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SUPREME COURT OF FLORIDA

ELDIS RAYMELL BOYETT, *
Petitioner, *
v. *
MERYL M. BOYETT, JR., *
Respondent. *
* * * * * * * * * * * * * * * *

CASE NO. 89,722

District Court of Appeal
5th District - No. 95-720

BRIEF OF PETITIONER

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PRELIMINARY STATEMENT

Petitioner will hereinafter be referred to as "the wife". Respondent will hereinafter be referred to as "the husband". References to the record on appeal will be denoted by the letter "R" followed by the page or pages in the record where the described documents appear. References to the transcript of the trial will be denoted by the letter "T" followed by the page or pages where the reference appears.

The undersigned gratefully acknowledges the invaluable assistance that was received from Mr. Jerry Reiss, A.S.A., Enrolled Actuary (#96-3608) in the preparation of this brief.

STATEMENT OF THE CASE

This matter was tried before the Honorable George A. Sprinkel, IV, Circuit Judge, in Orange County, Florida. Final judgment of dissolution was entered on January 3, 1995, equitably dividing the parties' marital assets and establishing the parties' obligations to one another concerning certain debts, and awarding the wife permanent alimony and a contribution toward her attorney fees and costs (R 199-203). The final judgment of dissolution expressly recognized the wife's right, as alternate payee of the husband's Orlando Utilities Commission Pension Plan, to receive a portion of the benefits payable with respect to a participant (namely, the husband) under the plan and awarded the wife 50% of the benefits accrued as of June 1, 1993 (the date of filing the petition for dissolution) and a portion of the benefits accruing thereafter until the husband's retirement, according to the following formula:

> 50% times (360 divided by [360 plus number of months from June 1, 1993 to retirement])

(R 202).

The husband timely filed a notice of appeal of the final judgment of dissolution to the District Court of Appeal, Fifth District. The district court affirmed the award of permanent alimony and reversed the allocation of responsibility for the debts and the contribution by the husband towards the wife's attorney fees and costs. It also reversed that part of the wife's participation in the husband's pension benefit accruing after June 1, 1993. The district court certified conflict with respect to this issue alone. The wife invoked this court's discretionary jurisdiction on this issue.

STATEMENT OF FACTS

The parties were married to each other on August 20, 1960 (T 21), and lived together for 34 years. They have two children who are adults. At the time of the marriage, Mr. Boyett was employed at the Orlando Utilities Commission (OUC) where he had been employed for approximately three years. (T 24). Mr. Boyett has remained employed to this date at OUC. Mrs. Boyett has been employed throughout the marriage except for one brief period of time. (T 29).

After their marriage, the parties resided in Cocoa, Florida for approximately five years. (T 30). They then bought a home in Bithlo, Florida in July, 1965. (T 30). This home remains one of their assets.

The parties raised their two sons in the home in Bithlo, Florida. Approximately ten years before the trial, they purchased a second home in Groveland, Florida, in which they planned to retire. (T 31).

At the time of the trial, Mr. Boyett was 55 years of age and a diabetic. His diabetes is under control. (T 49). Mrs. Boyett was 52 years old (T 119) and also suffers from diabetes, in addition to high blood pressure. (T 142). She also had a hysterectomy and is in counselling. (T 142-143).

At the time of the trial, the parties were the owners of four parcels of real estate. The accepted fair market values and mortgages on the parcels are:

1. Bithlo home $57,000.00; no mortgage

2. 40 acres - Lake County $28,000.00; mortgage $10,000.00

3. Groveland home $71,000.00; mortgage $35,000.00

4. 8 acres - Lake County $36,000.00; no mortgage.

The trial court distributed the real property items 1 and 2 to Mr. Boyett and items 3 and 4 to Mrs. Boyett.

The items of tangible personalty, such as automobiles, etc., have been distributed between the parties, as more particularly appears in the final judgment.

The trial court determined that the valuation date for equitable distribution purposes is May 31, 1993. That day is the last day of the month closest to the filing date of the dissolution petition herein.

The issue in this appeal concerns Mr. Boyett's defined benefit contribution plan with OUC, which is vested. Mr. Peter Geisler of OUC testified about this plan. His testimony is relatively short and is contained in the transcript, pages 72-87. Two letters from Mr. Geisler are filed in evidence. His letter dated July 16, 1993, Husband's exhibit 3 (R 196), contains the essential information regarding Mr. Boyett's pension benefit and its valuation. The valuation date is May 31, 1993 which corresponds with the date adopted by the trial court as the equitable distribution date.

The letter shows that Mr. Boyett's normal retirement date is September 1, 2001, when he would be 62 years old. Any retirement prior to age 62 results in a reduction of benefits. Mr. Geisler testified that based on Mr. Boyett's current salary the monthly retirement benefit at age 62 would be $2,860.86, assuming he retired in 1983 but waited until 2001 to receive his benefits (T 76-77), which would be reduced by 2% for each year prior to September 1, 2001 that Mr. Boyett retired, if he accepted benefits beginning with the early retirement date. (T 76). Thus, if he retired on May 31, 1993 and began to receive his benefits they would be only $2,388.82 per month. (T 76-77).[1] The court awarded the wife one-half of the retirement benefit calculated as if Mr. Boyett retired on June 1, 1993, and a portion of benefits calculated after June 1, 1993, according to the formula set forth in the final judgment.

Mr. Geisler testified about the calculation of the actual monthly benefit. He said that Mr. Boyett's benefits are determined by his highest three year average salary on his retirement date. Final benefits under the OUC retirement plan equal 75% of this average salary. (T 78). The 75% is fixed after thirty years of employment, which had occurred prior to filing the dissolution of marriage action. (T 83). Thus, Mr. Boyett's benefits could be higher than $2,860.86 per month if his three year average salary increases above the three year average

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[1]There is a typographical error on page 76, line 12 of the transcript. Instead of "Twenty-eight Hundred," it should read "Twenty-three Hundred."

as of June 1, 1993. Mr. Boyett would make no contribution to his pension after the trial, but his benefits will automatically increase. (T 83). The trial court awarded the wife a declining percentage of the potential future benefit.

SUMMARY OF ARGUMENT

The wife presents her argument in six distinct parts, each of which supports her claim that the appellate court erred in reversing the trial courts ruling:

Part 1: The marital portion of pension benefit includes passive increases of the benefit. If the benefit is paid under the immediate offset method, passive increases include interest earnings on the present value of the benefit. If it is paid monthly under the deferred distribution method, passive earnings are paid on the monthly *benefit,* by providing it with coverture fraction increases.

Part 2: If the non-participant wife must wait until the participant husband retires in order to receive the benefit, failure to provide her with pension increases that are the result of salary increases inflicts on her a double discount: *She receive[s] a discounted value fox immediate distribution but nevertheless [is] required to wait to receive payment until, if and when, the [employee spouse] reach[es] retirement and [begins] receiving benefits.* (DeLoach v. DeLoach, 590 So.2d at 962, (Fla.1st.DCA 1991), citing Seifert v. Seifert, 82 N.C.App. 329, *346* S.E.2d 504 (1986).

Part 3: (Pre-Retirement Dissipation of Marital Property) The husband could have retired immediately and begun receiving an early retirement subsidized benefit of $2,388/mo., [R-196]

7/16/93 beginning on May 31, 1993,[R-196, TR-76] or he could have separated from service and waited to receive his normal retirement benefit of $2,860.86 per month, beginning on September 1, 2001. [TR-76; R-196]. The $2,388 per month benefit was subsidized by 8% per year. [TR-73, 76][2] A benefit has greatest value when it is subsidized. [See Reiss, The Role Of The Pension Actuary In Valuation and Division of Retirement Plan Benefits, IV-Subsidized Early Retirement, 22 Fam.Law Commentator 5, p.7; Also See In re the Marriage of Gillmore, 29 Cal.3d 418 at 424 footnote 4, 174 Cal.Rptr. 493, 629 P.2d 1 (1981).] The participant failed to retire when the participant's benefit had its greatest value. In order for *any* subsidy to be paid, the participant must retire. [Id, Also see, The Congressional Record of August 9, 1984, H. 8761 and H 8762]. Therefore, the participant has discretionary control that determines the amount of marital property that the wife receives.[3]

[2] The record shows that the early retirement subsidized benefit is reduced by 2% per year, whereas, the non-subsidized benefit is reduced by 10% per year. This conflicts with the summary plan description, which is published evidence on file with the department of labor. It shows that the non-subsidized reduction for persons not earning the subsidy is 6%, whereas, the subsidized reduction is 1%. The 10%, 2% reductions are used throughout the arguments because it what is actually stated in the record. It really makes no difference to the arguments that are presented if the benefit is subsidized by 5% or 8%, as used herein.

[3] See In re the Marriage of Gillmore, 29 Cal.3d 418, 174 CalRptr 493 629 P.2d 1 (1981).

The husband argues that the post-dissolution increases in monthly benefit result from post-dissolution efforts. This is completely false under any reasoning when the benefit is almost completely subsidized, as is with this benefit, and is capped with a maximum number of years that may be used for determining the amount of benefit. Under both of these circumstances, the entire benefit (including the wife's share) dissipates by the husband's voluntary election to postpone retirement, unless the post-dissolution salary that determines the later benefits increases sufficiently to offset the dissipation of property caused by the husband's voluntary election.[4]

Part 4: (Post-retirement Dissipation of Marital Property) The wife is stripped of her pre-retirement survivor rights upon divorce. [TR-79] In addition, nothing in the record indicates (or is inconsistent with so as to suggest otherwise) that she can receive her assigned benefits before the husband retires. If he dies before he retires, a new wife can receive the entire benefit, including this marital share of benefit. [TR-78,79; R-196] Even if he doesn't die or remarry, she will receive the same monthly benefit over a shorter period of time, whereas his monthly benefit will continue to increase from future increases in salary. Either way, if the husband works past age 62 and the

[4] See Reiss & Quiat, The Public Pension Trap: Why Most Property Part 1, "B.3 With A Coverture Fraction," pp. 34-35 (Fam.Law.Commentator, September, 1996) with citations.

wife is denied a proportionate share of salary-based increases, the husband can redistribute the court ordered 50/50 share of the marital property to a better share for him."

Part 5: (Foundation of Efforts) The husband argues that the wife should not share in post-dissolution salary increases because such increases result from post-dissolution efforts. This is not a proper claim because there is no evidence in the record to support this. Future salary increases are seldom completely unrelated to what occurred beforehand. The marital years will always have some sort of marital contribution toward that future salary increase. It can become a logistic nightmare trying to separate out the exact marital contribution from the husband's post-marital contribution in determining how much each contributed toward the future salary increase.[6] Yet pay levels are built upon a combination of education and experience. Each component accumulates with time. Therefore, remove the marital years of service from the future pay and the future pay will be predictably (proportionately) less. This is why allocating a benefit on the basis of service is the fairest way to apportion the marital interest.

Part 6: (Foundation of Employer Contributions) The foundation of employer contribution surfaces somewhat as a new

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[5] Id.

[6] See, Gemma v. Gemma, **105** Nev. **458, 778** P.2d 429 (Nev. 1989)

argument. It supports the foundation of efforts argument at the same time that it proves false the husband's argument that the marital portion's inclusion of post-dissolution salary increases is the result of post-dissolution contributions. The same logic used to justify the Diffenderfer[7] conclusion that pension benefits are marital property can be used to show that marital benefits utilizing post-dissolution salary increases are likewise marital property.

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[7] See, Diffenderfer v. Diffenderfer, 491 So.2d 265 (Fla. 1986).

ARGUMENT

WHETHER THE DISTRICT COURT ERRED IN REVERSING THE TRIAL COURT'S DETERMINATION THAT POST-DISSOLUTION SALARY INCREASES CAN BE CONSIDERED A MARITAL PORTION OF ACCRUED BENEFITS SUBJECT TO DEFERRED DISTRIBUTION RATHER THAN AN AWARD OF POST-MARITAL PROPERTY, CREATING A CONFLICT WITH THE DISTRICT COURT OF APPEALS, FIRST DISTRICT'S DECISIONS IN DELOACH AND KIRKLAND.

Defined benefit plans generally have two purposes (or effects): (1) To provide the employee retirement pay that replaces a significant percentage of the wages earned immediately before retirement; and (2) To encourage the employee to stay with the employer until retirement, by allocating the majority of the benefit that will be paid to the last few years preceding actual retirement. [See Wall Street Journal Financial Staff, Lifetime Guide To Money, "Traditional Retirement Plans" (The Wall Street Journal, 1st ed. 1997) at pp. 188-190; DiFranza & Parkyn, Dividing Pension on Marital Dissolution, California Bar Journal, V. 55, p. 466. Nov. 1980]. This skews benefits based on earnings to the post-dissolution years of service by sheer design, irrespective of employee efforts, where, as here, the marriage is dissolved prior to retirement.

In any period, the amount of benefit earned is greater than in any comparable period that preceded it, because salaries generally continue to increase with time. In addition, if one of the purposes for the pension plan is to replace W-2 income earned immediately before retirement with a percentage of that income paid during retirement, why should a court apportion marital benefit accruals any differently? Hasn't a court determined earnings differently when it measures those earnings as if the participant terminated employment on the date of filing the petition for divorce? No court can determine an amount of earned benefit prior to benefit maturity unless, in so doing, it assumes that the employee terminated employment.[8] Benefit earnings prior to benefit maturity are only defined in terms of what would be paid if the employee quit.

The concept of defined benefit accruals is also abstract under family law, because what they are worth depends upon factors that may not be known for many years. These factors include whether the owner-employee survives to receive benefits, or has an ability to provide the former spouse with survivor benefits, and how long either survives after benefit payments begin.

In contrast, a defined contribution plan, such as a 401(k) plan, provides an easy-to-explain benefit. Its value is determined by what is in the account. Under a defined benefit plan, there can be many options that may be exercised that will not

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[8] A number of courts have dealt with this specific issue and have ruled that it is improper to assume that the participant terminated, when in fact that has not occurred. See, Franklin v. Franklin, 116 N.M. 11, 859 P.2d 479 (1993); In re the Marriage of Nordahl, 834 P.2d 838 (Colo.App. 1992); In re the Marriage of Clabault, 249 Ill.App.3d 641, 619 N.E.2d 163 (Ill.App.2nd.Dist. 1993); Layne v. Layne, 83 Oh.App. 559, 615 N.E.2d 332 (1992).

only determine the amount that is paid, but can also determine when it will be paid. [See, In re the Marriage of Gillmore, supra; Also see the construction of definitions in 29 U.S.C. §1002.] Given the vast differences between the two plan types, it should be expected that measurement of passive earnings on defined benefit plans will be far more complex than measurement of earnings on 401(k) plans.

Part 1

There are generally two accepted methods for dividing defined benefit plan property: The immediate offset method and the deferred distribution method. Few courts have had difficulty understanding the distinction between the two. Yet, appellate decisions that demonstrate a failure to grasp the differences between the two invariably confuse valuation issues that determine a present value amount (as used in an immediate offset) from valuation issues that govern the amount of monthly benefit provided under the deferred distribution method. It is the wife's contention that the District Court made this specific error in reversing the trial court's ruling.[9]

DeLoach identified two methods for distributing defined benefit marital property: (1) The immediate offset method; and the (2) deferred distribution method. [DeLoach at pp. 962-963].

[9] Also, in relying on Howerton v. Howerton, 491 So.2d 614-615, the court erred because the trial court in Howerton provided post-dissolution benefit increases having nothing to do with the issue for review.

It cited the legal standards used in determining the valuation factors that drive the amount of an immediate offset [DeLoach at 962]. It contrasted the valuation factors of the immediate off-set, determining a lump-sum amount, with the valuation factors of the deferred distribution method, which determine an amount of monthly benefit [DeLoach at pp. 963-966]. The value of that monthly benefit received on a monthly basis could be destroyed by a number of different contingencies. One of the contingencies that could destroy its worth is tied to the employee control over what the non-owning spouse receives (as is typical with all government type plans).[10] This control factor exists with the OUC plan, as was evidenced with the testimony of Mr. Geiser. [TR-73, 76-80, 82; R-196].

In addition to the husband's control factor of this case, there are two other ways in which this benefit can have little or no worth. Each can be triggered by the premature death of either the husband or the wife. It is partly on account of this risk that DeLoach determined that the non-owning spouse should share in the salary increases when the benefit becomes payable [DeLoach at 965 quoting Seifert at 507]. This risk is not shared equally by the parties. The employee has some control over this risk

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[10] See Reiss & Quiat, The Public Pension Trap: Why Most Property Divisions Are Unfair, Parts 1 and 2 22 Fam.Law.Commentator 1 p.1, pp. 32-36 (Sept., '1996) and 22 Fam.Law.Commentator 2, pp. 15 -19 (Dec., 1996).

by electing when to retire. [Gillmore at p. 424 footnote 41 The risk that his portion will be destroyed by untimely death is contingent upon his marital status (because a new wife will have survivor rights) and is destroyed, at most, by his death. The wife's benefit can be destroyed by the death of either her or the husband. Given that he controls when she receives her share of benefits, failure to award her any portion of the post-dissolution salary increases serves only to undermine the award that the trial court gave her in the first place.

Part 2

Naturally, if a non-employee's award is fixed at some dollar amount and the participant's benefit is mature, meaning that the participant could retire and receive it immediately, the longer that the non-employee spouse must wait to receive the benefit, the fewer number of years that it will be received. In the issue at bar, even as a present value it would be clear that the wife's interests would be decreasing each year that the husband postpones retirement. This is at least one of the reasons why the DeLoach court found that failure to increase the benefit with salary increases inflicts a double discount: *She receive[s] a discounted value for immediate distribution but nevertheless [is] required to wait to receive payment until, if and when, the [employee spouse] reach[es] retirement and [begins] receiving benefits* (DeLoach at p. 962, citing Seifert v. Seifert, 346 S.E.2d 504). This is also why the cases cited by the District Court in this cause apply only to immediate offset issues.

Part 3

The record shows that the $2,388.82 per month is a subsidized benefit and that the period of the subsidy ends with his 62nd birthday. [TR-73, 76, R-196] The record also shows that, as a subsidized benefit (which requires satisfaction of some age and years of service), it is reduced by 2% per year,[TR-76; R-196] for early retirement whereas, had the subsidy not been earned, the benefit would have been reduced by 10% per year. [TR-73]

A benefit is subsidized when its present value is greater than the present value of the normal form of benefit, payable at the normal retirement age. [See Reiss, "The Role of the Pension Actuary in Valuation and Division of Benefits", supra, endnote 42.] The record showed that the normal benefit was $2,860.86 per month. At least according to the plan's definition of actuarial equivalence, which likely drove the present value determination of $158,931.49, [TR-76, R-196] the benefit was subsidized by **8%** per year, i.e., the normal reduction, less the subsidized reduction. The record showed that the benefit was capped at 30 years[TR-78] (and the husband reached that limit)[TR-78] and that the only way that the benefit could increase in the future would be by salary increases, [TR-78] While the subsidy is available until age 62, the husband naturally forfeits a portion of the subsidy for each year that he fails to make the election to retire.

In this case, the benefit loses 8% of its value in one year: It increases by 2%,[TR-76] but loses 10%[TR-73] on account of losing one year's receipt of benefits. Inasmuch as the benefit decreases with post-marital efforts, the only thing that can be used to offset the loss is the post-dissolution salary increases (which may or may not increase sufficiently to completely offset the decreasing value.) Thus, the argument that the husband relies upon is neither relevant nor logical, because the present value of the benefit[11] is likely to decrease with post-marital efforts. Accordingly, the value of the benefit will depreciate unless the average salary is increasing by 8%. The wife has an absolute right to be protected from this loss when the husband completely controls the contingency of loss. [Gillmore, supra.]

Part 4

The husband can work past age 62 if he so chooses, forcing the wife to wait to receive payment until after his normal retirement date. [TR-77] This is a typical problem found in most government defined benefit retirement plans.[12] Before age 62, the

[11] The present value of the benefit in the record does not address the value of the subsidy, but instead is based upon the value of the benefit without the subsidy [R-196, R-197-198]. Both benefits were based upon the normal retirement benefit.

[12] See Reiss & Quiat, The Public Pension Trap: Why Most Property Divisions Are Unfair, Part 1, "Offsetting Loss Of Control", p. 36, supra.

monthly benefit increases by 2% each year[13], even though its value decreases by much more as a direct result of the loss of receipt of the benefit for that year. After age 62, the value will decrease at an accelerated rate (even though the monthly amount of that benefit increases) because the monthly benefit no longer increases by 2%,[14] and the life expectancy decreases as the employee advances in age. Accordingly, if wife share of benefit is fixed, her benefit value decreases during this period, and she faces an increasing risk that she will receive nothing. [Gillmore, supra] Under these circumstances, it is even more inequitable to deprive her of the only remedy available: The ability to at least have her benefit share in the salary increases. [In re the Marriage of Hunt, 909 P.2d at pp. 536-537.]

Part 5

The wife acknowledges that several of her arguments apply to the circumstances of the husband's particular plan.[15] No general argument works as well as the foundation of efforts argument, sometimes referred to as *The Marital Foundation Theory. No* appellate or supreme court decision better argues the marital

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[13] The reduction only applies to the normal retirement benefit. [TR-73,761

[14] The reduction only applies to the Normal Retirement Benefit.

[15] Some of the circumstances are generally experienced in most plans. The fact that all of the possible circumstances occurred in one plan makes this the ideal case to test the question that was certified.

foundation theory for Florida law than the Colorado Supreme Court decision in Hunt." This is true partly because Colorado is an equitable distribution state, like Florida, and true partly because the court reversed itself and embraced the marital foundation theory after a rehearing of the issues (wherein it demonstrated a much better understanding of defined benefit plans.)

The foundation of efforts argument applies to nearly all features of a defined benefit plan. It can be used to show that post-dissolution salary increases are marital property.[17] It can also be used to show that eligibility to receive other forms of benefits, or benefits adjusted for earlier ages, are marital property, even if it was earned with post-marital efforts. This would be equally true under either the immediate offset method or the deferred distribution method, as illustrated by the following example:

> The participant/husband's "normal retirement age" is 65. The marriage ends on his 53rd birthday. The accrued benefit on his 53rd birthday is $3,000 per month, payable at age 65. If the participant wishes to receive it early, he may do so at a reduction of 5% per year, but not earlier than his "early retirement" age 55. If the participant has 25 years of service, he may receive an unreduced benefit on or after age 55. He

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[16] See Hunt v. Hunt, 909 P.2d 525 (Colo 1995).

[17] See Kirkland v. Kirkland, 618 So.2d 295 (Fla.1st.DCA 1993); Hunt v. Hunt, supra; In re the Marriage of Adams, 64 Cal.App.3d 181, 134 Cal.Rptr. 298, 302 (1976); In re the Marriage of Bullicek, 59 Wash.App. 630, 800 P.2d 394 (1990); Jerry L.C. v. Lucille L.C., 448 A.2d 223 (Del. 1982)

has 23 years of service on his 53rd birthday. This is an ERISA plan that affords the wife QDRO rights.

The wife drafts an order to provide that she receives 50% of a DeLoach fraction at his age 55, to begin then. She also provides that such amount will be increased by any subsidy that the participant receives (in order to protect her rights if the husband elects his benefits after she begins receiving hers). The husband objects to the order, because both the salary that he receives that is used by the DeLoach formula and the subsidy that he may later receive were both earned after the date of divorce and require his continued work efforts in order to be able to receive such benefit.

The wife of the example, uses the foundation of efforts argument to demonstrate that the subsidy wasn't magically earned after the divorce, as the husband argues. It required prior marital efforts. If it weren't for the 23 years of marriage, the husband would only have two years of service at age 55 and could never achieve the 25 years needed before age 65 for receipt of any portion of the subsidy. This argument applies equally well for every eligibility issue under a defined benefit plan. It also applies equally well to salary.

During the 23 years of marriage, the husband accumulated 23 years of service at the job, 23 years' worth of life's experiences, which includes education and the needed maturity to make better decisions. Nearly every increase in salary, including promotions, had a marital contribution toward that increase.[18]

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[18] See In re the Marriage of Adams, supra; In re the Marriage of Bullicek, supra; In re the Marriage of Hunt, supra; and Kirkland v. Kirkland, supra.

There is even an employee expectation that promotions will eventually result from long service; otherwise, there would be little meaning attached to the term "seniority in the workplace". Phrased a bit differently, remove the 23 years of marital service, and the salary that the husband earns would be proportionately less. Given that defined benefit payments were shown earlier to be skewed in favor of service near retirement (post-dissolution service), and that it was designed to replace a percentage of income immediately preceding retirement, the structure of the plan itself provides benefits which anticipate a foundation of employee efforts. This is the essence of the foundation of efforts argument.

It is clear that public policy changed with the passage of REA ("The Retirement Equity Act of 1984"). Family law courts would no longer be plagued by non-assignment clauses and rigid plan rules that literally allowed one spouse to place the other on public assistance, when it so easily could be corrected with retirement plan property [29 U.S.C. §1056(d)(3)]. By adding this provison in REA, Congress not only provided access to the benefits via a QDRO, but it gave the court wide latitude in the division of those assets. Congress went to great lengths to remove participant control in ERISA plans by providing the non-owning spouse with the ability to continue survivor rights past divorce [29 U.S.C. §1056(d)(3)(F)], and by allowing the non-owning spouse the ability to receive the benefits independent of any participant election. [29 U.S.C. §1056(d)(3) (E)]. Congress also allowed the non-owning spouse to receive the benefits in any form available to the owning spouse (other than a joint and survivor annuity with a new spouse). [29 U.S.C. §1056(d)(3)(E)(ii)(III)]. It also envisioned the non-owning spouse sharing in certain benefit increases when such increases occurred.[19] Congress continues to expand the non-owning spouse's rights as is evidenced by certain changes it made in the Tax Reform Act of 1986.

All of these important changes were imposed on all ERISA plans. Therefore, the rigid requirements that determine benefit earnings are intended to apply only in determining the employee's rights that are the subject of forfeiture for termination of employment. Participants of such plans should no longer be permitted to hide behind those rigid requirements, particularly after Congress sent this strong message in REA (supplemented by the Tax Reform Act of 1986) that public policy had changed.

Part 6

The funding of employer contributions is made in a way that supports the foundation of efforts argument. This is the result that reasonably accepted actuarial principles must be observed in the funding of this plan. [See Reiss & Reynolds, [The Not-So-

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" See Congressional Record of August 9, 1984 at H 8761 and H8762.

Simple Coverture Fraction: Do Attorneys Risk More Than Embittered Clients?, 70 Fla.B.J. 5 at pp. 64-65 (1996)].

The employer is required to fund the marital portion of accrued benefit with post-dissolution salary increases projected to retirement. [Id] This is marital property under Diffenderfer in the same way that the court determined pension benefits were marital property. The funded portion (paid by the employer), representing the post-dissolution salary increases (by projecting those increases to retirement) is received in *lieu of higher [W-2] compensation which would have otherwise enhanced either the marital assets or the marital standard of living, and therefoxe are marital property.* (Diffenderfer at p. 267)

Viewed differently, a requirement that benefit increases be funded with anticipated salary increases (projected to the normal retirement age) results in a higher contribution than is earned as benefit for the younger participants. It also results in a lower employer contribution than is earned as benefit for the older participants who had many pre-funded contributions made in the earlier years. This is important because employers factor in the cost of providing benefits in their pay scale every time that they hire job applicants.

Accordingly, accrued benefits that are not nearly mature are entitled to those post-dissolution salary increases, because the much higher contributions over currently accrued benefits kept that pay scale down during the marital years, giving the marital years a stake in the benefits using the higher salary. Alternatively, accrued benefits that are not mature or nearly mature and have a non-marital portion that follows a marital portion, have overstated the non-marital portion of benefits, because the actual cost for providing the non-marital benefits was much less than what was actually earned. The high funding level during the marital years helped subsidize the post-dissolution benefits that were earned. As a result of this subsidy, the post-marital benefits are less costly than they would have been, giving the employer extra funds to pay a post marital raise. Therefore, when the husband argues that post-dissolution salary increases are the result of post-dissolution efforts, the argument is simply not true. The higher contributions that the employer made during the marital years, over what was necessary to pay current benefit accruals, subsidized the employer's benefit cost during the post-dissolution years. This allowed the employer greater ability to raise the employee's compensation during that period than would have been otherwise possible.

In making its ruling, the supreme court in Hunt had before it a passage in the respondent's brief (Dianna L. Hunt), quoting § 23.02[4][a] of VALUATIONS & DISTRIBUTION OF MARITAL PROPERTY,[20] which, although analyzed differently, leads to the same result.

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[20] Rutkin, Goodman, Blumberg, Gassman, Staller & Asinow, Valuations & Distribution of Marital Property, Matthew Bender, V.2, Chptr 23.

The author expresses an opinion that the time rule is widely used to value the marital interest in defined benefit plans [Citing authority]. [23-18]

> *The marital estate's fractional interest in the pension is derived by defining the numerator as the number of pension qualifying years during the coverture fraction and the denominator as the total number of work years that earned the pension. The fraction is then multiplied by the pension benefits. The result, the marital portion of the pension, is distributed in accordance with state law distributional principles.*

The following is quoted from that treatise [23-19]

> *The time rule is frequently challenged by a working spouse when the pension benefits are defined as a percentage of highest pre-retirement salary.* [Citations omitted]. *He argues that the spouse he is divorcing will, impermissibly, participate in the fruits of his post-divorce labor. He often suggests, as an alternative, that the marital share be calculated by reference to what he would receive if he retired at the salary he is earnings at the time of divorce.* [Citations omitted] *This argument has generally been rejected on a number of grounds. Insofar as contributions are actually made or, consistent with deferred compensation theory of pension recognition, the pension imputes work life contributions to the pension plan.*
>
> *[A]n employee's contribution in the early years of employment during the marriage, even though based upon a smaller salary, may actually be worth more than contributions during the postseparation years, due to the longer period of accumulated interest and investment income pxior to commencement of benefit payments. We therefore believe... that "the first few years of service (during marriage) must be given just as much weight in computing total sesvice as the last few years (after separation)* [Citations Omitted].

In arriving at the conclusion that the marital foundation theory was the most cogent argument, the Hunt court had to dismiss the employee's "Bright Line Theory" [Hunt, citing Koelsch v. Koelsch, 713 P.2d 1234, 1239 (Ariz. 1986)]. Under this theory, marital and non-marital efforts are easily discernible by a "bright line", which divides marital and non-marital efforts.

This theory has been shown to be invalid for a number of reasons involving both equity issues and points of law. This theory also contravenes F.S. 61.075(5)(a)(4), which states:

> "Marital assets and liabilities" include:
>
> 4. All vested and non-vested benefit rights, and funds accrued during the marriage in retirement, pensions, profit sharing, annuity, deferred compensation and insurance plans and programs.

Vesting is typically earned under the exact same requirements as service accruals: a stated number of hours (such as 1000) must be worked in each year. From the perspective of the employer, there is no difference in effort between earning an additional accrual under the plan and advancing on the vesting schedule. Neither will be paid unless the participant works the requisite hours.

Therefore, if one were to apply the "bright line theory" to unvested benefits, as the Summers[21] court did, it would result in a determination that only vested benefits are marital property.[22] Yet nearly every state has had little difficulty determining that non-vested benefits were marital property that could be divided if, and when, the pension vested and became mature, even though

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[21] Summers v. Summers, 491 So.2d 1270 (Fla.2nd.DCA, 1986).

[22] Id.

it required significant post-dissolution efforts in order to vest.

The husband argues the "bright line theory" as well. He argues that these increases require significant post-dissolution efforts, because it required him to work after the dissolution in order to receive the higher salary. He also argues that any raises that occur after the dissolution are the fruits of his labors.

The wife has shown that the "bright line theory" could apply only to immediate offsets because, under the deferred distribution method, the joint industry of husband and wife didn't end with the dissolution of marriage. Her share can be controlled by either his actions or things outside either of their control (which could destroy any value attached to the benefit). She showed that what was earned during the marriage is not that clear in a defined benefit plan and that plan earnings defined under the plan were designed to define employee rights in the event of employee termination of employment. It never purported to represent employee efforts or what was contributed on his behalf. While the same could be said of defined contribution plans, such plans are different because the value of the account balance is directly related to employee compensation, and therefore, to employee efforts. Instead, the defined benefit plan's purpose is to reward long term service disproportionately over short term service.

The wife also showed by a number of arguments that, just because the benefit increased after the marriage, it did not necessarily mean that its present value was increasing after the marriage. What happened to the value of the benefit was determined by both the elections that the employee would make and circumstances within his control. Thus, one of the problems of the "bright line theory" is that it assumes that higher benefits translate into more valuable benefits. This assumption has been shown to be false. How could anyone make that argument if the value of the benefit can actually decrease with post-marital efforts (irrespective of whether such efforts can be divided by a "bright line") ?

The second part of the husband's "bright line theory" is that the husband's post-separation salary increases are the fruits of his labor. The wife has shown that this is not true because most salary increases have a marital foundation. She showed that post-dissolution salary increases can be tied to an employer's greater ability to pay higher salaries, due to marital efforts subsidizing post-dissolution pension costs. She also showed that, while the actual receipt of all post-dissolution salary was his separate post-marital property, the marriage had a stake in the benefits using the post-marital salary because it subsidized pension increases using the higher salary.

By the design of a defined benefit plan, advancement on the vesting schedule and salary-based benefit increases have a common purpose, yet the employer rewards the employee for each year of additional service in the service component of the formula, by adding one year of additional service to it.

The wife contends that the issue of post-dissolution vesting and post-dissolution salary increases are very related to one another as operational principles under the plan. When the employer hires a new employee, it promises that employee (via the pension plan) that it will replace a specific percentage of his or her wages earned immediately preceding retirement. The employer also promises the employee that the benefit will be inflation-proof, by continually increasing the earned benefit to reflect higher wages.

The amount of the percentage is directly related to the number of years that the employee worked. This promise under the plan is unconditional, because it cannot be withdrawn. By attaching a vesting requirement to the benefit, the employer makes the entire benefit a conditional benefit, i.e., the employer withdraws the promise if a stated number of years has not been worked. The promise to inflation-proof the earned benefit is also a conditional benefit, because the employer withdraws the promise if the employee terminates employment before retirement. Consequently, advancement on the vesting schedule and salary-based increases are the same creatures that should be accorded the same treatment under the law, and should be distinguished from service increases, even though all three require significant post-marital effort.

The authors of The Not-So-Simple Coverture Fraction: Do Attorneys Risk More Than Embittered Clients? make an important point often misunderstood by advocates of the "bright line theory". The marital foundation theory can apply in reverse when the participant enters the marriage with substantial pre-marital service, which could have been the result that the participant was single or that the participant was previously married. If the participant terminates employment soon after the current marriage ended, the marital efforts, as measured by the "bright line theory," will be overstated. The marital years of service received full recognition for the foundation laid by the pre-marital years; whereas the pre-marital years receive no such recognition. The problem is corrected by a coverture fraction which distributes both efforts evenly. This is important because both husband and wife share equally in the fruits of long-term service (where both the benefits of pre-marital and marital service increase). They also share equally when premature termination of employment results in less benefit. Reiss and Reynolds state: "When the coverture fraction is applied properly, certain marital portions will be enhanced with post-dissolution salary increases, where other marital portions near retirement will be discounted, as they should be."[23]

Even though the coverture fraction distributes risk evenly, some courts have been bothered by the "what if" concept: They generally accept the premise of the marital foundation theory, but struggle with the idea that an employee could have extraordinary post-marital efforts that could lead to some major promotions well above anything that could be justified by a foundation of efforts argument. An often cited example is the manager, who is promoted to the CEO many years after the divorce. Yet this argument can be shown to be devoid of any value in practice.

Under ERISA pension plans, the benefits reaches the maximum monthly amount very quickly because of the salary limitations[24] of $150,000 and maximum benefit limitations under 26 U.S.C. §415(b) and (e). Most of the benefit that the CEO will receive will come from non-qualified stock options and non-qualified excess (IRC 5415) plans that the employee would have begun participation in after the marriage.

Under governmental plans, the benefit reaches its maximum quickly with such extraordinary efforts. The employee reaches the salary limitation (imposed by the highest grade) that much

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[23] Reiss and Reynolds, The Not-So-Simple Coverture Fraction: Do Attorneys Risk More Than Embittered Clients?, P2, 22 Fla.B.J. 6 at p. 104 (June, 1996).

[24] See, 26 U.S.C. §401(a)(17).

faster because government jobs do not pay that well. Accordingly, the concept is condensed to one wherein the employee had some increases that were the result of extraordinary efforts.

The court in Gemma, supra at pp. 431-432, addressed this issue and concluded that such circumstances were possible, even though it generally accepted that the marital foundation theory applied in all other cases. It carved out a solution that would allow the employee a right to later challenge the property distribution, but imposed on the employee the burden of demonstrating that the post-marital salary raise was the result of extraordinary post-marital efforts.

The major fault of this ruling is that all property divisions will no longer possess finality and that this would appear to be unfair to both sides. It is questionable whether such a burden could ever be met.

In every major salary increase, there are at least four components that could be included, apart from extraordinary efforts. After tracing and eliminating all four components (which may not be possible), the employee must demonstrate that the extraordinary efforts had not commenced during the marriage.

The first component is inflation. Most raises barely cover inflation, let alone provide anything beyond. If this were not historically true (over the last three decades), it wouldn't take two household incomes to support the family unit that it once took one income to support. The second component often provides a catch-up feature because many of the raises that preceded it lagged behind inflation. The third component is based upon seniority and is marriage foundation-based. Of course, there are promotions awarded which are truly the result of extraordinary efforts. When they occur, it will not be an easy job identifying when the extraordinary effort commenced.

If it commenced during the marital years, the non-employee spouse will have a right to share in it, even though the promotion occurred years after the marriage ended. Regardless, the promotion will likely include a catch-up feature (for inflation) in it. As both benefits and ability to pay higher salary are intertwined (representing the fourth component), it will have to be determined how much of the raise is based upon a greater employer ability to pay compensation, either because the benefits themselves reached the maximum amount with this employee, as did the husband (petitioner at the trial court), or are less costly due to a subsidized portion paid during the marital years.

If the employee could meet the heavy burden of Gemma and trace the promotion through this maze, which is doubtful, he or she might be surprised to find that the extraordinary post-marital effort component will be very small. It would require an extraordinary raise to overcome this burden, which would catapult the employee to a top level management position. At the top of management, the employee will find that he or she has reached the maximum benefits under the plan (which could have been achieved more slowly without the need to ever reach the top of management) and that the new benefit package will involve participation in non-qualified plans commencing after the marriage dissolved. This four-pronged argument should prove that there is no validity to any "bright line theory," especially under the defined benefit model.

CONCLUSION

The trial court had discretion to divide the defined benefit pension plan property in the manner that it provided and, in so doing, acted in accordance with Florida law. The appellate court erred when it reversed the trial court's entry of the judicial order. The appellate court erred as a matter of law, and, therefore, this Court should reinstate the trial court's judgment.

Respectfully Submitted,

JED BERMAN, ESQUIRE

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was furnished by U.S. mail to: GEORGE E. ADAMS, ESQUIRE, 1417 E. Concord Street, Suite 101, Orlando, Florida, 32803, on March 3, 1997.

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