Comment, HIDDEN VALUE?: VALUING POSTRETIREE HEALTH CARE BENEFITS AT DIVORCE

I. Introduction

Many businesses offer health care benefits for current employees. Some employers offer these benefits after the employee retires. In exchange for faithful employment, these benefits may be covered completely by those employers.[1]

Due to the astronomical rise in the cost of health care, there can be tremendous value in these benefits offered after the employee retires. Over the last thirty years, more courts have begun treating these benefits as marital property.[2] Lawyers who neglect to address this issue may cost their client compensation that is rightfully theirs.

Prior to 1994, there was not much debate on the issue of post-retiree health care benefits.[3] In 1994, William R. Horbatt and Alan M. Grossman published an article in the *Family Law Quarterly* stressing the value of these benefits.[4] This article sparked the debate on the value of these benefits, the financial significance of these benefits, and the issue of whether one has a property right to these benefits. Today, jurisdictions are split as to whether post-retiree health care benefits have marital value and are divisible at divorce.[5]

The question persists: What are post-retiree health care benefits? As described by Horbatt and Grossman, "Benevolent employers provided these benefits to a select group of loyal retirees

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[1] William R. Horbatt & Alan M. Grosman, *Division of Retiree Health Benefits on Divorce: The New Equitable Distribution Frontier*, 28 Fam. L.Q. 327 (1994); *see also* Jerry Reiss & Michael R. Walsh, *Post-Retirement Medical Benefits: A Not-So-Certain Property Right*, 15 J. Am. Acad. Matrim. Law. 375 (1998).

[2] *See* Horbatt & Grossman, *supra* note 1, at 375;*see also* Reiss & Walsh, *supra* note 2, at 375.

[3] *See* Reiss & Walsh, *supra* note 2, at 375.

[4] Horbatt & Grossman, *supra* note 1, at 328.

[5] *Compare* Burts v. Burts, 266 P.3d 337 (Alaska 2011) *with* Miller v. Miller, 2019 WL 4010925 (Ohio App. 12 Dist., 2019).

as a reward for their years of service."[6] In many cases, when employees retire, the company will cease to pay for their health care benefits. Many Americans use 66 as the benchmark for retirement age. According to a study done by the highly respected global analytics firm Gallup, the average age of retirement in the United States is 66.[7] Generally, Baby Boomers Social Security retirement age is 66. Medicare coverage begins at the age of 65.[8] More specifically, the open enrollment period for Medicare begins three months before the month one turns 65 and ends three months after the month that one turns 65.[9]

There are two parts to Medicare, Part A and Part B. Medicare Part A covers inpatient care within hospitals – including critical access hospitals and skilled nursing facilities.[10] These costs are usually fully covered by Medicare. Medicare Part B covers services that are not covered by Medicare Part A.[11] Part B includes coverage for things such as doctor's services, outpatient care, and other items.[12] Patients must pay a monthly premium for Medicare Part B, which was $134 per month in 2018.[13] Consequently, many of the postretiree health care plans that employer offer to faithful employees are "Medicare wrap-around" plans. Essentially, they "wrap around" the uncovered costs and pay them.

For example, a husband (or wife) has been offered these benefits from the employer. The couple then divorces before this benefit has vested. How is the value of postretiree health care benefits calculated? In circumstances such as these, it may be important for an attorney to hire an expert to analyze and value

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6 Horbatt & Grossman, *supra* note 1, at 328.

7 Frank Newport, *Snapshot: Average American Predicts Retirement Age of 66*, GALLUP ECONOMY (Dec. 2021), https://news.gallup.com/poll/234302/snapshot-americans-project-average-retirement-age.aspx.

8 *When Does Medicare Coverage Start?* STEP 2 (Dec. 2021), https://www.medicare.gov/basics/get-started-with-medicare/sign-up/when-does-medicare-coverage-start.

9 *Id*.

10 U.S. Dep't of Health & Hum. Servs., *Enrolling in Medicare Part A and Part B*, CENTERS FOR MEDICARE AND MEDICAID SERVICES (Dec. 2021), https://www.medicare.gov/Pubs/pdf/11036-Enrolling-Medicare-Part-A-Part-B.pdf.

11 *Id* at 6.

12 *Id*.

13 *Id*.

these benefits and their relation to that party's employment. While an expert may be costly, in certain circumstances it may be worth the cost to protect the client's rights and prospect of significant future benefits. Medical benefits enjoyed by a spouse after retirement may hold significant value, and it is important to analyze fully the facts of each case to determine said value – if any exists.

This Comment will discuss in Section II the classification of postretiree health care benefits as a marital asset. Section III will discuss valuation methods for postretiree health care coverage.

II. Postretiree Health Care Benefits as a Marital Asset

States differ as to the classification of post-retiree health care benefits as marital or community property.[14] Therefore it is important to carefully analyze the statutes and caselaw of individual states to know if these benefits can be considered marital property in the forum state. For example, caselaw in Ohio holds that these benefits are not marital property, and they cannot be valued or divided during the divorce or dissolution proceedings.[15] Appellate decisions in Ohio state that benefits such as these are not guaranteed – in fact, some benefits such as these have decreased as the employee's contributions to their pension plan increased.[16]

The article by Horbatt and Grossman presented a thorough discussion of the value of these benefits – which had, not long before, been treated by the courts as having no value at all.[17]

A. *Federal and State Retirement Plans*

1. *Tricare*

TRICARE is the health care plan offered to members of the military for their service. It is offered to active-duty service members, active-duty family members, National Guard and Reserve

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[14] Daniel L. Kresh, *Divorce and Separation: Health Insurance Benefits as Marital* Asset, 81 A.L.R.6th 655 (originally published in 2013).

[15] *Miller*, 2019 WL 4010925; Yates v. Yates, 2006 WL 389670 (Ohio Ct. App. Feb. 21, 2006).

[16] *Yates*, 2006 WL 389670 at P16.

[17] *Id.* at 334.

members and their family members, military retirees and their family members, survivors, and, in some cases, certain former spouses of military members.[18] TRICARE offers health and dental benefits for these parties both during military service and, in some cases, after retirement.[19]

Military retirees usually qualify for lifetime health care benefits.[20] In Alaska, TRICARE is considered marital property divisible at divorce, since the benefits were earned during marriage and have value.[21] However, many states have not addressed the issue of TRICARE as marital property.[22] An important question for intangible benefits such as post-retiree health care benefits is if the benefit has value that was earned during the marriage.[23]

Military spouses also have a program that they can enter to receive health care benefits if they are not eligible for TRICARE, called Continued Healthcare Benefit Plan.[24] This plan is available for former military members, their spouses, and their families for 18-36 months after they have lost their military healthcare benefits.[25] It offers similar coverage, but a premium payment is required.[26] Individual coverage costs approximately $1,654 per quarter and family coverage costs approximately $4,079 per quarter.[27]

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18 *TRICARE 101, What Is Tricare?*, TRICARE (Feb. 2022), https://www.tricare.mil/Plans/New.

19 *Id.*

20 *Your Health Plan Options*, RETIRED SERVICE MEMBERS AND THEIR FAMILIES (Dec. 2021), https://www.tricare.mil/Plans/Eligibility/RSMandFamilies.

21 *See* Horning v. Horning, 389 P.3d 61 (Alaska 2017); *see also* Burts v. Burts, 266 P.3d 337 (Alaska 2011); Hansen v. Hansen, 119 P.3d 1005 (Alaska 2005); Grove v. Grove, 2020 WL 1933644 (Alaska, 2020)

22 1 MILITARY FAMILY LAW § 4.05 (2022)

23 *Grove*, No. S-17388, 2020 WL 1933644.

24 *Continued Health Care Benefit Program,* CHCBP (Jan. 2022), https://www.corpscpc.noaa.gov/perservices/pdf/chcbp_handbook.pdf.

25 *Id*.

26 *Id*.

27 *Costs and Renewing Coverage,* HUMANA MILITARY (Feb. 2022), https://www.humanamilitary.com/beneficiary/benefit-guidance/special-programs/chcbp/costs.

2. *Government Retirement Plans*

Retiree healthcare benefit plans offered to public school teachers may be considered marital property. In *Weller v. Weller*, the husband was a public-school teacher who had participated in the State Teacher's Retirement System during a majority of the long (35-year) marriage.[28] Employer contributions to his retirement plan was a part of his compensation.[29] Because of this, the court found that the benefits were paid for in part with marital funds, and the retiree health care benefits were considered marital property.[30]

In the New Mexico case *Luxton v. Luxton*, the court held that the husband's U.S. Civil Service medical retirement funds were community property.[31] The court compared this case to an earlier case that held disability benefits provided by the federal government could be community property.[32] Many courts have not addressed valuing postretiree healthcare benefits, but jurisdictions that have definitively addressed the issue follow their state's caselaw.

B. *Private Retirement Plans*

In many cases, postretiree health care benefits are offered as a part of the employee's pension package. There have been two areas of thought that pertain to these types of health care benefit plans. The first idea is that these "fringe benefits" are mere gratuities – gifts from employers to employees for years of faithful service. The second, less optimistic of the two, is that employers never give employees anything without expecting something in return.[33] Many varieties of law simply agree that employers do not give out gifts to employees without receiving something in

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28 Weller v. Weller, No. 2001-G-22370, 2002 WL 31862681 (Ohio Ct. App. Dec. 20, 2002).

29 *Id.*

30 *Id.*

31 Luxton v. Luxton, 648 P.2d 315 (N.M. 1982).

32 *Id.*

33 In *Engstrom v. Engstrom*, 350 P.3d 766 (Alaska 2015), the wife received her benefits which had vested after eight years of service to the school district. The court found that because the plan had already vested, there was present calculable value, and that this benefit was not a mere gratuitous gift. Therefore, the entirety of the benefit was marital.

return.[34] Gifts from employers, if proven that they are given for services rendered, may be part of the marital portfolio. Gifts from employers are typically taxable as well.[35] However, pension plans can also be offered to employees to focus on employee retention. Their value can incentivize employees to remain in their position and provide quality work for their employers.

If these benefits are earned during the marriage, they may be marital property.[36] Courts may be more likely to find that postretiree health care benefits are marital property when a party introduces expert testimony for the following: (1) the benefits are part of an employer's total compensation package; (2) the benefits constitute a thing of value; (3) negotiated compensation packages that include retirement plans involve a reduction in current wages to obtain that benefit; and (4) such benefits accrue over time and are compensation for past services.[37] In Alaska, benefits earned during the marriage are marital property. In the *Burts v. Burts* case, the husband and wife were married for many years.[38] The husband was in the military. He earned his postretiree benefits over a twenty-year span – during fifteen of those years, the Burts were married. The court found that because he earned 75% of the benefit during the marriage, that 75% was marital and the other 25% was separate.[39] Revisiting Alaska, in *Hansen v. Hansen*, the wife had received a postretiree health care benefit from her employer, an Alaskan school district.[40] The benefit vested before marriage, and she cashed it out.[41] The husband and wife then married.[42] During the marriage, the wife repurchased the benefit.[43] Because she repurchased the benefit with

[34] Brett R. Turner, Equitable Distribution of Property § 6.22 at 141 (3d ed. 2005).

[35] *See* Research Institute of America, Beneficial Analysis P 126,710 (2022).

[36] *Engstrom*, 350 P.3d 766.

[37] Kresh, *supra* note 14, at 4.

[38] Burts v. Burts, 266 P.3d 337 (Alaska 2011).

[39] *Id.* at 340.

[40] Hansen v. Hansen, 119 P.3d 1005 (Alaska 2005)

[41] *Id.*

[42] *Id.*

[43] *Id.*

marital funds during the marriage, the court considered the benefit to be marital.[44]

Some jurisdictions – namely Indiana – look to see if the plan has vested.[45] Other courts consider evidence that the plan has vested as important to the property determination.[46] If so, it has value that was earned during the marriage and is marital property.

To show the court that these benefits have value divisible in the event of a dissolution or divorce it is important to: 1) stress that these benefits were conferred upon the employee for past-completed work; and 2) complete an in-depth analysis of the health care benefits.

C. *State Law Survey*

As previously noted, states differ as to whether health care coverage is marital/community property or non-marital, separate property. Indiana has provided that these benefits are marital property. Indiana requires that the benefit plan be vested during the marriage.[47] Alaska has ruled that to the extent that postretiree healthcare benefits have been earned during the marriage, the portion earned during the marriage is marital property.[48]

California, on the other hand, stated in *In re Marriage of Havins* that retirement healthcare benefit plans were not divisible community property.[49] Case law in New York has stated that the New York State Legislature had expressed an intention that health benefits not be counted as marital property.[50] Ohio case law prevents health benefits from being considered marital property due to their speculative nature.[51]

Many states have not addressed this issue.

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[44] *Id.*

[45] Bingley v. Bingley, 935 N.E.2d 152 (Ind. 2010).

[46] Engstrom v. Engstrom, 350 P.3d 766 (Alaska 2015).

[47] *Id.*

[48] *Id.*

[49] *In re* Marriage of Havins, 43 Cal. App. 4th 414, 50 Cal. Rptr. 2d 763 (Cal. Ct. App. 1996); Kresh, *supra* note 14, at 9.

[50] Henig v. Henig, 27 Misc. 3d 1204(A), 910 N.Y.S.2d 405 (N.Y. Sup. Ct. 2010).

[51] Wenger v. Wenger, No. 02CA0065, 2003 WL 22439861 (Ohio Ct. App. Oct. 29, 2003); Kresh, *supra* note 14, at 9.

III. Valuation Methods of Postretiree Health Care Benefits

A. *Valuation Methods*

1. *Know the Type of Benefit Being Offered*

It is important to first determine what kind of benefit is being offered before an attorney can begin to attempt to assign value to said benefit, or hire a qualified, experienced expert to value the asset. These benefits can be included in pension plans and retirement plans. Is the benefit offered within a retirement plan or within a pension plan? Has the client accumulated the benefit as a result of a lawsuit settlement? Courts may take the circumstances under which the plan was acquired into consideration when determining whether the benefit is marital or nonmarital.[52] There are many different forms that these benefits can take. It is important to first determine what form that benefit takes.

2. *Employ an Expert*

Employing an expert when valuing these types of benefits can not only ease the mind of the client and the lawyer, it may also add a measure of persuasion to their point on the issue. The importance of having the opinion of an expert is unequivocal. Experts within many different professions have been employed to value these kinds of assets.[53] It is important that an attorney hire an expert that has a record of experience in valuing these kinds of benefits and knows the nuances of doing so. Actuaries, economists, certified public accountants, and even attorneys who specialize in these benefits may be various options for valuing them.

Attorneys should perform a thorough analysis of the cost of having an expert value these benefits. While it is important to have an expert value these benefits, client cost must be ad-

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[52] *See* Paul v. Paul, 648 So.2d 1211 (Fla. Dist. Ct. App. 1995); *See* Miller v. Miller, No. CA2018-08--74, 2019 WL 4010925 (Ohio Ct. App., 2019).

[53] *Henig*, 910 N.Y.S.2d 405 (the husband employed an attorney whose sole area of practice was employee benefits and qualified pension plans, focusing on divorces, while the wife employed a forensic economist).

dressed. The following analysis can assist in determining if an expert is needed to value certain benefits:

1. The cost of the expert's services (which may include trial testimony) compared to the financial means of the parties;

2. The complexity of the benefits;

3. The likelihood that the client or another lay witness could make their point without the expense of hiring an expert;

4. the judge's receptiveness to an expert on the particular issue; and

5. the likelihood that the matter will proceed to trial.[54]

An attorney must analyze – intensively – what kind of expert to hire and which specific person will work as an expert for the betterment of the client. A knowledgeable and effective expert is invaluable when addressing these benefits.

3. *Valuing the Asset*

If the benefits are classified as marital property, they must be valued. Many courts find expert testimony on this issue to be extremely persuasive. After determining whether the benefit is marital, attorneys should take several initial steps to value it. First, obtain the business's medical plans.[55] Important documentation includes among other things all pertinent formal documents, relevant employer communications, and insurance policies.[56] Private employers typically keep copies of these documents on hand. Obtaining these documents from the federal government is slightly different. To obtain employee benefit plan documents, attorneys must reach out to the Department of Labor.[57] Attorneys located in the Washington D.C. area can obtain these documents in-person at the Employee Benefits Security

54 *Doing Your Digging: Discovery in Divorce Actions*, Massachusetts Continuing Legal Education, ch. 7-1 (2022).

55 Horbatt & Grosman, *supra* note 1, at 339. Horbatt and Grossman introduced their method for valuation in 1994, before many courts began denominating these benefits as marital. Many courts have since begun to find value in these plans and their plan remains useful today.

56 *Id.*

57 *How to Obtain Employee Benefit Plan Documents from the Department of Labor*, U.S. DEP'T OF LABOR (Feb. 2022), https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/resource-center/publications/how-to-obtain-employee-benefit-plan-documents-from-dol.

Administration.[58] Written and phone requests for documentation take approximately five business days.[59] If an attorney is seeking benefit paperwork from a state government job, it would be prudent for the attorney to reach out to the correct state administrative agency for that paperwork. Internet resources outlining these benefits are available for guidance.[60] Second, the attorney should obtain all public financial statements released in approximately the last twelve months.[61] Third, attorneys should obtain the most recent company valuation of the company's postretiree medical benefits prepared for the plan.[62] It is important to obtain sufficient supporting documentation for all of the previous three types of information listed.[63] If the party who is receiving the benefits signs an authorization, an attorney will not have to draft a subpoena for those documents.[64] If that party will not sign an authorization, an attorney can obtain this information via court order.[65]

An attorney must utilize different forms of discovery to obtain documents pertaining to the postretiree health care benefits offered by employers. It is imperative that the attorney utilize interrogatories to discern what benefits a party has, with which employer the benefits were given, etc. An attorney should request all relevant documents pertaining to the benefit, including: (1) any paperwork pertaining to a pension; (2) any paperwork pertaining to the benefits; (3) the employee's compensation plan and contract; and (4) any other relevant documents. When the relevant documents are identified, but an attorney cannot obtain them from the opposing party, an attorney may utilize a records deposition, sometimes colloquially referred to as a subpoena, under Federal Rule of Civil Procedure 31(a)(4), which states in pertinent part, "A public or private corporation, a partnership,

58 *Id*.

59 *Id.*

60 *Find a TRICARE Plan*, TRICARE (Feb. 2022), https://www.tricare.mil/Plans.

61 Horbatt & Grossman, *supra* note 1, at 339.

62 *Id.*

63 *Id.*

64 *See id.*

65 *Id.*

an association, or a governmental agency may be deposed by written questions in accordance with Rule 30(b)(6)."[66]

There are several methods available to value these benefits, assuming that they are marital. An attorney can measure the value of the policy, the amount of the premium subsidy, and the cost of purchasing a comparable policy on the private insurance market.[67]

Another way to value this type of benefit is to calculate the value based on life expectancy and calculate the value of a plan based on the value of a similar plan on the open market. See the table below as reference for the following hypothetical:

Life Expectancy Table[68]

Current Age	**MEN**	**WOMEN**
50	29.9	33.5
55	25.7	29
60	21.8	24.8
65	18.1	20.7
70	14.6	16.8
75	11.3	13.1

One method of valuing such a plan is to compare it to one on the open market and valuing it based on life expectancy. Above is a life expectancy chart published by the National Center for Health Statistics. There are three columns included in the table. The left column states that current age of a person. The middle column shows the estimated remaining years of life that a male has left to live. The right column contains the estimated remaining years that a female has left to live. These estimates

66 FED. R. CIV. P. 31(a)(4).

67 Kresh, *supra* note 14, at 339; *See Burts*, 266 P.3d 337 (The wife's expert valued the husband's postretiree health care benefits based on an estimated life expectancy of the husband. The court accepted this valuation because the husband did not introduce a competing valuation.); *See also* Ethelbah v. Walker, 225 P.3d 1082 (Alaska 2009) (holding that the value of the benefit should be based on the employer subsidy); Paul v. Paul, 648 So.2d 1211 (Fla. Dist. Ct. App. 1995) (awarding the wife one-half the cost of the husband's replacement plan bought on the open market).

68 NAT'L. CTR. FOR HEALTH STATISTICS, 2018 U.S. LIFE TABLES.

provide a reference to calculate the value of a plan based on life expectancy.

Suppose Jane and John Doe are divorcing. John Doe has postretiree health care benefits within his pension plan offered by his employer. Also suppose that, in this jurisdiction and allowed by the facts of the case, these postretiree health care benefits are considered marital property. John Doe is 70 years old, and Jane Doe is 60 years old, and both are retired.

John's postretiree healthcare is all inclusive – it covers all that Medicare Part A and Part B covers; therefore, he has not needed to enroll in Medicare and is solely covered by the benefit included in his pension plan. However, John's pension plan only grants coverage to him, and not his wife.

According to the Kaiser Family Foundation, in 2021, the annual average for premiums for single person life insurance coverage was $7,470, or approximately $622.50 per month.[69] The table above states that, statistically, John Doe has approximately 14.6 years left to live, or 175.2 months. To calculate the approximate remaining value of the plan compared to the national average, Jane would multiply 175.2 by $622.50. The approximate value of the health care coverage offered by the plan would be $109,062. However, one must consider discount rates given to customers. Discount rates bring down the full value over time to a present value now. Most health insurers offer discounts on medical costs after the premium is paid.[70] It is important to consider this factor when valuing.

Insurance agents may make valuable expert witnesses for the calculation of health care benefits based on life expectancy. They are immersed in the above-mentioned information daily. Because of daily immersion in all aspects of medical insurance, the agent would be in the best position to provide testimony on which policy is most similar to the one in question and compare the costs of these policies.

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[69] *2020 Employer Health Benefits Survey*, Kaiser Family Foundation (Oct. 8, 2020), https://www.kff.org/report-section/ehbs-2020-summary-of-findings/.

[70] *Do You Have Health Insurance?,* Substance Abuse and Mental Health Administration (Feb. 2022), https://www.samhsa.gov/sites/default/files/health-insurance-how-do-i-get-pay-use-with-notes.pdf.

4. *The Issue of Vesting*

Federal law states that pension plans must vest.[71] There is no such law for postretiree health care benefits. The vesting of a retirement benefit means that the employee has contributed the requisite amount of service in their position to receive an entitlement to their pension plan. In some jurisdictions, if the benefits have vested before the time of divorce, they must be valued because they have presently calculable value to the owner of the benefits.[72] The Indiana Court of Appeals in *Bingley v. Bingley* stated, "whether a right to a present or future benefit constitutes an asset that should be included in marital property depends mainly on whether it has vested by the time of dissolution."[73] However, not all states require vesting. Attorneys must evaluate the statutes and case law of their state when determining this issue.

If such a benefit has vested during the marriage, it is likely that the health care benefits are marital property since they have present, calculable value and have been earned in employment by the employee-spouse. Vesting may be a prerequisite for valuation and division as marital property.[74] Therefore, an attorney must analyze case law and the laws of their state to evaluate whether this issue is pertinent to their case.

5. *Analysis of the Two Viewpoints*

There is a continued trend towards valuing these postretiree benefits as marital property.[75] The rising cost of health care has driven the view that there are property rights in postretiree health care benefits, and they must be divided for there to be an equitable distribution of property in a divorce. However, whether these benefits are marital or non-marital differs from ju-

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71 29 U.S.C. § 1053 (2010).

72 In *Bingley v. Bingley*, 935 N.E.2d 152 (Ind. 2010), the husband received postretiree health care benefits from his employer. At the time of the divorce, he had already retired and was receiving the benefits. Therefore, the court reasoned that whether a right to a present or future benefit constitutes an asset that should be included in marital property depends mainly on whether it has vested by the time of dissolution.

73 *Id.* at 155.

74 *See id.*

75 *See* Kresh, *supra* note 14, at 4.

risdiction to jurisdiction. The following summarized cases highlight differences that may be found among various states.

A. *Varying State Approaches*

1. *Alaska*

Hansen v. Hansen

In *Hansen v. Hansen*, the wife had a Public Employees Retirement System retirement plan.[76] The plan vested and was cashed out before the marriage took place.[77] However, the benefit was reacquired through a repurchase during the marriage.[78] As a result, the Alaska Supreme Court ruled that this benefit was, at least in part, a marital asset.[79] The *Hansen* court stated that benefits earned during the marriage are marital property.[80] Although the wife earned and cashed out this benefit before the marriage began, the court reasoned, through the wife's action of repurchasing the benefits during the marriage, that it was, at least in part, marital property subject to division. In valuing the benefits, the court ordered the trial court to look to the amount of the premium subsidy that the employer provided and not to the cost of procuring a comparable plan.[81]

Hansen is currently the controlling law in Alaska; however, an issue in the valuation of such benefits was addressed in *Wilkins v. Wilkins* in 2019. Previously, the court had been using a "one-size-fits-all premium subsidy approach" to postretiree health insure benefits.[82] Essentially, the court refused to value the husband's postretirement health insurance benefits and ordered him to pay for adequate insurance coverage of the wife.[83] However, on appeal the Alaska Supreme Court ruled that this was incorrect.[84] Under *In re Marriage of Havins*, the court stated that when valuing this asset the superior court consider the em-

76 Hansen v. Hansen, 119 P.3d 1005, 1014 (Alaska 2005).
77 *Id.*
78 *Id.*
79 *Id.*
80 *Id.*
81 Kresh, *supra* note 14, at 8; *Hansen*, 119 P.3d at 1005.
82 Wilkins v. Wilkins, 440 P.3d 194 (Alaska 2019).
83 *Id.*
84 *Id.*

ployer's premium subsidy rather than either the proceeds or the cost of procuring comparable insurance.[85] The court then stated that it left the valuation method to the superior court and that court's gate-keeping function with respect to expert witness approaches to valuing these assets – changing how the valuation of these assets was looked at, and expanding the possibilities for valuing retirement benefits.[86]

Grove v. Grove posited a similar issue with the valuation of retirement benefits. Initially, the trial court entered an order that the husband pay the wife an amount of money over time that would allow her to purchase a reasonably equivalent insurance policy.[87] The Alaskan Supreme Court ruled that this was not sufficient as a valuation of the TRICARE benefits in question.[88] The Alaskan Supreme Court rejected the above method as a valuation for several reasons – but one policy reason in specific was highlighted.[89] The court stated that a strong policy rationale favored reducing financial entanglement after divorce – requiring a husband to pay a wife's monthly insurance premiums for her lifetime increases the possibility of entanglement.[90] Therefore, the case was remanded for valuation of the benefit.[91]

2. *California*

Havins v. Havins

In the *Havins* case, the husband was a long-term federal employee who had postretiree health care benefits through his employment.[92] This case takes place in California, a community property state. The husband had retired and earned the right to renew his health care benefits as a retiree.[93] He paid all premiums with postseparation funds.[94] During the divorce proceed-

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85 *Wilkins*, 440 P.3d 194; *Hansen*, 119 P.3d 1005.
86 *Wilkins*, 440 P.3d at 198.
87 Grove v. Grove, 400 P.3d 109 (Alaska 2017).
88 *Id.*
89 *Id.*
90 *Id.*
91 *Id.*
92 *In re* Marriage of Havins, 43 Cal. App. 4th 414, 50 Cal. Rptr. 2d 763 (1996).
93 *Id.*
94 *Id.*

ings, the husband argued that this benefit had no cash value, using a previous California Court of Appeals case that stated term life insurance policies were not divisible community property.[95] The wife argued that there was replacement value.[96] This "replacement value" was, essentially, the difference between what the husband would be paying for these benefits in the open market versus what he is paying with the benefits now.[97]

The court concluded that these renewal rights purchased by the husband had value, but because they were purchased and continually funded with his nonmarital property, they could not be valued and divided for divorce purposes.[98] The court stated that employer-subsidized retiree health insurance is unquestionably a fringe benefit derived from employment.[99] But because the renewal rights of the policy was purchased with postseparation earnings and became a fringe benefit following the separation of the parties, the benefit was nonmarital.[100]

3. *Ohio*

Miller v. Miller

In the *Miller* case, the husband received retirement health care benefits provided by his employer after settling a class-action lawsuit against his former employer.[101] The husband did not receive his healthcare benefit plan as a result of employment – he received it as a result of a lawsuit against his former employer.[102] His former employer created a healthcare trust fund for the class of retirees and the retirees' immediate family.[103]

As a result, the trial court found that no marital assets were used to establish the healthcare trust fund, and the husband could not withdraw funds from the trust nor have any control over the funds.[104] Ohio courts had previously held that postre-

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95 *Id.; In re* Marriage of Lorenz, 146 Cal. App. 3d 464 (1983).
96 *Havins*, 43 Cal. App. at 418.
97 *See id.*
98 *Id.*
99 *Id.*
100 *Id.*
101 *Miller*, 2019 WL 4010925.
102 *Id.*
103 *Id.*
104 *Id.*

tiree health care benefits provided in a pension plan were not to be considered marital subject to division in a divorce.[105] The court found that, based on a previous ruling, these types of benefits were not subject to division.[106] This previous ruling, in *Yates v. Yates*, expressly stated that healthcare benefits provided by a pension plan are not to be considered marital property subject to division and distribution.[107] The court, previously in *Yates* and subsequently in *Miller v. Miller*, explained "such benefits are not guaranteed and are therefore unlike any other employment deferred benefits."[108]

4. *Florida*

Paul v. Paul

In the *Paul* case, the District Court of Appeals of Florida found that the husband's pension, which included healthcare and dental benefits after retirement, was a marital asset subject to division.[109] In fact, the postretiree health care benefits in question that were a part of the husband's pension were the most valuable marital asset that the husband owned.[110] The Florida court of appeals affirmed the trial court's ruling that one-half of the pension plan accrued by the husband was divisible and was the property of the wife as equitable distribution of the marital estate.[111] The husband had retired early, and the wife had been a stay-at-home mother during their traditional, long marriage with a significantly lower earning potential.[112] The court reasoned that this split was reasonable because it provided for an equitable division of assets that otherwise would have put the wife in a position of financial peril.[113]

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105 *Id.*; Yates v. Yates, Nos. 2004-07-010, CA2004-07-011, 2006 WL 389670 (Ohio Ct. App. 2006).

106 *Id.*

107 *Id.*; Yates v. Yates, 2006 WL 389670, ¶ 16, (Ohio App. 12 Dist., 2006).

108 *Miller*, 2019 WL 4010925 at ¶12; *Yates*, 2006 WL 389670 – at ¶16.

109 Paul v. Paul, 648 So. 2d 1211, 1212 (Fla. Dist. Ct. App. 1995).

110 *Id.*

111 *Id.*; *see also* Kresh, *supra* note 14, at 6.

112 *Paul*, 648 So. 2d at 1213-14.

113 *Id.*

As a result, the court of appeals affirmed that the pension was subject to equitable division, and the trial court's method of division was accepted.[114]

5. *New York*

Henig v. Henig

In the *Henig* case, the court focused on determining whether postretiree health care benefits were marital, and, if so, how they should be valued.[115] The husband employed an attorney whose sole area of practice was employee benefits and qualified pension plans, focusing on divorces.[116] The wife employed a forensic economist who "ha[d] written many articles on how to value an employee's fringe benefits and deferred compensation, and he ha[d] evaluated loss of employee health care benefits in both personal injury cases and divorce actions."[117]

Such benefits were not free for the husband, however.[118] He paid $15.35 per month with a $300 deductible.[119] The wife argued that in the event of the death of the husband, the wife and her children would continue to be covered under this continued health care plan, but she provided no evidence to support this claim.[120] The wife also claimed that these "lifetime benefits," like pensions, held contractual rights which have value in lieu of compensation.[121] She provided no evidence for this claim, either.[122] The wife failed to convince the court that the benefits were property, and, therefore, they were not marital property, since she

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114 *Id.*

115 Walek v. Walek, 193 Misc. 2d 241, 749 N.Y.S.2d 383 (N.Y. Sup. Ct. 2002).

116 *Henig*, 910 N.Y.S.2d 405.

117 *Id.*

118 *Id.*

119 *Id.*

120 *Id.* at 1.

121 *Id.*; The Supreme Court of Alaska ruled in *Grove v. Grove*, 400 P.3d 109, 113-114 (Alaska 2017), that the lifetime medical military benefit provided by the military through TRICARE that was earned during the marriage was marital property.

122 *Henig*, 910 N.Y.S.2d 405 at *1-2.

provided no evidence nor expert testimony to support her claims.[123]

The above cases highlight the many ways that jurisdictions differ when addressing these types of benefits and the importance of a thorough analysis of individual case facts to assign value, if any, to postretiree health care benefits. They also show the complexities that attorneys and their experts face when addressing these benefits. Experts and their opinions are invaluable when attempting to persuade the trier of fact whether the healthcare coverage is marital property, whether it has value, and how to conduct the valuation.

IV. Conclusion

Lawyers have an "obligation to zealously protect and pursue a client's legitimate interests, within the bounds of the law, while maintaining a professional, courteous and civil attitude toward all persons involved in the legal system."[124] An effective analysis of postretiree health care benefits will – in some cases – result in effectively helping the client to receive their proper share of marital assets. This Comment emphasizes the importance of an accurate and thoughtfully analyzed evaluation of benefits that may or may not be marital property. It is quite possible that there is value in a spouse's postretiree health care benefits that should be divided at divorce. Simply put, jurisdictions differ on this issue. These benefits may hold tremendous value. A complete and thorough analysis of the benefits and the fact patterns of each case is needed to know if there is actual value in these plans that can be divided in the event of a divorce.

Peyton Harms

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123 *Id.* at *4.

124 Model Rules of Prof'l Conduct, preamble, ¶ 9 (Am. Bar Ass'n 2020).