ORIGINAL

SUPREME COURT OF FLORIDA

CASE NO. 89,722

ELDIS RAYMELL BOYETT,

Petitioner,

v.

MERLE M. BOYETT, JR.,

Respondent.

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

ANSWER BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

Statement of the Case by the Wife is correct.

STATEMENT OF THE FACTS

The Wife's Statement of Facts is essentially correct. In addition, the Final Judgment required the Husband to pay $1,200.00 per month for permanent periodic alimony. The Husband's net income was $3,078.00 per month. The Wife's net income was $1,208.00 which results in the Husband's income being $1,878.90 after the payment of alimony. The Wife's income would then be $2,408.00 per month. Financial Affidavits of the parties. (R 79-80)

SUMMARY OF ARGUMENT

SHOULD POST-MARITAL INCREASES IN RETIREMENT BENEFITS CAUSED BY SALARY INCREASES OF THE HUSBAND BE DISTRIBUTABLE TO THE WIFE AS MARITAL PROPERTY UNDER FLORIDA LAW?

The statutes of Florida clearly define marital property as that property acquired during the marriage. The case law in Florida overwhelmingly holds that property acquired after dissolution is not marital property. The law of other jurisdictions favors the disposition of this matter by the district court below. Indeed, to grant the wife an interest in the increases in pension after the valuation date caused by the husband's increases in salary is wholly wrong and inequitable under the facts of this case where the ruling proposed by the Appellant/wife would visit havoc and extreme financial injustice on the husband.

ARGUMENT

SHOULD POST-MARITAL INCREASES IN RETIREMENT BENEFITS CAUSED BY SALARY INCREASES OF THE HUSBAND BE DISTRIBUTABLE TO THE WIFE AS MARITAL PROPERTY UNDER FLORIDA LAW?

The trial court answered this question by saying that increases in salary which caused increases in pension benefits would be considered and relied on DeLoach v. DeLoach, 590 So.2d 956 (1st DCA 1991) and its progeny. The Appellate Court reversed relying on its previous decisions and those of the Second and Third Districts. Bain v. Bain, 553 So.2d 1389, 1391 (Fla. 5th DCA 1990) (citing Carroll v. Carroll, 528 So.2d 931, 933 (Fla. 3d DCA), rev. denied, 538 So.2d 1255 (Fla. 1988); Trant v. Trant, 522 So.2d 72, 73 (Fla. 2d DCA 1988); Howerton v. Howerton, 491 So.2d 614, 615 (Fla. 5th DCA 1986). Florida law, except for DeLoach and its progeny in the First District, is uniform in holding that property acquired after the date of dissolution of marriage is non-marital.

It is very clear in Florida that property and property rights acquired by a divorced spouse after divorce are not marital property. A majority of the Courts of Appeal in Florida have so held. Bain v. Bain, 553 So.2d 1389, 1391 (Fla. 5th DCA 1990) (citing Carroll v. Carroll, 528 So.2d 931, 933 (Fla. 3d DCA), rev. denied, 538 So.2d 1255 (Fla. 1988); Trant v. Trant, 522 So.2d 72, 73 (Fla. 2d DCA 1988); Howerton v. Howerton, 491 So.2d 614, 615 (Fla. 5th DCA 1986). Indeed the only Florida court which has adopted the DeLoach point of view is the First District in DeLoach itself and its progeny. DeLoach v. DeLoach, 590 So.2d 956 (1st DCA

1991); Kirkland v. Kirkland, 618 So.2d 295 (Fla. 1st DCA 1986). This Court in Diffenderfer v. Diffenderfer, 491 So.2d 265 (Fla. 1986) quoted a New York Court with approval as follows:

> "To the extent that they result from employment time after marriage and before 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." Majauskas v. Majauskas, 61 N.Y.2d 481, 491-92, 463 N.E.2d 15, 20-21, 474 N.Y.S.2d 699, 704-05 (1984).

Florida Statute 61.076, DISTRIBUTION OF RETIREMENT PLANS UPON DISSOLUTION OF MARRIAGE, was passed by the Florida Legislature in 1988 after the Diffenderfer case and states as follows:

> **Distribution of retirement plans upon dissolution of marriage.**
>
> All vested and nonvested benefits, rights and funds accrued during the marriage in retirement, pension, profit-sharing, annuity, deferred compensation and insurance plans and programs are marital assets subject to equitable distribution. (emphasis supplied)

Also Florida Statute 61.075(5)(a), EQUITABLE DISTRIBUTION OF MARITAL ASSETS AND LIABILITY, defines marital assets and liabilities as follows:

> 1. Assets acquired and liabilities incurred during the marriage individually by either spouse or jointly by them; (emphhsis supplied)
> 2. The enhancement in value and appreciation of nonmarital assets resulting either from the efforts of either party during the marriage or from the contribution to or expenditure thereon of marital funds or other forms of marital assets, or both: (emphasis supplied)
> 3. Interspousal gifts marriagethe ; (emphasis supplied)
> 4. All vested and nonvested benefits, rights, and funds accrued durins the marriacre in retirement, pension, profit-sharing, annuity, deferred compensation, and insurance plans and programs; and (emphasis supplied)
> 5. All real property held by the parties as tenants by the entireties, whether acquired prior to or during the marriacre, shall be presumed to be a marital asset.

> If, in any case, a party makes a claim to the contrary, the burden of proof shall be on the party asserting the claim for a special equity. (emphasis supplied)

Section 61.075(6) provides a cut-off date for the marital assets and liabilities as follows:

> The **cut-off date** for determining assets and liabilities to be identified or classified as marital assets and liabilities is the earliest of the date the parties enter into a valid separation agreement, such other date as may be expressly established by such agreement, or the date of the filing of a petition for dissolution of marriage. The date for determining value of assets and the amount of liabilities identified or classified as marital is such date or dates as the judge determines is just and equitable under the circumstances. Different assets may be valued as of different dates, as, in the judge's discretion, the circumstances require. (emphasis supplied)

There was no marital settlement agreement in this case. The court selected May 31, 1993 as the cut-off and valuation date that being the closest date to the date of filing that was also the end of the month. It appears to this writer that the above language in the statute is mandatory. It appears to the undersigned that the use of the term cut-off date by the legislature shows the intent of the legislature in the clearest possible language.

The statute also provides that different assets may be valued as of different dates in the judge's discretion as the circumstances require. The pension rights here litigated are assets of the husband which never became marital property under these definitions in the Florida Statutes. These increases resulting from work done after the cut-off date established by the statute and the court are non-marital assets and may not be subjected to evaluation and distribution.

Sections 61.075 and 61.076, Florida Statutes are clear and unambiguous in providing that only those pension benefits accrued during the marriage are subject to equitable distribution. In construing statutes such as these, this Court must assume that the Legislature intended the plain and obvious meaning of the words used in the statutes. Leisure Resorts, Inc. v. Frank J. Rooney, Inc., 654 So. 2d 911, 914 (Fla. 1995). Accordingly, the trial court's utilization of the Deloach method of distribution of the pension benefits in this case was contrary to the plain and obvious meaning of the words used in this statute. The trial court subjected pension benefits accrued after the dissolution of marriage to equitable distribution. Such a conclusion, is a violation of the statutes cited above. The Fifth District was correct in its reversal of the trial court.

We would call the Court's attention to the doctrine of expressio unius est exclusio alterius, the mention of one thing in a statute implies the exclusion of another. Moonlight Waters Apartments, Inc. v. Caulev, 666 So. 2d 898, 900 (Fla. 1996). This construction of the statute is supported by numerous district court opinions. E.g., Reyher v. Reyher, 495 So. 2d 797 (Fla. 2d DCA 1986); Zaborowski v. Zaborowski, 547 So. 2d 1296 (Fla. 5th DCA 1989).

B. The Prevailing Weight Of Florida Case Law Supports The District Court's Determination That Future Pension Benefits Are Not Subject To Equitable Distribution.

Although the Petitioner has relied heavily on the holding of the First District Court of Appeal in Deloach, a review of Florida

case law clearly shows that the Deloach method of distributing pension benefits was erroneous, as a matter of law.

This Court first recognized that pension benefits are subject to equitable distribution in Diffenderfer v. Diffenderfer, 491 So. 2d 265, 267 (Fla. 1986). This Court found particularly persuasive an opinion from the New York Court of Appeals which held, in part, that "[t]o the extent that they result from employment time after marriage and before commencement of a matrimonial action, they [pension benefits] 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." Diffenderfer v. Diffenderfer, 491 So. 2d at 267 (citing Maiauskas v. Majauskas, 463 N.E.2d 15, 20-21 (1984)) FN.

The Diffenderfer Court further stated that "[t]o the extent acquired during the marriage, the expected benefits are a product of marital teamwork." Diffenderfer, 492 So. 2d at 268. Any pension benefit increases that would accrue to the Respondent in this case would be the result of the Respondent's labors rather than any product of marital teamwork.

Each of the District Courts of Appeal have addressed the disposition of pension increases issue that is currently pending before this Court. The Husband is aware of no opinion outside of the First District Court of Appeal that has ruled that pension benefits accrued subsequent to the marriage are marital property.

The Second District has consistently held that pension benefits accrued after the date of the dissolution are not marital property. In Trant v. Trant, 522 So. 2d 72, 73 (Fla. 2d DCA 1988), the court held that a wife was not entitled to share in the increased value of her husband's pension following their divorce. Instead, the court held that the award should have been based on the present value of the pension as of the date the parties' marriage was dissolved. Id. Moreover, in Erde v. Erde, 503 So. 2d 904 (Fla. 2d DCA 1986), the court reversed a trial court's ruling that the wife should automatically be entitled to fifty percent (50%) of all future increases in retirement pay.

The Third District has reached the identical conclusion when faced with this issue. In Carroll v. Carroll, 528 So. 2d 931, 933 (Fla. 3d DCA 1988), the court reversed a trial court's final judgment with directions to award the wife a share of the present value of her husband's retirement plan. Id. The court expressly stated that the "present value of the retirement plans should, however, exclude any contributions that may have been made by the husband after the original Final Judgment of Dissolution." Id.

Subsequent to its ruling in Carroll, the Third District was again faced with this issue in Reynolds v. Reynolds, 615 So. 2d 243 (Fla. 3d DCA 1993). In Reynolds, the trial court adopted a figure for the present value of the husband's pension plan that included expected increases in salary should the husband continue to work through the expected age of retirement (62). Id. at 243. The Third District found that the trial court's ruling was erroneous,

as a matter of law, since it included post-dissolution income in arriving at a value for the plan. In so holding, the court noted that marital property rights cannot inure in property acquired after a judgment of dissolution of marriage. Id. at 244.

Although counsel is not aware of a decision from the Fourth District specifically regarding the issue of pension increases, counsel does note that the opinion by the Fourth District in Tripp v, Tripp, 510 So. 2d 1109 (Fla. 4th DCA 1987), is instructive. In Tripp, the Fourth District found that the trial court had committed reversible error when it failed to equitably distribute the husband's vested military pension despite a request by the wife that it do so. Tripp, 510 SO" 2d at 1120. The Fourth District recognized that vested pension benefits must be treated as marital assets, "at least to the extent earned or acquired during the marriage." Id. Accordingly, the Fourth District instructed the trial court to treat the husband's pension benefits earned or acquired durina the marriaae as a marital asset.

The Fifth District, in addition to the opinion filed below, has repeatedly held that only pension benefits accrued during the marriage are marital assets subject to equitable distribution. The Fifth District first addressed this issue in Howerton v. Howerton, 491 so. 2d 614 (Fla. 5th DCA 1986). In Howerton, the trial court awarded the wife fifty percent (50%) of her husband's pension at such time as he retired from employment including any lump sum benefits. The Fifth District, in reversing the trial court, recognized that if the husband continued to work his pension

benefit would increase and the wife would be sharing in benefits "acquired after the dissolution of the marriage." Id. (emphasis added by the court).

The Fifth District revisited this issue in Bain v. Bain, 553 so. 2d 1389 (Fla. 5th DCA 1990). In Bain, the court, after noting that premarital contributions are to be excluded from consideration as marital assets, held that "the evaluation of a retirement plan should exclude any contributions made after the original final judgment of dissolution." Id. at 1391. (citations omitted).

Moreover, even the First District, has retracted somewhat from its holding in Deloach. In Livinaston v. Livinaston, 633 So. 2d 1162, 1164 (Fla. 1st DCA 1994), a panel of the First District vacated an award of post dissolution pension benefits made by the trial court. In Livinaston, the First District noted the trial court may continue to reserve jurisdiction to defer a division of the benefits pursuant to Deloach; however, the court expressly held that "[a] former spouse is not entitled to pension benefits acquired after the dissolution of marriage." Id. (citing Howerton v. Howerton, 491 So. 2d 614 (Fla. 5th DCA 1986)).

It is also analogous that Florida Courts have considered good will in a business or a professional practice attributable to the presence and reputation of the individual attorney or practitioner is not a marital asset. In Thompson v. Thompson, 576 So.2d 267 (Fla. 1991) this Court stated as follows:

> If a law practice has monetary value over and above its tangible assets and cases in progress which is separate and distinct from the presence and reputation of the individual attornev then a court should consider the good

will accumulated during the marriage as a marital asset. (emphasis supplied)

The statutes of the State of Florida and the overwhelming weight of the case law in Florida supports the husband's contention that benefits acquired after dissolution are not marital property.

LAW FROM OTHER STATES

Other states which have ruled on the question here involved are set forth in Appendix 1 attached hereto.

In Koelsch v. Koelsch, 713 P.2d 1234 (1986), the Arizona Supreme Court was faced with similar arguments made by the petitioner, who was also seeking pension increases acquired after the dissolution of marriage. In Koelsch, the Arizona Supreme Court expressly held that fruits of labor expended during the marriage are marital assets, while earnings after the dissolution are separate property. Faced with similar arguments made in the present case, particularly that the pension increases were appropriate to the non-participant spouse because that spouse unduly bares the risk of loss of the pension benefits, the court reversed a Court of Appeals decision awarding the spouse pension increases to offset that risk of loss. Specifically, the Koelsch court noted that the Court of Appeals "attempted to ameliorate the risk of loss faced by the non-employee spouse by devising a formula which would permit that spouse to share in the future increases in the pension benefits. This compromise is improper for several reasons. First, it improperly allows the non-employee spouse to share in the post-dissolution separate property earnings of the employee spouse. . . The second problem with the disposition of

the retirement assets by the trial court and the Court of Appeals is that both formulas award a share of the employee spouse's earnings after dissolution to the non-employee spouse. . . If the amount of the monthly benefit at retirement is greater than the monthly benefit would have been had the employee spouse retired at the normal retirement date, any increases would be due to the separate labors of the employee spouse. . . ." Furthermore, the risk borne by the non-employee spouse, an issue prominently raised in Petitioner's brief, was addressed by Justice Erickson of the Colorado Supreme Court in his dissent in the case of In re Marriage of Hunt, 909 P.2d 525, 550 (Colo. 1995), a case relied on heavily by the Petitioner. Justice Erickson noted that the trial court should consider the various contingencies in each case with regard to the risks born by the parties in selecting the methodology and distribution of the marital property. Id. However, Justice Erickson notably pointed out that these contingencies are not properly considered "in determining whether the benefit is marital property" Id. (emphasis added by the court).

Justice Erickson's point is note worthy in light of the statutory equitable distribution scheme. Specifically, Section 61.075(9) allows the trial court the discretion to make an award as equity dictates in that particular case. Accordingly, the court has the discretion to consider the risk of loss in these types of cases when determining the methodology of distributing the marital assets: however, this contingency should not effect the clear

statutory mandate that only benefits accrue during the marriage are marital property.

FALLACIES OF THE MARITAL FOUNDATION THEORY

Part V and Part VI of Petitioner's brief relies heavily upon the marital foundation theory. This theory is based upon the premise that any post-dissolution increases are the result, not of the participant spouse's labors, but instead, are built upon the foundation achieved during the marriage of the party's. However, this theory is replete with logical inconsistencies. For example, increases in pension benefits are only marital property to the extent that the participant spouse remains with his present employer. Should the participant spouse change employers and obtain new and distinct pension benefits, the former spouse would not be entitled to any such benefits. This is the case even if the participant spouses new position were obtained as a result of the skill, training, education, etcetera that he obtained while employed during the marriage. Moreover, should the participant spouse leave his present employment and begin his own company, even though the new venture would be based upon knowledge, experience, and education, etcetera received during the marriage, the former spouse would not have any entitlement to such benefits under the marital foundations theory.

Also, good will in a professional practice attributable to the presence and reputation of the individual attorney, doctor or practitioner is not a marital asset. Clearly this is a case under

Florida law even if the experience and knowledge of the individual practitioner was obtained during the marriage.

In the case here before the Court, the parties to this long term marriage now find themselves in the position that both the husband and the wife continue to be employed. The husband at his long time job with the Orlando Utilities Commission, the Wife at State of Florida, Department of Revenue. The Wife is also employed by the State of Florida and is under their retirement system. She has only been there a short period of time. (T 144)

At the time of the divorce the allowance of permanent alimony to the wife placed the parties in the position that the wife's income after payment of alimony is $2,408.00 per month and the husband's income is $1,878.98 per month. The wife is receiving $529.00 per month more than the husband in spendable income. The District Court has affirmed the trial court in its exercise of discretion in the matter of alimony. We find the husband therefore in the position that not only is he faced with this contribution of $1,200.00 per month to his wife in permanent periodic alimony but is faced with his wife acquiring additional rights in his pension plan by reason of his continued work and continued efforts to support both himself and his former wife.

The wife argues that the husband's failure to retire reduces the value of what she is to receive from his pension. It reduces the value because it reduces the total amount which would be received by her over her presumed life expectancy.

The arguments on control of the pension by the pensioner, in this instance the husband, are interesting but without practical value in this case where the parties face the real world. The husband's theoretical ability to control the amount of money received under the pension is only that, theoretical. Should the husband be required to retire so as to maximize the property received from the pension. This means that he would retire, give up his well paying job, accept lesser compensation and a lower standard of living in order to maximize the dollars which he would receive over the life of the pension payout, i.e., his life. The husband in this scenario (had he retired June 1, 1993 the valuation date) would have income of one-half (1/2) of the pension or $1,191.41. The wife would have her income from her job $1,208.00 plus $1,191.41 from the pension. I think we can safely say that no court would order the payment of $1,200.00 alimony in these circumstances. The exercise of this right to early retirement by the husband would not be of benefit to the wife but indeed would be a detriment to her. Can there be any doubt that at the time of the husband's retirement and the wife's collection of a portion of that retirement, whatever it be, that the husband's alimony obligation to the wife will terminate or greatly reduce? The abstract argument of present values of retirement systems and the total dollars to be collected from them are calculations and theories which are of assistance to the Court but often as here fly in the face of practical reality.

The practicality in Mr. Boyett's situation is that he receives seventy-five percent (75%) of the average of his best three (3) years as retirement and then must divide that with his wife. The argument appears to be that at the time of valuation date established by the court Mr. Boyett should have retired. At that time he would have had an income of $2,388.82. From that benefit the wife would receive $1,194.41. Surely the wife's counsel and her actuary do not believe in that circumstance the court would have allowed $1,200.00 per month alimony from the husband's $1,191.41. Absurd as it seems when written, this is the argument advanced by the wife.

It is well to also point out that the wife is receiving nothing from the pension source during the time the husband is paying alimony. The husband is receiving exactly the same amount from the pension, zero.

CONCLUSION

Statutory law of Florida and the overwhelming weight of authority from Florida and other jurisdictions is that there is indeed a bright line in the law which terminates the right to acquisition of marital property after the applicable cut-off date. Not only is that the weight of authority but the practicalities of making such an allowance are particularly unjust in this case. It simply makes no sense that Mr. Boyett's continued work and employment should continue to increase the wife's marital property. This is particularly true in this situation where the wife is being more than adequately compensated in the form of alimony for any benefits that she might obtain from the pension.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been mailed to: JED BERMAN, ESQ., INFANTINO & BERMAN, P.A., Post Office Drawer 30, Winter Park, Florida 32790-0030, this 24th day of March, 1997.

GEORGE E. ADAMS

APPENDIX 1

ALASKA: Wainwriaht v. Wainwriaht, 888 P.2d 762, 764 (Alaska 1995)(holding that a trial court's retention of jurisdiction over the husband's pension rather than valuing the pension as though it had vested at the time of trial was erroneous): ARIZONA: Koelsch v. Koelsch, 713 P.2d 1234, 1239 (Ariz. 1986)(holding that the use of the "time rule" formula contravenes the notion that fruits of labor expended during marriage are community property whereas earnings after the marriage are separate property): DELAWARE: Donald R.R. v. Barbara S.R. 454 Atlantic 2d 1295, 1296 (Del. 1982)(holding that although pension benefits, whether vested or not, were marital property, the non-participant spouse's rights to such benefits are limited to "the pension benefits that were earned by the husband during the marriage"); DISTRICT OF COLUMBIA: Sanders v. Sanders 602 A.2d 663, 669 (D.C. App. 1992)(holding that a trial court, in determining the overall distribution of marital property, may distribute pension rights acquired during the course of the marriage); HAWAII: Krevtak v. Krevtak, 923 P.2d 960, 964 (Ha. App. 1996)(holding that for the purposes of determining what percentage of the husband's retirement benefits were marital property, the appropriate date for consideration was the termination of the spouse's economic partnership, which was the date of divorce): IDAHO: Shill v. Shill, 765 P.2d 140, 143 (Idaho 1988)(reversing a trial court's award of increases in pension benefits occurring after divorce as such benefits are not "acquired during the marriage" and, thus, are separate property); ILLINOIS: In re: Marriag of Frazier, 466 N.E.2d 290, 293 (holding that "[m]arital property rights cannot inure in property acquired after a judgment of dissolution of marriage"): ILLINOIS: In re: Marriage of Parker, 625 N.E.2d 237, 242 (Ill. App. 1993)(holding that only retirement benefits earned during the marriage are considered marital property); IOWA: In re: Marriage of Klein 522 N.W.2d 625, 628 (Iowa App. 1994)(holding that pension rights resulting from contributions made after the decree of dissolution but before retirement are the result of efforts made after dissolution and are, thus, excluded from division): KANSAS: In re: Matter of Marriaae of Sedbrook, 827 P.2d 1222, 1231 (Kan. App. 1992)(holding that pension benefits are marital property subject to equitable division, "to the extent earned during the marriage"); MARYLAND: Qeerina v. Deering, 437 A.2d 883, 890 (Md. App. 1981)(concluding that a spouse's pension rights, to the extent accumulated during the marriage, constitute a form of "marital property"); MICHIGAN: Lesko v. Lesko, 457 N.W.2d 695, 698 (Mich. App. 1990)(holding that the "portion of a pension attributable to service accrued prior to marriage or after divorce cannot be considered part of the marital estate subject to award by the court"); MISSOURI: Davolt v. Davolt, 764 S.W.2d 497, 499 (Mo. App. 1989)(holding that pension benefits earned during the marriage must be considered part of the marital property subject to division in a marital dissolution proceeding): MINNESOTA: Urbick v. Urbick, 474 N.W.2d 452, 453 (Minn. App. 1991)(holding that pension rights are subject to an award by the court if accrued at any time during the existence of the marriage relation); NEBRASKA: Reichert v. Reichert, 516

N.W.2d 600, 605 (Neb. 1994)(holding that "the marital estate includes only that portion of the pension which is earned during the marriage"); NEW HAMPSHIRE: Hillebrand v. Hillebrand, 546 A.2d 1047, 1050 (N.H. 1988)(holding that a divorce decree awarding a percentage of one party's pension to the other party "must take account of the fact that only those pension benefits which are attributable to the retiree's employment during the marriage are subject to distribution")(emphasis added by the court)(citation omitted): NEW JERSEY: Hayden v. Hayden, 665 A.2d 772, 774 (N.J. App. 1995)(holding that anticipated post-divorce, pre-retirement cost of living increases in husband's salary should not have been included in the evaluation of his pension for purposes of equitable distribution); NEW MEXICO: Madrid v. Madrid, 684 P.2d 1169, 1170 (N.M. App. 1984)(holding that increases in pension benefits coming after the date of the divorce are the husband's separate property); NEW YORK: Majauskas v. Majauskas, 463 N.E.2d 15, 20 (N.Y. 1984)(holding that vested rights in a pension plan are marital property to the extent that they are acquired between the date of marriage and commencement of a matrimonial action); NORTH DAKOTA: Olson v. Olson, 445 N.W.2d 1, 11 (N.D. 1989)(holding that pension or retirement benefits accumulated during the marriage are marital property divisible at divorce); OREGON: Rogers v. Rogers, 609 P.2d 877, 882-883 (Or. App. 1980)(holding that pension benefits are to be awarded based upon the amount the husband was eligible to receive at the time of the dissolution since the risk of forfeiture of these benefits should be born equally by both parties), modified on other grounds, 623 P.2d 1108 (Or. 1981); PENNSYLVANIA: Berrinaton v. Berrinaton, 633 A.2d 589, 594 (Pa. 1993)(holding that "in a deferred distribution of a defined benefit pension, the spouse not participating may not be awarded any portion of the participant-spouse's retirement benefits which are based on post-separation salary increases, instead of awards or years of service"); SOTJTH CAROLINA: Noll v. Noll 375 S.E.2d 338, 340 (S.C. App. 1988)(holding that pension benefits accrued by the husband during the marriage were subject to equitable distribution); TEXAS: Berry v. Berry, 647 S.W.2d 945, 956 (Texas 1983)(rejecting the "time rule" since it "has the effect of awarding benefits accruing to the [employee spouse] after the divorce from [the nonemployee spouse]")(citation omitted); VIRGINIA: Moslev v. Moslev, 450 S.E.2d 161, 165 (Va. App. 1994)(holding that the wife in a dissolution proceeding was only entitled to a 50% interest in the pension benefits earned by her husband during the marriage); WEST VIRGINIA: Butcher v. Butcher, 357 S.E.2d 226, 234 (W.Va. 1987)(holding that only those pension benefits accrued during the marriage were subject to distribution by the court); WISCONSIN: Bloomer v. Bloomer, 267 N.W.2d 235, 238 (Wi. 1978)(holding that pension rights earned during the marriage are properly included as a marital asset in dividing the property of the spouses).