partial vesting with each service year.⁴⁷ Taking the vesting factor into account, then, the general expression of the benefit formula is:

$$\text{Annual Benefit} = \text{Service Years} \times \text{Average Income} \times \text{Rate} \\ \times \text{Vesting Percent.}$$

Thus, for a pension calculated to be \$12,000 per year,⁴⁸ an employee who is 50 percent vested at retirement will receive pension benefits of \$6,000 per year.

C. Provisions Affecting the Number of Periodic Payments

1. Age at Pension Maturity

In addition to providing the basis for determining the amount of the periodic benefit, pension plans specify the conditions that an employee⁴⁹ must satisfy to become eligible⁵⁰ to retire.⁵¹ Eligibility for retirement

42. See *infra* text accompanying notes 217-34 for an analysis of *Schweitzer* on contributions.

43. 26 U.S.C. § 411(a) (1982).

44. FINANCIAL ACCOUNTING STANDARDS BOARD, ACCOUNTING STANDARDS, INDUSTRY STANDARDS, § Pe5.427 (1986) [hereinafter cited as FASB].

45. The Tax Reform Act of 1986, Pub. L. No. 99-514, 100 Stat. 2085 (1986), amended the minimum vesting standards of The Tax Code, 26 U.S.C. § 411(a) (1982), to allow either five-year vesting (graduated or cliff) or three- to seven-year vesting (graduated vesting reaching 100 percent at seven years). Prior to this change in the law, the most common form of vesting was ten-year cliff. BLS, *supra* note 23, at 54.

46. For example, assuming a five-year cliff vesting plan, the employee is zero percent vested during the first five years of service, but 100 percent vested thereafter.

47. For example, an employee's pension vests at the rate of 20 percent each year for five years.

48. The \$12,000 is assumed to be based on service years, income, and the plan rate.

49. For simplicity, the term "employee" is assumed to be synonymous with pension plan participant.

50. When the conditions of eligibility have been met, the pension is generally said to have "matured."

51. This Article will limit its discussion to retirement with full benefits. Pensions may also provide for early retirement at reduced benefits. In *Mattox v. Mattox*, 105 N.M. 479, 734 P.2d 259 (Ct. App. 1987), the New Mexico Court of Appeals rejected early retirement provisions as a basis for determining the community interest in a pension. Moreover, because the reduced benefits are generally actuarially adjusted to reflect the longer payout, the value of early retirement at reduced benefits is often actuarially equivalent to retirement with full benefits. BLS, *supra* note 23, at 50.

generally is determined by the employee's age and service years.⁵² For example, a plan might specify that an employee may retire and start receiving benefits at age 60 if the employee has accumulated 25 service years, but must wait until 65 to retire if the employee has only 5 service years.

Pension plans must also address the effect of early termination⁵³ on eligibility. Most pension plans⁵⁴ provide for deferred vested pensions because not all employees continue to work for the same employer until they become eligible to retire. Under a deferred vested pension, the amount of the periodic payment is determined by the plan formula based on income and service years during the period the individual is employed and reduced to reflect the vesting percent achieved as of termination.⁵⁵ If termination occurs before the employee becomes eligible to retire, however, benefit payments do not begin at termination. Instead, they begin at the "deferred vested retirement age."⁵⁶

2. Age at Death

The relationship between the age at pension maturity and the age of the employee/retiree at death determines the number of payments. Benefits generally will cease when the employee dies.⁵⁷ Thus, the employee's age at death affects the number of payments received. Given the age of the employee at pension maturity, the longer the employee lives after retirement, the greater the number of payments received, and vice versa. This

52. Age and service years are usually inversely related in the eligibility rules. The greater the number of service years, the lower the retirement age, and vice versa. Given an eligibility age and the birth date of the employee, it is possible to determine an eligibility date. Thus, the terms "age" and "date" can be used interchangeably in the context of eligibility.

53. As used here, "termination" refers to the voluntary or involuntary separation of the employee from employment.

54. All plans covered by The Employee Retirement Income Security Act of 1974, Pub. L. 93-406, 88 Stat. 829 (1974), must provide for deferred vested pensions.

55. See *supra* text accompanying notes 43-48.

56. Sometimes, but not always, the deferred vested retirement age is the age at which the employee would have become eligible to retire had employment continued. BLS, *supra* note 23, at 54. Not all pensions define the deferred vested retirement age in this way. Some pensions specify a deferred vested retirement age that is different than the age at which the employee would have become eligible had employment continued. If so, there are two eligibility dates: one for continued employment and one for early termination. This Article uses the terms "age at pension maturity" or "maturity date" to refer to eligibility in general. When it is necessary to distinguish between the two alternative eligibility ages, this Article uses the term "eligibility age" (or date) to refer to eligibility based on continued employment and "deferred vested retirement age" (or date) to refer to the retirement age provisions of the deferred vested pension.

57. Provisions for survivor benefits extend the payments beyond the death of the employee but reduce the amount of each payment. *Id.* The result is a larger number of payments, with smaller dollar amounts, which are generally actuarially equivalent to the larger payments which end at the death of the employee. *Id.* at 55. Actuarial equivalence means that they have the same expected value at the date of retirement as the larger benefits without survivor provisions. Therefore, this Article ignores survivor benefits in its discussion.

point is obvious, but it has significance for the analysis of uncertainty and risk in Section IV.

In summary, the two major elements required to determine the total value of a defined benefit pension are the amount of the periodic payment and the number of periodic payments.⁵⁸ The amount of the periodic payment is a function of service years, income, plan rate, and vesting.⁵⁹ The age at pension maturity and the age at death determine the number of periodic payments.⁶⁰ Given the total value of a defined benefit pension, the value of the community interest can be determined by defining the amount and the number of periodic payments earned during marriage.

III. DIVISION OF PENSION BENEFITS

How should pensions be divided? That is, how should the community portion of a pension be distinguished from the separate property of the employee spouse? The heart of the problem is interpreting the general principle that pension benefits earned in community property states during coverture are community property, while pension benefits acquired before marriage, after divorce, or outside community property states contribute to the value of the separate property of the employee spouse.⁶¹ In order to determine what part of a specific pension has been earned during coverture, the community interest must be defined more specifically. It is on this point that the New Mexico Supreme Court has remained silent.⁶² The value of the community interest can be defined in terms of the specific provisions of the pension plan. After the value is determined, the community share of the benefits can be divided.

A. *The Amount of the Periodic Payment*

1. Service Years Adjustment

The New Mexico Court of Appeals has recognized⁶³ a "service years adjustment," which has been described as follows:

The benefits payable each month should be divided [sic; multiplied] by a fraction, the numerator of which represents the number of years of coverture during which the participant earned the benefits under the plan, and the denominator of which reflects the number of years

58. See *supra* text accompanying note 37.

59. See *supra* text accompanying notes 38-48.

60. See *supra* text accompanying notes 49-57.

61. *Otto*, 80 N.M. 331, 455 P.2d 642.

62. In *Schweitzer*, 103 N.M. 612, 711 P.2d 889, the court addressed the inheritable community interest in a pension, but did not address the community interest outside the context of inheritability.

63. *Mattox*, 105 N.M. at 483, 734 P.2d at 263.

of service during which plan benefits were accrued. The result will reflect the portion of the benefits which is community property. . . .⁶⁴

An Arizona case illustrates the principle. In *Van Loan v. Van Loan*,⁶⁵ the parties married in March 1957 and divorced in February 1974. The husband had served nineteen years and five months in the armed forces at the time of divorce.⁶⁶ The Arizona trial court determined the formula to divide the community interest in the military pension benefits to be:

$$\frac{1}{2} \times 17 \text{ married years/number of husband's service years.}^{67}$$

The number of husband's service years was unknown at the divorce date because the husband did not plan to retire after 20 years of service.⁶⁸ In the above formula, one-half represents the wife's part of the community share of the military pension benefits. The remaining fraction represents a service years adjustment to determine the community interest in the pension.

A more general expression of the adjustment is:

$$\begin{aligned} \text{Annual Community Benefit} &= \text{Annual Benefit} \\ &\times \text{Married Service Years/Total Service Years.} \end{aligned}$$

Recall that:

$$\begin{aligned} \text{Annual Benefit} &= \text{Service Years} \times \text{Average Income} \times \text{Rate} \\ &\times \text{Vesting Percent.} \end{aligned}$$

Then substituting yields:

$$\begin{aligned} \text{Annual Community Benefit} &= \text{Total Service Years} \times \\ &\text{Average Income} \times \text{Rate} \times \text{Vesting Percent} \times \\ &\text{Married Service Years/Total Service Years.} \end{aligned}$$

Stated more simply, the formula is:

$$\begin{aligned} \text{Annual Community Benefit} &= \text{Married Service Years} \times \\ &\text{Average Income} \times \text{Rate} \times \text{Vesting Percent.} \end{aligned}$$

To summarize, the service years adjustment measures the period of coverture and uses married service years⁶⁹ in the pension formula instead

64. Neerken, *New Mexico Community Property Law and the Division of Retirement Plan Benefits Pursuant to the Dissolution of Marriage*, 13 N.M. L. REV. 641, 653 (1983).

65. 116 Ariz. 272, 569 P.2d 214 (1977).

66. *Id.* at 273, 569 P.2d at 215.

67. *Id.*

68. Twenty service years is the earliest eligibility date for military pensions, which vest and mature simultaneously after twenty years. *LeClert*, 80 N.M. at 236, 453 P.2d at 756.

69. To be precise, the number of married service years in community property states is the correct measure of coverture in this context.

of total service years. Only married service years contribute to the community share of the pension, while service years accumulated outside the marriage contribute to the employee's separate property. Adjustment of the service years factor in the pension formula, therefore, is consistent with the general rule that benefits earned outside coverture do not contribute to the value of community property.

2. Income Adjustment

The service years adjustment is not the only way to distinguish between the community and separate interests in the pension benefits. In *Van Loan*,⁷⁰ Justice Holohan strongly dissented from the majority's apparent acceptance of the service years adjustment as the only adjustment because, in his view, it divested the employee spouse of his separate property.⁷¹ The service years adjustment failed to distinguish from the community interest the employee's separate interest in post-marriage pay increases.⁷² Justice Holohan objected to the court's failure to distinguish between the community and separate interests in terms of the income factor of the benefit formula.

In the formula used here, the appropriate adjustment would be to multiply the annual benefit by the ratio of the average income during marriage to the average income used to compute the total pension benefit. The resulting formula is:

$$\begin{aligned} \text{Annual Community Benefit} &= \text{Married Service Years} \times \\ &\quad \text{Total Average Income} \times \text{Rate} \times \text{Vesting Percent} \times \\ &\quad \text{Married Average Income/Total Average Income.} \end{aligned}$$

Stated more simply, the formula is:

$$\begin{aligned} \text{Annual Community Benefit} &= \text{Married Service Years} \times \\ &\quad \text{Married Average Income} \times \text{Rate} \times \text{Vesting Percent.} \end{aligned}$$

Without such an adjustment to the income factor,⁷³ the non-employee spouse may claim the benefit of any post-divorce pay raises earned by the employee spouse.⁷⁴ These raises, either merit or cost-of-living, represent the separate property⁷⁵ of the employee spouse because they occur after divorce.⁷⁶

70. 116 Ariz. at 275, 569 P.2d at 217 (Holohan, J., dissenting).

71. *Id.*

72. *Id.*

73. For defined benefit pensions which are based on a dollar amount per year of service, rather than average earnings, the income adjustment is unnecessary and inappropriate. See *supra* note 40.

74. *Mattox*, 105 N.M. at 483, 734 P.2d at 263.

75. An exception may exist in a situation in which future pay raises are guaranteed as part of an employment contract. In such a situation, it could be argued that the future raises are a right existing at the time of the divorce and therefore that the raises are part of the community.

76. Cost-of-living adjustments made to the benefit amount after an employee retires (see *supra* note 41) are another matter. These adjustments may be on an *ad hoc* basis or may be specified as

Following Justice Holohan's reasoning,⁷⁷ it is clear that the failure to adjust all factors in the pension plan formula will result in an inadequate legal definition of the community interest in pension benefits. The separate property of the employee spouse will be included in the community interest without such adjustments. Thus, the service years adjustment accounts for the time factor in the pension benefit formula, while the income adjustment accounts for the income factor.

3. Vesting Adjustment

Treatment of the vesting factor raises somewhat more complex issues. The difficulty is the determination of the appropriate weight to be given to the degree of vesting accrued during coverture. As with the other factors which define the community interest in the pension, the approach to the vesting issue is suggested by the relationship between the principles of community property and the provisions of pension plans.

There are two reasonable methods for incorporating vesting into the definition of the community interest in the pension.⁷⁸ One method is to define the community interest in terms of the degree of vesting achieved by the employee at termination. The degree of vesting accrued during marriage would be irrelevant under this alternative. For example, suppose an employee was 50 percent vested at divorce, worked after the divorce until becoming 75 percent vested, and then quit. If vesting at termination defines the community interest, 75 percent vesting would be used in the pension formula (along with the service years and income during marriage) to determine the community interest in the pension. This approach incorporates post-divorce events (the accrual of 25 percent of the vesting) in the community interest. It also means that the community interest in the periodic payment is not known at the date of divorce.

In spite of these problems with using vesting as of termination to define the community interest, this seems to be the direction recently taken by

part of the pension plan. *Id.* Although these adjustments are made after the divorce, because they apply to the pension and not the employment of the employee spouse, they are essentially part of the pension rights acquired during coverture. It would therefore be appropriate to include these adjustments in the community interest. The New Mexico Court of Appeals, however, in *Madrid v. Madrid*, 101 N.M. 504, 684 P.2d 1169 (Ct. App. 1984), held that *ad hoc* cost-of-living adjustments to the retirement benefit amount are the separate property of the employee spouse.

77. *Van Loan*, 116 Ariz. at 275, 569 P.2d at 217 (Holohan, J., dissenting).

78. A third alternative would be to ignore vesting completely. Not only does this violate the principle that the community interest should be defined with reference to the principles of community property and the provisions of the pension, but it could result in the employee spouse being deprived of any interest in the pension. For example, suppose that a pension was entirely accumulated during coverture and, ignoring vesting, had a benefit of \$1,000 per month at divorce. When the pension was divided at the divorce date, the non-employee spouse would receive one-half, or \$500 per month. If the pension was 50 percent vested at the divorce, and if the employee was terminated immediately after the divorce date, the entire pension would be \$500 per month ($\$1,000 \times 50\%$). The non-employee spouse would get 100 percent of the pension. Thus, at the very least, the degree of vesting at termination must be considered in defining the community interest.

the New Mexico courts.⁷⁹ The New Mexico Court of Appeals in *Berry v. Meadows*⁸⁰ held that "[w]hile rights to benefits under a retirement plan may never vest or mature due to contingencies and unforeseeable occurrences, wife was, nevertheless, entitled to have her portion of the contingent interest computed and divided."⁸¹ In the same case, the Court of Appeals also relied on *Hughes v. Hughes*,⁸² which held that the time of vesting was not significant in determining whether retirement benefits were separate or community property.⁸³

The second approach to incorporating vesting is to define the community interest in terms of the vesting accrued during coverture.⁸⁴ This definition would be consistent with the rule that pre-marriage and post-divorce events contribute to the separate property of the employee spouse. Under a graduated vesting provision, the definition of community interest takes at face value vesting at the time of marriage and the time of divorce. The formula defining the community pension benefit is:

$$\text{Annual Community Benefit} = \text{Married Service Years} \times \\ \text{Married Average Income} \times \text{Rate} \times \text{Married Vesting Percent.}$$

A definition, however, which takes vesting at face value at the date of divorce may cause problems in the case of cliff vesting. Under a cliff vesting provision, an employee is not vested at all until a specified number of service years has been completed.⁸⁵ If the parties divorced after the employee spouse accrued four years and eleven months during coverture under a five-year cliff vesting provision, then the non-employee spouse would be allocated no interest in the pension. In one sense, vesting in this case is achieved entirely after the divorce. In another sense, it is clear that all five years, including the four years and eleven months accrued during coverture, contributed to the vesting of the pension.⁸⁶

An alternative to treating vesting at face value is to substitute a graduated vesting formula in cases of pensions with cliff vesting provisions. For example, if the divorce occurs at the end of the fourth year of a five-year cliff vesting period, a vesting adjustment would be set at 80 percent. A linear adjustment of this kind is consistent with generally accepted accounting standards.⁸⁷ The adjustment, of course, would have no effect

79. *Berry v. Meadows*, 103 N.M. 761, 713 P.2d 1017 (Ct. App. 1986); *Hughes*, 96 N.M. 719, 634 P.2d 1271.

80. 103 N.M. 761, 713 P.2d 1017.

81. *Id.* at 768, 713 P.2d at 1024.

82. 96 N.M. 719, 634 P.2d 1271.

83. *Id.* at 722, 634 P.2d at 1274.

84. DiFranza and Parkyn, *Dividing Pensions on Marital Dissolution*, 55 CAL. ST. B.J. 464, 466 (1980); CCH, *supra* note 35 at § 702.

85. See *supra* notes 45-46 and accompanying text.

86. *LeClert*, 80 N.M. at 236, 453 P.2d at 756.

87. FASB, *supra* note 44, § Pe5.116.

on the pension itself because the pension would remain unvested.⁸⁸ Credit, however, would be given to the non-employee spouse for years which ultimately contributed to vesting. The substitution of a graduated vesting formula for pensions with cliff vesting provisions also results in pensions with cliff vesting provisions being treated comparably to pensions with graduated vesting provisions. That is, for all pensions, credit would be given for the contribution made to vesting by years of coverture.

Three points are worth noting here. First, the service years, income, and vesting adjustments all specifically define the community interest in the pension in terms of the pension plan provisions. The pension plan defines pension benefits in terms of the employment record of the employee spouse. The service years, income, and vesting adjustments distinguish between the community interest and the separate interest of the employee spouse by defining the community interest in the amount of the periodic payment in terms of the employment record during coverture.⁸⁹

Second, if the service years, income, and vesting adjustments are made, the community interest in the amount of the periodic payment can be determined with certainty at the time of divorce. Only married service years, married average income, and the percentage vested during marriage define the community interest in the amount of the periodic payment. These factors are known at divorce.

Third, the adjustments are unrelated to the separate issue of distribution.⁹⁰ The definition of the community interest does not depend on the time or method of distributing that interest. Rather, division of the community's property interest in the periodic payment depends on the definition of the community interest in terms of the provisions of the pension plan.

B. The Number of Periodic Payments

Consideration of the number of payments will complete the definition of the community interest in a pension. The relationship between pension maturity and age at death determines the potential number of payments.⁹¹ Payments may begin when the employee satisfies the eligibility rules of the pension plan and end when the employee dies. Thus, the number of potential payments is a function of both pension plan provisions and natural factors.

88. See *infra* note 156 and accompanying text for an explanation of the treatment if a cliff vesting pension never becomes vested.

89. The provisions for deferred vested pensions provide a useful guide to understanding the community interest in the amount of the periodic payment. That is, consider what the periodic payment would be if employment ended on the day of the divorce (and started no earlier than the marriage date). The periodic payment amount under a deferred vested pension is equal to the community interest as defined here.

90. See *infra* text accompanying notes 123-26.

91. See *supra* text accompanying notes 49-57.

1. Age at Pension Maturity

The eligibility rules of the pension plan specify the earliest age at which the employee may retire.⁹² In virtually all cases, the employee may choose to postpone retirement by working beyond this age. This option gives rise to alternative definitions of the community interest in the number of payments: actual retirement age and eligibility age.⁹³

If the community interest is defined in terms of the actual retirement age, the community interest in the periodic payments begins when the employee retires. This definition corresponds to the "pay as it comes in" method of distribution. Evidently, this alternative was selected in *Schweitzer* because the court chose a "pay as it comes in" basis for dividing pension benefits.⁹⁴ However, *Schweitzer* was actually discussing issues related to distribution, rather than division, in spite of the court's use of the term "divide."⁹⁵ The court did not specifically analyze the retirement age issue.

In contrast, the Court of Appeals in *Mattox v. Mattox* held the eligibility age to be appropriate.⁹⁶ If the community interest is defined in terms of the eligibility age, the community interest in the periodic payments begins when the employee's right to receive benefits matures. At this point the benefits become a property right no longer contingent on satisfaction of eligibility requirements.⁹⁷

It is not clear whether the New Mexico Supreme Court will ultimately opt for the eligibility age or the actual retirement age to define the community interest. Eligibility age, however, is superior to the actual retirement age for several reasons. First, the eligibility age corresponds to the employee's rights to the pension.⁹⁸ Second, the eligibility age is known at the date of divorce.⁹⁹ Third, a definition based on eligibility age avoids a situation in which the employee spouse delays retirement to prevent the ex-spouse from receiving pension payments.¹⁰⁰ Fourth, this definition has been adopted in practice in New Mexico and elsewhere.¹⁰¹ Finally,

92. See *supra* text accompanying notes 49-56.

93. The issues related to the definition of the start of the community interest are relevant only if the employee has not yet retired. If the employee has retired at the date of divorce (the pension is "in pay status"), the community interest in the pension has already begun.

94. 103 N.M. at 615, 711 P.2d at 892.

95. *Id.*

96. 105 N.M. at 483, 734 P.2d at 263. *Accord* Wilder v. Wilder, 85 Wash.2d 364, 534 P.2d 1355 (1975).

97. This is inherent in the definition of eligibility. See *supra* text accompanying notes 49-56.

98. See *supra* text accompanying notes 49-52.

99. Eligibility age can be determined at the date of divorce based on the employment record of the employee and the eligibility provisions of the pension plan.

100. *Mattox*, 105 N.M. at 483, 734 P.2d at 263.

101. *Id.*; Troyan, *Pension Evaluation in Light of the Retirement Equity Act of 1984*, 11 FAM. L. REP. (BNA) 3005 (March 19, 1985); DiFranza and Parkyn, 55 CAL. ST. B.J. at 468.

Internal Revenue Code provisions¹⁰² facilitate implementation of this option in deferred distributions.¹⁰³

Even so, the eligibility age may be preempted by the pension plan in certain circumstances. If employment is terminated prior to the eligibility age specified by the pension plan, the deferred vested retirement age set by the pension plan becomes the first age at which benefit payments may begin.¹⁰⁴ The deferred vested retirement age in some cases is different than the eligibility age.¹⁰⁵ If employment is terminated before vesting is achieved in a cliff vesting plan, no payments will be made. The distinction between voluntary and involuntary termination becomes significant in this context. On one hand, voluntary termination by the employee spouse is similar to the voluntary choice not to retire at the eligibility age. In the case of postponed retirement, the eligibility age is the better definition of the community interest because it corresponds to the employee's right to the pension and is known at the time of divorce.¹⁰⁶ Similar reasoning suggests that the employee spouse's voluntary decision to quit before the eligibility age should not affect the community interest. Thus, the number of periodic payments in the community interest should be defined in terms of the eligibility age.

On the other hand, involuntary termination does not result from a choice made by the employee spouse.¹⁰⁷ At the time of the divorce, whether or not the employee will be terminated involuntarily is not known. For this reason, the possibility of involuntary early termination may require special consideration. This issue is discussed below in Section IV.

2. Age at Death

The other factor determining the number of payments is the death of the employee/retiree. The rights of the employee to the pension end with his or her death. Therefore, if the community interest is defined in terms of the provisions of the pension plan, the end of the community interest will correspond to the death of the employee spouse.¹⁰⁸

In summary, the community interest in pension benefits can be defined

102. 26 U.S.C. § 414(p)(4) (Supp. III 1985).

103. See *infra* text accompanying notes 115-19 for an explanation of the deferred distribution method.

104. See *supra* text accompanying notes 53-56.

105. See *supra* note 56.

106. See *supra* text accompanying notes 98-103.

107. Because involuntary termination is the only situation in which the deferred vested retirement age is the appropriate age for defining the community interest, the provisions of a deferred vested pension do not always provide a reliable guide to determining the number of payments in the community. Compare *supra* note 89.

108. Schweitzer, 103 N.M. 612, 711 P.2d 889. See accord *Wilder*, 85 Wash. 2d 364, 534 P.2d 1355.

in terms of specific provisions of the pension plan.¹⁰⁹ The amount of the community interest in the periodic benefit should be defined in terms of service years, average income, and vesting accrued during coverture, all of which are known at the date of divorce.¹¹⁰ The community interest in the number of payments should be defined by the eligibility age¹¹¹ (or deferred vested retirement age in the case of involuntary termination)¹¹² and the age of death of the employee.¹¹³ These definitions of the community interest not only are consistent with legal principles,¹¹⁴ but also provide a specific basis for the valuation and division of the community interest at the divorce.

IV. DISTRIBUTION OF PENSION BENEFITS

Once divided, one-half of the community share of the pension benefits must be distributed to the non-employee spouse. There are two general distribution methods: deferred and offset.¹¹⁵ A deferred distribution is made when pension benefits become payable to the employee and is tied to the provisions in the pension plan relating to the payout of benefits.¹¹⁶

With a deferred distribution, the distribution can be made to the non-employee spouse from the pension plan¹¹⁷ or from the employee spouse. In either case, the basis for determining both the amount of each periodic payment and the number of periodic payments constituting the community interest must be specified at the time of divorce.¹¹⁸

An offset distribution is made before the benefits become payable to the employee and/or uses a payout scheme different from that of the

109. See *supra* text accompanying notes 38-41.

110. See *supra* text accompanying notes 63-89.

111. See *supra* text accompanying notes 96-107.

112. See *infra* text accompanying notes 155-57 and 162-63 for a discussion of the treatment of the problems caused when the eligibility age (for continued employment) and the deferred vested retirement age (for termination before reaching the eligibility age) are different.

113. See *supra* text accompanying note 108.

114. See *supra* text accompanying notes 5-15, 45, and 102.

115. The terms "offset" and "deferred" can be misleading. Each term describes only one of several characteristics of the distribution. "Offset" refers to the source of funds for the distribution, while "deferred" refers to the time at which the distribution is made.

116. Troyan, *supra* note 101, at 3008.

117. To facilitate the distribution of private pension benefits after divorce, the Retirement Equity Act of 1984, Pub. L. 98-397, 98 Stat. 1426 (1984), required private pension plans to comply with court orders incorporated in a divorce decree. 26 U.S.C. § 414(p)(4) (Supp. III 1985). Pursuant to the act, a qualified domestic relations order (QDRO) must be prepared for submission to the pension plan. *Id.* The QDRO must be based on a judgment, decree, or order made pursuant to domestic relations law regarding community property. *Id.* It must identify the plan by name and number, and provide the names and addresses of the participant and the beneficiary, called an alternate payee. *Id.* The order must state either the amount or percentage of benefits, or the method to determine the amount to be paid to the alternate payee or non-employee spouse. *Id.* Also, the QDRO must state the number of payments or the period of time during which the payments are to be made. *Id.*

118. Troyan, *supra* note 101, at 3005; DiFranza and Parkyn, *supra* note 84, at 467.

pension plan.¹¹⁹ The distribution of one-half of the community interest to the non-employee spouse may occur at the time of the divorce or later.¹²⁰ Since it occurs prior to the maturity date of the pension or uses a different payout scheme,¹²¹ it must be comprised of assets other than the pension.¹²² Like a deferred distribution, an offset distribution requires determination at the time of divorce of the basis upon which the pension is to be divided.¹²³ In addition, the offset method requires the derivation of the present value¹²⁴ of the community interest in future benefits in order to make a distribution.¹²⁵

A. The Distribution Issue

The two distribution options have one important characteristic in common. Each method requires definition of the community interest in the pension and then division based on that definition before the community interest can be distributed. It is not possible to avoid answering any of the questions related to the definition of the community interest¹²⁶ simply by selecting one or the other distribution method. Definition and division are distinct from, and must precede, distribution.

Notwithstanding this similarity, the two methods of distribution appear to differ in several ways. These differences can be categorized as uncertainty, risk, implementation, and financial circumstances of the parties. The principal issue becomes whether or not these differences provide a basis for always choosing a deferred distribution. If so, the New Mexico

119. Troyan, 11 *supra* note 101, at 3006. A "pay as it comes in" distribution may correspond to the definition of deferred distribution used here. If the employee postpones retirement past the eligibility date, however, the actual pension payout will not correspond to the community interest in the number of payments, and "pay as it comes in" will not correspond to "pay as it comes due." If the community interest in the pension is based on the rights of the employee to the pension, rather than the actual claim on those rights made by the employee, "pay as it comes due" is the appropriate version for deferred distribution. "Pay as it comes due" also corresponds to the eligibility age criterion established in *Mattox*, 105 N.M. at 483, 734 P.2d at 263. For purposes of this discussion, however, a "pay as it comes in" distribution will be considered a deferred distribution.

120. Although offset distributions often are made in a lump sum at the time of divorce, there is nothing inherent in the offset method which prevents delay to a later date or making the distribution in a number of payments.

121. An example of such a distribution would be a lump sum distribution at maturity when such an option is not offered by the pension plan.

122. The pension is "offset" by other assets.

123. See *supra* text accompanying notes 63-113.

124. The term "present value" refers to a financial equivalent at one time to a value at another time. C. BANNOCK, R. BAXTER & R. REES, *THE PENGUIN DICTIONARY OF ECONOMICS* 323 (1977). The process used to determine present value is called "discounting." *Id.* Discounting is nothing more than accounting for the earning power of money, that is, accounting for interest earned on money invested. *Id.* at 118. Any time the distribution calls for a payment scheme that is different from that provided for by the pension, a present value is required to account for the time difference between the distribution and the pension payout.

125. *Copeland*, 91 N.M. at 414, 575 P.2d at 104; *Johnson*, 131 Ariz. 38, 638 P.2d 705.

126. See *supra* text accompanying notes 61-114.

Supreme Court is justified in mandating the use of deferred distributions. If not, an offset distribution may be preferable in a particular divorce. Absent agreement by the parties on this issue, the trial court, apprised of the facts, should select the distribution method best suited to the circumstances of a particular divorce. To select the method which fairly and equitably distributes pension benefits, the trial court must consider uncertainty, risk, implementation, and financial circumstances of the parties.

The following analysis will concentrate on the related, but distinct, issues of uncertainty and risk for two reasons. First, these issues are often misunderstood. Second, concern about uncertainty and risk was an important rationale in the *Schweitzer*¹²⁷ decision to limit trial court discretion in choosing a distribution method.

Courts in several states have devoted attention to the related issues of uncertainty and risk.¹²⁸ The Supreme Court of Arizona, in *Johnson v. Johnson*,¹²⁹ said that future benefits generally must be discounted¹³⁰ for mortality, interest, probability of vesting, and probability of continued employment.¹³¹ In *Wilder v. Wilder*,¹³² the Supreme Court of Washington considered the length of time remaining before eligibility matured, other employment options open to the employee spouse, the likelihood that the employee spouse might abandon the pension right to pursue another career, and the community's investment in the pension to offset against other assets awarded the non-employee spouse, if the employee spouse actually abandoned the pension.¹³³ The California Supreme Court, in the case of *In re Marriage of Brown*,¹³⁴ stated that a court must consider the possibility of death or the termination of employment because these events might destroy pension rights before they matured.¹³⁵ In *Ramsey v. Ramsey*,¹³⁶ the Supreme Court of Idaho remanded the case for determination of

127. 103 N.M. at 615, 711 P.2d at 892.

128. *Johnson*, 131 Ariz. 38, 638 P.2d 705; *In re Marriage of Brown*, 15 Cal.3d 838, 544 P.2d 561, 126 Cal.Rptr. 633 (1976); *Ramsey v. Ramsey*, 96 Idaho 672, 535 P.2d 53 (1975); *Copeland*, 91 N.M. 409, 575 P.2d 99; *Schweitzer*, 103 N.M. 612, 711 P.2d 889; *Wilder*, 85 Wash.2d 364, 534 P.2d 1355.

129. 131 Ariz. 38, 638 P.2d 705.

130. The court used the term discounting in an unconventional way. Discounting is appropriate to account for interest but is not appropriate to account for mortality, probability of vesting, or probability of continued employment. See *supra* note 124 regarding discounting; see *infra* text accompanying notes 161-73 for a discussion of the other factors mentioned by the court.

131. 131 Ariz. at 42, 638 P.2d at 709. The court addressed the issue of uncertainty, and held discounts for mortality and the probability of vesting inapplicable because the pension rights were vested. *Id.*

132. 85 Wash.2d 364, 534 P.2d 1355.

133. *Id.* at 367, 534 P.2d at 1358.

134. 15 Cal.3d 838, 544 P.2d 561, 126 Cal.Rptr. 633.

135. *Id.* at 844, 544 P.2d at 567, 126 Cal.Rptr. at 639.

136. 96 Idaho 672, 535 P.2d 53.

present value based on actuarial tables reflecting the employee spouse's life expectancy.¹³⁷

In *Copeland v. Copeland*,¹³⁸ the New Mexico Supreme Court referred to the *Wilder*, *Brown*, and *Ramsey* factors before concluding that a flexible approach was required to analyze the issue of deriving a present value.¹³⁹ The court remanded the case for further consideration and ultimate determination of how the benefits should be distributed.¹⁴⁰

Uncertainty at the time of divorce about the ultimate value of the pension generally has been viewed by the courts as a drawback to the use of offset distributions. An often cited rationale for deferred distributions is apportionment between the parties of the risk¹⁴¹ that the retirement benefits will not vest or mature.¹⁴² Other rationales include the uncertainty affecting vesting or maturation of pension benefits,¹⁴³ and better enabling the court to determine the actual proportion of benefits derived from community property.¹⁴⁴ Concern about uncertainty and risk ultimately led the Supreme Court of New Mexico to mandate in *Schweitzer* that "unless both parties agree otherwise, the trial court must divide community property retirement benefits on a 'pay as it comes in' basis."¹⁴⁵

In these decisions, the courts have failed to consider comprehensively the relationship among the factors affecting distribution. In turn, this has led to confusion which is particularly pronounced with regard to uncertainty and risk. The rationale for the holding in *Schweitzer* reflects just such a misunderstanding of uncertainty and risk.¹⁴⁶

B. Uncertainty

For purposes of this discussion, the term "uncertainty" means lack of knowledge at the date of divorce about the values taken by one or more of the parameters which define the community interest in the pension. Uncertainty about future events is a factor often considered by the courts

137. *Id.* at 680, 535 P.2d at 61.

138. 91 N.M. 409, 575 P.2d 99.

139. *Id.* at 414, 575 P.2d at 104. *Schweitzer* allows the offset method to be used if both parties in the divorce agree to its use. 103 N.M. at 615, 711 P.2d at 892. If the parties do not agree, a deferred distribution must be used. *Id.*

140. *Copeland*, 91 N.M. at 414, 575 P.2d at 104.

141. The term "risk" is sometimes used interchangeably with the term "uncertainty." The two terms are related but not synonymous. See *infra* text accompanying notes 147-84.

142. In *Re Brown*, 15 Cal.3d at 844, 544 P.2d at 567, 126 Cal.Rptr. at 639; *Shill v. Shill*, 100 Idaho at 437, 599 P.2d at 1008 (1979); *Copeland*, 91 N.M. at 413, 575 P.2d at 103; *Schweitzer*, 103 N.M. at 615, 711 P.2d at 892; *Cearley v. Cearley*, 544 S.W.2d at 666 (Tex. 1976).

143. In *Re Brown*, 15 Cal.3d at 844, 544 P.2d at 567, 126 Cal.Rptr. at 639.

144. *Shill*, 100 Idaho at 437, 599 P.2d at 1008.

145. 103 N.M. at 615, 711 P.2d at 892.

146. See *infra* text accompanying notes 235-46.

in evaluating distribution options.¹⁴⁷ Courts have concluded that the amount of uncertainty can be reduced by using a deferred distribution.¹⁴⁸ If the definition of the community interest in a pension is grounded in principles of community property and the provisions of pension plans, however, uncertainty is not materially affected by the distribution option used.¹⁴⁹ The significant difference between the two distribution options lies in the way each option accommodates uncertainty.

1. The Amount of the Periodic Payment

If the definition of community interest in the pension is based on the principle that events outside the marriage period do not contribute to the value of the community, then the value of the community interest in each periodic payment is known at the date of divorce.¹⁵⁰ In other words, if the community interest is defined as proposed in Section III, the choice of the distribution method does not affect the degree of uncertainty about the community interest in the individual benefit payments.¹⁵¹ There is no uncertainty to affect.

2. The Number of Periodic Payments

Two elements remain in the determination of the community interest in the pension which can produce uncertainty at the date of divorce: age at pension maturity and age at death. As discussed in Section III, the number of pension benefit payments properly included in the community depends on the date on which the community interest begins and the date on which it ends.¹⁵² In some circumstances, the former may not be known at the date of divorce, and the latter will never be known at the date of divorce.

a. Age at Pension Maturity

In some situations, there is no uncertainty about the maturity age.¹⁵³

147. *Johnson*, 131 Ariz. at 41, 638 P.2d at 708; *In re Brown*, 15 Cal.3d at 844, 544 P.2d at 567, 126 Cal.Rptr. at 639; *Copeland*, 91 N.M. at 413, 575 P.2d at 103; *Schweitzer*, 103 N.M. at 615, 711 P.2d at 892; *Wilder*, 85 Wash.2d at 367, 534 P.2d at 1358.

148. *In re Brown*, 15 Cal. 3d at 844, 544 P.2d at 567, 126 Cal. Rptr. at 639; *Copeland*, 91 N.M. at 413, 575 P.2d at 103; *Schweitzer*, 103 N.M. at 615, 711 P.2d at 892.

149. See *infra* text accompanying notes 155-74.

150. See *supra* text accompanying notes 63-90.

151. Strictly, there is no uncertainty about the value of the first payment. The value of subsequent cost-of-living adjustments cannot be known in advance. *Ad hoc* cost-of-living adjustments are the separate property of the employee. *Madrid*, 101 N.M. 504, 684 P.2d 1169. Automatic cost-of-living adjustments specified as part of the pension plan are presumably community property. Cost-of-living adjustments are easily accommodated with either distribution method. The possibility of cost-of-living adjustments does not affect the results of this Article's analysis and such adjustments are therefore ignored in the discussion.

152. See *supra* text accompanying notes 91-108.

153. Of course, there is no uncertainty about maturity for pensions which have already matured.

In a pension with the same eligibility and deferred vested retirement ages, there will be no uncertainty if the pension is vested or if the pension is unvested and uses graduated vesting.¹⁵⁴ Termination after the divorce and before either vesting or maturity will produce the same maturity age as continued employment to maturity.

In contrast, uncertainty at the date of divorce about maturity age will exist in two situations. First, for an unvested pension with a cliff vesting provision,¹⁵⁵ pension payments will never begin if the employee is involuntarily terminated after the divorce and before the pension vests.¹⁵⁶ Second, for an unmaturing pension with different eligibility and deferred vested retirement dates, the deferred vested retirement date will apply if the employee is involuntarily terminated after the divorce and before the pension matures. The eligibility date will apply in both situations if the employee continues working.

A deferred distribution will resolve the uncertainty in either situation. By the time the distribution is made, the appropriate date, if any, on which to begin the distribution will be known. An offset distribution can accomplish the same result.¹⁵⁷ In the cliff vesting case, for example, an offset distribution delayed until either vesting or termination occurs will accommodate the uncertainty. In the case with different eligibility and deferred vested retirement ages, an offset delayed until involuntary termination occurs or the pension matures, whichever comes first, will resolve the uncertainty.

Thus, there is no reason to rule out offset distributions on the basis of uncertainty about the maturity age. Neither distribution method can eliminate the uncertainty as of the date of divorce. Both can accommodate it by postponing distribution.

b. Age at Death

The number of payments is also affected by the age at death of the employee spouse.¹⁵⁸ This age is unknowable not only at the date of divorce, but also at the start of distribution with either distribution method. Since a deferred distribution ends with the date of death of the employee

154. See *supra* text accompanying notes 104-06.

155. Under the vesting provisions of the Tax Reform Act of 1986, *supra* note 45, this situation will only apply to employees with fewer than five years of pension plan participation. In most cases, this will mean that the pension will not have much value. Therefore, uncertainty in this situation will be unlikely to have major financial consequences to the divorcing parties.

156. It is useful to view the possibility of not vesting under cliff vesting as affecting the number of payments rather than the amount of the periodic payment. This allows the definition of the community interest in the amount of the periodic payment in cliff vesting pensions to be made as in Section III. See *supra* text accompanying notes 85-88.

157. Offset distributions can also accommodate uncertainty through the use of expected value. See *infra* text accompanying notes 161-74 for an explanation of expected value.

158. See *supra* text accompanying notes 57-60.

spouse,¹⁵⁹ deferred distributions resolve uncertainty about the age at death in the same way that they accommodate uncertainty about the maturity age, that is, by waiting until the age is reached.

The option of dealing with uncertainty about the age at death of the employee by waiting is not a plausible alternative with the offset method.¹⁶⁰ However, the use of expected value is an appropriate way to accommodate uncertainty.

3. Accommodating Uncertainty With Expected Value

It is relatively easy to resolve uncertainty about the dates of retirement and death by using the statistical measure called "expected value" to characterize these elements. This statistical technique weights the value associated with each alternative by the probability that the alternative will occur.¹⁶¹ For example, suppose the uncertainty involves involuntary early termination (and the deferred vested retirement age) versus continued employment (and the eligibility age). Assume that the present value of the community is \$40,000 if the employee works to the eligibility date and \$30,000 if the employee is terminated before the pension matures. Suppose further that the probability of each alternative is equal.¹⁶² Then, the expected present value would be:

$$(0.5 \times \$40,000) + (0.5 \times \$30,000) = \$35,000.$$

A similar expected value approach can be used to accommodate uncertainty about the age at death. The present value of the pension associated with each possible age at death would be multiplied by the probability that the employee would die at each age. An alternative may be to rely on a single expected age at death from an actuarial table. The advantage of the actuarial life expectancy approach is that only one calculation is needed, instead of one for each potential age at death.

It is possible that the expected value used for an offset distribution may not be the exact financial equivalent of a given deferred distribution.¹⁶³ This is because the expected value approach is based on every possible pension (e.g., a pension based on each of two alternative maturity dates) weighted by the probability that each pension will occur. In fact,

159. See *supra* text accompanying note 57.

160. Although formally a lump sum or structured distribution starting at the death of the employee is an offset distribution, it is unlikely that this option would be of much use in most divorces. To maintain this strict formality for the purposes of analysis would obscure, rather than illuminate, the comparison of the two distribution methods and the ways in which they accommodate uncertainty.

161. Expected value is discussed in any college level statistics text.

162. The probability of each alternative would be 0.5, which means there is a fifty-fifty chance of either alternative happening.

163. In fact, the division of property need not be exact. *Ridgway*, 94 N.M. 345, 610 P.2d 749; *Michelson v. Michelson*, 89 N.M. 282, 551 P.2d 638 (1976).

there will be only one pension, and a deferred distribution will be based on that pension.¹⁶⁴

Nevertheless, the expected value approach should not be rejected simply because it is not an exact financial equivalent of a given deferred distribution. In the first place, expected value is a standard statistical technique which has wide application.¹⁶⁵ The fact that it relies on probabilities, rather than certainties, in itself should be no bar to its use to establish the value of the community interest for an offset distribution.¹⁶⁶ Courts have found such a method of dealing with uncertainty acceptable in other contexts.¹⁶⁷

The second reason for not dismissing offset distributions based on expected value is more fundamental. The issue in the division of the community interest in a pension for purposes of divorce is the value of the community interest at the divorce date. In many court discussions of the choice of distribution method,¹⁶⁸ it is apparent that a deferred distribution is viewed as the correct distribution, and an offset distribution is to be judged by how faithfully it represents a financial equivalent of the deferred distribution.¹⁶⁹ The presumption that the deferred distribution is the correct alternative is wrong. Expected value does in fact represent the value of the community interest in the pension at the divorce date. It is irrelevant that the value at a later date may be different. The value of any community asset may be different after the divorce date than on the divorce date. For example, the husband may get stock and the wife a house of equal value. The day after the divorce the house may burn

164. This statement assumes that the community interest is clearly defined and that the implementation of the deferred distribution adequately captures the community interest.

165. The discussion of expected value may seem imposing to those readers without mathematical backgrounds. For those readers, the authors point out that a simple average (arithmetic mean) is an expected value. In the context of offset distributions, expected value may mean nothing more complex than using expected age at death (from an actuarial table) to determine the number of payments.

166. Courts in other jurisdictions have implicitly endorsed the method although they do not explicitly use the term "expected value." *Johnson*, 131 Ariz. 38, 638 P.2d 705; *Wilder*, 85 Wash. 2d 364, 534 P.2d 1355.

167. For example, the computation of earning capacity to establish damages in personal injury and wrongful death cases involves the same compromise in the face of uncertainty about the future. See *Hardie, Pay Now or Later: Alternatives in the Disposition of Retirement Benefits on Divorce*, 53 CAL. ST. B.J. 106, 109 (1978) for a discussion of the acceptance of uncertainty in various legal contexts.

168. *Johnson*, 131 Ariz. 38, 638 P.2d 705; *In re Brown*, 15 Cal.3d 838, 544 P.2d 561, 126 Cal. Rptr. 633; *Shill*, 100 Idaho 433, 599 P.2d 1004; *Copeland*, 91 N.M. 409, 575 P.2d 99.

169. This seems to be the concern in *Schweitzer*. In fact, considerable care must be taken to insure that the deferred distribution accurately reflects the community interest as of the date of divorce. If the community interest is defined based on the principles of community property and the provisions of pension plans as described in Section III, simply specifying that the pension will be distributed on a "pay as it comes in" basis will not necessarily preserve the community interest of the non-employee spouse. Post-divorce voluntary actions of the employee spouse can change the value of the pension and deprive the non-employee spouse of his or her rights.

down or the stock market may take a dive. This does not mean that the community interest was not divided equally and equitably at divorce. The same principle applies to pensions.

To summarize, the uncertainty associated with the value of the community interest in a pension at the time of divorce is, to a large extent, a function of the definition of the community interest.¹⁷⁰ If post-divorce events do not contribute to the community interest¹⁷¹ in the periodic payment, and if the employee's rights to the pension determine the community interest in the number of payments,¹⁷² then the only uncertainties remaining at the date of divorce are associated with the possibility of involuntary termination and with the age at death of the employee spouse. Deferred distributions resolve these uncertainties by waiting for the events in question to occur.¹⁷³ Offset distributions accommodate these uncertainties either by waiting for the events to occur or by using expected value. The use of expected value¹⁷⁴ should preserve sufficiently the equal division of the community so that an otherwise desirable distribution option need not be eliminated from consideration simply because it involves some uncertainties.

In other words, if the division of the community is guided by the principles of community property and pension plan provisions, uncertainty about the community interest as of the divorce date can be reduced to uncertainty about the age at maturity and the age at death. This uncertainty is not affected by the choice of a deferred distribution method. Therefore, the choice of distribution method must be based on considerations other than uncertainty.

C. Risk

Failure to eliminate all uncertainty creates a risk to the divorcing parties. The risk is that one distribution method will produce a pay out with a value different from that of the other distribution method.¹⁷⁵ The following table illustrates the distribution of the risk to the parties.

| If the Deferred | The Best Alternative to the | |
|---------------------|-----------------------------|---------------------|
| <u>Payment is:</u> | <u>Non-employee is:</u> | <u>Employee is:</u> |
| Equal to Offset | Either | Either |
| Less than Offset | Offset | Deferred |
| Greater than Offset | Deferred | Offset |

170. See *supra* text accompanying notes 63-90.

171. N.M. STAT. ANN. § 40-3-8(B) (Repl. 1986).

172. See *supra* text accompanying notes 91-108.

173. See *supra* text accompanying notes 156-60.

174. Expected value can also accommodate any other uncertainties that may result from a definition of the community interest that is different than that proposed by this Article.

175. The difference in value referred to here is not the same as the difference resulting from discounting to present value to arrive at the amount for the offset distribution. Throughout the following discussion, the term "value" means "value equivalent," that is, that the appropriate present value computation has been made for the offset distribution.

If the value of the two alternative distributions is equal, neither party would have a preference based on the value of the distribution. If the deferred payment amount is less than the offset payment amount, the non-employee spouse would be better off with the offset distribution method while the employee spouse would prefer the deferred distribution. Alternatively, if the deferred payment is greater than the offset payment, the non-employee spouse would be better off with a deferred distribution while the employee spouse would prefer an offset distribution.

Assuming that the community interest is defined so that post-divorce events do not affect the community interest, the value of the deferred distribution will be less than the value of the offset distribution if the number of payments under the deferred distribution is fewer than expected.¹⁷⁶ The number of payments will be fewer than expected¹⁷⁷ when maturity is later than expected¹⁷⁸ or when death is earlier than expected. The circumstances which will result in the deferred payment being greater than the offset payment are just the opposite of those listed above.

For example, if the employee believes that the retirement period or the periodic benefit amount will be less than expected, the employee will prefer a deferred distribution. On the other hand, if the employee believes that the retirement period will be longer than expected or that the periodic benefits will be greater than expected, the employee will prefer an offset distribution. The considerations for the non-employee spouse are just the converse of those of the employee spouse.

What does this suggest about agreement between the parties concerning the distribution?¹⁷⁹ Assuming common beliefs about the relationship between offset distribution and deferred distribution, agreement may be difficult to achieve because the parties will prefer different methods of distribution. For instance, if both parties believe that the offset value overstates the deferred value, the employee spouse will opt for the deferred distribution, and the non-employee spouse will opt for an offset distribution. Thus, if the parties agree on the direction of the difference between the two distributions, they will be unlikely to agree on a distribution method. On the contrary, if they disagree about the nature of the difference, they will agree on a distribution method. Finally, if both parties believe that the distributions are equivalent, they will be indifferent to the method of distribution, at least on the grounds of risk.

In summary, at the time of divorce there may be uncertainty about some of the factors affecting the value of the community interest in the

176. Here, the term "expected" means the number of payments used as the basis for the present value computation at the date of divorce.

177. See *supra* text accompanying notes 152-55.

178. This would happen if a deferred vested retirement date applied and the deferred vested date was later than the eligibility date.

179. In *Schweitzer*, the court left to the parties the choice of distribution method. 103 N.M. at 615, 711 P.2d at 892.

pension.¹⁸⁰ This means that the value of an offset distribution may be different from the value of a deferred distribution.¹⁸¹ If so, one spouse will be better off with an offset distribution and the other spouse will be better off with a deferred distribution.¹⁸² The choice of the distribution method cannot eliminate this risk to the parties associated with the selection of a distribution method.¹⁸³

The preference of each party depends on the direction of the difference between the values of the offset and deferred distributions.¹⁸⁴ Selecting an offset distribution simply reverses the risk to the divorcing parties associated with the age at death of the employee spouse relative to the expected age at death. The same is true of uncertainty, and therefore risk, associated with termination. In general, therefore, there is no *a priori* reason to prefer the deferred distribution method based on the existence of uncertainty or risk.

D. Implementation

If neither uncertainty nor risk provides a basis for choosing a deferred distribution, perhaps the consequences of implementation do. In his strong dissent in *Shill v. Shill*,¹⁸⁵ Justice Shepard analyzed several facets of implementation. He concluded that deferred distribution had "all of the vices and none of the virtues" of the offset distribution method.¹⁸⁶ First, the non-employee spouse must await the pleasure of the employee spouse as to the retirement date.¹⁸⁷ If the community interest is defined to begin with the eligibility date,¹⁸⁸ this vice is eliminated.

Second, the non-employee spouse is unable to take immediate control over the share of the community property.¹⁸⁹ If the term immediate control means an ability to convert the property, the employee spouse is similarly restricted. The nature of a pension precludes access to the funds prior to

180. See *supra* text accompanying notes 147-60.

181. See *supra* text accompanying note 164.

182. See *supra* text accompanying notes 175-79.

183. As has been shown, only one extreme distribution method can eliminate uncertainty, and therefore risk. This method postpones distribution to the death of the employee spouse, depriving him or her of the benefit of the pension. See *supra* note 160.

184. See *supra* text accompanying notes 175-79.

185. *Shill*, 100 Idaho at 440, 599 P.2d at 1011 (Shepard, J., dissenting).

186. *Id.* at 441, 599 P.2d at 1012.

187. *Id.*

188. *Id.* The actual retirement date must have been used to start the distribution in *Shill*. If the eligibility date were used, the non-employee spouse would not be dependent on post-divorce retirement decisions by the employee spouse for the start of a deferred distribution. This is one of the advantages of a definition of the community interest based on the provisions of pension plans and the principles of community property. Such a definition results in a deferred distribution starting on the eligibility date. See *supra* text accompanying notes 100-03.

189. *Shill*, 100 Idaho at 441, 599 P.2d at 1012 (Shepard, J., dissenting).

the maturity date in order to provide full benefits in the future.¹⁹⁰ This vice is applicable to both parties.

Third, deferred distribution does not sever the marital relationship finally and totally.¹⁹¹ The Retirement Equity Act of 1984¹⁹² required private pension plans to comply with court orders incorporated in divorce decrees. Military pensions are subject to comparable obligations under the Uniformed Services Former Spouses' Protection Act.¹⁹³ Similar provisions have been extended to state and local government employees in New Mexico.¹⁹⁴ As a result, most non-employee spouses can now deal directly with the pension plan. If severance of the relationship means absence of future contact, this vice is also removed.

Fourth, the non-employee spouse may be required to litigate with the pension fund or with a subsequent widow(er) in order to obtain a rightful share of the community interest in the pension benefits.¹⁹⁵ The same factors¹⁹⁶ which sever the interest of the parties should eliminate the need for future litigation with pension plans. Thus, this disadvantage has been removed as well.

On balance, it does not appear that factors related to the implementation of the distribution method suggest a clear *a priori* preference for either method. Neither party has access to pension funds before the maturity date, both methods can sever the interests of the parties, and neither method requires future litigation to obtain a rightful share of the community interest in the pension benefits. The deferred distribution method, therefore, is not consistently preferable to the offset distribution method.

E. Financial Circumstances of the Parties

The three preceding categories relate to issues which are similar in every divorce where pension benefits must be divided and distributed. They do not dictate the method of distribution. In contrast, the financial circumstances of the parties in each divorce are unique. These circumstances may be determinant. If the parties cannot agree, the trial court is best able to choose the better distribution method. Yet *Schweitzer* precludes trial court adjudication based on these unique circumstances.¹⁹⁷ In

190. See *supra* text accompanying notes 49-56.

191. *Shill*, 100 Idaho at 441, 599 P.2d at 1012 (Shepard, J., dissenting).

192. 26 U.S.C. § 414(p)(4) (Supp. III 1985). See *supra* note 118 for a discussion of QDROs.

193. The relevant provisions are codified at 10 U.S.C. § 1408 (1982). The ex-spouse can obtain distribution directly from the government if during the marriage at least ten years of military service occurred. *Id.* § 1408(d)(2).

194. N.M. STAT. ANN. § 22-11-42.B (Supp. 1987); and § 10-11-136 (Repl. Pamph. 1987).

195. *Shill*, 100 Idaho at 441, 599 P.2d at 1012 (Shepard, J., dissenting).

196. See *supra* text accompanying notes 191-94.

197. 103 N.M. at 615, 711 P.2d at 892.

effect, the court rules in favor of the party who prefers a deferred distribution.

First, the financial consequences for the employee spouse of the distribution may be particularly important. Courts in community property states have given considerable attention to the source of funds for the distribution.¹⁹⁸ In order to employ the offset method of distribution, New Mexico, Idaho, and Arizona require sufficient assets to cover the value of the pension.¹⁹⁹ In addition, Arizona requires lack of undue hardship to the employee spouse.²⁰⁰ Both the courts and the parties are in positions to assess the relative financial status of the parties. Absent agreement of the parties,²⁰¹ the trial court should be able to order an offset distribution if the financial consequences to the employee spouse do not prevent it.

Second, the timing of the divorce relative to pension maturity may be important. For example, a two-year wait to maturity may suggest that some advantages associated with a deferred distribution (such as payment out of the pension fund using a QDRO) outweigh the disadvantages, while a twenty-year wait may suggest the opposite. Absent agreement of the parties,²⁰² the trial court should decide whether or not an offset distribution is warranted under the circumstances of the case.

Third, the tax consequences of distribution may also vary. Pension proceeds normally will be taxable while distributions of community property at divorce will not.²⁰³ Thus, under an offset distribution, the non-employee spouse would receive non-taxable assets, while under a deferred distribution, the non-employee spouse would receive taxable income. Only the parties may consider the effect of these tax treatments. New Mexico courts will not consider this issue because the consequences are considered speculative.²⁰⁴

Finally, the income of the non-employee spouse may be a relevant factor. A non-employee spouse with high current earnings may prefer to defer distribution. Or, a non-employee spouse with little income may need an offset distribution to cover expenses while obtaining or upgrading job skills. In this situation, a dispute, whether genuine or pretextual, would prompt a deferred distribution.

The deferred method of distribution will not always be the better choice

198. *Copeland*, 91 N.M. 409, 575 P.2d 99; *Shill*, 100 Idaho 433, 599 P.2d 1004; *Johnson*, 131 Ariz. 38, 638 P.2d 705.

199. *Copeland*, 91 N.M. at 414, 575 P.2d at 104; *Shill*, 100 Idaho at 439, 599 P.2d at 1010; *Johnson*, 131 Ariz. at 42, 638 P.2d at 709.

200. *Johnson*, 131 Ariz. at 42, 638 P.2d at 709.

201. See *supra* text accompanying notes 179-201.

202. *Id.*

203. *Mattox*, 105 N.M. at 485, 734 P.2d at 265.

204. *Id.*

in all cases. Alone or in combination with the considerations above,²⁰⁵ the financial circumstances of the parties may be determinative. Under *Schweitzer*, however, the trial court must either ratify an agreement of the parties, or declare a deferred distribution without consideration of the merits.²⁰⁶

In summary, an analysis of uncertainty, risk, implementation, and financial circumstances of the parties has shown that the deferred distribution method is not clearly superior in all circumstances. If the community interest in a pension is properly defined, there is no difference in the amount of uncertainty and risk under the two distribution methods.²⁰⁷ There appear to be no significant differences based on severance of interests, access to the pension fund, or enforceability.²⁰⁸ On the other hand, there may be significant differences in the consequences of the distribution method to the parties.²⁰⁹ The financial circumstances of the parties, however, will differ in each case. Therefore, there appears to be no justification for the courts to mandate that one distribution method be used in all circumstances. The decision should be left to the parties, and, absent their agreement, to the trial courts to decide what method better suits the circumstances of a particular divorce.

V. SCHWEITZER RECONSIDERED

In light of the foregoing analysis, the majority and dissenting opinions in *Schweitzer* appear to be unsupported. The principal issue in *Schweitzer* was whether the non-employee spouse's share of the community interest in a contributory pension was devisable upon the non-employee's death when the retired employee spouse continued to receive pension benefit payments.²¹⁰ Mr. and Mrs. Burch divorced in January 1979.²¹¹ In dividing the community property, the court awarded to Mrs. Burch a portion of Mr. Burch's pension to be paid as Mr. Burch's payments came in.²¹² Mrs. Burch died in October 1981 devising her estate to her sister, Ms. Schweitzer.²¹³ Upon Mr. Burch's receipt of pension benefit payments in January 1982, he refused to disburse to Ms. Schweitzer the monthly portion of benefits awarded to Mrs. Burch by decree.²¹⁴ Ms. Schweitzer

205. See *supra* text accompanying notes 147-96.

206. 103 N.M. at 615, 711 P.2d at 892.

207. See *supra* text accompanying notes 147-84.

208. See *supra* text accompanying notes 185-96.

209. See *supra* text accompanying notes 197-204.

210. *Schweitzer*, 103 N.M. at 614, 711 P.2d at 891.

211. *Id.*

212. *Id.*

213. *Id.*

214. *Id.*

sued Mr. Burch on a contract theory for money due.²¹⁵ The district court granted Ms. Schweitzer's motion for summary judgment, finding that Mrs. Burch's right to one-half interest in the community property was devisable.²¹⁶

The Supreme Court of New Mexico reversed the district court with dual holdings, one related to division and the other to distribution of pension benefits. First, the court held that "any order dividing benefits on a 'pay as it comes in' basis must be construed as terminating upon the death of either spouse, unless the amount contributed by the community has not yet been paid out in benefits."²¹⁷ The majority reasoned that the holding would "achieve the objectives of retirement programs in providing subsistence for retired workers while at the same time complying with the community property principles that New Mexico follows."²¹⁸

The court's holding that pension benefits are divisible only up to the amount of the employee contributions creates an arbitrary definition of the community interest in pension benefits. Although the court distinguishes between contributory and non-contributory pension plans,²¹⁹ in neither case would this definition of the community interest be accurate. In the case of contributory plans, the employee spouse's property right in the pension is defined by the pension plan formula, not by the amount of funds contributed or invested (by either the employee or employer) to yield the benefits.²²⁰ In turn, the community interest in the matured benefits is defined by adjusting the plan formula to distinguish between the separate and community interests.²²¹

In the case of non-contributory plans, the court also creates an arbitrary definition of the community interest. The court states that "[i]f the non-employee spouse is awarded a share of the retirement benefits, his or her right to receive them until the benefits terminate is not affected *unless* he or she dies."²²² This contingency is based on the death of the non-employee spouse, an event not reflected in the pension formula or eligibility criteria from which the community interest is derived.²²³ The age at death of the non-employee spouse has nothing to do with the value of the pension. In effect, then, the court declares that the community interest

215. *Id.*

216. *Id.*

217. *Id.* at 615, 711 P.2d at 892.

218. *Id.* at 616, 711 P.2d at 893.

219. *Id.* at 615, 711 P.2d at 892.

220. See *supra* text accompanying notes 27-34.

221. See *supra* text accompanying notes 63-90.

222. *Schweitzer*, 103 N.M. at 615, 711 P.2d at 892, n.4. (Emphasis added).

223. Recall that the employee's right to pension benefits is defined in terms of the employee's service record and age at death. See *supra* text accompanying notes 37-60.

in a non-contributory plan has no value if the non-employee spouse dies before the pension matures.

Justice Stowers in his dissenting opinion supports this position more emphatically.²²⁴ He contends that "[t]he community property interest of a non-employee spouse's interest in retirement benefits should terminate upon his or her death, regardless of whether the retirement plan is contributory or non-contributory."²²⁵ He reasons that "the sole and primary purpose of retirement benefits is to provide subsistence to the employee and his spouse."²²⁶

Justice Stowers relies even more heavily on the objectives of retirement programs than does the majority. The objectives of pension plans are unrelated to the objectives of divorce. While the purpose of retirement programs may be to provide subsistence for retired workers,²²⁷ divorce is intended to legally dissolve the marriage and to determine, divide, and distribute community property, declaring it the separate property of the respective spouses.²²⁸ Merely because some of the community property happens to be benefits generated by a pension plan, it does not follow that distribution determinations regarding community property must achieve the objectives of retirement programs.

Furthermore, the pension represents deferred "compensation for services rendered in the past"²²⁹ by the employee spouse. The pension plan defines the employee's benefits in terms of service years, income, the plan rate, and vesting, and determines the eligibility requirements.²³⁰ Upon satisfaction of these requirements, the employee is eligible to receive deferred compensation in the form of periodic benefits paid from the date of maturity until the employee's death.²³¹ The benefit formula and eligibility rules do not include contingencies of need, marital status, or the survival of an ex-spouse. The employee is entitled, as a property right and by the terms of the pension plan, to receive the deferred compensation earned during the employee's years of service until the employee's death.²³² It follows that the non-employee spouse (or the estate of the non-employee spouse) is entitled similarly, as a community property right and by the terms of the pension plan, to receive a share of the deferred compensation

224. *Schweitzer*, 103 N.M. at 616, 711 P.2d at 893 (Stowers, J., dissenting).

225. *Id.*

226. *Id.*

227. *Id.* at 614, 711 P.2d at 891. It is not clear that this is, in fact, the purpose of pension plans. It is certainly not consistent with the notion of pensions as deferred compensation. *LeClert*, 80 N.M. at 236, 453 P.2d at 756. Moreover, even if true, it is irrelevant.

228. See *supra* text accompanying notes 5-8.

229. *LeClert*, 80 N.M. at 236, 453 P.2d at 756.

230. See *supra* text accompanying notes 37-56.

231. See *supra* text accompanying notes 57-60.

232. See *supra* text accompanying notes 37-60.

earned during coverture until the death of the employee spouse.²³³ By this analysis, the district court was correct in finding that:

The right of the former wife, after a divorce proceeding, to receipt of her Court awarded one-half interest in community property retirement plans of a couple does not cease upon her death merely because the particular form of community property awarded was retirement benefits on a pay as it comes in basis.²³⁴

Schweitzer also held that "upon dissolution of marriage, unless both parties agree otherwise, the trial court must divide community property retirement benefits on a 'pay as it comes in' basis."²³⁵ The rationale was that the holding would assure fairness and equity by eliminating the possibility that the death of either spouse may result in the over payment or under payment of pension benefits to the non-employee spouse.²³⁶ The lump sum (offset) case may "grant to the non-employee spouse an amount that might not ever be received if either spouse died before the projected benefits had been paid out."²³⁷ On the other hand, the deferred case "would operate to the benefit of the employee spouse whose retirement income would not have to be divided after the non-employee spouse's death."²³⁸

The choice of a "pay as it comes in" distribution method can produce an acceptable result from the standpoint of producing a correct division of the community (assuming that community is adequately defined) provided that the employee retires on the eligibility date.²³⁹ As has been shown, however, offset distributions are also consistent with a correct division of the community interest.²⁴⁰ In fact, the proper division of the community interest is independent of the distribution method chosen.²⁴¹ Thus, the preference given by the court for one distribution method has not improved the equity of the division.

In *Schweitzer*, the court discussed the risk to the parties in some detail.²⁴² The court concluded that the risk associated with the death of the employee spouse could be eliminated through the use of a "pay as it comes in"

233. See *supra* text accompanying note 108.

234. *Schweitzer*, 103 N.M. at 614, 711 P.2d at 891.

235. *Id.* at 615, 711 P.2d at 892. The court held only that the parties must agree to the method, not the amount, of the distribution. Thus, there may be some cases in which the trial court would be called upon to determine the amount of the community interest for an offset distribution.

236. *Id.*

237. *Id.*

238. *Id.*

239. If the employee does not retire on the eligibility date, the non-employee spouse will be undercompensated by a "pay as it comes in" distribution.

240. See *supra* text accompanying notes 155-74.

241. *Id.*

242. 103 N.M. at 615, 711 P.2d at 892.

distribution.²⁴³ As the foregoing analysis has shown,²⁴⁴ however, deferring the distribution does nothing to reduce the risk involved in the choice of distribution method. With a deferred distribution, the employee spouse is better off (*vis-a-vis* an offset distribution) if the deferred distribution value is less than the expected value upon which the offset distribution is based, and vice versa.²⁴⁵ The result for the non-employee spouse is the converse. In other words, the risk is distributed between the parties differently under deferred distribution than under offset distribution, but the amount of risk is the same.²⁴⁶ Thus, *Schweitzer* neither improves the equity of the division nor reduces the risk associated with distribution. It does, however, unnecessarily restrict the discretion of the trial courts.

In addition to its two holdings, the court makes two related assertions. First, it asserts that its holdings comply "with the community property principles that New Mexico follows."²⁴⁷ Yet, the court's arbitrary definition of the community interest in pension benefits is tantamount to treating the non-employee spouse's share as contingent on his or her survival rather than as a property right. Treatment of pension rights as contingencies²⁴⁸ was rejected when the New Mexico courts adopted the position that pension benefits were community property subject to division at divorce.²⁴⁹ Because it is impossible to reconcile these differences, the court's holdings, in fact, do not comply with New Mexico's community property principles.

Moreover, the court asserts that "[t]he holding of *Copeland* that retirement benefits are community property subject to division upon dissolution of marriage is not affected by our ruling today."²⁵⁰ In view of the foregoing analysis, it is not possible for the court to adopt a definition of the community interest in pension benefits which is contingent on the non-employee spouse's death and leave the *Copeland* holding unaffected. Contrary to the court's assertion, the court actually has overruled *Copeland* and fifteen years of community property precedent since *LeClert*.

VI. CONCLUSIONS

Courts in New Mexico and other community property states have divided

243. *Id.*

244. *See supra* text accompanying notes 175-84.

245. *Id.*

246. *Id.*

247. *Schweitzer*, 103 N.M. at 616, 711 P.2d at 893.

248. *French v. French*, 17 Cal.2d 775, 112 P.2d 235 (1941).

249. *LeClert*, 80 N.M. 235, 453 P.2d 755. *In accord*, *Van Loan*, 116 Ariz. 272, 569 P.2d 214; *In re Brown*, 15 Cal.3d 838, 544 P.2d 561, 126 Cal.Rptr. 633; *Shill*, 100 Idaho 433, 599 P.2d 1004; *Cearley*, 544 S.W.2d 661; *Wilder*, 85 Wash.2d 364, 534 P.2d 1355.

250. *Schweitzer*, 103 N.M. at 615, 711 P.2d at 892, n.4 (Emphasis added).

the community interest in pensions without first providing a comprehensive definition of the community interest in pensions. Such a definition is provided by the pension plan provisions in compliance with the principles of community property. The community interest in the amount of the periodic payment can be determined with certainty at the date of divorce by relying on service years, income, and vesting adjustments. The community interest in the number of payments can be determined by the relationship between pension maturity and the age of the employee at death. Unlike the amount, the number of payments is uncertain at the date of divorce. This uncertainty, in turn, creates risk.

The New Mexico courts also have been confused about the relationship between uncertainty and risk and the method of distribution of the community interest in pensions. The confusion about uncertainty and risk can be traced, at least in part, to the inadequate definition of the community interest in pensions. This Article has shown that if the definition of community interest is based on the principles of community property and the provisions of pension plans, the amount of uncertainty at the date of divorce is reduced to uncertainty about involuntary termination and the date of death. This uncertainty cannot be reduced by the choice of distribution method. Offset and deferred distributions merely accommodate uncertainty differently. There is, therefore, no basis for preference of either distribution method based on uncertainty.

There is risk, based on uncertainty at the date of divorce, to the parties resulting from the possibility of a difference in the value of the division under the alternative methods of distribution. The choice of distribution method cannot eliminate this risk. Offset and deferred distributions merely allocate the risk to the parties differently. There is, therefore, no basis for preference about the distribution method based on risk.

The differences in how each method implements distribution do not substantially impair the rights of either party. Neither party can access pension funds before the maturity date, both methods can sever the interests of the parties, and neither method requires future litigation to obtain a rightful share of the community interest in the pension benefits. These differences, therefore, do not provide a basis for choosing either distribution method.

Because the choice of distribution method cannot eliminate uncertainty or risk, the financial circumstances of the parties may be more decisive in selecting the distribution method. Each divorce is unique. Therefore, the weight to be given to the factors affecting the distribution decision will be different for each divorce. There is no reason to believe that one distribution method will be more equitable in all circumstances.

The Supreme Court of New Mexico, in *Schweitzer*,²⁵¹ defined the inheritable community interest in a pension in a way which bears no relationship to the principles of community property and the provisions of pension plans. In the same case, the court mandated that unless the parties agree otherwise, the court must divide pensions on a "pay as it comes in" basis.²⁵² In many cases, this distribution will not reflect the community interest in the pension because the community interest does not necessarily begin at the actual retirement date. Moreover, since the *Schweitzer* ruling was based on a faulty analysis of uncertainty, risk, and the distribution method, the court's decision unnecessarily restricts the distribution options of the trial courts in divorce cases.

251. *Id.* at 615, 711 P.2d at 892.

252. *Id.*