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THE DIVISIBILITY OF PENSION INTERESTS ON DIVORCE: THE DISTRICT OF COLUMBIA UPS THE ANTE

The District of Columbia Code provides a statutory scheme for the distribution of marital property upon the entry of a final divorce decree. Absent a valid antenuptial or post-nuptial agreement, all property acquired during coverture, except that acquired by gift, inheritance, bequest or devise, is subject to equitable distribution. The loose framework of the equitable distribution statute has provided the District of Columbia courts with considerable discretion in apportioning marital property. This discretionary power, however, is not without cost. The statute’s lack of specificity leads to speculation on whether certain items, particularly unvested interests in intangible assets, should be included among the property to be distributed. The apportionment problem becomes particularly difficult in

1. Section 16-910 of the District of Columbia Code provides:
   Upon the entry of a final decree of annulment or divorce in the absence of a valid antenuptial or post-nuptial agreement or a decree of legal separation disposing the property of the spouses, the court shall:
   (a) assign to each party his or her sole and separate property acquired prior to the marriage, and his or her sole and separate property acquired during the marriage by gift, bequest, devise or descent, and any increase thereof, or property acquired in exchange therefore; and
   (b) distribute all other property accumulated during the marriage, regardless of whether title is held individually or by the parties in a form of joint tenancy or tenancy by the entireties, in a manner that is equitable, just and reasonable, after considering all relevant factors including but not limited to: the duration of the marriage, any prior marriage of either party, the age, health, occupation, amount and sources of income, vocational skills, employability, assets, debts, and needs of each of the parties, provisions for the custody of minor children, whether the distribution is in lieu of or in addition to maintenance, and the opportunity of each for future acquisition of assets and income. The court shall also consider each party’s contribution to the acquisition, preservation, appreciation, dissipation, or depreciation in value of the assets subject to distribution under this subsection, and each party’s contribution as a homemaker or to the family unit.

2. Id. Although the present statute makes no distinction between sole and concurrent ownership of property, its predecessor did. See D.C. CODE ANN. § 16-910 (1973). The statutory change was designed to facilitate an equitable result in divorce property dispositions without requiring the court to search for strict legal or equitable ownership interests in the nontitled spouse. See Hemily v. Hemily, 403 A.2d 1139, 1142 (D.C. 1979).

3. The goal of a property distribution is to equitably divide between the spouses the property acquired during the marriage with marital funds and efforts. See supra note 1. An unvested interest in an intangible asset, such as a pension interest, becomes problematic
the distribution of pensions because such interests often do not have definite values at the time of the divorce decree. The difficulty in apportionment is compounded by consideration of whether property rights exist in the unvested interest, and if they are found to exist, what role conditions precedent to the receipt of the benefits play in determining their valuation.

In two recent cases, the District of Columbia Court of Appeals has offered guidelines for the application of the District of Columbia's equitable distribution statute to the apportionment of pension interests. In Barbour v. Barbour, the court dealt with the threshold question of whether a Federal Civil Service pension interest was "property" subject to equitable distribution in a divorce proceeding. Barbour involved a divorce in which both spouses were participants in the Federal Civil Service Retirement Plan. At the time of the entry of the divorce decree, the husband's pension had been vested for ten years while the wife's pension had not yet vested. During the course of the marriage, the wife had been responsible for all household chores as well as child care. She also had held part-time jobs outside the home. At the time of trial, the wife was providing full or partial financial support for six children and five grandchildren, while the husband was in default on child support and maintenance payments. Based on the disparate obligations of the parties, the trial court awarded the wife a portion of the husband's pension benefits. It further determined that under no condition was the husband to receive any portion of

4. Since there is no right in the pension interest, and many contingencies such as death, termination, and disability are present prior to the enjoyment of rights, the interest is difficult to value. See infra notes 148-50 and accompanying text.

5. It has been held that the holder of an unvested interest in a pension has no rights in the accrued benefits as long as the plan administrators have not breached their fiduciary duty. See infra notes 121-24 and accompanying text.

6. See supra note 4; infra notes 148-50 and accompanying text.


8. The Federal Civil Service Retirement Plan was developed as a result of the Civil Service Retirement Act. 5 U.S.C. §§ 8301-8348 (1982). The plan is funded by obligatory employee contributions based upon the employee's wage rate. 5 U.S.C. § 8334 (1982).

9. Barbour, 464 A.2d at 917. For a discussion of the concept of vesting and its importance to the divisibility of pension interests, see infra notes 27-37 and accompanying text.

10. 464 A.2d at 917. The factual circumstances presented in Barbour are of the very type that the District of Columbia Council, in promulgating the equitable distribution statute, wished the court to consider in effecting a just and reasonable property distribution. See supra note 1.

11. 464 A.2d at 917.
the wife's pension benefits.\(^\text{12}\)

On appeal, the husband challenged the trial court's decree on two legal theories. First, the husband argued that the trial court misconstrued the equitable distribution statute.\(^\text{13}\) Second, the husband charged that the trial court had abused its discretion when it disallowed him a portion of his wife's pension.\(^\text{14}\) The District of Columbia Court of Appeals rejected these arguments. It reasoned that pension benefits were inextricably bound to the modern employment relationship, and pensions were similar in nature to other deferred income assets.\(^\text{15}\) Thus, the court held that the inclusion of the pension interest as marital property was proper in light of the broad application to be afforded the equitable distribution statute.\(^\text{16}\) Additionally, the court held that the exclusion of the wife's pension benefits from the divisible marital property was within the scope of the trial court's discretion to effect a just and reasonable result.\(^\text{17}\)

In the companion case of \textit{McCree v. McCree},\(^\text{18}\) the District of Columbia Court of Appeals dealt with the question of retroactive application of the equitable distribution statute. During his marriage, the husband in \textit{McCree} had been employed by the federal government for thirty-five years.\(^\text{19}\) After separating from his wife, but prior to the entry of a final divorce decree, the husband retired.\(^\text{20}\) Upon retirement, a federal pension became the sole source of the estranged husband's income.\(^\text{21}\) In applying

\(\text{12. } \text{Id.} \quad \text{Contrary to the husband's assertion, the trial court did not treat the wife's pension as separate property by excluding it from the marital estate. It merely declined to divide this interest. Id. at 921-22.}\)
\(\text{13. } \text{Id.} \text{ at 918.} \quad \text{The thrust of the husband's argument was that since the equitable distribution statute did not refer specifically to pensions, the statutory term "property" could not be broadened by judicial construction to include pensions. Id.}\)
\(\text{14. } \text{See supra note 12.} \quad \text{An extended discussion of abuse of discretion is beyond the scope of this Note. It is sufficient to state that the notion of what constitutes abuse of discretion in a court's apportionment of marital property is well-settled in the District of Columbia. As long as the trial court's determination was based on the totality of the circumstances, the District of Columbia Court of Appeals will not disturb the trial court's decision. There is no requirement that the property be divided equally. For an excellent discussion on the present equitable distribution statute and the discretion afforded the District of Columbia Superior Court in the distribution of marital property, see Hemily v. Hemily, 403 A.2d 1139 (D.C. 1979).}\)
\(\text{15. } \text{Barbour, 464 A.2d at 920. See infra notes 118-19 and accompanying text.}\)
\(\text{16. } \text{464 A.2d at 919.}\)
\(\text{17. } \text{Id. at 922. See supra notes 12, 14.}\)
\(\text{18. } \text{464 A.2d 922 (D.C. 1983).}\)
\(\text{19. } \text{Id. at 925.}\)
\(\text{20. } \text{Id. The couple separated in November, 1978. McCree retired in November, 1980, prior to the a vinculo decree which was issued September 1981. Id.}\)
\(\text{21. } \text{Although the wife had no pension of her own, she eventually may become eligible for modest social security benefits. Id. In addition, the trial court found that the wife suf-}\)
the equitable distribution statute, the trial court apportioned the benefits due under the husband's pension.\textsuperscript{22} He challenged this distribution arguing that, since most of the rights to the benefits had accrued before the statute's effective date,\textsuperscript{23} the division of these benefits amounted to an unconstitutional "taking" of property without due process of law.\textsuperscript{24} The court of appeals affirmed reasoning that, because the equitable distribution statute was aimed at property divisions which would occur after its effective date, the statute's application was intended to be prospective only.\textsuperscript{25} Further, the court emphasized the important state interest in assuring a reasonable allocation of property for the protection of both spouses.\textsuperscript{26}

This Note will examine the propriety of regarding pension interests as marital property subject to the District of Columbia's equitable distribution statute. Distinctions will be drawn between vested and unvested pension interests regarding the congruity of those interests with traditional notions of property. This Note also will discuss the due process concerns caused by retroactive application of the equitable distribution statute to accrued pension benefits. Finally, it will assess methods of valuation and apportionment of the pension interest. The Note will conclude that if flexible methods of valuation and apportionment are employed, retroactive statutory application to vested pension interests does not violate due process and is inherently fair to both spouses. Unvested pension interests, however, should not be included in divisible marital property in the interests of preserving traditional property precepts and the reasonable expectations of the spouses.

\footnote{\textsuperscript{22} McCree, 464 A.2d at 925.}

\footnote{\textsuperscript{23} The effective date of the District of Columbia's equitable distribution statute was April 7, 1977. D.C. Law 1-107, tit. 1, § 107, 23 D.C.R. 8737 (1977). The pension interest in \textit{McCree} had fully vested many years before that date. Additionally, most of the benefits had accrued prior to the effective date. \textit{McCree}, 464 A.2d at 925.}

\footnote{\textsuperscript{24} \textit{McCree}, 464 A.2d at 924. Because his interest in the pension had totally vested prior to the effective date of the statute and his benefits were almost entirely accrued, McCree claimed that the distribution constituted a "taking" of property without due process of law in violation of the fifth and fourteenth amendments to the United States Constitution. \textit{Id. See} U.S. \textit{CONST.} amend. \textit{V}, XIV, § \textit{1}. Unlike the petitioning husband in \textit{Barbour}, McCree did not contest the characterization of his interest as marital property. Indeed, such a characterization was necessary to McCree's due process argument, which, by definition, required that the interest being "taken" was property. The majority of the courts that have considered whether a vested and matured pension right was apportionable as marital property have held such an interest to be includable in the marital estate. \textit{See generally Annot.,} 94 A.L.R.3d 176 (1979).}

\footnote{\textsuperscript{25} \textit{McCree}, 464 A.2d at 926-27.}

\footnote{\textsuperscript{26} \textit{Id.} at 928.
I. THE HISTORICAL DEVELOPMENT OF THE PENSION INTEREST AS MARITAL PROPERTY

A. Vesting

Judicial decisions determining the divisibility of rights in a pension plan have focused on the level of vesting of the pension interest in deciding whether to include it in marital property.\textsuperscript{27} Accrued pension benefits\textsuperscript{28} fall into one of three broad categories. The interest may be vested and matured, vested but not matured, or unvested. If the pension interest is vested and matured, an unconditional right to immediate payment exists.\textsuperscript{29} If the interest is vested but not matured, the interest survives discharge or voluntary termination of the employment relationship before retirement.\textsuperscript{30} If, however, the interest is unvested, it is completely forfeited upon termination of the employment relationship.\textsuperscript{31}

Of the three pension interests, a vested and matured interest is most closely related to the traditional notion of property.\textsuperscript{32} Interests of this type are immediately payable, the pension-earner exercises a great deal of control over the benefits, and the value of the benefits is easily ascertainable.\textsuperscript{33} Similarly, vested but not matured benefits are also readily characterized as property. Such benefits are necessarily payable at some future date and their value may be adequately estimated.\textsuperscript{34} Judicially protected rights exist in the pension-earner concerning the plan's administration, and indeed,

\begin{itemize}
  \item \textsuperscript{27} See Annot., 94 A.L.R.3d 176, § 13 (Supp. 1983).
  \item \textsuperscript{28} The concept of accrual of benefits under a plan is quite different from the concept of vesting. Benefits begin to accrue prior to vesting. The amount of accrued benefits is determined by the wage and the length of the employee's service. Accrued benefits are those benefits chargeable against the plan only if the conditions precedent to the receipt of the benefits are fulfilled. The accrual of benefits is determinative of the amount of the pension to be received, while vesting is determinative of the rights of the employee to the benefits accrued. See generally J. MELONE \& E. ALLEN, JR., PENSION PLANNING 54 (1972).
  \item \textsuperscript{29} See I. BAXTER, supra note 3, at § 11:2(a).
  \item \textsuperscript{30} Id. Although an interest may be vested, it may be subject to conditions precedent. For example, payment may be conditioned upon survival of the employee to retirement age. It is the conditioning of payment that distinguishes a vested but not matured pension interest from an interest which is both vested and matured. Id.
  \item \textsuperscript{31} Id.
  \item \textsuperscript{32} Traditional property concepts commonly include the unrestricted right to use a thing, to exclude anyone else from its use, and to dispose of it in every legal way. See generally T. BERGIN \& P. HASKELL, PREFACE TO ESTATES IN LAND AND FUTURE INTERESTS (1966); see also infra note 123.
  \item \textsuperscript{33} Based upon the amount of the accrued benefits, the contractual provisions of the plan, and the time-value of money, a matured right is easily valued.
  \item \textsuperscript{34} Based upon the actuarial expectancy to survive until retirement age and the projected increase of pension plan funds, the vested interest is more readily estimable than the unvested interest since the possibility of losing the right to receive the interest because of employment termination is not present. See infra note 122 and accompanying text.
\end{itemize}
most courts consider the vested but not matured right to be marital property subject to distribution on divorce. Unvested pension interests, however, bear the least resemblance to traditional property concepts. Although the benefits have accrued to the potential pensioner's account, the right to receive those benefits is conditional. It has been held that the pension-earner has no right to the accrued benefits if employment was terminated at the very brink of total vesting. Thus, courts have had the greatest conceptual difficulty in categorizing an unvested pension interest as property belonging in the marital estate, as is evidenced by the disparate positions taken by the various jurisdictions deciding the issue.

B. Dividing Unvested Interests: Brown and its Aftermath

The inclusion of unvested pension interests in the marital estate was first addressed by the community property states. In French v. French, the Supreme Court of California found that an unvested pension interest was not property and, therefore, was not a community asset subject to division.

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36. In Swaida v. IBM, 570 F. Supp. 482 (S.D.N.Y. 1983), aff'd, 728 F.2d 159 (2d Cir. 1984), the tentativeness of the unvested interest is exhibited. In Swaida, an employee with an unvested interest in a plan with ten-year cliff vesting was found to have no right to his accrued benefits when he was discharged nine years, nine months and twenty-one days after he was hired. "Cliff-vesting" is a method of vesting whereby until a certain date, the employee has no vested right in the plan, but on that date, the employee becomes 100% vested. Id. at 484. IBM structured its plan under the "elapsed-time method" of measuring years of service for its salaried employees. This method measures the time elapsed between two dates—the date of hire and the date of termination. In contrast, the Employee Retirement Income Security Act (ERISA) provides that years of service may be measured in terms of hours worked per year. ERISA § 203(b)(2)(A), 29 U.S.C. § 1053(b)(2)(A) (1982). If the employee puts in at least 1000 hours of service during the year, this is sufficient to constitute a year of service. Swaida worked over 1000 hours in the tenth year, but because IBM measured years of service under the elapsed-time method, his benefits did not vest. Thus, the action was dismissed on summary judgment. Swaida, 570 F. Supp. at 490.
38. This is probably because before the common law states adopted equitable distribution statutes, they placed considerable emphasis on title in a property division. Title, however, was of little importance in the community property states. With the advent of the Uniform Marriage and Divorce Act and the general realization of the inequitable results yielded by the title-based distinction, the question of which party held legal title was no longer regarded as a primary consideration in equitable distribution of property upon dissolution of a marriage. See Uniform Marriage and Divorce Act § 307, 9A U.L.A. 142 (1979).
39. 17 Cal. 2d 775, 112 P.2d 235 (1941).
Instead, the FRENCH court classified unvested pension interests as mere expectancies reasoning that, since the existence of a future benefit under the plan is dependent on the continued existence of the employment relationship, which is quite tentative, the interest cannot be construed as property.\textsuperscript{40}

Thirty-five years later, however, FRENCH was overruled by the landmark case of Marriage of Brown.\textsuperscript{41} The Supreme Court of California held that an unvested interest extended beyond the mere expectancy limit enunciated in French.\textsuperscript{42} Specifically, the Brown court held that an unvested interest was a contingent interest that formed part of the consideration of an employment contract.\textsuperscript{43} It reasoned that the realities of modern employment made the pension a bargained-for part of the compensation package instead of a mere gratuity.\textsuperscript{44} Thus, the right was basically contractual, and since a contract right is a property right, there should be a division upon divorce.\textsuperscript{45} California's lead was soon followed by most of the other community property states.\textsuperscript{46}

Before Brown, states retaining common law property concepts uniformly held that unvested pension interests were not divisible.\textsuperscript{47} The decision in Brown, however, formed the impetus for many states to reevaluate their previous positions concerning such interests. This reevaluation has produced at least three different stands on the issue: 1) adoption of the approach set forth in Brown;\textsuperscript{48} 2) consideration of the unvested pension interests as one factor in determining financial distribution, although not including the pension in the division;\textsuperscript{49} and 3) total disregard of the pension interest because of an inability to evaluate its worth, due to a lack of

\textsuperscript{40} Id. at 778, 112 P.2d at 236-37.
\textsuperscript{41} 15 Cal. 3d 838, 544 P.2d 561, 126 Cal. Rptr. 633 (1976).
\textsuperscript{42} Id. at 841, 544 P.2d at 562, 126 Cal. Rptr. at 636.
\textsuperscript{43} Id. at 845, 544 P.2d at 565, 126 Cal. Rptr. at 637.
\textsuperscript{44} Id.
\textsuperscript{45} Id.
\textsuperscript{46} See Shill v. Shill, 100 Idaho 433, 599 P.2d 1004 (1979) (unvested pension interest is a contingent community interest divisible by the court); Van Loan v. Van Loan, 116 Ariz. 272, 569 P.2d 214 (1977) (divisible property right in unvested pension attributable to community efforts); Cearley v. Cearley, 544 S.W.2d 661 (Tex. 1976) (pension is deferred compensation, and even though unvested, may be divided to the extent earned during marriage); Wilder v. Wilder, 85 Wash. 2d 364, 534 P.2d 1355 (1975) (unvested pension plan divisible at divorce). It may, however, be technically inaccurate to say the community property states followed California's lead, given that Washington was the first state to hold that unvested pension benefits were divisible marital property. See DeRevere v. DeRevere, 5 Wash. App. 741, 491 P.2d 249 (1971).
\textsuperscript{48} See infra notes 51-61 and accompanying text.
\textsuperscript{49} See infra notes 62-71 and accompanying text.
vesting.\textsuperscript{50}

In \textit{Robert C.S. v. Barbara J.S.},\textsuperscript{51} the Supreme Court of Delaware relied upon \textit{Brown} and upheld a trial court apportionment of the husband's unvested union pension.\textsuperscript{52} The court held that the nature of the pension as vested or unvested was not a controlling factor under the state's equitable distribution statute.\textsuperscript{53} It reasoned that modern employment had transformed the pension interest into present consideration for employment with enjoyment postponed until some future date.\textsuperscript{54} When viewed as present consideration, it follows that the pension interest is divisible, although not currently vested.\textsuperscript{55} The court stated, however, that the likelihood of eventual payment must be considered in the distribution.\textsuperscript{56}

Similarly, the Court of Appeals of Maryland, in \textit{Deering v. Deering},\textsuperscript{57} found that the husband's federal civil service pension fell within the scope of the state's equitable distribution statute. Although the pension interest in \textit{Deering} was vested but not matured, the court held that its decision applied to all pension interests regardless of vesting.\textsuperscript{58} In the court's view, concern with vesting clouded the issues of divisibility.\textsuperscript{59} Since the Maryland statute did not mention the level of vesting of a property interest, the court reasoned that an unvested interest can be divided as long as it is property.\textsuperscript{60} Because of the broad powers conferred upon the courts concerning property distribution in divorce, the \textit{Deering} court concluded that exclusion of unvested pension interests would be contrary to legislative intent.\textsuperscript{61}

A second, less liberal approach has been taken by a large number of courts which, although not including the pension in the marital estate, have considered the issue of divisibility of an unvested pension interest on divorce. In \textit{Goodwill v. Goodwill},\textsuperscript{62} the Court of Appeals of Indiana reversed a trial court's award of a portion of the husband's unvested pension to the wife. The court held that while it was permissible to treat a pension plan as a factor in determining the financial aspects of a divorce, the trial

\textsuperscript{50} See infra notes 72-80 and accompanying text.
\textsuperscript{51} 434 A.2d 383 (Del. 1981).
\textsuperscript{52} Id. at 387.
\textsuperscript{53} Id.
\textsuperscript{54} Id. at 386.
\textsuperscript{55} Id. at 387.
\textsuperscript{56} Id. at 388.
\textsuperscript{57} 292 Md. 115, 437 A.2d 883 (1981).
\textsuperscript{58} Id. at 128, 437 A.2d at 889.
\textsuperscript{59} Id.
\textsuperscript{60} Id. at 125, 437 A.2d at 887.
\textsuperscript{61} Id.
\textsuperscript{62} 178 Ind. App. 372, 382 N.E.2d 720 (1978) (en banc).
court had abused its discretion in awarding a portion of the unvested pension to the wife. The Goodwill court reasoned that if the pension-earner did not have a present, vested interest in the future payments, inclusion of the interest as property held by the couple would strain the meaning of property. The court further reasoned that distribution of property that may never become payable would be fundamentally unfair.

Similarly, the Court of Appeals of Oregon, in Roth v. Roth, determined that the husband's unvested pension interest could not be divided by the trial court when permanent alimony had been granted to the nonearning spouse. In the court's view, this essentially would result in a double distribution since the alimony would be derived from the pension. The same Oregon court later reasoned, in Rogers v. Rogers, that a pension interest, whether or not vested, is not per se marital property capable of division. Contingencies inherent in the particular plan may decrease the likelihood of its being property. The clear tenor of the opinion is that when a pension interest is unvested, it should not be included because of the tenuous nature of the interest.

The third approach to the characterization of the unvested pension interest excludes that interest from marital property because of the difficulty in ascertaining its monetary value. In Marriage of Evans, the Supreme Court of Illinois held that when there was insufficient evidence to establish a value for unvested benefits, those benefits should not be considered in the division of property on divorce. The court reasoned that if the receipt of benefits is conditioned on future events, these events must be taken into account in determining the value of the interest. While some speculation is tolerable, the Evans court suggested that the more one must speculate, the less likely the interest is property for purposes of distribution. The court implied that in instances where the benefits are subject to forfeiture upon death or termination of employment, a valuation problem nec-

63. Id. at 376, 382 N.E.2d at 723.
64. Id. at 375, 382 N.E.2d at 723.
65. Id.
67. Id. at 69, 569 P.2d at 695.
68. Id.
70. Id. at 893, 609 P.2d at 881.
71. Id. at 892, 609 P.2d at 881.
73. Id. at 529, 426 N.E.2d at 859.
74. Id. at 528, 426 N.E.2d at 857.
75. Id.
The Court of Appeals of Colorado took a similar approach in *Marriage of Camarata.* It refused to consider the interest of a husband in a pension plan as part of the marital estate, even when that interest had reached pay-status. The *Camarata* court reasoned that since the benefits had no cash surrender value, loan value, redemption value, lump sum value, or value realizable after death, the benefits should not be considered in the property settlement. Including such benefits would, in the court's view, be giving the title of property to an interest devoid of many of the classic attributes of property.

II. APPLICATION OF THE EQUITABLE DISTRIBUTION STATUTE

A. Nature of the District of Columbia Statute

In the District of Columbia, prior to the enactment in 1977 of the current property distribution statute, the title to property was a major concern in apportioning the marital estate. Because title-based apportionment was insensitive to the real expectations of the spouses, the statute was amended to make title to property irrelevant. The new statute is representative of the equitable distribution statutes in effect in most other common law jurisdictions. No limits are placed on the types of property that may be divided, so long as the property was acquired during coverture and was not acquired by gift, inheritance, bequest or devise.

In *Hemily v. Hemily,* the District of Columbia Court of Appeals construed the intent and reach of the equitable distribution statute soon after its enactment. The court held that, given the nature of the marriage relationship, each spouse would reasonably expect an interest in all property acquired during the marriage. In *Hemily,* the parties to the divorce had purchased two identical adjoining houses during their marriage. Although the title of both properties was originally in the husband alone, the title to one house was subsequently transferred by the husband to the wife during marriage. The husband, however, continued to make the mortgage pay-

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76. *Id.* at 531, 426 N.E.2d at 858.
78. *Id.* at 318, 602 P.2d at 908. Pay status is the time during which the pension benefits are actually received.
79. *Id.*
80. *Id.*
81. *See supra* note 2.
82. *Id.*
84. 403 A.2d 1139 (D.C. 1979).
85. *Id.* at 1142.
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ments on both properties. The trial judge applied the equitable distribution statute and awarded each spouse sole ownership of one house. The wife challenged the court's ruling, claiming that under the equitable distribution statute, the transfer to her of title was a gift. She asserted that this was, therefore, her sole property and not subject to consideration in the property division. The wife did, however, claim an interest in the other house. The court of appeals affirmed the lower court's award. While acknowledging there was superficial support for the wife's argument in the wording of the statute, the appellate court held that the statute barred only property that the other spouse would not reasonably expect to be property includable in the marital estate. The "gift" claimed by the wife was purchased with and maintained by marital funds. Thus, it was reasonable for the wife to expect that both houses would fall into the marital estate for the purpose of property distribution upon divorce.

In *Murville v. Murville*, the court of appeals further construed the equitable distribution statute. Following a divorce granted on the grounds of voluntary separation, the husband was granted the lion's share of the marital property in the property distribution. The wife appealed on the ground that the trial court had abused its discretion in barring cross-examination based on the issue of the husband's adultery. In affirming, the court of appeals noted that, although an inquiry as to fault in the breakdown of the marriage is not required by the equitable distribution statute, if alleged in a timely fashion, fault may be considered by the trial court as a relevant factor in distributing property. The court further held that a property distribution need not be equal, only equitable.

In sum, the District of Columbia Court of Appeals, in resolving controversies concerning the equitable distribution statute, has favored a broad inclusion of property among the assets to be distributed upon dissolution of a marriage.

86. *Id.* at 1140.
87. *Id.* at 1141.
88. *Id.* at 1142.
89. *Id.* at 1143.
91. *Id.* at 1108.
92. *Id.* at 1109.
93. *Id.* at 1110.
B. Retroactive Application of the Statute

Because of the enactment of equitable distribution statutes in many common law property jurisdictions, the application of such statutes to property held by the titled spouse prior to the statutes' effective dates occasionally has been challenged as violative of due process.95 The substance of such a challenge is that, by applying the statute to property that previously was held individually, thereby making that property part of the marital estate, the statute operates as a retroactive deprivation of property. This challenge raises the question of whether the legislature may constitutionally affect property rights. That it may do so through the exercise of its police power is well settled.

A state is vested with police power authorizing it to limit the use of property so that it may effect desirable societal goals.96 In Nebbia v. New York,97 the United States Supreme Court upheld a state statute setting the minimum prices for the retail sale of milk.98 The petitioners argued that the milk industry was not imbued with the public interest, and thus was not a proper target for the police power.99 Noting that property rights are not absolute,100 the Nebbia Court held that it was proper for the legislature to limit petitioner's property by setting prices.101 It held that due process merely required that the legislative enactment not be unreasonable, arbitrary or capricious.102 The impact of Nebbia is that as long as the legislature operates within these constitutional guidelines, it may affect property rights in any area to advance social goals.

Two recent state court decisions are directly on point. In Kujawinski v. [Vol. 33:1087]
Kujawinski, the Supreme Court of Illinois upheld the constitutionality of that state's equitable distribution statute when applied to property acquired before the statute's effective date. First, the court found that there had never been an absolute right to the property because the Illinois courts had the power to divest a spouse of property under the former statute. Second, the court held that the statute did not per se take property from a spouse, but merely prescribed procedures to be followed in the event of a divorce. Finally, the court held that it was in the interest of the state to slightly impair the spouse's already qualified property right to insure that the nontitled spouse will not become a ward of the state.

Similarly, the Supreme Court of Pennsylvania, in Bacchetta v. Bacchetta, found that the state's equitable distribution statute did not run afoul of the due process clause when applied to property obtained prior to the date the statute took effect. Finding that the legislative exercise was reasonable, the Bacchetta court held that this property was affected only upon divorce, only when justified by considerations of need and contribution, and only in amounts justified by the facts.

III. THE IMPLICATIONS OF BARBOUR AND MCCREE

A. The Divisibility of Pension Interests

The Barbour court answered the question of whether a vested but not matured pension interest was marital property in the affirmative. Barbour is notable because the District of Columbia Court of Appeals went beyond the scope of the issue presented and announced that the equitable distribution statute also embraced unvested pension interests.

The court initially addressed the critical question of whether a pension interest could realistically be called "property." It noted that a pension

103. 71 Ill. 2d 563, 376 N.E.2d 1382 (1978).
104. Id. at 575, 376 N.E.2d at 1385.
105. Id.
106. Id.
107. Id. at 577, 376 N.E.2d at 1387.
109. Id. at 234, 445 A.2d at 1197.
110. Id. at 235, 445 A.2d at 1198.
111. Barbour, 464 A.2d at 919. The court followed the rationale developed by the Court of Appeals of Maryland in Deering. The Deering approach held that every pension interest was marital property, but that the contingency of the interest should be considered in the valuation of the property. Deering, 292 Md. 115, 120, 437 A.2d 883, 889 (1981). See supra notes 57-61 and accompanying text.
113. Id. at 919. See supra note 32, infra note 122-23.
is an integral part of an employee's compensation package and represents deferred income. This compensation, if received contemporaneously with the employment services rendered, could have been used to purchase other types of deferred-income assets, which would become divisible marital property in the event of a divorce. The Barbour court reasoned that the parties' expectation of future income from a retirement plan did not hinge on whether the plan took the form of a pension or another type of deferred-income investment. Thus, the court could find no reasonable basis for including deferred-income assets as marital property while excluding unvested pension benefits. Further, since the equitable distribution statute authorized the trial court to distribute "all" property without defining the term "property," the court construed the statutory term "property" to include pension interests without regard to the level of vesting.

When applied to vested pension benefits, the Barbour court's logic is unassailable. When extended to include unvested pension benefits, however, it arguably becomes unsound. First, a deferred-income investment is purchased with the employee's own funds. Any interest an employee purchases, whether in the form of a contributory pension or an individual retirement account, is always a vested interest. Further, a purchased deferred-income asset carries with it a right to immediate control. Thus, even though pensions and deferred-income assets are used to effect the

115. Id.
116. Id.
117. Id. at 919. See supra note 1.
118. Section 411 of the Internal Revenue Code provides that all employee contributions to a pension plan are nonforfeitable and are fully vested if the accrued benefits are derived from such contributions. Such is obviously the case with deferred-income assets purchased with the employee's own funds. However, the employer who provides a noncontributory pension plan is not similarly bound to offer employees immediate vesting in their accrued benefits. See generally I.R.C. § 411 (1982). Additionally, in the event of the death of the contributor before age 59 1/2, the estate recaptures the investment without the 10% tax penalty. In an unvested pension plan, there is no right to pension benefits if one does not survive the time of vesting. Finally, in a tax-deferred annuity situation, pursuant to § 403 of the Internal Revenue Code, early recapture of the benefit is also possible. I.R.C. § 403 (1982). There can be no early recapture in an unvested pension setting, because there was never an absolute right to the property.
119. Although tax liability may be increased substantially, the investor will be able to control the capital he initially invested in an individual retirement account. See I.R.C. § 408 (1982). Additionally, in the event of the death of the contributor before age 59 1/2, the estate recaptures the investment without the 10% tax penalty. In an unvested pension plan, there is no right to pension benefits if one does not survive the time of vesting. Finally, in a tax-deferred annuity situation, pursuant to § 403 of the Internal Revenue Code, early recapture of the benefit is also possible. I.R.C. § 403 (1982). There can be no early recapture in an unvested pension setting, because there was never an absolute right to the property.
same goals, they are in fact very different creatures. An unvested pension benefit is subject to involuntary forfeiture at the whim of the employer. The same is plainly untrue of vested property interests.

Moreover, characterization of unvested pension benefits as "property," based on the absence of a statutory definition of the term and its use in conjunction with the word "all," is disingenuous. When the legislature fails to define a term, the word is presumed to encompass only the conventional definition.\textsuperscript{120} As Dean Cribbet has noted, "[P]roperty is a concept, separate and apart from the thing. Property consists, in fact, of the legal relations among people in regard to a thing."\textsuperscript{121} In this context, an unvested pension interest bears little resemblance to property.\textsuperscript{122} An employee has no right to accrued benefits under a pension plan if his interest is unvested and his employer has complied with the applicable laws.\textsuperscript{123}

\textsuperscript{120} This proposition is supported by the United States Supreme Court as well as District of Columbia Court of Appeals decisions. \textit{E.g.}, American Tobacco Co. v. Patterson, 456 U.S. 63, 68 (1982) (starting point in construing a statute is its language, which is assumed to embrace only the ordinary meaning of the words); Watt v. Alaska, 451 U.S. 259, 265 (1981) (starting point in every case involving statutory construction is the plain language of the statute); McMullen v. Police and Firefighter's Retirement and Relief Bd., 465 A.2d 364, 366 (D.C. 1983) (great weight should be given the reasonable construction of the statute); United States v. Stokes, 365 A.2d 615, 618 (D.C. 1976) (court is not empowered to look beyond the plain meaning of the statute's language).


\textsuperscript{122} \textit{See supra} note 32. Some writers avoid the traditional notions of property by suggesting that pension interests are "new property." The "new property" concept, posited by Professor Charles A. Reich, is more concerned with status than with traditional rights of ownership. Reich, \textit{The New Property}, 73 \textit{Yale L.J.} 733 (1964). This theory is based on the premise that government plays an extensive role in every aspect of modern life. This role is comprised largely of grants of status to its citizens, such as licenses, permits, welfare, and social insurance. These objects of status, Reich submits, have become substitutes for traditional wealth. \textit{Id.} at 739. One student author concluded that the "new property" concept had "particular force" when applied to pension interests because they are "substitutes for and defer receipt of wages presently earned." \textit{Note, The Pension Expectation as Constitutional Property}, 8 \textit{Hastings Const. L.Q.} 153, 167 (1980).

\textsuperscript{123} \textit{See supra} note 36. In this regard, it is important to note that since the employee may be denied any future use of the funds before they become vested, the unvested interest lacks one of the most essential elements of property. \textit{Accord} Dickman v. Commissioner, 104 S. Ct. 1086, 1090 (1984). In his opinion for the majority in \textit{Dickman}, Chief Justice Burger maintained:

\begin{quote}
Of the aggregate rights associated with any property interest, the right of use of property is perhaps of the highest order. One court put it succinctly: "'Property' is more than just the physical thing—the land, the bricks, the mortar—it is also the sum of all the rights and powers incident to ownership of the physical thing. Property is composed of constituent elements and of these elements the right to use the physical thing to the exclusion of others is the most essential and beneficial. Without this right all other elements would be of little value . . . ."
\end{quote}

Further, it is settled that a pension granted by the federal government, as was the situation in Barbour and McCree, merely confers a right that can be revised, modified or recalled by subsequent legislation.\(^2\)

Because the unvested property interest cannot reasonably be construed as "property," perhaps the pension is better understood if viewed under unilateral contract principles rather than as a form of deferred compensation.\(^3\) If the employee performs in the prescribed manner, a contractual right automatically arises at the time of vesting. Before that time, there is no property right in the unaccepted offer.

Had the Barbour court restricted its holding merely to encompass vested interests, which was the issue presented, its rationale would have been sound. The extension of the court's holding to embrace unvested pension interests, however, does not appear supportable.

B. Retroactivity to Encompass Vested Interests

After Barbour's holding that pension benefits constituted marital property under the equitable distribution statute, the District of Columbia Court of Appeals next turned to the companion case of McCree v. McCree and considered whether application of the statute to interests that vested prior to the effective date of the statute was an unconstitutional taking of property.\(^4\) The court dismissed the due process argument," reasoning ("In its final analysis, the property in anything consists in the use."); G. Thompson, Commentaries on the Modern Law of Real Property § 5, at 31 (J. Grimes ed. 1980) ("The use of a given object is the most essential and beneficial quality or attribute of property.").

\(^2\) E.g., Stouper v. Jones, 284 F.2d 140 (D.C. Cir. 1960). In Stouper, a federal employee was receiving a disability annuity pursuant to the Civil Service Retirement Act of 1930. She was divested of her benefits five years after she began receiving them because of a subsequent congressional act amending the section under which she derived benefits. Id. at 242. The same tentative right to pension benefits is evidenced by §8333 of the Retirement Act, which deals with requirements to receive annuities. 5 U.S.C. § 8333 (1982). The history of §8333 bears out the fact that Congress substituted the words "eligible for" for "entitled to" in the drafting of the statute. See 5 U.S.C. §8333 (1982). See also 60 Am. Jur. 2d Pensions and Retirement Funds § 25 (1964).

\(^3\) See generally J. Calamari & J. Perillo, The Law of Contracts § 2-14 (1977); see also Hurd v. Illinois Bell Tel. Co., 136 F. Supp. 125 (N.D. Ill. 1955), aff'd, 234 F.2d 942 (7th Cir.), cert. denied, 352 U.S. 918 (1956). The unilateral contract theory is more easily defensible than the deferred compensation theory. If deferred compensation is assumed in a nonvested setting, a result inconsistent with that theory is manifested. If the interest were compensation, its withdrawal upon termination would seem to give rise to an action for deprivation of property. Since the courts have held such a "deprivation" to be nonactionable, a theory that views the vesting of a pension as performance of a unilateral contract appears to explain the interest more accurately. See Swaida v. IBM, 570 F. Supp. 482 (S.D.N.Y. 1983), aff'd, 728 F.2d 159 (2d Cir. 1984); supra note 35.

\(^4\) McCree, 464 A.2d at 924. See supra note 24 and accompanying text.

\(^1\) McCree, 464 A.2d at 926.
that a remedial statute should be construed liberally.\textsuperscript{128} Further, in construing the pertinent portions of the Civil Service Retirement Act,\textsuperscript{129} the court found that pension benefits derived under the Act did not constitute constitutionally protected property, but were merely property interests to the extent that they were protected against arbitrary and irrational acts of Congress.\textsuperscript{130} The court also found that the equitable distribution statute fell squarely within the District of Columbia's police power over domestic relations.\textsuperscript{131} It reasoned that the application of the statute to mitigate economic hardship was a valid exercise of that power.\textsuperscript{132} Moreover, since the statute was to be applied only to distributions after the effective date, the court held such an application to be prospective in nature.\textsuperscript{133}

It is well settled that the regulation of the marriage relationship is within the purview of the state’s police power.\textsuperscript{134} Since the state controls the sole legal method of establishing and dissolving a marriage, the power is jealously guarded by the principles of federalism. It is, therefore, necessary to distinguish between a statute divesting a party of a property interest and a statute prescribing the guidelines for the exercise of the police power. As the \textit{McCree} court aptly noted, the statute does not per se affect title to property. The statute is applied only when the holder of property is before the court in a divorce proceeding.\textsuperscript{135} Furthermore, the litany of considerations set forth for the trial court in the statute ensures against an unreasonable, arbitrary or capricious distribution, thus satisfying \textit{Nebbia}'s requirements.\textsuperscript{136} Finally, the equitable distribution statute was enacted to

\begin{enumerate}
\item 128. \textit{Id.} at 927.
\item 129. \textit{See supra} note 8.
\item 130. \textit{McCree}, 464 A.2d at 930. The \textit{McCree} and \textit{Barbour} decisions are theoretically inconsistent. In \textit{Barbour}, the court determined that pension benefits were divisible property interests. 464 A.2d at 919. In \textit{McCree}, however, the court cited case precedent which held either that there was no property interest in a Civil Service retirement pension, or, at best, that there was a defensible property interest only to the extent that the legislature had acted irrationally in promulgating new laws. \textit{McCree}, 464 A.2d at 930 n.6 (citing Flemming v. Nestor, 363 U.S. 603, \textit{reh'g} denied, 364 U.S. 854 (1960) (only limit on congressional modification of pension interest is that it may not be patently arbitrary); Stouper v. Jones, 284 F.2d 240 (D.C. Cir. 1960) (interest in government pension may always be modified or removed by subsequent legislation)).
\item 131. \textit{McCree}, 464 A.2d at 928. \textit{See supra} note 96 and accompanying text. The state's power to control the marriage relationship has long been recognized. \textit{E.g.}, Boddie v. Connecticut, 401 U.S. 371 (1971) (exclusive mechanism for legal marriage or divorce is within the police power of the state); Maynard v. Hill, 125 U.S. 190 (1888) (state's police power allows it to create and dissolve marriages).
\item 132. \textit{McCree}, 464 A.2d at 929.
\item 133. \textit{Id.} at 926.
\item 134. \textit{See supra} note 131.
\item 135. \textit{McCree}, 464 A.2d at 929.
\item 136. \textit{See supra} notes 1, 102 and accompanying text.
\end{enumerate}
remedy the inequities of its predecessor, which emphasized title to pro-

perty in apportionment upon divorce. Application of the new statute only to marriages occurring or to property acquired after the effective date would cause confusion in property distributions. It also would impede achievement of the desired statutory goals.

C. Valuation

Because the Barbour court held that any potential benefit under a pen-
sion plan was divisible property, it was necessary for the court to discuss
the method of valuation for the purposes of apportioning such property. In both Barbour and McCree, the trier employed the proportionate-share method of valuation. Under that method, the portion of pension benefits attributable to employment during coverture is divided between the parties in whatever percentage is deemed equitable. Benefits are received by the nonearning spouse in futuro, when the pension is in pay-status. The advantages of this method are that both parties are provided some degree of security in retirement and bear equally the risk of forfeiture of the benefits.

The proportionate-share method, however, is not without its disadvan-
tages. Since the apportionment results in an in futuro distribution, the court must retain jurisdiction until retirement of the pension-earning spouse in order to complete the calculation. The allocation may not be modified, and thus the method is insensitive to future changes regarding the health and financial positions of the parties. Furthermore, the likelihood exists that a pension-earning spouse’s income could increase dramat-

137. See supra note 2.
138. McCree, 464 A.2d at 926.
140. Application of the proportionate-share method to the facts in McCree may aid the reader’s understanding of the mechanics of this method. In McCree, the husband had been earning the pension for 34.83 years when he retired. This period encompassed all 25.5 years of his marriage. Thus, the portion of the pension which was attributable to the marriage was 25.5 divided by 34.83, or 73%. This percentage of the pension was then divided between the parties pursuant to the equitable distribution statute. In McCree, the applicable percentage was 50%. Thus, the wife was granted 36.5% of all future benefits, an amount which was half of the portion of the pension attributable to the marriage. McCree, 464 A.2d at 925. This calculation cannot be completed until retirement because it is necessary to know the total number of years worked while earning the pension in order to determine the percentage of those years attributable to the marriage. Barbour, 464 A.2d at 921.
141. See supra note 78.
142. Clemens & Jaffe, Division and Taxation of Retirement Benefits in Dissolution Pro-
cceedings, Dividing Property on Dissolution of Marriage 187-88 (1980).
143. Id.
ically after the divorce. Under such circumstances, proportionate-share apportionment would result in a right to after-acquired property in the nonearning spouse, a result clearly not contemplated by the statute. These disadvantages hinder the clean severance of the marital bond, which is the desired end result of the equitable property division.

Although it approved the proportionate-share method, the District of Columbia Court of Appeals has not precluded other approaches to apportionment and valuation of the pension interest. One viable alternative is the present-value method. This method requires an evaluation of the current value of the benefits coupled with a present monetary division based upon the assessment. The present-value method considers the statistical probability of death, disability, termination, inflation and the receipt of after-acquired property in determining the present value of the expected future benefit. The advantages of this method are that it allows for the present transfer of funds to the nonearning spouse, and it assures that after-acquired property will remain with the proper party.

The main disadvantage of the present-value method is that, while the pension-earning spouse has no right to present enjoyment of the benefits, the nonearning spouse would be given a present enjoyment. Nonetheless, the goal of a property division is to fix spousal rights to property. If the marital blanket is to be torn, the present-value method is the most effective device for doing so. It should not be used, however, if a present calculation involves too much uncertainty.

A flexible approach to valuation and apportionment is preferred. De-
pending upon the financial positions of the parties, a method should be tailored to fit the specific facts and circumstances of the case. The District of Columbia Court of Appeals wisely left all valuation options open.

IV. Conclusion

Upon the entry of a final decree of divorce, the trial courts of the District of Columbia are vested with the power under the equitable distribution statute to determine important property rights between the estranged spouses. In Barbour, the District of Columbia Court of Appeals extended this power to include pension interests, whether vested or not. This extension is especially crucial in light of the importance of retirement income and the reality that a pension account is often the largest single asset in the marital estate. The holding in Barbour with respect to the specific parties and their circumstances is unassailable. The court's inclusion of unvested interests in distributable marital property, however, is arguably in error. Since an unvested pension interest lacks many of the attributes of property, including rights in the pension-earner, it is not consistent with the notion of property division to include such a tentative interest in the marital estate. One party cannot expect to have a future interest in which the other spouse has no right. Furthermore, retention of jurisdiction until the right becomes vested or payable amounts to a division of property acquired after the divorce.

In McCree, the court rightly upheld the application of the equitable distribution statute to property acquired before the statute's effective date. Since there is a strong state interest in the creation and dissolution of marriage, it was within the ambit of the legislature's authority to provide guidelines for property distribution upon divorce. Because this was a valid use of the police power, the due process requirements enunciated in Nebbia were fulfilled. Furthermore, postponement of the statute's application would have extended the inequities that the statute seeks to thwart.

In applying the equitable distribution statute to pension interests, the court of appeals wisely left the door open to various methods of valuation and apportionment. Flexibility must remain the polestar of the courts in this regard. In light of the many variables concerning parties to a divorce action, application of a broad-brush rule of valuation could give rise to inequitable results.

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