## 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,\*1 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 unmatured 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

unmatured right to a pension that would permit him to retire at half

pay on Feb. 20, 1983, at the earliest.\*2 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\*4 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\*5 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\*6 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\*7 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\*8 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 onthe-

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, 915916.

(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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