

## MEMORANDUM OF LAW

DATE: January 9, 1992  
TO: Larry B. Grissom, Retirement Administrator  
FROM: City Attorney  
SUBJECT: Retirement Benefits in the Event of Dissolution of Marriage  
- Civil Code Section 4800.8

You have requested an opinion regarding the applicability of the terminable interest rule to City Employees' Retirement System ("CERS"). In addition, you have asked whether the terminable interest rule has been overturned by the enactment of California Civil Code section 4800.8. Finally, you have asked whether CERS should continue to follow the terminable interest rule or whether CERS should make the necessary modifications to conform with the Civil Code. Briefly, the terminable interest rule no longer exists. It was abrogated by California Civil Code section 4800.8. This Civil Code section applies to CERS. As such, modifications in conformance with this section are necessary. This Memorandum of Law addresses these issues.

### STATUTORY BACKGROUND

#### 1. Abolition of the Terminable Interest Rule

"Under California law, retirement benefits earned by a spouse during a marriage are community property, subject to equal division upon the dissolution of that marriage." (Citation omitted.) *In re Marriage of Gillmore*, 29 Cal. 3d 418, 422 (1981). "This is true whether the benefits are vested or nonvested, matured or immature." *Id.* "Before enactment of Civil Code section 4800.8, generally any right a husband or wife might have to survivor and death benefits under his or her spouse's public pension plan terminated upon the death of either spouse under the terminable interest rule." *In re Marriage of Carnall*, 216 Cal. App. 3d 1010, 1018 (1989). This rule was based on two California Supreme Court decisions, *Waite v. Waite*, 6 Cal. 3d 461, 473 (1972) and *Benson v. City of Los Angeles*, 60 Cal. 2d 355, 360-361 (1963).

Briefly stated, this judicially created rule recognizes that an interest in a retirement plan traceable to contributions of community funds or to community labor constitutes community property; however, the interest of the nonparticipant spouse does not extend to benefits payable after the death of either spouse. Under the doctrine the nonemployee spouse takes a community share in the retirement benefits while the employee spouse is living citations, but

cannot alienate or devise those benefits  
citation which may be payable to a  
beneficiary other than the nonemployee spouse  
at the death of the employee, if so  
designated by the employee citation, or to  
a subsequent spouse who qualifies under the  
pension plan as the employee's 'survivor' or  
'widow' citation. (Citations omitted.)

In re Marriage of Carnall, 216 Cal. App. 3d at 1018.

There were two distinct aspects to the rule. First, the community interest in accrued benefits does not extend to pension benefits payable following the death of the employee spouse. As such, a nonemployee spouse could not claim pension benefits earned or accrued during marriage if the employee spouse had designated a third party to receive them after his or her death. Second, the nonemployee's interest in pension benefits terminates upon the death of the nonemployee spouse. As such, the nonemployee spouse could not bequeath these benefits by will. In re Marriage of Powers, 218 Cal. App. 3d 626, 635 (1990). "With respect to the second aspect of the rule, it should be noted that community interests are ordinarily inheritable." Id.

The terminable interest rule was criticized repeatedly by courts and commentators. Several decisions limited the rule's scope. For example, one court found that the rule did not apply to an employee spouses' accumulated contributions. As such the ex-spouse was permitted to recover one-half of the community portion of the deceased employee spouse's undistributed contributions to a pension plan. Chirmside v. Board of Administration, 143 Cal. App. 3d 205, 211-214 (1983). Another court provided a remedy of a resulting trust to protect a former wife's community interest in public pension benefits where, after her ex-husband's death, his "surviving spouse" elected to receive a monthly allowance in lieu of a lump sum death benefit consisting of the decedent's accumulated contributions plus an amount equal to six months salary. In re Marriage of Becker, 161 Cal. App. 3d 65, 74-77 (1984). Another court found that the terminable interest rule did not apply to an ex-spouse's community interest claim in her deceased former spouse's private pension benefits. Bowman v. Bowman, 171 Cal. App. 3d 148, 155-156 (1985).

"In 1986, the Legislature enacted Civil Code section 4800.8 (Stats. 1986, ch 686, Section 1, p. 2313)." In re Marriage of Carnall, 216 Cal. App. 3d at 1019. Section 2 of chapter 686 expressly stated "It is the intent of the Legislature to abolish the terminable interest rule set forth in Waite v. Waite, 6 Cal. 3d 461 (1972) and Benson v. City of Los Angeles, 60 Cal. 2d 355 (1963), in order that retirement benefits shall be divided in accordance with Section 4800."

## 2. Civil Code Section 4800.8

Civil Code section 4800.8 provides in pertinent part:

#### Section 4800.8 Division of retirement benefits

The court shall make whatever orders are necessary or appropriate to assure that each party receives his or her full community property share in any retirement plan, whether public or private, including all survivor and death benefits, including, but not limited to, any of the following:

(a) Order the division of any retirement benefits payable upon or after the death of either party in a manner consistent with Section 4800.

(b) Order a party to elect a survivor benefit annuity or other similar election for the benefit of the other party, as specified by the court, in any case in which a retirement plan provides for such an election.

(c) . . . .

(d) . . . .

The legislative history of Civil Code section 4800.8 provides insight into the various concerns behind the change in the law. An analysis of the statute by the Assembly Committee on the Judiciary noted:

1. Under the terminable interest rule a spouse in a long term marriage ending in dissolution could be deprived of any interest in the employee spouse's survivor benefits upon his or her death in favor of a short-term spouse.
2. The terminable interest rule has been criticized as creating an unequal division of community property leading to a windfall profit to the employee spouse and his or her new spouse.
3. A major justification for the rule has been prior federal law which accorded pension plans special tax status. This special status was protected by the "anti-alienation" or alternative payee clause in the pension contract. Changes in federal law, however, clearly indicate that payment of death or pension benefits to a former spouse do not violate that clause. As such, the terminable interest rule has become anachronistic. "It appears, therefore, that the overriding purpose of section 4800.8 was to rectify a state of law considered unjust." *In re Marriage of Powers*, 218 Cal. App. 3d at 636.

Importantly, Civil Code section 4800.8 applies to pension plans created by Charter cities. Although it is true that a city's charter prevails over general law with regard to municipal affairs, it is also true that as to matters of statewide concern, Charter cities remain

subject to state law. "The equitable dissolution of community property qualifies as a matter of state wide concern." Id. at 645. In addition, Civil Code section 4800.8 is accorded retroactive effect. Thus, Civil Code section 4800.8 will apply to "those dissolution proceedings in which property rights have not yet been adjudicated, or if adjudicated where such adjudication is still subject to appellate review, or in those adjudications where the trial court has expressly reserved jurisdiction to divide pension rights." (Citation omitted.) Id.

3. In re Marriage of Nice 230 Cal. App. 3d 444 (1981)

This case has been highlighted because it is the most recent interpretation of Civil Code section 4800.8.

Perry Nice was a firefighter for the City of Los Angeles and a participant in its pension plan. When he and his wife Geraldine divorced, the court awarded each a one-half interest in Perry's pension benefit which was found to be community property of the marriage. At the time of the divorce, Perry was eligible to retire, but he elected to continue working for the City. Had Perry retired, Geraldine would have been entitled to pension benefits of \$1,088 a month under the divorce decree. Despite Perry's desire to continue working, Geraldine elected to begin receiving these pension benefits immediately and the court ordered the City's Pension Board to begin paying her. In addition, the court awarded Geraldine her community share of survivor benefits and ordered the Pension Board to calculate and pay those monies as well.

The Pension Board moved to set aside the lower court's order on two grounds:

1) That the court had no power to order the Board to pay pension benefits to the former spouse of a pension plan member who was not retired but instead was still working; and

2) That the pension plan did not provide for a survivor benefit to a former spouse, nor any other benefit payable upon or after death of the plan member, and hence the court could not order the Board to pay such survivor benefit.

Relying on In re Marriage of Gillmore, 29 Cal. 3d 418 (1981), the court easily disposed of the first issue. Gillmore did not require the pension plan to pay the nonemployee spouse. In addition to Gillmore, the court interpreted prior case law to the effect that if one spouse continues to work instead of retiring, the other spouse may still be awarded immediate pension benefits in the divorce. However, it is the spouse who elects to continue working who must pay those benefits to the other spouse. The employer has no obligation to pay the other spouse and a court cannot order it to do so. A divorce court has discretion to determine how the working spouse will compensate the other for the value of the pension benefits, but that discretion does not include ordering the employer to pay some or all pension benefits to the former spouse of an employee who continues working.

On the second issue, the Pension Board argued that since the City's

plan did not provide for survivor benefits, it could not be ordered to pay Geraldine a share of something that did not exist. The Nice court reviewed *In re Marriage of Taylor*, 189 Cal. App. 3d 435 (1987), *In re Marriage of Carnal*, 216 Cal. App. 3d 1010, *In re Marriage of Powers*, 218 Cal. App. 3d 626 and Civil Code section 4800.8. The Nice court's summary of these cases follows.

In *Taylor*, the statutory public pension plan did not pay survivors' benefits to a member's former spouse, only to a surviving spouse, and did not pay benefits to the former spouse's heirs or devisees. The *Taylor* court found that section 4800.8 applied to these provisions and reversed that portion of the trial court's order determining the former spouse's interest in the member's retirement benefits, and remanded for a reconsideration of that issue.

In *Carnall*, a county's employees retirement association challenged an order that it designate a nonemployee spouse as the member's "surviving spouse" for purposes of receiving survivor and death benefits under an employee benefit plan. *Carnall* found that the judgement impaired the right of potential third parties with express statutory entitlement. *Carnall* also stated, however, that even though the former spouse did not have any rights as a "surviving spouse" to receive benefits upon the member's death, the statutory "surviving spouse" benefits would have been earned by efforts attributable in part to the community of which the former spouse was a member. As such, the *Carnall* court held that if it divided each future pension payment in a manner to be applied when each payment became due, the trial court would have to fashion an order allocating to the former spouse a prorated share of the survivor and death benefits.

*Powers* concerned the rights of the estate of a nonmember former spouse in the member's pension plan. The judgment of dissolution reserved the trial court's jurisdiction over any retirement benefits due the parties under the husband's membership in the pension plan. He continued to work and later remarried. The former spouse died five months after the dissolution. A few years later the member retired. The *Powers* court held that the former spouse's death did not automatically terminate her interest in the husband's pension plan. Since the Legislature intended to abrogate both parts of the terminable interest rule, section 4800.8 entitled the nonemployee spouse, whether living or dead, to that portion of the member spouse's retirement benefits attributable to community effort.

After reviewing these decisions the Nice court concluded:

These decisions and section 4800.8 suggest that as regards pension plan benefits on dissolution of marriage, community property rights have priority over contractual ones. *Powers* and *Taylor* particularly indicate that even if, as the

Board claims, the pension plan gives no "survivor benefits" to Geraldine, the trial court must nevertheless compensate her for that portion of the retirement benefit attributable to the community of which she was a member. This does not mean that Geraldine must be awarded "survivor benefits;" though not mandatory, it would be preferable for the court, after hearing actuarial and other relevant evidence, to establish a present cash value. The goal of such reconsideration is that in dividing community assets, the judgment of dissolution must compensate Geraldine for her share of that portion of Perry's retirement benefit attributable to the community. (Footnote omitted.)

In re Marriage of Nice, 230 Cal. App. 3d at 425-426.

Thus, with respect to the second issue, the appellate court in a sense agreed with the pension board. The Nice court, however, was concerned that the trial court had failed to consider this fact when it calculated Geraldine's one-half share of the community property pension benefit. It therefore remanded the case to the trial court to reconsider the matter and ensure that "the judgment of dissolution compensates Geraldine for her share of that portion of Perry's retirement benefit attributable to the community. Id. at 426.

#### CONCLUSION

The terminal interest rule no longer exists. It was abrogated by California Civil Code section 4800.8. This Civil Code section applies to CERS. As such, modifications in conformance with this section may be necessary. Due to the complexity of this issue, I suggest that you review the various retirement options available in CERS in light of Civil Code section 4800.8. Specific problems or concerns can then be addressed on a case by case basis.

I hope this response will assist you in your evaluation of the impact of this Code section on the retirement options available under CERS. Please let me know if I can be of further assistance.

JOHN W. WITT, City Attorney

By

Loraine L. Etherington

Deputy City Attorney

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