IN RE MARRIAGE OF STENQUIST: EQUAL PROTECTION FOR THE DISABILITY PENSION RECIPIENT IN CALIFORNIA COMMUNITY PROPERTY LAW

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Introduction

Litigation in California over the division of community property has rarely attained constitutional dimensions.[1] This is owing partly to the breadth of the state constitutional provisions governing the California community property system,[2] as the broad constitutional founda-

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1. The earliest cases relied principally on scholarly sources defining the Mexican-Spanish community property law and on California statutes restating or modifying that law. *See, e.g.*, Packard v. Arellanes, 17 Cal. 525 (1861); Noe v. Card, 14 Cal. 576 (1860); Panaud v. Jones, 1 Cal. 488 (1851). The case law of other community property jurisdictions—especially that of Texas and Louisiana—was also utilized in the early California cases, although less authoritatively than the Spanish commentaries or the California statutes. *See, e.g.*, Packard v. Arellanes, 17 Cal. 525; Van Maren v. Johnson, 15 Cal. 308 (1860); Noe v. Card, 14 Cal. 576; Smith v. Smith, 12 Cal. 216 (1859). Constitutional considerations were pivotal in more of these early cases than in cases today. For example, in George v. Ransom, 15 Cal. 322 (1860), the court held that constitutional guarantees extended to the wife's separate property and prevented the husband's creditors from subjecting her estate to their claims. *See also* Bowman v. Norton, 16 Cal. 213 (1860); Ingoldsby v. Juan, 12 Cal. 564 (1859); Revalk v. Kraemer, 8 Cal. 66 (1857); Guttmann v. Scannell, 7 Cal. 455 (1857). Most of these early cases confined constitutional discussion to issues surrounding the protections afforded the wife's separate property. For more recent examples of community property cases in which constitutional issues were litigated, see *In re* Marriage of Bouquet, 16 Cal. 3d 583, 546 P.2d 1371, 128 Cal. Rptr. 427 (1976); Addison v. Addison, 62 Cal. 2d 558, 399 P.2d 897, 43 Cal. Rptr. 47 (1965); Boyd v. Oser, 23 Cal. 2d 613, 145 P.2d 312 (1944); Estate of Thornton, 1 Cal. 2d 1, 33 P.2d 1 (1934); Stewart v. Stewart, 199 Cal. 318, 249 P. 197 (1926); Steinberger v. Young, 175 Cal. 81, 165 P. 432 (1917); Estate of Moffitt, 153 Cal. 359, 95 P. 653 (1908); Spreckels v. Spreckels, 116 Cal. 339, 48 P. 228 (1897). *See also* note 4 *infra*.

2. The original provision read as follows: "All property, both real and personal, of the wife, owned or claimed by her before marriage, and that acquired afterward by gift, devise, or descent, shall be her separate property; and laws shall be passed more clearly defining the rights of the wife, in relation as well to her separate property, as to that held in common with her husband. Laws shall also be passed providing for the registration of the wife's separate property." CAL. CONST. of 1849, art. XI, § 14. After the enactment of a statute "more clearly defining" the spouses' community property rights—"An act defining the rights of Husband and Wife," 1850 Cal. Stats. 254—the state constitution was amended to read: "All property, real and personal, owned by either husband or wife before marriage, and that

tion of the relevant statutes[3] has deflected litigation of constitutional questions within the community property context and thus forestalled the application of state and federal constitutional doctrines to community property issues.[4] It should not be surprising, therefore, that the California marital property scheme has only recently begun to serve the goal of "equal justice under law." Only since 1927 has the wife's interest in community property been defined by statute as "present, existing and equal" to that of the husband.[5] And only since 1975 has the

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acquired by either of them afterward by gift, devise, or descent, shall be their separate property." CAL. CONST. of 1879, art. XX, § 8. This was subsequently amended, on Nov. 3, 1970, to read simply: "Property owned before marriage or acquired during marriage by gift, will, or inheritance is separate property." CAL. CONST. of 1879, art. I, § 21 (1970). It is notable, therefore, that apart from the original constitution's passing reference to property "held in common," the constitutional foundation of California community property law is merely implicit in the recognition and protection afforded the spouses' (and originally only the wife's) *separate* property interests.

3. The relevant statutes are found principally in the Civil Code and the Probate Code. *See, e.g.*, CAL. CIV. CODE §§ 5104-5136 (West 1970); CAL. PROB. CODE §§ 201-206, 650-57 (West Supp. 1979).

4. The outstanding exception involves the doctrine against the retroactive operation of statutory amendments to the community property law. This doctrine has been applied on several occasions, *see, e.g.*, Boyd v. Oser, 23 Cal. 2d 613, 145 P.2d 312 (1944); Estate of Thornton, 1 Cal. 2d 1, 33 P.2d 1 (1934); Spreckels v. Spreckels, 116 Cal. 339, 48 P. 228 (1897). The doctrine has also been affirmed on several grounds, including due process (*Spreckels*), the privileges and immunities of citizens of the several states (*Thornton*; *Boyd*), and the general state constitutional right to separate property (*Thornton*; *Boyd*). Its soundness, however, was questioned by Justice (later Chief Justice) Traynor, in his concurrence in *Boyd*, and more recently by Justice Peters in Addison v. Addison, 62 Cal. 2d 558, 399 P.2d 897, 43 Cal. Rptr. 97 (1965). The court in *In re* Marriage of Bouquet, 16 Cal. 3d 583, 546 P.2d 1371, 128 Cal. Rptr. 427 (1976) may have impliedly overruled earlier case law on the issue of non-retroactivity. Justice Tobriner's majority opinion reasoned that the probable unconstitutionality of CAL. CIV. CODE § 5118 (West 1970) (relating to classification of the spouses' earnings while living separate and apart) before its amendment in 1971 supported "the conclusion that the Legislature intended the amendment to have retroactive effect." *Id.* at 588, 546 P.2d at 1373, 128 Cal. Rptr. at 429. *See generally* Reppy, *Retroactivity of the 1975 California Community Property Reforms*, 48 S. CAL. L. REV. 977 (1975); Note, *Retroactive Application of California's Community Property Statutes*, 18 STAN. L. REV. 514 (1966).

A few early California cases turned on the constitutional guarantee accorded *separate* property, especially that of the wife. *See, e.g.*, George v. Ransom, 15 Cal. 322 (1860); Ingoldsby v. Juan, 12 Cal. 564 (1859); Selover v. American Russian Commercial Co., 7 Cal. 266 (1857).

Finally, constitutional considerations have also been central in California cases involving conflicts with federal law, where applications of the supremacy clause of the United States Constitution, U.S. CONST. art. VI, § 2, have taken the issues out of state control. *See, e.g., In re* Marriage of Milhan, 13 Cal. 3d 129, 528 P.2d 1145, 117 Cal. Rptr. 809 (1974); *In re* Marriage of Fithian, 10 Cal. 3d 592, 517 P.2d 449, 111 Cal. Rptr. 369 (1974). *See also* Hisquierdo v. Hisquierdo, 439 U.S. 572 (1979); Yiatchos v. Yiatchos, 376 U.S. 306 (1964); Free v. Bland, 369 U.S. 663 (1962); and Wissner v. Wissner, 338 U.S. 655 (1950), which are cases where the United States Supreme Court found various state community property laws partially preempted by federal legislation.

5. CAL. CIV. CODE § 5105 (West Supp. 1980) (formerly § 161a): "The respective inter-

wife enjoyed, as a matter of legislative grace, rights in the management and control of community property coextensive with the husband's rights.[6] These most recent constitutionally-inspired renovations of the community property system, while consistent with the California Supreme Court's recognition of sex-based classifications as inherently suspect,[7] nevertheless amplify the court's historical silence when asked to redress marital property grievances having constitutional remedies.[8]

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ests of the husband and wife in community property during continuance of the marriage relation are present, existing and equal interests. This section shall be construed as defining the respective interests and rights of husband and wife in community property." The section was added in 1927, apparently in response to the California Supreme Court's holding in Stewart v. Stewart, 199 Cal. 318, 249 P. 197 (1926), that the wife's mere "protected expectancy" in the community property defeated her standing to sue for quiet title to real property held as community property in her name.

6. CAL. CIV. CODE § 5125 (West Supp. 1980) (formerly § 172) as amended by 1974 Cal. Stats. 2609, now reads in relevant part: "[E]ither spouse has the management and control of the community personal property, whether acquired prior to or on or after January 1, 1975, with like power of disposition, other than testamentary, as the spouse has of the separate estate of the spouse." CAL. CIV. CODE § 5127 (West Supp. 1980) (formerly § 172a) as amended by 1974 Cal. Stats. 2610, now reads in relevant part: "[E]ither spouse has the management and control of the community real property, whether acquired prior to or on or after January 1, 1975, but both spouses either personally or by duly authorized agent, must join in executing any instrument by which such community real property or any interest therein is leased for a longer period than one year, or is sold, conveyed, or encumbered . . . ." For an extensive study of the constitutional dimensions of community real property control and management prior to the 1974 amendments, see Note, *Equal Rights and Equal Protection: Who Has Management and Control?* 46 S. CAL. L. REV. 892 (1973).

7. *See* Sail'er Inn, Inc. v. Kirby, 5 Cal. 3d 1, 485 P.2d 529, 95 Cal. Rptr. 329 (1971).

8. *Cf.* Stewart v. Stewart, 199 Cal. 318, 249 P. 197 (1926) (holding that the wife's mere "protected expectancy" in the community property defeated her standing to quiet title to community real property held in her name); Estate of Moffitt, 153 Cal. 359, 95 P. 653 (1908) (refusing to construe the state constitution as granting the wife a present and vested interest in the community property so as to exempt her from inheritance tax payments upon her husband's death).

Although legislative reform of the California community property system has continued from a relatively early date, progress has not been rapid. Culminating in the enactment of CAL. CIV. CODE § 5125 (West Supp. 1980), *see* note 6 *supra*, the statutes only gradually restricted a husband's originally undisputed right to manage and control the community, and sometimes even the wife's separate, property. In 1891, CAL. CIV. CODE § 172 (currently § 5125) was amended to forbid the husband's disposal of community personal property without valuable consideration, absent the wife's written consent. In 1901, similar protection was afforded the wife for community property clothing and home furnishings. In 1917, an amendment to CAL. CIV. CODE § 172a (currently § 5127) prevented the husband from conveying or encumbering community real property without the wife's joinder. In 1951, CAL. CIV. CODE § 171c (currently § 5124) was added, granting the wife exclusive control and management of her own community property earnings and recoveries for personal injury, but only so long as they were kept separate and distinct from other community property and were not invested in real property.

The husband's long-recognized power to control community property moved the legislature to follow another approach in order to protect the wife's otherwise restricted property interests: reclassification of certain types of property as the wife's property, which was

Judicial acceptance, over the years, of certain manifest inadequacies in the statutory formulation of the California community property system may be attributed variously to the conservative nature of property law,[9] to the judicially-observed separation of powers,[10] or even to the parties' (or their attorneys') unwillingness to litigate the constitu-

outside the husband's control and management under CAL. CIV. CODE § 162 (1872) (currently § 5107) and was protected from creditors' claims against the community property under the California Supreme Court's earlier holding in George v. Ransom, 15 Cal. 322 (1860). Thus, in 1870, the wife's earnings while living separate and apart from the husband were made her separate property. *See* 1869-70 Cal. Stats. 226, later CAL. CIV. CODE § 169 (currently § 5118). Only since 1971 has the husband enjoyed similar property rights. *See* CAL. CIV. CODE § 5118 (West 1970). And in 1889, CAL. CIV. CODE § 164 (currently § 5110) was amended to provide that real or personal property acquired by a married woman through a written instrument was presumed to be her separate property. This provision now applies only to property acquired prior to January 1, 1975, the effective date of amended CAL. CIV. CODE § 5125 (West Supp. 1980) giving the wife competitive control and management of the community property equal to that of the husband. The prospective application of amended section 5125 strongly suggests that section 5110, as originally conceived, might have withstood the strict scrutiny mandated under *Sail'er Inn*, if only because both sections 5110 and 5125 had been *reciprocally* discriminatory—that is, because two constitutional wrongs had in effect made two (otherwise unconstitutional) rights.

9. *See* C. MOYNIHAN, INTRODUCTION TO THE LAW OF REAL PROPERTY 1 (1962): "A thorough understanding of the modern land law is impossible without a knowledge of its historical background. That law has been a millenium in the making . . . . The imprint of the past is still discernible in the present. In this branch of law more than any other we can time and again invoke the often quoted statement of Mr. Justice Holmes: 'Upon this point a page of history is worth a volume of logic.' "

The inherent conservatism of California community property law is apparent from its Mexican-Spanish origins, evidencing a heritage that may be traced ultimately to the Visigoths, and in written form as far back as 693 A.D. *See* W. DE FUNIAK & M. VAUGHN, PRINCIPLES OF COMMUNITY PROPERTY 3 (2d ed. 1971). It is notable that the earliest California community property cases relied largely on the Spanish community property system, looking to the Texas and Louisiana systems, as well as the seminal California statutes, as correctly restating Spanish community property doctrine. *See, e.g.*, Panaud v. Jones, 1 Cal. 488 (1851) and the other cases cited in note 1 *supra*.

10. The most notorious example is Stewart v. Stewart, 199 Cal. 318, 249 P. 197 (1926), where the court refused to recognize the wife's standing to sue her husband for quiet title to community real property recorded in her name. The court held that the marital property statutes gave the wife only a "protected expectancy" in the community property: "Had the legislature seen fit to so declare in the language employed by it . . . , no doubt could have existed as to its intent to work such a radical change in the former and long-established status as to render the interest of the wife in the community property thereafter to be acquired a present vested estate and interest therein from the date of its acquisition. The legislature did not do this nor anything like it." *Id.* at 340, 249 P. at 206.

Another notable example is Estate of Moffitt, 153 Cal. 359, 95 P. 653 (1908), where the court refused to construe the state constitution as granting the wife a present and vested interest in the community property so as to exempt her from inheritance tax payments upon her husband's death: "If . . . it never entered the minds of the men constituting the legislative body that they were imposing this tax upon the community interest of the wife, it can only be said that for their ignorance they, and not the courts, are responsible, and for their omission they, and not the courts must find the remedy." *Id.* at 362, 95 P. at 654.

tional issues.[11] Also relevant is a tendency, subtle but discernible throughout the history and development of California community property law, to avoid unnecessary judicial intrusion into intimate relationships.[12] These justifications, however, seem insufficient to support the working of otherwise avoidable injustice in any of the thousands of dissolution proceedings adjudicated annually in California.[13]

A constitutional dilemma is posed, therefore, by the California Supreme Court's recent holding in *In re Marriage of Stenquist*[14] that a disability pension might under certain circumstances qualify for classification as community property: might not classifying a disability pen-

11. The earliest official reports of community property cases, which include summaries of the attorneys' briefs, only rarely refer to constitutional doctrines. It is notable that although the briefs for Estate of Moffitt, 153 Cal. 359, 95 P. 653 (1908), did invoke Fourteenth Amendment rights, the court rejected these claims without discussion.

12. This attitude is particularly apparent in the rules relating to contractual modification of the California community property system. The system has always been subject to antenuptial and postnuptial contractual modification. Contracts which modify the classification provisions require a minimum of proof; indeed, postnuptial contracts modifying classification of community or separate property need not be written, or even express. *See, e.g.*, Tomaier v. Tomaier, 23 Cal. 2d 754, 146 P.2d 905 (1944); Nevins v. Nevins, 129 Cal. App. 2d 150, 276 P.2d 655 (1954). In Woods v. Security First Nat'l Bank, 46 Cal. 2d 697, 299 P.2d 657 (1956), these principles were followed pursuant to the "practice of informality in property dealings between husband and wife . . . ." *Id.* at 702, 299 P.2d at 660.

Most of the cases involve contractual modifications of the classification of community or separate property; but contracts modifying the spouse's statutory property interests can also relate to the exploitation and distribution of the community and separate property. In fact, property settlements occupy a favored position in California law. *See, e.g.*, Adams v. Adams, 29 Cal. 2d 621, 177 P.2d 265 (1947); Hill v. Hill, 23 Cal. 2d 82, 142 P.2d 417 (1943). In *Adams*, the court went so far as to hold such settlement contracts "binding on the court," *id.* at 624, 177 P.2d at 267, so long as they are free of fraud and duress. Such contracts were held to survive the death of either of the parties in McClenny v. Superior Court, 62 Cal. 2d 140, 396 P.2d 916, 41 Cal. Rptr. 460 (1964).

Contracts providing for spousal support are given statutory approval in CAL. CIV. CODE § 4802 (West 1970); so also are contracts for marriage settlements in CAL. CIV. CODE § 5134 (West 1970). The latter provision requires that marriage settlement contracts be written and recorded. *See* CAL. CIV. CODE §§ 5135-5136 (West 1970). These statutes regulating support and settlement contracts impose stricter requirements than do those imposed by the courts on contracts relating to classification. The different treatment is not entirely referable to perceived differences between the two types of contracts. For example, in Marvin v. Marvin, 18 Cal. 3d 660, 557 P.2d 106, 134 Cal. Rptr. 815 (1976), the California Supreme Court held that support agreements and property settlements between a man and woman living together in a nonmarital relationship need not be written, or even express. The holding in *Marvin* suggests that the state's manifest interest in protecting marital institutions, although sufficient to support legislative regulation of support agreements and property settlements, does not justify unnecessary judicial intrusion upon the freedom to contract, at least where parties are not actually married.

13. 49,300 divorces were filed in California in 1960, or 3.1 divorces per 1,000 population. By 1975, the figures had risen to 128,500 divorces, or 6.1 divorces per 1,000 population. *See* U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 1977 (98th ed. 1977).

14. 21 Cal. 3d 779, 582 P.2d 96, 148 Cal. Rptr. 9 (1978).

sion, which arises from the deprivation of a separate property health interest, as community rather than separate property, deny disabled pensioners, in their status as physically handicapped individuals, the equal protection of the laws? The immediate task of this note will be to analyze some of the latent constitutional issues in the *Stenquist* holding and to suggest some solutions. Specifically, it will be argued that where the division of post-dissolution disability pension receipts as community property interferes with a pensioner's demonstrated need for more than one-half of such receipts, application of recently articulated standards of intermediate review to the class of physically handicapped persons may justify treatment of the pension as the pensioner's separate property.

A constitutional analysis of *Stenquist* is timely for two reasons. First, related property issues have been involved in a number of recent state as well as United States Supreme Court cases.[15] Second, such an analysis seems particularly appropriate in light of continued efforts by state and federal bodies, both legislative and judicial, to protect the class of handicapped persons, whose members have long been subject to social and legal discrimination. This note will further attempt, therefore, to focus and expand upon the constitutional significance of these latter developments.

I. In re Marriage of Stenquist: A Summary

A. The Facts

The husband in *Stenquist* was a retired serviceman who had been unmarried when he entered the Army in 1944; six years later, he married. In 1953, he suffered a service-related injury requiring the amputation of his left forearm. At that time, the Army assigned him an 80% disability rating; thus, had he retired in 1953, he would have been entitled to "retired pay" amounting to 75% of his basic monthly pay at retirement, computed according to his disability rating and subject to the qualifications set forth in 10 U.S.C. § 1401.[16] Had the husband suffered no injury, or had he chosen not to exercise his disability option,

15. *See, e.g.*, Hisquierdo v. Hisquierdo, 439 U.S. 572 (1979); Henn v. Henn, 26 Cal. 3d 323, 605 P.2d 10, 161 Cal. Rptr. 502 (1980); *In re* Marriage of Samuels, 96 Cal. App. 3d 122, 158 Cal. Rptr. 38 (1979); *In re* Marriage of Pilatti, 96 Cal. App. 3d 63, 157 Cal. Rptr. 594 (1979); *In re* Marriage of Orr, 95 Cal. App. 3d 561, 157 Cal. Rptr. 301 (1979). *See also* Gorman v. Gorman, 90 Cal. App. 3d 454, 153 Cal. Rptr. 479 (1979), where an attorney was held liable to his client for failing to assert the latter's community property interest in her former husband's military retirement benefits.

16. 10 U.S.C. § 1401 (1975) provides that no serviceman's retired pay, whether ordinary or disability-related, shall exceed 75% of his basic monthly pay. Thus, where, as in *Stenquist*, a disability rating exceeds 75%, the excess must be excluded for purposes of computing the rate of retired pay. *See* 10 U.S.C. § 1201 (1979) for the statutory prerequisites to eligibility for retired pay under the disability formula.

his maximum retired pay in 1953 would have been only 22 1/2% of his basic monthly pay;[17] moreover, his right to ordinary (non-disability) retired pay would not have vested until 1964, when he would have completed twenty years of service.[18]

The husband continued in service until 1970. When he retired, his right to ordinary retired pay had vested. Owing to his rank and the length of his service, the husband found himself eligible for an ordinary retirement pension at 65% of his basic monthly pay (which had risen substantially since 1953) or, at his election, for disability-related retired pay at the 75% rate.[19] Assuming he would desire the greater amount, the Army began making payments to him pursuant to the disability option, which payments he accepted for four years.

In 1974, the husband filed for dissolution. The trial court found that those pension rights attributable to the husband's service before marriage, or to his disability even if earned during coverture, were classifiable as his separate property. The court also determined those rights acquired during marriage which were equivalent to ordinary retirement pension payments (based on longevity and rank) to be divisible as community property.[20] The court concluded that since the husband's right to ordinary retired pay had already vested in 1970, only such payments as exceeded those computed at the ordinary rate were clearly attributable to his disability and therefore classifiable as the husband's separate property. The pension was thus apportioned, with 77% (the portion earned during marriage) of 65/75ths (the portion determined to be equivalent to an ordinary pension) being distributed to the community, the remainder to the husband.[21]

The husband appealed from the trial court's determination.[22] While recognizing established doctrine that ordinary military retirement pensions are classifiable as community property,[23] he nevertheless

17. 10 U.S.C. § 1401 (1975) requires that non-disability retired pay be computed according to a formula whereby the serviceman's basic monthly pay is multiplied by 2.5 times the number of years which he served. Since the husband in *Stenquist* had served only nine years in 1953, his retired pay under the non-disability formula would have been 2.5 × 9, or 22.5% of his basic monthly pay at that time.

18. *See* 10 U.S.C. § 1293 (1975).

19. *See id.* § 1401.

20. *See In re* Marriage of Stenquist, 21 Cal. 3d 779, 783-84, 582 P.2d 96, 98-99, 148 Cal. Rptr. 9, 11-12 (1978).

21. *Id.* at 784 n.3, 582 P.2d at 99 n.3, 148 Cal. Rptr. at 12 n.3.

22. The wife also successfully cross-appealed from the trial court's order limiting its jurisdiction over spousal support to twenty-four months. *See id.* at 783, 582 P.2d at 98, 148 Cal. Rptr. at 11.

23. *See In re* Marriage of Fithian, 10 Cal. 3d 592, 517 P.2d 449, 111 Cal. Rptr. 369 (1974). *Accord*, Henn v. Henn, 26 Cal. 3d 323, 605 P.2d 10, 161 Cal. Rptr. 502 (1980). *But cf.* Hisquierdo v. Hisquierdo, 439 U.S. 572 (1979) (holding that a federally-funded railroad retirement pension constitutes separate property, where a specific federal statutory scheme manifests a congressional intent to that effect); *In re* Marriage of Orr, 95 Cal. App. 3d 561,

claimed the entire disability pension as his separate property under the California Supreme Court's earlier holding in *In re Marriage of Jones*.[24] In a six to one decision, however, the California Supreme Court affirmed the trial court's division, holding that because, and to the extent that, the disability pension served primarily to support the serviceman and his spouse after the former's retirement, it functioned similarly to an ordinary retirement pension, and as such was divisible as community property.[25] The court noted that to permit the husband, by unilateral election of a disability pension over ordinary retired pay, to " 'transmute community property into his own separate property' "[26] would do injury to the protective philosophy of the community property law.[27] Therefore, the husband's pension rights were to be apportioned between separate property and community property according to the trial court's formula.[28]

B. The Majority Opinion

In his opinion for the majority, Justice Tobriner first discussed the husband's misplaced reliance on *In re Marriage of Jones*,[29] where a serviceman's right to disability pay, acquired *before* the vesting of his right to ordinary retired pay, had been held to be his separate property.[30] Justice Tobriner pointed out that *Jones* applied only where the spouse "has no right to a pension because of longevity of service."[31] The *Jones* holding was subsequently further undermined by the court's holding in *In re Marriage of Brown*[32] that "pension rights, whether or not vested, constituted a property interest; [and] that to the extent that such rights derive from employment during coverture, they now comprise community assets."[33] Thus, not only was *Jones* limited to cases

157 Cal. Rptr. 301 (1979) (*Hisquierdo* requires classification of Veterans Administration disability benefits as the veteran spouse's separate property, pursuant to a federal statutory scheme almost identical to the one involved in *Hisquierdo*). For a further discussion of *Hisquierdo* and its implications for California community property law, see notes 118-30 and accompanying text *infra*.

24. 13 Cal. 3d 457, 531 P.2d 420, 119 Cal. Rptr. 108 (1975). *Jones* held that a military disability pension which matures prior to the vesting of rights in an ordinary pension gives rise to a separate property interest in past dissolution receipts. *See* notes 29-34 and accompanying text *infra*. *But see also* notes 66-79 and accompanying text *infra*, distinguishing *Stenquist* from *Jones*.

25. 21 Cal. 3d 779, 787-88, 582 P.2d 96, 101, 148 Cal. Rptr. 9, 13-14 (1978).

26. *Id.* at 782, 582 P.2d at 98, 148 Cal. Rptr. at 11 (quoting *In re* Marriage of Fithian, 10 Cal. 3d 592, 602, 517 P.2d 449, 456, 111 Cal. Rptr. 369, 375 (1974)).

27. 21 Cal. 3d at 782, 582 P.2d at 98, 148 Cal. Rptr. at 11.

28. *Id.* at 782-83, 582 P.2d at 98, 148 Cal. Rptr. at 11.

29. 13 Cal. 3d 457, 531 P.2d 420, 119 Cal. Rptr. 108 (1975).

30. 21 Cal. 3d at 784, 582 P.2d at 99, 148 Cal. Rptr. at 12 (1978).

31. *Id.* at 785, 582 P.2d at 99, 148 Cal. Rptr. at 12.

32. 15 Cal. 3d 838, 544 P.2d 561, 126 Cal. Rptr. 633 (1976).

33. 21 Cal. 3d at 785, 582 P.2d at 100, 148 Cal. Rptr. at 13. *See In re* Marriage of

involving nonvested ordinary retirement pensions, but its holding encompassed other nonvested assets as well, possibly making them community property.[34]

Justice Tobriner next considered the circumstances under which a disability pension might serve the function of an ordinary retirement pension, and so require classification as community property even where ordinary retirement rights have not yet vested. Reiterating doctrine first voiced in *Jones*, Justice Tobriner noted that disability benefits serve "primarily to compensate the disabled veteran for 'the loss of earnings resulting from his compelled premature military retirement and from diminished ability to compete in the civilian job market' . . . and secondarily to compensate him for the personal suffering caused by the disability."[35] Justice Tobriner, however, further recognized that such benefits also provide "support for the serviceman and his spouse after he leaves the service. *Moreover, as the veteran approaches normal retirement age, this latter purpose may become the predominate function served by the 'disability' pension.*"[36]

Justice Tobriner noted that the husband in *Stenquist* did not, in fact, retire prematurely to face the prospect of competing in the civilian job market while handicapped, but had retired only after acquiring a vested right to an ordinary retirement pension, and that his disability pension receipts began flowing only seventeen years after the date of injury. In this case the value of the husband's pension depended largely on his rank at retirement and on the longevity of his service, and was wholly unrelated to rank or longevity at the time of the injury.[37] Justice Tobriner concluded that "[u]nder these circumstances, the pension's function of compensating the husband for loss of earning capacity or providing recompense for personal suffering is secondary to the primary objective of providing retirement support."[38] The court

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Brown, 15 Cal. 3d 838, 851, 544 P.2d 561, 569, 126 Cal. Rptr. 633, 641 (1976). *Brown* overruled an earlier decision, French v. French, 17 Cal. 2d 775, 112 P.2d 235 (1941), which had held that community interests in nonvested retirement pensions were mere expectancies, and not property interests. In *Stenquist*, Justice Tobriner noted that when *In re* Marriage of Jones, 13 Cal. 3d 457, 531 P.2d 420, 119 Cal. Rptr. 108 (1975) was decided, *French* was still good law. Thus, although *Jones* was expressly limited to cases where disability payments were received prior to the vesting of ordinary retirement rights, Justice Tobriner declared that "[l]anguage in *In re Marriage of Jones* . . . inconsistent with this opinion is disapproved." 21 Cal. 3d at 789 n.11, 582 P.2d at 102 n.11, 148 Cal. Rptr. at 15 n.11. This limited disapproval of *Jones* prompted severe criticism from Justice Clark in his dissenting opinion to *Stenquist*. *Id.* at 796-97, 582 P.2d at 107, 148 Cal. Rptr. at 20 (Clark, J., dissenting). *See also* note 49 *infra*.

34. 21 Cal. 3d at 785, 582 P.2d at 100, 148 Cal. Rptr. at 13.

35. *Id.* at 787, 582 P.2d at 101, 148 Cal. Rptr. at 14 (quoting *In re* Marriage of Jones, 13 Cal. 3d at 459, 531 P.2d at 421, 119 Cal. Rptr. at 109).

36. 21 Cal. 3d at 787, 582 P.2d at 101, 148 Cal. Rptr. at 14 (emphasis added).

37. *Id.*, 582 P.2d at 101, 148 Cal. Rptr. at 14.

38. *Id.*

thus held the pension to be divisible as community property, following the court of appeal's formulation in *In re Marriage of Mueller*:[39]

> Where the employee spouse elects to receive disability benefits in lieu of a matured right to retirement benefits, only the net amount thus received over and above what would have been received as retirement benefits constitutes compensation for personal anguish and loss of earning capacity and is, thus, the employee spouse's separate property. The amount received in lieu of matured retirement benefits remains community property subject to division on dissolution.[40]

C. The Dissenting Opinion

In his lone dissent, Justice Clark expressed his disapproval of what he considered to be the majority's establishment of a discriminatory distinction between disabled employees receiving pensions and healthy employees who terminated employment prior to the vesting of retirement rights or who continued their employment until death.[41] Justice Clark first noted that, while existing law provided for the classification of anticipated, nonvested retirement payments as separate or community property at the time they became due, under *In re Marriage of Brown*[42] the employee spouse could not be prevented from changing or terminating employment, from modifying the terms and conditions of employment (including those relating to retirement benefits), or from electing between alternative retirement programs.[43] The employee spouse could therefore determine the nature of the community's retirement benefits.[44] This and other limitations on the application of community property principles to pensions suggested to Justice Clark that pension programs not only compensated for past services, but were also designed to induce employees to continue in the employer's service by

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39. 70 Cal. App. 3d 66, 137 Cal. Rptr. 129 (1977).

40. *Id.* at 71, 137 Cal. Rptr. at 132, *quoted in In re* Marriage of Stenquist, 21 Cal. 3d at 788, 582 P.2d at 101, 148 Cal. Rptr. at 14.

41. "By disapproving *Jones*, the majority single out the handicapped and compel them to compensate former spouses for loss of nonvested pension rights due to termination of employment. The disabled are placed in a worse position than the healthy who terminate employment. Former spouses of the disabled are given benefits when former spouses of the healthy are denied similar benefits." 21 Cal. 3d at 798, 582 P.2d at 108, 148 Cal. Rptr. at 21 (Clark, J., dissenting). *But see id.* at 788 n.10, 582 P.2d at 102 n.10, 148 Cal. Rptr. at 15 n.10, where the majority met Justice Clark's argument: "If instead of comparing a healthy worker who has forfeited pension rights with a disabled worker receiving a pension, we compare healthy and disabled workers who are both receiving pensions, we discover that under the allocation formula set forth in this opinion the disabled worker usually will retain a higher percentage of the benefits."

42. 15 Cal. 3d 838, 544 P.2d 561, 126 Cal. Rptr. 633 (1976).

43. 21 Cal. 3d at 793, 582 P.2d at 105, 148 Cal. Rptr. at 18 (Clark, J., dissenting). *See In re* Marriage of Brown, 15 Cal. 3d at 849-50, 544 P.2d at 568, 126 Cal. Rptr. at 640.

44. 21 Cal. 3d at 793, 582 P.2d at 105, 148 Cal. Rptr. at 18 (Clark, J., dissenting).

promising future subsistence for employees and their dependents.[45]

Justice Clark argued that the holding in *In re Marriage of Jones*,[46] that military disability payments received after dissolution are the separate property of the disabled spouse, was derived from doctrine establishing military disability pensions as comparable to personal injury awards, and therefore as representing compensation for loss of earning capacity on the open market, as well as for pain and suffering.[47] Further, "[b]ecause our decision in *Brown* determined that vested and nonvested retirement pensions shall be treated alike, no reason exists to distinguish our holding in *Jones* that disability compensation following dissolution is separate property when a disabled employee possesses nonvested retirement rights."[48] Thus, he argued, *Jones* did not need to be abandoned or even distinguished from *Stenquist*.[49] The *Jones* for-

45. *Id.* at 794, 582 P.2d at 105, 148 Cal. Rptr. at 18 (Clark, J., dissenting).

46. 13 Cal. 3d 457, 531 P.2d 420, 119 Cal. Rptr. 108 (1975).

47. 21 Cal. 3d at 794, 582 P.2d at 105, 148 Cal. Rptr. at 18 (Clark, J., dissenting).

48. *Id.* at 795, 582 P.2d at 106, 148 Cal. Rptr. at 19.

49. *Id.*, 582 P.2d at 106, 148 Cal. Rptr. at 19. Justice Clark assumed that the *Stenquist* majority had entirely repudiated the court's holding in *In re* Marriage of Jones, 13 Cal. 3d 457, 531 P.2d 420, 119 Cal. Rptr. 108 (1975), that post-dissolution receipts deriving from disability pension rights which mature *prior* to the vesting of ordinary pension rights constitute separate property. The majority's short caveat in *Stenquist*, that "[l]anguage in *In re Marriage of Jones* . . . inconsistent with this opinion is disapproved," 21 Cal. 3d at 789 n.11, 582 P.2d at 102 n.11, 148 Cal. Rptr. at 15 n.11, explains very little about its position on this point. It will be argued below, however, that the facts of *Jones* are distinguishable from those of *Stenquist*, and that the holdings are not essentially incompatible with each other. *See* notes 66-79 and accompanying text *infra*. If the formulation offered below is correct, Justice Clark's opinion loses much of its force. The majority's failure to limit its holding in *Stenquist* to the facts, however, justifies Justice Clark's concern for the physically handicapped and makes a summary presentation of his criticism of the court's seeming abandonment of *Jones* useful.

Justice Clark argued that abandoning *Jones* was inappropriate for three reasons. He first noted that the *Jones* holding was wholly independent of the "expectancy" doctrine, *see* note 33 *supra*, set forth in French v. French, 17 Cal. 2d 775, 112 P.2d 235 (1941), and later rejected in *In re* Marriage of Brown, 15 Cal. 3d 838, 544 P.2d 561, 126 Cal. Rptr. 633 (1976). The *Jones* Court did not cite *French*, or even mention the expectancy doctrine, fully aware that these both might soon be repudiated. 21 Cal. 3d at 796-97, 582 P.2d at 107, 148 Cal. Rptr. at 20 (Clark, J., dissenting). Instead, Justice Clark contended, *Jones* was based on the concept that disability payments are designed primarily to compensate disabled employees for the loss of separate property concerns. *Id.* at 796, 582 P.2d at 107, 148 Cal. Rptr. at 20.

Second, Justice Clark argued that the wholesale repudiation of *Jones* results in an invidious discrimination between disabled employees receiving pensions and healthy ones who terminate their employment after dissolution, but before rights to an ordinary retirement pension have vested. *Id.* at 797, 582 P.2d at 107-08, 148 Cal. Rptr. at 20-21. Justice Clark read the majority's repudiation of *Jones* as mandating the division of disability pensions even in *Jones*-type situations, where such pensions mature *prior* to the vesting of ordinary retirement rights. *Id.* at 798, 582 P.2d at 108, 148 Cal. Rptr. at 21. Thus, handicapped persons would be compelled to compensate former spouses for loss of nonvested pension rights due to termination of employment, whereas healthy persons would not. *Id.*, 582 P.2d at 107-08, 148 Cal. Rptr. at 21. Further, he argued, disabled persons are put in a worse

mulation assured a fair result, according to Justice Clark, because notice of that case's holding rendered the non-employee spouse's possible reliance on a retirement pension unjustified, and because that spouse was eligible, in any event, for support as necessary.[50] In his view, the majority's approach invidiously discriminated between disabled employees receiving pensions and healthy employees who either retired prior to the vesting of retirement benefits or simply continued employment.[51] Thus, Justice Clark would have reversed the trial court's judgment and found the husband's entire disability pension to be his separate property.[52]

II. Stenquist and the California Community Property Law of Pensions

A. Retirement Pensions: Ordinary vs. Disability

California case law treats ordinary retirement benefits as deferred compensation for earned services; like other earnings, therefore, they are classifiable as community property to the extent earned during coverture.[53] The question of whether such benefits constitute community

position than healthy persons where employment is continued *after* the vesting of ordinary retirement rights. Where the employee spouse is healthy, employment may continue until death, in which case no retirement rights will ever mature; since there will be no retirement benefits to be divided in such cases, the healthy employee will sometimes incur no liability to the former spouse. But, Justice Clark claimed, "the employee who retires for disability under today's majority decision immediately must pay part of the disability pension to the former spouse. The former spouse of the disabled employee is entitled to benefits upon payment of the disability pension, when had the employee remained healthy the former spouse might not have been entitled to any benefits and at most could only receive delayed benefits." *Id.* at 798, 582 P.2d at 108, 148 Cal. Rptr. at 21.

Justice Clark's third reason for disapproving the apparent wholesale abandonment of *In re Marriage of Jones* was based upon the majority's refusal to permit one spouse to unilaterally defeat the other spouse's community interest. He argued that the court had misinterpreted prior case law, and, in particular, had contradicted certain principles expressed in *In re* Marriage of Brown, 15 Cal. 3d 838, 544 P.2d 561, 126 Cal. Rptr. 633 (1976). *See In re* Marriage of Stenquist, 21 Cal. 3d at 799, 582 P.2d at 109, 148 Cal. Rptr. at 22 (Clark, J., dissenting). According to *Brown*, the employee spouse is free to alter the conditions of, and even terminate, his or her employment. 15 Cal. 3d at 849-50, 544 P.2d at 568, 126 Cal. Rptr. at 640. Justice Clark noted that since dissolution does not mandate retirement at the earliest possible age, continuing employment until death will result in no divisible retirement payments, and all earnings subsequent to dissolution will be either separate property or the community property of a new marriage. 21 Cal. 3d at 799-800, 582 P.2d at 109, 148 Cal. Rptr. at 22 (Clark, J., dissenting).

50. *Id.* at 796, 582 P.2d at 107, 148 Cal. Rptr. at 20.

51. *Id.* at 797, 582 P.2d at 107-08, 148 Cal. Rptr. at 20-21.

52. *Id.* at 800, 582 P.2d at 109, 148 Cal. Rptr. at 22.

53. *See In re* Marriage of Brown, 15 Cal. 3d 838, 544 P.2d 561, 126 Cal. Rptr. 633 (1976); *In re* Marriage of Fithian, 10 Cal. 3d 592, 517 P.2d 449, 111 Cal. Rptr. 369 (1974); Waite v. Waite, 6 Cal. 3d 461, 492 P.2d 13, 99 Cal. Rptr. 325 (1972); Phillipson v. Board of Administration, 3 Cal. 3d 32, 473 P.2d 765, 89 Cal. Rptr. 61 (1970). *Cf.* Klench v. Board of

property is independent of any contractual provision requiring the employee to contribute to a retirement fund.[54] Moreover, such benefits may derive from a private or governmental employment relationship, although a federal policy may require such benefits to be classified as separate property.[55] After *In re Marriage of Brown*,[56] ordinary rights need not have vested before a property interest in them will be found.[57] Thus, if an employee's marriage is dissolved before he or she becomes entitled to a retirement pension, the trial court may retain jurisdiction until retirement rights have vested and matured, in order to classify the pension when receipts begin to flow.[58]

Disability pensions are treated somewhat differently. As was pointed out in *Stenquist* and *In re Marriage of Jones*,[59] disability pensions serve primarily to compensate disabled employees for such essentially personal losses as the loss of earnings resulting from compelled premature retirement and from a diminished ability to compete in the job market, as well as the personal suffering caused by the disabling injury.[60] The courts have thus likened disability benefits to personal injury recoveries in tort.[61] In California, pursuant to a statute which became effective January 1, 1980, personal injury recoveries constitute community property where the cause of action for such recoveries arose during the marriage, so long as the spouses were not then separated.[62]

Pension Fund Comm'rs, 79 Cal. App. 171, 249 P. 46 (1926), where the court noted that "[a] pension is a gratuity only where it is granted for services previously rendered which, at the time they were rendered, gave rise to no legal obligation . . . . [But where] 'services are rendered under the pension statute, the pension provisions become a part of the contemplated compensation for these services and so in a sense a part of the contract of employment itself.' " *Id.* at 185, 249 P. at 50-51 (quoting O'Dea v. Cook, 176 Cal. 659, 169 P. 1176).

54. *See In re* Marriage of Fithian, 10 Cal. 3d 592, 517 P.2d 449, 111 Cal. Rptr. 369 (1974); Phillipson v. Board of Administration, 3 Cal. 3d 32, 473 P.2d 765, 89 Cal. Rptr. 61 (1970).

55. *See In re* Marriage of Fithian, 10 Cal. 3d 592, 517 P.2d 449, 111 Cal. Rptr. 369 (1974); Waite v. Waite, 6 Cal. 3d 461, 492 P.2d 13, 99 Cal. Rptr. 325 (1972); Phillipson v. Board of Administration, 3 Cal. 3d 32, 473 P.2d 765, 89 Cal. Rptr. 61 (1970). The United States Supreme Court's recent holding in Hisquierdo v. Hisquierdo, 439 U.S. 572 (1979), well illustrates the supervening effect of federal statutes on state community property classification systems. *See* notes 118-30 and accompanying text *infra*.

56. 15 Cal. 3d 838, 544 P.2d 561, 126 Cal. Rptr. 633 (1976).

57. *Id.* at 842, 544 P.2d at 563, 126 Cal. Rptr. at 635.

58. *Id.* at 849, 544 P.2d at 567-68, 126 Cal. Rptr. at 639-40; *In re* Marriage of Cavnar, 62 Cal. App. 3d at 665, 133 Cal. Rptr. at 270. This procedure seems to have originated from a suggestion first advanced in Note, *Retirement Pay: A Divorce in Time Saved Mine*, 24 HASTINGS L.J. 347 (1973).

59. 13 Cal. 3d 457, 531 P.2d 420, 119 Cal. Rptr. 108 (1975).

60. *In re* Marriage of Stenquist, 21 Cal. 3d at 787, 582 P.2d at 101, 148 Cal. Rptr. at 13; *In re* Marriage of Jones, 13 Cal. 3d at 459, 531 P.2d at 421, 119 Cal. Rptr. at 109.

61. *See, e.g., In re* Marriage of Jones, 13 Cal. 3d at 462, 531 P.2d at 424, 119 Cal. Rptr. at 112; *In re* Marriage of Mueller, 70 Cal. App. 3d 66, 70, 137 Cal. Rptr. 129, 132 (1977).

62. CAL. CIV. CODE § 5126 (West Supp. 1980). Prior to the enactment of the new stat-

By analogy—and following the reasoning in *Jones*—receipts from a disability pension are now to be classified as community property where the disabling injury which gave rise to the disability pension was suffered while the parties were married and living together.[63]

B. The Purpose of Disability Pensions

The *Stenquist* majority's view of the purpose for disability pensions was central to its holding. While recognizing that the primary purposes were those voiced in *Jones*, the court nevertheless noted that disability pensions normally replace ordinary pensions and therefore might also provide ordinary retirement support for the injured employee and his or her spouse;[64] further, this might become the primary purpose of the disability pension as the employee approached normal retirement age.[65] Thus, the purpose served by disability pensions varies according to the facts of each case.

1. Stenquist and In re Marriage of Jones

Since the holding of the court in *Stenquist* depended ultimately on the fact that the husband retired on his disability pension only after he had acquired a vested right to an ordinary pension,[66] the order of three events—injury, vesting and retirement—appears to be crucial to any determination of property interests in disability pensions. Three pos-

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ute, personal injury damages were classified as community property where received during the marriage; post-dissolution receipts were treated as the injured spouse's separate property. *See In re* Marriage of Jones, 13 Cal. 3d 457, 531 P.2d 420, 119 Cal. Rptr. 108 (1975); *In re* Marriage of Pinto, 28 Cal. App. 3d 86, 104 Cal. Rptr. 371 (1972).

63. A companion statute to CAL. CIV. CODE § 5126 provides that ". . . community property personal injury damages shall be assigned to the party who suffered the injuries unless the court, after taking into account the economic condition and needs of each party, the time that has elapsed since the recovery of the damages or the accrual of the cause of action, and all other facts of the case, determines that the interests of justice require another disposition. In such case, the community property personal injury damages shall be assigned to the respective parties in such proportions as the court determines to be just, except that at least one-half of such damages shall be assigned to the party who suffered the injuries. . . ." CAL. CIV. CODE § 4800(c) (West Supp. 1980). To the extent that the courts continue to treat disability pensions as comparable to personal injury damages, therefore, such pensions upon dissolution will normally be assigned to the disabled spouse. But since the courts are empowered to consider, among other things, "the time that has elapsed since the recovery of the damages or the accrual of the cause of action," it is doubtful that the new statutory scheme mandates a new treatment in future cases having *Stenquist*-type facts. Furthermore, the courts' practice of offsetting awards of entire community property assets to one spouse with proportionately greater shares of other community property assets to the other spouse, *see* note 112 *infra*, might be invoked to bring about, in effect, the equal division of a disability pension, even where circumstances would justify the pensioner's being awarded the greater share of the pension, or even the whole of it.

64. 21 Cal. 3d at 787, 582 P.2d at 101, 148 Cal. Rptr. at 14.

65. *See id.*, 582 P.2d at 101, 148 Cal. Rptr. at 13.

66. *See id.*

sibilities are apparent. First, the employee may suffer the disabling injury, and actually retire, before ordinary rights vest. This was the situation in *In re Marriage of Jones*,[67] where the court held (under the pre-1980 statute)[68] that disability pension payments received after dissolution were the injured spouse's separate property.[69] Second, the employee may suffer the disabling injury before ordinary rights vest, and retire only after the vesting of those rights, as was the case in *In re Marriage of Stenquist*.[70] There the court found that "[u]nder these circumstances, the pension's function of compensating the husband for loss of earning capacity or providing recompense for personal suffering is secondary to the primary objective of providing retirement support."[71] Thus, the disability pension may be classified as community property (and, under the new statute, awarded partly to each spouse)[72] to the extent earned during coverture and in an amount equivalent to the ordinary pension it replaces. Third, vesting of ordinary rights may precede both injury and subsequent retirement. There are no California cases which deal directly with this situation, but *Stenquist* may control in view of its apparent approval[73] of two Texas cases holding that disability pensions constitute earned property rights under such circumstances and are thus classifiable as community property.[74]

Reliance on *Stenquist*, however, is perhaps misplaced where injury and retirement both follow the vesting of ordinary rights. Although the employee's lost earning capacity might be of merely nominal value (especially where the employee is injured at a relatively advanced age, or where retirement had been contemplated only shortly before the disabling injury), the employee's personal suffering might nevertheless be more evident than in *Stenquist*-type situations. The *Stenquist* Court emphasized, for example, the fact that seventeen years of employment had elapsed between the husband's injury and his retirement.[75] Where the employee's retirement follows the injury more immediately, as

67. 13 Cal. 3d 457, 531 P.2d 420, 119 Cal. Rptr. 108 (1975).
68. *See* notes 62-63 and accompanying text *supra*.
69. 13 Cal. 3d at 464, 531 P.2d at 425, 119 Cal. Rptr. at 113.
70. 21 Cal. 3d 779, 582 P.2d 96, 148 Cal. Rptr. 9 (1978).
71. *Id.* at 787, 582 P.2d at 101, 148 Cal. Rptr. at 14.
72. *See* notes 62-63 and accompanying text *supra*.
73. *See* 21 Cal. 3d at 786 n.7, 582 P.2d at 101 n.7, 148 Cal. Rptr. at 14 n.7.
74. *See* Busby v. Busby, 457 S.W.2d 551 (Tex. 1970). In a 6-3 decision, the Texas Supreme Court found no distinction between voluntary retirement and disability retirement, where the husband's right to an ordinary retirement pension had vested prior to his being ordered to retire from military service due to diabetes and a thyroid condition. The dissent emphasized that receipts would not accrue until after the divorce judgment had been entered and that a right to benefits payable in the future is not property. *See also* Dominey v. Dominey, 481 S.W.2d 473 (Tex. Civ. App. 1972) where, under facts similar to those in *Busby*, the court held that the payments, although labelled "disability," constituted an earned property right, and were therefore to be classified as community property. *Id.* at 474.
75. 21 Cal. 3d at 787, 582 P.2d at 101, 148 Cal. Rptr. at 14.

within a few weeks or months, his or her personal suffering may be justifiably accorded greater weight in determining the appropriate classification than it was in *Stenquist*. Indeed, the injury may so adversely affect the employee's life expectancy as to render the disability pension's purpose of providing both spouses with retirement support virtually negligible.

Inasmuch as *Stenquist* is distinguishable on its facts from *In re Marriage of Jones*,[76] the *Stenquist* majority's limited disapproval of *Jones*[77] is of questionable significance, especially in view of the court's express limitation of *Jones* to situations where ordinary pension rights have not yet vested.[78] But while *Jones* related the classification of disability pensions to the purposes served by such pensions, it did not attempt to rank those purposes, as did *Stenquist*, to assist in the pension's classification. To the extent that future cases will depend upon a determination of which of several purposes is primarily served by a disability pension under the facts of the particular case, *Jones* may not be authoritative.[79]

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76. 13 Cal. 3d 457, 531 P.2d 420, 119 Cal. Rptr. 108 (1975).

77. "Language in *In re Marriage of Jones* . . . inconsistent with this opinion, is disapproved." 21 Cal. 3d at 789 n.11, 582 P.2d at 102 n.11, 148 Cal. Rptr. at 15 n.11. *See also* notes 33 and 49 *supra*.

78. *See* 13 Cal. 3d at 461, 531 P.2d at 423, 119 Cal. Rptr. at 111.

79. It seems of little importance that *Jones* was consistent with the now disapproved "expectancy" doctrine set forth in French v. French, 17 Cal. 2d 775, 778, 112 P.2d 235, 237 (1941), overruled by *In re* Marriage of Brown, 15 Cal. 3d 838, 544 P.2d 561, 126 Cal. Rptr. 633 (1976). *See* note 33 *supra*. As Justice Clark pointed out in his *Stenquist* dissent, *Jones* did not rely on or cite *French*. *See In re* Marriage of Stenquist, 21 Cal. 3d at 796, 582 P.2d at 107, 148 Cal. Rptr. at 20 (Clark, J., dissenting). Further, *Jones* is consistent with the holding in *In re Marriage of Brown*, that nonvested pension rights constitute property interests divisible upon maturity. Since *Brown* did not discuss disability pensions per se, nothing in that case impedes judicial recognition, following *Jones*, that the employee spouse's retirement on a disability pension prior to the vesting of ordinary rights effectively prevents the latter rights from ever vesting. As was pointed out in *Brown*, the employee spouse cannot be prevented from retiring before ordinary retirement rights vest, nor is the other spouse entitled in such a case to compensation for property rights in the ordinary pension which are lost due to the employee spouse's premature retirement. *See* 15 Cal. 3d at 849-50, 544 P.2d at 568-69, 126 Cal. Rptr. at 640-41. The fact that disability receipts flow from the employee spouse's premature retirement for reasons of disability ought not create equitable rights in those receipts for the other spouse, or even affect the other spouse's property interests, since, as the court recognized in *Stenquist*, the primary purpose of the disability pension should be to compensate the employee spouse for his or her compelled premature retirement, diminished ability to compete within the job market, and personal suffering. *See* 21 Cal. 3d at 787, 582 P.2d at 101, 148 Cal. Rptr. at 14. Such concerns, of course, are personal to the injured spouse; in *Jones*-type cases, therefore, the disability pension ought to be awarded entirely to that spouse. Thus, it appears that *Jones* is consistent not only with *Brown*, but with *Stenquist* as well.

2. *Stenquist, In re Marriage of Mueller, and In re Marriage of Cavnar*

If the principles voiced in *Stenquist* do not actually violate those expressed in *In re Marriage of Jones*,[80] they at least find scant support in two other cases relied on by the *Stenquist* majority—*In re Marriage of Cavnar*[81] and *In re Marriage of Mueller*[82]—each of which is distinguishable from *Stenquist*. The husband in *Cavnar* had converted his Teamsters' pension plan from a retirement pension to a more lucrative disability pension seven months *after* retirement and thirteen months before separation from his wife. The court of appeal held that only the net increase of disability over retirement pension represented compensation for disability-related losses; since "[i]t would be unjust to deprive wife of a valuable property right simply because a misleading label has been affixed to husband's pension fund benefits . . . ,"[83] the court reclassified the "disability payments" as community property to the extent that they displaced the original ordinary pension.[84]

The principal distinction between *Cavnar* and *Stenquist* is conspicuous: although the husband's retirement pension rights had vested in both cases before disability receipts began flowing, payments pursuant to the disability option in *Cavnar* had been elected only after the employee spouse had retired. Thus, the distinction is primarily between "vesting" and "maturity"—a distinction which was also emphasized in *In re Marriage of Brown*.[85] The significance of this distinction is evi-

80. 13 Cal. 3d 457, 531 P.2d 420, 119 Cal. Rptr. 108 (1975).

81. 62 Cal. App. 3d 660, 133 Cal. Rptr. 267 (1976).

82. 70 Cal. App. 3d 66, 137 Cal. Rptr. 129 (1977).

83. 62 Cal. App. 3d at 665, 133 Cal. Rptr. at 270.

84. *Id.*, 133 Cal. Rptr. at 270.

85. 15 Cal. 3d 838, 544 P.2d 561, 126 Cal. Rptr. 633 (1976). "In divorce and dissolution cases . . . the term 'vested' has acquired a special meaning; it refers to a pension right which is not subject to a condition of forfeiture if the employment relationship terminates before retirement. . . .

"As so defined, a vested pension right must be distinguished from a 'matured' or unconditional right to immediate payment. Depending upon the provisions of the retirement program, an employee's right may vest after a term of service even though it does not mature until he reaches retirement age and elects to retire. Such vested but immature rights are frequently subject to the condition, among others, that the employee survive until retirement." *Id.* at 842, 544 P.2d at 563, 126 Cal. Rptr. at 635 (footnotes omitted), *quoted in In re* Marriage of Cavnar, 62 Cal. App. 3d at 663 n.1, 133 Cal. Rptr. at 268 n.1.

Since the husband in *Cavnar* had retired *and was receiving ordinary pension payments when he exercised his disability option*, his rights to the ordinary payments had not only vested, but had matured as well. Thus, the *Cavnar* Court determined that "only a portion of husband's pension benefit payments, though termed 'disability payments,' is properly allocable to disability." 62 Cal. App. 3d at 665, 133 Cal. Rptr. at 270, *quoted in In re* Marriage of Stenquist, 21 Cal. 3d at 786-87, 582 P.2d at 101, 148 Cal. Rptr. at 14. In *Stenquist*, the ordinary pension rights, although vested, had not yet matured; under those circumstances, it is not obvious that the whole disability pension is not "properly allocable to disability." In light of the distinctions between vesting and maturity which the court had recognized in *Brown*, the *Stenquist* majority's failure to distinguish matured benefits from immature but

dent from the *Cavnar* Court's reliance on it.[86] Thus, *Cavnar* held that although the employee spouse retains the right to select the benefit plan of his or her choice, where that spouse has retired before electing to receive disability pay, and has already begun to receive ordinary retirement benefits, only so much of the newly-elected disability pay as exceeds the amount of ordinary retirement pay is classifiable (under the old statute) as separate property.[87]

In *In re Marriage of Mueller*,[88] however, the same court which had decided *Cavnar* a year earlier found no legal significance in the fact that in *Cavnar*, ordinary retirement receipts preceded disability pension payments.[89] There the husband, a serviceman, was eligible upon his retirement for an ordinary retirement pension at 65% of his basic monthly pay. He had also been given a 30% disability rating; thus, his choice was between either the 65% ordinary retirement pension, or disability benefits at 30% of his basic pay plus ordinary retirement benefits totalling a mixed disability and ordinary pension at 65% of his basic pay. Since disability benefits are not subject to federal income tax,[90] the husband understandably chose the mixed pension. Upon filing for dissolution, he successfully sought (under the old statute) classification of the entire pension as his separate property.[91]

The court of appeal reversed the lower court's determination, holding that the husband's right to a pension had matured on the date of his retirement,[92] and the fact that he had not received ordinary pension payments prior to the payment of disability benefits (as had the husband in *Cavnar*) was of no consequence.[93] Reiterating the doctrine it had voiced earlier in *Cavnar*, the court concluded that "where the employee spouse elects to receive disability benefits in lieu of a matured right to retirement benefits, only the net amount thus received over and above what would have been received as retirement benefits

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vested benefits, and even from nonvested benefits, *see* 21 Cal. 3d at 788 n.9, 582 P.2d at 101 n.9, 148 Cal. Rptr. at 14 n.9, is difficult to account for.

86. *See* 62 Cal. App. 3d at 664-65, 133 Cal. Rptr. at 269-70.

87. *Id.* at 665, 133 Cal. Rptr. at 270. Under the new statutes, *see* notes 62-63 and accompanying text *supra*, excess amounts would retain their community property characterization, but would be distributable at dissolution to the employee spouse.

88. 70 Cal. App. 3d 66, 137 Cal. Rptr. 129 (1977).

89. The opinions in both cases were written by Justice Kaufman and concurred in by Presiding Justice Gardner and Justice McDaniel.

90. *See* 10 U.S.C. § 1403 (1976); 26 U.S.C. § 104 (1976).

91. *See* 70 Cal. App. 3d at 69, 137 Cal. Rptr. at 132.

92. *Id.* at 71, 137 Cal. Rptr. at 132.

93. The court did find it significant, however, that some of the husband's pension was derived from vested ordinary rights: the "husband is incorrect in characterizing his right to retirement pay in the case at bench as merely vested. The trial court found husband was eligible to receive retirement benefits as of . . . the effective date of his disability retirement, and, in fact, he is receiving some longevity retirement pay as a result of his retirement on that date." *Id.* at 71, 137 Cal. Rptr. at 132.

constitutes compensation for personal anguish and loss of earning capacity and is, thus, the employee spouse's separate property. The amount received in lieu of matured retirement benefits remains community property subject to division on dissolution."[94] The trial court was directed "to determine the net amount after taxes by which the disability payments exceed the net amount after taxes that would have been received by virtue of retirement payments."[95] It is likely that the entire pension in *Mueller* was divided as community property, as it appears that the net amount receivable as ordinary retirement benefits exceeded the amount receivable as disability payments.

In looking to *Mueller* for support, however, the *Stenquist* Court ignored the fact that the value of Mr. Mueller's ordinary pension rights (65%) exceeded that of his disability rights (30%), whereas in *Stenquist*, the ordinary rights (65%) were less valuable than the disability rights (75%). Consequently, an employee in a *Mueller*-type situation would have more to gain by retiring after ordinary rights had vested than an employee in a *Stenquist*-type situation. Where an injured employee is capable of working and does in fact continue to work for a short time until ordinary rights vest, the primary purpose of the pension ultimately received may be to provide retirement support. This will be so when the facts show, for example, that the injured spouse had planned before the injury to retire at the moment of vesting, or where the spouse's injuries were so minor as to justify treating the "disability" pension as an ordinary retirement pension, notwithstanding the injured spouse's "disability rating."[96] Thus, under certain circumstances, employees entitled to disability pensions in amounts less than those of ordinary pensions might justifiably be estopped from depriving their non-employee spouses of community property rights in pension receipts. But where, as in *Stenquist*, the value of the ordinary pension rights does not and never can exceed the value of the disability pension rights, ordinary pension rights based on longevity of service become effectively worthless; under these circumstances, retirement support is much less clearly the primary purpose of pension receipts. In such cases, therefore, it is highly questionable whether the non-employee spouse should be recognized as deserving to share in the post-dissolution pension receipts. Even partial awards of such receipts to non-employee spouses probably require a showing, under the new statutes,[97] that the employee spouse's age, disability, and pre-injury retirement plans all militate against treating the disability pension as anything but an ordinary retirement pension.

94. *Id.*, 137 Cal. Rptr. at 132.

95. *Id.* at 72, 137 Cal. Rptr. at 133.

96. Military disability ratings, for example, are computed independently of the serviceman's fitness for service. *See* note 100 and accompanying text *infra.*

97. *See* notes 62-63 and accompanying text *supra.*

Upon close analysis, therefore, the district court of appeal's holdings in *In re Marriage of Cavnar* and *In re Marriage of Mueller* can be distinguished from the California Supreme Court's holding in *Stenquist*. Thus, *Cavnar* and *Mueller* do not necessarily justify the bald assertion that disability pensions which mature only after the vesting of non-disability retirement rights invariably serve a community property function and so must be divided equally between the spouses upon dissolution.

3. *Disability Pensions as Compensation for Loss of Employment Opportunities*

In analyzing the purposes served by retirement pensions under varying circumstances, the *Stenquist* majority failed to recognize that such pensions may also be designed to induce persons to continue in the service of their employer.[98] Thus, ordinary retirement pensions serve to compensate healthy employees not only for services rendered, but for the continuation of those services as well. Such a purpose presupposes the employee's ability to terminate employment at will.

Similar purposes are apparent in disability pensions, especially where the employee is given the option (as was the husband in *Stenquist*) of continuing service despite his or her disability.[99] Just as disability pay may serve to compensate the disabled employee for lost earning capacity on the open market, so also may disability pensions compensate the employee for the loss of his or her ability to leave service with any realistic prospects of other employment. In this sense, the compensation is for a loss of freedom to work elsewhere, and as such is wholly personal. Notably, the value of this loss (unlike other losses compensable by disability pensions) does not necessarily diminish with time, but may actually increase, as for example where the disabled employee is relatively young at the time of vesting, or where his or her training proves to be unusually valuable to other potential employers but for the disability. Particularly in the case of a disabled serviceman, the lost ability to leave military service will be even more keenly felt as more lucrative prospects of employment in the civil sector become increasingly remote.

98. *See* Waite v. Waite, 6 Cal. 3d 461, 472-73, 492 P.2d 13, 21, 99 Cal. Rptr. 325, 333 (1972); Phillipson v. Board of Administration, 3 Cal. 3d 32, 49, 473 P.2d 765, 776, 89 Cal. Rptr. 61, 72 (1970); Bellus v. City of Eureka, 69 Cal. 2d 336, 351, 444 P.2d 711, 720, 71 Cal. Rptr. 135, 144 (1968). *But cf. In re* Marriage of Fithian, 10 Cal. 3d 592, 599, 517 P.2d 449, 453, 111 Cal. Rptr. 369, 373 (1974), *quoted in* text accompanying note 115 *infra*, where the California Supreme Court refused to conclude that the classification of an *ordinary* military retirement pension as community property constituted a disincentive to continued service.

99. *See* note 100 and accompanying text *infra*.

C. Overriding Federal Policies

1. The Stenquist Pension

The disability pension's function of compensating injured servicemen for lost civilian employment opportunities comports with case law which establishes that mere disability does not mandate retirement from military service; in fact, disability ratings are wholly independent of fitness for military service.[100] Thus, disabled military employees not wholly unfit for service are given the option of retiring on disability pay, or of continuing service until they become unfit for military duty or are unwilling to continue service. At that time they are retired on the *higher* of disability pay or ordinary retired pay,[101] and in neither case will they lose the tax benefits of their disability pay.[102] Since the amount of retired pay in such instances may depend not only on rank and longevity but may also require consideration of the serviceman's disability rating, and since the tax benefits of the disability pension are not lost where the serviceman chooses a more lucrative ordinary pension, federal policy would suggest that the principal purpose of the disabled serviceman's retirement pension, even where the serviceman continues service after his injury, is not to provide the serviceman with retirement support, but rather to compensate him for lost employment opportunities in the civil sector.[103] The pension is based on the serviceman's monthly pay at the time of retirement, not at the time of injury; thus, just as the value of the disabled serviceman's lost civilian employment opportunities increases over time, so also does the value of the pension that he ultimately receives increase.

It is scarcely surprising that the husband in *Stenquist* did not retire immediately after his injury; evidently, he had been adjudged fit to continue military service, fitness for service being independent of disability under federal law. Nor is it particularly surprising that military

100. *See* Albert T. Watson, 152 Ct. Cl. 273, 280 (1961): "Congress provided that the percentage of disability should be determined 'in accordance with the standard schedule of rating disabilities . . .' [quoting 37 U.S.C. § 272(d) (1952)]. That schedule is written without regard to one's percentage of disability for military service. As to that, there are no percentages. One is either fit, or unfit. If he is unfit, the slight percentage of his unfitness will not keep him in the service." The converse also is true: if he is fit, the slightest percentage of his fitness will not keep him out of the service. *See also* Ray Myers, 416 F.2d 1302, 1305 (1969): "[T]he Veterans Administration Schedule for Rating Disabilities has no application to determination of fitness or unfitness for duty; it applies only to rating of disabilities."

101. *See* 10 U.S.C. § 1401 (1976). *Cf. In re* Marriage of Mueller, 70 Cal. App. 3d 66, 137 Cal. Rptr. 129 (1977), where the husband's 30% disability rating did not prevent his receiving a pension totalling 65% of his basic monthly pay, pursuant to his ordinary retirement rights. This aspect of *Mueller* is discussed in the text accompanying note 90 *supra.*

102. *Cf. In re* Marriage of Mueller, 70 Cal. App. 3d 66, 137 Cal. Rptr. 129 (1977) (husband electing mixed disability and ordinary retirement pension would not be taxed on the disability portion).

103. *See* 10 U.S.C. § 1401.

disability pensions are evaluated according to the serviceman's rank at retirement (a function of longevity of service) and not according to his rank or length of service at the time of injury, since such pensions represent compensation primarily for lost civilian employment opportunities, whose value increases with time. In these particulars, the decision in *Stenquist* is at odds with established federal policy regarding military disability pensions, since it fails to take into account the essentially separate property functions that such pensions may serve. The pension's exemption from federal income tax is further evidence of the possible inconsistency between federal policy and current state policy regarding military disability pensions. Thus, *Stenquist*'s treatment of military disability pensions may present difficulties under the supremacy clause of the United States Constitution.[104]

2. *Federal Supremacy in California Community Property Law*

The United States Supreme Court first applied the supremacy clause to a California community property case in *Wissner v. Wissner*,[105] where it held that the wife's claims, under California commu-

104. U.S. CONST. art. VI, cl. 2: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." The scope and protective purpose of the supremacy clause was defined by Chief Justice Marshall quite early in Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824): "Since, however, in exercising the power of regulating their own purely internal affairs, whether of trading or police, the States may sometimes enact laws, the validity of which depends on their interfering with, and being contrary to, an act of Congress passed in pursuance of the constitution, the Court will enter upon the inquiry, whether the laws of New York, as expounded by the highest tribunal of that State, have, in their application to this case, come into collision with an act of Congress, and deprived a citizen of a right to which that act entitles him. Should this collision exist, it will be immaterial whether those laws were passed in virtue of a concurrent power 'to regulate commerce with foreign nations and among the several States,' or, in virtue of a power to regulate their domestic trade and police. In one case and the other, the acts of New York must yield to the law of Congress; and the decision sustaining the privilege they confer, against a right given by a law of the Union, must be erroneous.

. . . .

". . . The nullity of any act, inconsistent with the constitution, is produced by the declaration, that the constitution is the supreme law. The appropriate application of that part of the clause which confers the same supremacy on laws and treaties, is to such acts of the State Legislatures as do not transcend their powers, but, though enacted in the execution of acknowledged State powers, interfere with, or are contrary to the laws of Congress, made in pursuance of the constitution, or some treaty made under the authority of the United States. In every such case, the act of Congress, or the treaty, is supreme; and the law of the State, though enacted in the exercise of powers not controverted, must yield to it." *Id.* at 209-11.

105. 338 U.S. 655 (1950). *Cf.* Free v. Bland, 369 U.S. 663, 664-71 (1962), where the Court held that by virtue of the supremacy clause, Treasury Regulations creating a right of survivorship in United States Savings Bonds registered in co-ownership form preempt any inconsistent provisions of the Texas community property law.

nity property law, to one-half the proceeds of a National Service Life Insurance policy must fail as frustrating Congress' deliberate intention to allow servicemen to choose their policy's beneficiary and to deny all other persons vested rights in the proceeds.[106] The Court determined that "[a] liberal policy toward the serviceman and his named beneficiary is everywhere evident in the comprehensive statutory plan."[107] The Court noted that Congress explicitly allowed the serviceman to control disbursement of the proceeds and exempted such proceeds from seizure by any legal or equitable process.[108] Citing *McCulloch v. Maryland*,[109] the Court further noted that the validity of federal statutes depends on whether they further ends legitimately within congressional powers.[110] The statute in *Wissner* was found to be a proper enactment under Congress' power to legislate in the interest of the national defense.[111] Since this statute conflicted with certain California community property provisions, the latter were held preempted by the federal legislation.[112]

Although *Stenquist* did not reach the issue of frustration of congressional intent, the California Supreme Court did distinguish *Wissner* in *In re Marriage of Fithian*,[113] which held that the classification of a serviceman's ordinary retired pay as community property, to the ex-

106. *See* 338 U.S. at 661 (citing 38 U.S.C. § 802(i) (currently 38 U.S.C. § 716(d) (1976)).

107. 338 U.S. at 658. The Court specifically noted that "[p]remiums are very low and are waived during the insured's disability; costs of administration are borne by the United States; liabilities may be discharged out of congressional appropriations." *Id.*

108. *See id.* at 658-59 (citing 38 U.S.C. §§ 802(g), 454a (currently 38 U.S.C. § 717(a), 3101(a)). Where federal law provides that a pension is exempt from seizure by legal or equitable process, the pension must be allocated as the pensioner's separate property. *See* Hisquierdo v. Hisquierdo, 439 U.S. 572 (1979) (railroad retirement pension), *In re* Marriage of Orr, 95 Cal. App. 3d 561, 157 Cal. Rptr. 301 (1979) (Veterans Administration benefits). *Cf.* Henn v. Henn, 26 Cal. 3d 323, 605 P.2d 10, 161 Cal. Rptr. 502 (1980), where the classification of ordinary military retirement pensions was noted as being governed by state law alone, since such pensions are not covered by any *Hisquierdo*-type statutory scheme manifesting a congressional intent to preempt.

109. 17 U.S. (4 Wheat.) 316, 421 (1819).

110. 338 U.S. at 660-61.

111. *Id.*

112. *Id.* at 661. *But see id.* at 661-64 (Minton, J., dissenting) where Justice Minton noted that part of the husband's policy was purchased with the proceeds of the sale of the wife's property, and that Congress could not have intended that the wife in such circumstances be defrauded. Until Hisquierdo v. Hisquierdo, 439 U.S. 572 (1979), the California courts avoided any possibility of fraud in instances of this sort by awarding the nonemployee spouse a proportionately greater share of the *other* community assets. *See, e.g., In re* Marriage of Milhan, 13 Cal. 3d 129, 528 P.2d 1145, 117 Cal. Rptr. 809 (1974). In *Hisquierdo*, the Supreme Court ruled that applying this practice to federal railroad retirement benefits "would improperly anticipate payment by allowing [the nonemployee spouse] to receive [his or] her interest before the date Congress has set for any interest to accrue.

"Any such anticipation threatens harm to the employee, and corresponding frustration to federal policy, over and above the mere loss of wealth caused by the offset." 439 U.S. at 589.

113. 10 Cal. 3d 592, 517 P.2d 449, 111 Cal. Rptr. 369 (1974).

tent earned during coverture, does not interfere with the accomplishment of Congress' goals in creating the current military retirement scheme.[114] The Court noted that:

> [t]here is considerable evidence that Congress enacted the federal military retirement pay system in order to bolster the morale of the serviceman and to provide him with an incentive to remain in the armed services, as well as to afford him material protection in his later years. It does not follow therefrom that applying community property law to retirement pay creates a disincentive to establishing a career in the military, or detracts from a serviceman's spirit or future security.[115]

But this distinction may be invalid where the military retirement benefits are disability-related, as in *Stenquist*, since a disabled serviceman (just like any other disabled employee) will often have extraordinary medical, emotional and other needs. Where such needs are clearly demonstrated, the disabled serviceman's morale and future security may indeed be jeopardized by dividing post-dissolution disability pension receipts equally between the spouses once ordinary retirement rights have vested. Although current state policy on this matter is not likely to interfere with the establishment of military careers, it is not inconceivable that disabled servicemen residing in California, once they have become disabled, frequently will prefer to retire before their ordinary retirement rights vest, so as to maximize their equitable entitlement, under the new statutes,[116] to post-dissolution pension receipts. Under such circumstances, the California community property law will constitute a disincentive to continued service, and to that extent will be at odds with federal policy. Moreover, the federal policy which applies special tax provisions only to disability-related military benefits, even where supplemented by ordinary benefits,[117] would support an inference that such disability benefits were intended as personal to the disabled serviceman, and so must be awarded entirely to him at dissolution.

The United States Supreme Court recently addressed a related question in *Hisquierdo v. Hisquierdo*,[118] which held that retirement benefits payable under the Railroad Retirement Act of 1974[119] may not be divided as community property. To reach this result, the Court relied on specific statutes manifesting a congressional intent that such benefits be treated as the employee spouse's separate property. First, annuities payable under the Act are declared exempt from "garnish-

114. *See id.* at 597-99, 517 P.2d at 452-53, 111 Cal. Rptr. at 372-73.
115. *Id.* at 599, 517 P.2d at 453, 111 Cal. Rptr. at 573.
116. *See* notes 62-63 and accompanying text *supra.*
117. *See* 10 U.S.C. § 1403 (1976). *See also* note 102 and accompanying text *supra.*
118. 439 U.S. 572 (1979).
119. 45 U.S.C. §§ 231-231t (1976).

ment, attachment, or other legal process."[120] Second, according to a 1975 addition to the Social Security Act,[121] "moneys . . . due from, or payable by, the United States . . . to any individual, including members of the armed services, shall be subject, . . . to legal process brought for the enforcement, . . . of . . . legal obligations *to provide child support or make alimony payments.*"[122] Finally, a 1977 statute relating to the 1975 statute defines "alimony" as *not* including "any payment or transfer of property or its value by an individual to his spouse or former spouse in compliance with any community property settlement, . . . or other division of property between spouses or former spouses."[123] Interpreting and applying these statutes as a single statutory scheme, the Court held that under the supremacy clause state community property provisions must yield to a conflicting congressional intent that retirement annuities payable under the Railroad Retirement Act be allocated entirely to the employee, not to his or her spouse.[124]

The probable effect of *Hisquierdo* on California community property jurisprudence is difficult to predict. But absent future legislation modifying current statutory language, the holding of *Hisquierdo* is likely to be read very narrowly by the California courts, as affecting only those federal pensions exempt from "garnishment, attachment, or other legal process" by federal statute.[125] These would include not only railroad retirement benefits, but social security benefits[126] and Veterans Administration benefits[127] payable under the Veterans Benefits Act[128] as well. No similar statute affects either ordinary or disability-related military retired pay.[129]

Thus, unless a federal statute exempts a particular pension from "garnishment, attachment, or other legal process," it is unlikely that the 1975 and 1977 additions to the Social Security Act may be invoked by employee spouses in California to insulate their pensions from the community property laws. Future adjudications over ordinary or disability-related military retired pay will therefore by unaffected by the Supreme Court's decision in *Hisquierdo*, and will instead continue to

120. *Id.* § 231(m).

121. Social Services Amendments of 1974, Pub. L. No. 93-647, § 101(a), 88 Stat. 2357, *as amended by* Tax Reduction and Simplification Act of 1977, Pub. L. No. 95-30, Title V, § 501(a), (b), 91 Stat. 157 (codified at 42 U.S.C. § 659 (1976 & Supp. II 1978)).

122. 42 U.S.C. § 659 (1976 & Supp. II 1978) (emphasis added).

123. *Id.* § 662(c) (1976 & Supp. II 1978).

124. 439 U.S. at 590-91.

125. *See* note 120 and accompanying text *supra.*

126. *See* 42 U.S.C. § 407 (1976).

127. *See* 38 U.S.C. § 3101(a) (1976).

128. *Id.*

129. Military retirement *annuities*, however, payable in lieu of and in lesser amounts than "retired pay," would appear to be the employee spouse's separate property under *Hisquierdo. See* 10 U.S.C. § 1440 (1976).

be controlled, in California, by *Stenquist*.[130]

D. Stenquist: Effects as Limitations

As argued above, the personal nature of the employee spouse's interest in a disability pension does not diminish through time where such a pension is seen as compensating the injured employee for lost employment opportunities and for the related loss of freedom to leave current employment.[131] Since this purpose is apparent from the federal law regulating military disability pensions,[132] the Court's focus in *Stenquist* on the moment of vesting seems misconceived. The holding in *Stenquist*, that the community's interest in a disability pension vests concurrently with the right to ordinary retirement benefits, means that the non-employee spouse is immediately entitled to a substantial portion of the pension. This will often produce an equitable result, but not always.

1. Distinguishable Facts

For example, where the employee spouse's disability is so severe as to require special medical care, an award of one-half the pension proceeds to the non-employee spouse may render the injured spouse unable to meet his or her disability-related expenses. This state of affairs is not inconceivable even in a *Stenquist*-type situation, where the husband continued active military service for seventeen years following his injury; some disability-related afflictions manifest themselves only later in life, and the effects of many injuries worsen steadily over time. Moreover, the expense of meeting disability-related needs increases progressively; thus, although recourse to the entire pension may not be necessary at first, the pension may be inadequate to cover medical and incidental expenses as the years pass, even if the injured spouse's physical condition remains relatively stable.[133] Finally, where the employee spouse's injury occurs only shortly before ordinary rights vest and that

130. The California Supreme Court so held recently in Henn v. Henn, 26 Cal. 3d 323, 328 n.3, 605 P.2d 10, 12 n.3, 161 Cal. Rptr. 502, 504 n.3 (1980) (citing Gorman v. Gorman, 90 Cal. App. 3d 454, 462, 153 Cal. Rptr. 479, 483 (1979)). *Hisquierdo* was held inapplicable to federal civil service pensions in *In re* Marriage of Samuels, 96 Cal. App. 3d 122, 158 Cal. Rptr. 38 (1979). Pensions regulated under the Federal Employees Retirement Income Security Act (ERISA) were held unaffected by *Hisquierdo* in *In re* Marriage of Pilatti, 96 Cal. App. 3d 63, 157 Cal. Rptr. 594 (1979). Federal civil service disability benefits and all disability pensions regulated by ERISA would thus appear to be subject to the principles enunciated in *Stenquist*. Of course, these principles would also apply to state and private pensions receivable by California domiciliaries.

131. *See* note 99 and accompanying text *supra*.

132. *See* notes 100-03 and accompanying text *supra*.

133. To a certain extent, these expenses will be neutralized by the cost-of-living increases mandated by 10 U.S.C. § 104a (Supp. 1978). Even so, special medical costs may increase at a more rapid rate than the routine costs contemplated by the statute.

spouse retires soon after vesting, the relative lack of time between injury and retirement—especially when compared with the seventeen-year lapse in *Stenquist*—suggests that the disability pension would probably be used to protect concerns entirely personal to the disabled spouse. By focusing on the moment of vesting, *Stenquist*, if read broadly enough, would foreclose consideration of those concerns.[134]

Unswerving adherence to the *Stenquist* formulation may also visit injustice upon the nonemployee spouse. If, for example, the injured employee spouse retires only shortly before vesting, any post-dissolution disability benefits to which he or she may be entitled might be allocable—even under the new statutes[135]—to the employee spouse. Thus, the employee spouse might "by invoking a condition wholly within his control, defeat the community interest of the other spouse,"[136] even where the employee spouse has no particular need for the entire disability pension. Such a result would be constitutionally tolerable, however, only where no overriding federal law impedes division of the pension as community property.[137]

2. The Vesting of Ordinary Retirement Rights

It is uncertain why the *Stenquist* majority conferred legal significance upon the moment of vesting. Disability pensions may serve primarily to provide retirement support, but only when the employee spouse continues working after his or her injury, a substantial period of time separates the moment of injury from the moment ordinary retirement rights vest, and the employee spouse does not need the pension to meet disability-related expenses—all conditions present in *Stenquist*. Further, the shift in purpose from compensation for entirely personal concerns to provision of retirement support is properly viewed as gradual, not sudden, since it depends on the development of a number of different factors. The nonemployee spouse's interest in the disability pension should perhaps be recognized as being acquired gradually, according to a sliding scale whereby the employee spouse's personal entitlements diminish with time and the community's entitlements increase. Under such a scheme, the moment of vesting might mark the time when the employee spouse's sole entitlements reach their maximum and the non-employee spouse's community entitlements reach

134. For instance, the *Stenquist* majority relied on—in fact found "indistinguishable"—*In re* Marriage of Mueller, 70 Cal. App. 3d 66, 137 Cal. Rptr. 129 (1977), which involved such a set of facts. *See In re* Marriage of Stenquist, 21 Cal. 3d at 786-89, 582 P.2d at 100-03, 148 Cal. Rptr. 9, 13-16. Justice Clark, dissenting, suggested that *Mueller* should be repudiated. *Id.* at 800 n.5, 582 P.2d at 109 n.5, 148 Cal. Rptr. at 22 n.5 (Clark, J., dissenting).

135. *See* notes 62-63 and accompanying text *supra*. These statutes do not specifically refer to disability pensions, which might therefore continue to be controlled by *Stenquist*.

136. *In re* Marriage of Stenquist, 21 Cal. 3d at 786, 582 P.2d at 100, 148 Cal. Rptr. at 13.

137. *See* notes 105-130 and accompanying text *supra*.

their minimum.[138] This approach offers substantial justice to both spouses and remains consistent with the principles voiced in *Stenquist*.[139]

138. Applying such a sliding scale to the facts in *Stenquist*, 6/26ths of the pension, representing the portion earned prior to marriage, is clearly separate property, and 3/26ths, representing the portion earned between the marriage date and the time of injury, is clearly community property. Allocability of the remaining 17/26ths would change character from year to year, according to a "depreciation" system whereby the employee spouse's sole interests in all non-matured disability payments gradually decreases from the date of injury to the date on which ordinary retirement rights vest. Thus, in 1953 (the year of the husband's injury) all non-matured rights in the husband's disability pension would be awarded to him alone; that is, if the husband had retired in 1953 the entire portion of his pension in excess of what had already been awarded—in this case, nothing—would be awarded to him alone, leaving the husband with 6/9ths separate property and 3/9ths community property. In 1954, the unclassified excess would begin to be depreciated over the eleven-year period preceding the vesting of ordinary rights. Thus, if the husband had retired in 1954, 6/10ths of his pension would be allocable to him alone, 3/10ths would be allocable to the community, and 10/11ths of the remaining 1/10th would be awarded to the husband, and 1/11th of the remaining 1/10th would be awarded to the community. This process would continue until 1964, when the husband's ordinary retirement rights would vest. Had Mr. Stenquist retired in that year, 6/20ths of his receipts would have been awarded, under our formula, to him outright; 3/20ths would have been allocated to the community; and the whole of the remaining 11/20ths would also have been awarded to the community. If the husband continued working after the moment of vesting, subsequent receipts attributable to this period would have been awarded entirely to the community. By this formula, the wife's one-half community property interest is 38.5% (that is 1/2 of 20/26ths); the husband's interest is 61.5%. Such a distribution would take into account the gradually changing purpose served by a disability pension. *Cf.* Treas. Reg. §§ 1.1014-5, 1.1015-1(b) (1980), where the uniform basis in a life estate and remainder is shared by the life tenant and remainderman in shifting percentages, according to the changing value of each party's interest in the subject matter.

Of course, the formula suggested above (and any other formula as well) would be subject to modification upon a showing of special need by the injured employee spouse due to his or her disability, according to California case law. *See* note 140 and accompanying text *infra*.

139. Other formulas are also possible. For example, if the husband in *Stenquist* had retired in 1964 rather than in 1970 he would have enjoyed no vested right to ordinary retirement benefits; therefore, his disability pay would have been separate property under *In re* Marriage of Jones, 13 Cal. 3d 457, 531 P.2d 420, 119 Cal. Rptr. 108 (1975). Since ordinary retirement rights vested in 1964, and the husband retired six years later following twenty-six years in service, the court might have apportioned the pension as 20/26ths separate property and 6/26ths community property. Although non-vested rights do represent a property interest, under *In re* Marriage of Brown, 15 Cal. 3d 838, 544 P.2d 561, 126 Cal. Rptr. 633 (1976), this rule may pertain only to non-vested rights in ordinary retirement pensions. Even if it applies to other types of pensions, including the pension in *Stenquist*, the purpose of the rule protecting non-vested rights is to assure the nonemployee spouse a portion of the receipts from rights which vest subsequently to the division of the community property. Since all of the rights in *Stenquist* had vested prior to dissolution, *Brown* should not prevent the 20/26ths and 6/26ths division.

If the employee spouse is considered as being compensated for a loss of freedom to change jobs, his or her award at dissolution might also be calculated according to how long this freedom was denied. Such a formula would not consider the employee's years of service while single since no freedom would have been denied during those years. Under this

The *Stenquist* Court's emphasis on the moment of vesting affected not only its holding that the wife retained a property interest in the husband's disability pension, but also its approval of the trial court's formula determining the value of that interest. California case law provides that in apportioning community and separate property the formula to be applied is the one best calculated to do substantial justice, according to the circumstances of the case, based on all of the evidence before the court.[140] Since the *Stenquist* formula creates a community property interest in the disability pension from the moment ordinary retirement rights vest, the fact that that interest had been accumulated only gradually was entirely ignored. Even under the new statutes,[141] this may be significant in certain cases factually distinguishable from *Stenquist*, especially where application of the *Stenquist* formula may not promote "the interests of justice."[142] For example, where the employee spouse's disability is so great that the value of any vested ordinary retirement right is practically negligible (as in *Stenquist*), and where no substantial period of time elapses between injury and vesting (as in *In re Marriage of Mueller*),[143] the entire disability pension may serve primarily to compensate the injured spouse for his or her personal suffering. Under these circumstances, a formula granting the nonemployee spouse an amount equivalent to one-half of the vested but ineffective ordinary retirement pension, to the extent attributable to earnings during coverture, would not accurately reflect the pension's purpose.

The *Stenquist* formula doubtlessly is appropriate in a case such as *In re Marriage of Cavnar*,[144] where ordinary retirement benefits were already flowing when the husband instead elected a more lucrative disability pension. The husband was properly prevented from defrauding his wife of a matured property interest. The *Stenquist* formulation might also be appropriate under *Stenquist's* facts, but only if the husband's disability was not so great as to entitle him in fairness to the portion that was ultimately awarded to the wife, and if some reason can

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formula, Mr. Stenquist was denied the freedom to change jobs for seventeen years, since he presumably never recovered from his disability; thus the whole of the pension would be awarded to him alone. Application of this formula would always result in the entire pension being awarded to the employee spouse, unless that spouse recovers from the disabling injury.

140. *See* Weinberg v. Weinberg, 67 Cal. 2d 557, 432 P.2d 709, 63 Cal. Rptr. 13 (1967); Estate of Neilson, 57 Cal. 2d 733, 371 P.2d 745, 22 Cal. Rptr. 1 (1962); Gilmore v. Gilmore, 45 Cal. 2d 142, 287 P.2d 769 (1955); Estate of Gold, 170 Cal. 621, 151 P. 12 (1915); Pereira v. Pereira, 156 Cal. 1, 103 P. 488 (1909); Tassi v. Tassi, 160 Cal. App. 2d 680, 325 P.2d 872 (1958).

141. *See* notes 62-63 & 135 and accompanying texts *supra.*

142. CAL. CIV. CODE § 4800(c), *quoted in* note 63 *supra.*

143. 70 Cal. App. 3d 66, 137 Cal. Rptr. 129 (1977).

144. 62 Cal. App. 3d 660, 133 Cal. Rptr. 267 (1976).

be found, under the circumstances of the case, for attaching particular importance to the moment of vesting as marking the end of all separate property interests and the beginning of all community property interests in the pension.

By failing to explain the significance of the moment of vesting, the *Stenquist* majority did not evaluate certain factors which may have been present in that case and which might have an impact on future litigation.[145] For instance, the court never expressly considered whether the husband might reasonably have been expected to find comparable non-military employment in 1953, when his injury occurred, or at any time thereafter. If not, his immediate retirement after only nine years of service on a disability pension of 75% of his basic monthly pay cannot be considered an option comparable to continued service. As he grew older, his age alone might have constituted a barrier to civilian employment, irrespective of his handicapped status; but the husband's disability surely exacerbated the effect of aging on his civilian employability. Recognizing this, federal law provides for the valuation of military disability benefits according to the percentage of disability and the serviceman's rank and longevity at retirement, rather than at the time of injury.[146] Thus, it would be reasonable for a disabled serviceman to continue service even beyond the time ordinary retirement benefits vest, and to expect that his disability-related medical needs would be sufficiently met by a disability pension which would begin flowing upon his retirement.[147]

In order to determine the husband's civilian employability, it is necessary to inquire into the nature of his training and his service before and after the injury. If the husband's injuries rendered his pre-injury training worthless (a fact testable by comparing his pre-injury and post-injury duties), making it extremely difficult for him to locate comparable civilian employment, it would be unfair to penalize him for not immediately discontinuing military service in order to take advantage of his disability pension rights. The propriety of conditioning a disabled serviceman's post-dissolution entitlement to a disability pension on his retirement prior to the time ordinary retirement rights vest

145. The discussion of *In re* Marriage of Mueller, 70 Cal. App. 3d 66, 137 Cal. Rptr. 129 (1977), and *In re* Marriage of Cavnar, 62 Cal. App. 3d 660, 133 Cal. Rptr. 267 (1976), in notes 80-97 and the accompanying text *supra*, illustrates the need to fully analyze the facts in prior cases, as well as in the case under consideration, and to assess the import of any distinguishable facts.

146. *See* 10 U.S.C. § 1401 (1976).

147. *But cf. In re* Marriage of Stenquist, 21 Cal. 3d at 787, 582 P.2d at 101, 148 Cal. Rptr. at 14 (1978), where the court held that the husband's continued service well beyond the date of injury and the measurement of his disability pension according to his rank and longevity as of the time of retirement were circumstances under which the disability pension's purpose of providing retirement support outweighed that of compensating the husband for strictly personal losses.

is especially tenuous where he is injured only shortly before the vesting of ordinary retirement rights and he is not ready to retire even after close to twenty years of military service.

The *Stenquist* majority seems to view a disability as lasting only as long as ordinary retirement rights do not vest, or at least as diminishing when such retirement rights do vest. The degree to which justice is achieved under that construction will vary according to the facts of each case. Because the principles enunciated in *Stenquist* were not more clearly defined, the holding, however fair as applied to the parties in that case, may not be authoritative in other cases. In fact, the *Stenquist* decision may have certain implications in federal constitutional law particularly with respect to the equal protection of physically handicapped persons. The following section considers some of these constitutional issues.

III. Equal Protection in Disability Pension Cases

A. Equal Protection: A Summary

Equal protection of the laws, guaranteed in both the Fourteenth Amendment[148] and in other doctrines of the United States Constitution reflecting the spirit of the Fourteenth Amendment,[149] has been described as embodying two distinct rights.[150] The first of these, which Professor Tribe terms the right to equal treatment,[151] guarantees equality of access to a limited set of interests—rights deemed so fundamental that they may be abridged only if necessary to promote a "compelling state interest."[152] The second protection afforded by the Fourteenth Amendment and related provisions concerns what Tribe calls the *right to treatment as an equal*.[153] This right guarantees equality with respect to all interests, requiring the government to treat each individual with equal regard. Thus, governmental choices which seem to reflect preferences based on prejudice are subject to special scrutiny and probable invalidation.

By its own terms, the Fourteenth Amendment applies only to the states.[154] Thus, the equal protection clause of the Fourteenth Amend-

148. The Fourteenth Amendment reads in relevant part: "No State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

149. *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 922-93 (1978); Tussman & ten Broek, *The Equal Protection of the Laws*, 37 CAL. L. REV. 341, 344 n.9 (1949).

150. *See generally* L. TRIBE, *supra* note 149, at 991-94.

151. *Id.* at 992.

152. San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 16-17 (1973).

153. L. TRIBE, *supra* note 149, at 993. *See also* Karst, *The Supreme Court, 1976 Term—Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1, 1-11 (1977).

154. The federal government is also bound, under the due process clause of the Fifth

ment may be invoked to challenge discrimination only where the state has become signficantly involved in impermissibly unequal treatment.[155] The challenged discrimination is usually legislative, but it may also be judicial.[156] In either case, however, "[t]he Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same."[157] Rather, the requirement is that "those who are similarly situated be similarly treated."[158] A governmental classification is legitimate if it treats similarly those who are similarly situated. Thus, the basic requirement has developed that governmental classifications be reasonable;[159] in order to survive equal protection scrutiny, the challenged classification must be referable to a legitimate public purpose based on some conception of the public good.[160]

The United States Supreme Court has traditionally used a two-tiered approach when analyzing reasonableness in equal protection cases.[161] The "lower" tier is characterized by the Court's deferring to the legislative will; the "higher" tier involves a stricter scrutiny of the legislative purposes for the classification. The degree of scrutiny triggered is partly dependent upon the type of right burdened by the classification.[162] Where the affected right is deemed "fundamental," the legitimacy of the classification will be examined with "strict scrutiny"; in such cases, the state has the burden of demonstrating that the classification "is 'tailored' narrowly to serve legitimate objectives and that . . . the 'less drastic means' [have been selected] for effectuating its objectives."[163] Among the slowly growing catalog of rights deemed fundamental for equal protection purposes are the First Amendment rights to freedom of expression, association, and assembly;[164] the rights

Amendment, to afford equal protection of the laws. *See* Bolling v. Sharpe, 347 U.S. 497 (1954).

155. *See* Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972); Reitman v. Mulkey, 387 U.S. 369, 380 (1967); Burton v. Wilmington Parking Auth., 365 U.S. 715, 721-26 (1961). *See also* Tussman & ten Broek, *supra* note 149.

156. *See* Shelley v. Kraemer, 334 U.S. 1 (1948).

157. Tigner v. Texas, 310 U.S. 141, 147 (1940).

158. Tussman & ten Broek, *supra* note 149, at 344-45. *See also* Skinner v. Oklahoma, 316 U.S. 535, 540 (1942); Buck v. Bell, 274 U.S. 200, 208 (1927); Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920).

159. *See generally* L. TRIBE, *supra* note 149, at 994-96.

160. *See* Tussman & ten Broek, *supra* note 149, at 346.

161. *See generally* L. TRIBE, *supra* note 149, at 996-1002.

162. *See id.* at 1002-12.

163. San Antonio Independent School Dist., 411 U.S. at 17 (1973) (quoting Dunn v. Blumstein, 405 U.S. 330, 343 (1972) and the cases collected therein). *See also* Kahn v. Shevin, 416 U.S. 351, 357-60 (1974) (Brennan, J., dissenting); Shapiro v. Thompson, 394 U.S. 618 (1969); Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966); McLaughlin v. Florida, 379 U.S. 184 (1964).

164. Fourteenth Amendment equal protection analysis is generally unnecessary to pro-

to interstate travel,[165] privacy,[166] equal voting opportunity,[167] and access to the courts;[168] and the rights to procreate[169] and to marry.[170]

The degree of scrutiny employed is also dependent upon the nature of the class burdened.[171] Thus, governmental action will be strictly scrutinized where a "discrete and insular minorit[y]"[172] has been "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process."[173] Strict scrutiny triggered by the "suspect class" has thus far been limited to classifications based on race,[174] ancestry,[175] and alienage;[176] and the continued viability of alienage as a "suspect" classification is uncertain.[177]

The "lower" tier of the two-tiered model mandates "minimal scrutiny" where the governmental action infringes no fundamental right and involves no suspect classification. In such cases, the governmental action is presumed valid, and the burden is imposed on the plaintiff to prove that the discrimination bears no rational relation to a legitimate

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tect these explicitly guaranteed rights, and the court normally safeguards them by other means. *See generally* L. TRIBE, *supra* note 149, at 1005-06.

165. *See, e.g.*, Shapiro v. Thompson, 394 U.S. 618 (1969). *But cf.* Sosna v. Iowa, 419 U.S. 393 (1975) (upholding the constitutionality of a state statute conditioning petition for divorce upon satisfaction of a one-year residency requirement).

166. *See* Griswold v. Connecticut, 381 U.S. 479 (1965).

167. *See, e.g.*, Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966). *But cf.* Richardson v. Ramirez, 418 U.S. 24 (1974) (upholding a state's disenfranchisement of convicted felons).

168. *See, e.g.*, Boddie v. Connecticut, 401 U.S. 371 (1971). *But cf.* United States v. Kras, 409 U.S. 434 (1973) (upholding a state's filing fee requirement for access to judicial discharge in bankruptcy).

169. *See* Skinner v. Oklahoma, 316 U.S. 535 (1942).

170. *See* Zablocki v. Redhail, 434 U.S. 374 (1978).

171. *See* L. TRIBE, *supra* note 149, at 1012-82. *See also* notes 190-200 and accompanying text *infra*.

172. United States v. Carolene Products Co., 304 U.S. 144, 153 n.4 (1938).

173. San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 28 (1973).

174. *See, e.g.*, Brown v. Board of Educ., 349 U.S. 294 (1955) (Brown II); Yick Wo v. Hopkins, 118 U.S. 356 (1886); Strauder v. West Virginia, 100 U.S. 303 (1880). *But see* Korematsu v. United States, 323 U.S. 214 (1944); Hirabayashi v. United States, 320 U.S. 81 (1943).

175. *See, e.g.*, Hernandez v. Texas, 347 U.S. 475 (1954); Meyer v. Nebraska, 262 U.S. 390 (1923). *But see also* Korematsu v. United States, 323 U.S. 214 (1944).

176. *See, e.g.*, Sugarman v. Dougall, 413 U.S. 634 (1973); Graham v. Richardson, 403 U.S. 365 (1971). *But see also* Foley v. Connelie, 435 U.S. 291 (1978); Heim v. McCall, 239 U.S. 175 (1915).

177. *See* 7 HASTINGS CONST. L.Q. 315, 484-94 (1980), where the author analyzes Ambach v. Norwick, 439 U.S. 907 (1979), in which the Supreme Court employed minimal scrutiny under the "rational basis" test to uphold a New York statute forbidding certification of aliens as public school teachers unless they manifest an intention to apply for citizenship.

governmental objective.[178] The usual result of applying the "rational-basis" test is that the discriminatory governmental action is upheld.[179] Generally, only when a statute is "underinclusive"[180] in that it fails to include all persons similarly situated with respect to the general purpose of the governmental action, or "overinclusive,"[181] in that it affects a wider range of persons than those whom the law may legitimately reach, will it be found invalid.

Between the two extremes of minimal scrutiny and strict scrutiny there has developed in recent years a "middle tier," lending some flexibility to the equal protection standard.[182] The Court has flirted with, but not often applied, intermediate scrutiny where the right at stake, although not fundamental, is nonetheless so important that interference with its exercise constitutes either a significant invasion of personal liberty or a denial of a benefit vital to the individual.[183] Intermediate review has also been employed, if only in dissenting opinions, for classifications which, although not "suspect," are nonetheless so sensitive as "to warrant more than casual judicial response."[184] Such elevated scrutiny has been applied, in dissenting opinions by some members of the Supreme Court, to classifications based on illegitimacy,[185] age[186] and wealth.[187] It has become the majority standard in gender-based discrimination cases.[188]

Professor Tribe notes five general techniques by which the Court may effectuate intermediate review.[189] First, the Court may look to the importance of the governmental objective furthered by the classification, relative to the classification's invasion of personal liberty.[190] Second, the Court may consider the degree to which the governmental classification is related to its objectives; such relationship must be "substantial" to withstand intermediate scrutiny.[191] Third, the Court may

178. *See* Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78 (1911). *See generally* Note, *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1076-87 (1969).

179. *See* Gunther, *The Supreme Court—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972). *But see, e.g.*, Eisenstadt v. Baird, 405 U.S. 438 (1972); Reed v. Reed, 404 U.S. 71 (1971).

180. *See, e.g.*, O'Brien v. Skinner, 414 U.S. 524 (1974).

181. *See, e.g.*, Rinaldi v. Yeager, 384 U.S. 305, 310 (1966).

182. The concept of intermediate review may be traced back to Justice Marshall's dissent in Dandridge v. Williams, 397 U.S. 471, 519-21 (1970) (Marshall, J., dissenting). *See also* Gunther, *supra* note 179.

183. *See generally* L. TRIBE, *supra* note 149, at 1082-97.

184. *Id.* at 1090.

185. *See, e.g.*, Mathews v. Lucas, 427 U.S. 495, 523 (1976) (Stevens, J., dissenting).

186. *See, e.g.*, Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 318-21 (1976).

187. *See, e.g.*, Dandridge v. Williams, 397 U.S. 471, 519-21 (1970).

188. *See, e.g.*, Frontiero v. Richardson, 411 U.S. 677 (1973) (plurality opinion).

189. *See id.* at 1082-89.

190. *See, e.g.*, Reed v. Reed, 404 U.S. 71, 76-77 (1971).

191. *See, e.g.*, Craig v. Boren, 429 U.S. 190, 201-02 (1976).

limit its consideration of the classification's rationale to points "currently articulated" by the party defending the governmental action.[192] Fourth, the Court may exclude the use of "after-the-fact rationalizations" in defense of the classification, thus limiting justification to considerations that can be shown in fact to have contributed to the classification's enactment.[193] And finally, where the Court does not wish to strike down the classification altogether, it may require that the governmental action be modified so as to permit rebuttal in individual cases.[194]

B. Stenquist and Equal Protection

Indiscriminating adherence to *In re Marriage of Stenquist*[195] would appear to raise a number of equal protection problems. The following section inquires first into the level of scrutiny applicable to cases involving persons in the *Stenquist* husband's class; once the equal protection rights of physically handicapped persons are set out, equal protection doctrine is analyzed with specific reference to *Stenquist*. *Stenquist*'s possible incompatibility with certain federal statutory policies is also discussed. Finally, some suggestions are offered as to the proper focus of future litigation over community property in disability pensions.

1. The Physically Handicapped in Constitutional Review

It should first be determined whether classifications which burden physically handicapped persons warrant strict judicial scrutiny. As discussed above, strict scrutiny may be invoked where the criteria for classification are so sensitive as to be considered "suspect," requiring the state to show a "compelling" governmental objective that cannot be achieved other than by burdening the suspect class.[196] The Court has posited a few justifications for treating governmental classifications based on race, ancestry and alienage as suspect. Perhaps the most prominent has been the seminal requirement that the burdened group be a "discrete and insular minorit[y],"[197] against whom the classification "tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities."[198] Thus, the burdened class must be readily identifiable as a politically impotent minority. The Court further requires that the minority group evoke

192. *See, e.g.*, Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 640-41 (1974).
193. *See id.* at 653 (Powell, J., concurring).
194. *See, e.g.*, Craig v. Boren, 429 U.S. 190, 199 (1976).
195. 21 Cal. 3d 779, 582 P.2d 96, 148 Cal. Rptr. 9 (1978).
196. *See* notes 171-76 and accompanying text *supra*.
197. United States v. Carolene Products Co., 304 U.S. 144, 153 n.4 (1938).
198. *Id. See also* San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 28 (1973), *quoted in* text accompanying note 173 *supra*.

stereotypes carrying a "stigma of inferiority and a badge of opprobrium";[199] the relative infrequency of such stereotypes would explain why only a small number of minority groups to date have merited the protection afforded by strict judicial scrutiny. A final requirement, although less strictly imposed than the first two, is that the condition defining the minority be congenital and immutable.[200]

Applying those criteria, it seems clear that physically handicapped persons do not qualify for treatment as members of a suspect class.[201] Members of minority races, or of particular alienages or ancestral groups, are much more readily identified than are members of a class somewhat sweepingly denominated "physically handicapped."[202] It is uncertain, for example, how serious a particular handicap would have to be before an individual would be entitled to special protection; it is also uncertain what criteria would be used in measuring the seriousness of specific handicaps. A case can even be made for the proposition that all persons are handicapped to some extent, thus eliminating the need for equal protection analysis.

Even if the identity of protected class members could be conclusively established, the required social opprobrium is lacking in the case of most physically handicapped persons. A handicapped condition more commonly evokes pity than any "stigma of inferiority." It is therefore doubtful that the strict scrutiny applied to classifications based on race, national origin or alienage would be appropriate in the case of physically handicapped persons. Thus, under current law, the physically handicapped probably do not qualify for treatment as a suspect class.

Strict scrutiny may also be invoked where a classification impinges upon a "fundamental right." The fundamental rights most clearly liable to invasion by state actions burdening the physically handicapped are the rights to interstate travel[203] and to equal employment opportunity.[204] Formerly existing inequities have largely been redressed by

199. Note, *supra* note 178, at 1127. *See also* Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 175-76 (1972).

200. *See* Frontiero v. Richardson, 411 U.S. 677, 686 (1973); Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 170-71 (1972). Note, however, that alienage is not immutable.

201. *But see* Burgdorf & Burgdorf, *A History of Unequal Treatment: The Qualifications of Handicapped Persons as a "Suspect Class" Under the Equal Protection Clause*, 15 SANTA CLARA LAW. 855 (1975).

202. *But cf.* CAL. VEH. CODE § 22511.5 (West Supp. 1979) (defining with particularity "physically handicapped" for the purposes of issuing identifying license plates and authorizing special vehicle parking privileges); 29 U.S.C. § 706(6) (defining "handicapped individual" for purposes of the Rehabilitation Act of 1973); *id.* § 706(12) (defining "severe handicap" with particularity for purposes of the Rehabilitation Act of 1973).

203. *See* note 165 *supra*.

204. On the right to equal employment opportunity as fundamental, see Truax v. Raich, 239 U.S. 33, 41 (1915) and Barsky v. Board of Regents, 347 U.S. 442, 472 (1954) (Douglas,

new legislation designed to safeguard those fundamental rights and their exercise by physically handicapped persons. In the area of travel, for example, state and federal legislation has been promulgated to afford physically handicapped persons ready access to airplanes as well as to public and private buildings.[205] Similarly, in the area of equal employment opportunity, federal and state governments have long pursued broad statutory policies encouraging employment of the physically handicapped.[206] Thus, existing legislation and executive regulations indicate the favorable direction that the law is taking in order to protect the fundamental rights of the physically handicapped.[207]

Even so, the relatively narrow scope of such legislation may not be amenable to expansion through the application of "upper-tier" equal protection analysis. Large differences in the nature and extent of individual handicaps, as well as in the qualifications for specific jobs, mandate a case-by-case approach to claims of employment discrimination.[208] This inability to identify common characteristics among the physically handicapped would probably preclude strict judicial scrutiny under either a suspect class or a fundamental right approach.

If resort must therefore be had to the "lower-tier" rational-basis test, it is virtually certain that the rights of physically handicapped persons will not be broadened. Since a classification is presumed to be

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J., dissenting). Denial of this right has recently been held to require more than minimal scrutiny under the due process clause of the Fifth Amendment. *See* Hampton v. Mow Sun Wong, 426 U.S. 88, 102-03 (1976).

205. *See, e.g.*, 29 U.S.C. §§ 792, 794; 42 U.S.C. §§ 4151, 4157; 14 C.F.R. §§ 121.571, 121.586, 135.81 (1980); CAL. VEH. CODE §§ 22511.5, -.7, -.8 (West Supp. 1979).

206. *See, e.g.*, 36 U.S.C. § 155; 29 U.S.C. §§ 701-794; 45 C.F.R. §§ 84-85; CAL. LAB. CODE §§ 1412, 1413.1(d), .1(g), 1420(a) (West Supp. 1979). *See also* Bayh, *Foreword to the Symposium Issue on Employment Rights of the Handicapped*, 27 DE PAUL L. REV. 943, 949-52 (1978).

207. *See generally* Du Bow, *Litigating for the Rights of Handicapped People*, 27 DE PAUL L. REV. 1101 (1978); Wright, *Equal Treatment of the Handicapped by Federal Contractors*, 26 EMORY L.J. 65 (1977); Comment, *Civil Rights—Handicapped Discrimination*, 8 CUM. L. REV. 977 (1977). These policies have been upheld in a number of state and lower federal court decisions. *See, e.g.*, Barnes v. Converse College, 436 F. Supp. 635 (D.S.C. 1977); Bartels v. Biernat, 427 F. Supp. 226 (E.D. Wis. 1977); Mills v. Board of Educ., 348 F. Supp. 866 (D.D.C. 1972); Bevan v. New York State Teachers' Retirement Sys., 74 Misc. 2d 443, 345 N.Y.S.2d 921 (Sup. Ct. 1973) *modified on other grounds*, 44 A.D.2d 163, 355 N.Y.S.2d 185 (Sup. Ct. 1974); Milwaukee R.R. v. Wisconsin Dep't of Indus. Labor and Human Relations, 8 Fair Empl. Prac. Cases 938 (Wis. Sup. Ct. 1974).

208. *Cf.* Southeastern Community College v. Davis, 442 U.S. 397 (1979), where § 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 794) was interpreted as allowing professional schools to impose "reasonable physical qualifications for admission to their clinical training programs." Writing for a unanimous Court, Justice Powell suggested that determination of whether such discriminations might be unlawful must proceed on a case-by-case basis. *Id.* at 412-13.

constitutional under this approach, it has been held that the governmental choice must be clearly wrong—not merely as an exercise of judgment but as an arbitrary display of power—before a governmental act will be declared invalid.[209] Hence, the Court generally utilizes minimal scrutiny to uphold governmental classifications. Since legislation which discriminates against the physically handicapped will usually be justified as reasonably related to *some* legitimate governmental objective,[210] application of the rational-basis test is unlikely to further the rights of handicapped persons.

Although it appears that neither strict nor minimal scrutiny of governmental activity can be utilized to expand the protection afforded physically handicapped individuals, the recently developed intermediate standard of review may prove more successful. As discussed above, intermediate review may be applied where the discrimination involves a sensitive, albeit non-suspect class;[211] it has been applied most notably in gender-based discrimination cases. This "middle-tier" approach is potentially applicable to physically handicapped individuals and, in particular, to persons situated like the husband in *Stenquist*.[212] An employee spouse who retires on a disability pension after his or her ordinary retirement rights have already vested may yet have disability-related medical needs which the pensioner is able to pay for only out of the disability funds. In such a case the employee spouse's right to equal protection may protect that spouse from a governmental classification which fails to distinguish him or her from a similarly situated person without special needs.

Involved here is a *de facto* discrimination, a deprivation attributable to a failure to classify (as distinguished from a *de jure* discrimination, a deprivation originating in an affirmative governmental classification). The United States Supreme Court generally has been

209. *See* San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1 (1973).

210. *See, e.g.*, CAL. VEH. CODE § 12805(e) (West Supp. 1978), denying driving privileges to any person "unable to operate a motor vehicle upon a highway . . . because of any other disability, disease, or disorder [upon determination] by examination or other evidence." Clearly, the statute's intent is to promote highway safety, a legitimate governmental interest. *See also* 8 U.S.C. § 1182(7), excluding aliens "who are certified by the examining surgeon as having a physical defect, disease, or disability [from admission into the United States] when determined by the consular or immigration officer to be of such a nature that it may affect the ability of the alien to earn a living, unless the alien affirmatively establishes that he will not have to earn a living." In this connection, *see also* Kleindienst v. Mandel, 408 U.S. 753, 762 (1972), declaring that unadmitted, nonresident aliens have no constitutional right of entry into the United States. Enforcement of these policies has prevented the entry into the United States of many persons suffering from physical defects. *See* United States *ex rel.* Saclarides v. Shaughnessy, 180 F.2d 687 (2d Cir. 1950); United States *ex rel.* Duner v. Curran, 10 F.2d 38 (2d Cir. 1925), *cert. denied*, 271 U.S. 663 (1926); United States *ex rel.* Markin v. Curran, 9 F.2d 900 (2d Cir. 1925), *cert. denied*, 270 U.S. 647 (1926).

211. *See* notes 182-84 and accompanying text *supra*.

212. 21 Cal. 3d 779, 582 P.2d 96, 148 Cal. Rptr. 9 (1978).

reluctant to redress *de facto* discriminations not motivated by a discriminatory purpose.[213] Some justices, however, have argued that the *de jure/de facto* distinction should be abandoned as outmoded and essentially incompatible with currently articulated equal protection principles.[214] Further, some progress recently has been made, at least in school desegregation cases, toward the disestablishment of the *de jure/de facto* dichotomy. In *Columbus Board of Education v. Penick*[215] and *Dayton Board of Education v. Brinkman*,[216] lower court findings of unconstitutional discriminatory purpose and current discriminatory impact were not disturbed where based on unrebutted evidence that the two cities had maintained separate black schools in substantial parts of their respective school systems. The discriminatory result was held to constitute prima facie proof of a discriminatory purpose, justifying the imposition of systemwide busing as a corrective measure. Since the requisite discriminatory purpose may be implied, in cases involving racial inequality, from long-term racial segregation in public education, and since such discrimination is sufficiently offensive to justify extraordinary remedies such as systemwide busing, a long-term inattentiveness to the needs of the physically handicapped (whether in education, employment, or any other constitutionally protected area) arguably merits some corrective action, notwithstanding the *de facto* context in which the latter discrimination may be evidenced.

Analogy to cases adjudicating the equal protection rights of racial minorities is helpful not only because such cases have, in fact, been the first to address the matter of *de facto* discrimination, but also because the Court's development of equal protection analysis has historically proceeded from the constitutional mandate to protect racial minorities, especially blacks.[217] This is not to say, however, that the benefits of equal protection may be afforded to a particular group only upon a

213. *See* Washington v. Davis, 426 U.S. 229 (1976); Keyes v. School Dist. No. 1, 413 U.S. 189 (1973).

214. *See* Keyes v. School Dist. No. 1, 413 U.S. 189, 217-53 (1973) (Powell, J., concurring in part and dissenting in part); *id.* at 214-17 (Douglas, J., concurring).

215. 443 U.S. 449 (1979). This case is discussed in 7 HASTINGS CONST. L.Q. 315, 505-22 (1980).

216. 443 U.S. 526 (1979). This case is discussed in 7 HASTINGS CONST. L.Q. 315, 505-22 (1980).

217. In the years immediately following the enactment of the Fourteenth Amendment, judicial application of the equal protection clause was limited to the protection of blacks. *See* Slaughterhouse Cases, 83 U.S. (16 Wall.) 36 (1873). A few years later, the equal protection clause was invoked to afford protection also to alien members of other racial minorities. *See* Yick Wo v. Hopkins, 118 U.S. 356 (1886). Gradually, and most notably under the Warren Court, the concept of equal protection was expanded to invalidate not only "suspect" classifications burdening certain minorities irrespective of their racial affiliations, but governmental intrusions upon certain "fundamental rights" as well. *See* notes 161-77 and accompanying text *supra*.

showing that that group is situated similarly to a racial minority.[218] The core of the equal protection.clause is not a constitutional mandate to protect blacks and other racial minorities, although that was the Fourteenth Amendment's historical purpose and remains its most important function in practice. Rather, the concept of equal protection as currently embodied in American constitutional law serves the more far-reaching purpose of assuring the dignity of full membership in society to each individual separately, such that society is precluded from arbitarily excluding any single individual from the responsibilities which it delegates or the benefits which it confers.[219] If this is accepted as the function of the equal protection clause, the *de jure/de facto* distinction ceases to be a logical element in the redress of discriminations burdening the physically handicapped either as individuals or as a group. This is true notwithstanding the Court's refusal to treat the group as a suspect class.

Substantial governmental intrusion upon protected rights, whether or not "fundamental," and whether or not motivated by a discriminatory purpose, would seem equally intolerable for similar reasons. Legislative or judicial classifications that deprive physically handicapped individuals of property solely because they have chosen to continue employment beyond the moment when their ordinary pensions vested tend to penalize handicapped employees for exercising a constitutionally protected right to equal employment opportunity. The fact that the classification operates as a penalty, depriving the handicapped individual of sorely-needed pension benefits, is especially obvious where the disabled pensioner can demonstrate a special need for the confiscated property, deriving from his handicapped status. Visiting such a forefeiture upon a handicapped person seems to violate the spirit, if not the overly mechanistic letter, of the equal protection clause.

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218. Recent limitation of the benefits of the equal protection clause to racial minorities has, to date, been a hallmark only of Justice Rehnquist's dissenting opinions. *See, e.g.*, Trimble v. Gordon, 430 U.S. 762, 777 (1977) (Rehnquist, J., dissenting). Encroachment upon the status of aliens as a suspect class, however, has recently been evidenced in Foley v. Connelie, 435 U.S. 291 (1978), and in Ambach v. Norwick, 439 U.S. 907 (1979), giving rise to the possibility that further equal protection limitations, affecting other protected groups as well as the exercise of fundamental rights, are forthcoming.

219. Thus, Professor Karst has argued for a concept of "equal citizenship" as constituting the substantive core of the Fourteenth Amendment's equal protection clause. *See* Karst, *supra* note 158, at 38-68. *Cf.* Poe v. Ullman, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting) *quoted in* Moore v. City of E. Cleveland, 431 U.S. 494 (1977): "Due process has not been reduced to any formula; its content cannot be determined by reference to any code. The best that can be said is that through the course of this Court's decisions it has represented the balance which our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society." *Id.* at 501.

2. Constitutional Issues in Stenquist

In referring solely to the moment of vesting in order to determine the divisibility of a disability pension,[220] the *Stenquist* majority penalized the disabled employee spouse for working beyond that moment; thus, the *Stenquist* holding may, in effect, interfere with the exercise of an important constitutionally protected right, the right to equal employment opportunity. In *Hampton v. Mow Sun Wong*,[221] this right was characterized as sufficiently important to warrant more than minimal scrutiny of governmental classifications burdening its exercise.[222] *Hampton* provides a convenient blueprint for analyzing governmental actions which allegedly infringe the right to equal employment opportunity. The *Hampton* Court examined (1) the nature of the group burdened,[223] (2) the breadth of the infringement,[224] (3) the proposed rationale for the governmental action,[225] and (4) the availability of less restrictive alternatives.[226]

This analytical framework may be readily applied to the holding in *Stenquist*. There, the group burdened is composed of married persons whose work-related disabilities, while not necessitating immediate retirement, qualify such persons for disability pensions; thus, *Stenquist* adversely affects a readily-identifiable subgroup of physically handicapped persons. As in *Hampton*, members of this class are "already subject to disadvantages not shared by the remainder of the community."[227] These disadvantages have been noticed at both the federal and state levels; special legislative, regulatory and judicial remedies have been devised in partial compensation.[228]

Additionally, as in *Hampton*, "the added disadvantage resulting from the enforcement of the rule . . . is of sufficient significance to be characterized as a deprivation of an interest in liberty."[229] Although *Stenquist* does not explicitly deprive disabled employee spouses of employment once secured, and does not forbid them from working beyond the moment that ordinary retirement rights vest, the *Stenquist* holding does render continued employment beyond that moment sig-

220. *See In re* Marriage of Stenquist, 21 Cal. 3d at 788, 582 P.2d at 102, 148 Cal. Rptr. at 15 (1978).

221. 426 U.S. 88 (1976).

222. *See id.* at 102-03. *See also* Truax v. Raich, 239 U.S. 33, 41 (1915); Barsky v. Board of Regents, 347 U.S. 442, 472 (1954) (Douglas, J., dissenting). *Hampton* was decided on the basis of the Fifth Amendment due process clause, since a federal regulation was involved.

223. 426 U.S. at 102-03.

224. *Id.* at 100-01, 115-16.

225. *Id.* at 104-16.

226. *Id.* at 114-16.

227. *Id.* at 102.

228. *See* notes 205-07 and accompanying text *supra*.

229. 426 U.S. at 102.

nificantly less attractive than it might otherwise be; this is especially true where dissolution precedes retirement. *Stenquist* offers non-employee spouses the unconditional right to be awarded a one-half interest not only in post-dissolution disability receipts attributable to post-vesting employment, but in receipts attributable to employment prior to vesting as well. To a certain extent, inequitable results which burden disabled persons having demonstrated needs for greater portions of their disability pensions will be mitigated by the new statutory scheme setting forth rules for the classification and distribution of personal injury damages.[230] However, the new statute does not explicitly mandate comparable treatment for disability pensions per se. Although the courts traditionally have treated such pensions as though they represented personal injury damage awards, nothing in the California community property regime forbids the abandonment of that practice, and *Stenquist* may continue to control in future cases involving property rights in disability pensions. Even if the new statutes are held to control in the disability pension area, those statutes may be interpreted as implicitly sanctioning the *Stenquist* approach to these problems, at least insofar as the courts are permitted to consider "the time that has elapsed since the . . . accrual of the cause of action."[231] Substitute "entitlement to the disability pension" for "accrual of the cause of action," and the moment at which ordinary retirement rights vest regains all its lost lustre. Most notable of all, perhaps, is the current judicial practice of offsetting unequal divisions of one community asset with proportionately unequal divisions of other such assets.[232] If this practice is applied in cases which involve the division and distribution of disability pensions, it will be all too easy to frustrate the equitable practices contemplated by the new statutes.

Disabled employee spouses in California must therefore be prepared either to retire on their disability pensions before their ordinary retirement rights vest, or to face the possibility of having to part with one-half of all vested pension receipts not attributable to employment as a single person even in dissolutions which precede retirement. To the extent that this constitutes a significant disincentive for disabled persons to continue working, it may also significantly infringe upon their right to equal employment opportunity. The deprivation will be especially marked where disabled employees are encouraged thereby to retire before ordinary rights vest, and so to forego all opportunities of continued employment (including, as a practical matter, employment under new employers) owing to their disabilities.[233]

230. *See* notes 62-63 and accompanying text *supra*.

231. CAL. CIV. CODE § 4800(c) (West Supp. 1980).

232. *See In re* Marriage of Milhan, 13 Cal. 3d 129, 528 P.2d 1145, 117 Cal. Rptr. 809 (1974).

233. There is now reason to doubt that even a disabled employee spouse who retires

The proposed reasons for this rule are unpersuasive. The *Stenquist* Court noted that the husband did not retire prematurely to face the prospect of competing on the civilian job market at a disadvantage, that he did not begin receiving his pension until seventeen years after his injury, and that the value of his pension was determined partly by longevity of service at retirement rather than at the time of injury. Under these circumstances, the court held that the pension's primary function was to provide retirement support.[234] As argued earlier, however, it cannot be assumed that this analysis will be appropriate in all cases having *Stenquist*-type facts.[235] The court further justified its holding as avoiding "complications" by means of a "simple mathematical computation."[236] But "administrative convenience," as this rationale is more commonly called, was held in *Hampton* to justify intrusions on the right to equal employment opportunity only where not outweighed by public interest considerations.[237] The public has a clear interest in the equitable division of marital assets at dissolution; but nothing in the *Stenquist* opinion suggests that the formula approved in that case will achieve substantial justice in cases where the handicapped employee is able to demonstrate a special need for a greater part of his or her disability pension than *Stenquist* would afford. Further, *Stenquist*'s apparent incompatibility with certain federal policies regarding military disability pensions,[238] as well as the civil rights of the physically handicapped in general,[239] casts considerable doubt on whether the court's formula serves the public interest at all. Indeed, none of the proposed reasons for the holding in *Stenquist* justifies the discrimination which may result in factually distinguishable situations.

Finally, less restrictive alternatives are available to accomplish the *Stenquist* Court's desired objective. As shown above, more equitable formulas which take into account a number of relevant factors may be utilized.[240] Application of such formulas may result in only a portion of the pension being awarded to the non-employee spouse; if none of it

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before ordinary retirement rights vest will be able to escape the spirit of *Stenquist*. In *In re* Marriage of Samuels, 96 Cal. App. 3d 122, 158 Cal. Rptr. 38 (1979), the court of appeals held that disability payments received after ordinary retirement age is reached constitute community property, even where the pensioner retires before that time due to his or her disability.

234. *See In re* Marriage of Stenquist, 21 Cal. 3d at 787, 582 P.2d at 101, 148 Cal. Rptr. at 14.

235. *See* notes 133-37 and accompanying text *supra*.

236. *In re* Marriage of Stenquist, 21 Cal. at 785 n.4, 582 P.2d at 99 n.4, 148 Cal. Rptr. at 12 n.4.

237. *See* Hampton v. Mow Sun Wong, 426 U.S. 88, 115-16 (1976).

238. *See* notes 100-04 and accompanying text *supra*.

239. Some of the federal policies regarding the physically handicapped are mentioned in notes 205-07 and the accompanying text *supra*.

240. *See* notes 138-39 and accompanying text *supra*.

is, the court may still award support to the nonemployee spouse in order to provide for his or her financial needs.[241] In sum, because the holding in *Stenquist* may, in certain situations, effectively burden a physically handicapped individual's right to equal employment opportunity, it is subject to an equal protection challenge. The United States Supreme Court's decision in *Hampton v. Mow Sun Wong*[242] indicates that an intermediate standard of review should be applied to classifications which burden this right.[243] Analyzing the *Stenquist* rule according to the *Hampton* mode of inquiry demonstrates that that rule, when applied to *Stenquist*-like fact situations, may violate the equal protection clause of the Fourteenth Amendment.

C. Conclusions

Which constitutional alternative is best suited to cases involving persons situated similarly to the *Stenquist* husband? If the essential fairness of dividing a disability pension one-half between the spouses in such a case depends on factors not considered in *Stenquist*, the disabled employee spouse should be given the opportunity to exempt himself or herself from that holding. The *Stenquist* rule might therefore be enforced in proper instances, but individuals potentially subject to the rule should be afforded an opportunity to rebut the presumption that their cases fall within its purview. Permitting rebuttal—thereby transforming irrebuttable presumptions into burden-shifting devices—has been a favored remedy in equal protection cases involving classifications subject to intermediate review.[244] This practice would be especially appropriate in determining the property rights of disabled spouses with respect to their disability pensions, and may be mandated in any event by the new statutes, if they are held to be controlling in pension cases. Since a disability pension may serve different functions under different circumstances,[245] the problem of classification should not be treated as one requiring a single solution for all cases. The intermediate remedy of a rebuttable presumption would accord equality of treatment to both spouses, without frustrating any established federal

241. *See In re* Marriage of Stenquist, 21 Cal. 3d at 795-96, 582 P.2d at 106-07, 148 Cal. Rptr. at 19-20 (Clark, J., dissenting).

242. 426 U.S. 88 (1976).

243. *See* note 222 and accompanying text *supra*.

244. *See, e.g.*, Trimble v. Gordon, 430 U.S. 762, 770-71 (1977), where the Court required a similar middle ground approach between an absolute rule and a case-by-case determination. *See also* Shapiro v. Thompson, 394 U.S. 618, 631 (1969); Carrington v. Rash, 380 U.S. 89, 96 (1965); United States Dep't of Agriculture v. Murry, 413 U.S. 508, 518 (1973) (Marshall, J., concurring); Skinner v. Oklahoma, 316 U.S. 535, 544 (1942) (Stone, C.J., concurring). *But cf.* Note, *The Irrebuttable Presumption Doctrine in the Supreme Court*, 87 HARV. L. REV. 1534 (1974) (arguing that the doctrine is confused and unhelpful).

245. *See* notes 64-99 and accompanying text *supra*. *See also* 21 Cal. 3d at 787, 582 P.2d at 101, 148 Cal. Rptr. at 14.

or state policy.[246] The employee spouse's status as a physically handicapped individual would be respected and protected, as would the nonemployee spouse's marital property rights in ordinary retirement benefits.

Under current California law, marital property rights bow to the equal protection rights of the physically handicapped until such time as ordinary retirement rights vest; at that moment, the tables immediately turn, and marital property rights outweigh the equal protection rights of disabled pensioners. Under the suggested approach, both sets of rights would receive the same consideration under all circumstances, obviating the need for a hierarchy of protection dependent upon the moment of vesting—an arbitrarily chosen moment, at best. Moreover, the suggested approach is compatible not only with existing federal policies regarding military disability pensions and the physically handicapped in general,[247] but also with California community property principles, since all apportionments and distributions must be consistent with the interests of justice, according to all the circumstances of a given case.[248] Adoption of this approach would not require that any prior California case be overruled, as none presents a problem similar to that posed in *Stenquist*.[249] Thus, the *Stenquist* rule could be followed in those cases where the employee spouse, like the husband in *Stenquist*, has no special need for the entire disability pension, and distinguished in situations where such a need is shown.

246. As discussed earlier, the supremacy clause of the United States Constitution, U.S. CONST. art. VI, cl. 2, requires that federal policy not be frustrated by state community property law. *See* notes 105-130 and accompanying text *supra*.

247. *See* notes 105-30 and 205-07 and accompanying text *supra*.

248. *See* note 140 and accompanying text *supra*.

249. *See, e.g.*, *In re* Marriage of Mueller, 70 Cal. App. 3d 66, 137 Cal. Rptr. 129 (1977); *In re* Marriage of Cavnar, 62 Cal. App. 3d 660, 133 Cal. Rptr. 267 (1976); *In re* Marriage of Jones, 13 Cal. 3d 457, 531 P.2d 420, 119 Cal. Rptr. 108 (1975). For a discussion of these cases and a comparison of each with *Stenquist, see* notes 66-97 and accompanying text *supra*.