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SUPREME COURT OF FLORIDA

CASE NO. 89,722

ELDIS RAYMELL BOYETT,

Petitioner,

v.

MERLE N. BOYETT, JR.,

Respondent.

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

REPLY BRIEF

JED BERMAN, ESQUIRE

INFANTINO AND BERMAN
P.O. Drawer 30
Winter Park, FL 32790-0030
(407) 644-4673
(407) 644-4128 (FAX)
Florida Bar No. 117436
Attorney for Petitioner

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

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 APPEAL, FIRST DISTRICT'S, DECISIONS IN DELOACH AND KIRKLAND.

The husband is a "Bright Line" theorist and has presented his answer brief as if the "Bright Line" approach was adopted by the Florida case law. The wife argues the "Marital Foundation Theory." Throughout the entire answer brief, the husband assumes the conclusions that he sets out to prove, which is circular reasoning.

This reasoning is first evident in the summary of husband's position:

> *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?*

This is not the issue before the court. The issue is whether, under marital law, post-dissolution salary increases do result in post-marital property. By assuming that it does, it is obvious that the weight of authority in Florida and elsewhere would support his conclusion that such benefits are separate non-marital property. The problem with husband's conclusion is the absence of logical reasoning.

The husband submits a long line of cases which demonstrate that only the assets acquired during the marriage result in marital property. The wife does not quarrel with this result. Indeed F.S. 61.075(5)(a)1. clearly states this. However, what was acquired during the marriage is not a simple matter to determine.[1]

In reaching his conclusion that post-dissolution salary increases of the marital retirement benefit result in post-marital property, the husband makes three unsupported assumptions: (1) That he terminated employment on the valuation date; (2) That the marital benefit subject to division is fixed at $2,861 per month, payable at his normal retirement date; and (3) That F.S. 61.075(6) requires that both the valuation date of the marital property and the date that the marital property is actually valued be the same.

<u>Husband's Assumption 1</u>: The only way to judge whether post-dissolution salary increases result in post-marital property is to compare the benefit that incorporates an assumption of termination of employment against one that does not. If the husband terminated employment on 5/31/93, he could have accepted $2,388 per month immediately, or he could have opted for the higher amount, $2,861 per month, paid 99 months later. Although choosing to forgo the immediate benefit is unlikely, it is possible because new employment and potential adverse tax conse-

1. The wife showed in her initial brief that the plan administrator determined during the marriage that the husband could have retired with a subsidized benefit of $2,388 per month, beginning on 5/31/93, or he could wait until his Normal Retirement Date, 9/1/2001, and receive $2,861 per month. He could also retire anytime between these dates and receive a monthly amount of benefit between those values.

quences can outweigh the fact that the subsidized benefit is much more valuable now than postponing the benefit until the normal retirement date. Yet, not even the plan administrator is willing to assume that the husband terminated employment in order to determine his specific benefit rights.[2]

Husband's Assumption 2: If the husband terminated his employment, which earned benefit is applicable to the marriage? Is it $2,388 per month, payable on 5/31/93, $2,861 per month, payable on 9/1/2001, or a monthly amount between $2,388 and $2,861? The wife showed that unless one were to assume that the husband terminated employment, none of the above monthly benefits would apply. This is the first flaw of the "Bright Line" approach.

Husband's Assumption 3: The husband argues that the determination of the benefit is quite simple. Since he did not retire, he assumes that the earned benefit is the amount payable at normal retirement, even though he objects to dividing that amount if he retires before 9/1/2001. Then he argues that F.S. 61.075(6) provides a cut-off date for valuing marital assets, which must generally be the earlier date either on which the parties enter into a valid separation agreement or on which the petition for dissolution is filed, and that the wife has valued the benefits after either date by employing a coverture fraction in order to measure the marital portion of the husband's benefit

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2. A non-participant can share in a subsidized benefit only when the employee retires. (See Reiss, Dividing Pension Rights: Exposing the Myths and the Malpractice, 17 FairShare 3 at p. 3 (March, 1997). Also see, In re the Marriage of Oddino, 55 Cal.Rptr.2d 811 (Cal.App. 1996).

at retirement. This, he concludes, is demonstrated by the Diffenderfer cite to Majauskas.[3]

Expressed differently, if F.S. 61.075(6) requires that both the valuation date and the date that the valuation is calculated be one and the same, then the present value of the retirement benefit in the record, i.e., $158,931.49 [TR-76, R-196], plus accrued interest to the date of distribution, must be paid to the non-participant wife, because, as the husband argues, there would be no ability to revalue the benefit after the marriage terminated. This conclusion runs contrary to almost all Florida and foreign cases that have considered this specific issue.

If experience determines that only three monthly payments will be made, then the wife shares in only those three payments and nothing else. In that case, the actual benefit that will be paid will be determined after. the participant retires, showing clearly that the statute controls only the measurement period and not the date on which the valuation must be performed.

The husband argues that the "Bright Line" separating post-dissolution benefit earnings from pre-dissolution benefits is

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3. Nothing demonstrates the husband's circular reasoning and incorrect conclusions better than the New York's Court of Appeals decision of Majauskas v. Majauskas, 463 N.E.2d 15 (N.Y. 1984) which was the centerpiece upon which the Diffenderfer v. Diffenderfer , 491 So.2d 265 (Fla. 1986) findings were based. Both cases limited such efforts to the marital years and the husband emphasized this as supporting his position. Yet, Majauskas justified use of a service fraction applied to the participant's benefit in pay status (Majauskas at 21): *By limiting the numerator to the number of months prior to commencement of action during which the parties were married, the Appellate Division simply conformed the judgment to the statutory definition of marital property as property acquired before the commencement of the matrimonial action (Domestic Relations Law, § 236, part B, subd. 1, par. c).* (Majauskas at 22.)

clear because all future increases in benefits require his continued post-marital effort. As a practical matter, the wife demonstrated that the benefit could increase with no post-marital efforts. This could occur when the husband makes his election to receive benefits. It also occurs when passive earnings are paid incidental to post-marital efforts.[4]

It is the wife's position that passive increases on marital property are also marital property when the joint industry between the parties has not terminated.[5] This applies under F.S. 61.075. Non-marital property does not include passive earnings onmarital property. Therefore, passive earnings must be marital property. Accordingly, the fourth erroneous assumption that the husband makes is that all post-marital benefit increases result in post-marital property. This is the second flaw of the "Bright Line" approach.

Passive earnings on marital property can accumulate after the marriage terminates, and such earnings can result from

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4. Many companies that provide Employee Stock Ownership Plans ("ESOP'S) will not allow an immediate distribution under QDRO'S. When they do, they will often not distribute ESOP stock to the non-participant spouse because the company would not want to distribute company stock to a non-employee, including the participant when he or she terminates employment. In order to enjoy any return on the funds until it is paid (or the higher return, as the case may be), the participant must continue to work for that employer. This clearly requires post-marital efforts. The same result can be true of certain 401(k) or other profit sharing plans that do not provide an automatic cash-out of benefits under a QDRO. Many other examples along this line of reasoning can be provided. The important point is that the non-participant spouse is entitled to these increases because, both the joint industries of the parties had not terminated, and such increases were clear cut passive earnings on marital property.

5. In re the Marriage of Hunt, 428 S.E.2d 899 (S.C.App. 1993) and In re the Marriage of Sien, 800 P.2d 1268 (Okla.App. 1994).

post-marital employee efforts, The test to determine whether an increase is passive is whether it is incidental to post-marital efforts. This normally occurs when a risk factor drives the future value of that asset. The wife might only receive three payments, showing that risk determines the future value of this asset more than any possible increases from salary.

The husband had the opportunity to buy out the wife's interest in his retirement benefit during the marriage. He failed to do so, and this places her interest at risk. As pointed out earlier, she might only receive three payments. He also retains discretionary control over when to retire. This places the wife's interest at further risk. Then, when as here, the benefit is almost fully subsidized, she faces an additional risk that the husband will intentionally dissipate *his* and *her* marital pension benefit in favor of an equivalent amount of non-marital pension benefit requiring his post-marital efforts.

While these reasons are sufficient to show that it is inequitable that she should not share in the salary increases, they also demonstrate that the post-dissolution salary increases are passive increases of marital property. Inclusion of salary increases could not have been possible had her interests been satisfied under the immediate offset method.[6] She should share in a salary increased for each year that her interest in the

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6. A determination of its present value *must* be made before the parties divorce. This obvious result is not in dispute. Under those circumstances, while the pension's true value can be severely understated by the present value, the non-participant spouse will at least have control over its future worth.

benefit is subject to this risk.[7] Although this could result in a gain to her, it is only reasonable when she also could lose so much by the risk. It is common experience that the return on an investment is related to the degree of risk taken. Any gain made by the husband's or wife's longevity can be forfeited where the husband controls when the benefit is first received, Accordingly, what, other than salary increases, could possibly reward the wife for the risk that the husband has imposed upon her?

The husband employs a fifth erroneous assumption: He assumes that marital and non-marital efforts are distinguishable on the valuation date. The wife showed this is false. Had the husband actually terminated employment, any pre-marital portion of his retirement benefits would have laid the foundation upon which the marriage later built. This means the marital portion of benefits determined under the "Bright Line" theory would have been overstated. [Reiss, Dividing Pension Rights: at p.5]

The wife showed that the employer's ability to pay the husband's post-dissolution salary increases is directly and indirectly related to its use of marital funds in subsidizing post-marital accruals. The husband failed to address this issue in his answer brief.

In commuting the marital benefit to the ***present value of $158,931.49***, many assumptions were made, including the assumption that the participant would retire at the normal retirement date.

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7. Otherwise, she only shares in the downside of the risk. Yet participant's often argue this is fair even with plans that are not defined benefit. See In re the Marriage of Hunt, 428 S.E. 2d 899 (S.C.App. 1993), supra and In re the Marriage o-f Sien, supra.

"Bright Line" theorists then argue that the *assumed amount of marital benefit* be fixed when the payment of the benefit is deferred and that all of the other assumptions that determined the earlier present value be abandoned in order to allow the amount of payments that were assumed in the present value calculation to be far less. This is a self-serving argument.

These same issues were recently evaluated by the New Hampshire Supreme Court in Rothbart v. Rothbart, 677 A.2d 151 (N.H. 1996). The Court stated at page 153:

> *The language of our holding in Hodgins is clear. We held that when the value of a pension to be divided is, by its nature, impossible to determine at the time of the divorce, the problem of valuation may be avoided, and the risks of uncertainty evenly placed upon the parties, by a decree providing that upon maturity of the pension rights, the recipient pay a portion of each payment received to his or her former spouse. Hodgins, 126* N.H. at *716, 497* A.2d at 1190 *(quotation omitted) (emphasis added). For example:*
>
> > *assuming that an equal distribution were to be called for, the decree would direct [the employee].. "upon commencement of his pension benefits", thereafter to pay [his former spouse] one-half of a percentage of "each benefit payable to him", less taxes. The percentage would be derived by dividing the number of months [the employee] was employed, during the marriage and prior to commencement of the divorce proceedings, by the total number of months of credits he will have earned toward his pension "as of the date benefits commence."*

Tt further stated at p. 154:

> *The Plaintiff's solution results in a new problem: applying the Hodgins percentage to a projected benefit* [without salary increases] *results in a distribution skewed in favor of the employee. The employee's highest three-year average salary is substantially dependent on the salary levels attained while married. The employee, then, benefits doubly from his years of work during the marriage - once by keeping a portion of the benefits attributable to those years and a second time by keeping for himself all of the benefit increases attributable to the later years, but which are firmly based upon those years while married. In addition, the plaintiff's solution ignores the fact that many salary increases merely reflect increases in cost of living. It would be unfair to grant the benefits attributable to such pay increases only to one spouse.*

The **Rnthbart** decision could not contradict in clearer language the conclusions that the husband claims are made in Hillebrand v. Hillehrand, 546 A.2d 1047 (N.H. 1988) (in the Appendix).

The New Hampshire supreme court states a compelling argument based on fairness that marital defined benefit property includes the post-dissolution salary increases that later determine its value. The wife has shown hy many arguments that **this** is more than a fairness issue: it is a complex problem of measurement of earned benefits. When the marital benefits can be measured to include salary increases; the right to receive those increases is absolute. "Bright Line" theorists seldom understand the crossover argument applicable to immediate offsets.

When the benefit is measured for purposes of immediately offsetting it with other marital property, F.S. 61.075(5)(a) prevents a present value determination which would include anticipated future salary increases. The husband seizes upon this result to argue that the same must be true under the deferred distribution method, even though its effect is the opposite.

To allow it under the immediate offset method would allow double-dipping of future investment earnings, first by awarding them up front in the present value, and second by distributing them when they are actual 1 y paid. When the benefit is paid under the immediate offset, the wife is free to invest that money any way she sees fit. **If** she invests it in a high risk portfolio, she is able to receive a high return on her investment. There is an extremely high risk associated with a deferred distribution asset because her ability to receive a return of the principal is

contingent on hnw long both she and her husband survive.

When, as here, the husband controls when the wife receives the benefit and the dollar amount of benefit that she receives is frozen, then the husband is encouraged to postpone retirement to the detriment of the wife. Under these circumstances, she faces the maximum possible risk. It is clear that high risk is appropriately rewarded under an immediate offset because the benefit value can increase by 15%. If the present value (of $158,931) commuted the normal retirement benefit at 7% interest, then the wife can gain at least 8% by her risk for each year that she is subject to it, which could provide her with enough money to fund a lifetime monthly benefit equal to or greater than that which is in issue under the deferred distribution method. Yet the husband argues that the wife has no corresponding right to investment. earnings under the deferred distribution method. In effect, he keeps all such earnings for himself because he continues to work past the date of divorce. He argues that he gets all the earnings, but she gets all the risk.

In his answer brief, the husband recites a line of cases that he claims supports his position. All but a few of those decisions applies to present value calculations (as used under the immediate offset method). These cases are clearly different from the present one, because the marital property in them needed to be valued during the marriage to permit an offset against other marital property. These cases are not authorities for the issues on review, nor are these cases in direct. conflict with DeLoach v. DeLoach, 590 So.2d at 963 (Fla.1st.DCA 1991)]. DeLoach provided a separate and distinct standard for valuing an immediate offset that conformed to the cases cited.[Id.] In the

remaining cases that the husband cites, the decisions merely examine F.S. 61.075(5)(a) as it applies to a different. set of facts and circumstances (apart from the issue of post-dissolution salary increases).

In Howerton,[8] and Trant,[9] the trial court awarded the wife a fixed percentage of a future benefit.. In neither case was the benefit mature, Regardless, unless the benefit. was mature at the same time that it. reached its maximum value[10], there could be substantial future service accruals implied by a fixed percentage formula. Either ruling might. have conflicted with DeLoach, if it came to its conclusion by applying that fixed percentage to a DeLoach-like service fraction, but it does not.

Under Livingston,[11] (which the husband claims retreats from DeLoach), the court examined an award which provides the wife with 100% *of any Florida Retirement Benefits remaining* upon *the husband's death*. All survivor benefits would include future earned rights occurring after the marriage terminated. This was clear error. That there was not any retreat from DeLoach can be seen by the court first reversing with respect. to benefits acquired before the marriage (in the Wisconsin plan), and then ordering on remand that the remaining benefits be divided according to a DeLoach fraction.

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8. Howerton v. Howerton, 491 So.2d 614 (Fla.5th DCA 1986).

9. Trant v. Trant, 522 So.2d 72 (Fla.2d DCA 1988)

10. This could occur either at the Normal Retirement Date or such earlier date that the Normal Retirement benefits are fully subsidized.

11. Livingston v. Livingston, 633 So.2d 1162 (Fla.1st DCA 1994).

The husband's citation to Erde[12] as support is inappropriate. Erde sought to divide the pension benefits as alimony. Any future increase in alimony resulting from Post-dissolution salary increases would have to he justified by the facts and circumstances at the time that the alimony is to he increased. It has nothing to do with the manner of property divisions under Florida law. Not one Florida citation of the husband supports his position that post-dissolution salary increases creates separate post-marital property.

In the foreign case law, only Koelsch v. Koelsch, 713 P. 2d 1234 (Ariz. 1986) supports the husband's position. The wife dealt with the many inconsistencies of Koelsch in her initial brief. Furthermore, Cooper v Cooper, 167 Ariz 482, 808 P.2d 1234 (Ct.App. 1990) superseded and amended it. The hushand's citation to the dissenting opinion in Hunt v. Hunt, 909 P.2d 525 (Colo. 1995), is just that, a dissenting opinion. Judge Erickson's dissent was only about salary increases that were the result of promotional increases. The original supreme court decision in Hunt held that only COLA increases in salary were marital property, something that "Bright Line" theorists flatly reject. Furthermore, many of the decisions cited as supporting the hushand's position: do not do so. Many states have adopted the time-rule approach. These include New York, Delaware, Minnesota, New Hampshire, and recently Illinois [In re the Marriage of Wisniewski, 1997 W.L. 11611 (Ill.App. 4thDist. 1997)] Few states that have endorsed the "Bright Line" theory will apply it to exclude COLA increases, as evidenced by Sutherland v. Cohern, 843

12. Erde v. Erde, 503 So.2d 904 (Fla.2d DCA 1986).

S.W.2d 177 (Tx.Ct.App.1992).

The husband then argues what he perceives to be fallacies of the wife's marital foundation theory. He states that:

> *Should the participant spouse change employers and obtain new and distinct pension benefits, the former spouse would not be entitled to such benefits.*

That statement, while true, is not inconsistent with the marital foundation theory. The wife's stake in the benefits, using the post-marital salary increases, terminated when the husband's employment terminated. This is a forfeiture problem, not a problem with the marital foundation theory. It has been addressed from time to time by Congress: notably **that** pension benefits should be portable from employer to employer. The husband's position demonstrates that he does not understand the wife's marital foundation theory. The loss of future benefits if the husband changes employers is something that both parties share.[13]

The husband's claim that Thompson v. Thompson [576 So.2d 267 (Fla. 1993)] demonstrates a fallacy to the marital foundation theory is incorrect. Thompson dealt with the valuation of a professional practice, which is neither a pension asset, nor does it work like a defined benefit pension asset. Given that the supreme court determined that "good will" was not a marital asset, how does that affect the marital foundation theory? The theory applies only to a marital defined benefit asset in order

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13. **Diffenderfer at 267, determined that retirement benefits are *received in lieu of higher [W-2] compensation which would have otherwise enhanced either the marital assets or the marital standard of living and are therefore marital property.* In her initial brief, the wife showed that this applies to the portion of benefit using post-dissolution salary increases, because the employer funded those salary increases with marital property.**

to measure the effect that the foundation of efforts has on the marital portion of benefits. Certainly, if there was no marital benefit, there could be no foundation of efforts upon which it. is built.

When the pension benefit. is mature and fully earned, and was earned solely with marital efforts, then the entire pension benefit is marital property. Those are the exact circumstances of this case, because the benefit maximizes after 30 years. Therefore, if the participant fails to retire, any increases that result from the salary increases are still marital property.

The concluding remarks of the husband dealing with the fairness of the trial court's division of benefits against the award of alimony is irrelevant to this issue. If upon payment of the benefits there is an inequity in the continuation of alimony, then the husband can request a future court to consider the changed financial circumstances created by the wife's receipt of such benefits.

CONCLUSION

The husband advanced nothing new by his answer brief. The entire brief relies upon circular reasoning that is based upon one supposition after another. The cases cited by him often demonstrate exactly the opposite from his conclusions,

"Bright Line" theorists fail to understand that the participant is limited by the normal form of accrued benefit only when he terminates employment.: yet, the benefit need not be limited by the normal form and can increase upon termination of employment, as well. They also fail to understand that the overwhelming weight of authority applies the "Bright Line" approach to only the immediate offset method, because an offset terminates the

joint industry of husband and wife with respect to that asset. Thus, they employ a fatal flaw in logic when they apply the "Bright Line" approach to the benefit, as if the participant terminated employment, in order to measure a marital portion, as if the joint industry of husband and wife had terminated with respect to that asset.

The wife showed that the trial court made a correct allocation and the appellate court erred in reversing it.

Respectfully Submitted,

Jed Berman