

Table of Cases

Indicating That Nonemployee spouse Will Share in the Improvement to Benefits Related to Post-Separation Salary Increases

This table has been compiled to illustrate the principle that the nonemployee spouse must share post-separation salary increases with the nonemployee spouse. There are almost 20 cases here, and there may be more.

There are **no** examples of cases where the post-separation-salary-generated pension increases were successfully kept for the employee spouse.

In re Marriage of Adams (1976) 64 Cal.App.3d 181, 134 Cal.Rptr. 298

Nonemployee spouse's interest properly based on ultimate retirement benefit, not benefit accrued as of date of separation. Time rule discussed.

In re Marriage of Anderson (1976) 64 Cal.App.3d 36, 134 Cal.Rptr. 252

Time rule applied even though pension increased in value after date of separation because early years should count as much as later years.

In re Marriage of Andreen (1978) 76 Cal.App.3d 667, 143 Cal.Rptr. 94

Pension divided based on final salary and not salary at time of marriage separation.

In re Marriage of Crook (1992) 2 Cal.App.4th 1606, 3 Cal.Rptr.2d 905

Husband's attempt to keep all increases due to post-separation salary increases rejected.

In re Marriage of Foster (1986) 180 Cal.App. 3d 1068, 227 Cal.Rptr. 446; Kremer, P.J./DCA 4 [**This is the other side of the coin.**]

Non-employee without remedy if employee leaves employment before vested.

In re Marriage of Freiberg (1976) 57 Cal.App.3d 304, 127 Cal.Rptr. 792

Nonemployee spouse is entitled to share of pension based on final benefits, not those as of date of separation.

Gemma v. Gemma 105 Nev. 458, 778 P.2d 429 (1989)

If jurisdiction is retained, the community interest is determined using the "time rule" on the ultimate, actual benefit. However, if the employee spouse can demonstrate at retirement that the ultimate benefit is the result of unusual post-separation efforts and not just cost-of-living and promotional increases, the benefit can be recalculated using the income the employee would have received in the normal course of events.

Caution: the above is a Nevada case and would likely be ignored by a California court, although it probably states the law.

In re Marriage of Gillmore (1981) 29 Cal.3d 418, 174 Cal.Rptr. 493

The nonemployee spouse gets to choose when she wants to commence her benefit, at any date upon which the employee spouse is eligible to retire.

Once nonemployee spouse makes election to begin receiving benefits, nonemployee gives up increased payments in the future due to increased age, longer service and higher salary.

In re the Marriage of Gowan, 1997 Cal. App. LEXIS 275

Parties' judgment which reserved jurisdiction to divide pension based on employee's past employment enabled nonemployee spouse to benefit from increases in value due to employee's re-employment not contemplated by the parties. ". . . [I]t was reasonable to expect that new pension laws and other future events (including some events not contemplated by the parties) could have an impact on the parties' rights in the pension. . . . Although the parties did not contemplate that the community property pension would become part of a larger "combined pension," this is precisely the kind of changed circumstance that makes the retention of jurisdiction appropriate and necessary."

Mrs. Gowan's benefit value increased by a factor of six or more due to Mr. Gowan's foolishness in negotiating with his company for the pension continuation benefit without buying her out first!

In re Marriage of Hayden (1981) 124 Cal.App.3d 72, 177 Cal.Rptr.183; Work, J./DCA 4

Upon remand, [after an appellate opinion pointed out the trial court's error]

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assets may be valued as of date of trial or as of date of retrial.

In re Marriage of Henkle (1987) 189 Cal.App.3d 97, 234 Cal.Rptr. 351; King, J./DCA 1

Once maximum benefits are earned, further employment not considered in time rule formula.

It was the military ex-spouse who was hurt here since her years of marriage went beyond the minimum of 30. If she had been married the first 10 years of 35 instead of the last 10 years, the inequity would have been visited on him.

In re Marriage of Jacobson (1984) 161 Cal.App. 3d 465, 207 Cal.Rptr. 512

Gillmore applies to military pensions.

Nonemployee spouse entitled to any cost-of-living increases which would have occurred had employee retired.

In re Marriage of Judd (1977) 68 Cal.App.3d 515, 137 Cal.Rptr. 318

Pension should be divided according to time rule. Community gets benefit of post separation salary increases.

In re the Marriage of Lehman (1998) 18 Cal. 4th 169; 955 P.2d 451, 74 Cal. Rptr. 2d 825

“The right to retirement benefits is a right to ‘draw[] from [a] stream of income that . . . begins to flow’ on retirement, as that stream is then defined.” Although employee spouse had to quit job to have his pension enhanced by adding three years to his age and three years to his service, former spouse entitled to her pro rata share of both enhancements; the additional years would not be added to the denominator of the time rule.

In re Marriage of Lucero (1981) 118 Cal.App.3d 836, 173 Cal.Rptr. 680; Tamura, J./DCA 4

Right to redeposit contributions withdrawn from pension to get increased benefits is a community property right.

In re Marriage of Marsden (1982) 130 Cal.App.3d 426, 181 Cal.Rptr. 910; ; Barry-Deal, J./DCA 1

Benefits must be valued as of date of trial, not date of separation.

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In re Marriage of Melton, (1994) 28 Cal.App.4th 931.

Bad News for Nonemployee Spouse : Judgment which divided pension and contained description of the benefits cannot be expanded to include benefits which increase by passage of time. Good News for Nonemployee Spouse: the benefit increases can be divided as an omitted asset under rationale of the *Henn* case.

In re Marriage of Poppe (1979) 97 Cal.App.3d 1, 158 Cal.Rptr. 500; Kaufman, J./DCA 4

This case sometimes cited as an example of non-time-rule case, because it used National Guard points in the formula. However, “points” awarded under National Guard retirement are representative of time worked, and in any event are the measure of how the benefits are accumulated.

In re Marriage of Scott (1984) 156 Cal.App.3d 251, 202 Cal.Rptr. 716

Gillmore applies to military pensions. Former spouse entitled to share in benefits which would have been received if retiree retires same date as the former spouse, e.g. COLA's.