

## LAW AND THE FAMILY

### Equitable Distribution of Pension Benefits

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DOMESTIC RELATIONS LAW Sec.236(B)(1)(c) defines marital property as "all property acquired by either or both spouses during the marriage." Therefore, a spouse's right to an equitable share in the other party's pension or retirement benefits is dependant on the meaning given to the term "property." The marital partnership concept and the language of DRL Sec.236(B)(5) support a broad view as to what constitutes "property." The legislative intent was to give a comprehensive meaning to "property" and to exclude from equitable distribution only that which is clearly separate property.

In *Majauskas v. Majauskas*,<sup>\*1</sup> the Court of Appeals held that vested rights in a noncontributory pension plan are marital property to the extent they were acquired between the date of the marriage and the commencement of the matrimonial action, even though the rights are unmaturred at the beginning of the action.

In *Majauskas*, the trial court had granted the wife a divorce and awarded her custody of the two children and maintenance of \$43 per week, to be reduced, if she obtained employment, by \$1 a week for every \$3 of gross earnings. The court also awarded child support of \$60 per child per week, to be increased in proportion to any increase in the husband's gross salary from his police department job. The trial court held that the husband had a vested but unmaturred right to a pension that would permit him to retire at half pay on Feb. 20, 1983, at the earliest.<sup>\*2</sup> It held that those rights were marital property subject to equitable distribution. The current value of the portion to which the wife was entitled was \$14,102.40.

The trial judge directed that the wife be paid, at the husband's option, either \$14,102.40 within 30 days or, at any time before retirement \$14,102.40 plus interest from the date of judgment, or "[one half] of the percentage that the months they were married bears to the total of months that [the husband] was employed, as a policeman, prior to his retirement."

Insufficient Record

The Appellate Division concluded that the record was insufficient to determine the propriety of the lump sum award and modified the decision of Special Term to delete the alternative provisions for a lump sum payment.\*3 The court provided that payments be made from the husband's retirement benefits, when received, and that they be measured against the payment received by the plaintiff, less taxes. The percentage of the payment was modified to compare the number of months the parties had been married to the number of months' credit the husband earned toward his pension at the time of his retirement. The court also deleted from the judgment the provisions for future increases of child support and decreases of maintenance.

The Court of Appeals held that the modifications ordered by the Appellate Division were either correct as a matter of law, or were committed to the discretion of the Appellate Division and, thus, beyond its power to review. The court also held that a matrimonial court in the exercise of the discretion vested in it by DRL Sec.236(B) may order distribution to one spouse of an equitable portion of that part of the present value of the other spouse's pension rights earned during marriage. Alternatively it may provide that upon maturity of the pension rights the recipient pay a portion of each payment received to his or her former spouse or may, if it determines that valuation or other problems make equitable distribution impractical or burdensome, order a distributive award in lieu of equitable distribution.

In the Court of Appeals, the husband argued that pension rights are not marital property, and that an award of any part of those rights violates the constitutional prohibition against diminishment or impairment of the benefits derived from the pension system of a civil division of the state.

#### Arguments Rejected

The Court of Appeals rejected the husband's argument that the explicit reference to loss of pension rights upon dissolution of the marriage in DRL Sec.236(B)(5)(d)(4) requires the conclusion that they cannot be marital property. It also rejected his further arguments that pension rights are not acquired until after they mature, which would be after the commencement of the action; that they are only a contingent right to future income; that if they constitute property, they originated prior to the marriage; and that payment of a part of his future pension income constitutes impermissible ``double-dipping."

The court stated that those arguments misconceived the Legislative intent behind the enactment of DRL Sec.236(B) and the

nature of rights under a pension plan. Against the statutory background, an employee's interest in such a plan, except to the extent that it is earned before marriage, or after commencement of a matrimonial action, is marital property. To the extent that they result from employment time after marriage, and before the commencement of a matrimonial action, they are contract rights of value, received in lieu of higher compensation that would otherwise have enhanced either marital assets or the marital standard of living and, therefore, are marital property.

The court noted that the husband's argument did not require a contrary conclusion, as the reference to "loss of inheritance and pension rights upon dissolution of the marriage as of the date of dissolution" referred to the loss of the non-employee's independent rights, which are essentially equivalent to inheritance rights, not to the loss of the employee-spouse's pension rights acquired during marriage. Insofar as the "double-dipping" argument was concerned, the court said that this ignored the provisions of the statute that require that in determining distribution, the court must consider any award of maintenance made, and in determining the amount, the court must consider "marital property" distributed pursuant to Sec.236(B)(5).

In its recent decision in *Burns v. Burns*<sup>4</sup> the Court of Appeals extended *Majauskas* to non-vested pensions. The husband argued on appeal, relying on the Court of Appeals' failure to reach the issue in *Majauskas* that the trial court erred by rendering a distribution to the wife of \$6,102 based on his non-qualified, non-vested pension from which he could receive no benefits until he reached age 55.

Mindful of the purposes underlying the Equitable Distribution Law and the broad legislative definition of marital property, the Court of Appeals concluded that non-vested pensions are also subject to equitable distribution, because they often represent deferred compensation for service performed over a number of years that encompasses the marriage. Finding that valuation issues do not present an insurmountable barrier to a fair distribution the Court stated:

The presence of several contingencies before vesting may operate to reduce the fact finder's estimate of the present value of the asset. Alternatively, where the asset's present value cannot be determined at all at the time of the divorce, the court may, in the exercise of its discretion, devise an order that allocates a portion of each future payment to the non-titled spouse. It held that the trial court did not err in assessing a present after-tax value for the husband's non-vested pension and in directing that the wife be awarded half of that amount because the husband was only two years away from vesting at the time of trial and there was no evidence that he was planning to leave the firm.

## Disability Pension

The question whether there is a spousal interest in a disability pension, and if so, to what extent, is a difficult one, complicated by the definition of "separate property" in DRL Sec.236(B)(1)(d)(2), which embraces "compensation for personal injuries." It is further complicated by the distinction between an "ordinary disability" pension and an "accidental disability" pension.

It is consistent with the policy expressed in the Equitable Distribution Law to make a distinction between items of damage for mental pain and suffering and items of reimbursement for medical expenses, and lost earnings, and to hold that the former is separate property. The statutory definition of "separate property" found in DRL Sec.236(B)(1)(d)(2) provides, in part that the term separate property shall mean "(2) compensation for personal injuries."

In *West v. West*<sup>5</sup> the action was remitted to the trial court for a determination of the "extent to which the plaintiff husband's disability pension was marital property" because the portion attributable to compensation for the husband's personal injuries was held to be separate property. The Appellate Division quoted from its opinion in *Damiano v. Damiano*<sup>6</sup> to the effect that the difference between a disability pension and a retirement pension lies in the extent to which the former is compensation for personal injuries and thus is separate property and not subject to equitable distribution. "However," said the Court, "where a disability pension may in part, represent deferred compensation, it is indistinguishable from a retirement pension and is, to some extent, subject to equitable distribution."

The decision in *West* does not distinguish between ordinary disability pensions and accidental disability pensions, and merely finds that certain disability pensions "may, in part, represent deferred compensation." In *West* the Court relied on the use of length of service in calculating the amount of the pension. The court did not answer the question whether an accidental disability pension has a component that represents deferred compensation.

In *Mylett v. Mylett*<sup>7</sup> the Appellate Court held that disability payments received by an injured police officer before the vesting of his pension, are, to the extent that the payments represent deferred compensation, marital property. The court did not however, examine the statutory scheme distinguishing between accidental disability pensions and ordinary disability pensions, except to notice "that to the extent these payments represent deferred compensation, they are indistinguishable from ordinary retirement pensions subject to equitable distribution."

In *Dolan v. Dolan*<sup>8</sup> the Court of Appeals held that to the extent the husband's disability pension represented "deferred compensation" related to the length of employment occurring during the marriage, it constituted marital property subject to equitable distribution.

The parties were married in 1966 and had three children. In 1969, the husband worked for the New York City Department of Sanitation. In 1978, he injured his back falling from a sanitation truck. He could not work for five weeks or perform his normal routine when he returned to work. Eventually he retired on an ordinary disability pension pursuant to Sec. 13-167 of the Administrative Code of the City of New York, effective in April 1980. When he retired, he accumulated about 11 years of service with the department, entitling him to pension benefits of \$811.84 per month from the New York City Employees' Retirement System. He subsequently worked for Marist College where he enrolled as a full-time student.

The husband commenced a divorce action in 1984. After trial, the Supreme Court granted a divorce to the wife and concluded that 47.62 percent of the husband's ordinary disability pension was marital property subject to equitable distribution. The remaining 52.38 percent was a disability payment and thus was separate property not subject to equitable distribution.

In allocating retirement benefits and disability benefits, the Supreme Court compared the pension benefit the husband would have received had he retired in the normal course with the allowance he received under the ordinary disability retirement provision. If the husband had 15 years of service, he would have had vested regular pension benefits computed under the formula for determining standard retirement allowances and his pension would have been considerably less, ie, it would have equalled 47.62 percent of the ordinary disability plan.

The Supreme Court concluded that 47.62 percent of the ordinary disability pension was pure pension and thus was marital property of which the wife was entitled to 50 percent. The Supreme Court also determined that the wife was entitled to 23.81 percent of any future increase in the monthly pension payment from the date of the commencement of the action. The Appellate Division affirmed the Supreme Court's determination. It concluded that because the ordinary disability pension benefits the husband was receiving had a 10-year service requirement, such benefits were not solely compensation for injuries but were, in part, an award for length of service.

Deferred Compensation

The Court of Appeals affirmed on the basis that part of the pension benefits constituted a form of deferred compensation derived from employment. In this case, the husband was retired, pursuant to the retirement for ordinary disability provision of Sec.13-167 of the Administrative Code, which entitled a member of the City Civil Service to receive an ordinary disability pension if he or she "is physically or mentally incapacitated for the performance of duty and ought to be retired," provided he or she had "ten or more years of city service and was a member or otherwise in city service in each of the 10 years preceding his or her retirement."

In this case, the Court of Appeals concluded that "an employee may receive an ordinary disability pension, even if the disability was not the result of a job related accident, provided the employee satisfies the length of service requirement." The Court distinguished the "regular pension" and the "ordinary disability pension" from the "accident disability" pension, which does not have a length of service requirement, and is "separate property" stating:

By contrast, a civil service member qualifying for a pension for "accident disability" does not have to satisfy a length of service requirement. Rather, the only requirement for entitlement to an "accident disability" pension is that the employee be "physically or mentally incapacitated for the performance of city-service, as a natural and proximate result of such city-service," and that the "disability was not the result of willful negligence" on the part of the employee (Administrative Code Sec.13-168 [a]). Thus, the statutory scheme distinguishes between eligibility for "regular," "ordinary disability" and "accident disability" pensions on the basis of length of service; entitlement to a "regular" pension vests upon 15 years of service (Administrative Code Sec.13-173.1) and an "ordinary disability" pension upon 10 years of service (Administrative Code Sec.13-167[a][1]), whereas there exists no length of service requirement for an "accident disability" pension.\*9

The Court of Appeals reasoned that the husband was being compensated for his length of service in the Department of Sanitation, in addition to being compensated for the injuries he sustained. It was surely implicit by virtue of the service requirement for the "ordinary disability pension," that there was a desire to provide employees, whose injuries prevented them from working until normal retirement age, some form of compensation for their injuries while also awarding them a portion of the deferred compensation they would have been entitled, but for the injuries. The Court of Appeals thus held that to the extent the husband's ordinary disability pension represented deferred compensation, it was indistinguishable from a retirement pension and therefore, to

that extent, was subject to equitable distribution.

Dolan infers that, in contrast, a lack of length of service requirement for the "accident disability" pension equates to compensation intended solely for the employee's personal injuries. This intention to compensate the employee solely for his or her personal injuries is how the Court of Appeals distinguished an accidental disability pension from an ordinary disability pension and makes it "separate property." Moreover, the length of service requirement is the fundamental distinction between an ordinary disability pension and an accidental disability pension and validates the intention to provide some deferred compensation that rightfully qualifies for the marital property category.

Mylett and West were each decided by the Appellate Division before the Court of Appeals decision in Dolan v. Dolan. The earlier cases analyzed the pensions differently from the Court of Appeals decision in Dolan. The decisions in West and Mylett concluded that a portion of the pensions represented deferred compensation because length of service on the job was used in calculating the amount of the pension.

The decision in Dolan concluded that length of service on the job is not a factor in determining entitlement to the pension, but rather "entitlement" is based solely on an on-the-job "personal injury" qualifying as accidental disability as a result thereof. What distinguishes an "accidental disability pension" from an "ordinary disability pension" and makes it purely compensation for personal injury is that "entitlement" is based only on an on-the-job personal injury. The Court of Appeals, in Dolan, strained to distinguish the "ordinary disability" pension (with a length of service/deferred compensation component) that is "marital property," from the "accidental disability pension," (which has no length of service/deferred compensation component). If its analysis is followed to its logical end it leads to the inescapable conclusion that such a pension is "compensation for personal injuries," which is "separate property."

notes

(1) *Majauskas v. Majauskas* (1984) 61 NY2d 481, 474 NYS2d 699, 463 NE2d 15.

(2) See *Majauskas v. Majauskas*, 110 Misc2d at 324, 441 NYS2d at 901.

(3) See *Majauskas v. Majauskas* (1983, 4th Dept) 94 AD2d 494, 497-498, 464 NYS2d 913, 915-916.

(4) 84 NY2 369, --- NYS2d --- (1994).

(5) 2d Dept 1984, 101 AD2d 834, 475 NYS2d 493.

(6) 2d Dept. 1983, 94 AD2d 132, 463 NYS2d 477

(7) 2nd Dept. 1990, 163 AD2d 463, 558 NYS2d 610.

(8) 1991) 78 NY2d 463, 577 NYS S2d 195, 583 NE2d 908.

(9) Sections 363 and 384-d of the New York State Retirement and Social Security Law, which govern pensions of state employees contain similar provisions regarding "accidental disability" and "ordinary disability" pensions.

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