West Virginia Courts Attempting To Equitably Distribute Defined Benefit Pension Plans During Divorce Proceedings: An Examination of the Immediate Offset and Deferred Distribution Methods

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WEST VIRGINIA COURTS ATTEMPTING TO EQUITABLY DISTRIBUTE DEFINED BENEFIT PENSION PLANS DURING DIVORCE PROCEEDINGS: AN EXAMINATION OF THE IMMEDIATE OFFSET AND DEFERRED DISTRIBUTION METHODS

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I. INTRODUCTION

The number and value of retirement plans, along with the high rate of divorce in the United States, makes it essential for parties to obtain equitable distribution of retirement plans in divorce proceedings. When parties get divorced, the largest asset to distribute is either the marital home or the rights to one of the spouse’s pension plan.¹ This should come as no surprise because more than 100 million Americans across the country rely on some sort of pension plan to provide financial security after retirement, and these accounts are worth more than four trillion dollars.²

When distributing marital property between spouses, a court is guided by the concept that each spouse should receive the benefit of his or her contributions toward the accumulated assets of the marriage.³ West Virginia courts permit a spouse, “who has made a material economic contribution toward the acquisition of property which is titled in the name of or under the control of the other spouse, to claim an equitable interest in such property in a proceeding seeking a divorce.”⁴ This concept is referred to as the doctrine of equitable distribution.

The equitable distribution of pension plans is a complex issue in divorce proceedings, and the process has been made more problematic by the use of inconsistent terminology and varying methods of valuing retirement plans. The problems of dividing pensions in divorce “seem to be increasing both in fre-

² Id. at 5.
⁴ Id. See also W. Va. Code Ann. § 48-7-103 (LexisNexis 2011).
AN EXAMINATION OF DISTRIBUTION METHODS

quency and difficulty. However, because pension plans can be such a mone-
tarily large marital asset, it is absolutely essential to the divorcing spouses that a
pension is equitably distributed between the parties.

This Note examines the different methods used when courts attempt to
equitably distribute pension plans, with a particularly close focus on defined
benefit pension plans. A close examination of how West Virginia courts tackle
this issue is also closely examined, analyzed, and critiqued.

Part II of this Note gives a background on the two most popular types of
pensions (defined contribution plans and defined benefit plans) and what de-
termines if a pension plan is governed by the Employee Retirement Income Se-
curity Act (“ERISA”). In Part III, this Note explains why pensions are classified
as marital property and, thus, subject to equitable distribution. In Part IV, this
Note concludes providing background information by explaining the difference
between when a pension vests and when it matures, a distinction that must be
understood to have a thorough grasp on the issue.

Part V briefly describes how defined contribution pension plans are eq-
uitably distributed; however, this is typically a fairly straightforward process
and is not examined in great detail. Part VI closely examines the first method of
equitably distributing a defined benefit pension plan: the immediate offset
method. This Note examines the strengths and weaknesses of the immediate
offset method, the difficulty in determining a present value because it requires
predictions of a spouse’s future actions, and how West Virginia has judicially
handled the method.

Part VII analyzes the second method of equitably distributing a defined
benefit pension: the deferred distribution method. This Note examines the
strengths and weaknesses of the method, offers a brief discussion on how a
Qualified Domestic Relations Order (“QDRO”) works, explains how the de-
ferred distribution method can disentangle the parties’ interest dependent on
whether or not the pension plan is governed by ERISA, and how West Virginia
has handled the method judicially. Part VII concludes by explaining how West
Virginia case law is overly broad on the issue and needs to be re-evaluated due
to the deferred distribution method’s newly created separate interest approach.

II. TYPES OF PENSIONS

Pensions are deferred compensation plans for an employee’s services
that represent a contractual right to receive future benefit payments when the
participating employee retires. There are two general types of retirement plans:
the defined contribution plan and the defined benefit plan.

5 In re Marriage of Benson, 545 N.W.2d 252, 253 (Iowa 1996).
6 Also known as an individual account plan. CARRAD, supra note 1, at 16.
8 Id. at 1076.
It is important to distinguish between the two types of plans because it is crucial to the determination of which equitable distribution method to use when dividing the parties' interests in the pension plan—an issue that is central to this Note. In addition, pension plans offered by private employers are governed by ERISA, whereas pension plans offered by public employers are not governed by ERISA. This Part provides a necessary background for the issues and analysis developed later in this Note.

A. Defined Contribution Plan

A defined contribution plan (or individual account plan) is a type of retirement plan that provides an employee with an individual account. The amount of the employer's annual contribution to the employee's account is specified, with the money being invested and the earnings accruing in the employee's account. Thus, the individual's account will reflect both the amount contributed by the employer and the gain (or loss) realized through investments. In most defined contribution plans, when the employee decides to retire, the retirement plan benefits are paid in a lump sum to the employee.

Similar to a bank account, defined contribution plans have a readily determinable value. All a participant has to do is get a copy of the most recent account statement to learn what is in the account and how much it is worth. The following are examples of defined contribution plans: money purchase pension plans, profit-sharing plans, section 401(k) plans, stock bonus plans, and employee stock ownership plans.

B. Defined Benefit Plan

Under a defined benefit plan, the provisions of the retirement plan specify a formula that determines a benefit amount that the employer promises to pay to an employee when the employee retires. By definition, a defined benefit plan "is any pension plan that is not a [d]efined [c]ontribution [p]lan."

See generally BARRY KOZAK, EMPLOYEE BENEFIT PLANS 297–300 (2010) (explaining that certain plans are statutorily excluded from ERISA coverage).

CARRAD, supra note 1, at 16.

Id.

KOZAK, supra note 9, at 86.

CARRAD, supra note 1, at 16.

Id.

Id. at 16–17.

Id. at 17.

In a defined benefit plan, unlike a defined contribution plan, there is not an individual account that an employee can call his own. One commentator explained the difference between the two types of plans by stating that a defined contribution plan can be viewed as "a basket full of money," and a defined benefit plan as "a basket full of promises." The responsibility for funding such benefits rests completely on the employer.

Defined benefit plans usually promise a level of monthly payments on retirement that is calculated by a formula specified in advance. A typical formula will take into account (1) the number of years the employee worked for the employer, (2) the employee's age at retirement, and (3) the employee's salary in his or her last years of employment, or an average of the last several years of salary. However, it is crucial to keep in mind that each plan uses a different formula for calculating benefit entitlements. The formula should be easily laid out in the terms of the particular defined benefit plan.

C. Pension Plans Governed by ERISA

The Employee Retirement Income Security Act ("ERISA") states that an "employee pension benefit plan" is any plan that is "established or maintained by an employer" for the purpose of "provide[ing] retirement income to employees." Retirement plans that qualify as employee pension benefit plans are subject to the rules and requirements of ERISA. In the United States today, almost every private employee benefit plan is an ERISA-qualified plan, regardless if it is a defined contribution or defined benefit plan.

D. Pensions Plans Not Governed by ERISA

ERISA does not cover pension plans offered to public sector employees. Therefore, pension plans offered by the federal government, a state or local government, or a branch of the military are not subject to the rules contained in ERISA.
III. PENSIONS CLASSIFIED AS MARITAL PROPERTY

Pensions acquired during marriage have long been considered marital property subject to equitable distribution. Nearly every state has laws that cause retirement benefits earned during the marriage to be within the marital property that is distributed between the spouses when the marriage ends. It is imperative for a prudent attorney to address the issue because many courts have held that it is malpractice to ignore or neglect a client’s rights to receive a share of the spouse’s pension in a divorce action.

West Virginia Code Section 48-1-233 defines marital property as “[a]ll property and earnings acquired by either spouse during a marriage... regardless of the form of ownership... whether individually held, [or] held in trust by a third party...”

Although the West Virginia Code does not specifically mention that pension plans are marital property subject to equitable distribution, West Virginia courts have consistently held that the Code Section is broad enough to encompass pension plans. In classifying property as separate or marital, the legislature has indicated a preference for classifying property as marital.

The underlying rationale for why pensions are viewed as marital property is relatively simple—a pension benefit is an economic resource. The pension is acquired with funds that otherwise would have been utilized by the parties during the marriage to purchase other assets. Therefore, the pension should be viewed similarly to any other asset constituting marital property.

Even if the pension has not yet vested or matured, thereby making it possible...
that it will never pay benefits to an employee spouse, the pension is still determined marital property. 37

When attempting to equitably distribute any marital property, West Virginia courts are guided by strong desirability to disentangle the parties from one another as quickly and cleanly as possible. 38 The underlying policy reason for wanting to provide a final resolution to the marital property issue is relatively simple—"[d]ivorced parties are notoriously willing to pursue litigation against each other," creating future court actions and increasing costs and time to both the parties and the court. 39

IV. THE DIFFERENCE BETWEEN A VESTED PENSION AND A MATURER PENSION

Both the courts and parties must be aware of the different terminology used in retirement plans when there is an attempt to equitably distribute the retirement plan between a divorcing couple. This Part provides a necessary background on the difference between a vested pension and a matured pension so the reader can have a thorough grasp of the issue presented in this Note.

A. Vested Pensions

A vested retirement plan refers to a pension right that is not subject to a condition of forfeiture if the employment relationship terminates before retirement. 40 Thus, a vested plan gives the employee a right to receive the benefits of a retirement plan regardless of whether the employment relationship terminates voluntarily or involuntarily. Typically, a retirement plan will vest when the employee completes the predetermined number of years of employment that is set forth in the retirement plan. 41

A non-vested retirement plan is simply a retirement plan under which the employee has not completed the predetermined number of years of employment. 42 Thus, if the employment relationship were to end under a non-vested retirement plan, the benefits under the plan would be forfeited. However, the money that the employee contributed to the plan will be distributed to the employee.

37 Id.
40 CARRAD, supra note 1, at 23.
41 Id. at 60.
42 Id. at 23.
B. **Matured Pensions**

A matured retirement plan is one in which the employee has an unconditional right to immediate payment.\(^4^3\) A retirement plan usually matures upon the employee reaching a specified age or when the employee has worked for the employer for a specified number of years.\(^4^4\) A non-matured retirement plan is simply one where the conditions to obtain an immediate right to payment of the retirement benefits are not completely satisfied.\(^4^5\)

V. **EQUITABLY DISTRIBUTING A DEFINED CONTRIBUTION PENSION**

The defined contribution plan is the simpler of the two types of pension plans when attempting to equitably distribute the pension during a divorce proceeding.\(^4^6\) A defined contribution plan has a readily ascertainable value because the employee spouse has an individual account value.\(^4^7\) This means that separate accounts are established and maintained on behalf of each plan participant, and the value of the employee spouse's benefits is equal to the account balance as of a specified date.\(^4^8\) Generally, the pension account is valued on the date of the divorce proceeding.\(^4^9\)

The Author would like to caution that this Note is intended to focus primarily on the more problematic issues involved in a defined benefit plan, not a defined contribution plan. A detailed analysis of equitably distributing a defined contribution plan is not necessary in this Note because it is typically a very simple and straightforward process.

VI. **THE IMMEDIATE OFFSET METHOD OF EQUITABLY DISTRIBUTING A DEFINED BENEFIT PENSION**

Division of a defined benefit plan is much more complicated than a division of a defined contribution plan.\(^5^0\) There are two major competing methods of division: the immediate offset method and the deferred distribution method.\(^5^1\) As further explained below, the major difference between the two methods is the time at which the pension is divided. This Part focuses on the immediate

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\(^4^3\) *Id.* at 24.

\(^4^4\) *Id.*

\(^4^5\) *Id.*

\(^4^6\) SHULMAN & KELLEY, supra note 27, at 3.

\(^4^7\) *Id.*

\(^4^8\) *Id.* at 3–4.

\(^4^9\) *Id.*

\(^5^0\) TURNER, supra note 39, at 192.

\(^5^1\) *Id.*
offset method and the following Part examines the deferred distribution method. 52

When the immediate offset method is used, the present value of the employee spouse’s pension is determined and taken into account with the parties’ other marital assets. 53 Stated another way, the court determines the present value of the future retirement benefits and awards the non-employee spouse a share of the benefits in an immediate lump sum award of either cash or property. 54 Thus, when the immediate offset method is chosen, the employee spouse retains the entire pension and the non-employee spouse receives other marital assets (cash or property) worth an amount that is equal to the present value of the pension.

In the future, when the employee spouse does begin to receive pension payments, the non-employee spouse will not receive any share of the pension payments because these payments have already been taken into account in computing the present value of the pension when the immediate offset was made. 55

A. Strengths of the Immediate Offset Method

The immediate offset method’s greatest strength lies in the fact that it provides a final resolution to the pension issue at the time of the divorce, thereby cutting the economic tie between the ex-spouses. 56 When a court is required to divide the rights of a pension in order to reach an equitable distribution of marital property in a divorce, the court emphasizes a desire to choose a method of division that disentangles the “parties from one another as quickly and cleanly as possible.” 57 The policy reason for wanting to provide a final resolution to the pension issue is based on the notion that “[d]ivorced parties are notoriously willing to pursue litigation against each other,” creating future court proceedings and increasing costs and time to both the parties and the court. 58 The immediate offset method does not allow for future litigation and, stated bluntly, “it deprives the combatants of one less subject to argue about at a later date.” 59

It should be noted that the parties are similarly disentangled when using the deferred distribution method if the defined benefit plan is governed by ERISA and the separate interest approach is used. 60 This issue is more thoroughly analyzed later in this Note.

52 See discussion infra Part VII.
54 Turner, supra note 39, at 192.
55 Id. at 196.
56 Id. at 193.
58 Turner, supra note 39, at 193.
60 See discussion infra Part VII.F.
B. Weaknesses of the Immediate Offset Method

The immediate offset method does have a major weakness—it forces the court to base its division of the pension upon actuarial probabilities rather than what actually occurs in the future. The issue of determining the present value of a defined benefit pension plan causes much confusion to the courts, and case law analysis often becomes fuzzy, failing to clearly articulate the issue. "The ultimate fairness of the immediate offset depends heavily upon the accuracy of the actuarial assumptions used to value the benefits—but actuarial assumptions are almost never completely accurate." This Note will address the issue and attempt to clear up ambiguities in applying the present value method when using the immediate offset approach.

Another major weakness of the immediate offset method lies in the fact that the employee spouse bears the entire risk that the pension will never be received. This occurs because the court must give the defined benefit pension a present value, even if it is uncertain whether that pension will ever actually pay out the benefits. Therefore, when the court uses an immediate offset and the pension is never actually received, it is possible for the non-employee spouse to receive tangible present dollars in return for his or her share in a pension that never actually yields benefits to the employee spouse.

This possibility leads to the argument that the immediate offset method unfairly distributes the risk of the pension not maturing (i.e. not reaching "Pay Status") to the employee spouse only. Commentators argue that the employee spouse bears an unfair amount of risk and should not have to "give up present dollars [or other marital assets] to compensate the non-[employee] spouse for giving up his or her rights in a pension" that may never actually pay out benefits. Allocating this entire risk to the employee spouse is a major weakness of the immediate offset approach.

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61 TURNER, supra note 39, at 193–94.
63 TURNER, supra note 39, at 195 (citations omitted).
64 See discussion infra Part VI.C.
65 TURNER, supra note 39, at 193.
66 Id.
67 Id.
68 A pension only becomes "In Pay Status" when the employee spouse retires and begins receiving benefits. CARRAD, supra note 1, at 24.
69 TURNER, supra note 39, at 193–94.
70 Id. at 194.
C. Difficulty in Determining the Present Value of a Defined Benefit Plan

Another major issue concerning the immediate offset method is actually reaching a present value determination of a defined benefit plan. As discussed above, when using the immediate offset method for a defined benefit plan, "the court awards the entire pension to the [employee] spouse and gives the non-[employee] spouse other cash or property equal to the value of his or her interest."71 This obviously requires the court to determine the present value of the defined benefit pension plan.72 It is common knowledge that a dollar today is worth more than a dollar tomorrow. 73 Most of the time, expert testimony is needed to determine the present value of a pension because the calculation is quite complicated.74

Expert testimony on the present value calculation of a defined benefit plan can differ in large numerical values, causing a substantial source of litigation around the pension plan.75 This is because the present value determination requires a number of assumptions including "whether and to what extent the plan is vested; the employee's health, age, and life expectancy; and the interest rate at which the plan is discounted."76 Other assumptions include the mortality rate at which the plan is discounted and the age at which the employee spouse will retire.77

There are numerous methods a trial court and an expert can use to determine the present value of a retirement plan.78 Furthermore, trial courts are given broad discretion in making the determination of which method to use.79

There is a multi-step process that takes place to arrive at the present value of a defined benefit pension plan. First, the court must determine the amount of pension benefits that the employee spouse will likely receive upon retirement.80 Second, the amount of pension benefits likely to be received in the future must be discounted to present value to account for inflation ("Present Value Discount").81 Third, the present value determined in the second step must be discounted for the chance that the employee spouse will die before receiving

71 Id. at 251.
72 Id.
73 Id. at 251–52.
75 Brandt, supra note 62, at 483.
76 Id.
77 Id. See generally TURNER, supra note 39, at 254–59.
78 Brandt, supra note 62, at 483.
80 TURNER, supra note 39, at 254–56.
81 Id. at 257.
the retirement benefits ("Mortality Discount"). Fourth, and finally, the present value determined in the third step must be discounted for the chance that the employee spouse will leave employment before the pension benefits vest ("Forfeiture Discount"). Generally, and for purposes of this Note, the first step is of most importance to an attorney representing a client in a divorce proceeding.

Typically, lawyers need to seek outside assistance in determining present value because it involves complex mathematical calculations. This explains why expert testimony is so prevalent when calculating the present value of a pension. These evaluations are typically calculated by an accountant or a small company that specializes in pension valuations. More specifically, steps two through four are left in the specialized area of the expert witness.

However, the first step, determining the amount of retirement benefits that the employee spouse will likely receive, should be of particular importance to a careful practitioner. This step requires the court to predict the value of the future retirement benefits based on certain assumptions. The assumptions needed to determine the amount of pension benefits that the employee spouse will likely receive upon retirement include: (1) predicting the date upon which the employee spouse will likely retire (the retirement age assumption), (2) predicting what the employee spouse's salary will be at retirement (the post-marital salary assumption), and (3) the duration of time over which the benefits will be received (the duration of benefits assumption).

From the lack of case law on this issue, it seems that many practicing attorneys do not take a second glance at the assumptions underlying the present value determination. However, the assumptions can significantly alter the equitable distribution of the pension plan and the divorce proceeding as a whole. This Note will examine these three assumptions, starting with a particularly close examination of how West Virginia courts predict the date upon which the employee spouse will likely retire.

1. The Retirement Age Assumption

"The most important of these assumptions is the date of retirement." Most defined benefit plans state that the retirement benefit to be paid in the future is based on the number of years the employee spouse worked for the em-

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82 Id. at 257–58.
83 Id. at 258. If the pension has vested at the time of the proceeding, then the forfeiture discount does not apply because the pension is not subject to a condition of forfeiture. Id.
84 Id. at 259–60.
85 Id. at 260. See also, e.g., TROYAN, INC., http://www.troyanlaw.com/index.htm (last visited Mar. 3, 2012) ("Our function is to simplify the tasks of the family practitioner regarding all aspects of valuation, negotiation and drafting regarding Retirement Plans.")
86 TURNER, supra note 39, at 254–57.
87 Id. at 254.
ployer and the average pay the employee received over a stated period. Obviously, the total number of years the employee spouse works for the employer is contingent on the date the employee retires. At the time the court is attempting to equitably distribute the pension, the date of retirement is not likely to be known because the employee spouse is presumably still working for the employer. "Absent special knowledge it is generally not possible to state with accuracy the actual (and in the future) retirement age of an individual."89

This type of situation requires the court, the parties, or the pension expert witness to predict the date of retirement in an effort to arrive at the present value. This assumption can result in substantial monetary differences in the estimated present value of the retirement benefits. It is staggering how often the predicted retirement date is uncontroverted by the parties, resulting in the courts unknowingly and inequitably distributing the marital property between the parties.

a. The Majority View: Making the Retirement Age Assumption Based on Available Evidence

When predicting retirement age, to avoid arriving at an arbitrary present value, a majority of the courts "attempt to predict from all available evidence the date upon which the [employee] spouse will most likely retire."91 In a typical situation, this date would be the average retirement age for the type of employer involved.92 However, another date may be applied if evidence is presented demonstrating that the employee spouse is likely to retire earlier or later than the normal retirement age.93

89 Id. at 17.
90 See Hein v. Hein, 366 N.W.2d 646, 648 (Minn. Ct. App. 1985) (showing the monetary difference of 31,140 in present value dollars, depending on whether the court predicted the employee to retire at age seventy or age fifty-six).
91 Turner, supra note 39, at 254. See, e.g., DeMarco v. DeMarco, 787 A.2d 1072, 1080–81 (Pa. Super. Ct. 2001) (remanding the case to further develop the record; noting it was error to assume husband would retire at age fifty, which apparently was the date of vesting; proper date is most likely date of actual retirement); Colling v. Colling, 910 P.2d 1165, 1168–69 (Or. Ct. App. 1996) (noting that pensions should be divided in divorce proceeding in a manner that is equitable under the circumstances); Heike v. Heike, 497 N.W.2d 220, 222 (Mich. Ct. App. 1993) (overruling prior case law requiring use of the earliest possible retirement age; instructing the trial court to value a pension in light of all the circumstances).
93 See, e.g., Staller v. Staller, 570 N.E.2d 1328, 1332 (Ind. Ct. App. 1991) (finding it proper for the trial court to assume retirement at age fifty-five where such retirement was strongly in the owning spouse's economic interest).
Hein v. Hein\(^\text{94}\) shows how many courts handle the retirement age assumption. Mr. Hein, who was employed as a police officer, testified that he was “going to have to work” until he was forced to retire at the age of seventy by his employer.\(^\text{95}\) However, Mrs. Hein presented evidence showing that the average retirement age for police officers in the area was fifty-six.\(^\text{96}\)

If Mr. Hein’s estimated retirement age was determined to be seventy, then his expert witness found that the present value of his pension was $11,417.\(^\text{97}\) However, if his retirement age was determined to be fifty-six, the present value of the pension would be $42,557.\(^\text{98}\) Thus, when calculating the present value of the pension, the monetary difference that resulted from using the two different retirement age assumptions was $31,140. This resulting substantial monetary difference is at the heart of the issue discussed in this Note.

In Hein, instead of using Mr. Hein’s estimated retirement age or Mrs. Hein’s estimated retirement age, the trial court set its own estimated retirement age.\(^\text{99}\) “The trial court found age sixty-five to be a reasonable projected retirement age,” and it calculated the pension’s present value to be $19,760.\(^\text{100}\)

Both parties appealed the trial court’s pension distribution, and the Minnesota Court of Appeals found that “the trial court chose an age in-between the ages proposed by the parties . . . without explaining how it [arrived] at the figure or why it was ‘reasonable.’”\(^\text{101}\) The appellate court found the trial court’s decision to base the pension present value on the retirement age of sixty-five to be “arbitrary.”\(^\text{102}\) Thus, the pension distribution was reversed and remanded with instructions to choose a date with some reasonable basis supported by the record.\(^\text{103}\)

\(^{94}\) Hein, 366 N.W.2d 646.

\(^{95}\) Id. at 648.

\(^{96}\) Id.

\(^{97}\) Id.

\(^{98}\) Id.

\(^{99}\) Id.

\(^{100}\) Id. See also Milteer v. Milteer, 280 A.D.2d 530, 530–31 (N.Y. App. Div. 2001) (reversing valuation based on apparently arbitrary assumption that husband would retire at age fifty); DeMarco v. DeMarco, 787 A.2d 1072, 1080–81 (Pa. Super. Ct. 2001) (remanding the case to develop the record further because the trial court’s assumption that the husband would retire at age fifty, which was the date the benefits vested, was arbitrary; proper date is most likely date of actual retirement).

\(^{101}\) Hein, 366 N.W.2d at 650.

\(^{102}\) Id.

\(^{103}\) Id.
b. The Minority/Troyan View: Making the Retirement Age Assumption Based on the Earliest Possible Retirement Date

Other courts choose to avoid the need for predicting the future by using the earliest allowable retirement date under the terms of the plan being divided. This bright line rule approach avoids the need to make speculative predictions about the actual retirement date, thereby decreasing the amount of litigation and evidence necessary to arrive at the present value of a defined benefit pension. However, this method increases the risk of inaccurate valuation by making an arbitrary assumption that may not come true, even when there is evidence suggesting an alternative retirement date is more probable.

William Troyan, president of William M. Troyan, Inc., specializes in retirement plan valuation for equitable distribution. Mr. Troyan has written a number of articles on valuation problems that arise during a divorce and often acts as an expert witness in divorce proceedings. Mr. Troyan advocates the use of the earliest possible retirement date and consistently uses that retirement age assumption when computing the present value of a defined benefit plan. However, Mr. Troyan does not substantially argue this position and, as noted above, this is against the majority of reported cases. Presumably, Mr. Troyan's argument for using the earliest possible retirement age is "that the absence of a standard assumption regarding the retirement age of the [e]mployed [s]pouse will lead to conflict, expense, and confusion." A major strength of using any bright line rule is that bright line rules typically streamline the judicial process by decreasing time spent in court and reducing the expenses to both the parties and the court. Bright line rules, however, are notoriously inflexible. A retirement plan is often the biggest marital asset that is equitably distributed between the parties during a divorce, and as such, a majority of courts recognize that a bright line rule should be avoided in a case where evidence is presented to show a more realistic retirement age for the employee spouse. Courts that follow the majority view believe that the retirement age should be based upon evidence, despite the increased amount of litigation and discovery on the issue.


105 See Troyan, supra note 53. See also TROYAN, INC., supra note 85 ("Our function is to simplify the tasks of the family practitioner regarding all aspects of valuation, negotiation and drafting regarding Retirement Plans. Best of all when you call Troyan, Inc. you can address your concerns to a firm with more than thirty-seven years of pension experience.")


107 See id.

108 Troyan, supra note 88, at 18.

109 CARRAD, supra note 1, at 5.
West Virginia's Lack of Case Law Discussing the Retirement Age Assumption: *Wood v. Wood*

There is very little precedent in West Virginia on how courts should make retirement age assumptions when computing the present value of a defined benefit plan. *Wood v. Wood*[^10] is the only case that touches the issue and the court did not provide any clear guidance for future adjudications.

In *Wood*, the court found that the evidence was conflicting as to the employee spouse’s earliest permissible retirement age.[^11] The Supreme Court of Appeals of West Virginia, without any legal analysis on the issue, held that because there was “conflicting evidence concerning when Mr. Wood [could] receive an undiscounted pension . . . the circuit court did not abuse [its] discretion in valuing Mr. Wood’s pension . . . .”[^12]

*Wood* simply leaves the issue of the retirement age assumption within the discretion of the trial court[^13] and does not give any clear guidance on how to predict the employee spouse’s retirement age when calculating present value for a defined benefit plan. The Supreme Court of Appeals of West Virginia seemed to be a little confused in *Wood*.

The court’s decision in *Wood* raises multiple questions. First, how could the evidence on Mr. Wood’s earliest possible retirement date be conflicting? Defined benefit pension plans state in clear, unequivocal language the requirements for when an employee can retire without receiving a penalty on his pension plan. This is typically stated as a number of years the employee must work in order to receive the full amount of his pension plan. From this, the employee’s earliest possible retirement age is readily ascertainable in the defined benefit pension plan. It is unclear why the court found the evidence on this issue to be conflicting;[^14] the earliest possible retirement date should have been stated clearly in the pension plan.

Second, in calculating the present value of the pension, what method did the Supreme Court of Appeals of West Virginia use to arrive at the retirement age assumption? Did the court attempt to predict the retirement age based on the available evidence (the majority method[^15]) or did the court try to ascertain the earliest possible retirement age (the minority/Troyan method[^16])?

It appears that the court tried to ascertain the earliest possible retirement age of Mr. Wood because it tried to predict when the employee spouse could

[^11]: Id. at 770.
[^12]: Id.
[^13]: Id.
[^14]: Id. ("Mr. Wood is still working and the evidence is conflicting whether he can retire after 30 years of service . . . with a non-reduced monthly benefit . . . .")
[^15]: See discussion supra Part VI.C.1.a.
[^16]: See discussion supra Part VI.C.1.b.
retire without receiving an undiscounted pension. If the court used the minority method, it did not provide any legal analysis on why it used this method. Because the court does not discuss the issue in any relevant detail, it would be inappropriate to conclude that the court intended to adopt the bright line rule of using the earliest possible retirement age when determining the present value of a defined benefit pension plan; there is simply not enough information to reach this conclusion.

Wood v. Wood does not provide any usable methodology for determining the retirement age assumption in West Virginia. The parties, the trial court, and the Supreme Court of Appeals of West Virginia confused the issue. There is no precedent in West Virginia to determine whether a trial court should follow the majority approach of predicting the retirement age assumption based on available evidence or whether it should apply the bright line rule of using the earliest retirement age.

Therefore, West Virginia courts handling divorce proceedings requiring distribution of defined benefit pension plans appear free to use any retirement age assumption they wish. Although the parties are presumably free to litigate the retirement age issue, it is this Author’s belief that family law practitioners in West Virginia fail to completely grasp the issue and sometimes overlook the retirement age issue altogether, leaving it completely in the hands of the pension expert witness. This results in a substantial (and often inequitable) monetary difference between how much of the marital property is distributed to each spouse.

2. The Post-Marital Salary Assumption

Defined benefit pension plans typically measure the employee’s retirement benefits as some function of his salary while he is employed. For instance, many plans determine the retirement benefit by taking an average of the employee’s salary during the last few years of employment before retirement.

When a court is determining the present value of a defined benefit plan, it must confront the issue of whether the marital estate is entitled to share in retirement benefits attributable to post-divorce salary increases. For example, if the defined benefit plan states that the employee spouse will receive a percentage of the average of the employee’s last thirty-six months of employment, the court will have to make an assumption as to what the employee spouse’s salary will be during the last thirty-six months of employment.

“A majority of states follow the marital foundation theory, which applies a reasonable prediction of future salary increases in determining the value

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117 See discussion supra Part II.B.

118 See discussion supra Part II.B. See also, e.g., Gemma v. Gemma, 778 P.2d 429, 431-32 (Nev. 1989) (noting that husband’s retirement benefits were a function of his average salary during his highest-paid thirty-six months of employment).
of the pension . . . ." The basis for this theory is that the future salary increases are consideration for the employee’s total body of work. Other courts apply the accrued benefit theory, limiting the marital estate to the accrued benefit on the date of classification. The basis for this theory is that the present value of the pension should be based on the salary as of the date that the divorce was filed. West Virginia case law has not yet addressed the post-marital salary assumption.

3. Assuming the Duration of Benefits

Additionally, the court must determine how long the employee spouse will receive benefits after retiring. The majority of defined benefit pension plans provide monthly benefits that begin once the employee spouse retires and end when he or she dies. Therefore, in order for the court to determine the present value of the retirement benefits, it is necessary to predict how long those benefits will be paid to the employee spouse upon retirement.

This assumption is typically made very easily through the use of actuarial statistics that determine the average life expectancy for any given person. By simply subtracting the predicted retirement age from the employee spouse’s predicted life expectancy allows the court to arrive at the total period over which benefits are likely to be received.

VII. THE DEFERRED DISTRIBUTION method ("QDRO") of Equitably Distributing a Defined Benefit Pension

The major difference between the immediate offset method and the deferred distribution method is the time at which the pension is divided. The im-

119 Turner, supra note 39, at 256. See, e.g., Rosenberg v. Rosenberg, 497 A.2d 485, 496 (Md. Ct. Spec. App. 1985) (finding it permissible to assume yearly salary increase in order to compute highest average salary to determine the amount used for calculation of pension).

120 Jerry L. C. v. Lucille H. C., 448 A.2d 223, 225–26 (Del. 1982) (reasoning that if the trial court uses only the salary amount for the years during marriage, the burden of dividing pensions would be unreasonable, as each case would require a unique valuation formula; post-divorce increases in salary should be used and multiplied by the percentage of the number of years worked married with the number divided by the number of years worked).

121 Turner, supra note 39, at 256. See, e.g., Wacholder v. Wacholder, 188 A.D.2d 130, 137 (N.Y. App. Div. 1993) (noting that because “the commencement of a divorce action ordinarily marks the closing date of the marital property accrual period, there is no justification for treating compensation received after that date as marital property”).

122 Turner, supra note 39, at 256.

123 Id. at 257.

124 Id.

125 Id.

mediate offset method discounts the pension to present value and awards the non-employee spouse his or her share of the benefits in an immediate lump sum award of cash or property.\textsuperscript{127} However, under the deferred distribution method, instead of immediately dividing the retirement benefits, the court determines the future benefits to which the non-employee spouse is entitled and orders that the non-employee spouse receive those benefits when the employee spouse begins to collect payment.\textsuperscript{128}

Typically, the non-employee spouse’s benefits are stated as a share of the employee spouse’s future benefit.\textsuperscript{129} This has the practical effect of dividing each of the employee spouse’s future benefit checks between the parties.\textsuperscript{130} In the typical case, “the actual distribution of benefits under the deferred distribution method is deferred until the parties reach retirement age.”\textsuperscript{131}

A. A Qualified Domestic Relations Order (“QDRO”) under an ERISA Plan

As discussed above, the Employee Retirement Income Security Act (“ERISA”) regulates the majority of all private retirement plans.\textsuperscript{132} Among the many provisions of ERISA is an anti-assignment clause that prevents pension owners from transferring their pension rights to another person.\textsuperscript{133} However, the anti-assignment clause does not apply if a state court orders a division of pension plan benefits.\textsuperscript{134} State courts use a Qualified Domestic Relations Order (“QDRO”) to assign an interest in the pension plan to the non-employee spouse.\textsuperscript{135}

A QDRO will allow a percentage of the employee spouse’s right to future retirement benefits to be assigned to the non-employee spouse to satisfy family support or marital property obligations when the court is attempting to equitably distribute the marital property.\textsuperscript{136} When the state court uses a QDRO,
it is ordering the plan administrator\textsuperscript{137} to provide a separate check directly to the non-employee spouse.

1. The Separate Interest Approach Under ERISA

The separate interest approach is the preferred approach and is typically used when the pension has not yet begun to pay out benefits.\textsuperscript{138} Under this approach, when a QDRO is used to divide the marital property, the benefits from the pension plan are separated into two separate pension accounts, each representing one spouse's interest in the plan.\textsuperscript{139} The non-employee spouse's interest in the pension plan is assigned in the form of an annuity on his or her life.\textsuperscript{140}

This allows the non-employee spouse to receive the benefit payments over his or her lifetime, as opposed to receiving the payments solely during the lifetime of the employee spouse.\textsuperscript{141} Stated in a more simple fashion, the non-employee spouse can continue to receive his or her share of the pension benefits even if that spouse outlives the employee spouse because the parties have two completely separate pension accounts.

In addition, the separate interest approach allows the non-employee spouse to choose when he or she wants to begin receiving payments, as long as it is on or after the earliest retirement date available to the employee spouse (regardless of when the employee spouse actually retires).\textsuperscript{142}

Similar to the immediate offset method, using a separate interest QDRO has the effect of disentangling the parties' economic interests, which is a goal the courts strive for when attempting to equitably distribute marital property.\textsuperscript{143}

\textsuperscript{137} A plan administrator is typically a person or entity that works for the employer and is in charge of the pension plan. The plan administrator is usually designated by the terms of the pension or, if no such person is designated, then it is the plan sponsor (employer). See 29 U.S.C. § 1002(16)(A) (2006); CARRAD, supra note 1, at 14.

\textsuperscript{138} TURNER, supra note 39, at 217–29.

\textsuperscript{139} PENSION AND WELFARE BENEFITS ADMIN., supra note 136, at 30.

\textsuperscript{140} GALE S. FINLEY, ASSIGNING RETIREMENT BENEFITS IN DIVORCE 40 (2d ed. 1999).

\textsuperscript{141} Id.

\textsuperscript{142} 26 U.S.C. § 414(p)(4)(B) (2006). The statute reads:

For purposes of this paragraph, the term “earliest retirement age” means the earlier of-

(i) the date on which the participant is entitled to a distribution under the plan, or

(ii) the later of-

(I) the date the participant attains age 50, or

(II) the earliest date on which the participant could begin receiving benefits under the plan if the participant separated from service.

\textsuperscript{143} Id.

\textsuperscript{143} Syl. pt. 5, Cross v. Cross, 363 S.E.2d 449 (W. Va. 1987). The syllabus point reads:
The parties' economic interests are disentangled because the non-employee spouse does not have to wait until the employee spouse actually retires to begin receiving the benefits of the pension.

If the non-employee spouse did have to wait until the employee spouse actually retired to begin collecting his or her interest in the future retirement benefits, then the parties' economic interests would not be disentangled and this could cause severe financial hardships for a non-employee spouse who needed to begin collecting his or her share of the pension benefits.

2. The Shared Interest Approach Under ERISA

Under this approach, instead of each party having his or her own individual pension account, the parties receive their respective benefits from the employee spouse's original pension account. As such, when the benefits are paid, the plan administrator makes a single payment to the employee spouse and this payment is shared by both spouses. It should be noted that the shared interest approach must be used when the pension has already reached pay status or when the pension plan is not governed by ERISA.

The major disadvantage of the shared interest approach is that, unlike the separate interest approach, the parties' economic interests are not disentangled because the non-employee spouse's interest in the pension plan is not assigned in the form of an annuity on his or her life. This creates the realistic possibility that the employee spouse may pre-decease the non-employee spouse, causing the employee spouse's pension account to be terminated and the non-employee spouse to stop receiving his or her share in the pension benefits. This is only one example of the disadvantages that occur when the parties are not disentangled in the shared interest approach. However, as discussed later

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When a court is required to divide vested pension rights that have not yet matured as an incident to the equitable distribution of marital property at divorce, the court should be guided in the selection of a method of division by the desirability of disentangling parties from one another as quickly and cleanly as possible.

Id. See also Syl. pt. 2, Langdon v. Langdon, 391 S.E.2d 627 (W. Va. 1990).


Id. at 208–09.

A pension only becomes "in pay status" when the employee spouse retires and begins receiving benefits. CARRAD, supra note 1, at 24. The separate interest approach would be inappropriate for a pension already in pay status because the amount of benefits could be equitably distributed by simply splitting the amount of the employee spouse's monthly check already being received. See id. at 79.

See discussion infra Part VII.B.


See id. at 209.

For more examples, see discussion infra Part VII.G.
in the Note, many of these disadvantages can be remedied by the separate interest approach.\textsuperscript{151}

B. Pension Plans Not Governed by ERISA

ERISA does not cover pension plans offered to public sector employees.\textsuperscript{152} Therefore, pension plans offered by the federal government, a state or local government, or a branch of the military are not subject to the rules contained in ERISA.\textsuperscript{153} However, non-ERISA pension plans are typically subject to orders with the same practical effect as a QDRO.\textsuperscript{154}

Because there are many different types of pension plans in the public sector, orders that have the same practical effect as a QDRO can vary wildly in their terminology. However, some public plans have copied the ERISA method and refer to orders distributing retirement benefits as QDROs, despite the fact that the plan is not regulated by ERISA. For example, the West Virginia Public Employees Retirement System (non-ERISA) uses a QDRO to recognize a non-employee spouse’s right to receive a portion of employee spouse’s retirement benefits.\textsuperscript{155}

For purposes of this Note, all orders that are used to distribute pension plans between two parties under the deferred distribution method are referred to as QDROs. However, it is important to keep in mind that although these public employers may use orders similar to QDROs, the pension plans are not bound by the ERISA regulations.

In non-ERISA plans, the use of the separate interest approach is extremely rare because the plan administrator does not have a statutory obligation to create separate pension accounts for the employee spouse and non-employee spouse, even if the QDRO directs the plan administrator to do so.\textsuperscript{156} Therefore, when the deferred distribution method is used for non-ERISA plans, the shared interest approach is usually pursued.

\textsuperscript{151} See discussion infra Part VII.G.

\textsuperscript{152} See CARRAD, supra note 1, at 2, 5.

\textsuperscript{153} SHULMAN & KELLEY, supra note 27, at 337. The authors write:

Government pensions such as from the Civil Service Retirement System (CSRS), the Federal Employees Retirement System (FERS), the Military Retirement System, and the Railroad Retirement Board allow for the equitable division of pension benefits through independent statutory vehicles that are outside the realm of qualified domestic relations orders (QDROs). Governmental plans are not ERISA-governed plans and are therefore exempt from the standard QDRO provisions of the law.

\textit{Id.}

\textsuperscript{154} See CARRAD, supra note 1, at 5.


\textsuperscript{156} See discussion infra Part VII.F.
C. **Strengths of the Deferred Distribution Method**

The major strength of the deferred distribution method, under both the separate interest and shared interest approach, is that distribution is based upon the benefits *actually received* by the employee spouse in the future, whereas the immediate offset method is based on a *prediction* of the benefits that will be received in the future.\(^{157}\) Thus, the deferred distribution method ensures that the non-employee spouse will receive his or her exactly correct share of the pension benefits.

Another strength of the deferred distribution method is that both parties, in the event that the pension plan does not vest or mature, equally share the risk of forfeiture.\(^{158}\) Under the immediate offset method, it is possible for the non-employee spouse to receive tangible present dollars in return for his or her share in a pension that never actually yields benefits to the employee spouse.\(^{159}\) However, under the deferred distribution method, the risk of the pension not reaching pay status is allocated equally between the two parties.

The final strength of the deferred distribution method is that the employee spouse does not have to offset the value of the future retirement benefits by sacrificing other tangible assets at the time of divorce. Immediate offset is only possible when there is sufficient tangible property other than the pension plan in the marital estate.\(^{160}\) If making an award at the time of the divorce would leave the employee spouse with an unreasonably low amount of presently existing property, deferred distribution is the preferred method.\(^{161}\)

D. **Weaknesses of the Deferred Distribution Method**

The deferred distribution method has three inherent weaknesses. First, because the actual division of the pension is deferred until the future, deferred distribution does not result in an immediate and final settlement of divorcing parties' issues. This forces the parties to have a continuing connection with each other.

\(^{157}\) Turner, *supra* note 39, at 197.

\(^{158}\) See generally Shulman & Kelley, *supra* note 27, at 10.

\(^{159}\) See *supra* text accompanying note 64.

\(^{160}\) Keller v. Keller, 760 A.2d 22, 26–27 (Pa. Super Ct. 2000) (holding that the marital estate was too financially small for the immediate offset method to be used); Belton v. Belton, 481 S.E.2d. 174 (S.C. Ct. App. 1997) (holding that it was erroneous to use the immediate offset method where the value of the pension exceeded the value of other assets).

\(^{161}\) Nicholson v. Wolfe, 974 P.2d 417, 426 (Alaska 1999) (holding that it was proper to use deferred distribution to divide wife's pension, where wife had limited liquid assets, while husband was likely to need a steady source of future income); Blanchard v. Blanchard, 731 So. 2d 175, 182–83 (La. 1999) (holding that it was improper to award wife her entire pension and husband the entire marital home because wife would be left without sufficient tangible assets; deferred distribution required).
other, which is contrary to the general preference in West Virginia for a division method that disentangles future financial connections between the parties.\footnote{Syl. pt. 2, Langdon v. Langdon, 391 S.E.2d 627 (W. Va. 1990); Syl. pt. 5, Cross v. Cross, 363 S.E.2d 449 (W. Va. 1987).}

Second, under deferred distribution, the non-employee spouse’s rights to the pension depends entirely on the survival of the employee spouse.\footnote{\textit{TURNER, supra} note 39, at 198.} Stated differently, if the employee spouse dies unexpectedly after the pension has reached pay status, the non-employee spouse loses his or her interest in the retirement security. However, as examined in greater detail below, this weakness is only present when the shared interest approach is applied, and this risk is alleviated by the use of the separate interest approach.\footnote{\textit{TURNER, supra} note 39, at 198.}

In an even more unfortunate situation, if the employee spouse dies before retirement, the non-employee spouse will be left with no retirement security at all.\footnote{\textit{TURNER, supra} note 39, at 198.} This risk is present in both the shared interest approach and the separate interest approach. Obviously, the possibility of the employee spouse dying before retirement would exist even if the parties did not decide to divorce. This risk can be minimized by the employee spouse providing either survivorship benefits\footnote{See discussion infra Part VII.G.} or life insurance.\footnote{\textit{TURNER, supra} note 39, at 198.} Nevertheless, many courts recognize that the deferred distribution provides less retirement security to the non-employee spouse than the immediate offset method simply because the non-employee spouse receives the money right away under the latter method.\footnote{\textit{TURNER, supra} note 39, at 198.}

Third, and most importantly, the employee spouse “has many choices as to the amount and form of benefits, and there are many ways in which the [employee spouse’s] conduct or misconduct after the divorce can affect the amount of benefits.”\footnote{\textit{TURNER, supra} note 39, at 272. See Smith v. Smith, 438 S.E.2d 582, 584 (W. Va. 1993). A full discussion of this issue is beyond the scope of this Note.} The employee spouse has the opportunity to make decisions that disadvantage the non-employee spouse, possibly out of spite.\footnote{\textit{TURNER, supra} note 39, at 272. See Smith v. Smith, 438 S.E.2d 582, 584 (W. Va. 1993). A full discussion of this issue is beyond the scope of this Note.} After the divorce, there are many employment decisions the employee spouse may choose that could significantly impact the deferred award, even if the employee spouse is being honest and making choices in good faith.\footnote{\textit{Id.}} These possibilities include:

\begin{itemize}
  \item It should be noted that survivor benefits can play a vital role in current defined benefit retirement plans. “They provide for a sum of money to be paid to the non-employee spouse following the employee’s death. They can protect against the possibility of the employee’s death before retirement (pre-retirement survivor benefits) or after retirement (post-survivor benefits).” \textit{TURNER, supra} note 39, at 272. See Smith v. Smith, 438 S.E.2d 582, 584 (W. Va. 1993). A full discussion of this issue is beyond the scope of this Note.
  \item \textit{Id. See also} Ruggles v. Ruggles, 860 P.2d 182, 194 (N.M. 1993); Rogers v. Rogers, 622 So. 2d 96, 98 (Fla. Dist. Ct. App. 1993).
  \item \textit{TURNER, supra} note 39, at 198.
  \item \textit{Id.}
  \item \textit{Id.}
\end{itemize}
[1] Spouse terminates, withdraws benefits, and does not reinstate [benefits].


[3] Spouse terminates, does not withdraw benefits, and leaves as matured.

[4] Other spouse dies before spouse has either elected to terminate or retire.


[7] Spouse dies after retirement but before other spouse.

[8] Significant changes are made by the [employer] after divorce and before retirement in the accrual of benefits.

[9] Significant changes are made by the [employer] after retirement in the level of benefit payments.\textsuperscript{172}

Further, the employee spouse or the employer may choose to retire, terminate or withdraw benefits.\textsuperscript{173} This creates the realistic possibility for an employee spouse to make a deliberate choice to retire or not retire in attempt to “freeze-out” the non-employee spouse’s interest in the benefits.\textsuperscript{174}

For example, an employee spouse may continue to work and deliberately not retire to make sure the non-employee spouse does not begin to collect his or her interest in the retirement benefits. One could easily envision a bitter ex-spouse engaging in conduct that damages the financial interests of the other spouse simply out of spite or vengeance.

In summary, all of the major weaknesses contained in the deferred distribution method are present because the employee spouse has many choices as to the amount and form of the retirement benefits. After the divorce is complete, the employee spouse’s conduct or misconduct can substantially affect the

\textsuperscript{172} Id. at 199 (quoting Broadhead v. Broadhead, 737 P.2d 731, 736 n.5 (Wyo. 1987)). See also Moore v. Moore, 553 A.2d 20, 25–26 (N.J. 1989) (stressing the many possible events which may occur between a deferred distribution decree and the receipt of benefits). See generally Troyan, supra note 53, at 3008 (providing an extensive and generally critical list of the problems in deferred distribution). However, it should be noted that many of these criticisms have been resolved through the shared interest approach. See also discussion supra Part VI.B.2.

\textsuperscript{173} Turner, supra note 39, at 199.

\textsuperscript{174} See id.
amount of retirement benefits. As a result, there is significant potential for the
employee spouse to take actions that disadvantage the non-employee spouse.
Moreover, even if the employee spouse does not act vindictively, there are still
many uncontrollable events that could occur after the divorce and significantly
affect the deferred award of retirement benefits.

E. Cross v. Cross: The West Virginia Supreme Court of Appeals Establishes a Preference for the Immediate Offset Method and Cautions Trial Courts To Only Use Deferred Distribution as a “Method of Last Resort”

In Cross v. Cross, Mr. Cross was employed by the Jackson County Board of Education as a principal and had a defined benefit pension plan account.175 As a public employee, Mr. Cross’s state teachers’ pension account was not governed by ERISA,176 and this was a material fact that both the lower and upper court overlooked.177 Mr. Cross was a participant in a retirement plan in which there were mandatory employer contributions during employment and the benefits could not be withdrawn until Mr. Cross retired.178 Thus, the terms of the plan made it impossible to withdraw money to make an equitable distribution payment to Ms. Cross.179

The trial court did not consider Mr. Cross’s pension plan when equitably distributing the marital assets between the parties.180 Ms. Cross appealed the trial court’s failure to award her any interest in Mr. Cross’ pension plan.181 The Supreme Court of Appeals of West Virginia stated that Mr. Cross’s retirement account, or more specifically, “the right to receive future benefits from that account . . . should be considered an asset in the equitable distribution of marital property.”182 The higher court’s finding that the retirement account was marital property was easily decided183 and is not central to the issue presented in this Note.

Ultimately, the Supreme Court of Appeals of West Virginia remanded the pension issue to the trial court with directions to choose an appropriate distribution method.184 In addition, the Supreme Court of Appeals of West Virginia

176 See discussion supra Part VII.B.
177 See generally discussion infra Part VII.G (discussing how disentanglement can still be in the deferred distribution method if the plan were governed by ERISA).
178 Cross, 363 S.E.2d at 454.
179 Id.
180 Id. at 453.
181 Id.
182 Id. at 453–54. See also discussion supra Part III.
183 “Unquestionably, Mr. Cross’s retirement account . . . is marital property.” Cross, 363 S.E.2d at 453.
184 Id. at 456.
gave the trial court certain “guidelines” to follow when choosing an appropriate plan.\(^{185}\) The court’s guidelines and the analysis used to arrive at these instructions are at the crux of this Note.

The Cross court began by noting that “[t]here is no fool-proof, scientific method regularly used by courts to divide retirement or pension benefits that have vested but not yet matured.”\(^{186}\) The court went on to say that it was “hesi-ta[nt] to dictate any specific technique for distributing pension benefits at divorce because each pension plan case presents a different set of problems.”\(^{187}\)

Although the court admitted it was hesitant to grant specific instructions on how a trial court should equitably distribute a spouse’s pension, it strongly encouraged the immediate offset method due to the desired policy goal of “disentangling parties from one another as quickly and cleanly as possible.”\(^{188}\) The disentangling of the parties was the only justification given for preferring the immediate offset method.

Without giving any more meaningful analysis on the issue,\(^{189}\) the once-hesitant Supreme Court of Appeals of West Virginia wrote Syllabus Point 5, which is still the only meaningful framework for West Virginia trial courts to follow when distributing pensions:

When a court is required to divide vested pension rights that have not yet matured as an incident to the equitable distribution of marital property at divorce, the court should be guided in the selection of a method of division by the desirability of disentangling parties from one another as quickly and cleanly as possible. Consequently, a court should look to the following methods of dividing pension rights in this descending order of preference unless peculiar facts and circumstances dictate otherwise: (1) lump sum payment through cash settlement or off-set from other available marital assets; (2) payment over time of the present value of the pension rights at the time of divorce to the non-working spouse; (3) a court order requiring that the non-

\(^{185}\) Id.

\(^{186}\) Id. at 454 (citation omitted).

\(^{187}\) Id.

\(^{188}\) Id.

\(^{189}\) The court recognized that the value of the pension might be so large that it would be impossible to offset it with other marital assets, especially when the parties have acquired few assets. Id. As a possible solution to this problem, the court entertained the idea of encouraging the employee spouse to “borrow money” to pay the non-employee spouse his or her share of the present value of the employee spouse’s future retirement benefits. Id. The court shot down this solution, reasoning that it was unlikely to compel a party to borrow money in an effort to apply the immediate offset method. Id. at 454–55.
working spouse share in the benefits on a proportional basis when and if they mature.\textsuperscript{190}

For purposes of clarity, it should be noted that the first and second options are the product of applying the immediate offset method, whereas the third option is a product of applying the deferred distribution method and using a QDRO.

The \textit{Cross} court went on to state the policy in West Virginia that "the least satisfactory method of dividing a pension is to allocate part of it to the non-working spouse when and if the benefits are paid. . . . [W]hen other methods of distribution are impossible, [deferred distribution] is the method of last resort."\textsuperscript{191}

\textit{Cross} was decided in 1987, and it continues to be the leading case in West Virginia for trial courts to follow when dealing with the issue of distributing defined benefit pensions.\textsuperscript{192} Although the court acknowledged that each pension presents a different set of problems, there is no doubt that it established a very broad and clear policy for preferring the immediate offset method and heavily disfavoring the use of a QDRO under the deferred distribution method.\textsuperscript{193}

The court's only justification for preferring the immediate offset method was that the deferred distribution method was, \textit{at the time}, incapable of disentangling the parties.\textsuperscript{194} However, ten years after \textit{Cross} was decided, a new approach to deferred distribution emerged that has the potential to disentangle the parties just as efficiently as the immediate offset method.\textsuperscript{195} It is likely that this second approach to deferred distribution will require a re-examination of \textit{Cross} that has not yet reached the Supreme Court of Appeals of West Virginia.

\begin{flushleft}
\textsuperscript{191} Cross, 363 S.E.2d at 455 (emphasis added) (citation omitted).
\textsuperscript{192} Gainer, 639 S.E.2d at 751; McGee, 585 S.E.2d at 41–42; Claypoole, 511 S.E.2d at 459; Langdon, 391 S.E.2d at 631–32; Raley, 382 S.E.2d at 94.
\textsuperscript{193} Cross, 363 S.E.2d at 455.
\textsuperscript{194} Id. at 453–56.
\textsuperscript{195} See discussion infra Part VII.F.
\end{flushleft}
F. The Department of Labor Recognizes a Second Method for Making a Deferred Distribution of Retirement Benefits: The Separate Interest Approach

When Cross was decided in 1987, there was only one way to implement a deferred distribution method: the shared interest approach. As discussed above, the Cross court focused on the major disadvantage of the shared interest approach—the parties' economic interests are not disentangled. If the employee spouse's pension never reached pay status, the non-employee spouse would never receive his or her share of the retirement benefits. This is exactly what the Cross court wanted to protect against when it stated a preference for the immediate offset method—the court did not want the non-employee spouse's economic interest to be entirely dependent on the employee spouse's actions.

In 1997, ten years after Cross was decided, a second method for performing a deferred distribution was created: the separate interest approach. The United States Department of Labor, which administers the QDRO provisions of ERISA, first mentioned the method in a handbook on QDROs. The Department of Labor explained that the separate interest approach divides the employee spouse's retirement benefits into two separate accounts, with the intent of giving the non-employee spouse "a separate right to receive a portion of the retirement benefit to be paid at a time and in a form different from that chosen by the [employee spouse]."

Before 1997, state courts did not apply the separate interest approach to a defined benefit plan when using the deferred distribution method. Therefore, the Cross court did not have an opportunity to explore that approach in its analysis that so heavily disfavored the deferred distribution approach.

However, it is now well recognized that if a pension is governed by ERISA, then the court can use a QDRO to require a plan administrator to provide part of the employee's pension to an ex-spouse under the separate interest approach. Essentially, the plan administrator divides the employee spouse's

196 TURNER, supra note 39, at 217–18.
197 See discussion supra Part VILE.
198 Cross, 363 S.E.2d at 453–56. The non-employee spouse is awarded a “specific percentage or amount from each future payment which becomes payable to the employee” spouse. TURNER, supra note 39, at 217.
199 See Cross, 363 S.E.2d at 453–56.
200 TURNER, supra note 39, at 217–18.
201 PENSION & WELFARE BENEFITS ADMIN., supra note 136, at 30.
202 Id. (emphasis added).
203 See TURNER, supra note 39, at 217–18.
204 See 29 U.S.C. § 1056(d)(3)(A) (2006). See also Anderson v. Suburban Teamsters, 588 F.3d 641, 651 (9th Cir. 2009) (“A QDRO requires a plan administrator to provide part or all of an employee’s pension to an ex-spouse.”).
retirement benefits into two accounts and then "treats each spouse as an individual participant under the plan," completely disentangling their financial ties.\footnote{205}{\textsc{turner}, supra note 39, at 221 (emphasis omitted).}

Although the separate interest approach is typically the preferred method of deferred distribution,\footnote{206}{see discussion supra Part VII.A.1.} it should be noted that a court could still draft a QDRO to require the plan administrator to apply the shared interest approach to an ERISA pension plan.\footnote{207}{pension & welfare benefits admin., supra note 136, at 31.}

For a complete understanding of the issue, it is imperative to recognize that the separate interest approach is typically not available for pensions that are not governed by ERISA, i.e. pension plans offered to public sector employees.\footnote{208}{Id.} Non-ERISA pension plans only use the shared interest approach because, unlike an ERISA-plan,\footnote{209}{see generally \textsection 29 U.S.C. \textsection 1056(d)(3)(A) (2006) (requiring a plan administrator of an ERISA plan to assign a portion of the benefits under that plan to an alternate payee if it is so ordered in the QDRO).} the plan administrator is not statutorily obligated to use the separate interest approach. Rather, the plan administrator is bound only by the specific rules of the pension plan at issue. Therefore, the plan administrator of a non-ERISA pension plan is not likely to expend the resources necessary to go through the process of creating a separate pension account for a non-employee spouse.

\section*{G. Disentanglement Can Be Achieved in the Deferred Distribution Method if the Pension Plan Is Governed by ERISA}

As mentioned above, there are two different approaches to the deferred distribution method: the separate interest approach (which is only available under an ERISA plan) and the shared interest approach (which is available under an ERISA and non-ERISA plan).\footnote{210}{see discussion supra Part VII.F.} In the deferred distribution method, disentanglement is only achieved through the separate interest approach because the non-employee spouse and employee spouse each have a completely separate, independent pension.

If a pension plan is not governed by ERISA and the shared interest approach is used, the QDRO will typically assign a fixed percentage of the em-
ployee spouse’s monthly benefit to the non-employee spouse.212 The non-employee spouse’s interest is economically strained because the shared interest approach only divides the single pension account held by the employee spouse.213 For example, if the employee spouse were to die, the non-employee spouse’s interest in the benefits would cease.214 This is one of the largest economic limitations in the shared interest approach. It is all too possible that the non-employee spouse may stop receiving his or her monthly check, causing severe financial hardships.215

In short, the non-employee spouse cannot collect any of his or her interest in the retirement benefits until the employee spouse goes into pay status.216 A pension only becomes “in pay status” when the employee spouse retires and begins receiving benefits.217 Therefore, under the shared interest approach, the non-employee spouse cannot become disentangled because his or her interest in the future retirement benefits is completely contingent on when (and if) the employee spouse retires.

The parties’ interests remain intertwined in many other different ways as well because the employee spouse can decide both when to retire and the form of benefits to take at retirement.218 Although each specific employer and pension plan come with different terms, it is generally true that most employee spouses can choose smaller monthly benefits that start earlier or larger monthly benefits that begin later.219 All the while, the only option the non-employee spouse has is to simply sit back and wait—he or she is completely frozen-out from making any decisions, much less “disentangled” from the other spouse.

This is exactly the type of situation the Cross court wanted to protect against when it stated that deferred distribution was a “method of last resort.”220 However, keep in mind that when Cross was decided, the separate interest approach for deferred distribution had not yet been recognized.

In contrast, under the separate interest approach, because the actual pension is divided into two separate accounts before the employee spouse begins collecting benefits, it “allows both the [employee spouse] and the [non-employee spouse] to each elect a form of benefits for their respective separate

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212 Id. at 209; Szydlowski v. Pension Benefit Guar. Corp., 2006 WL 903246, at *7 (E.D. Mo. 2006).
213 TURNER, supra note 39, at 209.
214 Id.
215 Id.
217 CARRAD, supra note 1, at 24.
218 TURNER, supra note 39, at 209.
219 Id. at 209–10.
shares." This has the practical effect of completely disentangling the parties’ future interests in the retirement plan similar to the disentanglement achieved in the immediate offset method.

Here, many of the economic limitations presented in the shared interest approach are avoided because the non-employee spouse is entitled to receive benefit payments over his or her lifetime, as opposed to receiving the payments only during the lifetime of the employee spouse. If the employee spouse were to die before deciding to retire, the non-employee spouse could still recover his or her interest in the retirement benefits because the spouse’s benefits are completely independent. The same is true even if the employee spouse died after he or she had retired because the non-employee spouse’s benefits are computed with respect to his or her life expectancy, and they do not depend in any way on the employee spouse’s benefits.

In addition, one spouse’s determination of when his or her benefits will start has absolutely no bearing on the other spouse. Thus, one spouse is free to choose smaller benefits sooner in time, while the other spouse waits to take larger benefits at a later date. Further, if the employee spouse chooses to retire early, that decision has no bearing on the non-employee spouse’s rights—the timing and amount of the non-employee spouse’s benefits depends entirely on his or her choice. In short, the separate interest approach treats the non-employee spouse as if he or she were a full participant under the pension plan.


West Virginia is not in the minority for not yet recognizing the separate interest approach. In fact, a leading treatise on the issue recognized that “[s]ince the publication of the DOL QDRO Guide, most state appellate courts have remained blissfully unaware of the separate interest approach.”

In Cross, the only justification given for preferring the immediate offset was the now outdated belief that the deferred distribution method was incapable

221 Szydlowski, 2006 U.S. Dist. LEXIS 87986, at *20 (citing Cynthia A. Samuel & Katherine S. Spaht, Fixing What’s Broke: Amending ERISA to Allow Community Property to Apply upon the Death of a Participant’s Spouse, 35 FAM. L.Q. 425, 441–42 (2001)).
222 Finley, supra note 140.
223 See Turner, supra note 39, at 221.
224 See id.
225 Id.
226 Id.
227 Id.
228 See id. at 222.
229 Id.
of disentangling the parties’ economic ties. However, in situations where the pension plan is governed by ERISA and the separate interest approach is available, the deferred distribution method does disentangle the parties. The preference for preferring the immediate offset method and using deferred distribution only as a method of last resort is out of date and overly broad.

In fact, depending on the unique circumstances presented in each divorce proceeding, the deferred distribution method may actually be preferred over the immediate offset method, especially when the pension plan is governed by ERISA and the separate interest approach is available.

One strength of the deferred distribution method lies in the fact that the distribution of benefits is based upon the benefits actually received by the employee spouse in the future, whereas the immediate offset method is based on a prediction of benefits that will be received in the future. Thus, the deferred distribution method ensures that the non-employee spouse will receive his or her exactly correct share of the pension benefits and not a mere prediction of what the benefits will be in the future. Courts have found that this is especially persuasive when the present value is difficult to compute with reasonable accuracy.

Deferred distribution is also more desirable when the parties do not have sufficient other tangible property remaining in the marital estate, making a present value award through the immediate offset method much more difficult. Often times, making a present award of either cash or other marital property would leave the employee spouse with an unreasonably low amount of tangible assets.

Another reason the deferred distribution method may be more advantageous to the parties is because the risk of forfeiture is allocated equally between the parties. Under the immediate offset method, it is possible for the non-

231 See TURNER, supra note 39, at 197. See also discussion supra Part VII.C.
232 See In re Marriage of Truax, 894 P.2d 936, 938 (Mont. 1995) (holding that where present value of pension was unusually unreliable, the pension should be divided by deferred distribution); In re Marriage of McLaughlin, 526 N.W.2d 342, 345 (Iowa Ct. App. 1994) (holding that where the parties’ pensions were difficult to value because one was unvested, it was error to use the immediate offset method; remanding for deferred distribution of both pensions); In re Marriage of Scheppele, 524 N.W.2d 678, 680 (Iowa Ct. App. 1994) (holding that where expert opinions on present value of pension varied wildly, it was error to use the immediate offset method; remanding for use of deferred distribution).
233 Blanchard v. Blanchard, 731 So. 2d 175, 182–83 (La. 1999) (holding that it was improper to award wife her entire pension and husband the entire marital home because wife would be left without sufficient tangible assets; deferred distribution required); Keller v. Keller, 760 A.2d 22, 26–27 (Pa. Super Ct. 2000) (holding that the marital estate was too financially small for the immediate offset method to be used); Belton v. Belton, 481 S.E.2d. 174, 182–83 (S.C. Ct. App. 1997) (holding that it was erroneous to use the immediate offset method where the value of the pension exceeded the value of other assets).
234 See SHULMAN & KELLEY, supra note 27, at 10.
employee spouse to receive tangible present dollars in return for his or her share in a pension that never actually vests or matures. Depending on the facts surrounding the pension plan, it may be extremely unfair to allocate the entire risk of the pension not vesting or maturing to the employee spouse. Many courts have found this particularly persuasive, especially when there is an unusually substantial risk that benefits will never be received.

VIII. CONCLUSION

When it comes to choosing between the immediate offset or deferred distribution methods, courts across the United States do not arrive at a general consensus as to which is the best. As a matter of law, only a few states require one specific method and most leave the choice in the trial court’s discretion. The Supreme Court of Appeals of West Virginia was absolutely correct to say that “[t]here is no fool-proof, scientific method regularly used by courts to divide retirement or pension benefits . . .”

The purpose of this Note is to inform the reader that, in order to achieve a completely equitable distribution of marital property, a diligent inquiry into the particular facts of a defined benefit pension plan and the relevant issues surrounding the divorcing couple is absolutely necessary. The method used to equitably distribute pension plans, especially defined benefit plans, can only be achieved through a fact-specific inquiry into the details of each divorce proceeding.

Alex Greenberg*

235 See discussion supra Part VI.B.
236 See, e.g., Curry v. Curry, 572 So. 2d 557, 557–58 (Fla. Dist. Ct. App. 1990) (affirming lower court’s decision to retain jurisdiction over the husband’s termination benefits which might never become payable); Grund v. Grund, 573 N.Y.S.2d 840, 844 (N.Y. Sup. Ct. 1991) (holding that it was improper to issue a lump sum payment to divide the husband’s accumulated leave time which might well be used up before he retires).
237 Turner, supra note 39, at 233.
238 Id.

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