

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PA

K. E. W.,	:	
Plaintiff	:	
	:	
v.	:	No. 04-20,215
	:	
R. L. W.,	:	
Defendant	:	

OPINION and ORDER

This opinion addresses the Motion in Limine filed by Husband, asking the court to rule on whether Wife’s disability benefits are marital or non-marital. Wife began receiving the benefits from the Public School Employees’ Retirement System on September 1, 2002, when she ceased her employment as a school teacher after becoming disabled. The parties separated in June 2005. The benefit Wife receives is referred to by PSERS as a “disability retirement benefit.” Wife will be eligible for the benefit as long as she is disabled. The disability benefit does not change to a regular retirement benefit once she reaches retirement age, if she remains disabled at that time.

Husband argues the marital value of Wife’s pension should be based upon the date of separation (\$234,184.37). Wife argues the marital value should be based upon an assumption that Wife ceased employment on September 1, 2002 and is unable to start collecting pension benefits until September 24, 2019, the date Wife would have been eligible for actual retirement benefits had she not become disabled (\$95,371.76).

The first appellate case to address the question of whether disability pensions are marital property is Ciliberti v. Ciliberti, 542 A.2d 580 (Pa. Super. 1988). In that case, the husband was receiving a police disability pension. The court affirmed that “retirement pension benefits” are marital property. It then went on to state:

We decline to hold that true disability payments are marital property subject to equitable distribution. Such benefits are intended to compensate the employee spouse for lost earning capacity. They are paid in lieu of the earnings which would have been paid to the employee if he or she had been able to work. They replace the future salary or

wages which the employee, because of the physical or mental disability, will not be able to earn. They are comparable to Workmen's Compensation disability payments.

Where it can be shown, however, that a portion of the employee spouse's disability pension is representative of retirement benefits, the amount received by the disabled employee in lieu of retirement benefits remains marital property subject to distribution.

Id. at 582.

In reaching this conclusion, the Ciliberti court cited the portion of the Divorce Code pertaining to veterans' disability pensions, which are not marital property "except for those benefits received by a veteran where such veteran has waived a portion of his military retirement pay in order to receive Veteran's compensation." 23 Pa.C.S.A. §3501(a)(8). As the Ciliberti court could not determine from the record whether there was a "retirement component" included in the disability payments or whether they were intended to be mere compensation for lost earnings, the case was remanded back to the trial court.

Husband argues that since Wife's disability benefit is considered by PSERS to be an "actual retirement benefit," the money is marital property. The court must look critically at this arbitrary characterization. Regardless of how Wife's disability benefit is labeled by PSERS, when we look to the actual purpose of the benefit, it is clearly intended to compensate Wife for lost earnings due to her disability. Wife is only entitled to receive those benefits because she is disabled; therefore, the disability payments are not received "in lieu of retirement benefits". Ciliberti, at 582. Upon reaching retirement age, however, Wife would be entitled to retirement benefits whether or not she was disabled. At that point, her disability retirement benefit can fairly be considered to be

received in lieu of her actual retirement pension, and is therefore marital property.

Moreover, Wife's disability benefit must be renewed and certified each year. If Wife becomes able to work again, the benefit will be discontinued, confirming that the benefit replaces lost earnings. It would be unfair to value Wife's pension in a manner that includes these disability payments, as they are not guaranteed, but depend upon the continuation of her disability.

The case before this court is strikingly similar to Malseed v. Malseed, 565 A.2d 453 (Pa. Super. 1989), in which Husband, who was forty-five years old, was receiving a disability pension until he reached the age of fifty-five. At that time, he would receive a regular pension. The court concluded the disability pension was not marital property, although the retirement benefit was marital property. As stated above, although Wife's disability benefit does not change to a regular retirement pension when she reaches retirement age, it replaces her retirement pension at that time.

Hayward v. Hayward, 630 A.2d 1275 (Pa. Super. 1993), involved a case where the husband, a disabled firefighter, was awarded a disability pension even though he was not old enough to retire and had not worked the required number of years. The court found his pension to be marital because it was nothing more than the pension he would have received at age fifty, divided by his statistical life expectancy. He merely received payments immediately rather than at age fifty, with reduced payments to reflect the longer pay-out period. Thus the total

value of the benefit was not altered. The firefighter's pension was not intended to replace his lost earnings, and was not contingent upon his disability.

In the case before this court, by contrast, Wife's disability payments are entirely dependent upon Wife remaining disabled, and are clearly intended to replace lost earnings due to her disability. In addition, the retirement benefit Wife becomes eligible for at retirement age is not diminished by the disability benefit she receives prior to reaching retirement age. Therefore, by valuing the pension at Wife's retirement age, Husband receives the full benefit of the actual retirement pension she would be entitled to absent her disability—but not the portion intended to compensate Wife for lost earnings until retirement age.

In support of Husband's argument that Wife's entire disability pension is marital property, Husband cites the case of Drake v. Drake, 725 A.2d 717 (Pa. 1999), which presented the question of whether a worker's compensation award was marital property. The Pennsylvania Supreme Court held the award was marital because the cause of action or claim accrued during the marriage. That holding, however, was based upon the wording of §3501(a)(8), which states that marital property excludes

Any payment received as a result of an award or settlement for any cause of action or claim which accrued prior to the marriage or after the date of final separation regardless of when the payment was received.

The court stated this section “makes no distinction concerning the purpose of the award or settlement, but posits that it applies equally to all claims or causes of action for personal injury, lost wages, disability or other damage. . . . We look only to the timing of the right to receive it.” Id. at 725-26. In its conclusion, Drake states,

In Pennsylvania, we hold that a workers' compensation commutation award that "accrued" during the marriage can be marital property subject to equitable distribution pursuant to Sections 3502 and 3502 of the Divorce Code.

Id. at 726. Thus the Supreme Court appears to intend its holding to apply only to workers' compensation commutation awards.

It is true Drake discusses disability payments, and states, "A disability payment that is not a federally created veterans' benefit does not fit within any of the exceptions set forth in Section 3501(a)(1) through (a)(8) and *can* be property of the marriage." Id. at 725 (Italics added). Drake also states, "[W]e reject Husband's argument that a disability payment is *per se* excluded from the definition of marital property." Id. at 724. (Italics added.) In a footnote, Drake further states, "We are aware that some Superior Court cases have intimated that disability payments are *per se* excludable from marital property," id. at 724 n. 8, and goes on to cite Ciliberti and Malseed.

The court notes that the Drake analysis by Madam Justice Newman may conflict with the Superior Court line of cases beginning with Ciliberti, but the holding does not. Neither the Supreme Court nor the Superior Court hinted that Drake in any way limits the Ciliberti line. Since Drake did not overrule Ciliberti or Malseed, and because of the italicized language cited in the above paragraph, this court does not believe Drake intended to hold that disability payments or pensions are always marital property when the spouse became disabled during the marriage. Rather, in construing Drake in conjunction with Ciliberte and Malseed, we conclude that disability payments are only marital property when they cannot be separated from other marital assets.

This is the conclusion endorsed by the Superior Court in Cioffi v. Cioffi, 885 A.2d 45 (Pa. Super. 2005). The facts of that case are different, involving the question of whether a marital property settlement agreement that distributed the husband's pension was intended to include a disability pension the husband received when he was

disabled after separation. However, in its analysis the Superior Court does not appear to find any contradiction between Drake and Ciliberti, stating,

It is well-settled that disability payments are not per se excluded from the definition of marital property for equitable distribution purposes. **Drake v. Drake**, 666 Pa. 481, 725 A.2d 717 (1999). Rather, a pure disability benefit will qualify as a martial [sic] asset subject to equitable distribution only when it cannot be separated from other proceeds that form part of the marital estate.

Cioffi, 885 A.2d at 49. The court then cites Ciliberti and Hayward.

In the case before this court, Wife's disability pension can easily be separated from her actual retirement pension by valuing the retirement pension as though Wife ceased employment with PSERS when she became disabled on September 1, 2002, and is unable to start collecting pension benefits until September 24, 2019. For the reasons stated in this opinion, the court concludes this result is the most equitable method of valuing the pension, as well as the method demonstrated by the applicable caselaw.

ORDER

AND NOW, this _____ day of October, 2006, for the reasons stated in this opinion, it is ordered that the value of the marital portion of the retirement benefit of K. E. W. shall be \$95,371.76.

BY THE COURT,

Richard A. Gray, J.

cc: Dana Jacques, Esq., Law Clerk
Hon. Richard A. Gray
Christina Dinges, Esq.
Janice Yaw, Esq.
Family Court
Gary Weber, Esq.