## 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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