
LAW AND THE FAMILY

"Distribution of Retirement Benefits"

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Domestic Relation Law 236(B)(1)(c) defines marital property as "all property acquired by either or both spouses during the marriage." It is a broad and comprehensive definition, founded upon the marital partnership concept, creating a rebuttable presumption that any property that is acquired during marriage is marital property.

Section 236(B)(5) and evolving case law 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. Subdivision "d" provides in part that

The term separate property shall mean: (1) property acquired before marriage or property acquired by bequest, devise, or descent, or gift from a party other than the spouse; (2) compensation for personal injuries.

A spouse's right to an equitable share in the other party's pension or retirement benefits is dependent on the meaning given to the term "property," as well as when the pension or retirement benefits are acquired and the nature of the benefits.

Noncontributory Pension Plans

In *Majauskas v. Majauskas*, [FN1] 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 not matured at the beginning of the action. It held that a matrimonial court 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 or 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.

It also noted that 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 which would otherwise have enhanced either marital assets or the marital standard of living, and therefore, are marital property.

In *Burns v. Burns* [FN2] the Court of Appeals concluded that nonvested 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.

In *Dolan v. Dolan* [FN3] 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 husband retired on an ordinary disability pension pursuant to 13-167 of the Administrative Code of the City of New York. When he retired, he accumulated approximately 11 years of service with the Department of Sanitation, thus entitling him to pension benefits of \$811.84 per month from the New York City Employees' Retirement System. The Supreme Court 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 determining the allocation between 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, i.e., it would have equaled 47.62 percent of the ordinary disability plan. 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 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."

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."

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 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.

Police Fund

In *DeLuca v. DeLuca* the Appellate Division, Second Department, held that payments from the New York City Police Department Police Superior Officers Variable Supplement Fund (VSF), which are made to eligible retired police officers, are not marital assets subject to equitable distribution. [FN4] This determination apparently ignores the comprehensive meaning given to "property" by the Legislature as construed by the Court of Appeals. [FN5]

Upon his retirement plaintiff was entitled to receive from the New York City Police Officers' Pension Fund the retirement pension benefits that he had accrued over his nearly 30 years of service. At the time of trial, he was receiving \$46,737 annually in pension benefits. He also possessed an annuity fund, which was maintained by the Detectives' Endowment Association, with a value of approximately \$33,000. Plaintiff was a detective at the time he retired and pursuant to Administrative Code of the City of New York 13-23 2(a)(16) and 13-278(4) he was also entitled to receive benefits valued at approximately \$110,000 from the Police Superior Officers' VSF.

The Court noted that Police Superior Officers' VSF was created by the Legislature.

The fund consists of "such monies as may be paid " from the "contingent reserve fund" of the Police Officers' Pension Fund. The contingent reserve fund consists of the accumulated contributions necessary to pay all the pensions and benefits directly associated with the Police Officers' Pension Fund. The amount contributed from the contingent reserve fund to VSFs annually is determined pursuant to a formula that compares that portion of the pension fund's investment earnings derived from assets invested in equity investment funds with a hypothetical earnings figure which would have been derived if the assets had been invested in fixed earnings securities.

Upon calculating the difference between the actual and hypothetical earnings, that difference is transferred to two variable supplements funds: the Police Officers' VSF and the Police Superior Officers' VSF. The transferred earnings are apportioned between the two VSFs in accordance with a statutory formula that apportions the earnings between the Police Officers' VSF and the Police Superior Officers' VSF in the same ratio that the active superior officers' total contributions to the pension fund bear to the active patrolmen's total contributions in the year that the transferable earnings were generated. For a police superior officer or a police officer to be eligible for benefits from either the Police Superior Officers' VSF or the Police Officers' VSF,

he or she must have been in service as a member of the pension fund and retire after 20 or more years in service. [FN6]

The Second Department concluded that the benefits derived from the Police Superior Officers' VSF and the Police Officers' VSF may not be characterized as part of a police officer's pension benefits and were, therefore, not marital property. It noted that in the context of marital property, pensions have been described as "contract rights of value, received in lieu of higher compensation that would otherwise have enhanced either marital assets or the marital standard of living" [FN7], and that Majauskas held that even though a worker's access to pension benefits does not occur until retirement, his or her right to receive the benefits upon retirement accrues incrementally during the years of employment.

It found that the Court of Appeals, therefore, has concluded that a pension fund is a type of "deferred compensation," which, to the extent it accrues during the marriage, is properly considered a marital asset subject to equitable distribution. It disagreed with the Supreme Court, as well as other courts that concluded that VSFs, which are initially derived from the reserves of the Police Officers' Pension Fund, are deferred compensation subject to equitable distribution.

The court pointed out that in several sections of the law the Legislature specifically declared that the VSF "shall not be and shall not be construed to constitute, a pension or retirement system or fund, and that it shall function as a means whereby payments, not constituting a pension or retirement allowance shall be made in accordance with the provisions of this subchapter, to eligible pension fund beneficiaries as a supplement to benefits received by them under subchapter one or two [i.e., police department pension funds]."

VSF Not Part of Pension

It noted that in reliance upon this explicit language, some New York courts had concluded that VSFs cannot be construed as pension or retirement allowances. It also pointed out that a review of the statutory formula unquestionably indicated that the VSF payments are not calculated on the basis of credits earned through a police officer's employment. The sole requirement for eligibility for such benefits is the completion of 20 years of service, but entitlement matures only upon retirement.

The Appellate Division stated that if the plaintiff retired prior to the completion of 20 years of service, or if he had become disabled and accepted disability retirement benefits before the completion of 20 years of service, he would not have been entitled to collect the Police Superior Officers' VSF payments. The Appellate Division noted that in *Lazarus v. Lazarus* the Supreme Court determined that a combined reading of *Majauskas v. Majauskas* and its progeny offered a set of criteria that included (1) whether the benefit is a form of deferred compensation, (2) whether the specific right at issue is a contractual right received in lieu of higher compensation which would have otherwise enhanced marital assets or the marital standard of living, (3) whether the contract right varied depending on the number of years employed, and (4) whether the employee's right to it accrued incrementally during his or her years of employment.

VSF Not Marital Asset

Applying the criteria delineated in *Lazarus*, it held that benefits paid by the Police Superior Officers' VSF are not a marital asset subject to equitable distribution because:

To conclude otherwise abrogates the efficacy of the legislative intent. The plaintiff's right to receive Police Superior Officers' VSF benefits did not accrue incrementally during his years of service. He became entitled to receive the benefit only upon the completion of 20 years of service. The payment of benefits to him, which is dictated by a prescribed statutory formula (see, Administrative Code of City of NY 13-281), does not change regardless of the number of years of service in excess of 20 years.

This determination ignores the fact that the VSF is "property," was acquired during the marriage, and does not come within one of the statutory exceptions.

FN(1) (1984) 61 NY2d 481, 474 NYS2d 699. In *Price v. Price*, 69 NY2d 8, 511 NYS2d 221 the court gave a liberal reading to "property" and strictly construed the "separate property" exception.

FN(2) (1994) 84 NY2d 369, 618 NYS2d 761

FN(3) (1991) 78 NY2d 463, 577 NYS 2d 195, 583 NE2d 908.

FN(4) It rejected the holdings of two lower court that they are deferred compensation subject to equitable distribution (See, *Torriente v. Torriente*, 184 Misc 2d 785; *DeGennaro v. DeGennaro*, 181 Misc 2d 928).

FN(5) *McSparron v. McSparron* 87 NY2nd 275, 639 NYS2nd 265 (1995)

FN(6) The Police Officers' VSF is calculated and disbursed pursuant to the same statutory guidelines.

FN(7) Quoting *Majauskas v. Majauskas*, 61 NY2d 481, 491-492

FN(8) See, *Lazarus v. Lazarus*, NYLJ, May 6, 199 6, at 35, col 6 [Sup Ct, Queens County]

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